

ZOMBIE LITIGATION: CLAIM AGGREGATION, LITIGANT AUTONOMY, AND FUNDERS' INTERMEDDLING

Maya Steinitz[†]

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[†] Professor of Law and R. Gordon Butler Scholar in International Law at Boston University Law School. I thank Nora Freeman Engstrom, Brian Fitzpatrick, Nancy Moore, Jessica Silbey, Chris Robertson, Mike Maurer, Nathan Miller, Abigail Field, and the participants of Boston University School of Law's faculty workshop for their comments. I am also grateful to Ryan Reimers and Robert Madden for their research assistance. The Author occasionally serves in litigation finance matters as an expert witness or consultant to plaintiffs, defendants, litigation funding firms, law firms, and investors.

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INTRODUCTION

The main debate surrounding litigation funding in recent years has focused on the question of disclosure of funding agreements. While the issue is important, predominantly because of its effects on the course and outcome of individual cases, far more important are bigger, interrelated questions that have systemic effects on the civil justice system, the legal profession, and the nature of the attorney-client relationship. The rise of litigation funding has had profound effects. The subsequent rise of portfolio funding—which I here propose to view as a new form of undisclosed and unregulated claim aggregation—has broader-still effects including clients' potential, and at times actual, loss of autonomy over their cases as their lawyers become originators, brokers, and/or managers of “litigation assets.”

First, I identify and explain a new possible scenario, which I call “zombie litigation”: litigation that a plaintiff no longer wishes to pursue or, in some cases, does not wish to initiate but that nonetheless proceeds through the court system for the benefit of a funder that has control over the plaintiff's case. *Second*, I explain how funders' incentives to demand zombie litigation are increased by the financialization of litigation: the concomitant rise of portfolio funding and secondary trading in legal claims. *Third*, I identify and explain the numerous doctrines,

rules of evidence, of procedure, and of professional responsibility that recognize and at times presuppose as axiomatic, the sanctity and centrality of a plaintiff's autonomy over their cases. *Fourth*, I map the harms said rules and doctrines seek to guard against and that would be unleashed if funder control over settlement decisions was normalized. These harms span unfairness at the level of individual cases, damage to the civil justice system as a public institution serving the public good, and erosion of the attorney-client relationship. The affected constituencies are plaintiffs, defendants, courts, and the public. *Fifth*, I also identify and systematize an emerging framework of addressing the risk of zombie litigation, and plaintiffs' loss of autonomy more generally, through managerial judging.

I

WHAT IS ZOMBIE LITIGATION?

To understand zombie litigation, I offer a hypothetical. The hypothetical is based, very generally and with some alterations, on a recent, high-profile case in which a Fortune 100 corporation was compelled by a funder to continue litigating after it had arrived at settlements that were acceptable to it and its defendants.¹ By abstracting away, simplifying and modifying from that specific dispute, I aim to avoid becoming entangled in its minutiae and idiosyncrasies; to convey that the reality of funders assuming control is a result of structural features which have emerged as litigation finance has evolved, and not an outlier that can be dismissed as a one-off; and to illustrate the systemic effects such control might have.

A. How Is Zombie Litigation Created?

Big Corporation ("BigCorp") is a large distributor of widgets in the United States, making it one of the biggest players in an industry that generates hundreds of billions of dollars a year in revenue. Big Litigation Financier ("BigFin") is one of

¹ See Petition to Confirm Arb. Award, *Glaz LLC v. Sysco Corp.*, No. 1-23-cv-02489-PGG (N.Y. Sup. Ct. Mar. 23, 2023); Petition to Vacate Arb. Award, *Sysco Corp. v. Glaz LLC*, No. 1:23-cv-01451 (N.D. Ill. Mar. 8, 2023); *In re Pork Antitrust Litig.*, No. 18-CV-1776 (JRT/JFD), 2024 WL 511890 (D. Minn. Feb. 9, 2024), *aff'd*, No. CV 18-1776 (JRT/JFD), 2024 WL 2819438 (D. Minn. June 3, 2024). I served as an expert witness produced by Sysco in its arbitration against Burford Capital and petition to the Illinois court to vacate the arbitral award. The hypothetical is generally based on the public information regarding that case. Sysco and Burford's lawyers in the real-world case, Boise Schiller, denies Sysco's allegations that it violated any rule of professional conduct.

the leading players in the no-longer-nascent litigation finance industry. It maintains several billion dollars of investments in a range of litigations in the United States and abroad. BigCorp brought several lawsuits against some of its suppliers for alleged antitrust violations throughout the American widget market. Its counsel, an AmLaw 100 firm (“BigLaw”) approached BigCorp with a funding offer from BigFin. BigLaw had worked with BigFin a number of times in the past, and planned on doing so again in the future. At the time it approached BigCorp, in fact, BigLaw had several cases related to the widget industry also funded by BigFin. BigLaw has taken on the widget cases—both those of BigCorp and of other clients—on a partial contingency fee basis.²

Before continuing with the hypo, it is worth pausing to review the different interests of each of the actors. BigCorp is seeking to recover damages it suffered as a result of the alleged anticompetitive behavior of its suppliers and to discourage such behavior in the future. But it also has ongoing business relationships with those suppliers, which it plans on maintaining into the future. BigLaw is interested in the fees it will earn from BigCorp, the additional fees it will earn from the other widget cases it is handling, and its “repeat play” business relationship with BigFin, which is funding its current suite of widget cases and is likely to fund future cases as well. BigLaw also has an interest in maintaining a good relationship with BigCorp, of course, but the market for legal services has evolved away from the type of loyalty big firms used to enjoy from their corporate clients. There are also many potential large clients and few large funders. Hence, the potential for repeat play is stronger with BigFin than with BigCorp. For BigCorp’s lead counsel in the widget matters (“BigPartner,” a rain-making partner at BigFirm), the relationship with BigFin could account for her entire book of business at any point in time or even for the remainder of her career, since funders often refer clients to their counsel of choice. Finally, BigFin is interested in a maximum return on its investment. This means the largest possible monetary recovery not only from BigCorp’s cases, but from all the widget cases across all plaintiffs that BigFin is financing. These include all of BigCorp’s widget cases, and also other widget cases being handled by BigLaw and other law

² Often, to align the lawyers’ interests with those of the funder, funders require that the lawyers accept a partial payment from the funder with the remainder of their compensation being contingent.

firms. BigFin, then, is engaged in *portfolio funding*, which has outpaced funding individual cases as the preferred model for large commercial litigation funders.³ We can already see that while it is certainly possible for all these interests to remain in alignment, there are also likely scenarios in which conflicts arise between and among the actors.⁴

BigCorp and BigFin entered into a litigation funding agreement which provided that BigFin would pay the legal fees and costs for all of BigCorp's widget cases. In return, BigCorp agreed that BigFin would receive a portion of the recovery, if any. One of the recurring problems in litigation finance is aligning incentives. At this stage of the process, BigCorp has shifted the expenses of its claims off its own books, reduced its overall risk, and the amount it may recover, which, in turn, may lead it to be less invested in the prosecution of the case. This is a problem for BigFin, since maximal efforts by BigCorp may be necessary to maximize its return. This issue is usually addressed through cooperation clauses and/or through staged funding, the provision of funding in stages, which creates an opportunity for funders to threaten discontinued funding if a plaintiff does not follow their advice/direction.⁵ In our hypo, the agreement goes a step further, including language that BigFin believes afforded it a veto over settlement decisions.

If everyone's interests had remained aligned, the question of the interpretation of such a clause may never have come up. But those interests can easily become misaligned—if, for instance, as the litigation progresses and more information becomes available, BigCorp comes to believe its case is worth less than it originally thought. This could be due to procedural developments, emerging evidence, a change in the law, or any of a number of other factors. In such a situation, disputes could

³ Julien Chaisse & Can Eken, *The Monetization of Investment Claims Promises and Pitfalls of Third-Party Funding in Investor-State Arbitration*, 44 DEL. J. CORP. L. 113, 130 (2020).

⁴ The literature on the conflicts of interests that are created once a funder is introduced into the attorney-client relationship even when a single case, not a portfolio, is involved is by now extensive. See, e.g., Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011); Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388 (2016); Brian Fitzpatrick & William Marra, *Agency Costs in Third-Party Litigation Finance Reconsidered*, 25 THEORETICAL INQUIRIES L. 1 (2025); Vicki Waye, *Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs*, 19 BOND L. REV. 225 (2007).

⁵ See generally Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 473 (2012); Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711 (2014).

very well arise over the meaning of the type of intervention BigFin is allowed under the contract.

BigCorp received a settlement offer. Because it had come to believe its claims were worth much less than it originally thought, and it was interested in resuming a normal relationship with its suppliers, BigCorp decided to accept the offer and settle its cases at a price significantly lower than was projected at the time BigFin decided to invest. BigCorp's decision to settle may also be affected by the fact that it has shifted some of its litigation risk onto BigFin. But recall that BigFin is a sophisticated funder well aware that litigation is a high-risk/high-reward asset class and that it is in the business of taking on risk that plaintiffs and contingency lawyers would otherwise carry. Indeed, that is a key reason it prefers to invest in portfolios, which provide diversification, rather than in single cases. Further, BigFin's business model is to require a very large percentage of any proceeds in all of its investments to compensate it for this and other risks that are inherent in litigations as assets.

BigCorp's decision to settle its cases affects the value of BigFin's investment in its entire widget portfolio of cases because the facts, the legal theories, and some procedural aspects of the cases across the portfolio overlap. Thus, the price at which BigCorp agrees to settle its cases may affect the entire "market" of widget cases, including all those in BigFin's portfolio. The same is true of BigLaw; having taken widget cases (those of BigCorp as well as of others) on a contingency fee basis it is both a lawyer and a financier. In the latter capacity, it is identically positioned as BigFin. Because of this, BigFin and BigLaw's interests no longer align with those of BigCorp, even though they were all aligned at the outset when they all agreed on the valuation of the case and sought to maximize a monetary settlement or judgment. The interests of the two financiers—BigLaw and BigFin—meanwhile, remain aligned. BigCorp's decision also jeopardized BigLaw's business relationship with BigFin. If BigFin lost big on a portfolio of widget cases sourced and brokered by BigLaw, then its prospects of future funding would become considerably dimmer. BigCorp has nothing more to gain from litigating—it is convinced the settlement offer is fair—and has much to gain from settlement: such as normalizing important business relationships and avoiding the continued drain of managers' and employees' time and energy. But for its investors, BigFin and BigLaw, BigCorp's cases are a commodity and they affect the rest of their widget portfolio. BigCorp believed that once the interests of BigCorp, on the one

hand, and BigPartner and BigFin, on the other hand diverged, BigPartner prioritized the interests of BigFin in ways that violated its professional responsibilities and so it fired BigLaw.

Litigation finance agreements routinely include arbitration clauses. This means that disputes between funders and their clients, as well as funders' involvement in the litigations they invest in, remain out of sight for the court, the public, and the defendants. The systemic effects of funders' intermeddling—whether influencing or outright controlling the litigation—are also not observable. In our hypo, BigFin sues BigCorp in international arbitration seeking to enjoin the settlement and force BigCorp to continue litigating the widget cases against its wishes. Note that this means that *de facto*, though not *de jure*, it would be enjoining the defendants to keep litigating and the courts to keep hearing the cases though neither defendants nor courts are aware of the international arbitration nor the existence or role of BigFin. The international tribunal ordered the injunction. What follows is what I call zombie litigation: litigation that all parties—plaintiff(s) and defendant(s)—wish to settle but are compelled to continue litigating for the benefit of maximizing the return of the litigation funders.

B. Why Might Zombie Litigation Become an Epidemic?

BigCorp may not garner much sympathy for losing control of its case to BigFin, given BigCorp's wealth, sophistication, and bargaining power. This, however, misses the broader implications of the hostile takeover of BigCorp's case. If a powerful corporation could neither retain its autonomy over its affairs nor command the loyalty of its counsel, other types of plaintiffs—individuals in individual cases and even more so in aggregate cases, as well as smaller businesses—do not stand a chance. In this subpart, I explain in brief why that is.

At the risk of stating the obvious, commercial litigation funders' sole purpose, like that of other commercial enterprises, is to maximize the profits of their shareholders. Such entities are neither nonprofits nor benefit corporations. Any positive social externalities, such as increased access to justice and enhanced efficiencies for law firms, are a side effect of profit maximization. Further, as is logical, litigation financiers are finance firms and so look to what firms in other parts of the financial industry have done. They do not seek to reinvent the wheel. Rather, they take existing, tried-and-true deal structures and modalities, and adapt them to the particular asset they are dealing with (lawsuits), the sector they serve (legal

industry), and the regulatory environment (no regulation). A few things follow: as is true for other types of finance, influence and control facilitate profit maximization; economies of scale and diversification enhance efficiencies; and shifting risk is valuable. Litigation financiers thus have structural incentives to maximize all of these. Some consequent trends and prospects are explored in this subpart.

Despite the opacity of litigation funding disputes, information about funders' de facto control, including over settlement decisions, is by now extensive. In addition to publicly reported cases of plaintiffs alleging such control and/or courts holding such control exists,⁶ the most comprehensive study of litigation funding to date, has concluded that:

Concerning the question of whether litigation funders exercise any form of control over the legal proceedings, *stakeholders other than funders that had an opinion overwhelmingly answered with "Yes"*, whereas a majority of litigation funders found a "No" as an appropriate answer. But even so, a significant number of litigation funders agreed they exercised some form of control over the legal proceedings. Stakeholders were then asked to indicate what type of control litigation funders had, *with top ranked forms of control being "consent for settlement", "choice of lawyer" and "agreement on strategy"*. There was a broad agreement among different stakeholder groups, including litigation funders, that is it [*sic.*] possible for the litigation funder to withdraw funding during the litigation process.⁷

⁶ See, e.g., *Boling v. Prospect Funding Holdings, LLC*, 771 Fed. App'x 562, 579–80 (6th Cir. 2019) (holding that the terms of the funding agreement "effectively g[ave] [the funder] substantial control over the litigation," including terms that "may interfere with or discourage settlement"); *Class Member's Mot. to Stay Arbitration at 4–6, In re Nat'l Football League Players' Concussion Inj. Litig.*, No. 2:12-MD-02323-AB (E.D. Pa. Feb. 12 2024), ECF No. 12375 (NFL concussion claimant was compelled to arbitrate a demand from a funder to seek medical treatment he did not wish to receive); *Compl., White Lilly, LLC v. Balestriere PLLC*, No. 1:18-CV-12404 (ALC), 2022 WL 4365615 (S.D.N.Y. 2022) (funder asserting a contractual right to exercise control); *Petersen Energía Inversora S.A.U. v. Argentine Republic*, No. 15 CV 2739 (LAP), 2023 WL 2746022 (S.D.N.Y. Mar. 31, 2023) (control described in Letter from the Laws. Comm. for Just. to the Texas Sup. Ct. Advisory Comm. on State TPLF Disclosure Rules (Sept. 25, 2024), <https://www.lfcj.com/document-directory/letter-to-the-texas-supreme-court-advisory-committee-on-state-tpdf-disclosure-rules> [<https://perma.cc/AGF6-C74W>]); *Chevron Corp.'s Mem. in Opp'n to Mot. for Class Certification at 34, Gbarabe v. Chevron Corp.*, No. 3:14-CV-00173-SI, 2016 WL 5596113 (N.D. Cal. 2017), ECF No. 186.

