
Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements

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Litigation finance is the new and fast-growing practice by which a nonparty funds a plaintiff's litigation either for profit or for some other motivation. Some estimates placed the size of the litigation finance market at \$50-\$100 billion. Both proponents and opponents of this newly emergent phenomenon agree that it is the most important civil justice development of this era. Litigation finance is already transforming civil litigation at the level of the single case as well as, incrementally, at the level of the civil justice system as a whole. It is also beginning to transform the way law firms are doing business and it will increasingly shape the careers of civil litigators at firms small and large. Consequently, Congress, state legislatures, state and federal courts, bar associations, international arbitration institutions, foreign legislatures, and foreign courts are concurrently grappling with how to regulate litigation finance and what, if any, disclosure requirements to impose on such financing.

This Essay aims to turn the debate inside out by proposing to abandon the quest for a bright line rule and to instead adopt a flexible, discretionary standard: a balancing test. The Essay culminates in a specific proposal for the contours — the interests and factors — which judges and arbitrators should be empowered and required to weigh when deciding whether and what form of disclosure to require. More specifically, the Essay details and rationalizes the specific public and private interests and factors to consider, including the profile of the plaintiffs and their motive for seeking funding,

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the funder's profile and motivation, the case type and the forum, the subject matter of the litigation, the potential effect on the development of the law, the structure of the financing, the purpose of the contemplated disclosure, and the procedural posture of the case.

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INTRODUCTION

Both critics and proponents of the newly emergent phenomenon of litigation finance agree that the practice is likely the most important development in civil justice of our time.¹ Litigation finance is transforming civil litigation at the case level as well as, incrementally, at the level of the civil justice system as a whole. It is beginning to transform the way law firms are doing business and will increasingly shape the careers of civil litigators at firms small and large. It is unsurprising, therefore, that litigation finance is of interest to legislatures and the courts. At the state and federal level, in the judiciary, the legislatures, and at bar associations, the question of the day is whether and how to regulate litigation finance. That debate, and this Essay, focuses, specifically, on regulation through disclosure of the financing.

In summary, litigation finance is the practice by which a nonparty funds a plaintiff's litigation either for profit or for some other motivation.² Last year, some estimates placed the size of the litigation finance market at \$50-\$100 billion.³ This market in legal claims has attracted specialist firms, private equity, hedge funds, wealthy individuals, the public (through crowdfunding platforms), and sovereign wealth funds, among others, who are looking for high-risk high-reward investments or for a *cause célèbre*. The high-profile funding of Hulk Hogan's lawsuit against Gawker has created a firestorm of public and regulatory interest. The funding of the concussion litigation, #MeToo cases, and Stormy Daniels' lawsuit — to name but a few recent examples — have dominated headlines and conferences.

This Essay argues that the quest for a bright line rule by which to regulate disclosure of litigation funding is fundamentally misguided because it fails to account for the near-infinite variability of funding scenarios, which implicate widely different interests, pose different

¹ See *infra* Part II.

² For a fuller explanation of the myriad forms litigation finance takes, see *infra* Part III.

³ See Brian Baker, *In Low-Yield Environment, Litigation Finance Booms*, MARKETWATCH (Aug. 21, 2018, 10:59 AM), <https://www.marketwatch.com/story/in-low-yield-environment-litigation-finance-booms-2018-08-17> [https://perma.cc/FL5P-4HMD].

risks, and affect different constituencies in varying degrees. In other words, rules are a legal technology that simply cannot capture nor address the nuance, variability, and context-specificity that litigation finance implicates. Instead of a bright line rule, this Essay proposes that legislatures and courts shift to a standard-based approach and adopt, specifically, a balancing test. A specific balancing test, including factors and interests to be weighed by courts on an *ad hoc* basis, is then offered.

The Essay progresses as follows. Part I contains a description of pending and recent legislation and regulations.⁴ Part II explains what's at stake as litigation finance expands and is poised to reshape civil litigation, civil justice, and the legal profession.⁵ Part III explains the reasons why finding a uniform approach to whether or not to mandate disclosure of litigation finance and if so in what form has proved so controversial and elusive.⁶ In a nutshell, the problem is the high variability of funding scenarios. The variables are described and unpacked. Part IV explains the invisible common thread in the otherwise-divergent current regulatory and scholarly approaches: when not punting, they assume a rules-based approach.⁷ It then suggests moving away from a search for a rule to the embrace of a standard.⁸ Part V then suggests such a standard or, more specifically, a balancing test, spelling out interests and factors to weigh.⁹

I. THE FLURRY OF LEGISLATIVE AND REGULATORY ACTIVITY AIMED AT A DISCLOSURE REGIME

Overlapping, but incohesive and under-theorized, discourses on whether and in what way to require disclosure of litigation finance are taking place at the federal, state and international levels. This Part describes these processes, and the proposals on the table, in that order.

A. At the Federal Level

At the federal level, two battlegrounds over regulation of litigation funding are currently waged and they revolve around legislation that would target complex (class and mass) litigation, at one level, and a possible change to the Federal Rules of Civil Procedure ("FRCP"), on

⁴ See *infra* Part I.

⁵ See *infra* Part II.

⁶ See *infra* Part III.

⁷ See *infra* Part IV.

⁸ See *infra* Part IV.

⁹ See *infra* Part V.

the other. With respect to the former, in May 2018, Senator Chuck Grassley, Chairman of the Senate Judiciary Committee, introduced the Litigation Funding Transparency Act of 2018 (“LFTA”), which aims “to increase transparency and oversight of third-party litigation funding in certain actions, and for other purposes.”¹⁰ The bill, reintroduced on February 13, 2019,¹¹ is a narrow, disclosure-only scheme that follows an earlier attempt to include litigation funding disclosure requirements as part of a broader push to restrict class actions — the unsuccessful Fairness in Class Action Litigation Act of 2017 (“FCALA”).¹²

If adopted, LFTA would require disclosure of litigation funding arrangements in class actions and multidistrict litigation in federal courts to the court and to all parties.¹³ LFTA’s stated goal is to improve transparency and oversight of the litigation finance industry, so that the court and other parties are able to identify conflicts of interest and “know whether there are undue pressures and secret agreements at play that could unnecessarily drag out litigation or harm the interest of the claimants themselves.”¹⁴

Critics of the bill, often large litigation funders, argue that the proposed legislation unjustifiably “mandat[es] broad disclosure to the defendant.”¹⁵ Instead, they suggest that disclosure should be limited to the court, to avoid “handing defendants an unfair advantage by getting a free look at plaintiffs’ financial affairs.”¹⁶ Critics also argue that the bill would impose even greater difficulties to plaintiffs of limited economic means “by imposing more barriers to entry for claimants trying to bring meritorious lawsuits against massive corporations.”¹⁷

¹⁰ S. 2815, 115th Cong. (2018).

¹¹ See Ross Todd, *Republican Senators Reintroduce Bill Pushing for Disclosure of Litigation Funding*, NAT’L L.J. (Feb. 13, 2019, 6:40 PM), <https://www.law.com/nationallawjournal/2019/02/13/republican-senators-reintroduce-bill-pushing-for-disclosure-of-litigation-funding>.

¹² See H.R. 985, 115th Cong. (2017).

¹³ See S. 2815 §§ 2-3.

¹⁴ See Press Release, Comm. on the Judiciary, Grassley, Tillis, Cornyn Introduce Bill to Shine Light on Third Party Litigation Financing Agreements (May 10, 2018), <https://www.judiciary.senate.gov/press/rep/releases/grassley-tillis-cornyn-introduce-bill-to-shine-light-on-third-party-litigation-financing-agreements>.

¹⁵ *Burford Capital Comments on The Litigation Funding Transparency Act of 2018*, BURFORD CAPITAL: BLOG (May 10, 2018), <http://www.burfordcapital.com/blog/litigation-funding-transparency-act-2018> [https://perma.cc/63XX-VMXT].

¹⁶ See *id.*

¹⁷ See Matthew Harrison, *The Litigation Funding Transparency Act of 2018*, BENTHAM IMF: BLOG (May 14, 2018), <https://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2018/05/14/the-litigation-funding-transparency-act-of-2018>.

With respect to amendments to the FRCP, as of this writing, the Advisory Committee on Civil Rules (“Advisory Committee”) finds itself amidst dueling lobbying efforts by proponents and opponents of litigation finance, with the latter lobbying for a revision of the Federal Rules of Civil Procedure mandating disclosure while the former endorsing retention of the *status quo*.¹⁸ The U.S. Chamber of Commerce, the nation’s leading business lobby, which has for years led the battle to eliminate or at least restrict litigation funding,¹⁹ recently renewed for the third time its call that federal courts require parties to disclose all litigation funding agreements — including the identity of the funder and the terms of the funding — at the outset of any case in federal court. It proposed a broad amendment to FRCP Rule 26 that would require disclosure of “any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.”²⁰

Scholars have also trained their sights on the question of disclosure in litigation finance. For example, one scholar proposes that procedural rules be revised or reinterpreted to require any party supported by a third-party funder to disclose the identity of the funder to the judge *in camera* so the judge may determine if there is a financial conflict of interest.²¹ Another suggestion is that a class relying on third-party funding should be required to disclose the arrangement to the court for

¹⁸ See ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 345-460 (Nov. 2017), http://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf [hereinafter AGENDA NOVEMBER 2017].

¹⁹ See, e.g., JOHN H. BEISNER & GARY A. RUBIN, U.S. CHAMBER INST. FOR LEGAL REFORM, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION 2, 10, 14 (2012), https://www.instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf; Harold Kim, *The Time for Litigation Funding Transparency Is Now*, U.S. CHAMBER INST. FOR LEGAL REFORM (Nov. 7, 2017), <https://www.instituteforlegalreform.com/resource/the-time-for-litigation-funding-transparency-is-now> [<https://perma.cc/D3VT-KTHA>].

²⁰ ADVISORY COMM. ON CIVIL RULES, AGENDA NOVEMBER 2017, *supra* note 18, at 345.

²¹ See Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 424-27 (2016). Sahani also argues that the current disclosure rules can be interpreted as relating to third party funding specifically, that the term “resources” in FRCP 26(b)(2)(C)(iii) should be construed to include third-party funding and that language referencing third-party funding should be added to the lists under Rule 16(b)(3)(B) and Rule 16(c)(2) such that information about funding be disclosed as part of the rules-mandated pretrial conferences. Additionally, she suggests adding a new Rule 7.2. In the context of disclosure of third-party funding agreements for a claim for attorney’s fees, she suggests enforcing disclosure under Rule 54(d)(2)(B)(iv) or revising it to include third-party funding. See *id.* at 416-34.

in camera review, and the decision-maker be provided at least the name of the funder.²²

The Advisory Committee declined to take up a similar suggestion in 2014, but it left the door open for future regulation, with members noting that “[w]e do not yet know enough about the many kinds of financing arrangements to be able to make rules”²³ and that “third-party financing practices are in a formative stage. They are being examined by others. They have ethical overtones. We should not act now.”²⁴ But more recently, in response to the latest advocacy for rule change, the Advisory Committee created a subcommittee tasked with considering the possibility of initial disclosure of third-party funders in multidistrict litigation.²⁵ The subcommittee recently reported that it “continues to gather information and has not yet attempted to develop recommendations about whether to consider possible rule amendments, or what amendments, if any, should be given serious study.”²⁶

Finally, federal courts, in typical common law fashion, have been weighing in on disclosure in litigation finance as various fact patterns increasingly come before them.²⁷ And while Congress is taking its time, district and appellate courts are enacting rules to deal with disclosure. As of this writing, twenty-four out of ninety-four district courts require some sort of disclosure of the identity of litigation funders in a civil case. Some of the district courts require a party to disclose the nature of a litigation funder’s interest in the case. District courts impose these enhanced disclosure requirements in a number of ways, with fourteen promulgating local rules mandating broader disclosure than what is required under FRCP Rule 7.1,²⁸ two using standing orders, and ten

²² See Aaseesh P. Polavarapu, *Discovering Third-Party Funding in Class Actions: A Proposal for In Camera Review*, 165 U. PA. L. REV. ONLINE 215, 233-34 (2017) (suggesting an affirmative duty on parties to disclose third-party funding agreements for *in camera* review); see also Sahani, *supra* note 21, at 424.

²³ ADVISORY COMM. ON CIVIL RULES, MEETING MINUTES 13 (2014), http://www.uscourts.gov/sites/default/files/fr_import/CV10-2014-min.pdf.

²⁴ *Id.* at 14.

²⁵ See ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 139 (Nov. 2018), https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

²⁶ *Id.* at 140.

