THE ALCHEMIST'S INVERSION

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Litigation finance makes the world go round. The capital financiers provide is the lifeblood for plaintiffs' firms and individual claimants attempting to run the litigation gauntlet in high-stakes battles with wealthy corporate entities. Third-party litigation funding in general litigation is well documented and frequently discussed. But the role financiers play and the dynamics they create in billion-dollar, mass-tort cases have been overlooked. This exclusion is confusing. Modern mass torts—including those involving Purdue Pharma, Johnson & Johnson, 3M, and Boy Scouts of America—each impact hundreds of thousands of individuals, seizing headlines and driving legal and policy debates.

Most mass-tort financiers are principled actors, content to passively invest in cases and allow claimants and their attorneys to guide outcomes. Hidden among this group is a divergent breed: private equity firms and multi-strategy hedge funds that I have termed "opaque capital." A new apex predator has entered the mass-tort ecosystem, and its tactics have been obscured by its ability to strike from the shadows. These puppeteers will never be passive investors. Opaque capital is moving into mass torts to dictate outcomes.

Opaque capital's unique brand of chaos is manifested most clearly at two distinct points. Primarily, opaque capital has the means to orchestrate the claim marshaling process to build—and in some cases create—a lucrative case. This idea provides the foundational premise for my theory, the Alchemist's Inversion. Many claims in a mass-tort dispute are nonmeritorious. If litigated, there is a high probability that these claims would be rejected by the judicial system. Opaque capital understands,

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however, that if these claims are bundled with meritorious ones, the resulting critical mass could force a defendant to pay a premium to settle all claims. The Alchemist's Inversion describes a litigation financier's use of unethical and potentially illegal tactics to create, enhance, and marshal low-value claims with the hope of turning them into gold.

The corollary to the Alchemist's Inversion is that opaque capital must control when cases settle to maximize the value of the asset it has created. In order to do so, opaque capital is (i) exerting contractual control through the capital provision agreement it signs with plaintiffs' law firms and claimants, and (ii) relying on relational leverage to persuade key actors to remain compliant at seminal moments.

By unpacking opaque capital's governing dynamics and assembling the full picture of modern mass-tort resolution, this Article seeks to help policymakers understand the consequences when power stays in the shadows.

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Amateurs seek the sun . . . . Power stays in the shadows.

— Christopher Nolan, Oppenheimer[1]

Introduction

Years later, when confronted with the scale of his crimes, Victor Melts still refused to apologize.[2] Melts insisted that he was a local business owner who simply did not have the means to ruin the lives of countless military personnel. But his role in one of the largest mass tort cases in U.S. history is undeniable. Melts and his brother took over the lease of a local hobby shop on May 2, 1955, and turned the facility into ABC One-Hour Cleaners ("ABC").[3] Camp Lejeune military base was across the street, housing thousands of military personnel and their families.[4] Like most dry cleaners, the Meltses utilized

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1 Oppenheimer (Universal Pictures 2023).

2 *See* Lisa Sorg, *A Superfund Cleanup in Jacksonville Failed. Without Federal Funding for a Fix, Contamination is Spreading.*, NC Newsline (Feb. 21, 2020), https://ncnewsline.com/2020/02/21/a-superfund-cleanup-in-jacksonville-failed-without-federal-funding-for-a-fix-contamination-is-spreading/ [https://perma.cc/WH8F-E4XU] ("'I can find no reason why my family and I should have to go through so much heartache and pain when we have done nothing wrong,' Victor Melts wrote to the state's Office of Legal Affairs in October 1987 . . . .").

3 U.S. Env't Prot. Agency, Record of Decision: ABC One-Hour Cleaners Site 13–14 (1993).

4 *See* Sorg, *supra* note 2. As many as one million people lived or worked at Camp Lejeune from August 1953 to December 1987. *See* Brenda Goodman,

tetrachloroethene (PCE) and various other chemicals to remove dirt and sweat from clothing.[5] Local cleaners customarily paid a service to dispose of hazardous waste in the city's wastewater treatment system.[6] ABC, in contrast, improperly flushed its waste directly into an underground septic tank, which discharged the waste into a drainage field just 500 yards away from the base.[7] This practice continued unabated for the next three decades.[8] Chemicals ultimately saturated the surrounding soil and seeped into the groundwater, contaminating wells that supplied drinking water to the base.[9]

Routine water quality evaluations at the base in 1980 identified volatile organic compounds in the drinking water. Additional testing followed and, in 1984, toxic levels of PCE—a known carcinogen that can cause a host of significant ailments, including cancer—were detected. After two decades of silence, the Department of Defense ultimately conceded an irrefutable fact: approximately one million individuals[10] who had resided at Camp Lejeune were directly exposed to toxic industrial solvents over a thirty-year period.[11]

Military personnel and their family members who suffered a litany of ailments, including adult leukemia, liver cancer, and Parkinson's disease, began filing suit in 2004.[12] Additional studies and surveys of Camp Lejeune inhabitants followed and culminated in the passage of the Camp Lejeune Justice Act of 2022 (CLJA), which allows military servicemembers to file claims if they were exposed to toxic water at Camp Lejeune for at least thirty days between August 1953 and December

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More Than 385,000 Camp Lejeune Contamination Claims Have Been Filed. So Far, the US Government Has Offered to Pay 114 of Them, CNN (Aug. 8, 2024), https://www.cnn.com/2024/08/08/health/camp-lejeune-water-filing-deadline [https://perma.cc/8KHG-PR28].

5 *See* U.S. ENV'T PROT. AGENCY, *supra* note 3, at 14.

6 *See* Sorg, *supra* note 2.

7 *See id.*

8 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-276, DEFENSE HEALTH CARE: ACTIVITIES RELATED TO PAST DRINKING WATER CONTAMINATION AT MARINE CORPS BASE CAMP LEJEUNE 11–12 (2007).

9 *Id.* at 31–32.

10 *See Landmark Study Finds Alarming Cancer Rates Among Camp Lejeune Service Members, Staff*, EWG (Feb. 1, 2024), https://www.ewg.org/news-insights/news-release/2024/02/landmark-study-finds-alarming-cancer-rates-among-camp-lejeune [https://perma.cc/UR2C-XA44].

11 *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 8, at 32–44.

12 *See id.* at 44 & n.63.

1987.[13] The Act imposes liability on the federal government, which initially projected $21 billion in damages to compensate hundreds of thousands of victims.[14] But barely a year after Congress approved the program, compensation demands had already topped $3 trillion.[15]

The mix of an apparently unlimited fund for damages, uncapped contingency fees for plaintiffs' attorneys, and extremely sympathetic victims set off a frenzy of claim aggregation. The furor soon attracted litigation financiers—parties who invariably see mass torts[16] as mere investment vehicles.[17] By 2023, nearly $2 billion had been invested in law firms filing or marshaling Camp Lejeune claims.[18] To date, litigation financiers have backed an estimated one-third of all claims in the case.[19] Oddly, a significant portion of these funds went toward marshaling claims held by individuals who had not served in the military, lived on the base, or even had any documentation supporting the primary ailments at issue.[20] Many of these claimants were coached to answer screening questions and then filed a nonmeritorious claim.[21]

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13 *See* Roy Strom, *Camp Lejeune Ads Surge Amid 'Wild West' of Legal Finance, Tech*, BLOOMBERG L. (Jan. 30, 2023), https://news.bloomberglaw.com/business-and-practice/camp-lejeune-ads-surge-amid-wild-west-of-legal-finance-tech [https://perma.cc/AJR7-SS82].

14 *See* Emily R. Siegel & Kaustuv Basu, *Bogus Claims Threaten to Taint Lejeune Toxic Water Payouts*, BLOOMBERG (Oct. 30, 2023), https://www.bloomberg.com/news/articles/2023-10-30/bogus-claims-threaten-to-taint-us-toxic-water-payout-to-veterans [https://perma.cc/WND5-A547].

15 Kaustuv Basu & Jon Meltzer, *Quick Camp Lejeune Payout Unlikely for Most, Claim Data Shows*, BLOOMBERG L. (Jan. 4, 2024), https://news.bloomberglaw.com/us-law-week/quick-camp-lejeune-payout-unlikely-for-most-claim-data-shows [https://perma.cc/YW2W-UXQU].

16 For purposes of this Article, the term "mass tort" describes high-volume personal injuries and death caused by a particular product or event.

17 *See* Strom, *supra* note 13.

18 *See* Siegel & Basu, *supra* note 14.

19 *See* Emily R. Siegel & Kaustuv Basu, *Litigation Funders Bet Billions on Veterans' Toxic Water Claims*, BLOOMBERG L. (July 20, 2023), https://news.bloomberglaw.com/us-law-week/litigation-funders-bet-billions-on-veterans-toxic-water-claims [https://perma.cc/7LCA-7EFP].

20 *See* Siegel & Basu, *supra* note 14.

21 *See id.* Following Professor Engstrom, I use the term "nonmeritorious" to describe claims that lack the ability to satisfy basic evidentiary requirements necessary for a colorable cause of action; for example, a claim where the claimant cannot establish that she suffers from the harm alleged or used the product in question could be "nonmeritorious" depending on the context of the dispute. As to these claims, the plaintiff has an extremely low chance of winning if the claim was actually litigated. *See* Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 22–23 (2019).

But why would anyone spend millions of dollars for bogus claims?

Third-party litigation financing is not a new practice. Litigation financiers discovered the benefits of investing in legal disputes decades ago. And there is an impressive canon of scholarship exploring the practice in general litigation.[22] But mass-tort financing is new[23] and has received little attention.[24] In fact, my recent essay was the first to shine a light on the byzantine space.[25] That primarily descriptive piece could only scratch the surface.

The exclusion of mass-tort financing from the litigation finance discussion is confusing. I believe that this oversight stems from the fragmentation of key information and the unwillingness of actors to discuss behavior in this specialized area. The resultant void has material consequences. Modern mass-tort cases are the financial juggernauts impacting hundreds of thousands of individuals and eclipsing all others in terms of damages sought, resolution complexity, and societal and economic impact. This scale and the potential risk of victim exploitation make disequilibrium in the mass-torts ecosystem uniquely troubling. And almost all modern mass-tort disputes represent existential threats to the corporate defendants involved.[26]

Mass torts are the epicenter of litigation finance's future. Investing in these cases can be monumentally lucrative. And

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22 *See, e.g.*, Maya Steinitz, *The Partnership Mystique: Law Firm Finance and Governance for the 21st Century American Law Firm*, 63 WM. & MARY L. REV. 939, 976–79 (2022); Suneal Bedi & William C. Marra, *The Shadows of Litigation Finance*, 74 VAND. L. REV. 563, 582 (2021); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 92–101 (2010).

23 In 2017, third-party litigation funding was "not commonplace" in MDL proceedings. ADVISORY COMMITTEE ON CIVIL RULES: AGENDA 372 (2021), https://www.uscourts.gov/forms-rules/records-rules-committees/agenda-books/advisory-committee-civil-rules-october-2021 [https://perma.cc/B99E-T4ZL]. However, "mass tort claims pending in [multidistrict litigations] constitute the fastest growing sector of those seeking assistance" from third-party financiers. Ronen Avraham, Lynn A. Baker & Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 REV. LITIG. 143, 143 (2021).

24 *See* Avraham, Baker & Sebok, *supra* note 23, at 147 ("The rapid growth of MDLs has been well documented . . . but the concurrent rise of consumer-litigant funding in MDL mass torts has received no attention.").

25 *See* Samir D. Parikh, *Opaque Capital and Mass-Tort Financing*, 133 YALE L.J.F. 32 (2023).

26 *See, e.g.*, Kim Chipman & Tarso Veloso, *Bayer Fights for Survival as Roundup Lawsuits Burn Cash*, BLOOMBERG (May 23, 2024), https://www.bloomberg.com/news/articles/2024-05-23/bayer-ceo-calls-roundup-claims-a-risk-to-world-food-security [https://perma.cc/366Z-SQXE].

structural and procedural loopholes allow financiers to influence case trajectory while maintaining their anonymity. As a result, financiers have moved into the market in recent years. To be clear, the vast majority of these investors appear to be principled actors willing to sit on the periphery and afford plaintiffs' attorneys autonomy in guiding cases to settlement. But hidden amongst this group is a divergent breed: private equity firms, multi-strategy hedge funds, and institutional asset managers[27] that I have termed "opaque capital." Opaque capital is new to the mass-tort ecosystem and the ability to linger in the shadows has obscured its tactics. Nevertheless, we know these actors from their long history in distressed-debt markets and their preternatural ability to shift fundamental tenets wherever they go, ignoring market norms and contractual restrictions in their quest for premium.[28] These puppeteers will never be passive investors. Opaque capital is moving into mass torts to dictate outcomes.

The mass-torts ecosystem is misunderstood, and the nuanced role various types of financiers play is overlooked entirely.[29] This deficiency has precluded meaningful attempts to identify governing dynamics and remedy systemic infirmities. The field is moving at a breathtaking pace without guardrails. Policymakers have been unable to conceptualize this space and determine how to intervene.[30] True normative insights are impossible without first understanding the key actors and the leverage they

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27 *See* Sujeet Indap, *Johnson & Johnson Settlement Shows the New Stakes in Litigation Finance*, FIN. TIMES (May 20, 2024), https://www.ft.com/content/abd5bf98-378f-4322-b930-68c9b410e783 [https://perma.cc/9BQT-DXXW] ("Industry participants say virtually every major private capital firm is involved in funding lawsuits, though often quietly and through affiliates."); Erin Mulvaney, *The Latest Ad Boom: Lawyers Seeking Plaintiffs for Mass Litigation*, WALL ST. J. (Jan. 19, 2024), https://www.wsj.com/us-news/law/the-latest-ad-boom-lawyers-seeking-plaintiffs-for-mass-litigation-6774f82b [https://perma.cc/4UQM-AXJH] ("[I]nvestors such as private-equity firms or hedge funds are providing [capital for mass-tort cases] . . . . 'Some of the biggest private-equity firms are dipping their toes in the area.'"); *see also* Dan Packel, *The Law Firm Disrupted: When Private Equity and Mass Torts Collide in the Same Firm*, LAW.COM (May 23, 2024), https://www.law.com/2024/05/23/the-law-firm-disrupted-when-private-equity-and-mass-torts-collide-in-the-same-firm/?slreturn=20250516173930 [https://perma.cc/FC2T-TGPS] ("[I]nvestment giants like Fortress . . . [have] turned increasingly towards third-party litigation finance. . . . Centerbridge Partners and Apollo Global Management . . . have also funded mass tort claims.").

28 *See generally* Samir D. Parikh, *Financial Disequilibrium*, 171 U. PA. L. REV. 1925 (2023); Vincent S.J. Buccola, *Sponsor Control: A New Paradigm for Corporate Reorganization*, 90 U. CHI. L. REV. 1 (2023).

29 *See supra* note 23.

30 *See* Emily R. Siegel, *Comer Urges Chief Justice Roberts to Examine Litigation Funding*, BLOOMBERG L. (July 12, 2024), https://news.bloomberglaw.com/

are willing to assert. I agree with Professor Engstrom and others who have called on academics and policymakers to dive deeper into the obscured areas of this ecosystem.[31] This Article attempts to heed this call by providing details of the incubation process for mass-tort cases, the unique perspective of the most aggressive financiers in the space, the risks these actors pose, and the normative adjustments that could defuse the threat.

Part I presents the incubation process for mass-tort cases in full. Scholars have focused on the legal stages after complaints are filed in court but have ignored the process that identifies and brings these claimants forward. This part, based on twenty-seven private interviews I conducted with mass-tort and litigation finance insiders,[32] explores the actors and the machinery in depth to better understand the incentives.

Part II unpacks the allure of mass-tort financing. The first step is understanding how financiers conceptualize the space. Financiers see mass-tort cases as corporate-asset sales, not traditional litigation. The sheer volume of claims in these cases ostensibly eliminates the potential for trying cases in court. Traditional litigation dynamics are deemphasized, revealing a negotiation where one party is merely attempting to impose escalating amounts of pressure on the other until capitulation.

With this framework, Part II explains that the potential recoveries in mass torts often eclipse other alternative asset classes, especially considering that successful outcomes are far more predictable than many would imagine. The investment in mass-tort litigation is uncorrelated to other investments, equities markets, interest rates, inflationary pressures, or shifts in the U.S. economy. Another overlooked facet of these cases is that there are few market norms in this space. Financiers can use contractual control and relational leverage to steer cases with virtual anonymity. Further, mass-tort victims are often

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business-and-practice/comer-urges-chief-justice-roberts-to-examine-litigation-funding [https://perma.cc/E4U5-9YNM].

31 *See, e.g.*, Nora Freeman Engstrom, *Shining a Light on "Opaque Capital,"* JOTWELL (May 15, 2024) (reviewing Parikh, *supra* note 25), https://torts.jotwell.com/shining-a-light-on-opaque-capital/ [https://perma.cc/8Y7R-YRN5] ("But, we can't know—and we can't even begin to grapple with potential policy responses—until we understand, exactly, who these funders are, how they operate, and the risks they pose.").

32 From March 2023 through January 2025, I conducted twenty-seven interviews with twenty-two individuals intimately involved in mass torts and litigation finance, including plaintiffs' attorneys, defense attorneys, claim aggregators, and litigation financiers. *See* Telephone Interviews with Litigation Finance Insiders (Mar. 2023–Jan. 2025) (on file with author).

distanced from case details and there are opportunities to surreptitiously erode the attorney-client relationship to ensure a desired outcome.

Part III reveals opaque capital and its governing dynamics. These actors' unique brand of chaos is manifested most clearly at two distinct points in a case trajectory. Primarily, opaque capital has the means to fuel and orchestrate the claim-marshaling process to build—and in some cases create—a lucrative case. This idea provides the foundational premise for my theory, the Alchemist's Inversion. What is alchemy? At a high level of abstraction, alchemy is the process of transforming an item undervalued by the market into one that is prized. Many claims in a mass-tort dispute are noncompensable and others are entirely nonmeritorious. If litigated, there is a high probability that causes of action based on these claims would be rejected by the judicial system. Opaque capital understands that if these claims are bundled with meritorious claims, the resulting critical mass could force a defendant to pay a wild premium to settle *all* claims. The Alchemist's Inversion describes a litigation financier's use of unethical and potentially illegal tactics to create, enhance, and marshal apparently low-value claims with the hope of turning them into gold.

The moment of settlement is the second point where opaque capital steps out of the shadows. The corollary to the Alchemist's Inversion is that to maximize value, opaque capital must dictate when the case is settled, or—using their nomenclature—when the asset is sold. Private equity firms and multi-strategy hedge funds have a history of aggressive intervention to control liquidity events. Opaque capital is able to run the same playbook in mass torts by (i) exerting contractual control through the capital-provision agreement it signs with plaintiffs' law firms and claimants and (ii) relying on relational leverage—the idea that "the party that enjoys the ability to threaten material harm in future business transactions can exploit that position when faced with contractual ambiguity"[33]—to persuade key actors to remain compliant at seminal case moments.

This Article concludes with my normative proposals. I should note that my goal is not to nudge litigation financiers out of the marketplace or limit the amount of capital flowing into disputes. My concern is that infirmities allow overly aggressive financiers to exploit victims and erode process integrity. My proposals attempt to close loopholes and cabin the most

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33 Parikh, *supra* note 28, at 1946 n.111.

aggressive actors. To achieve this end, I encourage multidistrict litigation (MDL) and bankruptcy courts to use existing tools to identify and expel nonmeritorious claims prior to fund distribution. When coupled with meritorious claims, nonmeritorious ones boost claim volume, which puts settlement pressure on corporate defendants. And the fact that these claims also have a high likelihood of being paid out in full creates perverse incentives. There are many reasons that we should all care about filtering nonmeritorious claims, but the most obvious is that every dollar that goes to a nonmeritorious claimant in these limited-fund cases is a dollar taken from a meritorious one.

The primary objective should be to align the interests of key parties to filter nonmeritorious claims. This alignment starts with courts using plaintiff fact sheets to force claimants to provide basic information about their claims and then using more aggressive tactics—including *Lone Pine* orders—to identify failing claims. Moving up a level, courts can use this data to penalize plaintiffs' attorneys who file a disproportionately large number of failing claims. Finally, at the top level, in cases polluted with a disproportionately large number of failing claims, courts can withhold some percentage of the common-benefit fund from the MDL leadership team. Bankruptcy courts should follow a similar path. These backend measures would aggressively encourage frontend filtering.

Party-neutral, procedural changes can be an effective way to bolster process fidelity. I believe, however, that policymakers also need to focus on the actors seeking to benefit from a compromised system. The most accessible idea is for courts to compel disclosure of capital provision agreements. Transparency is always attractive, but perhaps not as impactful as one would imagine. Indeed, *in camera* disclosures may bring an agreement before the court, but what provisions should courts be looking for and how should they respond if they find them? Disclosure merely pushes unresolved issues before a jurist who may be ill-equipped to manage them. More importantly, we know that opaque capital relies on relational leverage to dictate outcomes. Disclosure of the CPA may be a good beginning, but it is a half-measure at best. A more impactful approach may involve imposing fiduciary duties on financiers in these cases. I propose that any party participating in the contingency fees realized by an attorney should be prohibited from acting in ways that undermine the best interests of that attorney's clients as to substantive settlement decisions. These duties coupled with disclosure and the measures I propose may be sufficient to adjust current incentive structures.

I
THE MASS-TORTS ECOSYSTEM

A vast canon of scholarship explores litigation finance in two specific areas: (i) commercial disputes involving businesses and (ii) consumer disputes involving an individual pursuing legal action against another individual, business, or governmental entity.[34] Policymakers and scholars focus almost exclusively on these spheres, but this is not the epicenter of litigation finance's future.

Mass-tort litigation has an unprecedented gravitational pull, capturing the most complex legal and human-interest issues in the country and eclipsing all else based on the funds at stake and number of individuals affected. Unsurprisingly, the possibility for exploitation in this sphere is similarly heightened. Litigation financiers discovered the benefits of investing in general litigation matters decades ago. But the unique allure of mass-torts investing is something new.

This Part begins by providing a general overview of the key actors in the mass-tort theatre. The Part then unpacks how these parties operate the machinery that advances a dispute toward resolution. The Part ends by detailing litigation finance generally and then revealing that a new type of financier has emerged.

A. Key Actors

Organizing and guiding a large-scale, mass-tort case presents a unique level of complexity. Hundreds of thousands of victims desperate for compensation vie with each other to access a limited pool of funds. Billions of dollars are involved. The ultimate allocation of these funds between attorneys, victims, states, and various governmental entities will be determined within a framework with limited predictability. An extremely fragmented hub-and-spoke model has emerged to address the resolution quandary. A web of unconnected and often disparate service providers can be analogized to satellites orbiting a group of plaintiffs' attorneys situated at the center.

1. *Attorneys*

The unique resolution model in this sphere requires the involvement of numerous attorneys playing various roles.

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[34] *See supra* note 22.

Established plaintiffs' firms are the primary figures. These attorneys have dominated the mass-torts space, possessing the gravitas and capital necessary to run the multi-year gauntlet to resolution. Millions of dollars are necessary to sustain a case through various stages of development, including advertising, claim marshaling, claimant screening, claim purchasing, expert witness retention, medical records retrieval, countless depositions, and steering committee assessment fees.[35] These demands are the primary reason why self-financed firms have historically controlled aggregate litigation.