⁷ See EUR. COMM'N DG JUST. & CONSUMERS, *MAPPING THIRD-PARTY LITIGATION FUNDING IN THE EUROPEAN UNION* 12 (2025) (emphasis added), <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/>

The question of the validity of funder control can come up in multiple scenarios including situations where a court or tribunal is called upon to interpret a vague contractual provision, which can be interpreted as either granting or not granting the funder such control; when a court is called to enforce or set aside an arbitral award purporting to enforce the funder's control;⁸ when a party challenges a funding agreement as unconscionable; and in challenges to certification of a class.⁹

When the question thus arises, courts and tribunals should disallow funders' control both under existing law and as a normative matter. And given the discrepancy between what third-party litigation funding ("TPLF") contracts often say—including, as many do, explicit language disclaiming funders' control—and the reality as described by consumers of funding, judges should consider taking an active role to ensuring undue control is not exerted when a case is financed.

1. *Control over Individually Funded Cases*

Exerting control over financed cases is unlawful—“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 or withdraw from representation if the client persists in granting the funder control.”¹⁰ It also creates exposure for financiers—e.g., of lawsuits, getting dragged into discovery, reputational harm, and regulatory attention. This leads some funders to adopt a passive approach. Others straddle a line of exerting influence short of control. And others obtain control through one or more means. While funders generally avoid explicit control provisions in funding contracts and often include provisions disclaiming control, what appears to be commonplace is *indirect* control—economic control rather than control through

civil-and-commercial-law/third-party-litigation-funding-tplf_en [https://perma.cc/BKH4-9MN7].

⁸ Both scenarios presented themselves in the Sysco/Burford dispute. In that case, the public policy concerns against the funder's control also came up in connection with a motion to have the funder substitute the plaintiff as party of record. See *In re Pork Antitrust Litig.*, No. 18-CV-1776 (JRT/JFD), 2024 WL 511890 (D. Minn. Feb. 9, 2024), *aff'd*, No. CV 18-1776 (JRT/JFD), 2024 WL 2819438 (D. Minn. June 3, 2024).

⁹ *Burkhart v. Genworth Fin., Inc.*, C.A. No. 2018-0691-NAC, 2024 WL 3888019 (Del. Ch. Aug. 21, 2024) (alleged funder control raised as objection to adequacy of representation under Rule 23(d) certification).

¹⁰ Anthony J. Sebok, *The Rules of Professional Responsibility and Legal Finance: A Status Update*, 57 WAKE FOREST L. REV. 777, 788 n.65 (2022).

contractual agreement. Some funders appear to be exercising indirect control through a combination of control over the selection and replacement of lawyers; economic influence over or control of lawyers and law firms; and the ability to exit the funding arrangement mid-litigation, which leads to a “hold up” problem in funding agreements—funders’ disproportionate bargaining power due to their ability to cease funding.

2. Control of Aggregate Litigation

Aggregate litigation—mass and class actions—appear to be the fastest growing “asset classes” for litigation funders.¹¹ Plaintiffs in such cases are, notoriously, often passive. Plaintiffs may be unable to control their cases because the cases are too small for it to be rational for them to invest the time. In the case of class actions, plaintiffs may not even be aware that they are plaintiffs. Even when plaintiffs’ stake is large, plaintiffs in aggregate litigation often lack the bargaining power to steer their lawyers. One of the most common criticisms of aggregate litigation—class, mass, and derivative actions—is that contingency-fee lawyers, not plaintiffs, drive and control such cases.¹²

Litigation funders have all the same incentives that contingency-fee lawyers do and the same factors that disempower plaintiffs vis-à-vis their lawyers apply vis-à-vis the funders as well. Additionally, funded plaintiffs’ lesser power is compounded by several factors. Plaintiffs may not even be aware that their cases are being funded. Even when they are, they are even less likely to understand complex financial agreements than they are to understand lawyers’ retention agreements. The lawyers’ conflicts with their clients are heightened because their loyalty is split between their clients—often a one-shot relationship—and their funders—often a repeat-play relationship.¹³ Lawyers have fiduciary duties and other professional responsibilities

¹¹ See generally Ronen Avraham, Lynn A. Baker & Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 REV. LITIG. 143 (2021); Samir D. Parikh, *Opaque Capital and Mass-Tort Financing*, 133 YALE L.J. F. 32 (2023); Brian T. Fitzpatrick, *Can and Should the New Third-Party Litigation Financing Come to Class Actions?*, 19 THEORETICAL INQUIRIES L. 109, 119 (2018). Cf. J. Maria Glover, *Asking the Right Questions About Legal Finance in United States Aggregate Dispute Resolution*, 25 THEORETICAL INQUIRIES L. 81 (2025) (critically examining the likelihood of funding of different forms of mass claiming).

¹² Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POLY REV. 69, 71 (2004); Jade Brewster, *A Kick in the Class: Giving Class Members a Voice in Class Action Settlements*, 41 W. ST. U. L. REV. 1, 4 (2013).

¹³ On repeated play relationship in litigation funding and its effects, see Steinitz, *supra* note 5; Suneal Bedi & William C. Marra, *The Shadows of Litigation*

towards their clients as well as towards the courts, and society writ large as “officers of the court.”¹⁴ Funders have no parallel obligations. By virtue of the rules of procedure, courts play an active supervisory role over lawyers’ conflicts, but not over funders’ conflicts in aggregate litigation.

3. *Claim Portfolios as Undisclosed, Unregulated Aggregation Devices, Secondary Markets, and Moral Hazards*

Economically speaking, claim portfolios are an aggregation device. Like class and mass actions, portfolios offer economies of scale with their attendant efficiencies (e.g., an opportunity to specialize)¹⁵, diversification for the investors (lawyers and funders), and consequently can enhance access to justice by lowering the costs of legal services. Portfolios are also characterized by many of the same problems as class and mass actions: mainly, conflicts of interests between the lawyers and their clients and amongst claimants whose cases are aggregated, and incentives to bring non-meritorious cases.

Claim portfolios are not, however, a *procedural* aggregation device created by the legal system and supervised by the courts the way class and mass action mechanisms are; they are economic devices that are invisible to the courts and to defendants. They were not created by the legal system to enhance its own efficiency, to provide access to justice, and to incentivize private enforcement of the law. In fact, as discussed throughout this piece, they largely undermine all of these goals.

Economic aggregation via claim portfolios means that many of the agency and other problems inherent in procedural aggregation can now arise in cases far broader than those that would traditionally qualify for aggregation because any set of cases can be bundled in a portfolio. They do not need to be related as required to be joined as a class, MDL, or derivative actions. And one Nvidia-like runaway success can render any portfolio, irrespective of its contents, highly lucrative.

The potential abuses that procedural aggregation (class, mass and derivative actions) and economic aggregation (claim

Finance, 74 VAND. L. REV. 563, 598 n.133 (2021) (discussing trust in repeat contractual relationships).

¹⁴ See generally Deborah M. Hussey Freeland, *What Is a Lawyer? A Reconstruction of the Lawyer as an Officer of the Court*, 31 ST. LOUIS U. PUB. L. REV. 425 (2012).

¹⁵ See generally BRIAN T. FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* (2019); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987).

portfolios) share has led our system to deviate in the procedural aggregate litigation context from its adversarial nature and instead to adopt a managerial, and even inquisitorial model in which judges supervise key aspects of such cases in order to minimize risks to plaintiffs, defendants, and the courts themselves. Conversely, the problems that claims portfolios give rise to are channeled into arbitration, not the courts, obscuring portfolios' effects both in individual cases and systemically. By contrast, courts do not appear willing to apply unbridled market logic to legal claims as assets but rather are concerned with the special character of lawsuits as processes intended to resolve disputes and to enforce and develop the law for the benefit of both private parties and the public.¹⁶

The unregulated and undisclosed potential downside risk of economically aggregated cases is further increased, compared with that of procedurally aggregated cases, because funded portfolios are supported by secondary markets. Lawyers can shift some or all of the risk they take as financiers onto third-party financiers. Third-party financiers can further shift the risk onto anyone interested in purchasing an interest in legal claims. Some funding arrangements have a derivative nature—investors acquire an interest pegged to the value of the claim rather than an interest in the claim itself—which makes them more liquid. This ability to shift risk creates a “moral hazard”: a situation where agents (lawyers) who are now insulated from risk may behave differently from the way they would behave if they were fully exposed to the risk.¹⁷ Here, the moral hazard is that the risks of originating “subprime” claims are eliminated by the ability to bundle them with meritorious ones and relatively easily sell them in secondary markets.

Lawyers' new roles as originators and brokers of portfolios of cases thus compound the well-known and well-understood conflicts of interest that already exist in aggregate litigation (mass and class actions) as well as those that exist in the funding of single (unbundled) cases. As some lawyers' and law firms' businesses cease to center around serving clients, and instead shift to centering on originating, brokering, and managing cases to the advantage of funders, with whom they often have repeat-play relationships and with whom they co-invest,

¹⁶ See, e.g., *Burkhart v. Genworth Fin., Inc.*, C.A. No. 2018-0691-NAC, 2024 WL 3888019 (Del. Ch. Aug. 21, 2024).

¹⁷ Kevin Dowd, *Moral Hazard and the Financial Crisis*, 29 *CATO J.* 141, 142 (2009).

lawyers' fiduciary role is placed under stress. This *financialization of litigation* into an unregulated asset class with nascent secondary-market risks is distorting our civil legal system from one designed to enforce rights and obligations and resolve disputes into one designed to maximize returns for lawsuit and law firm investors. As discussed throughout, the financialization of litigation, by necessity, distorts the traditional role of courts and of the attorney-client relationship.

II

PLAINTIFFS' AUTONOMY, DEFENDANTS' DUE PROCESS RIGHTS, THE INTEGRITY OF THE COURTS, AND THE PUBLIC INTEREST

In the real-world case upon which our hypo is based, a 2-1 majority of an international arbitral tribunal decided that freedom of contract would render a provision that affords a funder settlement veto over a case valid.¹⁸ This is incorrect. In that case, a petition to vacate the arbitral injunction award as against public policy, and a parallel petition to enforce it, ended up being settled before either court had an opportunity to rule on the question.¹⁹ Had the courts been given the opportunity to rule, the question would have been a matter of first impression. No court in the United States has ever been requested, let alone agreed, to grant permission to a third-party funder to control settlement decisions. Conversely, numerous doctrines, rules of evidence, of procedure, and of professional responsibility, as well as court orders, recognize, and at times presuppose as axiomatic, the sanctity and centrality of a plaintiff's autonomy over their cases. This autonomy includes, *in particular*, control over settlement decisions. In this Part, I examine these doctrines and rules. The mapping of these norms reveals the harms they seek to protect against that would be unleashed if funder control over settlement decisions was normalized. The harms span unfairness at the level of individual cases, damage to the civil justice system as a public institution serving the public good, and erosion of the attorney-client relationship. The affected constituencies are plaintiffs, defendants, courts and the public—in short, all of us. Before discussing these doctrines and rules, however, I first address two arguments

¹⁸ Order on Claimants' Preliminary Injunction Application, ¶ 203, Glaz LLC v. Sysco Corp., LCIA Case No. 225609 (Dec. 14, 2022).

¹⁹ See Petition to Vacate Arb. Award, Sysco Corp. v. Glaz LLC, No. 1:23-cv-01415 (N.D. Ill. Mar. 8, 2023); Petition to Confirm Arb. Award, Glaz LLC v. Sysco Corp., No. 1-23-cv-02489-PGG (N.Y. Sup. Ct. Mar. 23, 2023).

sometimes advanced to justify the notion of funders' control over cases including over settlement decisions: the idea that freedom of contracts is the end point, not the starting point, to analyzing whether a contract that purports to grant funder control is valid and the idea that third-party control over plaintiffs' cases and settlement decision is the same as insurers' control over defendants' cases and settlement decisions. I also explain that compelling plaintiffs to litigate is akin to ordering specific performance of a personal service, a remedy not available in our system precisely due to the value we place on freedom.

A. Freedom of Contract and the Insurance Analogy

1. *Freedom of Contract*

While the principle of freedom of contract is a cornerstone of U.S. law, this freedom is not absolute. Numerous exceptions exist to protect both individuals and the public interest from fundamentally unfair or harmful contracts. These protections include: preventing contracts that lack genuine assent (e.g., duress, misrepresentation, mistake); involve illegal conduct (e.g., contracting to commit a crime or tort; contracting to violate statutes like creating usurious loan agreements or restraining trade in violation of antitrust laws); are not explicitly illegal, but nonetheless are contrary to public policy (e.g., restricting competition, attempting to excuse liability for intentional misconduct, promoting immorality, impairing family relations, requiring a party to waive essential legal rights, especially in situations of unequal bargaining power); are procedurally or substantively unconscionable—so unfair or oppressive as to shock the conscience of the court.²⁰

Multiple federal and state statutes and regulations create limits to freedom of contract in particular areas. These limits include: consumer protection laws preventing unfair or deceptive practices; labor laws restricting the ability of employers and employees to freely contract wages, working conditions, and the right to organize; landlord-tenant laws, often providing minimum unwaivable tenant protections; insurance laws, regulating the terms and conditions of insurance contracts to

²⁰ See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); U.C.C. § 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 2022); RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981); RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 18:10 (4th ed. 2023); ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS* § 29.4 (2025); 17A AM. JUR. 2d *Contracts* § 271 (2024).

protect policyholders.²¹ This final category of limits on freedom of contact is particularly relevant for our purposes and is discussed below.

2. *An Analogy to the Bar on Specific Performance of Personal Services*

Beyond the law of freedom of contract limitations, it is instructive to also examine the law on limitations on remedies, specifically the bar on specific performance for personal service contracts, when analyzing what judicial response would be consistent with basic principles of our legal system.

Forcing a plaintiff to litigate is like ordering specific performance of a contract for personal services, a remedy unavailable in our legal system.