²⁷ See, e.g., *Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc.*, Nos. 16-538, 16-541, 2018 WL 466045, at *6 (W.D. Pa. Jan. 18, 2018); *United States ex rel. Fisher v. Ocwen Loan Servicing, LLC*, No. 4:12-CV-543, 2016 WL 1031157, at *6-7 (E.D. Tex. Mar. 15, 2016).

²⁸ The rule requires that “[a] nongovernmental corporate party must file two copies of a disclosure statement that: (1) identifies any parent corporation and any publicly

using local forms which require disclosure of litigation financiers.²⁹ In the case of appellate courts, six U.S. circuit courts of appeal have local rules requiring expanded disclosure of litigation funders beyond the requirements of Federal Rule of Appellate Procedure 26.1.³⁰ These circuit courts generally require a party to disclose any person or organization with a financial interest in the litigation. Beyond this, though, the rules of circuit courts vary in details, with different circuits having different rules regarding whether amici curiae must disclose litigation financing, whether disclosures are limited to certain types of appeals, and other such issues.³¹ The stated purpose of these regulations is to assist judges with evaluating possible issues of recusal and disqualification and none require automatic disclosure in every civil case.³²

B. At the State Level

State legislatures and courts have also, increasingly, taken up the issue of litigation finance regulation in recent years. Unlike federal regulation, which tends to come up in the context of commercial litigation funding or focus on class and mass litigation, the focus at the state level is on consumer litigation funding.³³ Therefore, these

held corporation owning 10% or more of its stock; or (2) states that there is no such corporation.” FED. R. CIV. P. 7.1(a).

²⁹ See ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 210-11 (Apr. 2018), <https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf> [hereinafter AGENDA APRIL 2018].

³⁰ The rule requires that “[a]ny nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.” FED. R. APP. P. 26.1(a).

³¹ See ADVISORY COMM. ON CIVIL RULES, AGENDA APRIL 2018, *supra* note 29, at 209-10.

³² See *id.* at 210.

³³ See Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 460-61 (2012) [hereinafter *The Litigation Finance Contract*] (explaining the common distinction between consumer litigation funding, which focuses on the funding of small personal claims for individual clients, and commercial litigation funding, which focuses on the funding of larger, higher value claims brought by more sophisticated parties, these parties often being business entities); see also Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377, 382-83 (2014) (noting three main types of litigation financing: consumer litigation financing, commercial litigation financing, and lawyer lending); Anthony J. Sebok, *Litigation Investment and Legal Ethics: What Are the Real Issues?*, 55 CANADIAN BUS. L.J. 111, 114-15 (2014) [hereinafter *Litigation Investment and Legal Ethics*] (describing the differences between consumer and commercial litigation investment); Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 864-65 (2015) (noting the

regulatory efforts often focus on ensuring that agreements are in writing and contain terms with “common, everyday meanings to enable the average consumer who makes a reasonable effort under ordinary circumstances to read and understand the terms of the contract without having to obtain the assistance of a professional.”³⁴

Because the regulation of consumer funding is concerned with avoiding predatory lending-like practices, most of the state regulation is less germane to the current discussion, other than to demonstrate the prominence of the regulatory flurry around a phenomenon that is already altering the quantity, nature, and outcome of civil litigation and is poised to further do so in coming years. But some state-level developments are nonetheless worth noting in the current context. Specifically, in April 2018, Wisconsin enacted “a first-of-its-kind state law requiring litigants to disclose their outside legal funding arrangements.”³⁵ The rule requires a party, “without awaiting a discovery request, [to] provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.”³⁶ This is the first state regulation which imposes a broad mandatory disclosure requirement for litigants funded by third parties.³⁷

Finally, like their federal counterparts, state courts have also been called upon to decide whether and how litigation funding should be disclosed.³⁸

different regulatory regimes imposed on commercial and consumer litigation financing).

³⁴ VT. STAT. ANN. tit. 8, § 2253(a) (2015); *see, e.g.*, ARK. CODE ANN. § 4-57-109 (2015); ME. REV. STAT. ANN. tit. 9-A, § 12-104 (2008); NEB. REV. STAT. ANN. § 25-3303 (2010); OHIO REV. CODE ANN. § 1349.55 (2008); OKLA. STAT. ANN. tit. 14A, § 3-805 (2013); TENN. CODE ANN. § 47-16-104 (2014); *see also* ADVISORY COMM. ON CIVIL RULES, AGENDA APRIL 2018, *supra* note 29, at 216-17 (discussing state legislation and regulations for regulating litigation funding through registration models and caps on rates and fees).

³⁵ Andrew Strickler, *Wis. Gov. Signs Legal Funder Transparency Rule*, LAW360 (Apr. 3, 2018, 9:26 PM), <https://www.law360.com/legalethics/articles/1029480/wis-gov-signs-legal-funder-transparency-rule>.

³⁶ WIS. STAT. ANN. § 804.01 (2019).

³⁷ *See* Strickler, *supra* note 35.

³⁸ *See, e.g.*, *Carlyle Inv. Mgmt. v. Moonmouth Co.*, C.A. No. 7841-VCP, 2015 WL 778846, at *8-9 (Del. Ch. Feb. 24, 2015) (litigation funding documents serve a dual litigation and business purpose, but should still be subject to work product confidentiality protections); *Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co.*, No. 07C-12-134-JRJ, 2015 WL 1540520, at *4 (Del. Super. Ct. Mar. 31, 2015)

C. *International and Foreign Regulatory Developments*

The development of litigation finance in the United States represents an expansion of an industry that first took hold in domestic litigation in Australia and the United Kingdom, and then expanded in international arbitration.³⁹ In the realm of international arbitration, the most important development is the creation of “soft law” in the form of a Report by the International Council for Commercial Arbitration (“ICCA”)-Queen Mary Task Force on Third-Party Funding in International Arbitration, which was finalized, after a very long and public deliberative process, in April 2018. It restates the general norm emerging in international arbitration of requiring disclosure of the existence and identity of funders for the purpose of arbitrators’ conflicts check and confirms the emergent consensus that arbitrators have the authority to order such disclosure. But, likely due to the controversial nature of disclosure, the report refrains from “provid[ing] any new standards for assessing conflicts, but instead refers such issues to existing law, rules, and guidelines.”⁴⁰ Arbitrators, thus, are left to decide on their own whether, to what extent, and under what conditions, further disclosure may be warranted.

In Australia, the first jurisdiction to legalize (indeed — actively foster) litigation finance, the existence of a litigation finance agreement needs to be disclosed, but the details of the agreement are likely

(since the payment terms in a litigation finance agreement were prepared in anticipation of litigation, and involved attorney mental impressions and litigation strategies, these terms should be subject to work product protection); *Conlon v. Rosa*, Nos. 295907, 295932, 2004 WL 1627337, at *2 (Mass. Land Ct. July 21, 2004) (the need to evaluate bias and credibility of the plaintiff weighs against holding litigation finance documents confidential).

³⁹ See Leslie Perrin, *England and Wales*, in *THE THIRD PARTY LITIGATION FUNDING LAW REVIEW* 48, 48-58 (Leslie Perrin ed., 2d ed. 2018) (reviewing litigation financing in England and Wales); Nicholas Dietsch, Note, *Litigation Financing in the U.S., the U.K., and Australia: How the Industry Has Evolved in Three Countries*, 38 N. KY. L. REV. 687, 698-705 (2011); Jasminka Kalajdzic et al., *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 96-113 (2013); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1275-86 (2011) [hereinafter *Whose Claim Is This Anyway?*]. See generally LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, *THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION* (2d. ed. 2017) (detailing third-party litigation funding in several countries and discussing the problems that may arise with litigation funding in international arbitration).

⁴⁰ See INT’L COUNCIL FOR COMMERCIAL ARBITRATION, REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 12 (2018), https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf.

privileged.⁴¹ And in the United Kingdom, the existence of a litigation finance agreement and the identity of the litigation funder are not considered privileged information but the details of a litigation finance agreement generally are.⁴²

* * *

What pending proposals generally have in common is that, when they do not simply punt on the issue, they seek or assume bright-line rules on disclosure. The rest of the Essay questions this approach.

II. THE STAKES: WHY LITIGATION FINANCE IS UNDERSTOOD TO BE THE MOST IMPORTANT DEVELOPMENT IN CONTEMPORARY CIVIL LITIGATION

Critics and proponents alike agree that the rise of litigation finance in recent years is the single most important development in civil justice.⁴³ The following paragraphs explain the main reasons the practice is so

⁴¹ See Jason Geisker & Jenny Tallis, *Australia*, in *THE THIRD PARTY LITIGATION FUNDING LAW REVIEW*, *supra* note 39, at 1-11.

⁴² See Perrin, *supra* note 39, at 53.

⁴³ See, e.g., GEOFFREY MCGOVERN ET AL., *THIRD PARTY LITIGATION FUNDING AND CLAIM TRANSFER 1* (2010) (ebook). More generally, “[w]e find ourselves in the second stage of a revolution in the financing of civil litigation . . . [c]ompared with the situation seventy-five years ago, the plaintiffs’ bar is today better financed, both absolutely and relative to the defense bar.” Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 183 (2011). Critics include the U.S. Chamber of Commerce, through its publications. See, e.g., JOHN BEISNER ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, *SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES* (2009), https://www.instituteforlegalreform.com/uploads/sites/1/thirdparty_litigationfinancing.pdf; BEISNER & RUBIN, *supra* note 19, at 1 (labeling litigation finance “a clear and present danger to the impartial and efficient administration of civil justice in the United States”); *Third Party Litigation Funding*, U.S. CHAMBER INST. FOR LEGAL REFORM, <https://instituteforlegalreform.com/issues/third-party-litigation-funding> (last visited Sept. 8, 2019) [hereinafter *Third Party Litigation Funding*]. Other critics include Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL’Y 613 (2012) and Joanna M. Shepherd, *Ideal Versus Reality in Third-Party Litigation Financing*, 8 J.L. ECON. & POL’Y 593 (2012). Proponents include ABA Comm. on Ethics & Prof’l Responsibility, see Formal Opinion 484 (Nov. 27, 2018), N.Y. State Bar Ass’n Comm. on Prof’l Ethics, see Ethics Opinion 1104 (Nov. 15, 2016), and scores of scholars, see, e.g., Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83 (2008); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004); Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615 (2007); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65 (2010); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625 (1995); Sebok, *Litigation Investment and Legal Ethics*, *supra* note 33, at 111.

profoundly important and why it has generated so much interest among academics, lawyers, legislatures, the judiciary, the media, and the investment community.

A. *Litigation Finance Implicates Foundational Questions of Civil Justice*

The primary import of the industry is its propensity to increase the number of cases brought. This is either a positive or a negative depending on whether one focuses on the potential to increase access to justice for deserving but under-resourced plaintiffs, or on the potential to increase non-meritorious litigation.⁴⁴

An associated concern, relating to systemic effects on the courts, is what affects the availability of funding and liquidity of legal claims might have on how quickly cases settle.⁴⁵ But peel away this level of the debate and other, possibly even more profound, implications arise.

⁴⁴ For arguments that litigation finance is likely to increase non-meritorious litigation, see, for example, Jeremy Kidd, *Modeling the Likely Effects of Litigation Financing*, 47 LOY. U. CHI. L.J. 1239, 1258-60 (2016); Thomas J. Donohue, *Stopping the Litigation Machine*, U.S. CHAMBER OF COMM. (Oct. 31, 2016, 9:00 AM), <https://www.uschamber.com/series/your-corner/stopping-the-litigation-machine>; and *Third Party Litigation Funding*, *supra* note 43. For arguments that litigation is unlikely to increase non-meritorious litigation, see, for example, Molot, *supra* note 43, at 106-07; Shannon, *supra* note 33, at 874-75. More generally, for literature on the socially desirable level of litigation, see, for example, Richard L. Abel, *The Real Tort Crisis — Too Few Claims*, 48 OHIO ST. L.J. 443 (1987) and Nora Freeman Engstrom, *ISO the Missing Plaintiff*, JOTWELL (Apr. 12, 2017), <https://torts.jotwell.com/iso-the-missing-plaintiff/> (book review) (“Using a number of methodologies, these researchers have, again and again, confirmed Abel’s basic empirical premise. In most areas of the tort law ecosystem, only a small fraction of Americans seek compensation, even following negligently inflicted injury.”). For a classic law and economics analysis of the suboptimal levels of litigation, see Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997); Nora Freeman Engstrom, *Re-Re-Financing Civil Litigation: How Lawyer Lending Might Remake the American Litigation Landscape, Again*, 61 UCLA L. REV. DISCOURSE 110 (2013) (describing the evolution of funding available to plaintiff-side personal injury firms and identifying the ways in which third party funders in this space may alter the American litigation landscape).