Being an established firm provides unique optionality. In addition to the staggering fees when cases do settle, these attorneys enjoy the luxury of tailoring their involvement to their risk appetite. An established firm can devote resources to securing thousands of clients in a given case, organizing the steering committee, and then ultimately being part of a leadership team that negotiates settlement.[36] This firm can be actively involved in a case with its attorneys handling the daunting legal and logistical matters. But this process can take over a decade. Consequently, an established firm may secure the right to represent thousands of claimants but then "sell"[37] that representation to other law firms; by doing so, the established firm cedes control of the overall dispute in exchange for a portion of the ultimate recovery. By hedging its position based on substantive case information that may not be available to the general public, the established firm can minimize its exposure in a particular case but still retain backend participation if the settlement proves to be

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35 *See* Tom Baker, *Where's the Insurance in Mass Tort Litigation?*, 101 TEX. L. REV. 1569, 1586–87 (2023).

36 *See* Telephone Interviews with Litigation Finance Insiders, *supra* note 32.

37 Naturally, a firm cannot sell clients nor claims in a traditional sense. What is happening in these cases is that the established firm can negotiate a joint representation with another firm and a fee splitting arrangement. *See* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 537 (2003) ("There are. . .really pernicious referral systems [for mass-tort cases where attorneys]. . .advertise on television and funnel literally thousands of cases to some guy because the guy will split the fees 50/50 . . . .")(citation omitted). I see this as a sale because the established firm participates in a portion of the ultimate recovery but plays no meaningful role in litigating the case. In other words, the representation is "sold" to another firm, and the originating firm maintains backend participation. By the same token, law firm A in a joint representation with law firm B can—subject to client approval—"buy" claims by paying law firm B a lump sum to relinquish its interest in any fees received from the representation.

unexpectedly lucrative.[38] As of late, many established firms have begun embracing the role of financier by providing capital to junior firms[39] that wish to build claim inventory.[40] The established firm generally does not provide any legal services in these situations.[41]

A mass-tort oligopoly has existed for decades, controlled by a small pool of established law firms. Until recently, significant barriers to entry have excluded all others.[42] The recent introduction of litigation finance caused a dramatic shift and fostered more competitive dynamics. Primarily, access to capital has supported the entrance of new plaintiffs' firms.[43] These junior firms are invariably populated with young attorneys that lack proven track records. Without access to capital, these firms would have traditionally been excluded from lucrative cases. Today, junior firms work with financiers who provide the capital necessary to build claim inventory—the new currency in this space. Many of these attorneys are extremely inexperienced and have only a passing interest in litigating complex cases.[44] Fortunately, junior firms do not have to worry about actually litigating cases or orchestrating settlement.[45] Their focus is on marshaling claims and using inventory size to secure

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38 There are firms that almost exclusively marshal claims and enter into joint-representation agreements with other firms that actually litigate the case. *See* Telephone Interviews with Litigation Finance Insiders, *supra* note 32.

39 I use the term "junior firms" to describe law firms that lack large pools of capital to fund mass-tort cases and tend to be run by young, far-less experienced attorneys.

40 Baker, *supra* note 35, at 1580 ("[A] capital-rich lawyer or law firm forms a joint venture with a law firm that needs working capital, and they strike a fee-sharing agreement that reflects the lawyers' relative contributions of labor and capital to the venture. The capital-rich lawyer's capital functions as non-recourse financing for the law firm that is contributing only (or primarily) labor to the venture.").

41 *See* Telephone Interviews with Litigation Finance Insiders, *supra* note 32.

42 *See* The Econ. of Everyday Things, *Personal Injury Lawyers*, FREAKONOMICS RADIO NETWORK, at 14:14 (Feb. 18, 2024), https://freakonomics.com/podcast/personal-injury-lawyers/ [https://perma.cc/ZDR6-ECDP] ("If you're a brand new player [in the personal injury space] and you want to get in, you're almost going to have to spend three or four times what [established law firms spend] to really make a name for yourself.").

43 Baker, *supra* note 35, at 1587 ("When funding became available, it not only allowed experienced lawyers without money who were willing to go the distance, it also allowed a new kind of law firm.").

44 *See* Telephone Interviews with Litigation Finance Insiders, *supra* note 32.

45 *See id.* ("[Claim aggregators offer to sell] thousands of claims [and] . . . some guy in his thirties . . . says, 'Holy shit, if I got 5,000 claims and this thing settles . . . I'm going to make a lot of money.' And he has no intention of litigating those claims. He barely intends to even get medical records . . . .").

a seat on a steering committee, waiting for the oversized returns that accompany settlement of cases of this scale.[46] These firms are beholden to financiers. As a result, they are unable to push back on exploitive terms that aggressive financiers may propose, making them financiers' preferred access point into the mass-torts ecosystem.

2. *Inventory Builders*

Case-acquisition firms, lead generators, and claim aggregators have historically been three distinct actors in the mass-torts ecosystem, but recent years have been marked by consolidation. All three are service providers used by attorneys to secure additional claims in a given case, and I refer to them collectively as "inventory builders." A law firm seeking a prominent role in a mass-tort case must represent thousands of claimants. Many plaintiffs' firms have sophisticated intake and marketing departments where employees identify, interview, and assess potential clients.[47] These departments function well for traditional motor vehicle accidents but are woefully inadequate to build inventory volume in a large-scale matter. Consequently, even established law firms must work with inventory builders.

Case-acquisition firms resemble sophisticated advertisers and are often referred to as marketers. These firms manage outreach to potential claimants, offering (i) television advertising; (ii) video "infomercials" posted on Facebook and other social-media platforms; (iii) direct texting, emailing, and calling of potential claimants; and (iv) websites created specifically to engage with potential claimants.[48] The rise of social media has provided an unprecedented level of access. Case-acquisition firms offer a multitude of fee arrangements. The traditional model involves a law firm paying the marketer a flat fee and the marketer conducting in-house intake for individuals who respond to the outreach. Alternatively, the marketer may charge a flat fee per claim generated (e.g., $1,500 a claim for 500 claims). Under both derivations, the marketer is primarily

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46 *See id.*

47 *See id.*

48 *See* Strom, *supra* note 13; Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women into Often-Unneeded Surgery*, N.Y. TIMES (Apr. 14, 2018), https://www.nytimes.com/2018/04/14/business/vaginal-mesh-surgery-lawsuits-financing.html [https://perma.cc/KQJ5-ZCCX] ("Plaintiffs' firms turned to marketers to recruit clients. Women with mesh implants said they soon started receiving torrents of unsolicited phone calls . . . .").

an advertising partner. More recently, case-acquisition firms have been willing to take a stake in the ultimate case recovery. For example, some marketers may accept a reduced per claim charge coupled with a percentage of the final recovery (e.g., $1,000 per claim for 500 claims plus 10% of any judgment or settlement).[49] This shift to backend participation indicates how lucrative mass torts have become and can be analogized to a law firm taking stock in lieu of payment for legal services provided to a start-up technology company.

Lead generators resemble case-acquisition firms but are diminished in a material way. Lead generators offer a speculative package: a list of individuals who saw some general outreach and inquired about retaining an attorney for their personal-injury suit.[50] Lead generators perform minimal preliminary screening, if any; it is incumbent on the law firm to actively assess the lead and then convince those with compensable claims to retain the law firm. Claims based on general leads can be high quality, but that is rare. Consequently, leads require thorough screening and live interviewing. Generators capture individuals based on a very general profile and many of the potential clients may never have used the product in question and may not have any injuries at all.[51] Attorneys have been extremely critical of lead generators,[52] but these actors are firmly entrenched in the mass-tort ecosystem.[53] Lead generators appeal to a unique type of buyer. A firm that believes that a case is lucrative may be willing to work with a lead generator even if it means only 10% of leads produce a claim that is compensable. Lead generators are one of the few sources of viable claims for a plaintiffs' firm that has already accessed other inventory builders but still wishes to increase its position in a mature case.

Claim aggregators—or "case runners"—are perhaps the most controversial of the three inventory builders, because

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49 *See* Complaint for Class Action, Injunctive Relief & Damages ¶¶ 12–13, Monson v. McClenny, Moseley & Assocs., No. 23-cv-00928 (S.D. Tex. Mar. 14, 2023); Telephone Interviews with Litigation Finance Insiders, *supra* note 32.

50 Telephone Interviews with Litigation Finance Insiders, *supra* note 32.

51 *See id.*

52 *See* Paul M. Barrett, *Need Victims for Your Mass Lawsuit? Call Jesse Levine*, BLOOMBERG (Dec. 12, 2013), https://www.bloomberg.com/news/articles/2013-12-12/mass-tort-lawsuit-lead-generator-jesse-levine-has-victims-for-sale?embedded-checkout=true [https://perma.cc/94E6-QCZ9] ("[Ryan Thompson, a prominent plaintiffs' attorney] calls lead generators 'leeches on our industry' and says that prospective clients they identify often don't pan out.").

53 *See id.*

they are willing to get their hands dirty. These firms employ the traditional marketing approaches noted above to identify claimants but then go further. Aggregators are willing to directly engage with potential clients. For example, aggregators will go into communities after natural disasters and solicit claimants.[54] Unlike case acquisition firms, claim aggregators are not waiting for a client to initiate an engagement. Claim aggregators are speculators intent on securing an asset at a relatively low point in the valuation cycle and then reselling that asset quickly at a significantly higher price.[55] This strategy requires aggregators to marshal as many claimants as possible in the days and weeks after a triggering event—such as a natural disaster or a report identifying a product as harming users in an unforeseen way—and then "sell"[56] claims in bulk as the case gains notoriety and claim values improve.[57] As explored in further detail in subpart I.B., *infra*, there is no established exchange for mass-tort claims trading. Claim aggregators are the primary actors selling claims to law firms, playing a vital role in propping up this fledgling market. But claim aggregators have also recently come under attack for fabricating inventory and pursuing quick sales.[58]

3. *Vendors*

Mass torts are big business with myriad administrative and logistical demands. This reality has spurred "vendorization" in the space, which is a term used to describe the introduction of sophisticated administrators like the Garretson Group, Archer, and Torticity that provide various "back room"

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54 *See* Francesca Mari, *The Lawyer Whose Clients Didn't Exist*, THE ATLANTIC (May 2020), https://www.theatlantic.com/magazine/archive/2020/05/bp-oil-spill-shrimpers-settlement/609082/ [https://perma.cc/P25N-ATJM] (explaining how claim aggregators stormed Louisiana and other Gulf states after the BP oil spill and signed up individuals who had supposedly been harmed by the spill).

55 *See* Telephone Interviews with Litigation Finance Insiders, *supra* note 32.

56 An inventory builder cannot sell clients nor claims in a traditional sense. What is happening in these cases is that the inventory builder has identified individuals who may be able to assert a claim in a given case and is willing to connect these individuals to an attorney for a fee. *See supra* note 37.

57 Claim brokers are arguably the fourth player in this area. These actors act as intermediaries connecting law firms to inventory builders for a commission. *See* Rebecca Berrebi, *Litigation Finance & the Benefit of Brokers*, BLOOMBERG L. (Apr. 2022), https://www.bloomberglaw.com/external/document/XCO9RN74000000/litigation-professional-perspective-litigation-finance-the-benef [https://perma.cc/UE5Q-TFXW]. Claim brokers do not make any representations regarding claim quality.

58 *See* Mari, *supra* note 54.

services.[59] For example, a vendor may play an integral role in claim assessment by pulling potential clients' medical records and reviewing other records to help assess a claim. Attorneys will also need to hire statistical modeling experts to estimate the potential value of each class of claims and determine how many claims will need to be kicked out of the case.[60] Vendors assist throughout the entire case and manage logistics surrounding settlement and ultimate distributions. They also help with claim administration by establishing case-specific portals, communicating with client pools, preparing instructional videos and newsletters, and managing global communications.[61] Vendors provide essential services that law firms could not possibly replicate. Recently, some vendors have also begun altering their payment model by providing services for a low base rate coupled with a percentage of the final recovery or, in some cases, payment based entirely on a percentage of the case recovery.[62]

B. Deus Ex Machina

The previous subpart provided a thumbnail sketch of some of the key actors in the mass-tort ecosystem. This subpart explains how they help run case machinery.

I am unaware of any scholarship that explores in detail how modern mass-tort cases are incubated.[63] My own research—based primarily on twenty-seven interviews I conducted with litigation finance insiders—revealed an extremely idiosyncratic process, intentionally obscured by key parties. Breathtaking chaos appears to be the most apt description.

Before delving into the machinery, the value of inventory building should be explored briefly because motivations are not entirely intuitive. An attorney who accepts the financial and scientific merits of a particular case is going to believe that each claim she retains is a valuable asset. And where an attorney suspects that a claim is nonmeritorious, the claim may still

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59 The proliferation of these actors is highlighted by elaborate global conferences like Mass Torts Made Perfect where plaintiffs' attorneys mingle with vendors offering all of these services and more. *See* MASS TORTS MADE PERFECT, https://mtmp.com/ [https://perma.cc/F97Z-7ETT].

60 *See* Telephone Interviews with Litigation Finance Insiders, *supra* note 32.

61 *See Mass Tort Claims Administration*, ARCHER, https://www.archersystems.com/mass-tort/claims-administration/ [https://perma.cc/U7WH-SJNX].

62 *See* Telephone Interviews with Litigation Finance Insiders, *supra* note 32.

63 Many sources discuss player dynamics and legal battles once actions have been filed in state and federal court. *See, e.g.*, ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS (2019).

have value if it can be bundled with meritorious and compensable claims.[64] If the attorney decides against directly pursuing the matter, there will be windows where she can "sell"[65] the asset for a profit. For an attorney who is interested in pursuing a recovery for her clients through the judiciary, each added claim is presumably enhancing that attorney's aggregate contingency fee. A group of attorneys seeking to marshal claims in a particular dispute are certainly competing for clients, but as the group secures more and more claimants, the effect is to add legitimacy to the claims and raise public awareness.[66] A critical mass of claimants draws media scrutiny, which applies public pressure on corporate defendants. A large-scale, mass-tort case creates a black cloud over a corporate defendant's business and brand.[67] And this fact makes a defendant more amenable to settlement.[68] Also, as detailed in section I.B.2, *infra*, "coveted and remunerative positions" on key steering committees in cases are awarded based on the size of an attorney's inventory,[69] and inventory volume provides leverage to

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64 *See* Task Force on Contingent Fees of the Am. Bar Ass'n's Tort Trial & Ins. Prac. Section, *Contingent Fees in Mass Tort Litigation*, 42 TORT TRIAL & INS. PRAC. L.J. 105, 108–09 (2006) [hereinafter Task Force on Contingent Fees] ("[B]undling is often the joining together of a few strong claims with a larger number of weak claims. The plaintiffs' lawyer approaches the defense and proposes to try these claims together. In exchange for settling the strongest claims, . . . the plaintiffs' lawyer receives favorable settlements for all the cases. . . . Presumably, the aggregate settlement is higher with bundling than without.").

65 *See supra* note 37.

66 *See* Mari, *supra* note 54 ("One of the surest paths to a handsome profit for a mass tort is for it to be, well, massive.").

67 *See* Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447, 462 (2022) ("The cloud suppresses market capitalization, because investors are forced to discount valuation of the corporate entity . . . . Credit markets are affected similarly, but the results are increased borrowing costs or—in the doomsday scenario—restricted access to credit."); *See also, e.g.*, Chipman & Veloso, *supra* note 26.

68 *See* Engstrom, *supra* note 21, at 32 ("[D]efendants reportedly feel more 'pressure' to settle when up against a lawyer with a large 'volume of cases.'").

69 *Id.*; *see* Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 350 (2014) ("[H]ighly coveted leadership positions are appointed, in part, based upon the size of counsel's inventory . . . ."); *see also* Laws. for Civ. Just., Comment to the Advisory Committee on Civil Rules and its MDL Subcommittee 3 (Dec. 22, 2022), https://www.uscourts.gov/sites/default/files/22-cv-t_suggestion_from_lcj_-_rule_16_0.pdf [https://perma.cc/PF6P-3F6R] ("Particularly when seeking leadership positions, plaintiffs' lawyers endeavor to gather as many names/claims as possible, as quickly as possible . . . ."); Mari, *supra* note 54 ("The government's theory was that Watts had engineered the massive client list to secure a spot on the Plaintiffs' Steering Committee—for which his firm would pocket $17 million . . . .").

dictate case trajectory.[70] All of these factors lead to "exceptionally high rates of claim initiation."[71]

1. *Mobilization and Performance-Enhancing Capital*

Various events can trigger a mass-torts scramble, including a natural disaster like the Maui wildfire, a report identifying a product as harming users in an unforeseen way,[72] and a new drug that is extremely profitable.[73] Even seemingly innocuous events can set off a marketing frenzy. Annual spending on television advertisements seeking mass-tort claimants more than tripled in the past decade.[74] And online advertising through social-media platforms has revolutionized the industry.[75] Digital marketing amplifies the size of these cases by allowing inventory builders and others the means to expeditiously and accurately identify potential claimants. A case like 3M's Combat Arms MDL would have had a fraction of the over 275,000 claimants it does today if it had been initiated just "five or seven years ago."[76] Inventory builders' efficacy has improved dramatically in the last decade, and financiers have

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70 *See* Opening Brief of Certain Insurers at 18, Nat'l Union Fire Ins. v. Boy Scouts of Am. (*In re* Boy Scouts of Am.), 650 B.R. 87 (D. Del. 2023) (No. 22-cv-01237), ECF No. 45 [hereinafter Boy Scouts Opening Brief] (observing that one plaintiffs' attorney in the bankruptcy case "noted that their goal was to 'keep focused on [the lawyers'] marketing and media efforts going full tilt . . . [to secure] control [of] 80% of the claims, I.e. [sic] our coalition controls the case'" (alterations in original)).

71 Engstrom, *supra* note 21, at 30.

72 *See* 112 INT'L AGENCY FOR RSCH. ON CANCER, IARC MONOGRAPHS ON THE EVALUATION OF CARCINOGENIC RISKS TO HUMANS 398 (2017) (implicating Roundup's key ingredient); *see also* Alex Wolf, *Trillions in PFAS Liabilities Threaten Corporate Bankruptcy Wave*, BLOOMBERG L. (Oct. 24, 2023), https://news.bloomberglaw.com/bankruptcy-law/trillions-in-pfas-liabilities-threaten-corporate-bankruptcy-wave [https://perma.cc/PSV9-4L65].

73 The Judicial Panel on Multidistrict Litigation has already instituted an MDL focused on Ozempic. *See* Hailey Konnath, *Ozempic MDL Gets New Judge After Judge Pratter's Death*, LAW360 (June 7, 2024), https://www.law360.com/articles/1845718/ozempic-mdl-gets-new-judge-after-judge-pratter-s-death [https://perma.cc/8PQU-P8SC].

74 *See* Philip Goldberg, *How Mass Tort Litigation is Gaming the Judicial System*, BLOOMBERG L. (Mar. 2, 2023), https://news.bloomberglaw.com/us-law-week/how-mass-tort-litigation-is-gaming-the-judicial-system [https://perma.cc/ZH8P-4766].

75 *See* The Econ. of Everyday Things, *supra* note 42, at 17:31 ("Legal advertising firms are also increasingly focused on digital ads.").

76 Strom, *supra* note 13 ("Five or seven years ago, a tort like 3M would have been 50,000 claimants . . . . Now it's [more than] 275,000 claimants because of innovations around digital marketing . . . ." (alteration in original) (internal quotations marks omitted)).

rewarded these parties and law firms with access to performance-enhancing capital.

a. *Inventory Building*

The vast majority of plaintiffs' law firms lack sophisticated marketing departments. Consequently, case-acquisition firms and claim aggregators are an indispensable part of the incubation process.[77] Some inventory builders have in-house staff focused on identifying emerging mass torts by studying social media.[78] A law firm interested in securing clients can sign a service agreement with a case-acquisition firm to marshal claims. The case-acquisition firm acts as an "agent of record" for the law firm in reaching out to potential clients.[79] The law firm invariably pays the marketer a set amount for each potential client. The marketer will often accept some basic screening responsibilities. Imagine an oil spill off the coast of a prominent U.S. city. The law firm could contract for the marketer to text individuals in the area and include a link to an assessment form.[80] Potential claimants who respond become part of a "warm transfer" where the marketer is contracted to screen the individual before transferring her to the law firm. Recent disputes have revealed that marketers—often located outside the US—will use the call to instruct potential claimants on what they will need to say to survive the law firm's subsequent screening.[81] As this outreach is unfolding, claim aggregators are deploying teams into the affected areas and attempting to secure potential claimants. These teams go door-to-door,

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77 There is a distinct first-mover advantage in advertising. The cost of a sponsor result for a general Google search regarding Camp Lejeune tort claims spiked once it became clear that the government was going to create an ostensibly unlimited trust for these types of claims. A party that had locked in advertising rates in advance of this spike is at a distinct advantage over one who sought the purchase later in the process. *See* Telephone Interviews with Litigation Finance Insiders, *supra* note 32. Naturally, this happens across Facebook, Instagram, YouTube, Tik Tok and various other prominent social media platforms. Also, high-value, compensable claims are often secured at the outset. Aggregators that arrive late are often left sifting through claims that have material deficiencies or may be entirely nonmeritorious. *See id.*

78 *See id.*

79 *See* Complaint for Class Action, Injunctive Relief & Damages, *supra* note 49, ¶ 11.

80 *See id.* ¶¶ 15–16. The Telephone Consumer Protection Act limits this type of unsolicited marketing text, 47 U.S.C. § 227, but many marketers ignore the law.

81 *See* Complaint for Class Action, Injunctive Relief & Damages, *supra* note 49, ¶ 16.

signing up numerous parties with no more than an infinitesimal chance of recovery.[82]

A triggering event may also prompt a resource-rich law firm to outsource inventory building by funding a junior firm to marshal claims. As recoveries in mass-tort cases have exploded, established law firms have become investors, reaching out to reputable law firms in the mass-torts ecosystem and offering access to capital.[83] Attorneys successfully transitioning out of their traditional roles have naturally attracted the attention of financiers, who have far more experience providing capital. The influx of litigation finance puts more pressure on all attorneys, even those law firms that do not use litigation finance at all. Use of performance-enhancing capital by some will invariably force others to follow suit.

b. *Inventory Investment and Claims Trading*

The incentives to inventory build are clear, but the reasons all presuppose that a particular case is lucrative. However, the task of assessing claim value at the outset of a case is extremely difficult; attorneys attempt to perform diligence and close information gaps, but little is known. Law firms unaccustomed or unwilling to act with limited information will invariably vacillate. Consequently, these actors will be excluded from the first round of claim marshaling, which tends to yield the claims with the highest value. Indecisive law firms can certainly jump into the fray later, but they may be forced to pay a premium[84] for inventory that will no doubt have a mix of compensable and noncompensable claims.[85]

These dynamics—coupled with the relatively high success rates and premium recoveries in mass-tort cases—compel many law firms to rely on inventory builders. At one level, inventory

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82 *See* Mari, *supra* note 54 ("[The claim aggregator had] hired more than 100 field-workers to gather questionnaires from prospective clients, for $10 to $50 each. They knocked on doors and hung out at the docks; they scouted Catholic churches, grocery stores, and other places where Vietnamese people congregated.").

83 *See* Telephone Interviews with Litigation Finance Insiders, *supra* note 32; *see also supra* note 37.

84 *See* Strom, *supra* note 13 ("Before [PACT] was passed, Camp Lejeune claims could be purchased by law firms for about $1,000 . . . . That has since increased to $5,000 or more . . . .").

