Partners in Claim: Litigation Funding as Quasi-Partnerships

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The third-party litigation funding (TPLF) industry is a rapidly growing phenomenon in the United States, making headlines in cases ranging from celebrity privacy scandals to multimillion-dollar NFL head-injury lawsuits. Proponents praise TPLF for increasing access to justice, particularly for underprivileged parties who may otherwise lack the resources to pursue their claims. Critics, however, warn that it fosters opacity, promotes frivolous lawsuits, inflates legal costs, and allows funders to exert undue influence over litigation strategies and settlement negotiations. To address these commonly held criticisms while preserving the advantages of the practice, this Article proposes a novel approach to TPLF, reconceptualizing these arrangements as a quasi-partnership. Based on the regulatory and theoretical principles governing limited partnerships, we develop a framework that specifies the roles, rights, and duties of claimants, funders, and their attorneys. The funders serve as "limited partners," providing capital but being barred from directing litigation strategy or settlement decisions. Claimants are cast as "general partners," retaining substantive control but bound by fiduciary duties to the "partnership," including the funder's interests. The claimant's attorney, in turn, is redefined as owing duties to both the client and the partnership as a whole, balancing the interests of all parties involved. This framework clarifies why funders should have limited control over litigation decisions, delineates necessary disclosure obligations, and defines the permissible scope of funder access to case-related information. The proposed model is not only a more accurate account of how TPLF operates in practice but is also normatively superior to current arrangements, offering a principled and economically efficient model for integrating TPLF into

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modern litigation practices—one that preserves its access-to-justice benefits and mitigates its potential risks.

Introduction

Football holds a revered place in American culture, but at times the game comes at a significant cost. Recently, a group of retired National Football League (NFL) players filed a lawsuit against the League, alleging that it had failed to protect them from the long-term consequences of repeated head injuries. In April 2015, the District Court approved a tentative settlement agreement with the NFL, creating an uncapped fund (adjusted from the parties' originally-agreed-to $765 million fund) designed to finance medical examinations and compensate players for their injuries.[1] Under the settlement, players were required to submit a claim

1. *See* Final Order and Judgment Memorandum at 10-11, *In re* Nat'l Football League Players' Concussion Inj. Litig., No. 2:12-md-02323-AB (E.D. Pa. Apr. 22, 2015); *see also In re* Nat'l Football League Players Concussion Inj. Litig., 821 F.3d 410, 423-24 (3d Cir. 2016) (affirming the district court's approval of the revised settlement, which provided an uncapped compensation fund for retired players); Nat'l Football League, *Ex-Players Agree to $765M Settlement in Concussions Suit,* NFL (Aug. 29, 2013), https://www.nfl.com/news/nfl-ex-players-agree-to-765m-settlement-in-concussions-suit-0ap1000000235494 [https://perma.cc/KP3P-UZBU] (reporting on the initial capped settlement agreement that was later revised by the district court). Since this settlement, more than $1 billion has been paid to former players and their families. *See* Reeves Wiedeman, *Tua Tagovailoa and the End of the NFL's Concussion Crisis*, INTELLIGENCER (Oct.

package to the Claims Administrator, who would then determine their awards. However, frequent delays in processing claims left many players waiting for extended periods to receive compensation. To cope with these delays, some players entered into agreements with third-party litigation funders, securing immediate cash advances by assigning their rights to future settlement proceeds to the funder.[2]

This type of relationship between plaintiffs and litigation funders immediately raises concerns about conflicts of interest. On one hand, having already received financial benefits in advance of the legal process, plaintiffs may exploit the arrangement by neglecting to assert their rights or fulfill their obligations—for example, by settling prematurely or failing to cooperate with the proceedings.[3] On the other hand, the funder, aware of these risks and the plaintiff's financial vulnerability, may leverage its superior bargaining power to demand an excessive share of the compensation. In the NFL litigation, similar concerns of abuse by funders led the District Court to declare all contracts between the players and funders void. The Third Circuit, however, partially reversed this decision, concluding that although the settlement prohibits funders from claiming money directly from the Claims Administrator, the District Court exceeded its authority by invalidating individual funding agreements.[4] Notwithstanding the potential for abuse, when functioning effectively, third-party litigation funding (TPLF) can offer significant advantages. However, as this example demonstrates,[5] current doctrinal tools are limited in their ability to address the unique challenges posed by these relationships, and it is unclear whether the law's existing approach to understanding and regulating TPLF is satisfactory.