⁴⁵ See Steinitz, *Whose Claim Is This Anyway?*, *supra* note 39, at 1305-07. For empirical data on the subject, see Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer-Litigant Funding* 13 (Cardozo Legal Studies Research Paper No. 539, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3137247 (using a dataset of funding requests to find that in cases where the plaintiff was funded and the lawsuit was settled, 417 days was the median amount of time between the initial payment to the funder and settlement of the case and the funder being fully paid); David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075, 1080-81, 1107 (2013) (finding that although data on settlements cannot be obtained, “that once

B. *Constitutional, Human Rights, and Civil Rights Implications*

The ability to bring a suit — an expensive enterprise under the best of circumstances — implicates constitutional, human, and civil rights. Access to justice is a human right, “guaranteed as a legal right in virtually all universal and regional human rights instruments, since the 1948 Universal Declaration, as well as in many national constitutions.”⁴⁶ In the United States, the right to bring a suit is often further described as a form of free speech and participation in certain types of cases is understood to be an aspect of democratic participation.⁴⁷ Tellingly, the last time a vigorous debate erupted around “champerty” and “maintenance” — the traditional doctrines that barred, with some exceptions, the funding of a suit by a nonparty — was when civil rights organizations took on civil rights cases, including school integration cases, pro bono.⁴⁸

And for defendants, the questions of who funds the plaintiffs’ case, the motivation behind the funding, and whether or not the defendants get to request discovery from the funders or, even, join them as parties, are often framed as questions of defendants’ due process rights.

C. *Implication for the Organizational Structure of Law Firms and the Competition for Legal Services*

Litigation finance, especially with the very recent advent of “portfolio funding” — funding tied to the performance of a portfolio of cases,

defendants recognize the increased likelihood of litigation and the greater resources held by plaintiffs, they would be more likely to settle in equilibrium. While transitioning to that new equilibrium, there is another potential benefit from litigation funding: earlier resolution of the law.”); Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding — A Signaling Model*, 63 DEPAUL L. REV. 233, 235 (2014) (arguing that third-party litigation funding gives plaintiff(s) more time to come to a better settlement); Daniel L. Chen, *Can Markets Stimulate Rights? On the Alienability of Legal Claims*, 46 RAND J. ECON. 23, 49 (2015) (“[I]ncreased settlement may arise if litigation funding reduces the uncertainty of case outcomes. . . . Although settlement is not directly measured . . . the number of cases filed and the number of finalizations are positively associated with litigation funding, whereas the number of times parties are required to appear before court per case is negatively associated with litigation funding . . .”).

⁴⁶ Francesco Francioni, *The Rights of Access to Justice Under Customary International Law*, in ACCESS TO JUSTICE AS A HUMAN RIGHT 1, 2 (Francesco Francioni ed., 2007).

⁴⁷ See, e.g., Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577-79 (2008) (arguing that trials further certain social and democratic aims such as giving a voice to litigants to express their claims and providing a platform for the publication of wrongs that may have been incurred).

⁴⁸ See *The South’s Amended Barratry Laws: An Attempt to End Group Pressure Through the Courts*, 72 YALE L.J. 1613, 1613 (1963).

rather than that of a single case, and provided directly to law firms⁴⁹ — is changing the competitive landscape of law firms and is poised to change the organization, governance, and finance of law firms.⁵⁰ For example, start-up and boutique firms are now able to effectively compete with so-called BigLaw and with established plaintiffs' firms for high-end work, including work that may require investment by the firm (e.g., contingency and *qui tam* cases). The availability of outside financing also vitiates the traditional workaround, developed when law firms had a monopoly over litigation finance, whereby law firms created consortia of firms, where only one or some provides lawyering, and the others were brought on board solely to provide financing.⁵¹ These changes will have cascading effects on how law firms finance and govern themselves.

D. Spillover Effects to Criminal Defense Finance

The financing of civil litigation, especially the modalities it takes, appears to have inspired modes of criminal defense funding. For example, following the development of the crowdfunding of litigation funding,⁵² criminal defendants have followed suit with similar crowdfunding efforts.⁵³ And one may surmise that through sensitizing

⁴⁹ See *As the Funding Industry Evolves, Portfolio Financing Grows in Popularity*, BENTHAM IMF: BLOG (May 10, 2018), <https://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2018/05/10/as-the-funding-industry-evolves-portfolio-financing-grows-in-popularity> [https://perma.cc/53U7-CHB4]; Press Release, Burford, Burford Capital Announces Innovative Insolvency Portfolio Financing with Grant Thornton (May 4, 2016), <http://www.burfordcapital.com/newsroom/burford-capital-announces-innovative-insolvency-portfolio-financing-grant-thornton>; *Portfolio Litigation Funding*, WOODSFORD LITIG. FUNDING, <https://woodsfordlitigationfunding.com/litigation-finance/portfolio-litigation-funding> (last visited Feb. 18, 2018) [https://perma.cc/E3YK-YN53].

⁵⁰ For an in-depth discussion of these effects, see Maya Steinitz, *The Partnership Mystique: Law Firm Finance and Governance in the 21st Century* (forthcoming manuscript) (on file with author).

⁵¹ See Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 475-76 (1998); Marc Galanter, *Case Congregations and Their Careers*, 24 LAW & SOC'Y REV. 371, 387 (1990).

⁵² See *infra* note 122.

⁵³ Prominent current examples include Michael Cohen, Benjamin Netanyahu, and Rick Gates. See *Michael Cohen Truth Fund*, GOFUNDME (Aug. 21, 2018), <https://www.gofundme.com/hqjupj-michael-cohen-truth-fund>; *Netanyahu Rejects Decision Banning Tycoons from Funding His Legal Defense*, TIMES OF ISRAEL (Feb. 24, 2019, 9:16 PM), <https://www.timesofisrael.com/netanyahu-rejects-decision-banning-tycoons-from-funding-his-legal-defense> ("Legal representatives for Prime Minister Benjamin Netanyahu declared Sunday that the premier does not intend to accept a decision banning funding from wealthy associates of his legal defense in the three

the public to litigation funding, with its attendant host of conflicts and other ethical challenges, in the civil justice arena, conflicts-ridden modes of funding in the criminal defense realm may become more palatable than they otherwise would have been.⁵⁴

* * *

The urgency of all of these questions is amplified when one considers the explosive growth of the industry in recent years, both nationally and globally, and the projections of further future growth as well as expansion into new areas.

Third-party funding, which until the beginning of this century was considered near-universally as a crime, a tort, or at least an ethical violation, has erupted into the mainstream and some estimates of the size of this global industry now place its market capitalization at \$50-\$100 billion.⁵⁵ Given the growing awareness of litigation finance, the fact that many areas of litigation, such as class and mass actions in the United States, have not yet been unlocked as “asset sub-classes,” and the fact that various jurisdictions have only recently or not yet legalized the practice — by all estimates, litigation finance is poised to continue seeing robust growth in coming years.⁵⁶ This brings us to our next topic: the variability of litigation finance scenarios.

corruption cases he is facing.”); Kathryn Watson, *Judge Chastises Rick Gates for Legal Defense Fundraiser Video*, CBS NEWS (Dec. 22, 2017, 1:01 PM), <https://www.cbsnews.com/news/judge-chastises-rick-gates-for-legal-defense-fundraiser>.

⁵⁴ For examples of such controversial, potentially conflicts-ridden, forms of criminal defense finance by President Trump with respect to the legal bills of his family members and former and current staffers, see Summer Meza, *Trump’s New Conflict of Interest Could Involve Paying Off Officials to Not Talk About Russia*, NEWSWEEK (Nov. 18, 2017, 9:33 AM), <https://www.newsweek.com/trump-legal-fees-staffers-conflict-interest-715995> (“[R]ather than using campaign donations or charging the Republican National Committee, [President Trump] has created a fund to finance the legal bills of his former and current staffers — which could violate ethics laws if there’s a chance it could influence their testimonies. . . . The RNC paid more than \$230,000 for two of Trump’s personal attorneys The Republican Party has shelled out even more for Donald Trump Jr., paying more than \$500,000 in legal fees as he faces allegations of collusion”).

⁵⁵ See Baker, *supra* note 3. Of course, since almost all funders are privately-held, and since substantial numbers of financings are provided by ad hoc funders, not dedicated litigation financiers, definitive numbers are unavailable.

⁵⁶ See, e.g., MAYA STEINITZ, *THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE* 127-130 (2019) (discussing the rise of litigation finance and its growing prominence); Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT’L L. 159, 164-68 (2011) (discussing the growing global scale of litigation finance in jurisdictions such as Australia and England, and how countries such as Spain and Brazil offer untapped markets for third-party funding); Christopher P. Bogart, *What’s Ahead*

III. THE VARIABILITY OF LITIGATION FINANCE SCENARIOS

When assessing the suitability of the approaches currently contemplated, as outlined in Part I, it is important to understand the wide array of practices that fall under the rubric of “litigation finance” and the colorful cast of characters that are involved. Ultimately, the variability of litigation finance scenarios militates against a bright-line rule approach.

In 2016, litigation finance exploded into the public consciousness when billionaire Peter Thiel’s funding of Hulk Hogan’s lawsuit against Gawker became public. Mr. Hogan (whose legal name is Terry Bollea), a retired professional wrestler, sued Gawker for, *inter alia*, invasion of privacy for publishing a video showing him having sex with a friend’s wife.⁵⁷ In May 2016, reports surfaced that Mr. Thiel, a Silicon Valley mogul, funded the case. Reporting suggested, specifically, that he did so in order to satisfy a personal vendetta: Gawker had “outed” him as gay a decade earlier.⁵⁸ Bankrolling Hogan’s claim was, according to news reports, his “revenge.”⁵⁹ Revenge is indeed a dish best served cold: careful canvassing for a “good” plaintiff ultimately yielded a \$140 million judgment in favor of Mr. Hogan. The large judgment pushed Gawker into bankruptcy.⁶⁰

in Litigation Finance?, BURFORD: BLOG (July 17, 2017), <http://www.burfordcapital.com/blog/future-litigation-finance-trends> [https://perma.cc/3P8Q-RPD3] (arguing that litigation finance will experience robust growth in the coming years); *Litigation Finance Forecast: Six Trends to Watch in 2019*, BENTHAM IMF: BLOG (Jan. 2, 2019), <https://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2019/01/02/litigation-finance-forecast-six-trends-to-watch-in-2019> [https://perma.cc/2KPG-BAA5] (predicting a surge in portfolio financing to fund more large-scale litigation).

⁵⁷ See *Bollea v. Gawker Media, LLC*, No. 8:12-cv-02348-T-27TBM, 2012 WL 5509624, at *2 (M.D. Fla. Nov. 14, 2012).

⁵⁸ See Eugene Kontorovich, *Peter Thiel’s Funding of Hulk Hogan-Gawker Litigation Should Not Raise Concerns*, WASH. POST: THE VOLOKH CONSPIRACY (May 26, 2016, 5:19 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/26/peter-thiels-funding-of-hulk-hogan-gawker-litigation-should-not-raise-concerns/>; Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker*, N.Y. TIMES (May 25, 2016), <https://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html>.

⁵⁹ Manuel Roig-Franzia, *What Happens When Billionaires Battle Gossipmongers? Prepare for Explosions*, WASH. POST (Feb. 9, 2019, 4:00 AM), https://www.washingtonpost.com/lifestyle/style/what-happens-when-billionaires-battle-gossipmongers-prepare-for-explosions/2019/02/08/bb475576-2be8-11e9-b011-d8500644dc98_story.html. Thiel told the New York Times, “It’s less about revenge and more about specific deterrence I saw Gawker pioneer a unique and incredibly damaging way of getting attention by bullying people even when there was no connection with the public interest.” Sorkin, *supra* note 58.

⁶⁰ Gawker filed for bankruptcy on June 10, 2016. See *In re Gawker Media LLC*, 571 B.R. 612, 617 (Bankr. S.D.N.Y. 2017); see also Matt Drange, *Peter Thiel’s War on Gawker*:

Because the funding in this case felled a news outlet, journalistic interest was heightened and the case generated significant coverage in the press which, in turn, led to increased calls to regulate the nascent but fast-growing litigation finance industry.⁶¹ Specifically, the case drew attention to the issue of whether the existence of funding agreements, the terms of any agreement, and/or the identity of any funders should be public information.⁶²

To add complexity and intrigue to this example, according to *Forbes* magazine, Gawker executives “agree[d] to sell a minority stake in the company to Russian billionaire Viktor Vekselberg and his company [T]he money was used, in part, to defend itself from ongoing litigation.”⁶³ In other words, litigation finance was utilized on both sides of the ‘v.’ with questionable funding sources and motivations on both cases.

Other ripped-from-the-headlines examples of funded litigations include Stormy Daniels’ crowd-funded litigation;⁶⁴ the NFL concussion cases;⁶⁵ and #MeToo cases.⁶⁶ Predatory lending practices on the

A Timeline, FORBES (June 21, 2016, 1:22 PM), <http://www.forbes.com/sites/mattdrange/2016/06/21/peter-thiels-war-on-gawker-a-timeline/#181ed4b17e80>.