It is long established that courts will not grant specific performance—compelling the breaching party to fulfill their contractual obligations—when a personal service is sought.²² This bar is rooted in and has echoes of the prohibition of slavery and involuntary servitude under the Thirteenth Amendment.²³

Like involuntary provision of a personal service, the forced continuation of legal action, driven solely by a funder's financial interests and against the plaintiff's wishes involves the compelled expenditure of one's time, energy, and personal autonomy for the benefit of another. A contractual provision that empowers the funder to unilaterally dictate the continuation

²¹ See generally RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 208 & Introductory Note to ch. 8 (AM L. INST. 1981) (discussing when a contract is unenforceable on grounds of public policy and unconscionable contracts and stating, among other things, that “[i]n general, parties may contract as they wish, and courts will enforce their agreements without passing on their substance. Sometimes, however, a court will decide that the interest in freedom of contract is outweighed by some overriding *interest of society* and will refuse to enforce a promise or other term on grounds of public policy. Such a decision is based on a reluctance to aid the promisee rather than on solicitude for the promisor as such. . . . [E]nforcement of the promise may be an inappropriate use of the judicial process in carrying out an unsavory transaction. The decision in a particular case will often turn on a delicate balancing of these considerations against those that favor supporting transactions freely entered into by the parties. . . . [T]he policies with which this Chapter is concerned touch upon matters of substance related to the *public welfare* rather than aspects of the bargaining process between the parties.” (emphases added)). See, e.g., N.Y. REAL PROP. LAW § 218 (McKinney 2024) (stating that a waiver of rights protected by good cause eviction laws is void); Norris-LaGuardia Act, 29 U.S.C. §§ 101–115 (1932) (prohibiting anti-union “yellow-dog” contracts).

²² Lumley v. Wagner, (1852) 42 Eng. Rep. 687; De Francesco v. Barnum, (1890) 45 Ch D 430; Warner Bros. Pictures, Inc. v. Nelson [1937] 1 KB 209 (Eng.); RESTATEMENT (SECOND) OF CONTRACTS § 367 (AM. L. INST. 1981).

²³ Bailey v. Alabama, 219 U.S. 219 (1911); Pollock v. Williams, 322 U.S. 4 (1944).

of litigation effectively conscripts the plaintiff into an ongoing legal battle, regardless of their personal desires, emotional well-being, or strategic assessments. A plaintiff might find themselves expending time and energy participating in discovery, enduring the stress of legal proceedings, expending any remaining social capital they have with the defendants, experiencing the invasion of privacy that comes with discovery—all not for their own primary benefit, but to maximize the funder's potential return on investment.

3. *Does an Analogy Between TPLF and Insurance Support an Argument in Favor of Funder Settlement Control?*

Some argue that allowing third-party funders to control settlement is analogous to allowing insurers to control their insureds' settlement decisions. This argument has also been coupled with the argument that freedom of contracts militates that plaintiffs, by analogy to insureds, should be allowed to contract away their settlement rights.²⁴ An examination of the context in which insurers are allowed a certain measure of control over settlement decisions and of the differences between TPLF and insurance shows neither argument is compelling.²⁵ If anything, the analogy points towards limitation of freedom of contract as well as the imposition of fiduciary duties and other obligations on funders.

Usually when the analogy is advanced, its starting point is a pointing out that third-party funders pay the plaintiffs' cost of litigation and assume the risk of a loss and that this is similar to the function that liability insurance plays on the defense side. However, this is, at best, a partial picture. As a preliminary matter, even when insurance law allows insurers to control the insured's (i.e., defendant's) settlement decision, there is no analogy, in terms of infringement on autonomy, to the funder's control of plaintiffs' settlement decisions. A truly

²⁴ See Tom Baker, *What Litigation Funders Can Learn About Settlement Rights from the Law of Liability Insurance*, 25 THEORETICAL INQUIRIES L. 17 (2025); W. Bradley Wendel, *Controlling the Delegation of Control*, 25 THEORETICAL INQUIRIES L. 63 (2025), at 68–72.

²⁵ For arguments regarding similarities, see, e.g., Baker, *supra* note 24; Charles Silver, *Litigation Funding Versus Liability Insurance: What's the Difference?*, 63 DEPAUL L. REV. 617 (2014). Focusing on distinctions are, e.g., Michelle Boardman, *Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation*, 8 J.L. ECON. & POL'Y 673 (2012); Joanna Shepherd Bailey, Michelle Boardman, Jeremy Kidd, Eric Schuller & Paul Sullivan, *Third-Party Litigation Financing*, 8 J.L. ECON. & POL'Y 257, 273–77 (2011) (comments by Michelle Boardman).

analogous scenario would be, for example, if our legal system allowed insurers to compel insured parties to receive medical treatment against their wishes. It does not.

More broadly, this starting point draws a partial picture at best. Insurers undertake a far broader assumption of risk than do litigation funders. Insurers typically indemnify the insured not only against the costs of litigation but also against the underlying liability if the insured is found liable. They have direct exposure to the judgment itself. Third-party litigation funders, by contrast, only assume the costs of litigation not the risk of liability. Further, insurers are generally involved in indemnifying against unforeseen losses or liabilities arising from events outside the insured's direct control (e.g., car accidents), whereas funders selectively decide which cases to fund and then invest in a legal action a plaintiff is choosing to pursue.²⁶ Equating a funder's desire for a return with an insurer's right to control settlement within its coverage obligations ignores these crucial distinctions and risks.

Moreover, the settlement rights of insurers are heavily circumscribed by their fiduciary or quasi-fiduciary duties and an enhanced duty of good faith and fair dealing. This duty of good faith is generally considered to be broader, more specific, and often carries more significant legal consequences than the general contractual implied duty of good faith. For example, it extends beyond just the performance of the policy terms and encompasses the insurer's conduct in investigating, evaluating, and paying claims. Critically for our purposes, an insurer must consider the insured's best interests when considering settlement offers within policy limits (especially in liability insurance).²⁷ Further, whereas breach of the general contractual implied duty typically leads to standard contract remedies, remedies for an insurer breaching their duty of good faith can include compensation for emotional distress, consequential economic losses, and, in some jurisdictions, punitive damages.²⁸

²⁶ Boardman, *supra* note 25, at 696.

²⁷ Some state insurance statutes specifically outline unfair claim settlement practices and create a statutory basis for bad faith claims. See, e.g., N.Y. INS. LAW § 2601 (McKinney 2018); DEL. CODE ANN. tit. 18, § 2304 (2024).

²⁸ See, e.g., COUCH ON INSURANCE § 205:13 (3d ed. 2023) (discussing breach of duty to defend as a basis for intentional infliction of emotional distress); Egan v. Mutual of Omaha Ins., 24 Cal.3d 809 (1979) ("As one commentary has noted, 'The insurers' obligations are . . . rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements . . . [A]s a supplier

Fiduciary duties are a general “technology” to mitigate conflicts of interest when those are inherent to a relationship. They are legal obligations imposed on a fiduciary to act in the best interests of a beneficiary in matters within the scope of their relationship.²⁹ Until the emergence of litigation finance, only lawyers and insurers—both subject to fiduciary duties—were allowed to fund another’s litigation. In the United States—unlike in, e.g., Australia and the United Kingdom, which pioneered the global litigation finance industry—litigation finance emerged as a market force, not as a consequence of a legislative, deliberative decision to allow funding lawsuits without associated fiduciary duties.³⁰ Insurers, specifically, owe insured parties fiduciary or, at a minimum, quasi-fiduciary duties. These duties were developed through common law and are often reinforced by statute, and at their core are obligations on insurers to act in the best interests of their policyholders. These duties include, *inter alia*, a duty to defend against covered claims (in liability policies); a duty to act with due diligence and care; and a duty of loyalty, which, while not

of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public’s trust must go private responsibility consonant with that trust.” (alterations in original) (quoting Goodman & Seaton, *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court*, 62 Cal. L. Rev. 309, 346–47 (1974)); see also William G. Passannante & Tom Dupont, *U.S. Tort System: Insurance Bad Faith and Extra-Contractual Damages Can Level the Playing Field with Your Insurance Company*, INT’L BAR ASS’N (July 27, 2022), <https://www.ibanet.org/us-tort-system-insurance-bad-faith-and-extra-contractual-damages> [<https://perma.cc/S5NN-DKPB>] (“Furthermore, insurance companies that refuse a settlement offer in bad faith may be held liable in damages to the insured based on the principle that it has pursued its own interests by compromising those of the insured. . . . In such an event, the insurance company’s fiduciary obligation includes, in a typical formulation, ‘a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business.’ . . . [An insurance company must] fairly consider reasonable settlement offers. . . . If an insurance company fails to authorise a favourable settlement within its policy limits, or if further delay causes this settlement opportunity to be lost, it can be held liable for any eventual judgment and other damages, even uninsured losses. . . . Policyholders may recover consequential damages in insurance cases involving a breach. . . . A number of states in the U.S. permit the recovery of punitive damages against insurance companies for their breach of the duty of good faith and fair dealing. New York, California, Louisiana and New Mexico are among those which permit this. . . . [I]n Colorado a policyholder may recover damages in tort for breach of the duty of good faith and fair dealing for emotional distress.”)

²⁹ RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. L. INST. 2006).

³⁰ Steinitz, *supra* note 4, at 3 (on the emergence of TPLF).

necessarily articulated as a strict fiduciary duty, has been interpreted to mean that insurers must give equal consideration to the insured's interests rather than simply prioritizing their own, especially when those interests conflict with the insurer's own financial interests including, in particular, when making settlement decisions within policy limits.³¹

With regard to limitations on freedom of contract, insurance law is replete with such limitations. State and federal insurance laws and regulations impose numerous mandatory terms, restrictions, and prohibitions on insurance contracts to safeguard the interests of policyholders. For example, some forms of insurance, such as automobile liability insurance, workers' compensation insurance, and the Affordable Care Act (ACA), involve both mandatory coverage requirements and prohibitions on certain exclusions and limitations. Under the ACA, health insurance plans are required to cover a set of "essential health benefits" such as preventive care, maternity care, and mental health services, and cannot exclude coverage for pre-existing medical conditions.³² Public policy may prevent an insurer from excluding coverage for liability arising from an insured's negligence, even if it was reckless.³³ Insurance laws often restrict the circumstances under which an insurer can cancel or refuse to renew a policy.³⁴ Insurance law imposes certain mandated policy provisions and disclosures, and many states have standardized basic terms and conditions.³⁵ Insurance laws often require policies to include a grace period for premium payments.³⁶ Many states regulate insurance rates, particularly for essential coverages like auto and homeowners' insurance, to prevent excessive or unfairly discriminatory pricing,³⁷ limiting the insurer's freedom to charge whatever the market might bear. Some jurisdictions or

³¹ RESTATEMENT OF THE LAW, LIABILITY INSURANCE § 24 (AM. L. INST. 2019) (on an insurer's duty to make reasonable settlement decisions). States, of course, vary on the specifics of the duty. See, e.g., Symposium, *Duty to Settle: The Texas Stowers Doctrine and Approaches Adopted in Other Jurisdictions*, AM. COLL. OF COVERAGE COUNS. (Nov. 11, 2022); Christine E. Hiler & Samantha Wolff, *Navigating California Insurance Defense Settlements*, LAW360 (July 1, 2015), <https://www.hansonbridgett.com/sites/default/files/sitecore/Files/Publications/Navigating%20Calif%20Insurance%20Defense%20Settlements.pdf> [<https://perma.cc/9ZEF-7998>].

³² Patient Protection and Affordable Care Act (ACA), 42 U.S.C. §§ 18001–18122.

³³ APPLEMAN ON INSURANCE LAW & PRACTICE § 7031 (2d ed. 2011).

³⁴ See COUCH ON INSURANCE, *supra* 28, § 29:6.

³⁵ *Id.* § 19.

³⁶ *Id.* § 76:48.

³⁷ *Id.* § 2:31.

specific types of insurance policies require mandatory arbitration or mediation to resolve disputes.³⁸ And, most relevant to our discussion, insurance laws typically prohibit insurers from engaging in unfair claim settlement practices (such as lowballing settlements).³⁹

Some of the above examples come from insurance contexts more analogous to commercial litigation funding and some from contexts more analogous to consumer litigation funding. Either way, they illustrate the various ways in which insurance law mandates specific terms, prohibits certain exclusions, requires clear disclosures, and dictates claims-handling practices to ensure a baseline level of fairness and protection for those who purchase insurance. This regulatory framework recognizes that insurance is not merely a commercial transaction but a vital mechanism for financial security and risk transfer. Similarly, as discussed throughout, funding litigation is a transaction beyond the mere commercial. State insurance statutes, it should be noted, often provide a basis for regulatory action by the state's insurance department in addition to creating a private cause of action for bad faith against an insurer by the insured.⁴⁰

When comparing the rights of insurers, one must consider not only the corresponding obligations but also the social utility of insurance. Insurance and TPLF—both forms of private ordering via private contracting—have vastly different positive and negative social externalities. As Nobel laureate Kenneth Arrow explained, insurance serves as a cornerstone of the modern economy by providing essential mechanisms for risk transfer, capital allocation, and economic stability in virtually every sector of the economy, helping overcome the fundamental problems of risk aversion and uncertainty that permeate economic life.⁴¹ By allowing individuals and businesses to transfer the financial burden of potential losses to a collective pool, mitigating the potentially devastating impact of unforeseen events, insurance enables greater risk-taking and investment, fostering economic growth.⁴² The pervasive and essential nature of

³⁸ *Id.* § 209:12.

³⁹ *See, e.g.*, Mass. Gen. Laws ch. 176D, § 3.

⁴⁰ *See* COUCH ON INSURANCE, *supra* 28, § 4:21.

⁴¹ *See generally* Kenneth J. Arrow, *Insurance, Risk and Resource Allocation*, in FOUNDATIONS OF INSURANCE ECONOMICS: READINGS IN ECONOMICS AND FINANCE 220, 220–21 (Georges Dionne & Scott E. Harrington eds., 1992).

⁴² Insurance plays other fundamental functions in the modern economy including underpinning the credit markets; providing a crucial safety net, e.g. via

insurance across virtually every sector of the economy underscores its indispensable social contribution.

Unlike insurance, third-party litigation funding does not serve as a broad mechanism for risk transfer or contribute to overall economic stability. It is a specialized financial product focused on legal claims. The social contribution of the third-party litigation funding industry is thus much more modest (and according to many, negative⁴³). Especially in a system like the United States, which has the contingency fee, that contribution includes, predominantly, a possible modest increase in access to justice, liquidity of some legal claims, increased competitiveness in the legal sector, and increased profitability in the legal sector, which may, under some circumstances, translate to lower costs for legal services.⁴⁴ In jurisdictions without the contingency fee, the access to justice benefit is more dramatic, especially with respect to class actions, which are prohibitively expensive without a funding mechanism. These benefits come with private and social costs, including the potential to increase frivolous litigation and to protract litigation. Further, TPLF's "infrastructure" is the civil justice system meaning, funders benefit from the operation of the courts—a branch of the government and a publicly funded good. This means their activity shapes, and in some cases distorts, the work of the government, and that they effectively receive a subsidy from the public. In sum, insurers and funders have fundamentally different roles, obligations, and underlying risks, and the services they provide carry vastly different social benefits and costs for Americans as a whole.