85 The phrase "noncompensable claim" will refer to claims where the claimant has generally filed the claim in good faith, used the product in question and suffering the injury alleged but faces some significant obstacle that limits the possibility of a recovery.

builders provide law firms with the table stakes necessary to participate in a large-scale mass-tort case and potentially be part of the leadership group. Law firms would prefer to be able to marshal claims through their own intake process where claimants can be screened thoroughly and "investment-grade" claims can be more easily identified.[86] But the resources necessary to run a high-volume claim processing group are staggering. And, in a best-case scenario, traditional means of claim marshaling can produce only hundreds of claims over the course of months and years.[87] This volume is insufficient in most cases to compensate a law firm for the multi-year gauntlet it must navigate to settlement. Further, law firms vying for leadership positions invariably represent thousands of claimants.

At a second level, inventory builders help law firms speculate on case outcomes.[88] Many law firms play the role of professional traders in a highly volatile asset class. As one plaintiffs' attorney explained to me, he will aggressively acquire claims when he is particularly optimistic about the settlement prospects in a given matter.[89] In staking out its position, law firms will have to determine—just like any investor or gambler—the spot on the risk curve they are comfortable occupying. Risk-tolerant law firms have no choice but to engage inventory builders.[90] The ones I interviewed invoked gambling metaphors to describe their process. These attorneys explained that they were comfortable trusting their gut and acknowledged relying on various proxies, the most prominent of which was the idea of betting on the jockey, not the horse—an allusion to identifying the prominent law firms moving into a given case and potentially replicating these firms' buying strategy.[91] The rationale supporting this approach is that even if these law firms lack inside information, they still have the fortitude to salvage value if the cases are less valuable than initially suspected. Naturally, the risk of failure is still material—as seen recently in the Tylenol[92] and

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86 Bedi & Marra, *supra* note 22, at 607.

87 *See* Telephone Interviews with Litigation Finance Insiders, *supra* note 32.

88 *See id.*

89 *See id.*

90 *See id.*

91 *See id.*

92 *See* Edward E. Neiger, Alexandra Robertson & Gregory Lawrence, *Understanding Rule 702 and the 'Daubert' Standard*, N.Y.L.J., Mar. 11, 2024, at 3 (explaining that MDL Judge Cote "found that the plaintiffs' expert witnesses [in the Tylenol/Acetaminophen MDL] had not offered sound scientific methodology that

Zantac[93] MDLs. And just like a seasoned bettor, experienced law firms regularly hedge their positions. For example, a firm may purchase various baskets of claims that represent different types of realized harm.[94] In smaller cases, an attorney may have to decide if she believes she will be litigating or if the accumulation of claims is merely an investment. In larger cases, the answer will invariably be the latter.

As noted above, there is no exchange for trading claims and no entity large enough to engage in market making[95] in this space. Instead, there is an active secondary market where parties "buy" and "sell" claims.[96] In this shadow market, prices fluctuate wildly based on legal and non-legal developments.[97] Volatility here can be analogized to an individual purchasing shares in a publicly traded pharmaceutical company in the days before the Food and Drug Administration announces whether it will approve the company's new wonder drug. Claims trading can be heavy in the weeks and months before seminal events in a case, including a *Daubert* ruling, a bellwether verdict, or the passage of legislation creating a funding pool.[98]

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supports the opinion that Tylenol/acetaminophen's active ingredient can cause" autism or ADHD and subsequently granted summary judgment in favor of the defendants).

93 *See In re* Zantac (Ranitidine) Prods. Liab. Litig., 644 F. Supp. 3d 1075, 1277, 1286 (S.D. Fla. 2022) (granting motion to exclude plaintiffs' general-causation experts for lacking reliable methodologies and granting motion for summary judgment).

94 In the Johnson & Johnson talcum powder dispute, some claimants alleged that use of talcum powder caused ovarian cancer, but others claimed that inhaling talcum powder caused mesothelioma. *See In re* LTL Mgmt., LLC, 64 F.4th 84, 92–93 (3d Cir. 2023). In cases where multiple claimant groups exist, a law firm can hedge its position by representing claimants in all groups and then adjusting its position based on case developments.

95 *See* Maureen O'Hara & George S. Oldfield, *The Microeconomics of Market Making*, 21 J. FIN. & QUANTITATIVE ANALYSIS 361, 361–76 (1986) ("A market maker is a dealer who conducts a two-sided auction for [some good or asset] by standing ready to trade on either side of the market . . . . If an excess of buy or sell orders arrives, a market maker accommodates traders through inventory adjustments and adjusts bid and ask prices to balance the order flow.").

96 *See supra* note 37. The idea of "investment-grade" claims is attractive, but "investment-grade" claims are rarely sold. *See* Telephone Interviews with Litigation Finance Insiders, *supra* note 32. As a result, the secondary market is premised on trading claims that are well below investment grade. These claims still hold value for various reasons including (i) facilitating speculative investing; (ii) assisting an attorney to make their way onto a steering committee or leadership role; and (iii) fulfilling capital-deployment directives.

97 *See* Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L.J. 619, 664 (2006).

98 *See* Strom, *supra* note 13. Also, during the early stages of a case, lead counsel is developing legal strategy and identifying injuries that are compensable.

For example, the Louisiana Supreme Court recently overturned a law that had been unanimously approved by the state legislature that removed the state statute of limitations on molestation claims.[99] Various other states have passed similar legislation, opening up the floodgates for sexual abuse claims from previous generations. In the months leading up to this verdict, various case developments subtly indicated that the court was considering such a dramatic ruling. An attorney representing sexual abuse claimants in Louisiana could have started selling[100] her claims in advance of the ruling, indicating her prediction on which way the court was planning to rule. An attorney buying[101] these claims would similarly be speculating on the outcome of the ruling.

Attorneys have become increasingly vocal about fraud in the claims trading marketplace.[102] The risks are somewhat unavoidable. The premium recoveries realized in mass-tort cases and other case-specific dynamics drive demand for claims. This demand limits acquirer leverage in a market where seller reputation is often unknown. Claim sellers usually allow purchasers a small window—seven days in most cases but no more than thirty days—to return claims.[103] This accommodation theoretically allows the firm to assess the claim, but claim validation can be a protracted process. Claim assessment firms can spend months pulling medical records for just one claimant.[104] Also, a purchasing firm can interview the prospective client during the return window, but that client may lie—intentionally or unintentionally—and claim infirmity will not be apparent for months, if ever.[105] Attorneys I spoke with were resigned to purchase batches having 40–50% of noncompensable

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See BURCH, *supra* note 63, at 17–18. Lead counsel may deem certain causes of action unsupportable, and the plaintiffs' steering committee will not pursue them. In most cases, holders of these disfavored claims face a total loss on their investment. *See* Telephone Interviews with Litigation Finance Insiders, *supra* note 32.

99 David Hammer, *Dismay as Louisiana Lookback Law for Child Sexual Abuse Victims Struck Down*, THE GUARDIAN (Mar. 22, 2024), https://www.theguardian.com/us-news/2024/mar/22/louisiana-lookback-law-child-sexual-abuse-victims [https://perma.cc/64KY-4948].

100 *See supra* note 37.

101 *See supra* note 37.

102 *See* Siegel & Basu, *supra* note 14 ("Unfortunately, fraud is becoming increasingly more prevalent [in claims trading]. It stems from lawyers taking shortcuts and using newer marketing companies without properly vetting them or doing any due diligence.").

103 *See* Telephone Interviews with Litigation Finance Insiders, *supra* note 32.

104 *See id.*

105 *See id.*

claims.[106] This may sour future purchases from a particular inventory builder, but, in cases where there is a strong desire to increase a firm's position, this is a lucrative purchase even with the high fallout rate.

In an interesting twist, many insiders I spoke with asserted that financial success in a given case is most strongly correlated to the size of an attorney's claim inventory, as opposed to the attorney's legal acumen.[107] If a critical mass of claims is secured, the argument goes, then the rest of the process is merely about applying pressure to a corporate defendant and negotiating a purchase price. Naturally, attorneys mock this premise, but inventory builders are beginning to take claim baskets to law firms and offer them a mere 40% of the contingency fees realized—effectively 16% of the ultimate case recovery.[108] These types of collaborations are in an infancy stage but highlight the unique perspective of non-attorneys. As discussed in more detailed in Part II, *infra*, these parties do not see attorneys as the most important party in mass-tort cases; indeed, they see these cases as mere asset sales, not litigation disputes. The inventory builder in this new model is paying the attorney for her services by sharing a piece of the backend. This limits the inventory builder's upfront costs. The law firm also benefits, because it can secure a larger recovery if the case proves to be unexpectedly lucrative. But the law firm's preferences are secondary. The inventory builder is amenable to this arrangement because it pushes a lot of the risk onto the attorneys, providing a meaningful hedge.

These new collaborations reconceptualize the hub-and-spoke model. Attorneys do not occupy the hub; rather, the party that marshals the claims is the gatekeeper. That party can be a marketer or financier, who then brings in an attorney to execute the preliminary legal work and formulate strategy. Legal expertise is a valuable commodity, but it is still a commodity. The implications from this premise are clear: attorneys in these arrangements should be paid handsomely for the services they provide, but they should not control the process or receive the lion's share of the ultimate recovery. To

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106 *See id.*

107 *See id.*

108 *See id.* Plaintiffs' firms often negotiate a 40% contingency fee with their mass-tort clients, of which they may occasionally share a small percentage with the referring firm or service provider. In these new, alternative arrangements with inventory builders, the law firm would have a 16% actual contingency fee but still bear the risk that the case yields no recovery. *See In re* MMA L. Firm, PLLC, 661 B.R. 548, 562 (Bankr. S.D. Tex. 2024).

an attorney, this idea is blasphemy. To a financier, these are simply first principles for the future of mass-tort litigation.

2. *Multidistrict Litigation*

If a legal dispute gains traction in the mass-torts ecosystem, complaints will be filed across the country, often times in both state and federal court. A critical mass of filed cases will make MDL the inevitable destination.[109] In anticipation of this outcome, key plaintiffs' attorneys will privately organize the steering committee—the group that will lead the litigation once an MDL is instituted. The formation of this committee occurs before the MDL and, in many cases, the steering committee is presented to the MDL judge fully formed, awaiting her approval.[110]

There are significant benefits to being on the steering committee and part of the leadership group. The leadership team and the attorneys at their firm are compensated for the hours worked on the case.[111] This amount is in addition to any contingency fee—typically 40%—they are already owed by the clients they represent.[112] Further, a tax—referred to as the "common-benefit fee"[113]—is paid to the leadership team in compensation for leading and settling the litigation. This fee is funded by the MDL court holding back a certain percentage of plaintiffs' firms' gross recovery.[114] Any plaintiffs' attorney performing "common-benefit work" can seek payment from the fund, but it exists to pay the leadership team. The holdback is approximately 4% to 8% of the gross recovery[115] and comes

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109 Class aggregation under Rule 23 of the Federal Rules of Civil Procedure is not a viable option for most modern mass-tort cases because there are too many individualized issues regarding causation and damages to satisfy Rule 23's predominance and superiority requirements. *See* Parikh, *supra* note 67, at 473. For these cases, the remaining options are MDL, bankruptcy, or an out-of-court settlement.

110 *See In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 954 (N.D. Cal. 2021). Lead counsel is a subgroup within the steering committee.

111 The leadership team is responsible for leading the litigation, including "conducting discovery, communicating with other plaintiffs' lawyers . . . , determining the substantive legal positions to be taken, litigating those positions, and engaging in settlement discussions." *Roundup*, 544 F. Supp. 3d at 954.

112 *See id.* at 961.

113 The "common-benefit fee" is a tax meant to address the unavoidable free-rider problem that exists in these types of multi-level settlement constructs. Some attorneys are tasked with leading the process, but the vast majority are sitting on the sidelines waiting for a distribution.

114 *See Roundup*, 544 F. Supp. 3d at 960–61.

115 Nora Freeman Engstrom & Todd Venook, *Harnessing Common Benefit Fees to Promote MDL Integrity*, 101 TEX. L. REV. 1623, 1643 (2023).

out of the distribution received by attorneys not performing common-benefit work.[116] This mechanism makes sense because the idea is that attorneys who free ride should pay the tax, not their clients. The prominence of the common-benefit fee is in some respects an indication of a larger structural phenomenon: in MDL, a few attorneys sit at the center, working diligently, surrounded by passive speculators and investors awaiting their payout.[117]

To advance a case, lead counsel will need to litigate the "general-causation" question by presenting expert testimony that could support a reasonable jury concluding that the defendant's service or product is capable of causing the harm alleged. This is the *Daubert* hurdle, named after the 1993 Supreme Court case that held Rule 702 of the Federal Rules of Evidence as the standard for admissibility of expert evidence in federal courts.[118] The MDL court must find that there is some scientific basis for the plaintiffs' claims. This is a crucial stage in the process. "If the plaintiffs were to lose on [this] threshold question, every single case in the MDL would be dismissed."[119] Lead counsel and the steering committee would not be able to recover the substantial investment made in bringing the dispute to this stage.[120] As noted above, this occurred recently in both the Tylenol/Acetaminophen MDL[121] and the Zantac MDL.[122] Failure at this stage can doom a plaintiffs' attorney who overleveraged based on an optimistic expectation of success.[123]

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116 *See Roundup*, 544 F. Supp. 3d at 971.

117 *See id.* at 962. But the steering committee presents significant risks, as well. Steering committee members are required to contribute funds that—in the aggregate—will be necessary to fund the litigation. These "assessments" are the costs of being on the steering committee. Assessments can be significant and will go uncompensated if the litigation fails. *See id.* at 953–54.

118 *See* Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993). This process is commonly referred to as "*Daubert*" and this Article follows that convention. I do understand, however, that many parties are averse to using the term *Daubert* in this way because Rule 702 of the Federal Rules of Civil Procedure—not one individual case—delineates the applicable standard. *See generally* David E. Bernstein & Eric G. Lasker, *Defending* Daubert*: It's Time to Amend Federal Rule of Evidence 702*, 57 WM. & MARY L. REV. 1 (2015).

119 *Roundup*, 544 F. Supp. 3d at 955.

120 *See* Neiger, Robertson & Lawrence, *supra* note 92.

121 *See id.*

122 *See In re* Zantac (Ranitidine) Prods. Liab. Litig., 644 F. Supp. 3d 1075, 1277, 1286 (S.D. Fla. 2022) (granting motion to exclude plaintiffs' general-causation experts for lacking reliable methodologies and granting motion for summary judgment).

123 *See* Task Force on Contingent Fees, *supra* note 64, at 113 (explaining that many "plaintiffs' firms have 'crashed and burned' by guessing wrong about the 'next' mass tort").

The likelihood of a lucrative settlement increases significantly if the case survives *Daubert*, and bellwether trials are next. These cases are "tried in the hope of educating both sides about their prospects in future cases," which invariably informs their respective settlement positions.[124] Significant importance is placed on the role bellwether trials can play in forging settlement, but these verdicts are less impactful than one would imagine. Settlement in modern mass-tort cases are only occasionally driven by the merits of the claims at issue. There are a number of cases where plaintiffs lost all or ostensibly all bellwether trials but still secured a significant settlement from the corporate defendant—who sought to avoid staggering legal fees and further brand erosion. For example, Johnson & Johnson faces claims that their talcum powder causes ovarian cancer. By March 2025, seventeen cases had advanced to a state court jury verdict.[125] Johnson & Johnson was victorious in sixteen of the seventeen cases.[126] In fact, the company has "prevailed in 95% of ovarian cases tried to date, including every one tried over the last six years."[127] Nevertheless, the company recently proposed a $6.4 billion settlement for all remaining ovarian cancer claimants.[128] Johnson & Johnson employed a similar approach in the Xarelto MDL, where the company prevailed in all three bellwether trials and all Pennsylvania state court cases that were tried but still agreed to settle the matter for $775 million.[129]

Bellwether trials can inform but rarely do they dictate settlement outcomes. Even after a critical mass of bellwether trials conclude, the parties may be no closer to settlement. But an impasse does not cause cases to be sent back to their original

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124 *Roundup*, 544 F. Supp. 3d at 955.

125 *See J&J's New Talc Tort Trial*, WALL ST. J. (Mar. 2, 2025), https://www.wsj.com/opinion/j-js-new-talc-tort-trial-settlement-attempt-talc-suit-ovarian-cancer-bankruptcy-76d30c15 [https://perma.cc/GW26-ZP3T].

126 It should be noted that the "one" case that Johnson & Johnson lost was *Ingham v. Johnson & Johnson*, which actually involved twenty-two women and resulted in a $4.7 billion verdict against the company (later reduced to $2.1 billion). 608 S.W.3d 663, 680 (Mo. Ct. App. 2020); *see also* Greg Stohr & Jef Feeley, *J&J to Pay $2.1 Billion Talc Award as Top Court Nixes Appeal*, BLOOMBERG L. (June 1, 2021), https://news.bloomberglaw.com/us-law-week/j-j-must-pay-2-1-billion-talc-award-as-top-court-rejects-appeal [https://perma.cc/JUV8-7WQR].

127 Dietrich Knauth & Mike Spector, *J&J Advances $6.48 Billion Settlement of Talc Cancer Lawsuits*, REUTERS (May 1, 2024), https://www.reuters.com/legal/jj-advances-6475-billion-settlement-talc-cancer-lawsuits-2024-05-01/ [https://perma.cc/EP6L-R85Q].

128 *Id.*

129 *See* Tina Bellon, *Bayer, J&J Settle Thousands of U.S. Xarelto Lawsuits for $775 Million*, REUTERS (Mar. 25, 2019), https://www.reuters.com/article/business/bayer-jj-settle-thousands-of-us-xarelto-lawsuits-for-775-million-idUSKCN1R61UD/ [https://perma.cc/7YLU-JT4E].

courts. From 1968 through September 30, 2018, transferee courts had received and resolved approximately 516,593 cases.[130] Of these civil actions, only 16,728 were remanded for trial.[131] A staggering 97% of transferred cases were resolved in the MDL court by dispositive motion or settlement. The vast majority of cases languish for years as transferee judges cajole—and in some cases, attempt to compel—the parties to settle.[132] MDL courts often view settlement as the only acceptable outcome, irrespective of claim merit, defendant culpability, or settlement integrity.[133] This fixation often produces compelled settlements that fail to consider culpability. This heightens the possibility of extortive litigation and creates the narrative that corporate actors that conform their behavior to legal strictures are no better off than those that do not.

MDL's perceived deficiencies have altered its unquestioned position as the final resolution station for mass-tort cases. Modern mass-tort cases invariably begin in MDL, but many have not been resolved there. As explained in the following section, corporate defendants have decided to change the battlefield, opting out of MDL through a process I call bankruptcy preemption.

3. *Bankruptcy Preemption and Global Settlement*

Modern mass-tort cases—including those involving Purdue Pharma, Boy Scouts of America, Johnson & Johnson, 3M, and Takata—began as MDLs. But corporate defendants frustrated with the infirmities of the process ultimately opted to file for bankruptcy. Most of these cases were resolved through the bankruptcy process, but some of these cases were dismissed and ultimately settled out of court.

Bankruptcy's structural, procedural and substantive benefits provide optionality that can be particularly attractive to corporate defendants. For example, "[t]he seemingly boundless reach of bankruptcy court jurisdiction allows the court to

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130 *See Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407: Fiscal Year 2018*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. 3 (2018), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2018.pdf [https://perma.cc/6BEX-TLTU].

131 *Id.* at 5.

132 "MDL judges have various means to compel settlement. Primarily, judges will aggressively encourage parties to engage in settlement, including by appointing a special master who will be actively involved in ensuring meaningful discussions. Judges can also hold on to cases indefinitely and pressure settlement." Parikh, *supra* note 67, at 478 n.231 (citations omitted).

133 *See generally* George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 559–69 (1997).

marshal all [state and federal cases] affecting a debtor in one single venue."[134] Further, bankruptcy's powerful automatic stay halts all creditor actions, including pending litigation against the debtor and can be extended to nondebtors to allow key parties to focus on negotiating a global settlement. Compromise often begins with a court-appointed mediator leading high-level discussions between plaintiffs' attorneys, the debtor, and representatives of the debtor's corporate affiliates. Unlike MDL, an impasse at this point does not plunge the case into purgatory. Instead, the bankruptcy court can intervene by identifying claims subject to pending litigation against the debtor and estimating the value of the claims that cannot be resolved in a timely manner. Claims that could take decades to be tried and resolved outside of bankruptcy can be assessed within a matter of months through a process called estimation.[135]

Claimants actively participate in the estimation process. It is important to note that the bankruptcy judge does not unilaterally decide what each claimant will receive. Rather, the judge determines the total value of all claims against the debtor—subtotaled based on claim classification—and allows the debtor to publicly propose a settlement to victims based on this figure. Victims are not bound by this offer. They are allowed to vote on whether they believe that the debtor's proposal is the best offer they can secure.

Settlement at this stage can take various forms. A successful plan vote, as seen in Purdue, Takata, and Boy Scouts of America, leads to confirmation of a plan of reorganization and establishment of a settlement trust from which claimants are paid.[136] In other cases—including Johnson & Johnson's talcum powder subsidiary LTL and 3M's Combat Arms case—the bankruptcy court identified infirmities in the cases and dismissed them.[137] These expulsions often lead to out-of-court

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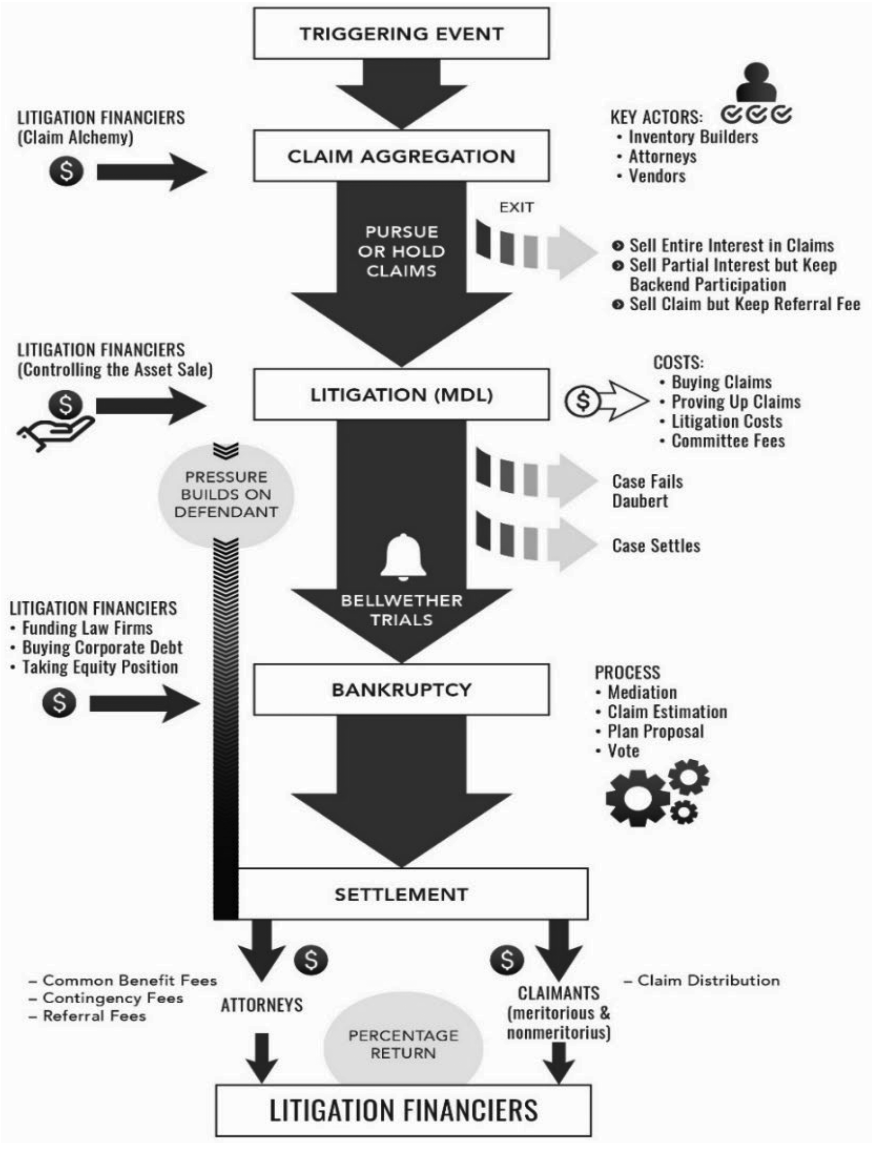
134 Parikh, *supra* note 67, at 480.