⁶¹ See, e.g., Michelle Castillo, *Gawker to Pay Hulk Hogan at Least \$31 Million to Settle Case*, CNBC (Nov. 8, 2016, 2:42 PM), <https://www.cnbc.com/2016/11/02/gawker-settling-litigation-with-peter-thiel-hulk-hogan-for-undisclosed-amount.html> (noting the founder of Gawker’s thoughts on the legacy of the Gawker-Hogan litigation and the potential danger of “dark money” in litigation finance); Sorkin, *supra* note 58 (discussing the increased journalistic interest in third party funding); Martha C. White, *Peter Thiel vs. Gawker: Case Highlights World of ‘Litigation Funding’*, NBC NEWS (May 29, 2016, 7:37 AM), <https://www.nbcnews.com/business/business-news/peter-thiel-vs-gawker-case-highlights-world-litigation-funding-n581726> (discussing the growing practice of litigation finance).

⁶² This statement is based on more than a dozen calls from journalists received by the author in connection with the disclosure of the Thiel financing of the Hulk’s case against Gawker.

⁶³ Drange, *supra* note 60; see Tom Winter & Robert Windrem, *Who Is Viktor Vekselberg, the Russian Oligarch Linked to Trump Lawyer Michael Cohen?*, NBC NEWS (May 10, 2018, 6:22 AM), <https://www.nbcnews.com/politics/donald-trump/meet-nice-russian-oligarch-linked-trump-lawyer-michael-cohen-n872716> (explaining that Vekselberg is possibly linked to money that has moved through companies he is associated with to Michael Cohen, President Trump’s former personal lawyer and a convicted felon, and potentially paid to Stormy Daniels).

⁶⁴ See Stephanie Clifford, *Clifford (aka Daniels) v. Trump et al.*, CROWDJUSTICE (Apr. 24, 2018), <https://www.crowdjustice.com/case/stormy>.

⁶⁵ See Steven M. Sellers, *Troubled NFL Concussion Deal May Roil NHL Cases*, BLOOMBERG LAW (May 25, 2018, 4:06 AM), <https://news.bloomberglaw.com/product-liability-and-toxics-law/troubled-nfl-concussion-deal-may-roil-nhl-cases>.

⁶⁶ See Matthew Goldstein & Jessica Silver-Greenberg, *How the Finance Industry Is Trying to Cash In on #MeToo*, N.Y. TIMES (Jan. 28, 2018), <https://www.nytimes.com/>

consumer litigation finance part of the industry, often deployed when individuals of limited means have suffered a bodily injury and are seeking to finance personal injury cases, have also been in the news.⁶⁷ In the international and transnational realm, attention grabbers include funding in the bet-the-company and bet-the-region mass torts litigation between thousands of Ecuadorian residents of the Amazon and the oil giant Chevron,⁶⁸ and the atypical, nonprofit funding by the Anti-Tobacco Trade Litigation Fund, created by Bloomberg Philanthropies and the Bill and Melinda Gates Foundation, which funded low- and middle-income countries that were defendants in the international investment arbitration against tobacco companies that claimed that regulations requiring plain packaging of tobacco products violated their rights under investment treaties.⁶⁹ A domestic corollary can be seen in the funding by Iowa agricultural groups of the defense of three state counties against pollution charges, through the following non-transparent structure:

In March of 2016, documents revealed . . . that agricultural groups — including the Iowa Farm Bureau Federation, the Iowa Soybean Association, the Iowa Corn Growers Association (ICGA) and the Iowa Drainage District Association — secretly funded the defense of the Iowa lawsuit through a 501(c)3 nonprofit, the Agricultural Legal Defense Fund. According to Internal Revenue Service documents . . . fertilizer and other agricultural company officials make up the bulk of the nonprofit's officers and directors, including representatives from Smith Fertilizer, Monsanto Co., Growmark, Cargill, Koch

2018/01/28/business/metoo-finance-lawsuits-harassment.html; Philippe A. Lebel, *Could a Litigation Finance Initiative Capitalize on #MeToo?*, NAT'L L. REV. (Nov. 14, 2017), <https://www.natlawreview.com/article/could-litigation-finance-initiative-capitalize-metoo>.

⁶⁷ See, e.g., Matthew Goldstein, *Judge Dismisses Federal Suit Accusing Firm of Defrauding 9/11 Responders*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/business/september-11-attacks-nfl-concussion-settlements.html> (discussing the practice of extending cash advances to people with pending cases such as 9/11 responders).

⁶⁸ See *Chevron Corp. v. Donziger*, 833 F.3d 74, 134 (2d Cir. 2016); Steinitz, *The Litigation Finance Contract*, *supra* note 33, at 465-79.

⁶⁹ See *Philip Morris Brands Sàrl v. Oriental Republic of Uru.*, ICSID Case No. ARB/10/7, Award, ¶¶ 12, 22 (July 8, 2016). For an explanation of third-party funding in that case as well as other forms of third-party funding of investment arbitration, see Victoria Shannon Sahani, *Revealing Not-for-Profit Third-Party Funders in Investment Arbitration*, OXFORD U. PRESS (Mar. 1, 2017), <http://oxia.ouplaw.com/page/third-party-funders> [<https://perma.cc/LFF9-ML4K>].

Agronomics, DuPont Pioneer and the United Services Association.⁷⁰

The list goes on and on, but these examples are sufficient to illustrate the key point upon which this Part will elaborate: the range of funding scenarios is vast and its vastness and variability is, arguably, the main reason those drafting proposed disclosure rules find it hard to settle on a noncontroversial formula. For example, our legal system arguably should treat providing access to justice very differently than it does using the courts as a vehicle for revenge. Similarly, as already acknowledged, average Joes and Janes should receive more protection (which may require disclosure to courts) than do sophisticated funded parties. And foreign governments and their agents acting as financiers may require a different level of scrutiny than a commercial entity, especially if the cases they invest in have national security or foreign relations implications.

Similarly, companies funding cases against their competitors should be treated differently than professional funding firms funding similar cases for a monetary profit. Politically-motivated funding, while distasteful to many, should be considered in light of First Amendment concerns not necessarily present in other types of cases. The consideration for disclosure in arbitration — generally a confidential forum but also one where the decision-makers are selected *ad hoc* by parties (i.e., do not have life tenure) — are different from courts which, in rule of law societies, are transparent and wherein judges are not jostling for their next appointment. And it appears as though the public may regard a news outlet as different from other types of defendants, especially if the litigation threatens to drive it out of business.

In other words, variables such as the motivation and likely effects of the funding, type of funder, type of funded party, type of defendant, subject matter of the case, and forum all matter. Further, simply classifying the funding by type does not dispose of the inquiry as to what type of and how much disclosure, if any, is appropriate. For example, arbitrators, who usually have a private practice and serve clients when they're not serving on a tribunal, may be more likely to have a conflict of interest than are judges, pointing in the direction of

⁷⁰ Llewellyn Hinkes-Jones, *Open Records Request Exposes Rare Litigation Finance Document*, BLOOMBERG LAW (Feb. 23, 2017), <https://www.bloomberglaw.com/product/blaw/document/X2CUA2PO000000> [https://web.archive.org/web/20170223223237/https://www.bna.com/iowa-pollution-suit-n57982084227/]. The report goes on to quote Michael Reck, an attorney with Belin McCormick P.C. in Des Moines, Iowa, one of the law firms representing the counties, as stating that such finance agreements are “not uncommon.” *Id.*

more disclosure in arbitration. However, arbitrators, unlike judges, are not empowered to protect the general public and are not expected or empowered to consider policy implications to the same extent as judges are, pointing in the direction of less disclosure.

And here is another example of the context-specificity needed. Even in international arbitration, one size does not fit all: the funding of a commercial claim brought by a commercial party does not, on its face, suggest transparency of funding is warranted. But the funding of an international arbitration involving, say, a boundary dispute or exploration rights does call for transparency as to who is pulling the purse strings because of the public interest involved in such matters. Finally, and again an example from international arbitration, at the beginning of the process disclosure of the identity of the funder aimed only at the tribunal may be all that is needed for conflicts check purposes. Conversely, at the end of a case when a panel needs to decide whether and to what extent to shift the cost of the proceeding to the losing party, disclosure of the funding terms to both the tribunal and opposing party may be warranted.⁷¹

The dizzying array of variables and variations suggests that: (i) judges and arbitrators should be empowered to inquire into funding and; (ii) the extent and form of this important inquiry should be left to the discretion of the individual decision-maker so she can engage in a thoughtful weighing of the intricate considerations as they pertain to the facts before her. The next Part brings the analysis full circle with a proposed balancing test.

IV. THE PROPOSAL: A BALANCING TEST

To properly account for the role of litigation finance in proceedings before them, judges and arbitrators should be given broad discretion to undertake a contextual analysis and should not be hamstrung by the kinds of all-or-nothing or otherwise bright-line rules currently contemplated. Nor, however, should they be left totally without guidance, even though, at present, it is understood that decision-makers such as judges or arbitrators have the authority to order disclosure. In short, the proper approach to the question of whether and what to disclose is a balancing test.

To simplify a vast debate in legal philosophy,⁷² the distinction between rules and standards is as follows. “Rules” are rigid and

⁷¹ See INT’L COUNCIL FOR COMMERCIAL ARBITRATION, *supra* note 40, at 159.

⁷² For jurisprudential classics on the rules/standards distinction and its implications, see, for example, H.L.A. HART, *THE CONCEPT OF LAW* 126-31 (1961);

constraining: “Once a rule has been interpreted and the facts have been found, then the application of the rule to the facts decides the issue to which it is relevant.”⁷³ Conversely, standards provide *discretion*. They seek to guide rather than dictate an outcome. To illustrate:

Oliver Wendell Holmes and Benjamin Cardozo find themselves on opposite sides of a railroad crossing dispute. They disagree about what standard of conduct should define the obligations of a driver who comes to an unguarded railroad crossing. Holmes offers a rule: The driver must stop and look. Cardozo rejects the rule and instead offers a standard: The driver must act with reasonable caution.⁷⁴

There are tradeoffs when choosing one approach over the other, but a standard is ultimately preferable to a rule in this context. The main advantage of rules is their predictability. The main advantage of standards is fairness through context-specificity. This is so because rules give law content *ex ante* whereas standards do so *ex post*.⁷⁵ Further, “[r]ules typically are more costly than standards to create, whereas standards tend to be more costly for individuals to interpret when deciding how to act and for an adjudicator to apply to past conduct [W]hen individuals can determine the application of rules to their contemplated acts more cheaply, conduct is more likely to reflect the content of previously promulgated rules than of standards that will be given content only after individuals act.”⁷⁶ A standard, therefore, will

ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 115-23 (1922); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 10-12 (1991); Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22-29 (1967); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1701 (1976). For examples of treatment of the distinction and its consequences from the law and economic tradition, see, for example, Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

⁷³ Lawrence Solum, *Legal Theory Lexicon: Rules, Standards, and Principles*, LEGAL THEORY BLOG (Sept. 6, 2009, 9:40 AM), <http://lsolum.typepad.com/legaltheory/2009/09/legal-theory-lexicon-rules-standards-and-principles.html> [<https://perma.cc/8EF4-SXLV>]. Solum, like others, distinguishes between standards and principles but, for simplicity, I will follow Dworkin and limit the distinction to rules and standards. See Dworkin, *supra* note 72, at 22-29.

⁷⁴ Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379 (1985) (footnotes omitted).

⁷⁵ See Kaplow, *supra* note 72, at 559-60.

⁷⁶ *Id.* at 557.

provide less guidance to litigation financiers, attorneys, and parties than a rule would and, in that sense, could create costly uncertainty. The lack of a rule could even allow for undesirable behavior as actors explore, through trial (no pun intended) and error, what is and is not permissible.

Notwithstanding the costs of uncertainty and potentially undesirable behavior, a standard is the right approach to litigation finance disclosure because the sector and its best practices are still evolving and, more importantly, because no single rule would be able to encompass the vast array of scenarios falling under the increasingly stretched definition of litigation finance. What rule, for instance, could adequately account for the difference between a corporate plaintiff whose legal costs are partially covered by a sophisticated investor who has arranged with the corporation's law firm to fund a portfolio of cases, on the one hand, and, on the other, a fired factory worker whose civil rights case is funded by a small startup focused on algorithm-driven investments in claims worth under one million dollars? And yet both of those are examples of litigation funding.