Medicare and unemployment insurance; enabling businesses to recover from losses and maintain operations thus contributing to economic stability; and pooling and channeling capital into various sectors of the economy. See e.g., Arrow, *supra* note 41; J. Françoise Outreville, *The Relationship Between Insurance and Economic Development: 85 Empirical Papers for a Review of the Literature*, 16 RISK MGMT. & INS. REV. 71 (2013).

⁴³ See, e.g., *The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Donald J. Kochan, Professor of Law and Executive Director of the Law & Economics Center, George Mason University's Antonin Scalia Law School); John H. Beisner, Remarks at *A Bridge too far? An Expert Panel Examines the Promise and Peril of Third-Party Litigation Financing*, 103 JUDICATURE DUKE L. CTR. JUD. STUD. 48 (2019); Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation-Finance Dilemma*, 8 J.L. ECON. & POL'Y 613, 627–29 (2012); MAYA STEINITZ, *LITIGATION FUNDING, LAW FIRM OWNERSHIP, AND THE FUTURE OF THE LEGAL PROFESSION* (forthcoming, Cambridge Univ. Press) (surveying pros and cons of TPLF).

⁴⁴ Steinitz, *supra* note 43.

In conclusion, insurance is analogous to TPLF only in very limited respects. Even to the extent that TPLF is analogous to insurance, the analogy does not support the proposition that funders should be allowed to compel a plaintiff to litigate against their wishes. It does, however, support limitations on the freedom of contract. It also supports an overall regulatory framework that includes fiduciary duties, an enhanced duty of good faith, disclosure requirements,⁴⁵ state enforcement agencies, and private rights of action. “Cherry picking” insurers’ rights while disregarding their obligations will exacerbate, rather than reduce, the well-understood downsides of TPLF.

B. Champerty 2.0: Unconscionability, Equity, Abuse of Process, and Public Policy

The most fundamental doctrine in litigation finance law is champerty. In this subpart, I will show that, contrary to a perception that champerty is progressively declining throughout the United States,⁴⁶ a close examination of doctrinal developments since the rise of third-party funding at the turn of the century shows a different pattern: champerty is alive and well in many states, including some that are important for litigation finance. Other states are moving away from champerty as an overly blunt tool while remaining firmly committed to its underlying policies. Where courts shift *away* from champerty, they are shifting *towards* other doctrines that do a better job in the twenty-first century of preserving and protecting policies that serve as the bedrock of civil justice without sacrificing the potentially beneficial aspects of third-party funding, which is primarily access to justice. To do this, I will first give a brief background of champerty, then explain which policy goals it historically served, and next turn to a discussion of how courts have turned to the doctrines of unconscionability, equity, and public policy to advance the same goals. Finally, I will note that as courts become more aware of—and concerned by—litigation finance, some are beginning to apply the lens of abuse of process to financed claims.

⁴⁵ Insurance policies are subject to mandatory disclosure. FED. R. CIV. P. 26(a)(1)(A)(iv).

⁴⁶ See, e.g., *In re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2024 WL 1214568 (N.D. Ill. Mar. 21, 2024); cf. discussion of *Miller v. Caterpillar and Todd v. Franklin*, *infra* pp. 128, 131.

1. *Champerty and the Foundations of Civil Justice*

Champerty is state law and since the rise of litigation finance some states have doubled down on this prohibition against a non-party funding of litigation while others have loosened it. The next section shows that the handful of states that are turning away from champerty are doing so in favor of using other doctrines like unconscionability, equity, and public policy to address the same concerns that champerty traditionally addressed. These doctrines, courts reason, are more finely tuned than champerty and better understood. They firmly aim the analysis at the question of whether a particular arrangement goes against important values and make it clear that when abuses that champerty historically protected against are present, an exception to freedom of contract applies. A contract that leads to such abuses will still not be enforced in those jurisdictions. The final section notes that courts are increasingly aware of and concerned about litigation finance, leading some to appeal to general public policy norms and to determine whether such arrangements might constitute an abuse of process.

“Champerty” is a form of “maintenance,” two concepts that are centuries old and that were brought to the United States from England. Both, importantly, were torts and crimes at common law.⁴⁷ Champerty and maintenance were eliminated as crimes and torts in England, and also in most (though not all) states in the United States—but the prohibition on champertous contracts became, for the most part, enshrined in statute or as part of the common law, depending on the jurisdiction, independent of being a crime or a tort.⁴⁸ The United States Supreme Court succinctly defines the concepts thus: “Maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome.”⁴⁹ The prohibition against champerty has its origins in ancient Greece and Rome, where advocates before the court who exploited their influence over the judicial system to bully, harass, and intimidate others were known as “sycophants” and “calumniators” respectively—“maintainers” in medieval

⁴⁷ 14 AM. JUR. 2D *Champerty, Maintenance & Related Doctrines* § 1 (2024).

⁴⁸ Criminal Law Act 1967, c. 58, § 13 (UK); see Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 639–43 (2007).

⁴⁹ *In re Primus*, 436 U.S. 412, 424 n.15 (1978).

England.⁵⁰ The social context in which champerty matured, was one in which

“small men” transferred their rights of action in property disputes to “great men” in order to get the great men’s support at law. Because the legal establishment was weak at the time, the great men could overwhelm the court, thus enabling the little man to get his land claim and the great men to get their share. In other words, *champerty was a means by which great men increased their power at the expense of the courts of justice.*⁵¹

Champerty thus seeks to thwart “financial overreaching by a [funder with a] superior bargaining position,”⁵² compared to the finance recipients and to prevent powerful players from monopolizing the courts.

Contemporary cases often reference Black’s Law Dictionary’s definition: “[a] bargain by a stranger with a party to a suit, by which [such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered.”⁵³ Like historical case law, contemporary case law often focuses on third-party “intermeddling”—the less powerful sibling of control—by a non-party in another’s lawsuit. *American Jurisprudence*, for example, defines a champertuer as one who “intermeddles in a suit of a stranger or is one not having any privity or concern in the subject matter, or standing in no relation of duty to the suitor.”⁵⁴

Control of another’s suit is often an indication that prohibited champerty is present.⁵⁵ In the pivotal report that gave a stamp of approval to third-party funding in the United States, the American Bar Association clarified that even in jurisdictions where champerty is permitted, it is allowed only insofar as the supplier of funds does not engage in “intermeddling”

⁵⁰ *Osprey, Inc. v. Cabana Ltd. P’ship*, 532 S.E.2d 269, 273 n.2 (S.C. 2000).

⁵¹ Steinitz, *supra* note 4, at 1287 (quoting *Thallhimer v. Brinckerhoff*, 3 Cow. 623, 644 (N.Y. Sup. Ct. 1824)).

⁵² *Saladini v. Righellis*, 687 N.E.2d. 1224, 1226 (Mass. 1997).

⁵³ *E.g.*, *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 724 (N.D. Ill. 2014) (alteration in original) (emphasis omitted) (quoting BLACK’S LAW DICTIONARY).

⁵⁴ 14 AM.JUR. 2D *Champerty, Maintenance, and Barratry* § 1.

⁵⁵ *Maslowski v. Prospect Funding Partners LLC (Maslowski I)*, 944 N.W.2d 235, 241 (Minn. 2020); *Charge Injection Techs. v. E.I. Dupont De Nemours & Co.*, C.A. No. N07C-12-134-JRJ, 2016 WL 937400, at *4 (Del. Super. Ct. Mar. 9, 2016) (finding an agreement non-champertous *because of the absence of control*); *Am. Optical Co. v. Curtiss*, 56 F.R.D. 26, 30–31 (S.D.N.Y. 1971); *see also*, *Sebok, supra* note 10.

with the litigation's conduct—for example determining trial strategy or controlling settlements.⁵⁶

There is a spectrum of approaches to champerty among the different states. California, for example, never had a champerty prohibition. Some states, like Kentucky and Pennsylvania have, and recently reinforced, strong bans on champerty. Others fall somewhere in between. For example, New York and Delaware maintain anti-champerty laws but interpret them in ways that generally allow litigation finance within specified constraints.⁵⁷

The champerty prohibition, and the focus on preventing third-party intermeddling in particular, has had such longevity and near universality⁵⁸ because it protects the integrity of the justice system from multiple threats and ensures it will not be used for purposes other than its public functions—the pursuit of justice and the peaceful resolution of disputes. As the discussion of case law below shows, by ensuring litigation is brought *by and for an injured party*, champerty deters speculation in lawsuits, curbs excessive litigation, prevents the protraction of litigation, particularly when brought by a non-party with no stake in the case, and protects against the extortion of defendants. Champerty aims to decrease meritless litigation as well as cases that would not otherwise be brought even if they are meritorious, for example, if the parties would resolve the dispute privately without resorting to litigation. And like many other doctrines and rules, it seeks to promote settlement.

Importantly for our purposes, the champerty doctrine has long emphasized various facets of the plaintiffs' autonomy and agency over their cases, and the extent to which control is exercised over the claim has been a key factor:

More common are limitations based on *how* the maintenance is performed. . . . The most common way states control the *how* question in champerty is by limiting how much *control*

⁵⁶ A.B.A. COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 11 (2011), <https://lowellmilkeninstitute.law.ucla.edu/wp-content/uploads/2019/02/ABA-White-Paper-on-Litigation-Finance.pdf> [<https://perma.cc/TFV7-ZPBK>].

⁵⁷ LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 160 (2d ed. 2017); see *Buckhorn Res., LLC v. Combs Heirs, LLC*, No. 2018-CA-1073-MR, 2020 WL 6372558, at *3 (Ky. Ct. App. Oct. 30, 2020); *WFIC, LLC v. LaBarre*, 148 A.3d 812, 819 (Pa. Super. Ct. 2016); N.Y. JUD. LAW § 489; *Charge Injection Techs.*, 2016 WL 937400.

⁵⁸ It existed throughout the Common-Law world and, by other names, is a principle that can be found in other legal systems as well. NIEUWVELD & SAHANI, *supra* note 57, at 14, 23, 219.

the investor has over the conduct of the litigation into which she has put her money. We can say, therefore, that states sometimes limit *intermeddling profit maintenance*: where a contract allows the third party to take too much control over the conduct of what otherwise would be a meritorious suit by another, the maintenance will be prohibited.⁵⁹

In sum, champerty does a heavy lift, protecting a variety of values and interests, including those of the courts and the public, plaintiffs, potential defendants (against non-meritorious claims), and actual defendants. Importantly, any reader familiar with the main policy debates relating to civil litigation, especially mass torts and class actions, in recent decades will immediately recognize that these interests and concerns remain viable, indeed central, today. Scholarship about mass torts and class actions is nothing if not full of analyses on how to avoid inauthentic claims (traditionally understood to be brought by entrepreneurial lawyers who “hire” clients rather than the other way around); avoid incentives to bring non-meritorious cases; prevent lawyer-funders (contingency-fee lawyers) either prolonging cases or settling them too soon for their own benefits, and similar conflicts between lawyer-funders and their clients.⁶⁰

a. *Control*

During the late nineteenth and early twentieth centuries, two notable exceptions to the champerty doctrine emerged. The first was the contingency fee, whereby lawyers, acting as fiduciaries for the financed parties and bound by ethical regulations, were permitted to finance litigation. The second was insurance, which became acceptable but entailed imposing fiduciary or quasi-fiduciary obligations and a complex regulatory scheme designed to protect both insured parties and broader society, as discussed above. Thus, champerty became permissible in specific contexts where fiduciary duties and regulatory oversight safeguard the interests of the funded party—plaintiffs in the case of contingency fees, and defendants in the case of insurance—the courts, and the public.

In the beginning of the twenty-first century, third-party funding emerged and, as a market force, carved a place for itself as a new, third form of champerty. TPLF’s achieved a measure

⁵⁹ Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 109 (2011).

⁶⁰ See, e.g., Coffee, Jr., *supra* note 15.

of acceptability and mainstreaming by assuaging concerns from legislators, courts, the legal profession, and the public that their involvement will not undermine the attorney-client relationship. They have assured all those stakeholders that third-party funding will not encourage non-meritorious litigation nor prolong cases, which would further burden the already overextended court system. Crucially, they have emphasized that plaintiffs will retain control over their cases generally and specifically with regard to settlement decisions.⁶¹

A recent Delaware case is a case in point. *Charge Injection Techs, Inc. v. E.I. DuPont De Nemours & Co.* illuminates and illustrates champerty doctrine's focus on the question of control: "in a vigorously litigated Delaware case, the trial court held that a third-party financing agreement did not constitute champerty or maintenance because the funder did not have the contractual right to control the litigation, nor did it have de facto control over the conduct by counsel of the litigation."⁶² This case is especially noteworthy because it discusses two kinds of control: one, obtained via contract the other, de facto control via influence over counsel. The court found that *both* kinds of control are relevant in analyzing whether an agreement is champertous.

In *Boling v. Prospect Funding*, decided in 2019, a litigation funder contended that Kentucky's champerty law lacks a clear policy against litigation funding agreements. However, the Sixth Circuit, interpreting Kentucky law, affirmed the District Court's judgment that the agreement was champertous. The court found that the terms gave the funder significant control over the litigation, imposed conditions that compromised a plaintiff's independence, and could interfere with or discourage settlement.⁶³

New York, perhaps the most important jurisdiction in the litigation funding context given its role in commerce, maintains

⁶¹ See, e.g., A.B.A. COMM'N ON ETHICS 20/20, *supra* note 56, at 23 n.82 (quoting Comments of Juridica Capital Mgmt. Ltd. to the A.B.A. Working Grp. on Alternative Litig. Fin. 6 (Feb. 17, 2011)); see also OmniBridgeway explanation that "Litigation funders are not permitted to exercise control over the lawyers' strategy decisions and generally are afforded limited rights in this regard under [litigation funding agreements]." *Litigation Finance*, OMNI BRIDGEWAY, <https://omnibridgeway.com/litigation-finance> [<https://perma.cc/PS79-5W2S>].

⁶² W Bradley Wendel, *Paying the Piper but not Calling the Tune: Litigation Financing and Professional Independence*, 52 AKRON L. REV. 1, 22-23 (2018) (discussing *Charge Injection Techs*, 2016 WL 937400, at *5).