In this Article, we introduce an innovative framework for conceptualizing this market. Drawing on economic analysis, we argue that

25, 2024), https://nymag.com/intelligencer/article/tua-tagovailoa-and-the-end-of-the-nfls-concussion-crisis.html [https://perma.cc/B5LG-K7PS].

2. *In re* Nat'l Football League Players Concussion Inj. Litig., 923 F.3d 96, 109 (3d Cir. 2019).

3. See, for example, Non-Binding Opinion at 4, *In re* Nat'l Football League Players' Concussion Inj. Litig., No. 22-2381 (3d Cir. Oct. 27, 2023), where funders described challenges in recovering funds from certain class members who, after receiving a direct settlement payout, dissipated the proceeds without repaying the funder.

4. *See In re NFL Concussion Litig.*, 923 F.3d at 113.

5. For another high-profile third-party litigation-funding (TPLF) case illustrating conflict-of-interest concerns, see generally *In re* Gawker Media LLC, No. 16-11700 (SMB), 2017 Bankr. LEXIS 1798 (Bankr. S.D.N.Y. June 28, 2017); Bollea v. Gawker Media LLC, No. 12012447-CI-011 (Fla. Cir. Ct. Oct. 15, 2012). The case stemmed from the Gawker Media publication of a sex tape involving wrestler Hulk Hogan. It was later revealed that this expensive legal battle was funded in part by Peter Thiel, a billionaire entrepreneur. Years earlier, Gawker Media had outed Thiel as gay, a disclosure he viewed as a gross violation of his privacy. This ultimately led to Gawker's bankruptcy, following a jury's decision awarding Hogan $140 million in damages. *See* Alan Yuhas, *Peter Thiel Justifies Suit Bankrupting Gawker, Claiming to Defend Journalism*, GUARDIAN (Aug. 15, 2016), https://www.theguardian.com/technology/2016/aug/15/peter-thiel-gawker-bankruptcy-lawsuit-hulk-hogan-sextape [https://perma.cc/C7GP-798R].

viewing TPLF as a form of quasi-partnership can address many of the current criticisms of the industry while preserving its benefits—ultimately improving the overall functioning of the legal system. If adopted, this framework could enhance market efficiency while promoting more equitable funder-claimant relationships and better protecting the interests of all parties involved.

TPLF emerged as a response to longstanding structural and financial barriers faced by litigants, and may offer significant advantages, particularly by enhancing access to justice for less-privileged parties. Although a citizen's right "to institute and maintain actions of any kind in the courts of the state" is unquestionable,[6] practical access to justice is often elusive. Prolonged litigation and the high costs of legal services may prevent clients from exercising their rights. In response, various solutions for funding legal proceedings have emerged,[7] including lawyers offering flexible financing terms beyond billable hours and, more recently, the TPLF industry. In exchange for a share of the settlement or court-awarded damages, funders provide litigants with nonrecourse capital. Unlike traditional loans, no repayment is required unless the plaintiff prevails,[8] which helps explain the higher interest rates typically associated with such arrangements. Acceptance of this relatively new but rapidly growing phenomenon in the United States[9] varies by state; some prohibit it entirely, while others permit it despite ongoing concerns from bar associations.

To analyze the TPLF market thoroughly, we should situate it relative to existing access-to-justice mechanisms, most notably the contingency fee arrangement. Under contingency fee agreements, an attorney finances a case in exchange for a share of the recovery. These arrangements are themselves a form of third-party funding.[10] However, the contingency fee model has inherent limitations. First, the availability of such funding is constrained by the liquidity of lawyers and law firms, which is often insufficient to finance all deserving plaintiffs, particularly in capital-intensive, large-scale contexts like mass-tort litigation.[11] Second, ethical

6. Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230).