In the following Section I argue, more specifically, for a particular kind of standard: the balancing test. The reason for this recommendation is that "[i]n almost all conflicts . . . there is something to be said in favor of two or more outcomes. Whatever result is chosen, someone will be advantaged and someone will be disadvantaged; some policy will be promoted at the expense of some other."⁷⁷ A balancing test thus recognizes that, normatively speaking, litigation funding is, *ex ante*, neither "good" nor "bad" nor is its regulation (here, in the form of disclosure) "good" or "bad." It is context specific. This pragmatism, inherent to the judicial activity of balancing, is the reason why, while this legal technique has its detractors,⁷⁸ "[b]alancing tests are ubiquitous in American law. From the Due Process Clause to the Freedom of Speech and from the federal joinder rules to personal

⁷⁷ Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 *Yale L.J.* 1855, 2123 (1985). For an in-depth discussion of the benefits and perils of balancing tests, see, for example, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943, 943-44, 965-66 (1987) (discussing these modes of judicial decision making in the context of constitutional law). Litigation finance, *inter alia*, intertwines with the constitutional values of the right to have one's day in court and of due process.

⁷⁸ See Patrick M. McFadden, *The Balancing Test*, 29 *B.C. L. REV.* 585, 636-49 (1988). See generally Aleinikoff, *supra* note 77 (discussing the rise in use of balancing tests and giving various critiques of balancing).

jurisdiction, U.S. law makes the outcome of legal disputes dependent on the balancing of various *interests* and *factors*.”⁷⁹

A. The Proposed Balancing Test

In this Section, I will first outline the important interests of the public and of the parties at stake in litigation finance. Then, I will map those interests onto a series of concrete factors that judges and arbitrators should consider when deciding on disclosure.⁸⁰

1. Interests

Whether and how a litigation is funded implicates public and private interests.⁸¹ Specifically, the public has an interest in such matters as access to justice, the development of the law, the cost of civil justice, the level of litigation in society, whether systemically the “Haves” come out ahead in litigation, the length of time litigation takes, the extent of discovery the parties can afford/inflict, and the purposes for which the public good that is the justice system is being used (e.g., justice, compensation, third party profits, revenge, politics, policy, and so forth).⁸² A special subset of public interest is the interests of the forum itself (usually, judicial economy). However, because the manner in which effects on the courts often feature in policy debates surrounding litigation finance, and due to the prevalence of arbitration which raises a separate set of concerns, I treat forum interests as a separate category. Finally, the private litigants, both the funded plaintiffs and the defendants who face them, have private interests which must be weighed. Some of those overlap with the public interests mentioned

⁷⁹ Lawrence Solum, *Legal Theory Lexicon: Balancing Tests*, LEGAL THEORY BLOG (Dec. 10, 2017, 5:37 PM) (emphasis added), <http://lsolum.typepad.com/legaltheory/2017/12/legal-theory-lexicon-balancing-tests.html> [<https://perma.cc/8AGY-WUQW>].

⁸⁰ This is an expansion and an application of a taxonomy I first offered in a previous article. See Steinitz, *Whose Claim Is This Anyway?*, *supra* note 39, at 1302-03.

⁸¹ Balancing tests often take the meta structure of balancing public versus private interests with different private and public interests falling under each category depending on the interests. A couple of examples include the balancing test for granting preliminary injunctions and the one for granting dismissal based on forum non conveniens. See 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948.2 (3d ed. 2019); 14D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3828 (4th ed. 2019).

⁸² For a discussion of how repeat players such as funders can affect whether the “Haves” or “Have-nots” come out ahead in litigation, see Steinitz, *Whose Claim Is This Anyway?*, *supra* note 39, at 1299-1302. For a similarly canonical explanation of why there is both too little and too much litigation due to the divergence of private and social incentives to sue, see Shavell, *supra* note 44, at 575-81.

above — plaintiffs, for instance, have a stake in improved access to justice and plaintiffs and defendants both have an interest in efficient proceedings — but others exist independently. Any test relating to a component of litigation — its finance — should weigh all of these categories of interests.

I will first lay out those interests in more detail, and in the next Section, I will turn to a discussion of how those interests manifest in specific aspects of a litigation (or arbitration) that could be the subject of a decision-maker's attention when contemplating disclosure.

a. Public Interests

That the extremely high cost of litigation puts justice out of reach for most average Joes and Janes is the starting point for many a course in first year civil procedure. The public has an interest in reducing barriers to accessing the courts. Indeed, the global litigation finance industry first took hold in Australia and the United Kingdom when each jurisdiction legalized the practice as part of national access to justice reforms.⁸³ Disclosure requirements that are too cumbersome may depress the level of available funding, or raise its costs, or both, diminishing the benefits litigation finance contributes to access to justice.⁸⁴

The expense of litigation imposes an additional cost — by increasing the homogeneity of parties it also increases the homogeneity of the issues presented to the courts. This means that some areas of the law get more judicial attention than others and consequently benefit from more iterative and nuanced development. The public has an interest in access to justice generally, but also an independent interest in the development of areas of law that may be less keenly pursued by the deep-pocketed litigants who can best afford to go to court. Litigation finance has the potential to add significant diversity to the pool of those able to afford to litigate, and therefore to increase the diversity of issues before the courts. But it holds the potential to do more than that. In terms of contribution to the development of the law and the question of who gets to affect judicial law-making, namely is it only the “Haves,” or do the “Have-nots” get a chance to do so as well?:

⁸³ Michael Napier et al., CIVIL JUSTICE COUNCIL, IMPROVED ACCESS TO JUSTICE — FUNDING OPTIONS AND PROPORTIONATE COSTS 54 (2007); RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 40 (2009), <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

⁸⁴ See Avraham & Sebok, *supra* note 45, at 5-6, 30.

By aligning structurally weak social players who make infrequent use of the courts (one-shotters) with powerful funders who make repeated use of the court system (repeat players), litigation funding may alter the bargaining dynamics between the litigating parties in favor of disempowered parties. It may thereby enable the litigation process to serve as a redistributive tool by society's have-nots as opposed to an (unwitting, perhaps) guardian of the status quo in favor of society's haves. In other words, it may allow these traditionally disempowered parties to "play for rules," i.e., to affect the content of legal rules determined by the courts.⁸⁵

In addition to the general barrier to access to justice imposed by excessively expensive litigation, the high cost of particular parts of the process, especially discovery, opens the door to gamesmanship. The party with more resources has considerable leeway to decide whether, for instance, to "bury" the opposing party with document production or to overwhelm it with discovery requests. Over time, this has contributed to the assessment that the better-resourced party has an undeservedly higher chance of prevailing in any given case. This undermines the strong public interest in having courts that offer a level playing field. Litigation finance can redress that imbalance by equalizing the resources of parties thus making gamesmanship around costs a less effective strategy.

Not all public interests go the way of litigation finance, however. For instance, courts should be a place for the resolution of disputes and not a source of business profit. This is not to say that plaintiffs with legitimate claims should not be able to secure financial settlements or damages awards just because they need to pay financing costs in order to do so. (In this sense, financing litigation is the same as financing education, health care, and so forth through various forms of financing that carry fees). But it does mean that if in any single case, "portfolio" of cases, or category of cases, ultimately most of the recovery goes to the financiers (be they lawyers or third-party funders), rather than to compensate injured parties, deter bad behavior, or otherwise promote the traditional goals of the public good that is the civil justice system, judges can and should be able to take such factors into consideration as they already do, e.g., when supervising class action settlement. And this, in turn, may mean looking into the funding arrangements, including

⁸⁵ Steinitz, *Whose Claim Is This Anyway?*, *supra* note 39, at 1271-72.

the financial terms, and if need be, determining who is the real party in interest in the case.⁸⁶

In the same vein, litigation finance may, in any given case, stretch the already lengthy timeline of litigation. The efficiency of the justice system is of considerable public interest. If financed parties use the resources available to them to draw out a case that might otherwise have been withdrawn or settled, in order to extract more profit, especially when a finance agreement allows a funder to “vote” against settlement, the system risks becoming more inefficient and expensive for everyone. In other countries, especially those with civil law systems, judges have much more discretion than do American judges, constrained as they are by the Seventh Amendment, to throw out a case at almost any stage of the proceedings.⁸⁷ The lesser discretion enjoyed in that regard by U.S. judges increases the danger that funded parties and those backing them could impose inefficiencies on the process in their quest for profits.⁸⁸

⁸⁶ In this vein, I have argued elsewhere that consumer litigation funding regulation should ensure that plaintiffs are guaranteed a minimum of 50% recovery of tort claims. See *Lawsuit Lending: Hearing Before the N.Y. State S. Standing Comm. on Consumer Prot.*, (N.Y. 2018) (statement of Maya Steinitz, Visiting Professor of Law at Harvard Law School, Professor of Law at University of Iowa School of Law), <https://www.nysenate.gov/transcripts/public-hearing-05-16-18-nys-senate-hearing-consumer-protection-final.txt>. See generally Maya Steinitz, *Letter to the Hon. Sen. Orrt (NYS Senate) Regarding Litigation Finance (Lawsuit Lending) (2018)* (Univ. of Iowa Legal Studies Research Paper No. 18-15, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3238148 (arguing for a 50% minimum recovery requirement by addressing both the economics of the requirement and the normative arguments for it).

⁸⁷ See generally JAMES G. APPLE & ROBERT P. DEYLING, *A PRIMER ON THE CIVIL-LAW SYSTEM* 26-27 (1995) (outlining differences in the legal process between civil-law judges and American judges).

⁸⁸ For an example of a litigation finance agreement that grants control over settlement of consumer cases (low value cases brought on a volume basis), see *Mize v. Kai, Inc.*, No. 17-CV-00915-NYW, 2018 WL 1035084, at *5 (D. Colo. Feb. 23, 2018) and *Carton v. Carroll Ventures, Inc.*, No. CV 17-0037 KG/SCY, 2017 WL 8941281, at *4 (D.N.M. July 10, 2017). Both cases discuss a funding scheme by a funding entity which funded discrimination cases brought under the Americans with Disabilities Act. Under the scheme, the funding agreement purported to limit the plaintiffs’ ability to discontinue the litigation or settle without the funder’s prior consent as well as to require plaintiffs to settle if so directed by the funder. The funding agreement also had the effect of awarding plaintiffs \$50 per case with all other proceeds going to the funder and attorney. For an example of a litigation finance agreement that grants control over settlement of a mass tort case to the funder, see the discussion of the funding in the Chevron-Ecuador environmental mass tort litigation in Steinitz, *The Litigation Finance Contract*, *supra* note 33, at 465-79.

Another, less obvious, element of this analysis is the public interest in data about this brand new, game-changing practice.⁸⁹ In the early days of the contingency fee, in the 1920s, the New York City bar and bench grew increasingly worried about contingency fee practices. In 1928, the bar associations for New York City, Manhattan, and the Bronx requested the Appellate Division of the First Judicial Department of the New York Supreme Court to investigate the matter. The Appellate Division entrusted Justice Wasservogel with the task and commissioned a report. The findings of this report led to a recommendation that attorneys be required to file a copy of the retainer agreements between the contingency lawyers and their clients, and an affidavit explaining how the retainer was obtained and affirming that the case had not been solicited by the attorney.⁹⁰

The First Judicial Department implemented some of the report's recommendations, amongst them a requirement that plaintiffs' lawyers file so-called retainer statements that set out the terms of the attorney's compensation. Fast forward to 1955, and Justice Wasservogel was once again commissioned to produce a report on contingent fee practices and consider capping such fees. This second report was based on the retainer statements mandated by the 1929 regulations which were mined and resulted in a finding that 60% of retainers specified that 50% of any recovery went to the lawyers. The ultimate policy outcomes of this second, data-based report were that the First Judicial Department issued regulations that capped contingency fees in actions for personal injury or wrongful death at one-third.⁹¹ The new regulations further required "that lawyers file with the court a 'closing statement' within fifteen days of receiving any money on behalf of a client, whether in judgment or settlement. The closing statement records '[t]he gross amount of the recovery, . . . [t]he taxable costs and disbursements, . . . [t]he net amount of the recovery actually received by the client, . . . [t]he amount of the compensation actually received or retained by the attorney'"⁹²

⁸⁹ See Eric Helland et al., *Contingent Fee Litigation in New York City*, 70 VAND. L. REV. 1971, 1973-76 (2017) (describing the evolution of the requirement that lawyers in tort cases filed in New York file a copy of their retainer and a closing statement with pertinent information and how the data comprised of such disclosure affected the legislative cap on contingency fees in the state).

⁹⁰ See *id.* at 1972-74.

⁹¹ See *id.* at 1974-75. Or a regulatory sliding scale. See *id.* at 1975.