⁶³ *Boling v. Prospect Funding Holdings LLC*, 771 Fed. Appx. 562, 580 (6th Cir. 2019).

its statutory champerty prohibition (which includes exceptions generous enough to allow many forms of contemporary litigation funding).⁶⁴ In recent years, New York courts generated some convulsions in the litigation funding world when, on a couple of occasions, it held agreements to be champertous,⁶⁵ thus signaling that rumors of the death of champerty in the jurisdiction have been greatly exaggerated. Further, New York's statute explicitly prohibits soliciting, buying, or taking an assignment, which, according to its plain language, includes indirect assignments of claims.⁶⁶ If and when faced with the question of whether obtaining control over litigation constitutes an "indirect assignment," a New York court would likely consider the public policies underlying the prohibition on champerty, including the courts' general disapproval of attempts to control a claimholder's decisions regarding their litigation.⁶⁷

In the 2014 case of *Miller v. Caterpillar*, the U.S. District Court for the Northern District of Illinois examined whether Illinois' maintenance statute applied to Miller's agreement with a third-party litigation financier. The statute states that "if a person officiously intermeddles in an action that in no way belongs to or concerns that person, by maintaining or assisting either party, with money or otherwise, to prosecute or defend the action, with a view to promoting litigation, he or she is guilty of maintenance"⁶⁸ The court focused on defining "officious intermeddler" and concluded that it refers to someone who initiates litigation that otherwise would not have occurred, prolongs litigation that would otherwise settle, pursues meritless litigation, or litigates for harassment purposes. The court determined the funding agreement did not violate the statute, but the case clearly showed that champerty and maintenance remain significant concerns in Illinois.

⁶⁴ N.Y. JUD. LAW § 489(1).

⁶⁵ *Justinian Capital SPC v. WestLB AG*, 28 N.Y.3d 160, 170 (2016); *Phoenix Light SF, Ltd. v. U.S. Bank Nat'l Ass'n*, 612 F. Supp. 3d 263, 282–83 (S.D.N.Y. 2020); *Leasing Control Inc. v 500 Fifth Ave., Inc.*, 193 A.D. 3d 592, 592 (N.Y. App. Div. 2021).

⁶⁶ N.Y. JUD. LAW § 489(1) ("No . . . corporation or association, directly or indirectly . . . shall solicit, buy or take an assignment of . . . any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon" (emphasis added)).

⁶⁷ See *supra* notes 50–56; *infra* notes 74–75, 78–80, 100–07, 111–19.

⁶⁸ *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 725 (N.D. Ill. 2014) (emphasis omitted) (quoting 720 ILCS 5/32-12).

b. *Unconscionability, Equity, and Public Policy*

States such as Massachusetts, Ohio, and Minnesota⁶⁹ have abolished the champerty doctrine, opting instead for more finely tuned frameworks such as unconscionability, overarching principles of equity, and public policy considerations. In these and other jurisdictions that have loosened or even eliminated champerty, courts still reject what has traditionally been called “officious intermeddling”—encouraging the filing of claims, influencing the litigation, prolonging litigation, interfering with lawyers’ independent judgment, and outright controlling the litigation. This is especially true when the intermeddling limits a client’s autonomy over settlement decisions. As the ABA summarized, in jurisdictions where champerty is permitted, “[it] is generally permissible as long as the supplier is not . . . ‘intermeddling’ with the conduct of the litigation (e.g., determining trial strategy or controlling settlement).”⁷⁰ What has changed in jurisdictions that have updated their approach to champerty is that the prevention of officious intermeddling is accomplished through doctrines like unconscionability, equity, and a direct appeal to public policy. These tools have the benefit of being not only more flexible but also potentially broader than champerty. Thus, they may be used to more easily limit abusive litigation funding practices. Simultaneously, they operate in a way that will not eliminate a private-market solution to access to justice problems. I call these doctrines, as applied to litigation finance, “Champerty 2.0,” and courts’ treatment of them shows that the spirit of champerty is very much alive.

An example of this more tailored approach can be seen in *Maslowski v. Prospect Funding*, a case in which the Minnesota Supreme Court abolished the state’s common-law doctrine of champerty but emphasized that this does not render all previously champertous agreements enforceable as written.⁷¹ The court emphasized that, although it was abolishing champerty, “[p]arties like Maslowski retain the common law defense of unconscionability,”⁷² a “mechanism for protecting individual parties from unfair or inequitable contracts (including litigation

⁶⁹ See *Saladini v. Righellis*, 687 N.E.2d 1224 (Mass. 1997); Ohio Rev. Code Ann. § 1349.55.; *Maslowski I*, 944 N.W.2d at 241.

⁷⁰ A.B.A. COMM’N ON ETHICS 20/20, *supra* note 56, at 11.

⁷¹ *Maslowski I*, 944 N.W.2d at 241.

⁷² *Id.*

financing agreements).”⁷³ The court further noted that “[c]ourts and attorneys should likewise be careful to ensure that litigation financiers do not attempt to control the course of the underlying litigation, similar to the ‘intermeddling’ that we described in our early champerty precedent.”⁷⁴

As to plaintiffs’ control over their cases, the Minnesota Supreme Court reinforced the general principle that “‘it is difficult to conceive of any stipulation more against public policy’ than a contract term requiring the litigation financier’s permission to settle the underlying litigation.”⁷⁵ Following this direction, on remand, Minnesota’s trial and appellate courts found a portion of the funding contract unconscionable because the

agreement unconscionably interfered with Maslowski’s decisions as to her legal claim Restricting Maslowski’s freedom to enter into settlements and imposing a fixed penalty on her if she fails to ‘use reasonable efforts’ to protect [the funder’s] interests offends the . . . principle . . . [that] an outside party may not influence a litigant’s efforts to settle a legal claim⁷⁶

Similarly, the Supreme Court of South Carolina noted, in *Osprey v. Cabana*, that the abolition of champerty as a defense does not imply that agreements that would have previously been voided are now enforceable.⁷⁷ The Court listed several factors that could render a funding agreement unenforceable, including whether “the financier engaged in officious intermeddling.”⁷⁸ The Court explained that a financier becomes an officious intermeddler by offering unsolicited advice or attempting to control litigation to stir up strife or prolong frivolous lawsuits.⁷⁹ In other words, officious intermeddling encompasses more than control; even unsolicited advice may suffice to breach public policy.

Again, we see a judicial retreat from champerty, not due to indifference towards its underlying public policies, but because “other well-developed principles of law can more effectively

⁷³ *Maslowski v. Prospect Funding Partners LLC*, 994 N.W.2d 293, 304 (Minn. 2023).

⁷⁴ *Maslowski I*, 944 N.W.2d at 241.

⁷⁵ *Id.* (quoting *Huber v. Johnson*, 70 N.W. 806, 808 (Minn. 1897)).

⁷⁶ *Maslowski v. Prospect Funding Partners LLC*, 978 N.W.2d 447, 456–57 (Minn. Ct. App. 2022), *rev’d*, 994 N.W.2d 293 (Minn. 2023).

⁷⁷ *Osprey, Inc. v. Cabana Ltd. P’ship*, 532 S.E.2d 269, 278 (S.C. 2000).

⁷⁸ *Id.*

⁷⁹ *Id.*

accomplish the goals of preventing speculation in groundless lawsuits and the filing of frivolous suits.”⁸⁰

In Illinois, champerty remains a viable common-law doctrine, and maintenance is statutorily prohibited. While Illinois courts have, to an extent, moved away from strict common-law definitions, they still aim to uphold the public policies against champerty, focusing on preventing the commercialization of disputes. “While the common-law crime of champerty has not been abolished by statute in this State, the tendency of decisions is to depart from the severity of the old law and at the same time to preserve the principle which tends to defeat the mischief to which the old law was directed, namely, ‘the traffic of merchandizing in quarrels, of huckstering in litigious discord.’”⁸¹ In *Todd v. Franklin*, the U.S. District Court for the Northern District of Illinois found that although the actions of an assignee to whom Todd assigned his claim did not meet the technical definitions of the champerty his “actions are *close enough* to champerty and barratry to bolster [the] argument that the assignment of [the] claims in this case violates Illinois *public policy*.”⁸² Namely, the court voided the assignments *directly* based on champerty’s public policy with something less than champerty. This case also illustrates that champerty 2.0 can be broader, grabbing scenarios that would not neatly fit the definition of champerty.

These cases illustrate that across different jurisdictions and over time, courts consistently express the same fundamental concerns. While some states are relaxing champerty prohibitions to facilitate litigation funding and enhance access to justice, they are doing so with clear caveats against officious intermeddling, ensuring that third-party funding does not undermine the autonomy of plaintiffs, the rights of defendants, and the independent judgment of attorneys.

2. *Abuse of Process and the Real Party in Interest Rule*

The concept that best captures most, if not all, of the main concerns that third-party funding gives rise to—(1) the disclosure debate about whether, when, and how are defendants

⁸⁰ *Id.* at 277.

⁸¹ *Berlin v. Nathan*, 381 N.E.2d 1367, 1378 (Ill. App. Ct. 1978) (quoting *Milk Dealers Bottle Exch. v. Schaffer*, 224 Ill. App. 411, 415 (1922)).

⁸² *Todd v. Franklin Collection Serv., Inc.*, No. 11 C 6128, 2011 WL 6140863, at *4 (N.D. Ill. Dec. 9, 2011), *aff’d*, 694 F.3d 849 (7th Cir. 2012) (emphases added).

entitled to know about third-party funding of their opponents;⁸³ (2) the fear of flooding the courts with non-meritorious litigation; (3) the fear of plaintiffs' loss of control over their cases; and (4) the fear that foreign entities and governments will use the American court system for improper ends⁸⁴—is that of *abuses of process*. All of the aforesaid can be understood as just that: abuse of the legal process for purposes foreign, and even antagonistic, to the functions of the civil justice system, which are dispute resolution, enforcement of rights and obligations, and development of the law. The doctrine of abuse of process has therefore crept up, though not as often as one might expect, in challenges to third-party funding practices that some regard as abusive. One way to limit abuses of process is to ensure that the real party in interest is before the court. The entwined nature of abuses of process, the real party in interest, and the question of who controls the litigation—including the decision to file and settle—and lawyers' misplaced loyalties are illustrated in a highly publicized recent case, *Nimitz Techs. LLC v. Cnet Media, Inc.*

To protect and promote transparency in his court's proceedings, on April 18, 2022, Judge Connolly of the District Court for the District of Delaware issued two standing orders. The first directed each party to “include in its disclosure statement . . . the name of every owner, member, and partner of the party, proceeding up the chain of ownership until the name of every individual and corporation with a direct or indirect interest in the party has been identified.”⁸⁵ In discussing his reasons for issuing the order, Judge Connolly noted that it “promotes the identification of the real parties in interest in a case.”⁸⁶ The second required disclosure in all cases of a) the identity of

⁸³ See, e.g., Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. DAVIS L. REV. 1073 (2019); *Unsuitable Litigation: Oversight of Third-Party Litigation Funding: Hearing Before the H. Comm. on Oversight and Accountability*, 118th Cong. (2023); *Litigation Funding Transparency Act of 2021*, S. 840, 117th Cong. (2021); *Protecting Our Courts from Foreign Manipulation Act of 2023*, S. 2805, 118th Cong. (2023).

⁸⁴ This concern has caught the attention of Congress, where Republican legislatures have recently held hearings on the topic and advanced proposed legislation. See *supra* note 83.

⁸⁵ Standing Order Regarding Disclosure Statements Required by Federal Rule of Civil Procedure 7.1 (D. Del. Apr. 18, 2022), <https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Disclosure%20Statements.pdf> [<https://perma.cc/6HHB-D496>].

⁸⁶ *In re Nimitz Techs. LLC v. CNET Media, Inc.*, No. CV 21-1247-CFC, 2022 WL 17338396, at *3 (D. Del. Nov. 30, 2022) [hereinafter *Nimitz Memorandum*] (memorandum order).

any third-party funder; b) a statement indicating whether the funder's approval is required for settlement; and, c) a description of the funder's interest.⁸⁷ The Third-Party Funding order requires affirmative disclosure of the existence of funders, but does not require any filing where no funder exists.

Nimitz Technologies LLC ("Nimitz") filed four patent enforcement cases in Judge Connolly's court. Initially it failed to file either the statement required by the Disclosure Order or any statement pursuant to the Third-Party Funding Order. After being prompted (twice) by the Court, Nimitz certified that it had a single owner, Mark Hall, and no third-party funder.⁸⁸ Because of revelations in a series of other cases, which at first blush seemed unrelated, Judge Connolly began to suspect that IP Edge, a well-known patent-monetization firm, was assigning its patents to shell companies in order to have those companies bring suit and that those companies were systematically failing to disclose IP Edge as a third-party funder. "Based on the totality of this information, [Judge Connolly] was concerned that Nimitz and the [plaintiffs in other cases] may not have complied with the Third-Party Funding Order, as none of those parties had disclosed a funding arrangement with IP Edge."⁸⁹ He therefore called for an evidentiary hearing.

At the hearing it became clear that the nominal owners of the LLCs bringing these related claims—the ones who, according to filings in the Patent and Trademark Office, had acquired all rights, title, and interest in the patents that were the subject of the suits—had little to no grasp of the economics of the agreement they had entered into, no understanding of patents or patent litigation either generally or in the specific instances of the patents they nominally owned, and no contact with the counsel purporting to bring and settle these actions on their behalf.⁹⁰ They had been marketed a source of "passive income" by a consulting firm, Mavexar. By agreeing to become the principal of an LLC formed by Mavexar; accepting assignments of patents facilitated by Mavexar; and then proceeding with patent litigation using counsel Mavexar selected, paid for, and

⁸⁷ Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022), <https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf> [<https://perma.cc/5XPQ-DW3L>].

⁸⁸ Nimitz Memorandum, *supra* note 86, at *9–10.

⁸⁹ *Id.* at *11.

⁹⁰ Transcript of Evidentiary Hearing at 107, Nimitz Techs. LLC v. BuzzFeed, Inc., No. 1:21-cv-01362-CFC (D. Del. Nov. 4, 2022).

directed, the nominal owners were entitled to somewhere between 5% and 10% of the recovery while being liable for 100% of the attorneys' fees and other costs not covered by proceeds of the claims.⁹¹

Judge Connolly concluded the evidentiary hearing by noting that "I think the testimony has to give pause to anybody who really is concerned about the integrity of our judicial system, the abuse of our courts, and potential abuse, lack of transparency as to who the real parties before the Court are, about who is making decisions in these types of litigation."⁹² He then issued an order requiring Nimitz and the other plaintiff LLCs, their counsel, and Mavexar to disclose records of their dealings. The United States Court of Appeals for the Federal Circuit denied Nimitz's appeal of the order.⁹³ After multiple appeals and motions to set aside the order, Nimitz and the other LLC plaintiffs provided at least some of the required documents.⁹⁴

In light of the revelations, Judge Connolly referred the attorneys representing Nimitz and the other LLC plaintiffs for discipline for violating their fiduciary duties to their ostensible clients, and referred the attorneys working at IP Edge/Mavexar for discipline for the unauthorized practice of law. With respect to the attorneys for the plaintiffs, Judge Connolly reasoned that "[i]t appears that counsel violated both Rule 1.2(a) and Rule 1.4 by failing to have any communication with their clients before filing, settling, and dismissing the clients' cases . . . [and that i]t also appears that counsel violated Rule 1.7 and, to the extent their fees were paid or advanced by Mavexar or IP Edge, Rule 1.8(f). As an initial matter, by failing to communicate with their clients, counsel violated their obligation to ascertain at

⁹¹ *Id.* at 87–88, 91, 94–97.