135 *See* 11 U.S.C. § 502(c).

136 *See* Suneal Bedi & Samir D. Parikh, *Mass-Tort Trusts and the Faustian Bargain*, 110 CORNELL LAW R. 1595, 1603 (2026).

137 In the first bankruptcy case of Johnson & Johnson's talcum powder subsidiary, LTL, the Third Circuit Court of Appeals ruled the LTL did not have the requisite immediate "financial distress" necessary to relief under the Bankruptcy Code. *In re* LTL Mgmt., LLC, 64 F.4th 84, 110–11 (3d Cir. 2023). The Third Circuit implied that LTL may have been attempting to improperly access the bankruptcy courts to improve its leverage over claimants. *Id.* at 109–10. The bankruptcy case of 3M's Aearo subsidiary suffered a similar fate before the bankruptcy court in the Seventh Circuit. *See In re* Aearo Techs. LLC, No. 22-02890, 2023 WL 3938436, at *22 (Bankr. S.D. Ind. June 9, 2023).

settlements, the elusive end to the dispute arc.[138] Diagram 1 below captures the process.



Modern mass torts take parties through an extremely public and taxing ordeal over the course of many years. This fact is enough to keep most actors away.[139] But these cases still

138 *See infra* Diagram 1.

139 Financiers are extremely active at this stage in a case trajectory as well, providing additional funding to plaintiffs' firms, buying up corporate debt and

produce unparalleled returns, creating a premium that is split among a small pool of attorneys. This premium—in addition to other factors explored further in Part II—has attracted the attention of third-party litigation finance.

C. Third-Party Litigation Finance and Opaque Capital

The resource demands of modern mass-tort cases are staggering and only a few law firms have the financial wherewithal to run this gauntlet on their own. In the last few years, litigation financers have accessed the mass-torts ecosystem by offering resource-deficient firms a golden ticket to enter the litigation labyrinth. In many respects, these actors are leveling the playing field, but this group is not a monolith. Hidden amongst them is a new breed of financier, determined to dictate outcomes in ways few could have foreseen.

1. *The Traditional Formulation of Litigation Finance*

Litigation finance began in Australia in the 1990s.[140] Australia prohibits contingency fees for attorneys but allows contingent returns for investors.[141] The litigation-finance diaspora quickly spread to Europe before reaching the United States, which is now the center of the litigation-finance universe.[142] Third-party litigation finance is growing rapidly.[143] The practice is a ubiquitous feature of litigation around the world with

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equity, and, in some cases, attempting to acquire the corporate debtor. *See* Parikh, *supra* note 25, at 45 ("Centerbridge [Partners] and Apollo funded mass-tort litigation against PG&E. As the bankruptcy case unfolded, Centerbridge accumulated 1.6% of PG&E stock, and Apollo purchased more than $500 million in PG&E debt. Both also held insurance claims against PG&E." (footnote omitted)).

140 *See* JOHN BEISNER, JESSICA MILLER & GARY RUBIN, U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES 9 (2009), https://instituteforlegalreform.com/wp-content/uploads/media/thirdpartylitigationfinancing.pdf [https://perma.cc/SRR7-G4F4] ("Third-party financing originally developed in Australia in the 1990s for use in insolvency litigation.").

141 *See id.*

142 In 2020, approximately $8.8 billion of the $17 billion invested into litigation funding globally involved litigation in the United States. *See* IRINA FAN ET AL., SWISS RE INST., U.S. LITIGATION FUNDING AND SOCIAL INFLATION: THE RISING COSTS OF LEGAL LIABILITY 2–3 (2021), https://www.swissre.com/dam/jcr:7435a896-5f4b-463b-a1e6-7d4ec17db556/swiss-re-institute-expertise-publication-us-litigation-funding-and-social-inflation-december2021.pdf [https://perma.cc/FE7L-Y6HE].

143 *See* Emily R. Siegel, *Litigation Funders Set to Prosper in Proposed NY Rule Change*, BLOOMBERG L. (Apr. 10, 2024), https://news.bloomberglaw.com/business-and-practice/litigation-funders-set-to-prosper-in-proposed-ny-rule-change [https://perma.cc/Z54M-7F6B].

over $17 billion of third-party capital flowing to litigants and the professionals that represent them.[144]

Litigation finance relationships exist in various permutations and derivations, but all begin with the premise that a cause of action is property.[145] Even valuable property can represent an illiquid asset, the monetization of which can be extremely protracted and resource intensive. Third-party financiers are arguably the lenders and investors willing to unlock these funds.[146]

Litigation financiers have historically played the role of lender in either commercial[147] or consumer[148] disputes. Financiers typically provide nonrecourse[149] loans to individual and corporate plaintiffs as well as law firms, receiving a fixed payment upon a successful judgment or settlement.[150] These loans are customarily made to fund one case but may be secured by

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144 *See supra* note 142.

145 *See* Parikh, *supra* note 67, at 488 n.325 ("The Supreme Court's constitutional property doctrine establishes that a cause of action is a 'property interest' of which a claimant cannot be deprived without due process of law."). Settlement is merely selling this asset to the defendant.

146 *See* Bedi & Marra, *supra* note 22, at 571–72.

147 The commercial sphere is populated by suits involving multimillion-dollar-damage claims between sophisticated business entities. Litigation finance almost exclusively partners with corporate plaintiffs who have the financial wherewithal to pay litigation expenses but opt for litigation finance to (i) avoid expense spikes in particular quarters, (ii) share or spread risk, and (iii) access preeminent legal counsel with whom litigation financiers may enjoy strong relationships. *See id.* at 578–80.

148 The consumer sphere is populated by suits generally involving financially unstable plaintiffs—typically an individual plaintiff in a minor personal injury or divorce proceeding. The upfront funding is used to cover basic financial support and living expenses during case pendency. Avraham, Baker & Sebok, *supra* note 23, at 151.

149 A nonrecourse loan is one that is generally understood to allow the financier to recover only its initial investment and other fees and interest from a successful recovery or judgment in the plaintiff's favor. *See* Mariel Rodak, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503, 506–07 (2006). But there is no binding universal definition of this term, the contours of which are ultimately established by the applicable capital provision agreement. Some financiers secure personal guarantees from law firm borrowers, thereby changing the nonrecourse nature of the loan.

150 *See* AM. BAR ASS'N COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 6–7 (2012) [hereinafter ABA COMM'N], https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf [https://perma.cc/9R5B-TPRM] ("In a typical transaction, the [financier] agrees to pay a given amount of money to the plaintiff . . . in exchange for a promise by the plaintiff to pay the [financier] that amount plus an additional amount (sometimes referred to as a 'fee') specified in the contract in the event of a positive outcome in the suit . . . ."); *see also* Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1301 (2012) (explaining that there are three main types of

a portfolio of cases where a law firm is the borrower.[151] In litigation that offers the potential for a windfall recovery—including high-stakes intellectual property and personal-injury disputes—a financier may extend capital and receive the right to an "equity-like participation" in litigation proceeds upon resolution.[152]

Investment dollars from financiers can go to buying claims from aggregators, retaining expert witnesses, or taking depositions; in some cases, financiers provide bridge financing or "working capital" for individual claimants who need access to capital to make it to the settlement date.[153] The funded party can be a claimant or the law firm representing the claimant.[154] Financiers are compensated through various structures. The applicable agreement is called the capital-provision agreement (CPA). Typical frameworks provide for recovery based on (i) some multiple of the amount of capital provided, (ii) a percentage of the recovery in the underlying claim or total case proceeds, or (iii) a time-based return where borrowing costs fluctuate over time to capture the time value of the financier's investment.[155] The CPA could also simply provide that the financier receives the highest amount realized after these metrics are applied. Financing is generally a hybrid model with the financier agreeing to pay up to half of the budget for attorneys' fees and the plaintiffs' firm shouldering the remaining half in exchange for participating in case proceeds.[156]

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litigation finance relationships: "consumer legal funding, loans to plaintiffs' law firms, and commercial dispute funding").

151 *See* Burch, *supra* note 150, at 1302.

152 *See* FAN ET AL., *supra* note 142, at 5.

153 Allen Fagin & Ralph Sutton, *Tips for Negotiating Litigation Funding Agreements*, VALIDITY (Apr. 4, 2022), https://www.validityfinance.com/news/thought-leadership/2022-04-04-tips-for-negotiating-lfas [https://perma.cc/6BFB-VJM9].

154 *See id.*

155 *See* Brian Fitzpatrick & William Marra, *Agency Costs in Third-Party Litigation Finance Reconsidered*, 25.2 THEORETICAL INQUIRIES L. 1, 7 (2025). One issue is that these terms provide strong incentives to settle cases before the tipping point where a reasonable settlement fails to produce the expected return for attorneys and claimants. At the same time, financiers don't want attorneys prematurely settling a case for materially diminished value. *See id.* at 11.

156 *See id.* at 8–9. There is also portfolio financing where a funder can invest in multiple cases in which a plaintiffs' firm is involved. Portfolio financing offers diversification; financing is cross-collateralized and the performance is presumably uncorrelated. For example, sexual abuse claims in Boy Scouts of America presumably resolved independently of product liability claims in 3M's Combat Arms MDL.

2. *Benefits and Risks of Litigation Finance*

Litigation finance offers a number of benefits to litigants and the integrity of the judicial process. Primarily, litigation finance offers access to justice by helping level the playing field between plaintiffs and corporate defendants, providing plaintiffs and their counsel the resources necessary to see a case to judgment. Litigation finance can be equated to venture capital for individuals battling corporate behemoths with robust insurance policies.[157] Financiers also provide optionality. Historically, plaintiffs could sell their causes of action to only the defendant. Financiers address monopsony in the litigation arena.[158]

In lucrative cases with protracted resolution timelines, third-party funding is attractive to individual plaintiffs as a way to pay down debts and other obligations or to receive an advance on a strong cause of action. Various consumer rights are implicated in these types of lending arrangements, especially where a plaintiff's debt obligations increase over time and the financier enjoys recourse against the individual plaintiff in the event the case fails to produce the necessary proceeds to address the debt. Corporate plaintiffs involved in business-to-business disputes have been attracted to litigation finance to avoid daunting litigation expenses and to access preeminent legal counsel with whom financiers may enjoy relationships. Financiers also allow corporate plaintiffs to monetize unrealized claims, especially at a time when disputes may be limiting access to capital or otherwise dissuading investment. In some cases, the practice is particularly beneficial for these parties because funding is nonrecourse, and the capital received is booked as revenue, not debt.[159] And if a funder is paying counsel, the business is relieved of having to book those payments as expenses, conceivably boosting its bottom line.[160]

On the other hand, litigation financiers have been secretive and this has fueled a fair amount of speculation about the practice's deleterious effects. Critics argue that financiers do not seem interested in furthering access to justice or any particular

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157 *See* Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 480 (2012).

158 *See generally* Fitzpatrick & Marra, *supra* note 155.

159 *See* David J. Kerstein & Wendie Childress, *Mechanics of Litigation Finance*, BLOOMBERG L. (Nov. 2019), https://www.bloomberglaw.com/external/document/X2J0HBOG000000/litigation-overview-mechanics-of-litigation-finance [https://perma.cc/HSQ5-YTVE].

160 *See id.*

cause; they are merely investors seeking returns that will exceed those from other investments.[161] The most troubling narrative that has emerged is that financiers can be a significant obstacle to settlement. In recent antitrust litigation involving Sysco, U.S. Magistrate Judge Docherty denied the request of Burford Capital—a third-party litigation funder—to substitute in the litigation one of its subsidiaries for the plaintiff Sysco. In denying this request, Judge Docherty cast aspersions on Burford's motivations:

> Burford wants the litigation to continue so it can realize two sorts of benefit. First, Burford apparently hopes to extract larger settlement payments . . . . Second, . . . Burford is trying to prevent [the settlements that have been proposed] because . . . if they go through, [the lower settlement numbers] will set benchmarks for other settlements with other defendants.[162]

Another fear is that, by turning a cause of action into a commodity, litigation finance will drive more nonmeritorious claims into an already overwhelmed judiciary.[163] The potential erosion of the attorney-client relationship is also a concern. Financiers invest funds on behalf of private clients and owe duties to these investors to maximize returns. Consequently, as witnessed in other markets, these firms intervene frequently and aggressively in managing their investments.[164] This behavior is uncontroversial in private business transactions between sophisticated parties but creates complexity in the litigation triad involving clients, attorneys, and financiers. The interests of financiers and clients diverge in many cases and, when they do, the fear is that the financier will eclipse the client by exerting contractual and relational leverage over attorneys.[165]

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161 *See* European Parliament Resolution of 13 September 2022 with Recommendations to the Commission on Responsible Private Funding of Litigation (2020/2130(INL)), 2023 O.J. (C 125) 1, 4 [hereinafter European Parliament Resolution] ("[E]mpirical data show that litigation funders most often select cases that represent the best potential returns, and would not invest in cases they regard as too risky or not profitable enough . . . ." (footnote omitted)).

162 *In re* Pork Antitrust Litig., No. 18-cv-1776, 2024 WL 511890, at *7 (D. Minn. Feb. 9, 2024).

163 *See* Siegel & Basu, *supra* note 14 ("Demand for [lead generators'] services has grown in part because of a surge in litigation funding available to law firms.").

164 *See* Parikh, *supra* note 28, at 1941–48 (describing the behavior of private equity firms and multi-strategy hedge funds in distressed debt markets).

165 *See Unsuitable Litigation: Oversight of Third-Party Litigation Funding: Hearing Before the H. Comm. on Oversight & Accountability*, 118th Cong. (2023) [hereinafter *Unsuitable Litigation*] (written testimony of Maya Steinitz, Professor, Boston Univ. L.

The idea of anonymity attracted many firms to litigation finance, but that privilege has fueled growing suspicion about financiers and their objectives.[166] Based on my research, these fears appear to be unfounded for the majority of financiers. These firms may be reluctant to offer full transparency, but this reluctance stems from a fear of giving adversaries a competitive advantage that could undermine case recoveries, as opposed to an attempt to obfuscate malfeasance. Unfortunately, the firms that are the face of litigation finance have received the brunt of criticism and been forced to publicly defend the industry they lead. As explored below, these spotlighted battles have allowed a more sinister group of financiers to operate in the shadows.

3. *Opaque Capital*

As noted above, litigation finance presents unique characteristics based on the specific area in which it is engaged. Consequently, the potential risks vary as we move from the commercial sphere involving business-to-business litigation to the consumer sphere where financiers fund personal injury lawyers or individual plaintiffs in relatively modest causes of action.

The mass-torts ecosystem represents the third sphere, which exists as a hybrid space that amplifies the problems seen in the other two spheres. Mass torts are a hybrid because—just like the commercial sphere—they have a host of aggressive parties where a staggering amount of funds are at stake. And, just like the consumer sphere, they involve unsophisticated individuals who have experienced significant individual harm and face exploitation. These complexities couple

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Sch.), https://docs.house.gov/meetings/GO/GO00/20230913/116346/HHRG-118-GO00-Wstate-SteinitzM-20230913.pdf [https://perma.cc/64NB-SDQR] ("The primary worry here is that funders and lawyers often have ongoing relationships and that the lawyers may be tempted to prefer the funder's interests over those of the client when such conflicts arise."). We see this especially in the mass-tort context. *See* Susan D. Carle, *The Settlement Problem in Public Interest Law*, 29 STAN. L. & POL'Y REV. 1, 36 n.102 (2018) ("[W]hen the third-party funder [i]s a repeat player on whom the lawyer relie[s] for continuing business . . . the lawyer might face an impermissible conflict of interest . . . ."); *see also* Parikh, *supra* note 28, at 1946 n.111 (explaining the idea of relational leverage in the distressed debt market).

166 Some have argued that it is possible for hostile foreign interests to invest in litigation as a means to undermine the U.S. economy or otherwise avoid sanctions. The risk seems remote but far more realistic in recent years. *See* Emily R. Siegel & John Holland, *Putin's Billionaires Dodge Sanctions by Financing Lawsuits*, BLOOMBERG L. (Mar. 28, 2024), https://news.bloomberglaw.com/litigation-finance/putins-billionaires-sidestep-sanctions-by-financing-lawsuits [https://perma.cc/6YB4-6V8T].

with the intractable problems that characterize the largest aggregate litigation cases in the world.

Opaque capital is the new breed of financier in mass torts.[167] These financiers are drawn to mass-tort litigation for a variety of reasons, including the wild premium these cases offer and the opportunity for clandestine maneuvering. Opaque capital could passively invest in case portfolios through law firms, but these sophisticated parties understand that their chase for yield requires direct engagement in high-stakes disputes.

As explored in detail in Part III, *infra*, opaque capital's engagement is unique because it is willing to work with a variety of professionals to dictate outcomes. As witnessed in distressed debt markets, these parties are adept at identifying arbitrage opportunities and exploiting these opportunities mercilessly to secure premium recoveries.[168] Opaque capital is willing to partner with junior firms to access the mass-torts ecosystem. Once inside, these financiers engage intermediaries who contact potential claimants and attempt to create and enhance claims.[169] Opaque capital is also willing to extend financing directly to claimants in exchange for various privileges, including the right to veto settlement offers. And these financiers fund plaintiffs' attorneys, case-acquisition firms, and claim aggregators to control each module. By exerting leverage at various process points, opaque capital is pursuing a model that it has perfected in other markets[170] and presaging a new one that commentators have overlooked.[171]

I do not argue that these tactics are currently widespread. Instead, I argue opaque capital's objectives are clear based on past behavior. Extrapolating from this history offers a view of

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167 *See* Parikh, *supra* note 25, at 44; *see also* INS. INFO. INST., WHAT IS THIRD-PARTY LITIGATION FUNDING AND HOW DOES IT AFFECT INSURANCE PRICING AND AFFORDABILITY? 3 (2022), https://www.iii.org/sites/default/files/docs/pdf/triple_i_third_party_litigation_wp_07272022.pdf [https://perma.cc/FA9F-B9V8] ("Banks and traditional lenders do not see a stake in a potentially valuable lawsuit . . . because there is an inherent risk of capital loss . . . . Enter private equity, hedge funds, . . . certain trusts, and other deep-pocketed investors that can afford to take on this risk. In exchange, these investors command very high rewards.").

168 *See* Parikh, *supra* note 28, at 1948.

169 *See infra* Part III.

170 *See* Parikh, *supra* note 28, at 1948 ("To balance out the obvious risks that come with over-leveraged companies, private equity sponsors have been subtly modifying debt documents to eliminate restrictive covenants and open loopholes . . . .").

171 *See infra* Part III (explaining the vertical-integration risk in the mass-torts ecosystem).

litigation finance's future.[172] Part II, *infra*, presents the factors attracting opaque capital.

II
The Allure of Mass-Tort Financing

Before exploring the allure of mass-tort cases as an investment class, it is necessary to understand how the space is conceptualized by the most influential actors. Financiers view personal-injury mass torts as asset sales, not litigation.[173] This position is extremely controversial but would be foolish to disregard. Understanding these actors and the risks they pose is impossible without first attempting to understand their perspective and means of strategy development.

The etymology of the asset-sale paradigm is the fact that a cause of action is property,[174] and settlement is merely selling this property to the defendant at an agreed-upon price. There are various settlement platforms that can be used to facilitate this sale, but they involve the judiciary or exist in the judiciary's shadow. The threat of pursuing a dispute all the way to jury verdict is a strong one in stand-alone, personal injury cases, especially where seasoned plaintiffs' attorneys have impressive success rates, and boards of directors for corporate defendants may be more terrified of the legal fees of their own outside counsel than whatever judgment the plaintiff may be able to secure. Outside of the mass-torts sphere, plaintiffs' attorneys are able to guide and control a personal-injury case because an attorney's courtroom prowess directly affects case outcomes. A masterful litigator can often force settlement by threatening courtroom wizardry. But the sheer volume of claims in a mass-tort dispute precludes attorneys from litigating more than a

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172 *See, e.g.*, *Johnson & Johnson Announces Plan by its Subsidiary, LLT Management LLC, to Resolve All Current and Future Ovarian Cancer Talc Claims Through a Consensual "Prepackaged" Reorganization*, Johnson & Johnson (May 1, 2024), https://www.jnj.com/media-center/press-releases/johnson-johnson-announces-plan-by-its-subsidiary-llt-management-llc-to-resolve-all-current-and-future-ovarian-cancer-talc-claims-through-a-consensual-prepackaged-reorganization [https://perma.cc/ZTS7-U9UD] ("The talc claims asserted against the Company exemplify the egregious impact on U.S. businesses from meritless litigation and extreme judgments obtained by the plaintiffs' bar through . . . the unregulated and surreptitious financing of product litigation by financial institutions, including private equity and sovereign wealth funds . . . .")(internal quotation marks omitted).

173 Parikh, *supra* note 25, at 40; *see also* J. Maria Glover, *The Civil Justice Business*, 101 N.Y.U. L. Rev. (forthcoming 2026).

174 *See* Parikh, *supra* note 67, at 488 n.325 ("The Supreme Court's constitutional property doctrine establishes that a cause of action is a 'property interest' of which a claimant cannot be deprived without due process of law.").

mere handful of individual cases. And once a critical mass of claims lands in federal courts, the matter will invariably become part of multidistrict litigation. As noted in Part I, *supra*, MDL is designed for procedural streamlining but, in reality, MDLs are captive settlement processes. For example, the 3M Combat Arms MDL had close to 275,000 claims at its peak. At the time of settlement in August 2023, only sixteen cases had actually been tried, even though complaints had been pending in federal court for over five years.[175] Plaintiffs' attorneys involved in this case certainly provided meaningful legal services, but the chance of actually dragging the corporate defendant into court to try a case was remote.

There is a strong basis to argue that a supermajority of attorneys in the mass-torts ecosystem are asset managers, not litigators. They share some characteristics with stereotypical attorneys in so far as they occasionally appear in court, write briefs, and make legal arguments. Their legal skills, however, may have little to no impact on the outcome of the asset sale.[176] These attorneys' primary job is to identify potentially lucrative cases, marshal claims, locate experts who will support the claims, and tout the value of the asset to journalists and at conferences.[177] Kingdoms are built and perish based on claim inventory.[178] Once a dispute becomes part of an MDL, some key attorneys may start performing activities that litigators normally do, but the vast majority of attorneys are merely managing their assets and waiting to sell. These bizarre phenomena bolster a type of Wall Street paternalism, which holds that attorneys should focus on being attorneys and financiers and other business experts should make decisions about how to maximize value.

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175 *See* Mari Gaines, *3M Earplug Lawsuit Settled: Everything You Need to Know*, FORBES (Oct. 18, 2023), https://www.forbes.com/advisor/legal/product-liability/3m-earplug-lawsuit [https://perma.cc/VFR4-Y524].