7. TPLF is often viewed as involving a corporate investor lending to indigent plaintiffs in exchange for high interest or a portion of the damages awarded. Today, however, funding is offered to many kinds of litigants, including corporations and class-action representative plaintiffs. *See* Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1277 (2011).

8. Jarrett Lewis, *Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 GEO. J. LEGAL ETHICS 687, 687 (2020).

9. *See* Letter from Lisa A. Rickard, Pres., U.S. Chamber Inst. for Legal Reform, to Rebecca A. Womeldorf, Sec'y of Comm. on Rules of Prac. & Proc. of the Admin. Off. of the U.S. Cts. (June 1, 2017), https://www.uscourts.gov/sites/default/files/17-cv-o-suggestion_ilr_et_al_0.pdf [https://perma.cc/7C4J-L5JD].

10. *See infra* note 86.

11. While some firms mitigate this by raising capital directly from funders (e.g., through portfolio financing), this alternative can conflict with ethical rules in many jurisdictions that prohibit nonlawyer ownership of law firms or the sharing of legal fees. *See, e.g.*, Bedi & Marra, *infra* note 86, at 587.

regulations strictly limit the financial assistance an attorney can provide to a client beyond advancing litigation expenses.[12] TPLF addresses these shortcomings. By introducing specialized capital from nonlawyer investors, TPLF provides a scalable funding solution that is not dependent on the representing attorney's balance sheet.

Furthermore, from a normative standpoint, separating the roles of legal representative and financier is beneficial. When the representing attorney is also the sole funder, a potential market failure can arise,[13] creating a tradeoff for the claimant between the quality of legal services and the availability of funding.[14] TPLF offers an alternative that mitigates this tension, allowing clients to secure representation from the best-suited counsel, irrespective of that counsel's ability to bankroll the case. Thus, TPLF should be viewed not as a replacement for contingency fees but as an evolution of litigation financing that expands access-to-justice models.

The growth of the TPLF industry in the United States has accelerated since 2014, as exemplified by the growth of Burford Capital Limited, one of the largest funders.[15] In 2016, Burford's net after-tax profit rose by 75% to $115.1 million, and revenue surged by 59% to a record $163.4 million, driven primarily by a 60% increase in litigation-related investments.[16] More recent data confirms the continued scale and dynamism of the industry: Burford reported $872 million in new commitments and total revenues of $396 million for fiscal year 2025, reflecting sustained growth in legal finance activity, indicating both sustained capital inflows into litigation finance and ongoing monetization of funded claims.[17] TPLF companies are also expanding the methods they use to invest in litigation and the types of cases they are willing to fund. Traditionally, TPLF firms invested exclusively in individual cases that underwent a thorough vetting process. Today, some firms invest in portfolios of cases at certain law

12. In most jurisdictions, lawyers can provide limited funding to their clients, advancing court costs and expenses of litigation, but they cannot otherwise provide funding to a liquidity-constrained claimant. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.8(e) (A.B.A. 2025).

13. In the legal-services market, lawyers compete based on price and quality, leading to an efficient market equilibrium. Constraints on competition, such as limits on available capital for law firms, lead to inefficient pricing. *See* Clifford Winston & Quentin Karpilow, *Should the US Eliminate Entry Barriers to the Practice of Law? Perspectives Shaped by Industry Deregulation*, 106 AM. ECON. REV. 171, 173 (2016) (noting that entry barriers to the legal-service market decrease quality and drive up prices).

14. In such arrangements, the lawyer's dual role may replicate some of the incentive misalignments discussed later in relation to third-party funders—yet with even greater influence, given the lawyer's professional control over case strategy and procedural decisions.