⁹² *Id.* at 107.

⁹³ *See* Nimitz Techs. LLC v. CNET Media, Inc., No. CV 21-1247-CFC, 2023 WL 8187441, at *2 (D. Del. Nov. 27, 2023).

⁹⁴ *Id.* at *10. Among the details discovered in the investigation were facts that did not even exist when counsel ostensibly representing it was contacted by IP Edge to draw up the complaints that Nimitz would eventually file. *Id.* at *3–6. Someone with an IP Edge email address submitted to the PTO the assignment of the patent to Nimitz in Mark Hall's name. Hall, recall, was the sole owner of Nimitz. *Id.* A foreign government, France, retained a 35% interest in proceeds from patent enforcement. *Id.* The attorney purporting to represent Nimitz never contacted Hall before filing twenty-one cases in three courts in the name of Nimitz or before agreeing to settlements in thirteen of them. The relationship between IP Edge and Mavexar is not entirely clear, but Judge Connolly concluded that "[t]he documents produced . . . make clear that numerous Mavexar and IP Edge actors engaged in the practice of law on behalf of Nimitz [and the other LLC plaintiffs]." *Id.* at *34.

the outset of their representations whether a conflict or potential conflict existed. Beyond that, the terms of Mavexar's consulting services agreements with counsel's clients created at least potential conflicts of interest between Mavexar and the clients. Because of those potential conflicts, counsel's blind adherence to Mavexar's directions to file and settle cases in the clients' names created a significant risk that counsel's actions materially limited their representations of their clients."⁹⁵ He also sent his findings to the Department of Justice for further investigation based on his conclusion that "(1) counsel of record for the LLC plaintiffs violated numerous rules of professional conduct by actions they took and failed to take; . . . and (3) real parties in interest in the patents in these cases, including a foreign government, were not disclosed to the [Patent and Trademarks Office], defendants, or the Court."⁹⁶

The case illustrates, once again, the connection between funders' control, lawyers' conflicts of interest, and abuses of process. None of these abuses of process, violations of ethical obligations, nor suspected frauds upon the court and the PTO would have been brought to light without Judge Connelly's willingness to assume an active role in investigating potential abuses. *Nimitz* also illustrates the wisdom behind Rule 17(a) of the Federal Rules of Civil Procedure (and its state analogues) according to which a lawsuit "must be prosecuted in the name of the real party in interest."⁹⁷ It shows how a lack of transparency as to the real party in interest—the party in control of the litigation—creates the conditions for abuses of process. A party who controls a case is a real party in interest, they should be transparent to the courts and the parties, otherwise, abuses of process are likely—even inherent. Therefore, on a number of occasions in recent years, a discovery of funders' control has led to a finding that the funder is the real party in interest.⁹⁸

More broadly, the public policies underlying the real party in interest rule include promoting due process by making sure defendants know who they are facing so they can fully participate in the adversarial process; protecting the public record regarding the facts at issue in court cases as required by the

⁹⁵ *Id.* at *30–31.

⁹⁶ *Id.* at *2

⁹⁷ FED. R. CIV. P. 17(a)(1).

⁹⁸ *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 693–94 (Fla. Dist. Ct. App. 2009); *Am. Optical Co. v. Curtiss*, 56 F.R.D. 26, 29–32 (S.D.N.Y. 1971); *see also* *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 (1980); *Nat'l Credit Union Admin. Bd. v. HSBC Bank US, Nat'l Ass'n*, 331 F.R.D. 63, 72 (S.D.N.Y. 2019).

rule of law;⁹⁹ and making sure courts and counsel are able to identify potential conflicts of interest. Certain areas of law, such as antitrust law, envision private enforcement of the law for the public benefit. For that reason, such laws afford incentives like treble damages to induce private parties to enforce antitrust law. If third-party funders are now becoming “private attorneys general” this should be transparent so that the public can scrutinize how this function is exercised by such players.¹⁰⁰ Similarly, class actions are a device often justified on the grounds that they provide private enforcement of the law. The cost to the public and to private parties from the downsides of class actions, such as the incentivization of strike suits and high compensation for the lawyers, is often justified by this socially beneficial function and the notion that members of the private bar are acting as private attorneys general.¹⁰¹ The changes that third-party funding introduces, to any specific class action and the system of class actions, should similarly be transparent to the public.

3. *The Public Policy in Favor of Settlements: Federal and States’ Rules of Civil Procedure and of Evidence*

Agreements purporting to grant a third-party control over settlement decisions also run afoul of a strong public policy, at both the state and federal level, of favoring settlements: “It is axiomatic that the law encourages settlement of disputes.”¹⁰²

⁹⁹ *Guerrilla Girls, Inc. v. Kaz*, 224 F.R.D. 571, 573 (S.D.N.Y. 2004) (adversaries’ and public’s interest in knowing the real party in interest).

¹⁰⁰ *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972) (“By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as ‘private attorneys general.’”). Congress and the courts have made it clear that the public has an interest in ensuring that *the injured party* is the one bringing suit. 15 U.S.C. § 15(a), titled “Suits by persons injured,” states: “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” (emphases added).

¹⁰¹ JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* (HARV. UNIV. PRESS 2015); FITZPATRICK, *supra* note 15.

¹⁰² *Bano v. Union Carbide Corp.*, 273 F.3d 120, 129 (2d Cir. 2001) (collecting federal cases); see also *In re Sony Corp. SXR*D, 448 Fed. App’x. 85, 87 (2d Cir. 2011) (“Public policy favors settlement.”); *Snyder v. Wells Fargo Bank, N.A.*, No. 11 Civ. 4496(SAS), 2011 WL 6382707, at *5 (S.D.N.Y. Dec. 19, 2011) (“[T]here is always a strong federal policy in favor of early and amicable settlement.”); *Gupta v. Headstrong, Inc.*, No. 17-CV-5286 (RA), 2018 WL 1634870, at *3 (S.D.N.Y. Mar. 30, 2018) (“Federal courts likewise have ‘articulated a strong policy in favor of enforcing settlement agreements and releases.’” (quoting *Levine v. Bd. of Educ.*

The preference for settlement is evident throughout the federal rules of procedure and of evidence. Rule 16(a)(5) of the Federal Rules of Civil Procedure, for instance, encourages pre-trial conferences that have as one of their goals “facilitating settlement.” And Rule 408 of the Federal Rules of Evidence, incentivizes settlement talks by barring introduction at trial of information or offers from those talks in order to prove liability. “The primary policy reason for excluding settlement communications is that the law favors out-of-court settlements and allowing offers of compromise to be used as admissions of liability might chill voluntary efforts at dispute resolution.”¹⁰³ Federal courts also have local rules designed to facilitate settlements.¹⁰⁴

In an example of the same policy at the state level, New York law clearly reflects a policy preference for encouraging settlement. Non-settling defendants, for example, cannot seek contribution from defendants that have settled.¹⁰⁵ Parties may be ordered to undertake settlement negotiations as part of a litigation.¹⁰⁶ New York law protects settlement communications in the same way the federal law does.¹⁰⁷ In 2004, the New York Court of Appeals reinforced “[its] State’s strong policy promoting settlement.”¹⁰⁸ In fact, a New York court went so far as to state that an agreement that “gave [the attorney] a veto over any settlement may be found to have violated Rules of Professional Conduct.”¹⁰⁹ The court relied on *In re Snyder*, where the Court of Appeals explained that:

of City of N.Y., No. 97-9035, 1998 WL 386141, at *2 (2d Cir. May 21, 1998)); *Howell v. Motorola, Inc.*, 633 F.3d 552, 561 (7th Cir. 2011) (recognizing the “importance of the federal policy in favor of voluntary settlement of claims”); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) (“[A] strong public policy favors agreements, and courts should approach them with a presumption in their favor.” (quoting *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990))).

¹⁰³ *Zuric Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 689 (7th Cir. 2005).

¹⁰⁴ See, e.g., N.D. ILL. LR 16.1.5, [https://www.ilnd.uscourts.gov/ViewRuleDetails.aspx?xD2R+pW9R4U=\[https://perma.cc/E3YH-WQJZ\]](https://www.ilnd.uscourts.gov/ViewRuleDetails.aspx?xD2R+pW9R4U=[https://perma.cc/E3YH-WQJZ]) (requiring counsel and the parties in civil cases to “undertake a good faith effort to settle” in advance of trial).

¹⁰⁵ N.Y. GEN. OBLIG. LAW § 15-108(b) (McKinney 2007).

¹⁰⁶ N.Y. UNIFORM RULES FOR N.Y. STATE TRIAL CTS. §§ 202.12(c), 202.26, <https://ww2.nycourts.gov/rules/trialcourts/202.shtml> [<https://perma.cc/YHP5-WM8Z>].

¹⁰⁷ See, e.g., *In re Gordon v. Vill. of Bronxville*, 799 N.Y.S.2d 160 (Sup. Ct. 2004).

¹⁰⁸ *Bonnette v. Long Island Coll. Hosp.*, 3 N.Y.3d 281, 286 (2004); see also *Mahoney v. Turner Constr. Co.*, 61 A.D.3d 101, 106 (N.Y. App. Div. 2009) (“We recognize that “[s]trong public policy considerations favor settlements” (quoting PATRICK M. CONNORS, PRACTICE COMMENTARIES, N.Y. C.P.L.R. C3101:18A, at 35)).

¹⁰⁹ *Freeman Lewis LLP v Financiera De Desarrollo Indus. y Com. S.A.*, 172 A.D.3d 574, 575 (N.Y. App. Div. 2019).

[M]ore important than any such personal and private considerations is the one of public concern that such contracts would prove added obstacles to that quieting of disputes and to that adjustment and settlement of litigation which always has been and always should be favored by the acts of legislatures, the decisions of courts and the expressions of public opinion. For, in my judgment, there is no need of long argument to demonstrate that such contracts would prove such obstacles. We have before us in this very litigation an illustration of the manner in which they would be utilized if so permitted to prevent settlements even when the attorney and client were involved in no other differences than those of an honest opinion about the amount which ought to be realized from the litigation.¹¹⁰

Although the court there was referring specifically to an agreement between a claimant and counsel, the reasoning it offers is the same as underlies the general and well-settled judicial preference for settlement and the disfavor with which courts view obstacles to settlement.

The strong public policy favoring settlement is widely recognized in scholarly literature.¹¹¹ Settlement is in the public interest because it lightens the load on the judiciary; clears the way for other cases to proceed apace; avoids the expense of trial for litigants and taxpayers alike; and conserves the private resources of the litigants. Further, litigants who settle are more satisfied with the outcomes of their cases.¹¹²

4. *Plaintiffs' Autonomy, the Attorney-Client Relationship, and the Rules of Professional Conduct*

Client's autonomy and agency is the foundation of the attorney-client relationship, which is an agency relationship. The lawyer is an agent and fiduciary of the client: "The *touchstone* of the client-lawyer relationship is the lawyer's obligation to assert *the client's position* under the rules of the adversary system . . ." ¹¹³ This principle runs through the rules of professional conduct in

¹¹⁰ *In re Snyder*, 190 N.Y. 66, 71 (1907); see also *Freeman Lewis*, 172 A.D.3d at 575; *Anderson v. Itasca Lumber Co.*, 91 N.W. 12, 13 (Minn. 1902) ("[T]he clause referred to in the contract prohibiting settlement without the consent of the plaintiff has been declared by the courts to be void, as against public policy.").

¹¹¹ See, e.g., Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1 (1992).

¹¹² *Kalinauskas v. Wong*, 151 F.R.D. 363, 365 (D. Nev. 1993).

¹¹³ N.Y. RULES OF PRO. CONDUCT, Preamble para. 2 (N.Y. STATE BAR ASS'N 2025) (emphasis added).

every one of the fifty states.¹¹⁴ For example, with respect to the duty to exercise independent judgment, the rules state that “[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, *solely for the benefit of the client and free of compromising influences and loyalties.*”¹¹⁵

With regards to control over settlement decisions, in particular, the rules of professional conduct in all fifty states ensure that clients always have the right to accept or reject a settlement proposal.¹¹⁶ A lawyer must abide by a client’s decisions concerning the objectives of the representation, including and especially a client’s decision whether to settle a matter.¹¹⁷ The sanctity of clients’ control over settlement decisions is derived from the more general protection of clients’ control over fundamental legal decisions, such as a client’s decision to write a new will or to plead guilty to a crime.¹¹⁸ The reason is always the same: litigation “concerns a client’s affairs and is intended to *advance the client’s lawful objectives as the client defines them* Some decisions are so vital to a client that a reasonable client would not agree to abandon irrevocably the right to make the decisions”¹¹⁹ And the decision about whether to settle is specifically reserved to the client “because a settlement definitively disposes of client rights.”¹²⁰ For the same reasons, if a funding agreement compromises the attorney’s independent judgment on this point, or any other, the lawyer must withdraw.¹²¹

¹¹⁴ This tenet is foundational to the Model Rules of Professional conduct, see *supra*, notes 116, 117, 119, 120, 121, which have been adopted in forty-nine states, *Alphabetical list of Jurisdictions Adopting Model Rules*, ABA (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ [<https://perma.cc/TR9V-EEBH>]. California’s Rules of Professional Conduct include similar provisions, including conflict of interest rules that subordinate the interests of the lawyer and third parties. RULES OF PRO. CONDUCT r. 1.7(b) (STATE BAR OF CAL. 2018), <https://www.calbar.ca.gov/legal-professionals/rules/rules-professional-conduct/current-rules-professional-conduct> [<https://perma.cc/44A4-8PMC>].

¹¹⁵ See N.Y. RULES OF PRO. CONDUCT r. 1.7 cmt.1(N.Y. STATE BAR ASS’N 2022) (emphasis added).

¹¹⁶ MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS’N 2020).

¹¹⁷ *Id.* r. 1.2(a)-(b).

¹¹⁸ See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22 (AM. L. INST. 2000).

¹¹⁹ *Id.* § 22 cmt. b (emphases added).

¹²⁰ *Id.* § 22 cmt. d.

¹²¹ See MODEL RULES OF PRO. CONDUCT r. 1.16(a)(1) (AM. BAR ASS’N 2020) (withdrawal if representation results in violation of the Rules); *id.* r. 1.7(a)(2) (representation limited by interests of lawyer); *id.* r. 2.1 (requirement to maintain independent professional judgment).