176 *See* Task Force on Contingent Fees, *supra* note 64, at 109–10 (explaining that plaintiffs' steering committee members are tasked with looking "after the big picture: mapping the overarching discovery, trial, and settlement strategies and coordinating the implementation of those strategies," while other attorneys are tasked with handling the issues unique to their individual clients, including answering interrogatories (quoting *In re* Nineteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litig., 982 F.2d 603, 605 (1st Cir. 1992))).

177 The American Bar Association has stated that "[t]hese roles are not . . . traditional lawyer functions." *Id.* at 108.

178 *See* Indap, *supra* note 27; Engstrom & Venook, *supra* note 115, at 1634 (explaining that rewards in mass torts "hinge significantly on claim volume").

Mass torts are alluring to opaque capital because they look familiar. Successful outcomes rely on many of the same factors that are evident in high-stakes, private business transactions. These cases are not an oral argument before an evenly divided court or unpredictable jury. These cases involve leveraging a position until a counterparty is broken and forced to concede. Attorneys may be competent at this type of battle, but opaque capital—which has honed its playbook in the world of distressed debt investing—is the alpha.

A. Premium and the Inevitability Doctrine

As detailed in subpart I.B, *supra*, the investment necessary to incubate and sustain a modern, mass-tort case can be daunting.[179] But the potential return offers a premium unavailable in almost any other asset class,[180] driving increasing investment dollars into the space.[181] These cases offer significant returns, even when factoring in the risks of failure.[182] Historically, a small pool of established law firms have benefited from these capital demands and various other barriers to entry to create a fiefdom where they split the spoils.[183] And these spoils have steadily grown over time. The United States has begun placing a greater emphasis on personal and corporate accountability,[184] causing judgments in personal-injury cases to increase dramatically.[185] The trend has incentivized many financiers to move away from merely lending money to plaintiffs and law firms to an arrangement where they participate in the ultimate recovery in the case. I characterize this as a migration from a "debt position" to an "equity position."

An equity position in these cases offers the promise of staggering returns. Some argue that funders hope to realize

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179 *See* Task Force on Contingent Fees, *supra* note 64, at 116–20 (detailing the staggering expenses plaintiffs' firms incurred in various cases).

180 *See id.* at 114.

181 *See* Siegel & Basu, *supra* note 14.

182 *See* Avraham, Baker & Sebok *supra* note 23, at 174.

183 *See* Task Force on Contingent Fees, *supra* note 64, at 114 ("[Plaintiffs' attorneys] who are going to enter this market will have to be well capitalized to attract and support the cases . . . . [H]igh up-front expenses will be a barrier to entry for new lawyers who might otherwise compete for clients . . . .").

184 *See* Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. U. L. REV. 425, 449–50 (2022).

185 *See* Goldberg, *supra* note 74.

a return of approximately four times their initial investment.[186] Naturally, mass torts can take years to reach resolution. But even with a protracted five-year timeline, the annual rate of return can be between 20–30%.[187] In a recent settlement with various defendants who had been involved in the distribution of prescription opioids, the common-benefit fund was $2.1 billion.[188] Plaintiffs' firm Motley Rice received $396 million in common-benefit fees alone.[189] These funds go entirely to these firms and, though they may be paid over the course of years, the revenue stream can be securitized so that the firms receive funds upfront immediately.[190] And this distribution does not account for contingency fees or any other fees that the firms have arranged. Financiers also enjoy optionality in managing their position. A financier that funds potentially lucrative litigation has the option of (a) waiting for settlement, (b) syndicating the litigation by allowing other investors to participate,[191] or (c) selling off its position in the secondary market. As the secondary

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186 *See* Katharine Gemmell, *Here's How Hedge Funds Are Speculating on Justice*, BLOOMBERG (Aug. 27, 2022), https://www.bloomberg.com/news/articles/2022-08-27/how-hedge-funds-are-speculating-on-justice-quicktake [https://perma.cc/QFN7-U2S4].

187 Investment strategies are bespoke, but many financiers look for actions that can yield ten times their initial investment. In these cases, the financiers will seek approximately 30% of the damages recovered. *See id.* For example, imagine that a case has the potential of a $1 billion settlement. An aggressive financier provides capital to three plaintiffs' law firms and a significant block of claimants. The applicable capital provision agreements provide that the financier's recovery is limited to 75% of the ultimate recovery realized by these groups. The aggregate investment is $100 million. The case does in fact settle for $1 billion. The law firms' contingency fees approximate $200 million and the financier receives $150 million. The claimant block also receives $200 million and the financier receives an additional $150 million, making the aggregate recovery $300 million, a 200% return. This hybrid arrangement is still extremely attractive to the law firm. The attorneys on the case were invariably paid for at least a portion of their billable work out of the financier's initial $100 million investment. The law firm retained a small equity piece and participated in the ultimate recovery. The financier allowed the firm to hedge its position and potentially participate in other cases to reflect the law firm's risk appetite and other preferences. Claimants received funds upfront that allowed them to minimize risk and begin addressing their expenses.

188 *See* Hailey Konnath, *Motley Rice Allocated Biggest Share of $2B Opioid Fees*, LAW360 (June 7, 2024), https://www.law360.com/pulse/articles/1845770/motley-rice-allocated-biggest-share-of-2b-opioid-fees [https://perma.cc/AQ7K-RPLV].

189 *See id.*

190 *See* Emily R. Siegel, *Opioids Lawyers Offer Investors Piece of $100 Million-Plus Win*, BLOOMBERG L. (June 17, 2024), https://news.bloomberglaw.com/business-and-practice/opioids-lawyers-offer-investors-piece-of-100-million-plus-win [https://perma.cc/8ALK-C5CH] ("Securitization is an increasingly common tool in litigation finance . . . .").

191 *See* Steinitz, *supra* note 157, at 470–71 (describing Chevron/Ecuador litigation, which provides a template).

market matures, litigation financiers will be able to easily exit their positions. Further, litigation finance is a unique addition to an investor's portfolio because it is uncorrelated with other asset classes[192]—such as equities—and generally unaffected by results in other mass-tort cases; recoveries are also insulated from shifts in the U.S. economy, inflationary pressures, and global and political dynamics.

Investment premium can be attributed, at least in part, to the fact that resource-rich corporate entities are implicated in these cases. Mass-tort defendants are financial behemoths, and insurance coverage does not have the same limiting effect in these cases. In a traditional personal injury litigation, plaintiffs' attorneys must shape "the tort claim to fit the insurance."[193] In modern mass torts, attorneys disregard insurance because "[t]he defendants are well-heeled [and attorneys are looking at the defendant's] balance sheet, not their insurance."[194] There are exceptions, including cases involving asbestos and sexual abuse claims. But aside from these cases, corporate defendants tend to be extremely profitable. The balance sheet drives settlement. Attorneys are not forced to tailor claims and demands to policies and coverage limits. Further, since defendants frequently settle with their own money, at least one vocal—often intractable—party is removed from the negotiations.[195]

The expected return in these cases is mesmerizing, but there are still significant risks and the risk-adjusted rate of return is more difficult to assess. This fact could deter investment, but opaque capital is comfortable tolerating uncertainty and waiting extended periods of time to realize oversized returns. These parties are willing to engage in chaotic processes,

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192 *See* Baker, *supra* note 35, at 1590 ("Litigation funders claim, and managers of pools of investable assets apparently believe, that the expected returns of litigation funding are sufficiently uncorrelated with other asset classes . . . .").

193 *Id.* at 1573.

194 *Id.* at 1575.

195 *See id.* at 1584. What invariably happens in many cases is that plaintiffs settle with the corporate defendant who then attempts to access applicable insurance policies (assuming any are available) through arbitration proceedings as outlined in the policy. *See id.* at 1576. This has presented unique issues for insurers in many bankruptcy cases. Debtors have argued successfully that this "insurance neutral" model precludes insurance companies from having standing to challenge a debtor's plan of reorganization in bankruptcy. The consequence is that insurers have been stranded on the sidelines in many recent cases while debtors propose trust procedures that seem to lack meaningful fraud prevention devices. The Supreme Court recently ruled that insurers did have standing to object in these cases. *See* Truck Ins. Exch. v. Kaiser Gypsum Co., 144 S. Ct. 1414, 1420 (2024).

managing exposure by intervening as necessary to bolster outcomes.[196] Judicial proceedings involving juries are extremely unpredictable. The financier, however, is not betting on the outcome of one unpredictable event; rather, she is betting on the settlement pressure of thousands upon thousands of claims. The law of large numbers[197] appears to provide the basis for this approach, but the theorem is a minor actor here. Financiers are not taking a position in multiple claims in order to better approximate the expected return in a given case or otherwise hedge their position. In the mass-tort ecosystem, claim volume itself is the pursuit and a means to ensure success.[198] The litigation labyrinth is daunting, but a party with the resources to stay the course knows that the corporate defendant will invariably have to concede. I refer to this as the "inevitability doctrine", and it works at two levels. First, a critical mass of claims creates a high probability of a lucrative settlement. Second, a case that survives *Daubert* offers a windfall.[199]

B. Attractive Process Features

Customary dispute resolution through the federal judiciary is an abhorrent prospect to most, but mass-tort cases exhibit attractive process features. Primarily, financiers exist in a regulatory vacuum. There are no material laws or regulations unique to mass-tort cases policing their behavior. And there are few market norms. Mass-tort financing is relatively new, which means that custom and practice is fluid. International organizations for litigation financiers impose codes of conduct on members, but the vast majority of funders—especially aggressive U.S. financiers—have not joined these organizations.[200]

Financiers enjoy the ability to mold the space through private contracts that contain financier-favorable terms and relational leverage. Without regulation, dynamics are dictated

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196 *See* Parikh, *supra* note 28, at 1941–48 (describing the behavior of private equity firms in distressed debt markets).

197 The law of large numbers in this context holds that as the number of random causes of action in a given case are adjudicated, the average recovery approaches the expected recovery.

198 *See* Mari, *supra* note 54 ("One of the surest paths to a handsome profit for a mass tort is for it to be, well, massive."); Engstrom, *supra* note 21, at 31 ("[O]nce the mass tort is in full swing, . . . rewards depend largely on claim volume—meaning, bluntly, the more the merrier.").

199 *See* Siegel & Basu, *supra* note 19 ("[Mass-torts financing is] arguably more attractive in that there's less risk and less volatility in that return stream . . . .").

200 *See* European Parliament Resolution, *supra* note 161, at 5.

by the party with superior negotiating leverage, which will invariably be the financier. Junior firms amplify the potential opportunity. Junior firms are less established firms that lack the capital necessary to play a meaningful role in a prominent mass-torts case. Historically, these firms were excluded from the mass-torts ecosystem.[201] Financiers allow these firms to participate but will be able to impose the terms of the relationship. Financier freedom is coupled with the promise of anonymity.[202] "There is no nationwide requirement to disclose litigation funding agreements to courts or opposing parties in U.S. federal litigation," and only a few federal courts such as the District of New Jersey, along with a few individual judges through standing orders, require acknowledgement of a funding relationship.[203] And these acknowledgements do not necessary lead to disclosure of the financier involved.

Licensed attorneys are required to exercise independent professional judgment and owe a general duty of loyalty to their clients.[204] The lack of guardrails in the mass-torts ecosystem can erode the attorney-client relationship and create a terrible principal-agent problem. This is another benefit for the financier. Mass-tort victims are the principals in these disputes; they are the key parties for whom the professionals act and owe fiduciary obligations. In reality, claimants lack the means to monitor attorneys and financiers.[205] In most cases, the claimants

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201 *See* The Econ. of Everyday Things, *supra* note 42.

202 Based on my review of private correspondence, I have determined that financiers prefer to stay out of the spotlight.

203 U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105210, THIRD-PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA, AND TRENDS 26–28 (2022), https://www.gao.gov/assets/gao-23-105210.pdf [https://perma.cc/U765-DFMY]. Chief Judge Connolly, U.S. District Court Judge for the District of Delaware, has a standing order that requires all parties appearing before him to disclose any third-party funding they receive. *See infra* note 344. Judges also have the inherent power to order in-camera disclosures as part of settlement approval, *see* Emily R. Siegel, *3M Lawsuit Investors Ordered to Be Unmasked Amid $6 Billion Deal*, BLOOMBERG L. (Aug. 30, 2023), https://news.bloomberglaw.com/business-and-practice/3m-lawsuit-investors-ordered-to-be-unmasked-amid-6-billion-deal [https://perma.cc/5LGW-X2JH], but they rarely do so, *see* Parikh, *supra* note 25, at 35 (explaining that in the PG&E bankruptcy case, "the court concluded that the prepetition funding arrangement was not relevant").

204 *See* MODEL RULES OF PRO. CONDUCT rs. 1.7, 5.4 (AM. BAR ASS'N 2023).

205 *See* Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835, 1844 (2022) ("67% [of respondents] did not feel like they understood what was happening with their lawsuit [and attorneys] seemed to communicate with their clients only when it was time to settle . . . .").

have never spoken to their attorneys[206] and know little about the proceedings affecting their claim.[207] Victims are the public face of the dispute, creating a sympathetic patina but play no role in actually guiding the litigation. Trapped behind a veil of imposed ignorance, clients are unable to monitor and police their agents. The "invisible-principal" dynamic coupled with a pliable plaintiffs' firm offers the overly aggressive financier the ability to control cases.[208]

III
Opaque Capital's Governing Dynamics

Opaque capital is enjoying a burgeoning influence in the mass-torts ecosystem, but the actual impact and aftershocks are difficult to assess. As noted above, I do not argue that opaque capital's tactics are currently widespread. Rather, opaque capital's objectives are clear based on past behavior. Judicial or legislative intervention could be necessary to avoid distortion, but policymakers need to first understand the actor and its governing dynamics. As explored below, I argue that opaque capital's unique brand of chaos will manifest most clearly at two distinct points in a dispute's trajectory.

A. Creation

In general, product-liability litigation, an attorney considering representing an alleged victim on a contingency basis must be able to confirm two preliminary matters: the individual used the product in question and she suffers the injury alleged. These gatekeeper issues would customarily be assessed in the initial screening. The relatively high probability of the defendant and the court system discovering a nonmeritorious claim compels vigilance. An attorney working on a contingency basis bears the risk of loss and internalizing this risk prompts investigation.

Customary incentives mutate in mass torts. Nonmeritorious claims exist alongside meritorious ones in the claim inventory of

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206 *See id.* ("I've actually never spoken to any of the attorneys in [the law firm representing me], only the legal aide.").

207 *See id.*

208 There is an argument that financiers could actually act on behalf of clients and monitor plaintiffs' attorneys, *see* Burch, *supra* note 150, at 1315, but I suspect opaque capital will see the governance vacuum as an opportunity to pursue purely self-serving measures.

any large-scale case.[209] In cases with thousands of claims, false positives[210] are unavoidable and widely accepted, which presents an opportunity.

One of the key arguments this Article advances is that an unscrupulous financier can seize—and in some cases even create—a lucrative position in a mass-torts case. This idea provides the foundational premise for my theory, the Alchemist's Inversion. At a high level of abstraction, alchemy is the process of transforming an item undervalued by the market into one that is prized. Many claims in a mass-tort dispute are noncompensable and many others are entirely nonmeritorious. If litigated, there is a high probability that causes of actions based on these claims would be rejected by the judicial system. These are negative value claims because the cost of pursuing the claim is greater than any recovery that could be realized from the pursuit. But opaque capital understands that if these claims are bundled with meritorious claims, the resulting critical mass could force a defendant to pay a premium to settle *all* claims. This is the basic premise of the Alchemist's Inversion. As explored below, the term describes a litigation financier's use of unethical and potentially illegal tactics to create, enhance, and marshal apparently low-value claims with the hope of turning them into gold.

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209 Engstrom, *supra* note 21, at 24 ("Generally, in mass-tort cases, some injury victims will have suffered a bona fide impairment . . . . But, sensing a payday, other individuals (no one knows how many) are also apt to be sucked in, typically claiming that they have sustained an injury that is, in fact, either nonexistent, grossly exaggerated, or unrelated to the instant defendant's conduct."); *see also* Engstrom & Venook, *supra* note 115, at 1631–33 (listing several recent cases that appeared to contain large numbers of nonmeritorious claims, including *Vioxx*, *Deepwater Horizon*, *Fosamax*, *Digitek*, *Abilify*, *Zostavax*, and *3M*). We saw this in the Boy Scouts of America litigation. The heinous acts perpetuated by the organization's volunteers and administrators over the course of numerous decades are undeniable. But the means to accurately assess and verify claims were often lacking. *See, e.g.*, Boy Scouts Opening Brief, *supra* note 70, at 21–22 (explaining that the claims filed after a marketing blitz were much more difficult to assess because they (i) were based on incidents that allegedly occurred 50–60 years ago, (ii) made allegations that were generally unreliable, and (iii) involved claimants who had not previously reported abuse).

210 *See, e.g.*, NYU Sch. of L., *Theory of Aggregation: Class Actions, MDLs, Bankruptcies, and More*, YouTube, at 27:41–28:08 (Nov. 8, 2018), https://www.youtube.com/watch?v=vAwH6jpfdP4 [https://perma.cc/E9AC-SQMA] (the lead attorneys in the *Vioxx* settlement acknowledged that there were thousands of claims filed by individuals that never even took the drug, but that did not preclude an extremely lucrative settlement); *see also* Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 961 (1995) ("[M]ass tort actions attract, . . . and pay, a large number of claims that are insubstantial—or, in the words of one experienced plaintiffs' lawyer, 'junk.'").

1. *Nonmeritorious Claims and the Critical Mass Effect*

Subpart I.B, *supra*, detailed the various reasons that plaintiffs' attorneys in the mass-torts ecosystem are fixated on building claim inventory. Lucrative positions in a case are often awarded based on how many claimants an attorney represents. Further, a critical mass of claims puts pressure on defendants to settle but also brings public attention to the dispute. Pursuing nonmeritorious claims fuels these objectives, and the potential benefits of adding a nonmeritorious claim are greater than the costs for a variety of reasons.[211] Primarily, plaintiffs' attorneys who originally interview potential claimants bear the burden of vetting claims, but many refuse to fulfill this obligation[212] or are merely unable.[213] But the cost for this dereliction is unclear. Many MDL courts have exhibited a

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211 *See* Engstrom, *supra* note 21, at 31.

212 *See* Laws. for Civ. Just., *supra* note 69, at 3 ("Particularly when seeking leadership positions, plaintiffs' lawyers endeavor to gather as many names/claims as possible, as quickly as possible, often without regard to validity, forcing other lawyers competing for those positions to do the same. These large piles of uninvestigated names/claims are a self-perpetuating problem for the judge because, as the numbers grow, the lawyers have less and less ability to do their job."); Boy Scouts Opening Brief, *supra* note 70, at 20 ("Although the proof of claim forms required the signatory to attest to the trust of the claim, plaintiffs' attorneys elected to sign thousands of forms themselves, . . . at times without even bothering to review the forms, speak with their clients, or confirm their accuracy." (footnotes omitted) (citation omitted)); *see also* Rick Archer, *Judge Tosses 16K Talc Claimant Votes In Imerys Ch. 11*, Law360 (Oct. 13, 2021), https://www.law360.com/articles/1430779?copied=1 [https://perma.cc/895C-L5NC] ("U.S. Bankruptcy Judge Laurie Selber Silverstein said she could not ignore evidence that Bevan & Associates LPA had done 'zero diligence' to determine if any of the clients on whose behalf it submitted a 'master ballot' had been exposed to talc produced by Imerys and were entitled to vote on its Chapter 11 plan."); *In re* Imerys Talc Am., Inc., No. 19-10289, 2021 WL 4786093, at *11 (Bankr. D. Del. Oct. 13, 2021) ("What is crystal clear is that . . . prior to voting, Bevan & Associates performed zero diligence to discern which of its clients, if any, had been exposed to talc, much less to [the defendants'] talc . . . .").

213 Marketers and claim aggregators I spoke with described what I would call "dumb" fraud and "smart" fraud. Telephone Interviews with Litigation Finance Insiders, *supra* note 32. Dumb fraud involves a potential claimant who was not injured and perhaps did not even use the product in question but believes that they may be able to receive a distribution in a hasty settlement process. Claim aggregators may not actively screen these parties but there is a sense in the community that there is a high probability of screening such false victims with simple fact sheets and sixty-minute interviews. On the other end of the spectrum, it is extremely difficult to screen "smart" fraud, especially in sexual abuse cases. Some claimants have been coached and know exactly what to say to make it through a screening. In cases where medical records are necessary to substantiate a claim, the chance of screening false victims will ultimately improve, but that may not happen until years into a case. In many cases, medical records are not a prerequisite so "smart" fraud can ride through.

reluctance to rely on Rules 8–12 and 26(a)(1)(A) of the Federal Rules of Civil Procedure and impose prefiling due diligence in the same way they do in nonaggregate litigation.[214] And MDL and bankruptcy courts have historically been unable to filter claims in large mass-tort cases.[215] As a result, nonmeritorious claims hold the promise of a full recovery.[216] "[T]he bigger an MDL . . . gets, the less individualized scrutiny each claim will realistically receive, creating incentives for ever more claims to be filed" with the hope the case settles before true claim assessment occurs.[217] The critique is that MDL compels settlements that blindly include noncompensable and nonmeritorious claims.[218] Further, plaintiffs' attorneys receive litigation funding based on the number of compensable claims they represent in a given case. An event of default would occur if even a small portion of this inventory were determined to be nonmeritorious. In funding agreements I have reviewed, a breach of this

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214 *See* Laws. for Civ. Just., *supra* note 69, at 2. The implication appears to be that the burden should fall on plaintiffs' attorneys, but vetting a claim is extremely resource intensive. But without vetting, these cases are left with an odd presumption that claims are valid unless demonstrably false—which, of course, is converse to what the presumption is expected to be.

215 *See, e.g.*, M. Casey Rodgers, *Vetting the Wether: One Shepherd's View*, 89 UMKC L. Rev. 873, 873–74 (2021) ("MDLs have no built-in, uniform mechanism for efficiently filtering out [unsupportable] claims. . . . [T]he sheer volume of unsupportable claims in some MDLs can grossly distort the true merit and size of the litigation."); *see also In re* Fosamax Prods. Liab. Litig., No. 06-MD-1789, 2012 WL 5877418, at *3 (S.D.N.Y. Nov. 20, 2012) ("[T]he Court has reason to believe that spurious or meritless cases are lurking [because] more than 50% of the cases set for trial have been dismissed, and some 31% of cases that have been selected for discovery have been dismissed.").

216 *See, e.g.*, Bedi & Parikh, *supra* note 136, at 1603 (detailing infirmities in the trust-distribution process); *Unsuitable Litigation*, *supra* note 165 (written testimony of Maya Steinitz, Professor, Boston Univ. L. Sch.) ("[I]t is potentially profitable to bundle nonmeritorious cases together with meritorious ones to increase negotiation leverage . . . ."); Task Force on Contingent Fees, *supra* note 64, at 109 ("[B]undling is often the joining together of a few strong claims with a larger number of weak claims. . . . Presumably, the aggregate settlement is higher with bundling than without."); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. Rev. 469, 495 (1994) (explaining that many mass-tort attorneys choose to "suck up good and bad cases, hoping that they can settle in gross").