⁹² *Id.* at 1975 (quoting the report) (internal quotation marks omitted). These closing statements, in turn, yielded Helland et al.'s article which contains invaluable findings including that "very few cases are resolved by dispositive motions; that litigated cases and settled cases have almost exactly the same average recovery; that median

In other words, what is now a core tenet of contingency fee practice in personal injury cases (at least in New York), namely a cap on attorney's fees, was a direct outcome of data-gathering and data-based policy-making.⁹³ The need for data in the context of litigation funding is particularly acute because of a feature of the commercial litigation funding industry universally overlooked in the disclosure debate: funding agreements almost always contain arbitration clauses.⁹⁴ This means that the public — be it consumers or legislatures — has no way to understand the reality of the practice and engage in fact-based consumerism, negotiation, and regulation.⁹⁵

With this non-exhaustive list of public interests in place, let us turn to look at some of the private interests at play. Here, too, the discussing is not meant to be exhaustive.

b. Private Interests

The private parties to consider are the litigating parties — including individual plaintiffs, classes, and defendants — and the funders. (As a side note, another potential category of possible private parties whose interest should be weighed, but are beyond the scope of this Essay, are the investors who invest in litigation finance. These increasingly include pension funds, university endowments, and sovereign wealth funds.⁹⁶)

Plaintiffs' interests include access to justice and the wherewithal to withstand the long and expensive process of litigation on the individual case level (as distinct from the overall access to justice and average litigation length public concerns discussed in the previous Section).

litigation expenses, other than attorney's fees, are 3% of gross recovery; that claims are disproportionately from poor neighborhoods; and that attorneys' fees are almost always one-third of net recovery, which is the maximum allowed by law." *Id.* at 1971.

⁹³ See *id.* at 1972-76.

⁹⁴ This observation is based on the author's extensive experience working with funders, plaintiffs, law firms, and investors, as well as on conversations with funding firms. Exceptions tend to occur only when the funding is provided by an *ad hoc* funder rather than a funding firm, which means that litigation over funding agreements in the courts are based on agreements that are unlikely to be the industry standard.

⁹⁵ The lack of data about the industry and its practices was a recurring theme during the public hearing on the regulation of consumer litigation funding held by the New York State Senate Standing Committee on Consumer Protection in May 2018. See NY Senate, *Public Hearing - Committee on Consumer Protection - 5/16/18*, YOUTUBE (May 16, 2018), https://www.youtube.com/watch?time_continue=245&v=y2hQNhvJHk.

⁹⁶ See Sara Randazzo, *Litigation Financing Attracts New Set of Investors*, WALL ST. J. (May 15, 2016, 5:37 PM), <https://www.wsj.com/articles/litigation-financing-attracts-new-set-of-investors-1463348262> ("Pension funds, university endowments, family offices and others have collectively pumped more than a billion dollars into the sector . . .").

Plaintiffs' interests also include privacy in relation to their finances. As I like to tell my students to illustrate this last point, whether my mother-in-law is funding my slip-and-fall case and what kind of strings she attaches to such funding has never been considered of relevance in a litigation. That *status quo* is a good place to start the analysis, with deviations requiring affirmative justification.

Of course, defendants have countervailing interests, such as being able to pursue avenues reasonably calculated to lead to material information that may help expeditiously and fairly resolve the dispute and a right to know, and confront, the real party in interest in the case they are defending.

Finally, funders' interests should also weigh in the balance. These include intellectual property in the financial products they produce and a desire to keep the costs of doing business (assuming a for-profit funder) low.⁹⁷ The latter means a legitimate concern in avoiding being dragged into the discovery process, being joined as a party, or otherwise being the target of strategic satellite litigation.

c. Forum Interests

In addition to avoiding conflicts of interest on the part of the judges, which is a basic tenet of the rule of law, core concerns for the courts and the judicial system as a whole are the efficient resolution of disputes and the overall integrity of the system. These, too, may point towards limiting satellite litigation relating to litigation funding in the form of seeking discovery from funders or joining them as codefendants for purely tactical reasons, practices which may unnecessarily complicate and raise the cost of litigation. But it also includes empowering judges to figure out, through disclosure, whether the funding terms inappropriately incentivize lengthening the litigation timeline as well as whether the funding arrangement, e.g. the composition of a portfolio, incentivize the filing of *prima facie* non-meritorious claims.⁹⁸ In the

⁹⁷ By analogy, contingency fee agreements receive, under certain conditions, protection based on the same rationale. See Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 722-23 (2014).

⁹⁸ Some market participants have suggested to me that some law firms and/or corporations are asking financiers to accept weak cases as part of a portfolio if they wish to obtain the right to finance the entire portfolio (or, in other words, if they wish to do the functional equivalent of taking an equity stake in the firm). If true, this is similar to the practice of bundling prime and subprime mortgages in mortgage-based securities. To highly simplify, the idea is that by first bundling and then "slicing" the bundles, securitization allowed for the shifting of risk of subprime mortgages from the originators and primary investors to the overall secondary market and the economy as a whole. Famously, the true costs of this practice were also externalized on the subprime

same vein, the judicial system also has an interest in preventing arrangement types — such as highly synthetic derivatives backed by contingent (or even speculative) litigation proceeds — that are likely to flood the courts with non-meritorious cases.⁹⁹

2. Factors

Each of the interests discussed above can be mapped onto one or more concrete factors in any given litigation or arbitration. This is important, because judges and arbitrators should not be left to consider in the abstract whether disclosure, as a general concept, increases access to justice or diversity in legal issues, for example, but should instead be provided with guidance for how those interests might play out in specific litigation scenarios depending on their profile, as understood in light of the variables described above. The following Subsections describe those specific factors.

a. *The Profile of the Plaintiffs and Their Motive for Seeking Funding*

A plaintiff's profile and reasons for seeking funding are important because they bear on the extent to which interests such as access to justice are at stake. Funded plaintiffs may be consumers, start-up companies, established corporations, developing and developed nations, a lead plaintiff in a class action, or the class itself, to name but some examples. The degree to which disclosure-based court involvement and the rigors of the adversarial system should be brought to bear may differ based on such characteristics of the funded plaintiffs.

To further elaborate, an established corporation might seek litigation funding as a form of corporate finance. In this scenario, one might imagine a sophisticated corporation using third-party litigation funding as a way to shift litigation risk, to manage its balance sheet, or to obtain operating capital during a time when litigation otherwise limits access to capital. Conversely, parties who might otherwise lack the resources to withstand long and expensive trials, or even to bring their claims at all, may seek financing in order to be able to access the civil justice

borrowers who ended up in foreclosure, the taxpayers who needed to bail out banks and other entities, and the global economy as a whole. See, e.g., Yuliya S. Demyanyk & Otto Van Hemert, *Understanding the Subprime Mortgage Crisis*, 24 REV. FIN. STUD. 1848, 1875-76 (2011); Steve Denning, *Lest We Forget: Why We Had a Financial Crisis*, FORBES (Nov. 22, 2011, 11:28 AM), <https://www.forbes.com/sites/stevedenning/2011/11/22/5086/#36da42daf92f>.

⁹⁹ Steinitz, *Whose Claim Is This Anyway?*, *supra* note 39, at 1318-22.

system.¹⁰⁰ These cases should not be treated alike for regulatory purposes. Further, consumers are generally understood to require a higher level of protection than do sophisticated entities. Similarly, members of a class are understood to need more court protection than, perhaps, both of the preceding categories.¹⁰¹

b. Funder's Profile and Motivation

Dispassionate for-profit litigation finance firms, secretive hedge funds, wealthy individuals, family members, non-profits, law firms providing pro bono services, political action committees (PACs), foreign governments (through sovereign wealth funds or otherwise), “crowds” funding via crowdfunding platform — all these are examples of litigation funders currently active in the market. These descriptors already hint at the wide variety of possible motivations for funding: profit, affecting rule-change for ideological or commercial reasons, assisting the indigent or a family member, hindering the competition, furthering foreign policy, opening up the courts to underrepresented claims or claimants, privately enforcing the law¹⁰² — these and more

¹⁰⁰ See Anthony J. Sebok, *Private Dollars for Public Litigation: An Introduction*, 12 N.Y.U. J.L. & BUS. 813, 813-14 (2016); Anthony J. Sebok, *Should the Law Preserve Party Control? Litigation Investment, Insurance Law, and Double Standards*, 56 WM. & MARY L. REV. 833, 894-95 (2015); Steinitz & Field, *supra* note 97, at 716; W. Bradley Wendel, *Paying the Piper but Not Calling the Tune: Litigation Financing and Professional Independence*, 52 AKRON L. REV. 1, 13-14 (2018); Christopher P. Bogart, *The Case for Litigation Funding*, BURFORD: BLOG (Oct. 11, 2016), <http://www.burfordcapital.com/blog/case-litigation-funding> [https://perma.cc/KLZ8-99VD]; Maya Steinitz, *Contracting for Funding in “Access to Justice Cases” Versus “Corporate Finance Cases,”* MODEL LITIG. FIN. CONT. (June 24, 2013), <http://litigationfinancecontract.com/contracting-for-funding-in-access-to-justice-cases-versus-corporate-finance-cases> [https://perma.cc/WFK4-PD6G].

¹⁰¹ This was generally held to be the case, for example, in the September 11th litigation. See Transcript of March 19, 2010 Status Conf., *In re World Trade Ctr. Disaster Site Litig.*, 21 MC 100, Doc. No. 2037 at 54-55 (S.D.N.Y. Mar. 19, 2010). On the potential conflicts of interest that third party funding of class action may introduce, see Brian T. Fitzpatrick, *Can and Should the New Third-Party Litigation Financing Come to Class Actions?*, 19 THEORETICAL INQUIRIES L. 109, 115-23 (2018). 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, 509-16 (2014) (outlining issues that may arise if third-party litigation financing becomes frequent in class action suits in the United States).

¹⁰² On third party funding's effect on private enforcement of law through class and mass action, see generally John C. Coffee, Jr., *Securities Litigation Goes Global*, LAW (Sept. 15, 2016, 12:00 AM), <https://www.law.com/newyorklawjournal/almID/1202767289255/securities-litigation-goes-global/>; Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 322-23 (2011).

may all be motivations for funding. Some motivations are, arguably, more worthy of protection than others. To take an extreme example, consider the firestorm that followed the Gawker case, where Hogan's backer seemed to be interested, troublingly, chiefly in revenge and where his target was a member of the Fourth Estate.

To make explicit what the foregoing illustration highlights — the type-of-funder factor overlaps (but is not coextensive with) the funders' motivation. The commercial funder envisioned in the previous paragraph will likely be somewhat constrained by reputational considerations — wanting to be known for screening and backing good cases and providing decent funding terms. It is also likely to be interested in profitable cases which, usually, will correlate with meritorious ones, and will likely be uninterested in vendettas, politics, foreign relations, and the like. For good and bad, it will also not be concerned with promoting the public interest. Conversely, not-for-profit funders may be concerned with (their version of) the public interest but, of course, what constitutes and furthers the “public's interest” is often a contested matter. A sovereign wealth fund or a foreign government may seek to advance foreign policy or military goals. A one-shot funder¹⁰³ may be interested in profit, hindering a competitor, revenge, fame, or politics. A PAC, or a politically-motivated wealthy individual, will probably wish to advance a political agenda. A “crowd” may be comprised of people motivated by justice, politics, or profit. Interestingly, as the reaction to the Gawker case illustrates, maintenance — funding without a profit motivation — may be more problematic than champerty — funding for a profit — even though much of the contemporary consternation around the rise of litigation finance focuses on “profiteering” from others' claims and from the justice system.¹⁰⁴

¹⁰³ On the disparate use of litigation by “one-shotters” versus “repeat players” to advance goals beyond a win in a particular case, especially to affect changes in the law, see Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-114 (1974) [hereinafter *Why the “Haves” Come Out Ahead*].

¹⁰⁴ Champerty is defined as an “agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim” or, more pejoratively, as “[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds.” *Champerty*, BLACK'S LAW DICTIONARY (11th ed. 2019). It is a form of maintenance whereby “assistance in prosecuting or defending a lawsuit [is] given to a litigant by someone who has no bona fide interest in the case.” *Id.* at *Maintenance*.

We should leave it to the discretion of the judge whether suspicion or evidence of certain motivations should factor into the decision of whether and how much to disclose of the funding arrangement. Similarly, the weight to be given to the type of funder, which *inter alia* hints at motivation, is also a factor to weigh in the balance.

c. The Case Type and the Forum

Individual litigation, class actions, mass actions, or arbitration (which can be domestic, international regarding commercial law, or international regarding investment law) implicate completely different issues which may call for court supervision and public interest-based transparency as to how a case is funded, by whom, in what manner, and for what goal.