Funders' control of litigation, as illustrated above and reported in other cases,¹²² erodes the foundation of the attorney-client relationship, thus understood, from one in which the lawyer loyally and zealously works to promote the client's interests to one in which the lawyer is directed to prioritize the interests of funders. As one participant in a litigation funding panel put it, "this is the golden rule—he with the gold, rules." As funders become more enmeshed with law firms, not just individual cases—by incubating them, bankrolling them, outright owning equity in them, where allowed, and backing portfolios originated and co-owned by lawyers where a direct ownership stake in a law firm is not allowed¹²³—it is naïve to think that lawyers' loyalty remains undivided. The legal profession is at risk of becoming like the medical profession, where insurers' interests constrain or even override the best interests of patients and the professional judgment of doctors.¹²⁴

Acknowledging the risk of such realignment of interests and loyalties, bar associations have repeatedly clarified that litigation funding must not run afoul of legal ethics requirements¹²⁵ including the duties to: avoid conflicts of interest; advocate loyally and zealously, i.e., lawyers' obligation to prioritize

¹²² See, e.g., *infra* subpart II.C (discussing the protein litigation); *supra* section II.B.2 (discussing Nimitz); *Binh v. King & Spalding, LLP*, No. 4:21-CV-02234, 2022 WL 130879, at *1 (S.D. Tex. Jan. 10, 2022) (alleging collusion between lawyers and funder); Marc Goldstein, *Should the Real Parties in Interest Have to Stand Up? Thoughts About a Disclosure Regime for Third-Party Funding in International Arbitration*, 8 TRANSNAT'L DISP. MGMT. 1 (2011) (account by a lawyer of his client being "held in terrarium" by funder).

¹²³ Maya Steinitz, *The Partnership Mystique: Law Firm Finance and Governance for the 21st Century American Law Firm*, 63 WM. & MARY L. REV., 939, 939 (2022); *Bentham IMF Unveils New Portfolio Model for Litigation Funding*, OMNI BRIDGEWAY (Nov. 16, 2015), <https://www.benthamimf.com/news/press-releases/press-releases-full-post/pressreleases/2015/11/16/bentham-imf-unveils-new-portfolio-model-for-litigation-funding> [<https://perma.cc/WAW6-DFXE>] ("We help [law firms] recruit talent, launch a promising new litigation specialty [W]e help incubate firms and practice groups.")

¹²⁴ See, e.g., David Wainer, *You Can Thank Private Equity for That Enormous Doctor's Bill*, WALL ST. J. (May 30, 2024), <https://www.wsj.com/health/health-care/you-can-thank-private-equity-for-that-enormous-doctors-bill-3a2fc90b> [<https://perma.cc/JM8Z-Y8UQ>]; Reed Abelson & Margot Sanger-Katz, *Serious Medical Errors Rose After Private Equity Firms Bought Hospitals*, N. Y. TIMES (Dec. 26, 2023), <https://www.nytimes.com/2023/12/26/upshot/hospitals-medical-errors.html> [<https://perma.cc/Z3BH-62UT>].

¹²⁵ See, e.g., A.B.A. COMM'N ON ETHICS 20/20, *supra* note 56; N.Y. STATE BAR ASS'N, REPORT ON THE ETHICAL IMPLICATIONS OF THIRD-PARTY LITIGATION FUNDING (2013) (quoting in agreement *Formal Opinion 2011-2: Third Party Litigation Financing*, N.Y.C. BAR, <https://www.nycbar.org/reports/formal-opinion-2011-2-third-party-litigation-financing/> [<https://perma.cc/5AUC-VMW8>] (last visited Feb. 9, 2026)).

their clients' interests and follow their clients' directives, not those of funders; exercise independent professional judgment, free of funders' interference; maintain attorney-client privilege; and protect the confidentiality of "work product."¹²⁶ What bar associations emphasize must be safeguarded when funding is involved implies what it is they fear is at risk: loyalty to the client, zeal in protecting the client's interests, the independent judgment of lawyers, clients' confidences and trust, and clients' autonomy.

Bar associations are aware that repeat-play relationships between lawyers and funders are likely to breed conflicts of interest and loss of client autonomy. The ABA's *Best Practices* caution that a "lawyer should beware of conflicts of interest [for example, consider] how many times has the lawyer used the particular funder or any other funders? What is the relationship between the lawyer and the funder?"¹²⁷ Conflicts may be exacerbated by the fact that "most litigation funders are repeat players," creating a perpetual cycle of investment and litigation decisions that are designed to maximize funders' return on investment rather than advance the best interests of the law firm's clients. In short, the closer the relationship between funders and law firms becomes, funders' interests will probably exert more pull than those of the clients.¹²⁸ Therefore, in the context of litigation funding, a careful lawyer will assure that the litigation funding agreement accurately reflects that the client retains control of the litigation and that the attorney "retains and protects his or her ability to exercise independent professional judgment."¹²⁹

With respect to the question of whether freedom of contract is the right framework, it is noteworthy that while some rules of professional conduct expressly provide that the client can give informed consent to conduct that would otherwise violate the rules, with respect to others:

The issue of contracting around the ethics rules popped up in the 1990s, over the question of who controls the client-lawyer relationship when the client is an insured and the

¹²⁶ MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2020) (conflicts of interest); *id.* r. 1.7 cmt. 1 (loyalty); *id.* r. 1.3 cmt. 1 (zeal); *id.* r. 1.6 (confidentiality); *id.* r. 1.6 cmt. 3 (attorney-client privilege and work product doctrines).

¹²⁷ A.B.A., BEST PRACTICES FOR THIRD-PARTY LITIGATION FUNDING 17 (2020).

¹²⁸ See Zeqing Zheng, *The Paper Chase: Fee-Splitting vs. Independent Judgment in Portfolio Litigation Financing of Commercial Litigation*, 34 GEO. J. LEGAL ETHICS 1383, 1399 (2021).

¹²⁹ A.B.A., *supra* note 127, at 11 n.5.

insurer is paying for defense counsel under a subrogation clause in the insurance contract. The relationship between insured and insurer is fraught with potential conflicts of interest. The *Model Rules* are clear: the lawyer's undivided loyalty goes to the client regardless of who pays. The insurance bar countered that the insurance contract can include clauses in the insurance policy to contract around these ethical prohibitions; Professors Silver and Syverud wrote a classic article defending the latter point of view. However, the ABA ethics committee disagreed, arguing that "the Rules of Professional Conduct—and not the insurance contract—govern the lawyer's obligations to the insured." The *Restatement (Third) of the Law Governing Lawyers* sides with the ethics committee's position. This example illustrates two points: in the law of lawyering, the fiduciary duty of undivided loyalty takes primacy over contract law, in the sense that it cannot be contracted around; but also, the *Rules of Professional Conduct* set the terms of that fiduciary duty. The first point helps confirm the centrality of fiduciary ethics in at least one important chunk of legal ethics: the conflict-of-interest rules. The second point helps confirm that these rules are the *lex specialis* of fiduciary obligation in legal ethics.¹³⁰

Bar associations, however, are ineffective as regulators of litigation funding because they are generally understood to have authority over lawyers, not funders (and for other reasons beyond the scope of this paper, such as regulatory capture). As discussed below, judges are much better positioned to step into the gap, and some have led the way, demonstrating what effective judicial supervision can look like.

5. *Defendants' Constitutional Right to Due Process*

As we have seen in the previous sections, the principle of plaintiffs' autonomy and agency over their cases is foundational, making appearance after appearance throughout the Federal Rules of Civil Procedure, the Federal Rules of Evidence, the Model Rules of Professional Conduct, and their state analogues. But wait, there's more: in the area of litigation funding generally, and the question of who should control litigation, plaintiffs' and defendants' interests actually aligned. The Due Process Clauses of the Fifth and Fourteenth Amendments have been interpreted to include a right to a fair and efficient

¹³⁰ David Luban, *Fiduciary Legal Ethics, Zeal, and Moral Activism*, 33 GEO. J. LEGAL ETHICS 275, 286–87 (2020) (emphases in original) (footnotes omitted) (quoting A.B.A. COMM. ON ETHICS & PRO. RESP., FORMAL OP. 96-403 (1996)).

resolution.¹³¹ When plaintiffs lose control over their cases, especially their ability to settle them and to decline to bring additional claims,¹³² defendants are adversely affected. The loss of ability to control settlement decisions can lead to zombie litigation, which is clearly detrimental to defendants who incur extra direct litigation costs as well as indirect litigation costs. A funder controlling litigation behind the scenes, Svengali-style, can violate defendants' rights to know who, and what, they are confronted with and mount an effective defense.¹³³

The direct costs of the litigation increase, first and foremost, simply because the case is prolonged—this is the essence of zombie litigation. Relatedly, lawyers often complain that when third-party funders are undisclosed, mediation fails because there is apparently a party with influence or control over settlement that is invisible to the defendants. Extra direct costs can also be the result of satellite litigation over the funder's control. Examples of expensive satellite litigation in the antitrust protein litigation include the costs of the arbitration proceedings at the London Court of International Arbitration; the parallel proceedings to enforce the arbitration award and to vacate it in, respectively, NY and Illinois federal district courts; and the costs of the substitution proceedings in Minnesota and Illinois district courts and in the Seventh Circuit.

Because funders controlling litigation is alien to our legal system, it is hard to predict all of the consequent harms. For example, in the protein market antitrust litigation, an arbitral injunction against settlement led to the substitution of the funder for the original claimholder.¹³⁴ This, in turn, led to

¹³¹ *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976). These constitutional principles are also echoed in Rule 1 of the Federal Rules of Civil Procedure, which states that the Rules shall “be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1.

¹³² Some litigation funding agreements contain an agreement to fund an existing case and a requirement that additional claims be pursued. It should be noted that in some states, a requirement that claims be filed is a ‘stirring up of strife’ that renders an agreement champertous. In New York, for instance, the champerty statute prohibits entering into an agreement “with the intent and for the purpose of bringing an action or proceeding thereon.” N.Y. JUD. LAW § 489(1); *Am. Optical Co. v. Curtiss*, 56 F.R.D. 26, 29–32 (S.D.N.Y. 1971) (“Corporations cannot maintain actions on claims which, in violation of the Penal Law, are assigned to the corporation for the purpose of bringing suit thereon.”); *Bluebird Partners v. First Fid. Bank*, 94 N.Y.2d 726, 738 (2000).

¹³³ See discussion of Nimitz, *supra* section II.B.2.

¹³⁴ *In re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2024 WL 1214568 (N.D. Ill. Mar. 21, 2024).

defendants' claims of unfairness towards them in the form of having to litigate against an underfunded shell entity.¹³⁵ The defendants claimed that any sanctions that may be ordered by the court (e.g. for discovery abuses) would not be collectable and that it would not be able to guarantee that the original plaintiffs' evidence and witnesses would be produced.¹³⁶ None of these consequences could have been foreseen by anyone at the outset. One can envision other proceedings: added discovery; standing challenges; and motions to declare and include the real party in interest.

Zombie litigation can also increase a myriad of indirect costs, which often attend litigation. Such indirect costs can include harm to business relationships; distraction of and distress to employees and managers, reputational harm, depression of stock price, increase in the cost of obtaining credit and entering into certain transactions, and more.¹³⁷ Further, if a funder controls the litigation, the company's management may lose the protection of the business judgment rule.¹³⁸

Because the type, scope, scale, and duration of such indirect costs are often uncertain and unquantifiable, they create uncertainty for the parties involved. Such uncertainty is its own cost and is the bane of business.

While there is generally no incentive to bring a single non-meritorious claim, because non-meritorious claims are unlikely to lead to favorable judgements and, therefore, they are also unlikely to lead to high-value settlements (though they may lead to low, nuisance-value settlements), bundling cases creates structural incentive to bundle "subprime," i.e., non-meritorious, claims together with potentially meritorious ones. When funders control bundled cases, either directly or through control over lawyers, the above harms to defendants can increase exponentially. The prime example is the moral hazard created when contingency-fee lawyers can shift the risk of bringing cases onto funders or secondary markets.

¹³⁵ For arguments against substitution in the protein litigations, see Defendant's Memorandum in Opposition to Joint Motion for Substitution of Plaintiff, Sysco Corp. v Agri Stats, Inc., No. 21-cv-1374 (D. Minn. July 21, 2023).

¹³⁶ *Id.*

¹³⁷ See MAYA STEINITZ, THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE 113-19 (2019) for a full analysis of indirect costs of litigation and how such costs can dwarf the direct costs of litigation.

¹³⁸ A presumption that officers and directors of a company act in good faith and in the best interest of the corporation and that they are therefore entitled to deference by courts. 18B AM. JUR. 2D *Corporations* § 1452 (2025).

In sum, the proper question isn't whether freedom of contract applies in some general sense to a contract between a funder and a (sophisticated) plaintiff, a truism in our system. The question is whether any of the exceptions to freedom of contract apply. The survey of relevant law above explains why the answer to that question is a clear "yes."

C. The Antitrust Protein Market Litigation

Many of the considerations outlined above are evident in the courts' treatment of the real-world inspiration for our hypothetical: the funding of Sysco's antitrust litigation against various protein suppliers, which was subject to a "hostile takeover" in arbitration by its funder, Burford Capital. In the real world, an arbitral tribunal, with a 2-1 majority, embraced the idea that (1) Burford's view that proposed settlements will hurt the profitability of its investments in other cases, brought by other plaintiffs, was a proper and prevailing consideration; and (2) a settlement veto right could be validly granted to a funder.¹³⁹

Although Sysco discharged its counsel for what it regarded as violations of its ethical obligations, Burford refused to approve substitute representation.¹⁴⁰

Sysco petitioned a federal district court in Illinois to vacate the arbitral award, while Burford petitioned a New York state court to enforce the award.¹⁴¹ Before either of those cases could be heard, Sysco and Burford settled. As part of their agreement, Sysco assigned its cases to Carina, a special-purpose entity created by Burford to accept the assignments and proceed with the litigation.¹⁴² Burford then rehired the firm Sysco fired to resume litigating the cases.¹⁴³ Because of the settlement, no court had the opportunity to rule directly on the validity of the arbitral tribunal's injunction and, by implication, on the validity of a contract clause that, arguably, grants a funder veto over settlement decisions. Nonetheless, the federal courts in Minnesota and Illinois entertained challenges from Sysco's antitrust defendants to the assignment and subsequent attempted substitution of Sysco by Carina.¹⁴⁴ The courts' opinions on these

¹³⁹ See Order on Plaintiffs Preliminary Injunction Motion, *supra* note 18.

¹⁴⁰ *In re Pork Antitrust Litig.*, No. 18-CV-1776 (JRT/JFD), 2024 WL 511890, at *2 (D. Minn. Feb. 9, 2024), *aff'd*, No. CV 18-1776 (JRT/JFD), 2024 WL 2819438 (D. Minn. June 3, 2024).

¹⁴¹ *Id.*

¹⁴² *Id.* at *2-3.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at *3-4.

challenges show, in particular, concerns about preserving the public policy of encouraging settlements and protecting plaintiffs' control over the conduct of their claims.¹⁴⁵ The courts' rulings in these subsequent challenges to the substitution show an unwillingness to accede to the notion that funders can take settlement control of funded cases and force litigants to litigate despite their wishes to settle.