217 Engstrom, *supra* note 21, at 29; *see also* D. Theodore Rave, *Multidistrict Litigation and the Field of Dreams*, 101 Tex. L. Rev. 1595, 1602 (2023) ("If the MDL judge focuses on discovery and motions relating to common issues first, leaving individual issues until later in the litigation . . . then weak or meritless cases may go untested until late in the game. And the litigation may settle before any such testing occurs . . . .").

218 Minutes of Committee on Rules of Practice and Procedure (Jan. 4, 2023), *in* Advisory Committee on Civil Rules: Agenda 15, 33 (2023), https://www.uscourts.gov/sites/default/files/2023-03_civil_rules_committee_agenda_book_final_0.pdf [https://perma.cc/99NN-3RFX] (recounting the defense bar's critique of MDL).

nature would entitle the financier to demand immediate repayment of the entire outstanding obligation. Finally, many of the most famous mass-tort cases settled years before there was any scientific consensus about causation.[219] In cases where fraud filtering occurs before distribution, trust claim procedures invariably allow claimants to choose a "quick payout" option where they receive a reduced distribution on an expedited timeline with the understanding that the claim is given only a cursory review.[220] Even when nonmeritorious claims are detected, I could not find an instance of a court in a modern large-scale, mass-tort case fining counsel.[221]

Claim alchemy also involves the enhancement of claims. We saw this in the vaginal mesh case. In 2008, many recipients of mesh implants designed to correct pelvic organ prolapse began complaining that they were experiencing bleeding and discomfort.[222] Soon there were approximately 100,000 suits pending in state and federal court.[223] Plaintiffs' attorneys realized that the value of a claim increased dramatically if the implant had been removed from a plaintiff's body.[224] Removing the mesh, however, can be extremely complicated because the device is made of material that is designed to bond with human

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219 *See* Parikh, *supra* note 67, at 458–59. ("For example, various studies indicate that a woman's use of talcum powder on her body does not increase the risk of ovarian cancer, but there is currently a lack of consensus in the scientific community." (footnotes omitted)); David E. Bernstein, *The Breast Implant Fiasco*, 87 CALIF. L. REV. 457, 459, 479–80 (1999) (book review) (explaining that Dow Corning was forced to file for bankruptcy to address claims that silicone gel breast implants caused cancer even though there was ostensibly no scientific evidence supporting the claims).

220 *See* Bedi & Parikh, *supra* note 136, at 1635–36. As of September 2023, 88% of the 4,321 claims filed with the Boy Scouts of America trust chose expedited distribution. *See Scouting Settlement Trust—Quarterly Report (FY23 Q3)*, SCOUTING SETTLEMENT TRUST 2, https://scoutingsettlementtrust.org/data/upl/01958c2e/1063-730a-a1bb-3856e570e589/original.pdf [https://perma.cc/M4LW-UKSU]. Insurers have been complaining that trust-distribution procedures do not have sufficient fraud-screening mechanisms.

221 *See* DOUGLAS G. SMITH, THE RISING BEHEMOTH 11–26 (2020).

222 Alison Frankel & Jessica Dye, *Investors Profit by Funding Surgery for Desperate Women Patients*, REUTERS (Aug. 18, 2015), https://www.reuters.com/article/business/healthcare-pharmaceuticals/special-report-investors-profit-by-funding-surgery-for-desperate-women-patients-idUSL3N10S54U/ [https://perma.cc/YAN4-XM8E].

223 *Id.*

224 *See* Goldstein & Silver-Greenberg, *supra* note 48 (quoting plaintiff's counsel's statement that "[d]efendants have offered next to nothing to settle cases involving mesh products that have not been removed").

tissue.[225] Therefore, the presumption was that a plaintiff who received a doctor's approval to have the implant removed must have experienced serious complications and be entitled to a much larger recovery.[226] Seizing on this idea, litigation financiers engaged inventory builders to call mesh recipients who had not had the device removed and convince them to do so.[227]

In some instances, the caller would tell victims that they needed to remove the mesh implant immediately because any delay could lead to their death.[228] But there was good news: a financier was willing to pay for the procedure and had already contracted with a surgeon willing to remove the implant.[229] No determination was ever made that the plaintiff needed to have the mesh implant removed. In many cases, there was no basis for removal, which could itself cause extreme complications.[230]

The vaginal mesh case is an extreme example but highlights the clandestine maneuvering that can exist in this sphere. With full understanding of the asset-sale paradigm and the critical-mass effect, observers have identified the value of marshaling and enhancing meritorious and nonmeritorious claims alike.

2. *The Unknown Scale*

Opaque capital is fueling aggressive and reckless claim marshaling.[231] A material, unanswered question is just how many nonmeritorious claims exist in any nonclass aggregate litigation case. Is this a real process infirmity or a theoretical one? "No one knows what percentage of mass-tort claims are groundless,"[232] but figures range from 20–30% historically up to 50% for modern cases.[233] The Combat Arms MDL illuminates the problem.

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225 *See* Frankel & Dye, *supra* note 222; *see also* Goldstein & Silver-Greenberg, *supra* note 48.

226 *See* Frankel & Dye, *supra* note 222.

227 *See* Goldstein & Silver-Greenberg, *supra* note 48 (explaining that "women [were] sucked into [an] assembly-line-like system . . . fueled by banks, private equity firms and hedge funds" that "provide[d] financial backing" and then manipulated into having a radically invasive procedure that few needed).

228 *See id.*

229 *See* Frankel & Dye, *supra* note 222.

230 *See id.*

231 *See* Siegel & Basu, *supra* note 14.

232 Engstrom, *supra* note 21, at 24 n.94.

233 Laws. for Civ. Just., *supra* note 69, at 1 n.3.

The Combat Arms MDL is the largest MDL in U.S. history and contained approximately 275,000 claimants at its apex.[234] Third-party financing allowed attorneys to relentlessly target potential claimants through television, radio, and social media advertising, as well as television infomercials that ran on various cable channels.[235] This aggressive outreach ensured that individuals who potentially held a meritorious claim would have the opportunity to participate in the case and receive a recovery. Unfortunately, the outreach also attracted significant numbers of claimants who had never used the earplugs in question and were not experiencing hearing loss.[236] Due to the sheer number of claims, the vast majority of filed claims were simply unvetted by the intake process and remained unvetted for years.[237]

The Combat Arms MDL provides a natural experiment regarding how aggressively funded claims marshaling can distort mass torts. The Combat Arms claimants were not typical. Combat Arms claimants were former military personnel who had been issued potentially defective earplugs by the U.S. military. Therefore, the claimants had a significant relationship with the distributor of the product at issue. And unlike distributors for other products, the military maintained a comprehensive record of each issuance, each use, and the overall health of each soldier while using the product.[238] The unique recorded history in the dispute allowed for an assessment of a subset of filed claims. In 2021, a random sample of five hundred claimants designated "Wave 1" plaintiffs were required to produce evidence supporting their claims.[239] Of that group,

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234 *See* Nate Raymond, *3M Owes $58 Million to Two Veterans in Latest Combat Earplug Trials*, REUTERS (Mar. 26, 2022), https://www.reuters.com/legal/litigation/jury-says-3m-owes-50-mln-us-army-veteran-latest-earplug-trial-2022-03-25/ [https://perma.cc/5NJS-2Z2C] ("They are among the more than 280,000 former and active military members who have sued 3M claiming the company's combat earplugs are defective and damaged their hearing, in what has become the largest federal mass-tort litigation in U.S. history."); *see also* Case Management Order No. 31 (Wave Order #1) at 1, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 19-md-2885 (N.D. Fla. Nov. 22, 2021), ECF No. 2304 [hereinafter Combat Arms Wave Order].

235 *See* Informational Brief of Aearo Technologies LLC at 25–28, *In re* Aearo Techs. LLC, No. 22-02890-JJG-11 (Bankr. S.D. Ind. July 26, 2022), ECF No. 12 [hereinafter Aearo Informational Brief].

236 *See id.* at 7–8. The fact that the MDL court waived claim filing fees created a lottery-type environment. *See id.* at 33–34.

237 *See id.* at 29.

238 *See id.* at 37.

239 *See* Combat Arms Wave Order, *supra* note 234, at 1–2.

126 (25.2%) produced nothing and dropped out of the case.[240] Overall, there was no record of nearly 75% of Wave 1 plaintiffs ever having used Combat Arms earplugs, and 65% of this group affirmatively reported using different hearing protection devices.[241] Of the subset that had used the earplugs in question, 85% had "normal hearing" pursuant to the World Health Organization's criteria during the periods they had alleged to have used the Combat Arms earplugs.[242]

To the extent that the "Wave 1" plaintiffs were a truly representative sample and the U.S. military's assessment of a soldier's hearing was sound, the findings indicate that the Combat Arms MDL was populated with a significant number of nonmeritorious claims. Further, military record keeping highlighted claim infirmities that plagued this case and could also exist in others. For example, various claimants in the sample claimed to use Combat Arms earplugs at a time before their military bases even began issuing them; others claimed use at military bases that never issued the earplugs at all.[243] At the very least, the sample delineates the extent that aggressive marketing outreach can distort resolution by convincing individuals who did not use the product at issue or did not suffer any harm to file a claim based on fear of missing out on a potential lottery distribution.[244] In all fairness, a number of different hearing protection devices were made available to military personnel, and the risk of product confusion was not insignificant.[245] I imagine the same is true in many mass-tort

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240 Aearo Informational Brief, *supra* note 235, at 35; *see also* Declaration of David Horowitz in Support of Debtors' Motion for Declaratory & Injunctive Relief ¶ 23, 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Techs. LLC), Ch. 11 Case No. 22-02890-JJG-11, Adv. No. 22-50059 (Bankr. S.D. Ind. July 26, 2022), ECF No. 4.

241 Aearo Informational Brief, *supra* note 235, at 38.

242 *Id.* at 40; *see also* Robb M. Stewart, *3M Says Pentagon Data Show No Hearing Loss Among Most Plaintiffs in Earplug Litigation*, WALL ST. J.: WSJ PRO BANKR. (Mar. 1, 2023), https://www.wsj.com/articles/3m-says-pentagon-data-show-no-hearing-loss-among-most-plaintiffs-in-earplug-litigation-98fcc06c?gaa [https://perma.cc/4JXT-LH5W] ("3M Co. said U.S. Department of Defense records for more than 175,000 plaintiffs show that most claimants in Combat Arms earplug litigation have normal hearing under medically accepted standards . . . ."). I acknowledge that the U.S. military's assessment of soldiers may have been entirely deficient, and a significant number of false negatives may be the result.

243 *See* Aearo Informational Brief, *supra* note 235, at 38–39.

244 These issues also appear to exist in mass arbitration cases. *See* J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1319–22 (2022).

245 *See* Aearo Informational Brief, *supra* note 235, at 36 ("The Combat Arms accounted for just a fraction of the total hearing protection units purchased by the military.").

cases. However, as explored below, the harm of nonmeritorious claims entering the system is fully realized even where claim infidelity is unintentional.

3. *Consequences*

Significant numbers of nonmeritorious claims entering a given case undermine the judiciary and harm various stakeholders, including actual victims.[246] As with any limited-fund case, nonmeritorious claimants usurp scarce funds. Every dollar received by a nonmeritorious claimant is one less dollar available for a meritorious claimant. And when nonmeritorious claims are discovered, they dilute empathy for true victims and raise questions about the merits of the litigation.[247] On the other side, volume attracts public scrutiny and may create an aversion in the general population to using life-saving products and treatments. Litigation costs divert corporate resources and impact the development of future medications.

Plaintiffs' attorneys have believed for years that aggressive claim aggregation was a shortcut to settlement; a means to place extreme pressure on a corporate defendant who would be desperate to settle. Unfortunately, as questionable claims enter the system, they artificially inflate resolution values. I argue that too many nonmeritorious claims may actually disincentivize settlement in some cases. I acknowledge that claim volume still creates various public, investor, and judicial pressures that can compel settlement.[248] However, corporate

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246 *See* Rave, *supra* note 217, at 1616–17 (noting that "an excess of weak claims in an MDL could raise problems for plaintiffs as well"). For example, in bankruptcy, claimants are often allowed to vote on a proposed plan of reorganization prior to any meaningful vetting; therefore, there is a possibility that mass-tort claimants holding nonmeritorious claims could vote in favor of a plan and wind up binding those holding meritorious claims who vote against the plan. *See* Motion of the Official Committee of Talc Claimants for Entry of an Order (I) Authorizing an Estimation of Current Talc Claims for Voting Purposes, (II) Appointing Kenneth R. Feinberg as Expert Pursuant to Federal Rule of Evidence 706, & (III) Establishing Procedures & Schedule for Estimation Proceedings ¶ 7, *In re* LTL Mgmt., LLC, No. 23-12825 (Bankr. D.N.J. July 12, 2023), ECF No. 1020 (explaining the risk).

247 *See* Siegel & Basu, *supra* note 14 ("And in the end it's going to victimize the entire community, because people will look at [victims] and wonder if [they] are real.").

248 Johnson & Johnson's talcum powder litigation demonstrates the power of claim volume. *See* Peter Loftus & Andrew Scurria, *Johnson & Johnson Seeks $9 Billion Settlement of Talc Lawsuits*, WALL ST. J. (Apr. 5, 2023), https://www.wsj.com/articles/johnson-johnson-proposes-paying-9-billion-to-settle-talc-lawsuits-2fcc672a?gaa [https://perma.cc/8TXS-KYTC]; *see also* Goldberg, *supra* note 74 ("As [3M] said, 'The combination of advertising-induced filing of masses of unvetted claims and a preordained expectation of settlement often create a high-volume

defendants—who have often been reluctant to settle—will become even more reluctant as new cases are infected with a disproportionately large number of nonmeritorious claims. If realized, this phenomenon could push out resolution timelines. Defendants feel exploited and begin to jump from state court to federal court, from MDL to bankruptcy, trying to find a venue they believe will see through the fog to the merits of these cases.[249] Opaque capital is built for the decade-long slog, but actual victims rarely are. In the long run, these tactics are likely to diminish recoveries.

Opaque capital is perfecting a unique brand of alchemy, but winning the race for inventory is only half the battle.

B. Control

The litigation finance industry has consistently propounded the premise that financiers do not manage attorneys, oversee litigation strategy, or control settlement in any form.[250] And this may be true for the vast majority of engagements. The quaint notion of the passive investor, however, is less realistic in the mass-tort sphere. The capital commitments and potential recoveries are too monumental for a financier to blithely cede control. The true value of claim alchemy is realized only if the financier can control settlement. Therefore, there is a corollary to the Alchemist's Inversion: in order to maximize value, an aggressive financier that has transformed base metals into gold must dictate when the asset is sold.[251]

Investment managers who invest millions of dollars into a venture are never going to be passive actors content to sit in a corner and hope the outcome meets expectations. You could

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cudgel that inflates settlement value, or—as is the case with the Combat Arms MDL—precludes any reasonable settlement.'").

249 *See* Aearo Informational Brief, *supra* note 235, at 53–57 (describing 3M's odd bankruptcy ploy with its Aearo subsidiary); Samir D. Parikh, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE 53, 57–59 (2022) (describing Johnson & Johnson's controversial use of the Texas Two-Step to access bankruptcy for its talcum subsidiary); *see also* Jef Feeley, *J&J Sets Up 3rd Talc Bankruptcy Bid by Moving Unit to Texas*, BLOOMBERG (Jan. 22, 2024), https://www.bloomberg.com/news/articles/2024-01-22/j-j-prepares-for-3rd-talc-bankruptcy-bid-by-moving-unit-to-texas?embedded-checkout=true [https://perma.cc/TJK8-UPE7]. It goes without saying that all the traditional criticisms of protracted litigation also apply here.

250 *See generally* Fitzpatrick & Marra, *supra* note 155.

251 This corollary aligns with our understanding of how private equity firms and multi-strategy hedge funds behave in other markets. *See* Parikh, *supra* note 28, at 1941–48 (describing the behavior of private equity firms and multi-strategy hedge funds in distressed debt markets).

argue that financiers actually have a duty to intervene. Fund managers—including private equity managers—owe a duty to the fund they manage and the fund's investors. The SEC has made it clear that these managers are obligated to manage the fund's investment in the best interest of the fund and maximize returns.[252] The financier that sits idly by while a law firm advises clients to accept an offer that produces a radically diminished return could arguably violate the duties it owes to its investors.

Nevertheless, the argument often made is that a financier cannot "take control" of the litigation because of the rules of ethics that bind the attorneys in the case.[253] And that may be true, but what constitutes "control" is unclear. A perfectly acceptable structure can exist to accommodate the attorney's ethical obligations and the financier's objective of avoiding suboptimal settlements. In this model, the financier does not explicitly control the case but merely emerges at decisive moments to guide the asset to its full value. A financier's ability to intervene can take two primary forms: direct intervention relying on explicit contractual provisions and indirect intervention relying on relational leverage to convince a plaintiffs' attorney to influence her clients' decision.

1. *Contractual Control*

Attorneys are prohibited from advancing funds to their clients for ordinary living expenses in all key litigation states.[254] An attorney working on a contingency basis can absorb certain court filing fees and other related costs but cannot provide financial assistance to a client[255] nor acquire an interest in the client's cause of action, aside from her contingency fee.[256] But resolving mass-tort cases can take over a decade. Claimants facing daunting medical expenses and related costs are often desperate for financing to bridge them to the settlement distribution. Consequently, many claimants rely on third-party financiers for the capital necessary to run the litigation

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252 *See* Carrington Coleman, *SEC Clarifies Fiduciary Duty of Private Equity Fund Managers*, LEXOLOGY (Feb. 22, 2020), https://www.lexology.com/library/detail.aspx?g=681a61b9-7e44-45fb-9a87-86a1353b9a07 [https://perma.cc/FC7S-3Z52].

253 *See* Fitzpatrick & Marra, *supra* note 155, at 6.

254 *See* Avraham, Baker & Sebok, *supra* note 23, at 184 & n.79.

255 *See* MODEL RULES OF PRO. CONDUCT r. 1.8(e) (AM. BAR ASS'N 2023).

256 *See id.* at r. 1.8(i).

gauntlet.[257] The relationship can take various forms, including recourse and nonrecourse lending. Particularly relevant to this Article is the prospect of an agreement where a funder receives a percentage of the ultimate recovery in exchange for upfront financing. This arrangement is particularly attractive to litigants because they can transfer a portion of their risk but owe the funder nothing if the litigation proves to be unsuccessful.[258] This type of financing is unique. Consequently, the funder can ask for more than just backend participation.

Capital provision agreements (CPAs) delineate the relationship between a financier and the plaintiff or the plaintiff's law firm. CPAs can also be the means by which opaque capital secures direct control over the timing of settlement.[259] But can an individual give a financier veto power over settlement in exchange for short-term financing? There seems to be a vague argument that an individual cannot give up control of her case because that would be against public policy.[260] The basis for this argument is unclear and scholars have disagreed.[261] Professor Wendel has written that the issue has not been litigated and that this grant of power to the financier should be permissible if the financier is required to exercise its decision in "good faith."[262] I am not sure if the "good faith" qualifier is necessary, but this fortification could be inserted into the CPA as

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257 *See* Avraham, Baker & Sebok, *supra* note 23, at 182 & n.72.

258 *See id.* at 150.

259 *See* BEISNER, MILLER & RUBIN, *supra* note 140, at 6–7.

260 *See* Anthony J. Sebok, *The Rules of Professional Responsibility and Legal Finance: A Status Update*, 57 WAKE FOREST L. REV. 777, 788 n.65 (2022) ("[A] lawyer should counsel a client to refuse any funding agreement that allows a funder to take control of any settlement, which would be seen as against public policy in every state . . . .").

261 *See* ABA COMM'N, *supra* note 150, at 23 ("There would seem to be no reason, as a matter of contract law, to regard these contractual provisions [granting decision-making authority to a financier] as unenforceable . . . ."); W. Bradley Wendel, *Third-Party Litigation Financing*, *in* TEXAS BUSINESS LITIGATION 1293, 1306 (Sofia Adrogué & Caroline Baker eds., 5th ed. 2022) ("Although it has not yet been litigated in the United States, it is conceivable that some modest degree of control by a funder would be permissible if it were similarly subject to a duty to exercise control in good faith."); Glaz LLC v. Sysco Corp., Case No. 225609, Order on Claimants' Preliminary Injunction Application, ¶ 203 (London Ct. Int'l Arb. Mar. 10, 2023), https://jusmundi.com/fr/document/decision/en-glaz-llc-posen-investments-lp-and-kenosha-investments-lp-v-sysco-corporation-order-on-claimants-preliminary-injunction-application-corrected-friday-10th-march-2023 [https://perma.cc/VLE5-P3ZS] (agreeing with expert witness' statement that "[e]very litigant has the autonomy to decide when and whether to settle" and "[e]very litigant also has the autonomy to contract that right away unless there is some legal or ethical barrier to doing so" (emphasis omitted)).

262 Wendel, *supra* note 261, at 1306.

a way to assuage courts while having little impact in practice. Further, the financier can argue that it is not actually controlling the case; rather, it is merely providing input as to certain key decisions. Contractual wizardry could also be employed to secure the power without alerting a court. A financier could simply insert a provision into the CPA that precludes a claimant from agreeing to settle a case for less than a set amount without financier consent.[263] Once again, the financier has a strong argument that it is not controlling the case, merely policing a plaintiff from acting in bad faith and decimating the financier's expected recovery. It would be easy enough for a financier to set this amount higher than the best case estimate and then surreptitiously use its consent right as a veto power. The CPA could similarly have a clause that requires the client to reimburse the financier all litigation expenses if she rejects the financier's settlement advice.[264] This would create a Hobson's choice for the plaintiff.

Unfortunately, "litigation financing contracts are confidential, and only . . . a few [have] come to light."[265] In an effort to demystify the funding process, a few financiers have released contract templates over the years.[266] All of these agreements describe a benign relationship where the financier is a passive investor, attorneys have autonomy, and the plaintiff has unquestioned, decision-making authority.[267] But many cases do not exhibit these dynamics. The agreements that parties have been *compelled* to release provide a glimpse into the shadows.[268]

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263 Roy Strom, *Unlikely Colorado Court Vexes $8 Million Litigation Finance Win*, BLOOMBERG L.: BUS. & PRAC. (Oct. 19, 2023), https://news.bloomberglaw.com/business-and-practice/unlikely-colorado-court-vexes-8-million-litigation-finance-win [https://perma.cc/F89T-KF3V] ("[Claimant] was not allowed [by the applicable CPA] to accept a settlement worth less than 90% of what he estimated the case was worth . . . .").

264 *See* Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: A Response to Engstrom*, 129 YALE L.J.F. 64, 74 (2019) (describing an example of such a clause). There are countless possible forms these types of control provisions can take.

265 Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 719 (2014).

266 *See, e.g.*, *Documents*, LIONFISH CAPITAL, https://www.lionfish-capital.com/documents#Form-section [https://perma.cc/ZH23-DGZH] (last visited Oct. 15, 2025); *see also* BURFORD CAP., LEGAL FINANCE CASE STUDIES (2022).

267 *See* ABA COMM'N, *supra* note 150, at 26 ("The Working Group reviewed numerous contracts submitted by [litigation financiers] that expressly disclaim any control by the [financier] over the settlement decision.").

268 *See* Boling v. Prospect Funding Holdings, LLC, 771 F. App'x 562, 580 (6th Cir. 2019) (noting that the district court found that the CPA at issue appeared to give the funder power to "interfere with or discourage settlement"); Mize v. Kai,

Sysco Corp. v. Glaz LLC reveals the full picture of how a financier can seize veto power.