For example, class and mass cases, wherein the lawyers rather than the clients drive and control the case, are very different from individual claims. In the class action context, in particular, members of the class are unnamed and may even be unknown.¹⁰⁵ Traditionally, courts exercise more supervision over such litigation including, critically, over settlements because of the myriad conflicts they entail and the scale of threat they present to defendants. The presence of third-party funding, in lieu of or in combination with attorney funding, is likely to exacerbate conflicts of interest in this context and so court involvement should be heightened as compared to individual cases.¹⁰⁶

In another example, arbitration (excluding public international law disputes) is a private process conducted in a private forum. By its very essence, private adjudication behind closed doors involves less transparency than litigation in open courts. Further, arbitrators — privately appointed *ad hoc* to resolve a specific dispute based on the parties' agreement that they do so — are not a branch of the government entrusted with and required to safeguard the public interest in the same manner judges are. Arbitrators, therefore, may need to be more circumspect with the goals they wish to further in imposing

¹⁰⁵ The writings on the conflicts of interest inherent in class and mass actions where the lawyers, rather than the clients, control the litigation are legion. See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1358-67 (1995); Samuel Issacharoff, *Class Action Conflicts*, 30 UC DAVIS L. REV. 805, 827-30 (1997); Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 597 (2003).

¹⁰⁶ A commendable example is a recent procedural order by Judge Polster of the United States District Court for the Northern District of Ohio, discussed *infra* Section D of this Part.

disclosure.¹⁰⁷ But even here, more granularity and nuance are required than simply identifying the case type or the forum. For example, it is understood that international investment arbitration, in which a foreign investor sues a government for violation of a bilateral investment treaty, is a form of private adjudication of public disputes and as such arbitrators sitting in such matters must hew more closely towards both transparency and safeguarding public interests (generally¹⁰⁸ as well as specifically when it comes to disclosure of who is funding the arbitration, in what manner, and in furtherance of what goals¹⁰⁹).

d. *The Subject Matter*

Funders have shown interest in cases spanning areas such as contracts, torts, antitrust, intellectual property, consumer protection, *qui tam*, individual and mass torts, human and civil rights, divorce, international commercial, and investment law — to name some common examples. The degree of disclosure desirable in these disparate areas of law is, arguably, different.

One can easily argue, for example, that transparency with respect to those pulling the purse strings and influencing legal argumentation, strategy, settlement, and precedent-making is much more important in international investment disputes, which are governed by public international law, involve the distribution of public money into private hands, and often adjudicate the validity of the conformity of regulation and legislation in the areas of environmental protection, workers' rights,

¹⁰⁷ For the debates on the proper disclosure regime in international commercial arbitration, see Elizabeth Chan, *Proposed Guidelines for the Disclosure of Third-Party Funding Arrangements in International Arbitration*, 26 AM. REV. INT'L ARB. 281, 281-83 (2015); Jennifer A. Trusz, Note, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 GEO. L.J. 1649, 1673 (2013).

¹⁰⁸ For discussions of international investment arbitration as a form of public law and the attendant considerations arbitrators must consider, see generally Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1543-45 (2005); Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 71-73 (2011).

¹⁰⁹ For discussion of the proper disclosure regime in international investment arbitration, and how it differs from the desirable regime in international commercial arbitration, see Rachel Denae Thrasher, *Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*, 59 B.C. L. REV. 2935, 2944-48 (2018); Frank J. Garcia, *The Case Against Third-Party Funding in Investment Arbitration*, INT'L INST. SUSTAINABLE DEV. (July 30, 2018), <https://www.iisd.org/itn/2018/07/30/the-case-against-third-party-funding-in-investment-arbitration-frank-garcia> [<https://perma.cc/52YH-4EZU>].

and consumer protection with sovereigns' international obligation than it is in international commercial arbitration involving contracts between private parties.¹¹⁰

Similarly, divorce often implicates the third-party interests of minors. Therefore, who influences the course of such litigation and its outcome, and the court's ability to bring such potentially real party in interest forth is different than in, say, contract or even tort disputes.¹¹¹

As these examples illustrate, the subject matter of the litigation should affect whether and what form disclosure of funding is appropriate.

e. Potential Effect on the Development of the Law

Famously, and as alluded to above, repeat players — like corporations, insurance companies, and third-party funders — can and do “play for rules,” namely litigate rather than settle in order to change the content of the law.¹¹² And “[w]hile rule change is a public good, it may be profitable for litigation funders to invest in rule change. This is because they manage a portfolio of litigation and, in particular, because they invest repeatedly and sequentially in certain categories of cases.”¹¹³ Investing in precedent, in other words, is as valuable for repeat players as is lobbying for legislative change:

[G]oing to trial specifically in order to obtain rule change may be strategic for litigation funders . . . because the value of precedent is greater for them than it is for their one-shotter clients. Economists have argued that “when neither party is interested in precedent, there is no incentive to litigate, and hence no pressure on the law to change. When only one party is interested in precedent, that party will litigate until a

¹¹⁰ International investment law involves the protection of foreign investors from governments in the jurisdictions in which they invest. Rights of action are afforded only to the former, not the latter, and are granted in Bilateral Investment Treaties (hence, the public international law nature of the dispute). See KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL* 88-90 (2013).

¹¹¹ On divorce finance, see Jeff Landers, *Can't Afford Your Divorce? New Firms Specialize in Divorce Funding*, FORBES (Jan. 15, 2015, 3:24 PM), <https://www.forbes.com/sites/jefflanders/2015/01/15/cant-afford-your-divorce-new-firms-specialize-in-divorce-funding/#29b3d2457715>.

¹¹² See Galanter, *Why the “Haves” Come Out Ahead*, *supra* note 103, at 100.

¹¹³ Steinitz, *Whose Claim Is This Anyway?*, *supra* note 39, at 1312.

favorable decision is obtained; the law in such cases will favor parties with such an *ongoing interest*.”¹¹⁴

Not every case has the potential to set precedent and change the course of the law. But when a judge believes the case before her is of such nature, it is reasonable to suggest she takes that factor under consideration, when deciding whether, to what extent, and to whom disclosure is warranted. Under such circumstances probing, for example, who controls the litigation — whether it is the client or the funder — takes on a heightened significance.

f. The Structure of the Financing

The way financing is structured is, perhaps surprisingly, also an important factor to consider when deciding what degree of involvement by the decisionmaker is warranted.¹¹⁵ For example, a case may be invested in passively or actively. Namely, a funder may never get involved after initially vetting a case, requiring only to be informed of material developments. On the other end of the spectrum, a funder may be very involved, including in selecting the lawyers, dictating strategy, and controlling settlement decisions.¹¹⁶ Historically, the greater the

¹¹⁴ *Id.* at 1315 (quoting Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 61 (1977)) (internal quotation marks added); see also Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 807 (1994).

¹¹⁵ This often-overlooked factor is, in fact, so important that its nuances and intricacies is a main reason that the ICCA–Queen Mary Task Force’s soft law production effort ended up punting, rather than reaching, an agreed-upon guideline on disclosure. For a critique of the Task Force’s grasp of the effects of deal structures, see Christopher P. Bogart, *Deeply Flawed: A Perspective on the ICCA–Queen Mary Task Force on Third-Party Funding*, BURFORD: BLOG (Oct. 6, 2017), <http://www.burfordcapital.com/blog/icca-queen-mary-task-force-report-flaws> [https://perma.cc/9NJK-XCLU]. For scholarship on different possible litigation finance structures, see generally Radek Goral, *The Law of Interest Versus the Interest of Law, or on Lending to Law Firms*, 29 GEO. J. LEGAL ETHICS 253 (2016); Anthony J. Sebok & W. Bradley Wendel, *Duty in the Litigation-Investment Agreement: The Choice Between Tort and Contract Norms When the Deal Breaks Down*, 66 VAND. L. REV. 1831 (2013); Maya Steinitz, *Incorporating Legal Claims*, 90 NOTRE DAME L. REV. 1155 (2015); Steinitz & Field, *supra* note 97.

¹¹⁶ In the Mize litigation, for example, the funder bargained for an explicit right to control settlement including a purported right to require the plaintiff to continue litigation and prohibit her from settling or withdrawing. See *Mize v. Kai, Inc.*, No. 17-cv-00915-NYW, 2018 WL 1035084, at *5 (D. Colo. Feb. 23, 2018) (“The agreement purports to limit Ms. Mize’s ability to ‘discontinue the Claims with[ou]t the prior consent of [Litigation Management]’ . . . and prohibits Ms. Mize from settling the case without prior consent of Litigation Management and requires Ms. Mize to settle if so directed by Litigation Management.”).

control by the funder, the greater the suspicion and protection exercised by courts (through the intricacies of the doctrine of champerty).¹¹⁷

By the same token, the funding of individual cases involves different considerations than does the rapidly-growing funding of portfolios of cases. In the latter investment structure, the funders often contract directly with the law firm and plaintiffs may not even be aware that their cases are being funded.¹¹⁸ They may therefore not be aware of salient features of their case such as the resulting conflicts of interest and how the interest formula may affect their lawyers' recommendations on whether, when, and for how much to settle.¹¹⁹

And here is yet another example from this more-obscure and less self-evident factor: whether a funder is reserving the right to create derivatives tied to the litigation proceeds may have systemic effects on the courts and may therefore implicate a public interest that is otherwise not common with respect to how one finances her case.¹²⁰ To

¹¹⁷ See *Stan Lee Media, Inc. v. Walt Disney Co.*, No. 12-cv-02663-WJM-KMT, 2015 WL 5210655, at *2-3 (D. Colo. Sept. 8, 2015) (stating that due to an entity's funding and control of litigation there is "a colorable argument that [the entity] should be held to be a party to the underlying litigation"); *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 693-94 (Fla. Dist. Ct. App. 2009) (finding that a funder could be a party to a suit despite not being named in pleadings if they had sufficient control). The same rationale applies to court scrutiny of the selection of class counsel, litigation conduct, and settlement in class action. See generally BRIAN ANDERSON & ANDREW TRASK, *THE CLASS ACTION PLAYBOOK* (2d ed. 2012) (referencing the ways in which attorneys, not clients, control class actions and the consequent safeguards placed by the rules of procedure and the court to protect the class member-clients).

¹¹⁸ See ROSS WALLIN, *CURIAM, PORTFOLIO FINANCE AS A TOOL FOR LAW FIRM BUSINESS DEVELOPMENT* (2018), <https://www.curiam.com/wp-content/uploads/Ross-Wallin-Westlaw-Journal-Article.pdf> [<https://perma.cc/4QPR-WY6L>] ("In portfolio finance transactions, a litigation finance company provides capital to a firm . . . in exchange for a negotiated share in whatever proceeds the firm receives from a portfolio of cases."). The September 11th case is an example of a case in which the plaintiffs had no idea of the funding until they were slapped with the fees for it. See Binyamin Appelbaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. TIMES (Nov. 14, 2010), <https://www.nytimes.com/2010/11/15/business/15lawsuit.html>.

¹¹⁹ See N.Y. City Bar, Comm. on Prof'l Ethics, *Opinion 2018-5* (July 30, 2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2018-5-litigation-funders-contingent-interest-in-legal-fees> (reasoning that portfolio funding may conflict with attorneys' independence and independent judgment).

¹²⁰ See Steinitz, *Whose Claim Is This Anyway?*, *supra* note 39, at 1282-83 (discussing the potential systemic effects of litigation proceed-backed securities) ("[I]t is possible that in the foreseeable future we will also be witnessing the creation of a new form of securities — legal-claims-backed securities. Reportedly, some tort-litigation lenders are already in the practice of aggregating the claims they acquire and selling shares of the composite funds; that is, they are engaged in a rudimentary form of securitization. Further support of the proposition that securitization of this new asset class, namely

understand whether such a securitization prospect exists, decision-makers may need to see whether certain terms — such as a right to assign the claim or a portfolio of claims — are included in the funding agreement, especially if the agreement is a standard form developed by funders.

More broadly, certain structuring may render a litigation contract a security. In such a scenario, a whole host of securities regulation may come to bear.¹²¹ And there may be additional crossover regulation implicated in other funding scenarios such as when a litigation is crowdfunded since crowdfunding is subject to its own set of regulation.¹²² The foregoing highlights the fact that various regulators (not only courts) may have an interest in the terms under which litigation is funded, the structure funding takes, and the systemic effects those might have on the civil justice system as a whole as well as on the investing public.

g. *The Purpose of the Contemplated Disclosure*

The purpose(s) for which disclosure is sought — which may evolve and change over the course of the litigation — can and should also affect not only whether disclosure is warranted and to whom but especially which part of a funding agreement should be disclosed.

legal claims and defenses, may be forthcoming in the near future can be gleaned from the fact that the first wave of litigation funding also generated a smattering of similar secondary trading in legal claims. A few lawsuits were syndicated during the 1980s, with some instances of syndication ending up in litigation. In addition, there is one case in which shares in future judgments have been traded on Nasdaq.” (citations omitted)). For sources on the logic of bundling prime and subprime investments — be they mortgages or lawsuits — via securitization and the potential negative externalities such practices, if unchecked, can cause, including negative systemic effects, see *supra* note 98 and accompanying text.