On February 9, 2024, a Magistrate Judge in federal court in Minnesota denied the motion seeking the substitution of Sysco as the named plaintiff in the beef and pork antitrust cases, holding that the arrangement was against the public interest, on grounds that would have invalidated the arbitration award had the challenge to it not been settled.¹⁴⁶ The Magistrate Judge declared "the transfer does violence to the Federal Rules of Civil Procedure's meaning of transferring an 'interest,' has caused serious practical problems in this litigation, and will allow a financier with no interest in the litigation beyond maximizing profit on its investment to override decisions made by the party that actually brought suit."¹⁴⁷ The Magistrate Judge did not directly analyze the legality of Sysco's assignment to Burford; instead, the court decided to exercise its discretion to deny the substitution because allowing it would contravene the public policy of party control and the public policy favoring settlement. The order emphasized the burden on the court system inflicted by it and the resulting assignments.¹⁴⁸ The order stressed the "largest harm that condoning Burford's efforts to maximize its return on investment would cause is the harm of forcing litigation to continue that should have settled."¹⁴⁹

A Minnesota District Court Judge, upholding the Magistrate Judge's order, emphatically rejected Carina and Sysco's argument. The court noted that the Magistrate "was particularly concerned with the possibility that on the facts of this case, substitution would allow a litigation financier 'with no interest in the litigation beyond maximizing profit on its investment to override decisions made by the party that actually brought suit.'"¹⁵⁰ The District Court agreed and noted that the

¹⁴⁵ *Id.* at *7–12.

¹⁴⁶ *Id.* (denying Sysco's motion to substitute plaintiff in consolidated cases).

¹⁴⁷ *Id.* at *1.

¹⁴⁸ *Id.* at *6–10.

¹⁴⁹ *Id.* at *7.

¹⁵⁰ *In re Pork Antitrust Litig.*, No. CV 18-1776 (JRT/JFD), 2024 WL 2819438, at *2 (D. Minn. Jun 3, 2024) (quoting *In re Pork Antitrust Litig.*, 2024 WL 511890, at *3).

validity of the assignment of the Sysco's claim to Carina "is of no matter. Though the State of Minnesota has abolished its common-law prohibition against champerty, courts must still 'be careful to ensure that litigation financiers do not attempt to control the course of the underlying litigation.' . . . The substitution motion directly resulted from their attempt to resolve the dispute over whether Sysco or Burford should control this litigation. The Court will not approve such conduct."¹⁵¹ In other words, the court disapproved of a funder controlling the litigation *even when, through assignment, the funder became the claimholder*.

Meanwhile, the Illinois district court allowed Carina to substitute for Sysco in the Broilers litigation.¹⁵² The decision focused on substitution after the assignment of claims, not on the question of a *third-party funder's* control of settlement. Otherwise stated, since the claims had by that point been assigned, Burford was no longer a third-party funder but rather a claimholder. Thus, the Illinois decision does not shed any light on how that court would regard a third-party funder seeking to control litigation. However, that same court's ruling on whether to honor the original settlement between Sysco and one of the major defendants, Pilgrim's Pride, suggests some level of discomfort with third-party control of litigation as well.

On September 8, 2023, Pilgrim's Pride moved to enforce the terms of the global settlement it had negotiated with Sysco to resolve Sysco's claims against it, one of the settlements Burford had opposed. On June 14, 2024, the Illinois district court held the settlement agreement enforceable, effectively restoring to Sysco the control it had lost during the arbitration.¹⁵³ The judge *de facto* (though not *de jure*) set aside the arbitration award by saying "[t]he written agreements, however, were never signed because Sysco's litigation funder, Burford Capital, objected to the settlement."¹⁵⁴

In summary, Sysco's antitrust protein cases could have concluded in 2022 but instead are shambling forward, draining the money, time, and energy of the court system, the defendants, and even Sysco itself—zombie litigation. Put differently, a Fortune 100 company is being forced to collaborate in the

¹⁵¹ *Id.* (quoting *Maslowski I*, 944 N.W.2d at 241).

¹⁵² *In re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2024 WL 1214568 (N.D. Ill. Mar. 21, 2024).

¹⁵³ *In re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2024 WL 3011350 (N.D. Ill. June 14, 2024).

¹⁵⁴ *Id.* at *2.

prosecution of claims that directly pertain to its core business and affect its relationships with suppliers and consumers. Sysco is also being forced to work with lawyers it fired due to alleged disloyalty and conflicts. All this, instead of repairing relationships with suppliers and releasing executives and employees from the time and emotional demands of litigation. Large-scale cases that a plaintiff and its defendants could have years ago dispensed with proceed in the courts for the benefit of a funder, continue to trudge through the public's justice system, like a zombie.

III

PREVENTING A ZOMBIE APOCALYPSE THROUGH JUDICIAL SUPERVISION

As the examples provided above indicate, notwithstanding the various norms designed to ensure plaintiff autonomy and prevent third-party interference with the same, our system—which evolved assuming an outright ban on third-party litigation funding—is straining to deal with the new powerful market force that is third-party funding. In this Part, I explain that a framework for preventing zombie litigation, ensuring party autonomy, and more broadly preventing litigation-funding-related abuses of process exists but is under-utilized: judicial supervision. I provide some examples of how a few judges used such tools in recent cases, ad hoc, to prevent funders' undue control over litigation, and recommend that judges embrace and actively develop this form of managerial judging in light of the systemic effects that litigation funding is having on the judicial branch.

In the previous sections, I explained that the issues that arise with respect to control of litigation are (1) best understood as questions of potential abuse of process; and (2) that portfolio funding is a new form of claim aggregation. In both areas—preserving the integrity of the judicial process and safeguarding the interests of plaintiffs in aggregate litigation—judges have long taken an active role. First, judges have inherent authority to ensure the integrity of the judicial process. As Judge Connolly noted in the *Nimitz* case:

It cannot be seriously disputed that I had the inherent authority to order [the investigation]. . . . The Supreme Court has expressly held that a federal court's inherent powers include . . . “the power[] to conduct an independent investigation in order to determine whether [the court] has been the victim of fraud.”¹⁵⁵

¹⁵⁵ *Nimitz Memorandum*, *supra* note 86, at *26-27 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)).

Second, in class and mass actions, judges have long followed a model of “managerial judging”—active case management and a focus on both the efficiency of the process and the fairness of the settlement¹⁵⁶—rather than a pure adversarial model in which lawyers alone drive the course of a case. In the class action context, to name but a few examples, judges evaluate the qualifications and experience of the proposed class counsel; identify and address any potential conflicts of interest that may arise between class counsel and the class members including assessing whether counsel has any financial incentives that could compromise their representation of the class; review and approve proposed settlements; entertain complaints from class members who believe that their rights have been violated or that the settlement is unfair; and assess the reasonableness and fairness of attorneys’ fees.¹⁵⁷ Judges also play an active role in mass torts, sometimes even with respect to the financing of the litigation.¹⁵⁸ All these tools can be used by judges when a case is financed and, especially, when a case is aggregated in a portfolio.

There are some “green shoots”—indications that judges are starting to exercise scrutiny in the same vein with respect to ensuring that plaintiffs remain in control of their funded cases, both in aggregate litigation as well as in individual cases (i.e., irrespective of inclusion of the funded cases in a portfolio). The most straightforward way the courts oversee litigation

¹⁵⁶ Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–79 (1982); see also, Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L. J. 1983 (1999) (“In the world of mass tort litigation, at least, we have sneaked away from the traditional U.S. adversarial model of justice, and towards the inquisitorial model common in the civil law countries of continental Europe and, to a lesser extent, Latin America. We have turned toward inquisitorial justice not by design, but by necessity and ad hoc innovation.” (footnotes omitted)).

¹⁵⁷ FED. R. CIV. P. 23.

¹⁵⁸ See generally Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995); Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377, 378 (2014) (describing Judge Hellerstein’s decision to disallow the rollover of certain case financing costs in the 9/11 litigation from the lawyers to their clients: “Making national news, he broke ranks with other courts and commentators and ultimately disallowed the proposed deduction. In so doing, Judge Hellerstein could not cite a single Model Rule, *Restatement* section, ethics opinion, or court precedent in his favor. Instead he reasoned: ‘Beyond legality and beyond ethics, there’s also a sense of balance and what’s appropriate, particularly in this field, particularly in relationship to clients who sign . . . retainer agreements without thinking too much about what they mean.’” (alteration in original) (footnotes omitted) (quoting Transcript of Oral Argument at 21, *In re World Trade Ctr. Disaster Site Litig.*, Nos. 21 MC100 (AKH), 21 MC 102 (AKH), 21 MC 103 (AKH) (S.D.N.Y. Aug. 27, 2010)). Judge Hellerstein described his approach in Alvin K. Hellerstein, James A. Henderson Jr. & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders’ Tort Litigation*, 98 CORNELL LAW REVIEW. 127 (2012).

finance is by granting discovery requests and entertaining parties' motions challenging the validity and/or effect of funding agreements.

More comprehensive measures of judicial supervision entail court orders, both case-specific orders and standing orders. Examples of such orders, including ones seeking to prevent funder control, are proliferating in the MDL context. Increasingly, these orders reflect an understanding that control can be indirect and implied. For example, the Northern District of Ohio, Eastern Division, has ordered that in all multidistrict litigation cases, counsel for a funded party must provide the court with:

(A) a letter briefly describing the [third-party] financing; and (B) two sworn affirmations—one from counsel and one from the lender—that the [third-party] financing does not: (1) create any conflict of interest for counsel, (2) undermine counsel's obligation of vigorous advocacy, (3) affect counsel's independent professional judgment, (4) give to the lender any control over litigation strategy or settlement decisions, or (5) affect party control of settlement.¹⁵⁹

In Florida, a U.S. District Court in a multidistrict litigation required counsel to disclose whether the case was financed and, if so, to answer several questions, including the following:

Does the litigation funder have any control (direct or indirect, actual or apparent or implied) over the decision to file or the content of any motions or briefs, or any input into the decision to accept a settlement offer? Does the financing (1) create any conflict of interest for counsel, (2) undermine counsel's obligation of vigorous advocacy, (3) affect counsel's independent judgment, (4) give to the lender any control over litigation strategy or settlement decisions (as to either the common benefit work done by counsel or work for individual retained clients), or (5) affect party control of settlement?¹⁶⁰

A similar result is achieved in some courts through the creation of local rules. In one well-known example, the U.S. District Court for the District of New Jersey amended its local

¹⁵⁹ See *In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018).

¹⁶⁰ See Pretrial Order No. 16, Order Regarding Third Party Litigation Funding at 12, *In re Zantac (Ranitidine) Prods. Liab. Litig.*, MDL No. 2924 (S.D. Fla. Apr. 23, 2021); see also Standing Order Regarding Third-Party Litigation Funding Arrangements, *supra* note 87.

rules in 2021 to require disclosure of litigation funding including an indication of the extent of the funder's control over settlement and any terms and conditions related to that control.¹⁶¹

The most involved form of judicial supervision is the role Judge Connolly played in the *Nimtz* case. Extracting from the *Nimtz* saga a model of managerial judging for the age of litigation funding, it is important to start by rendering visible the first, invisible step in Judge Connolly's supervisory role: having his antenna up and noticing possible abuses. As discussed above, detecting possible violations, he ordered disclosure of the litigation finance agreements, launched a *sua sponte* investigation and issued *sua sponte* orders, conducted an evidentiary hearing, and required lawyers to make representations. As a result of his findings, he referred attorneys to their bars for discipline and sent his findings to the Department of Justice for further investigation of possible fraud on the PTO based on his conclusion that "counsel of record for the LLC plaintiffs violated numerous rules of professional conduct."¹⁶² Of course, such extensive supervision should be reserved for rare cases with the types of red flags of serious misconduct Judge Connolly detected in his courtroom. But the case is useful in demonstrating the extent to which, with awareness of the severity of the potential effects funder intermeddling may have, judges have powerful tools at their disposal and do not need to wait for legislators to step in.

Explicit and implied throughout the judicial interventions of judges discussed throughout this paper is that judges recognize that a lawyer's ability to adhere to their fiduciary (and other) duties towards clients—to act loyally, zealously, and with care—is placed under stress when a third-party funder is involved. Hence, the need for orders requiring lawyers to certify an absence of conflicts, vigorous advocacy, independent professional judgment, and absence of control—direct, indirect, explicit or implied—over litigation strategy or settlement decisions. The most straightforward way to realign lawyers' interests with their clients and restore the equilibrium that existed

¹⁶¹ D.N.J. L. Civ. R. 7.1.1 (2021) (Disclosure of Third-Party Litigation Funding). For a compendium of examples of local rules and standing orders, see SHOOK, HARDY & BACON, *THIRD-PARTY LITIGATION FUNDING: STATE AND FEDERAL DISCLOSURE RULES & CASE LAW* (May 11, 2022), <https://www.shb.com/-/media/files/professionals/j/katie-jackson/shb-handout-tpf-disclosure-rules-and-case-law.pdf> [<https://perma.cc/3EB5-EFSP>].

¹⁶² See *Nimitz Techs. LLC v. CNET Media, Inc.*, No. CV 21-1247-CFC, 2023 WL 8187441, at *2 (D. Del. Nov. 27, 2023).

from time immemorial till the emergence of third-party funding in the twenty-first century is to treat third-party funders the way that the only previously-allowed funders (i.e., contingency fee lawyers and insurers) were treated—as fiduciaries (or, in the case of insurers under certain state laws, quasi-fiduciaries). Fiduciary duties can be developed through the common law, by judges, as was the case in insurance law.

CONCLUSION

The ascent of litigation funding has ushered in a new era of complexity for the civil justice system. This Article has sought to illuminate a particularly concerning dimension of this evolution: the specter of “zombie litigation.” As the pursuit of profit increasingly intertwines with legal advocacy through mechanisms like portfolio funding and the secondary trading of claims, the fundamental principle of litigant autonomy risks becoming a casualty. Cases that plaintiffs no longer wish to pursue, or in some cases, do not wish to initiate, can be propelled through our courts, not for the vindication of rights, but for the financial benefit of third-party funders. In the process, deleterious effects ensue for all involved: not just plaintiffs but also defendants, the courts, and the public.

The rise of portfolio funding further complicates matters as it serves as a form of undisclosed economic aggregation, which creates conflicts of interest and distortions of the legal system similar to those created by procedural aggregation.

To counteract these adverse effects, the Article advocates for the proactive use of managerial judging by courts in cases involving third-party funding. By playing an active role, as some judges have begun to do, judges can address all the most troubling aspects that the financialization of litigation gives rise to, as described in this Article. Exercising their inherent authority, judges’ toolbox is substantial, encompassing tools like disclosure, supervision, imposition of fiduciary duties and sanctions, investigation, and referrals to regulators.