In that case, an antitrust class action alleging price fixing was filed in 2016 on behalf of various injured parties, including Sysco.[269] Two years later, Sysco opted out of the class action and filed its own direct-action complaints.[270] Sysco's causes of action were valuable but illiquid. Scott Gant, Sysco's outside counsel at the time, suggested that his client consider collateralizing the potential revenue stream from the litigation.[271] Burford Capital, a litigation financier, was willing to provide nonrecourse financing for the litigation.[272] In 2019, Sysco and Burford agreed that Burford would provide approximately $140 million to finance the antitrust litigation in return for a significant portion of any potential recovery Sysco received.[273] The agreement identified Burford and its affiliates as "passive providers of external capital."[274] Sysco enjoyed decision-making authority. Gant was lead counsel representing Sysco in the disputes, but he would also become a reliable business partner of Burford Capital.[275]

By December 2020, Sysco had apparently breached various provisions of the agreement, and the parties entered into

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Inc., No. 17-cv-00915, 2018 WL 1035084, at *5 (D. Colo. Feb. 23, 2018) (analyzing the applicable CPA and finding that the agreement prohibited the plaintiff from settling the case without the funder's prior consent and required her to settle if so directed by the funder); Abu-Ghazaleh v. Chaul, 36 So. 3d 691, 693 (Fla. Dist. Ct. App. 2009) (observing that financier had the right to "approve[] counsel's bills; and had the ability to veto any settlement agreements").

269 *See* Petition to Vacate Arbitration Award ¶ 18, Sysco Corp. v. Glaz LLC, No. 23-cv-01451 (N.D. Ill. Mar. 8, 2023), ECF No. 1 [hereinafter Petition to Vacate]; *see also* Declaration of Barrett G. Flynn in Support of Petition to Vacate Arbitration Award ¶ 4, Sysco Corp. v. Glaz LLC, No. 23-cv-01451 (N.D. Ill. Mar. 8, 2023), ECF No. 1-1.

270 *See, e.g.*, Complaint, Sysco Corp. v. Cargill Inc., No. 22-cv-1750 (D. Minn. June 24, 2022); Complaint, Sysco Corp. v. Agri Stats, Inc., No. 21-cv-1374 (D. Minn. Mar. 8, 2021); Complaint, Sysco Corp. v. Tyson Foods, Inc., No. 18-cv-700 (N.D. Ill. Jan. 30, 2018).

271 *See* Ross Todd, *How a Boies Schiller Litigator Got Caught Up in the Fracas Between a Litigation Funder and a Client*, AmLaw Litig. Daily (Mar. 15, 2023), https://www.law.com/litigationdaily/2023/03/15/how-a-boies-schiller-litigator-got-caught-up-in-the-fracas-between-a-litigation-funder-and-a-client/?slreturn=20250718113836 [https://perma.cc/FED6-VXKJ].

272 *See* Petition to Vacate, *supra* note 269, ¶ 19.

273 *See* Todd, *supra* note 271; *see also* Petition to Vacate, *supra* note 269, ¶ 19.

274 Petition to Vacate, *supra* note 269, ¶ 20.

275 *See id.* ¶ 26 & n.5 (explaining that Gant had appeared in Burford's promotional materials in 2020 and his law firm represented at least one other party in the antitrust litigation that had accepted financing from Burford); *see also* Todd, *supra* note 271.

an amended CPA, which was subsequently followed by additional amendments (collectively, the "New Sysco CPA").[276] New provisions effectuated a subtle but dramatic shift. Under the revised agreements, Sysco was still deemed to have "control" over the antitrust litigation, but the new language gave Burford unilateral power to veto any settlement offer in the case.[277]

In 2022, Sysco decided to settle the antitrust suits, and Barrett Flynn—Sysco's associate general counsel—and Gant were able to reach tentative settlements in many cases. Flynn set up a conference call to discuss the good news with Burford.[278] Unfortunately, Burford representatives informed Flynn that he was settling prematurely and his prescribed course would cause Burford to "lose hundreds of millions of dollars."[279] Invoking its power under the New Sysco CPA, Burford informed Flynn that he was not allowed to settle the cases and instructed him to continue litigating.[280] Flynn sought validation from his outside counsel but Gant refused, stating that he agreed with Burford that the proposed settlement undervalued the claims.[281] Sysco would later argue that this litigation *coup d'etat* was carefully orchestrated.[282] Just a few days earlier, Gant had discussed the case with Burford representatives and ostensibly reversed course.[283]

The dispute went to binding arbitration. The legal community was skeptical that a litigation financier could veto a plaintiff's good-faith decision to settle an action. But an arbitration panel, applying New York state law, ruled in Burford's favor. The panel found that the New Sysco CPA explicitly afforded Burford "the initial determination on whether to accept or reject a settlement offer."[284] The panel was unpersuaded by

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276 *See* Petition to Vacate, *supra* note 269, ¶¶ 22–25; *see also* Motion to Dismiss Amended Petition Without Prejudice & Stay Action at 4–5, Sysco Corp. v. Glaz LLC, No. 23-cv-01451 (N.D. Ill. Mar. 27, 2023), ECF No. 26. The litigants dispute the need for these amendments.

277 *See* Andrew Strickler, *Burford Has 'Initial Control' in Sysco Settlements, Panel Says*, Law360 (Mar. 13, 2023), https://www.law360.com/pulse/articles/1584981/burford-has-initial-control-in-sysco-settlements-panel-says [https://perma.cc/9YXM-LJ5Q].

278 *See* Petition to Vacate, *supra* note 269, ¶¶ 27–28, 33.

279 Strickler, *supra* note 277.

280 *See* Petition to Vacate, *supra* note 269, ¶ 34.

281 *See id.*

282 *See id.* ¶ 33.

283 *See id* ¶¶ 29, 33–34.

284 Strickler, *supra* note 277. The parties ultimately settled the dispute. *See* Hailey Konnath, *Burford, Sysco Agree to Drop Litigation Funding Suits*, Law360

Sysco's public policy arguments or the idea that common law doctrines affected Burford's veto right.[285]

Burford cannot be described as opaque capital,[286] but its dispute with Sysco crystalizes the power inherent in CPAs for financiers seeking veto rights as a means to protect investments. The simple conclusion is that financiers can easily seize decision-making power and have done so in some cases. Why not seize that power in all cases?

2. *Relational Leverage and the Financier's Invisible Hand*

Capital provision agreements often contain terms that explicitly preclude a financier that is a party to the contract from (i) controlling the law firm's professional judgment, (ii) interfering with the lawyer-client relationship, or (iii) pressuring the law firm or claimants as to claim settlement (the "Passive Investor Provisions").[287] But the protection that these provisions provide is illusory in many cases. I have been able to review both public and private CPAs. I identified Passive Investor Provisions in all the agreements I reviewed. By digging a little deeper into these financing relationships, however, I discovered a significant loophole. Agents for a main investment fund are tasked with identifying opportunities, negotiating with counterparties, and then finalizing an investment with a law firm partner. Before closing, these agents will often incorporate an independent entity (the "Stand-In Financier") that will be the actual party to the agreement.[288] The agents will explain this change to the counterparty as necessary for the main fund to

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(June 28, 2023), https://www.law360.com/articles/1694223/burford-sysco-agree-to-drop-litigation-funding-suits [https://perma.cc/52FV-6V2T].

285 Glaz LLC v. Sysco Corp., Case No. 225609, Order on Claimants' Preliminary Injunction Application, ¶ 203 (London Ct. Int'l Arb. Mar. 10, 2023), https://jusmundi.com/fr/document/decision/en-glaz-llc-posen-investments-lp-and-kenosha-investments-lp-v-sysco-corporation-order-on-claimants-preliminary-injunction-application-corrected-friday-10th-march-2023 [https://perma.cc/VLE5-P3ZS] ("Professor Issacharoff's general statement . . . identifies the foundational point: 'Every litigant has the autonomy to decide when and whether to settle. Every litigant also has the autonomy to contract that right away unless there is some legal or ethical barrier to doing so.'" (emphasis omitted)).

286 *See supra* Part II.

287 *See, e.g.*, Declaration of Patrick C. Swiber in Support of Respondent's Opposition to Petition to Confirm Arbitration Award Exhibit A § 5.3(b)(v), Glaz LLC v. Sysco Corp., No. 23-cv-02489 (S.D.N.Y. May 3, 2023), ECF No. 21-1.

288 In the Sysco and Burford Capital dispute, Burford affiliates Glaz LLC, Posen Investments LP, and Kenosha Investments LP were the entities that contracted with Sysco in order to maintain Burford's anonymity. *See* Petition to Vacate, *supra* note 269, ¶ 20.

maintain its anonymity. This Stand-In Financier is bound by the Passive Investor Provisions, but the main fund and its key agents—the parties that actually arranged the financing and monitor the investment—are not. In other words, the Passive Investor Provisions can be mere window dressing and in no way limit the financier's ability to influence case trajectory.[289]

Even where Passive Investor Provisions bind the main fund financier, there are myriad avenues for evasion. As noted above, an attorney's ethical obligations restrict her from following a financier's instructions to the detriment of her clients. An agreement between these parties could not provide for an explicit dereliction of that duty. Opaque capital can, however, effectuate this result through relational leverage.

A "complete" contract is one that specifies what conduct is required by contractual parties in substantially all scenarios.[290] But contracts for complex business transactions are incomplete. Incomplete contract theory asserts that parties cannot address substantially all contractual contingencies.[291] The theory focuses primarily on drafter limitations and attributes incomplete contracting to information costs, transaction costs, and agency costs.[292] In recent years, however, private equity firms have engaged in incomplete contracting *by design*, intentionally imbuing contracts with ambiguity and loopholes on the idea that incomplete contracts benefit parties that have the most relational leverage.[293] Relational leverage recognizes that business relationships are imbalanced, and "the party that enjoys the ability to threaten material harm in future business transactions can exploit that position when faced with contractual ambiguity."[294] I recently explored this idea in distressed

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289 For example, imagine a judge overseeing a dispute inquires about the Passive Investor Provisions in an applicable CPA. An attorney working with a financier could accurately represent to the court that the CPA has robust Passive Investor Provisions but fail to note—perhaps inadvertently—that the financier is not a signatory to the CPA.

290 *See* Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RSRV. L. REV. 187, 190 (2005) ("A contract is incomplete if it fails to provide for the efficient set of obligations in each possible state of the world." (emphasis omitted)).

291 *Id.*

292 Elisabeth de Fontenay, *Complete Contracts in Finance*, 2020 WIS. L. REV. 533, 540–41.

293 See Parikh, *supra* note 28, at 1946 n.111.

294 *Id.* (explaining the divergence of relational leverage and relational contracting). *See generally* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003).

debt markets,[295] but opaque capital's tactics are portable. Transporting this idea to mass-tort financing creates situations where ambiguous contractual provisions offer financiers optionality at moments of crisis.

Financier puppeteering attempts to control the formulation of legal strategy, the execution of that strategy, and the recommendations that attorneys make to their clients. Relational leverage primarily exists outside the applicable CPA. Opaque capital relies on the repeat player model and a multitude of relationship touchpoints between itself and a law firm to apply pressure and compel compliance at key points in a case trajectory[296]—a practice referred to as the "financier's invisible hand."[297] For example, the request could be for the attorney to recommend that her clients vote against a settlement proposal. An attorney who pushes back on this request could be cajoled with carrots (e.g., the idea of future capital infusions in subsequent cases) or sticks (e.g., the funding may be staggered and the financier has discretion to withhold future distributions, or the financier may have a lien on the attorney's case portfolio and could threaten aggression if the firm experiences any distress). Some commentators have argued that an attorney's ethical obligations prevent improper influence.[298] I suspect this argument sweeps too broadly and fails to appreciate opaque capital's unique ability to dislodge even the most stubborn ethical obligations.[299]

Relational leverage can also connect to various provisions in the CPA. The primary ones allow a financier to ex ante select attorneys to work alongside existing plaintiffs' attorneys.

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295 *See* Parikh, *supra* note 28, at 1946 n.111.

296 *See* Radek Goral, *Skin in the Game: Why Business Lawsuits Get Third-Party Funded*, 30 NOTRE DAME J.L. ETHICS & PUB. POL'Y 247, 269–71 (2016) (explaining the repeat-player problem).

297 *See* Telephone Interviews with Litigation Finance Insiders, *supra* note 32 ("[There are] stories of plaintiffs who have funded these large inventories . . . with money they've got from lit funders, and they're so underwater that it's driving how much they have to get for their inventory in terms of settlement. So there isn't that direct pressure that they can directly contractually restrain them. There's that indirect pressure . . . .").

298 *See generally* Fitzpatrick & Marra, *supra* note 155.

299 *See* MAX FRUMES & SUJEET INDAP, THE CAESARS PALACE COUP 276 (2021) (quoting attorney Bruce Bennett to illustrate private equity firm Apollo's influence over its outside counsel, Paul, Weiss, claiming "[t]here can be no serious dispute that Paul, Weiss, acting for [Apollo] . . . not only facilitated the Fraudulent Transfers [at issue in the Caesars Casino's bankruptcy case] but was intimately involved in their formulation and implementation").

Attorney-selection clauses[300] and "attorney ombudsmen" provisions collectively allow the financier to have a trusted agent embedded in the case and monitoring all litigation decisions.[301] These are just a few examples of the countless ways a financier can exert influence. CPAs are bespoke and permutations of indirect control are limited to only the creativity of the drafting attorney and the individual financier's negotiation leverage.

Financier intervention can certainly add value, policing plaintiffs' attorneys and honoring claimant preferences. I think this may be true in some cases with certain financiers, but it would be naïve to believe that this is the path forward for opaque capital. More realistically, relational leverage is just another weapon in the aggressive financier's arsenal. Some may assume that financiers are limited to using just one weapon. I argue that opaque capital is going to use them all.

This Article's final Part considers what—if anything—should be done to stall opaque capital's march.

IV
Normative Formulation

Litigation finance can provide myriad benefits, but—as Part III, *supra*, captured—financiers also have the means and incentives to distort equilibrium and equity. This Article has provided unique insight into opaque capital and the risks these actors pose. With this insight, policymakers will be in a position to begin assessing the impact on the mass-tort ecosystem. To be clear, my goal is not to push litigation financiers out of the marketplace or limit the amount of capital flowing into disputes. Rather, policymakers can better protect meritorious claimants and ensure process integrity by curtailing the most reckless practices and cabining the most aggressive actors.

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300 *See, e.g.*, Declaration of Caroline N. Mitchell in Support of Chevron Corp.'s Memorandum in Opposition to Motion for Class Certification & Motions to Exclude the Reports & Testimony of Onyoma Research & Jasper Abowei Exhibit 13 §§ 1.1, 10.1, Gbarabe v. Chevron Corp., No. 14-cv-00173 (N.D. Cal. Sept. 16, 2016), ECF No. 186-4 (creating control over the case by allowing the litigation financier to monitor plaintiffs' counsel and restrict retention of any professional not previously approved).

301 *See, e.g.*, Complaint ¶ 35, White Lilly, LLC v. Balestriere PLLC, No. 18-cv-12404 (S.D.N.Y. Jan. 2, 2019).

A. Nonmeritorious Claims and the Poisonous Tree

Altering a familiar legal metaphor, nonmeritorious claims are arguably a poisonous tree in the mass-tort ecosystem,[302] producing harmful fruits that impact various stages of the resolution process. There are three primary reasons nonmeritorious claims enter the system: misdiagnosis, defendant manipulation, and double-dipping—where a claimant is attempting to secure multiple recoveries for the same injury.[303] The consequences of nonmeritorious claims, however, are realized regardless of the reason they are filed. As noted in subpart III.A, nonmeritorious claims impact the initial phase of a case by creating volume, which draws public scrutiny and can "black cloud" the corporate defendant. At this stage, nonmeritorious claims also enhance the perception that plaintiffs' claims are legitimate. As the dispute moves further along, nonmeritorious claims can amplify the aggregate settlement value. And at the backend of the process, these claims are often paid out in full, creating a windfall for certain individuals, their law firms, and potentially other parties. Nonmeritorious claimants do the most damage to meritorious ones at this point by depleting a limited fund. As explored below, these unique stages often exist in different proceedings and judicial contexts, starting with multidistrict litigation and ending with resolution in bankruptcy premised on a claimants' settlement trust.

1. *Improving Existing Tools in MDL*

Many of the concerns with opaque capital evaporate if nonmeritorious claims can be filtered at the early stages of a dispute or, at the very least, prior to distribution. MDL is extremely prominent in the resolution process. MDL judges have tools to address nonmeritorious claims, but an apparent reluctance to use these tools has amplified the problem.

Primarily, plaintiff fact sheets are ordered in almost all large-scale, mass-tort MDLs.[304] Fact sheets are Frankenstein documents—an amalgamation of "initial disclosures, interrogatories, requests to produce documents, and deposition

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302 *See* Perry Cooper, *Defendants' Gripes with MDLs, and What to Do About Them*, BLOOMBERG L. (Oct. 26, 2017), https://news.bloomberglaw.com/class-action/defendants-gripes-with-mdls-and-what-to-do-about-them [https://perma.cc/3JEU-P2XU] ("[C]ases that truly have no merit are a real problem in MDLs.").

303 Engstrom, *supra* note 21, at 25.

304 *See* Burch, *supra* note 264, at 78.

queries."[305] These forms are often answered under oath[306] and contain a series of questions designed to determine if the claimant used or came in contact with the product in question and suffered or suffers from the harm alleged.[307] Fact sheets include an authorization to release medical records.[308] The information provided helps a court with case management[309] and the selection of bellwether trials. Parties can also gain insight into their respective positions and that of their adversary, presumably aiding settlement prospects. But there are procedural concerns.[310]

Fact sheets could theoretically help filter nonmeritorious claims, but their implementation has been suboptimal. They are often issued toward the end of the litigation arc to ensure settlement.[311] For example, when considering a seemingly viable global settlement offer, MDL courts will often order any party voting against settlement to fill out a fact sheet and ostensibly prove up their claim. This subtle pressure is designed to shepherd the recalcitrant. Further eroding the utility of fact sheets is that courts rarely set firm deadlines for submission or delineate clear penalties for noncompliance.[312]

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305 *Id.* at 80.

306 Fact sheets often have an attestation requirement, but it seems that the clients are often not asked to attest. In many cases, the attorneys make a general statement on behalf of the group. The penalty for false statements seems unclear. *See id.*

307 There are also defendant fact sheets designed to probe the defendant's knowledge about its product and the risk of harm. *See id.* at 83 n.103.

308 Engstrom & Venook, *supra* note 115, at 1637.

309 Plaintiff fact sheets also presumably assist attorneys in fulfilling their obligations under FED. R. CIV. P. 11.

310 *See* Burch, *supra* note 264, at 80 ("[PFSs] read[] like a pancaked version of initial disclosures, interrogatories, requests to produce documents, and deposition queries, but without each rule's prepackaged protections and limits.").

311 *See id.* at 69; Laws. for Civ. Just., Comment to the Advisory Committee on Civil Rules and its MDL Subcommittee 3 (Sept. 9, 2020), https://www.uscourts.gov/sites/default/files/20-cv-aa_suggestion_from_lawyers_for_civil_justice_-_mdls_0.pdf [https://perma.cc/W6RX-SH2Y] ("[T]he average time from Panel centralization to entry of a PFS order in the proceeding it studied was over 8 months." (quoting ADVISORY COMMITTEE ON CIVIL RULES: AGENDA 209 (2019), https://www.uscourts.gov/sites/default/files/2019-04_civil_rules_agenda_book.pdf [https://perma.cc/P43V-AVPY])).

312 Burch, *supra* note 264, at 79–82. The MDL census is similar to a PFS and is a tool used early in a case to gather high-level data on filed cases. The main purpose is to gauge the extent of use or exposure and help organize claimants into different settlement tiers based on their alleged injury. *See* BURCH, *supra* note 63, at 112, 129. The MDL census is not generally designed to filter nonmeritorious claims.

When initial efforts to manage sprawling mass-tort cases fail or plaintiffs demonstrate a considerable lack of diligence,[313] courts are willing to employ more aggressive tactics, including *Lone Pine* orders pursuant to Rule 16 of the Federal Rules of Civil Procedure.[314] These orders typically require three distinct evidentiary showings: (i) exposure to the product at issue, (ii) impairment, and (iii) proof of causation, usually in the form of an expert affidavit or report.[315] A claimant that cannot satisfy the necessary showing faces dismissal of her claim. The orders help courts "handle the complex issues and potential burdens on defendants and the court in mass-tort litigation."[316] The consensus is that these orders should be used sparingly[317] and are not suitable at early stages where little to no discovery has occurred.[318] Consequently, *Lone Pine* orders are invariably issued at an advanced stage of litigation or, in many cases, after a tentative settlement has already been reached. In these latter instances, however, the order—much like plaintiff fact sheets—serves to aggressively encourage plaintiffs to accept a proposed settlement, not as a means of ferreting out nonmeritorious claims.[319]

MDL courts have the tools necessary to start filtering the bulk of nonmeritorious claims filed in these cases. In order to realize this benefit, judges would need to target different levels within the case governance structure to achieve alignment. Starting at the claimant level, MDL courts should use fact sheets early in a dispute to isolate troublesome claims and then impose escalating scrutiny through more aggressive submission requirements—including *Lone Pine* orders—to ensure

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313 *See, e.g.*, *In re* Zimmer NexGen Knee Implant Prods. Liab. Litig., No. 11-cv-05468, 2016 WL 3281032, at *1 (N.D. Ill. June 10, 2016) (issuing a *Lone Pine* order after various case management difficulties).

314 *See* Engstrom, *supra* note 21, at 20.

315 *Id.*

316 Acuna v. Brown & Root, Inc., 200 F.3d 335, 340 (5th Cir. 2000).

317 *See* Engstrom & Venook, *supra* note 115, at 1636 (explaining that *Lone Pine* orders can be so demanding as to filter compensable claims and, in addition, "subvert . . . the carefully crafted safeguards that surround summary judgment"); *see also* Adinolfe v. United Techs. Corp., 768 F.3d 1161, 1167–68 (11th Cir. 2014).

318 *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 557 F. Supp. 2d 741, 744 (E.D. La. 2008) (issuing a *Lone Pine* order after case had been pending for three years and a significant amount of discovery had occurred).

319 Burch, *supra* note 264, at 76 (explaining that courts use *Lone Pine* orders post-settlement "to signal that plaintiffs should either settle or prepare to prove their claims immediately without the procedural protections of summary judgment").

compliance. This framework would need to be bolstered by firm deadlines and clear penalties for noncompliance. Claims that fail to comply would not necessarily need to be dismissed from the case. In some instances, the court could require these claimants pay a nominal filing fee to keep the claim on the case docket. This approach would be an effective stress test on a questionable claim.

Moving up a level, I agree with Professors Engstrom and Venook's proposal that MDL courts adjust common-benefit taxes to encourage attorneys to make the necessary investment in claim assessment.[320] The more aggressive use of plaintiff fact sheets and *Lone Pine* orders allows courts to assess claims. Through this claim assessment process, claims that drop out of the case or are woefully deficient would be deemed "failing" claims. Professors Engstrom and Venook have suggested that courts "levy a higher [common-benefit fund] assessment on those lawyers who file[] a high proportion of 'failing' claims."[321] Imagine a case with a 6% common-benefit fee—meaning that 6% of an attorney's contingency fee is held back by the court and ultimately placed in a fund for attorneys whose work significantly aided the plaintiff collective. If—for example—less than 90% of the claims represented by a given attorney successfully survive the screening, that attorney could be ordered to pay an elevated 9% common-benefit fee. The percentage would rise for attorneys that land farther away from the benchmark.[322] At the same time, an attorney whose claims clear this threshold would pay a reduced common-benefit fee, 3% for example. This change would successfully incentivize attorneys to undertake cursory screening of the claims they originate. These measures could also lead to attorneys demanding some proof of screening to accompany the claims they purchase from inventory builders, thereby instilling some integrity at the frontend of the process. Most relevant to this Article, the increased common-benefit fee tax diminishes an attorney's net contingency fee and that affects any other party who holds a stake in that fee, including litigation financiers. This seemingly small shift could have a material effect on a financier's overall rate of return, which would suppress incentives to pursue distortive claim marshaling.