¹²¹ See generally Wendy Gerwick Couture, *Securities Regulation of Alternative Litigation Finance*, 42 SEC. REG. L.J. 5, 16-19 (2014); Wendy Couture, *Does Litigation Finance Implicate the Policies Underlying the Securities Laws?*, MODEL LITIG. FIN. CONT. (Oct. 7, 2013), <http://litigationfinancecontract.com/does-litigation-finance-implicate-the-policies-underlying-the-securities-laws/> [https://perma.cc/K34H-VWH6] (“[L]itigation finance implicates the securities laws’ policy of ensuring disclosure. Therefore, to the extent that a litigation finance contract satisfies the elements of an ‘investment contract,’ it should be subject to securities regulation.”); Richard Painter, *The Model Contract and the Securities Laws Part III*, MODEL LITIG. FIN. CONT. (July 22, 2013), <http://litigationfinancecontract.com/the-model-contract-and-the-securities-laws-part-iii> [https://perma.cc/MZ8S-YB77].

¹²² On the advent of crowdfunding, see generally Manuel A. Gomez, *Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as a Litigation Financing Tool*, 49 U.S.F. L. REV. 307, 321-333 (2015); Ronen Perry, *Crowdfunding Civil Justice*, 59 B.C. L. REV. 1357, 1361-73 (2018). For regulation of crowdfunding generally, see, for example, 17 C.F.R. § 227.201 (2017) (outlining disclosure requirements).

If the purpose of disclosure is for a judge or arbitrator to check for conflicts, disclosing the identity of the funder (and possibly its parent entities) may suffice and could potentially be done *in camera*. If the purpose is to determine whether the funder is a real party in interest,¹²³ which the court might wish to subject to its authority or a party that should be granted a right to intervene, then the level of control obtained by the funder — which may be embedded in a host of provisions in the funding agreement¹²⁴ — may be relevant. In another example, if a party (e.g., a member of a class) or the court suspect a funder is engaged in the unauthorized practice of law, disclosure of the role afforded to the funder in the funding agreement will legitimately be in question, and may possibly come up through a so-called intervention.¹²⁵ When supervision of a settlement is in question, both the degree of control and the funding formula may be fair game for scrutiny by a judge or members of a class.¹²⁶ Financial terms may also be relevant to determination of late-stage issues such as whether and how much fees to shift at the end of a case.¹²⁷

¹²³ See FED. R. CIV. P. 17(a) (“An action must be prosecuted in the name of the real party in interest.”). In *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691 (Fla. Dist. Ct. App. 2009), a funder “was to receive 18.33% of any award” and “had to approve the filing of the lawsuit; controlled the selection of the plaintiffs’ attorneys; recruited fact and expert witnesses; received, reviewed and approved counsel’s bills; and had the ability to veto any settlement agreements.” *Id.* at 693. Under those circumstances, the Court of Appeal of Florida held that the funder has achieved the status of “party” under Florida law irrespective of the fact that it was not so named in the pleadings. *Id.* at 693-94.

¹²⁴ The direct and, more interestingly, indirect ways funders can gain control over the litigation are discussed in Steinitz & Field, *supra* note 97, at 735-40.

¹²⁵ See 7B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1799 (3d ed. 2019) (explaining that intervention “enable[s] class members on the outside of the litigation to function as effective watchdogs to make certain that the action is fully and fairly conducted”).

¹²⁶ Judge Hellerstein’s decision in the September 11th case, discussed *supra* note 118, in which he held, when scrutinizing a settlement, that attorneys, rather than the plaintiffs, should absorb the costs of interest paid on loans used to finance the litigation, is an example of why and when the financial terms may need to be disclosed. For a further discussion of the fee controversy surrounding the case, see Mireya Navarro, *Already Under Fire, Lawyers for 9/11 Workers Are Ordered to Justify Some Fees*, N.Y. TIMES (Aug. 27, 2010), <https://www.nytimes.com/2010/08/27/nyregion/27lawsuit.html>.

¹²⁷ In international arbitration scholarship much ink has been shed, and some arbitral decisions have been issued, on the question of whether disclosure of funding is necessary in order for arbitrators to determine whether to shift fees (a norm in international arbitration which follows the so-called “British Rule” (loser pays) with respect to fee shifts). See, e.g., Trusz, *supra* note 107, at 1677 (arguing that “institutions should expressly provide that the tribunal may not consider third-party funding in any decisions on costs or security for costs”). That scholarship and jurisprudence also discusses whether and to what extent disclosure is warranted at the beginning of the

The public interest in transparency with respect to understanding the scope and nature of the new, growing, and game-changing phenomenon of litigation finance could be another goal of disclosure.¹²⁸

The purpose of requesting disclosure may be of an altogether different nature, though: abusive disclosure. Namely, requests for disclosure aimed at dragging a funder into discovery disputes or even into the main litigation as a party in order to prolong the litigation and raise its costs; to seek to find out the plaintiff's "reservation point"¹²⁹ at which it will settle not on the merits but because funding has been exhausted or for some other, non-merits-based reason; and to glean the type of proprietary financial products a funder has developed for competitive reasons that have nothing to do with the case at hand.

h. The Procedural Posture of the Case

The purpose for which disclosure is sought, as the discussion in the preceding Subsection implicates, bleeds into another factor: the procedural posture of a case. Funders have been known to step in and invest in a case before it is filed, after filing but before trial, after trial but before appeal, and after a final judgment or award has been rendered at the enforcement or collection stage.¹³⁰ The procedural posture can and should affect disclosure decisions.

For example, at the enforcement or collection stage, financial or control terms, which may have been relevant earlier in the proceedings, may no longer be relevant; still, the nature of the case and of the parties may continue to be relevant. And in another hypothetical, the very fact of funding, but nothing more, may be all that is needed when deciding

process in order to determine whether security of costs is warranted. *See, e.g.*, Chan, *supra* note 107, at 283 (arguing that an arbitral tribunal should be able to consider the funder's financial support and the terms of withdrawal for the funder when considering security for costs); Kelsie Massini, *Risk Versus Reward: The Increasing Use of Third Funders in International Arbitration and the Awarding Security for Costs*, 7 Y.B. ARB. & MEDIATION 323, 330-32 (2015) (arguing that it is beneficial for the funder to be disclosed at the start of the arbitration proceedings for security of costs purposes).

¹²⁸ *See supra* text accompanying notes 89–95.

¹²⁹ A "reservation point" is "the least favorable settlement that the client is willing to accept." LARRY L. TEPLY, *LEGAL NEGOTIATION IN A NUTSHELL* 81 (3d ed. 2016) (emphasis omitted). The reservation point is affected by factors other than the value of the negotiated asset and knowing an opposing party's reservation point enables a party to make the lowest offer that would be accepted.

¹³⁰ *See, e.g.*, *Commercial Litigation Funding*, BENTHAM IMF, <https://www.benthamimf.com/what-we-do/commercial-funding> (last visited Sept. 9, 2019) [<https://perma.cc/2KFN-6NAQ>] (stating that Bentham invests in claims at the pre-trial and trial steps, as well as during appeals and to help with judgment collections).

whether a contender for the role of class counsel is “adequate” as required by FRCP Rule 23.¹³¹

B. An Iterative Inquiry

Further, I suggest that the proposed balancing test may be deployed, with appropriate modifications for timing and context and with due regard to cost, at any stage of the litigation or arbitration. The analysis could even be repeated at different stages of the litigation because, as the preceding Subsection explains, the applicable factors may be different leading to a different result as to whether, to what extent, and in what form to order any disclosure.

For instance, at the commencement of an international arbitration, the fact of funding and identity of the funder may be sufficient because the question at hand for a tribunal to decide is whether conflicts of interests exists. But at the end of the process, if the case has not settled, the tribunal may need to see the financial and control terms in order to decide whether and how much of the fees to shift under the “loser pay” convention.¹³² Financial provisions — e.g., how much funding has been committed and what formula is used to the divide the litigation proceeds — are regarded as particularly sensitive by many plaintiffs and funders and particularly open to strategic gaming by defendants who can “game” the litigation aiming to spend down the committed amount or trigger acceleration of interest.

The option to reevaluate can help prevent over-disclosure early on which may prove unnecessary if a case settles early.

C. Additional Disclosure Calibration Tools

At this point, it should be evident that disclosure is a process, not an event, and that decision-makers are faced with a spectrum of options, not with a “zero sum” decision.

At one end of the spectrum, a judge or an arbitrator may require disclosure *in camera* of the existence of funding only, with or without the mere identity of the funder included. At the other end of the spectrum, is the disclosure to the court, opposing party, and filing for the public record of the entire agreement. In the middle of the spectrum are such tools as the disclosure of certain provisions only and the redaction of others or the filing of a short, check-the-box closing

¹³¹ See FED. R. CIV. P. 23(g)(1)(A)(iv). For the jurisprudential elaborations of these requirements, see JEROLD S. SOLOVY ET AL., 5 MOORE’S FEDERAL PRACTICE § 23.120 (2003).

¹³² See INT’L COUNCIL FOR COMMERCIAL ARBITRATION, *supra* note 40, at 159.

statement. A decision-maker can create further gradations by either declining a disclosure without prejudice so that the matter can be revisited as the litigation progresses or, conversely, by imposing a continuing duty to disclose so that if the existence of funding or the identity of funders change throughout the life of the litigation a plaintiff is under an obligation to so disclose.

In addition to regarding the disclosure decision as one that can be revisiting later in the process, as suggested above, decisionmakers can make use of *in camera* and/or *ex parte* submissions, redactions, “attorney’s eyes only” designations, filing all or parts of the funding agreement under seal, or requesting attorneys to certify representations about what an undisclosed agreement does or does not contain. In short, the basic tools generally available to moderate undesirable effects of discovery are all available in this context as well.

The final, concluding Section of this Part provides an example of well-calibrated, context-sensitive disclosure by a federal judge presiding over a multidistrict litigation (“MDL”).

D. An Example: The Order Regarding Third-Party Contingent Litigation Financing in In re Nat’l Prescription Opiate Litigation

A commendable example of a nuanced judicial approach that appears to have taken into account the type of case, the funded parties, the procedural posture, the possible deal structure (and its effects on conflicts of interest) and that made use of tools such *ex parte* submissions and certification by the attorneys, is an order by Judge Polster of the United States District Court for the Northern District of Ohio, presiding over an MDL.

Preliminarily, it should be noted that Judge Polster both broadly defined “third-party contingent litigation financing” as “any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of an MDL Case, by settlement, judgment, or otherwise,”¹³³ and surgically exacted that the term does not include “subrogation interests, such as the rights of medical insurers to recover from a successful personal-injury plaintiff.”¹³⁴

¹³³ Order Regarding Third-Party Contingent Litigation Financing, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018).

¹³⁴ *Id.* at 1 n.1.

Next is the disclosure regime tailored by Judge Polster to the case at bar. “Absent extraordinary circumstances,” he ordered, “the Court will not allow discovery into [third-party contingent litigation] financing,”¹³⁵ but “any attorney in any MDL Case that has obtained [third-party contingent litigation] financing shall:

- share a copy of this Order with any lender or potential lender.
- submit to the Court *ex parte*, for in camera review, the following:
 - (A) a letter identifying and briefly describing the [third-party contingent litigation] financing; and
 - (B) two sworn affirmations — one from counsel and one from the lender — that the [third-party contingent litigation] financing does not:
 - (1) create any conflict of interest for counsel,
 - (2) undermine counsel’s obligation of vigorous advocacy,
 - (3) affect counsel’s independent professional judgment,
 - (4) give to the lender any control over litigation strategy or settlement decisions, or
 - (5) affect party control of settlement.”¹³⁶

In so ordering, without handing defendants an informational windfall, the court thus placed the burden of safeguarding legal ethics despite the complications of third-party funding, and potential liability in case of a failure to meet it, on the gatekeepers with the best view of whether problems exist or arise. And it also placed the lawyers, existing and potential funders on notice that the watchful eye of the court is upon them.

CONCLUSION

In sum, the quest for a disclosure rule has set policymakers on a wild goose chase that has led some to avoid or punt on the issue all together while leading others to propose disclosure regimes that are either over- or under-protective of the multiple stakeholders in this regulatory quandary — namely, plaintiffs, defendants, funders, the public, and the courts — and their varying complex and shifting interests. By

¹³⁵ *Id.* at 1.

¹³⁶ *Id.*

reminding the legal community of the availability of standards, especially balancing tests, and by fleshing out the specifics of what such a balancing test might consist of in this context, I have endeavored to break the Gordian knot of the surprisingly difficult question of whether and how to structure a disclosure regime for litigation finance.