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320 Engstrom & Venook, *supra* note 115, at 1642–44.

321 *Id.* at 1640.

322 *See id.* at 1642–44 (including a table delineating a sliding scale).

At the top level, MDL courts should explore ways to spur MDL leadership to monitor claim integrity. One possibility is restricting access to common-benefit funds. If the claim assessment process reveals more than a certain percentage of "failing" claims, some portion of common-benefit funds would be withheld from distribution. For example, if the percentage of "failing claims" exceeds 35%—a number that the insiders I spoke with believed indicated a serious deviation—then the court would hold back 5% of the common-benefit fund.[323] This feature should arise only in cases abnormally polluted with nonmeritorious claims such that MDL leadership team has to accept at least some responsibility.

If implemented, these proposals could set up an interesting outcome where there is a significant number of nonmeritorious claims in a case. Indeed, a large subset of plaintiffs' attorneys would be contributing more to the common-benefit fund because of their lack of vigilance, but not all of those funds would be available to MDL leadership because of the holdback. What should be done with the surplus funds? The most reasonable use of these funds is a redistribution to those whose claims are ultimately deemed to be compensable. I argue that this would represent a "make-whole" payment appropriate for these claimants because the volume of nonmeritorious claims—and the failure of attorneys to screen them—arguably delayed settlement. Another benefit is that financiers would be incentivized to invest in meritorious claims because these claims would hold the potential for this payment kicker.

Ultimately, the goal of these protocols is not to unreasonably punish attorneys or dissuade the filing of potentially compensable claims. The goal is to tighten the framework so that all key parties are invested in claim and process integrity at the frontend of the process. Structural and procedural improvements in MDL, however, are only half of the story. Most modern mass torts have migrated from here to bankruptcy before reaching final settlement. The backend process deficiencies are just as troubling.

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323 In the recent opioid settlement involving drug distributors, the common-benefit fund was $2.1 billion; a 5% holdback would be a considerable $105 million. *See* Alison Frankel, *Opioid Plaintiffs' Committee Urges US Appeals Court to Toss Fee Bid by Shut-Out Law Firms*, REUTERS (Sept. 10, 2024), https://www.reuters.com/legal/litigation/column-opioid-plaintiffs-committee-urges-us-appeals-court-toss-fee-bid-by-shut-2024-09-09/ [https://perma.cc/D7ZH-9LTE]. Naturally, the percentage would fluctuate based on the level of failure in the claim inventory.

2. *Closing the Bankruptcy Loophole*

Filtering nonmeritorious claims in MDL is vital, but that occurs infrequently and there is no mechanism to preclude claims that are successfully filtered there from reemerging in bankruptcy. Therefore, both platforms need to have adept filtering protocols.

The bankruptcy process offers parties expedited resolution. There is an argument that it would be wasteful for courts in mass-tort cases to devote more than meager resources to determining whether individual claimants can substantiate their claims or for a debtor to review individual claims and object to nonmeritorious ones. In fact, in most mass-tort bankruptcies, debtors eschew granular claim analysis, focusing instead on the claim inventory at a high level, then employing statistical modeling to make conclusions about viability and compensability of the thousands of claims in the case before pursuing settlement.[324]

Nonmeritorious claims in bankruptcy present the same threats as those outside of the process,[325] but with additional facets. As explained in section I.B.3, *supra*, mass-tort claimants in bankruptcy have a right to vote on the debtor's proposed settlement. A court will not confirm a plan of reorganization that includes this settlement if less than 75% of personal injury claimants vote in favor of the deal.[326] A plan that receives the necessary votes can be confirmed by the bankruptcy court and imposed equally on all parties, even those that voted against it. This presents a new way that nonmeritorious claimants can directly disadvantage meritorious ones.[327]

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324 *See* Telephone Interviews with Litigation Finance Insiders, *supra* note 32.

325 For example, nonmeritorious claims deplete trust funds, but initial meritorious claimants may not absorb the primary harm. As funds are depleted, trusts begin reducing distributions to avoid insolvency. We have seen this in a number of trusts, most notably the Johns Manville trust. In these cases, distributions can dwindle to the point where future claimants who file claims in subsequent years receive a fraction of the current claimants' recovery. *See* Bedi & Parikh, *supra* note 136, at 1636 ("The fear is that the blended recovery rate over the life of the trust will diverge significantly from the per-claimant recovery that initially made the settlement look favorable.")..

326 *See* 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb). The subsection imposes the requirement in cases involving asbestos claims, but debtors have accepted the threshold requirement even in cases without asbestos exposure. *See* Parikh, *supra* note 67, at 484.

327 For example, nonmeritorious claimants may not put any value on nonfinancial measures—including public apologies from wrongdoers—that attempt to address the wrong perpetrated by the corporate debtor, but such measures may be extremely important to many meritorious claimants.

Filtering nonmeritorious claims in bankruptcy has been elusive, but concerns about this issue have been muted by the speed and efficiency the process offers.[328] Corporate defendants are extremely concerned about nonmeritorious claims at the early stages of a case. This sentiment dissipates when the bankruptcy process brings forward a global settlement. At this later stage, the debtor is offered the ability to settle all claims in the case in exchange for a flat contribution to a settlement trust. The debtor knows that once the trust is funded and the case closes there is no risk of future liability, even where the trust becomes prematurely insolvent.[329] Debtors formulate their settlement proposals understanding that a significant percentage of pending claims may be nonmeritorious or noncompensable, but the debtor is unconcerned whether claims will be filtered before distribution once the final deal is struck; indeed, the harm will be borne by meritorious claimants.

This reality creates an odd dynamic at the backend of the bankruptcy process: the party in a position to pursue screening of nonmeritorious claims—or at least ensure that an effective fraud-filtering mechanism is part of trust protocols—has ostensibly no incentive to do so. To the extent these protocols could derail settlement, the debtor is incentivized to forgo them. The debtor is settling the dispute for a fixed amount and then completely walking away, relying on its own funds coupled with contributions from affiliates and insurance policies. This makes things easier for plaintiffs' attorneys, who are vehemently averse to their client's claims being scrutinized. Compounding this is the fact that courts exhibit an odd malaise, disinclined to "micromanage" the claim assessment process.[330] The prospect of moving an elephantine mass of cases off its docket is extremely alluring, and the court can take comfort in

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328 *See* Samir Parikh, *Bankruptcy Is Optimal Venue for Mass Tort Cases*, Law360 (Feb. 28, 2022), https://www.law360.com/articles/1468363/bankruptcy-is-optimal-venue-for-mass-tort-cases [https://perma.cc/5ZBA-3LQA].

329 *See* Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 Fordham L. Rev. 325, 338 (2022); *see also* Truck Ins. Exch. v. Kaiser Gypsum Co., 144 S. Ct. 1414, 1426 (2024) (explaining that the debtor's liability is extinguished by the plan so it has no "incentive to limit the postconfirmation cost of defending or paying claims").

330 Hilary Russ, *Lawyers Filing Boy Scout Claims Must Add Personal Vow*, Law360 (Sept. 26, 2023), https://www.law360.com/bankruptcy-authority/midcap/articles/1725595/lawyers-filing-boy-scout-claims-must-add-personal-vow [https://perma.cc/UMD7-7Y6F] (noting that Judge Silverstein, who oversees the Boy Scouts of America bankruptcy, "said that she would not 'micromanage' the [claim filtering] process"); *see also* Bedi & Parikh, *supra* note 136, at 1636.

the idea that the claimants' settlement trust will be responsible for the herculean task of filtering.

The burden of filtering nonmeritorious claims invariably falls to the trustee of the settlement trust. These trustees, however, face the same resource constraints as courts, plaintiffs' attorneys, and corporate defendants and invariably adopt streamlined operations.[331] Bankruptcy trusts presume the validity of submitted claims. Insiders understand this well, and the incentive to file nonmeritorious claims persist. Trusts also contain an "immediate payment" option, which allows claimants to accept a reduced distribution in exchange for an extremely cursory review of their claim. This is the failsafe for those with the most specious claims.

Insurance companies would like to be involved in designing fraud-filtering mechanisms and are arguably "the only entity with an incentive to identify problems with the [plan and trust protocols]."[332] But this party had been excluded from the trust formulation process. As noted in subpart II.A, *supra*, insurance companies enjoy less influence in these cases than one would imagine. Corporate defendants tend to be extremely profitable and would prefer to guide the case without insurer meddling. Of course, these defendants have insurance policies and expect to fund the settlement trust at least in part with these funds. But defendants have leaned on the doctrine of "insurance neutrality" to keep insurance companies on the sidelines during plan formulation. This doctrine holds that an insurance company lacks standing to object to settlements in bankruptcy—even those that contain deficient fraud-filtering mechanisms—if (i) a policyholder is merely going to pursue claims under existing insurance policies after the plan of reorganization is confirmed, and (ii) the plan does not increase the insurance company's prepetition obligations or impair its prepetition policy.[333]

Existing tools and the recent shift in case law could provide a means to improve process integrity. Bankruptcy courts should seek the same governance alignment described in section IV.A.1, *supra*. Luckily, the attorney-payment procedures in MDL are invariably adopted in mass-tort bankruptcy proceedings, and many of the same proposals I made for MDL judges can apply to bankruptcy judges. At the claimant level,

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331 *See* Bedi & Parikh, *supra* note 136, at 1636.

332 *Truck Ins. Exch.*, 144 S. Ct. at 1426.

333 *See id.* at 1427.

much like their MDL counterparts, bankruptcy courts should adopt questionnaires as a way to take a first cut at the most egregious claims. Bankruptcy courts rarely engage in claim filtering, but they do possess the tools to do so. There are a few cases where a debtor sought to estimate the aggregate value of its liability and, through that process, successfully raised concerns about claim integrity. Bankruptcy courts in these cases[334] ordered claimants to fill out a personal injury questionnaire ("PIQ")—which appears to be the bankruptcy equivalent of a plaintiff fact sheet. And just like a fact sheet, the PIQ requires a (i) statement substantiating the claimants' exposure to the product, (ii) medical release or proof of diagnosis to establish injury, and (iii) general certification under penalty of perjury.[335] The PIQs used in recent cases are certainly a good beginning. The court could then rely on *Lone Pine* orders[336] to target those claims that fail the first cut.

Moving up a level, attorneys whose claim inventory has a critical mass of claims that fail the assessment review pose a unique problem in bankruptcy where there is no universally accepted common-benefit tax that can be adjusted as a penalty. The bankruptcy court certainly has the power to attempt to modify fee distributions to recidivist attorneys. A more realistic approach could be to single out attorneys who have 10% or more claims in their inventory identified as "failing" claims. The claims filed by such an attorney that do survive the initial assessment would receive a "heightened scrutiny" screening by the trustee before a distribution from the settlement trust will

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334 *See In re* Honx, Inc., No 22-90035, 2022 WL 17984313 (Bankr. S.D. Tex. Dec. 28, 2022); *In re* Boy Scouts of Am., 642 B.R. 504 (Bankr. D. Del. 2022); *In re* Bestwall, LLC, 99 F.4th 679 (4th Cir. 2024); *In re* Specialty Prods. Holding Corp., No. 10-11780 (Bankr. D. Del. May 20, 2013).

335 *See, e.g.*, Order Pursuant to Bankruptcy Rule 2004 Directing Submission of Personal Injury Questionnaires by Asbestos Claimants & Governing the Confidentiality of Responses Exhibit 1 at 7–9, 12, *In re* Honx, Inc., No. 22-90035 (Bankr. S.D. Tex. June 15, 2023), ECF No. 839.

336 *Lone Pine* orders appear to be a viable option in bankruptcy. The orders are premised on FED. R. CIV. P. 16(c)(2)(L). *See* Engstrom, *supra* note 21, at 18. Rule 7016 of the Federal Rules of Bankruptcy Procedure provides that FED. R. CIV. P. 16 applies in adversary proceedings. FED. R. BANKR. P. 7016(a). Claims processing does not necessarily take the form of an adversary proceeding, but it could. A debtor could object to a group of claims and then seek relief specified in Bankruptcy Rule 7001 in order to create an adversary proceeding. In that context, the bankruptcy court would be able to issue *Lone Pine* orders, as necessary. That being said, one could also argue that these orders are just a part of the bankruptcy court's inherent power. Ultimately, this ambiguity has dissuaded bankruptcy courts from considering this dramatic step, but there does appear to be a basis for its use.

be made. This provides much of the same deterrence effect to the attorney and benefit to meritorious claimants as my sister proposal for MDL courts. That being said, I acknowledge that this approach could be seen as penalizing the offending attorney *and* her meritorious clients who had nothing to do with how their attorney's inventory was constructed. Nevertheless, the heightened scrutiny I envision would require a claimant to provide only prima facie evidence of their case; establishing causation would be unnecessary. This is surely an additional burden but not one that should unintentionally filter meritorious claims.

At the top level, leadership attorneys invariably seek a fee in bankruptcy that mirrors what they would have received through the common-benefit fund in MDL.[337] Consequently, bankruptcy courts can adopt the same construct that I proposed above. To the extent that claim assessment identifies a case that is polluted with failing claims, leadership's access to substantial contribution fees will be reduced commensurate with the deviation. For example, a case with more than 35% failing claims would entitle the bankruptcy court to reduce leadership's substantial contribution fees by 5%, which could be over one hundred million dollars that can be redistributed to meritorious claimants.

I acknowledge that these changes place a burden on all parties and increase case costs, potentially reducing the aggregate funds available for meritorious claimants. Nevertheless, the practice would help filter nonmeritorious claimants from the recovery pool and thereby *increase* the individual recovery meritorious claimants realize. As noted above, additional vigilance at the backend will gradually improve frontend behavior and disincentivize marshaling specious claims.

Finally, incorporating a robust fraud-filtering mechanism into the claim distribution process performed by settlement trusts would be ameliorative. As noted above, insurance companies have pushed for this but have been shut out of the process. This exclusion will change going forward because of the Supreme Court's ruling in *Truck Insurance Exchange v.*

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337 *See* Transcript of Trial Day 4 at 97–99, 142–44, *In re* Red River Talc LLC, 670 B.R. 251 (Bankr. S.D. Tex. 2025) (No. 24-90505), ECF No. 1278 (explaining the common-benefit fund in MDL and how the parties involved in the Red River bankruptcy were attempting to create a similar fund in the bankruptcy case). To be clear, some bankruptcy courts are extremely reluctant to grant substantial contribution fees to plaintiffs' firms, at least at the same level as those realized through an MDL common-benefit fund. This is certainly a reason why many plaintiffs' attorneys are loathe to see mass-tort cases land in bankruptcy.

Kaiser Gypsum Co.[338] In that case, Truck Insurance Exchange ("Truck") was the primary insurer for Chapter 11 debtors that had manufactured and sold products containing asbestos.[339] These debtors had filed a plan of reorganization that—at least from the insurer's perspective—lacked disclosure requirements that would have helped identify nonmeritorious claims. The insurer sought to object to the plan. The bankruptcy court, however, ruled that it lacked standing, because the plan was insurance neutral. The district court and Fourth Circuit Court of Appeals both affirmed.[340] The Supreme Court reversed, holding that insurance companies that have issued policies covering the claims involved in a particular mass-tort bankruptcy case have standing to object to proposed plans of reorganization.[341] This ruling gives insurers additional voice in the trust formation process, which could help to bolster the weak fraud prevention protocols that have characterized modern cases.[342]

B. Cabining Aggressive Financiers

In addition to the proposals above, policymakers need to focus on the actors seeking to benefit from a compromised system. The most frequently discussed proposal for aggressive financiers emphasizes transparency and requires the disclosure of capital provision agreements in all mass-tort cases. Courts have the inherent power to do this,[343] and some have already issued standing orders compelling disclosure and possibly *in camera* review.[344] Transparency is always attractive

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338 144 S. Ct. 1414 (2024).

339 *Id.* at 1420.

340 *Id.* at 1423.

341 *Id.* at 1427–28.

342 I acknowledge that insurers "must still meet constitutional and prudential standing requirements to be heard on a particular issue." Brent Weisenberg & Jeff Prol, *Revisiting Scalia's 'What's It To You?' After Kaiser Ruling*, LAW360 (July 5, 2024), https://www.law360.com/bankruptcy-authority/articles/1854598/revisiting-scalia-s-what-s-it-to-you-after-kaiser-ruling [https://perma.cc/D3WG-PZPH].

343 Bankruptcy courts customarily require parties to disclose funding relationships, though rarely require production of funding agreements. *See* Parikh, *supra* note 25, at 35 ("[T]he court [in the PG&E bankruptcy case] concluded that the prepetition funding arrangement was not relevant . . . . The court reached this conclusion even though . . . the capital-provision agreement . . . was never provided to the court . . . .").

344 Chief Judge Connolly, U.S. District Court Judge for the District of Delaware, has a standing order that requires all parties appearing before him to disclose any third-party funding they receive. *See* Josh Landau, *Not Just Delaware: Litigation Funding Transparency Progress Across Multiple States*, PAT. PROGRESS (Feb. 15, 2024), https://patentprogress.org/2024/02/

but perhaps not as impactful as one would imagine. Indeed, *in camera* review may bring an agreement before the court, but what provisions should courts be looking for and how should they respond if they find them? Control provisions are of primary concern. What if an agreement appears to have control provisions, but they are vague and open to interpretation? Does a mere veto right constitute control of a case? Does a court have the power to strike these provisions from a private agreement based on the possibility that they could be abused? At least one party to the agreement is not even before the court. I suspect that disclosure of CPAs merely pushes unresolved issues before a jurist who may be ill-equipped to manage them. More importantly, we know that opaque capital relies on relational leverage to dictate outcomes. Enhanced disclosure may be a good beginning, but it is a half-measure at best.[345]

I would like to introduce the idea of imposing fiduciary duties as a way to cabin opaque capital. Fiduciary duties arise in various situations but are most prominent in assessing the behavior of senior officers and board directors for corporate entities.[346] As noted in the discussion of incomplete contracting in section III.B.2, *supra*, parties are unable to draft robust contractual provisions that effectively address all potential disputes or regulate all material bad acts. For example, imagine that Company X regularly purchases commercial real estate. A director of Company X holds a partial ownership interest in a number of entities from which Company X believes it may purchase property. The company can ensure that this director does not take part in sale discussions nor vote on any proposed purchases for which she is conflicted. Indeed, the director's

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not-just-delaware-litigation-funding-transparency-progress-across-multiple-states/. [https://perma.cc/NS7N-SZ3J]. Select states have sought to intervene and require disclosure of financing agreements, including Florida, Wisconsin, and Louisiana. *See* Brian Joseph, *State Lawmakers Wade Into Third-Party Litigation Funding*, LexisNexis (Feb. 20, 2024), https://www.lexisnexis.com/community/insights/legal/capitol-journal/b/state-net/posts/state-lawmakers-wade-into-third-party-litigation-funding [https://perma.cc/AE5C-NBD3]; Jamie Hwang, *Wisconsin Law Requires All Litigation Funding Arrangements to Be Disclosed*, ABA J. (Apr. 10, 2018), https://www.abajournal.com/news/article/wisconsin_law_requires_all_litigation_funding_arrangements_to_be_disclosed [https://perma.cc/P7WA-L3M3]; Emily R. Siegel, *Louisiana Gov. Gets Bill Regulating Lawsuit Funding Business*, Bloomberg L. (May 31, 2024), https://news.bloomberglaw.com/business-and-practice/louisiana-gov-gets-bill-to-regulate-lawsuit-funding-business [https://perma.cc/G67P-SHRR]. Of course, this does not have any impact in federal court where prominent mass-tort cases are invariably resolved.

345 *See* Glover, *supra* note 173.

346 *See, e.g.*, Parikh, *supra* note 28, at 1962–68.

fiduciary duty of loyalty prohibits it. But the shareholders are concerned that the director will attempt to influence other directors in their purchase decision. The board could try to restrict this behavior but delineating the exact actions that the director cannot undertake would be extremely difficult. Fiduciary duties can help fill the gap. In this case, the duty of loyalty would apply to any attempt by the conflicted director to influence a vote but allow a court to evaluate the conduct ex post under a flexible standard, tailoring its inquiry to the idiosyncrasies of the case.

We know that opaque capital relies on relational leverage and this tactic is extremely hard to restrict contractually. In the mass-torts sphere, financiers enter into capital provision agreements with parties who often lack the leverage necessary to demand contractual provisions that preclude financier attempts to influence outcomes. And even if these parties had sufficient leverage to include limiting provisions, drafting effective language would be a daunting task. Imposing fiduciary duties could mitigate this exposure.

Congress and state legislatures[347] are considering legislation designed to regulate third-party litigation finance.[348] Disclosure provisions are a focal point. Legislatures could bolster these disclosure provisions by imposing a fiduciary duty on third-party financiers. Drawing in part on a proposal currently pending before the European Commission,[349] I propose that—as to substantive settlement actions taken in a case—any party enjoying a direct or indirect material interest in the contingency fees realized by an attorney be prohibited from acting in a way that could undermine the best interests of that attorney's clients. This derivation of the typical duty of loyalty could serve as a backstop measure to address attempts to exert relational leverage. Further, as noted in section III.B.2, *supra*, financiers often create a Stand-In Financier to be the contractual party to

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347 The relationship between financiers on one hand and plaintiffs' firm and claimants on the other is invariably subject to New York state law through a choice-of-law provision that appears in capital provision agreements in prominent cases. The initial response is that parties will opt out of New York state law and select a different state. But it is not that simple. New York state law and case law offer financiers and investors certainty and extremely favorable treatment across a host of issues. I suspect that opting out of New York state law based on this one issue would be a pyrrhic victory for financiers.

348 *See* Joseph, *supra* note 344 (noting that litigation funding bills are pending in ten states); *see also* Litigation Funding Transparency Act of 2021, H.R. 2025, 117th Cong. (2021).

349 *See* European Parliament Resolution, *supra* note 161, at 11, 14, 18.

the capital provision agreement, thereby escaping the terms in the agreement. My proposal would capture these parties—and potentially others—based on their interest in the case.

I acknowledge that this change would not halt all financier attempts to influence a case and further research is necessary. Nevertheless, the imposition of such a duty is intriguing and could afford claimants and law firms the ability to push back on relational leverage tactics and, in extreme cases, pursue litigation against an overly aggressive financier.

Ultimately, the multi-faceted problem that opaque capital presents requires a multi-faceted approach. This change, coupled with the other measures I propose, may be sufficient to adjust current incentive structures and minimize the risk of claimant exploitation.

Conclusion

Opaque capital is a new apex predator in the mass-torts ecosystem, gradually deploying a unique arsenal to secure a premium. Without intervention, the ultimate effect on claimants and the judiciary could be decidedly negative. But policymakers cannot assess what intervention—if any—is necessary without understanding the prevailing incentives and dynamics. This Article seeks to open a meaningful discussion about mass-tort financing by exploring the key actors and assembling the modern mass-tort picture in full. The light cast on the shadowed corners of litigation finance reveals that more exploration is necessary.