15. Letter from Lisa A. Rickard, *supra* note 9, at 3 (describing Burford as one of the largest companies offering litigation funding; analyzing their data; and observing that Burford reported substantial increases in profits, income, and investment commitments from 2015 to 2016).

16. *Id.*

17. *Fourth Quarter and Full Year 2025 Financial Results*, BURFORD CAP. 7, 19 (Feb. 26, 2026), https://s206.q4cdn.com/737820215/files/doc_financials/2025/q4/2026-02-26-Burford-Capital-4Q25-and-FY25-Earnings-Presentation-FINAL.pdf [https://perma.cc/647A-6ZNR].

firms.[18] Another factor driving the expansion of the TPLF industry is its increasing acceptance by law firms. A survey by Burford revealed that 28% of private-practice lawyers reported that their firms used TPLF, representing a four-fold increase since 2013.[19]

The potential of a well-functioning TPLF market to transform the legal landscape is immense. By offering crucial financial support to litigants who might otherwise be unable to pursue their claims, TPLF empowers underfunded parties to access justice. This helps level the playing field, enabling individuals and smaller entities to challenge resource-rich opponents. TPLF allows litigants to pursue their legal rights without the burden of escalating legal costs, forging a more equitable legal system. By expanding enforcement of legal rights, TPLF encourages potential defendants to increase their compliance efforts, suggesting that, in the long term, widespread access to courts is likely to reduce court congestion.

Despite its probable advantages, TPLF has attracted substantial criticism. Key concerns include the potential for funders to exert undue influence over litigation strategies, the possibility of funders exploiting plaintiffs, ethical dilemmas surrounding attorney independence, and the risk of encouraging frivolous lawsuits because of the nonrecourse nature of the funding. The challenges TPLF faces are further complicated by diverging state regulations. Some states adhere to the ancient common-law doctrines of champerty and maintenance. Champerty prohibits the sale of the proceeds from a legal judgment "to an otherwise disinterested party,"[20] and maintenance involves improper interference in someone else's litigation.[21] These doctrines can limit funding options significantly and

18. *See, e.g.*, *Portfolio Finance*, BURFORD CAP., https://www.burfordcapital.com/what-we-do/portfolio-finance [https://perma.cc/59AK-TU7E] ("Portfolio finance gathers multiple litigation or arbitration matters into a single funding vehicle to unlock significant and flexible capital."). The diversification of investment strategies has contributed to the growing influence of TPLF and raised concerns that it may increase the likelihood of spurious lawsuits. *See Selling More Lawsuits, Buying More Trouble: Third-Party Litigation Funding a Decade Later*, U.S. CHAMBER INST. FOR LEGAL REFORM 4-5, 8 (Jan. 2020), https://instituteforlegalreform.com/wp-content/uploads/2020/10/Still_Selling_Lawsuits_-_Third_Party_Litigation_Funding_A_Decade_Later.pdf [https://perma.cc/LJ48-JJ4B] ("The new practice group 'will represent plaintiffs who are seeking litigation funding for individual cases and portfolios of cases and law firms who are seeking litigation funding for portfolio cases . . . .'").

19. Letter from Lisa A. Rickard, *supra* note 9, at 6 (describing Burford's statements about their work with different law firms).

20. Paul Bond, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297, 1297 (2002); *see also* Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 579 (2010) (defining champerty as an agreement to divide litigation proceeds with an unrelated party who helps enforce the claim); David R. Glickman, *Embracing Third-Party Litigation Finance*, 43 FLA. ST. U. L. REV. 1043, 1052 (2016) (noting that champerty historically targeted intermeddling by a stranger without privity or concern in the suit).

21. *Maintenance*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining "maintenance" as "[i]mproper assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case"); *see also In re* Primus, 436 U.S. 412, 424 n.15 (1978) ("[M]aintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or

raise ethical obstacles for lawyers.[22] Other states have relaxed or abolished these prohibitions,[23] but modern limitations on litigation funding still arise from ethical rules, such as the Model Rules established by the American Bar Association. Specifically, Model Rule 5.4(a) generally prohibits attorneys from sharing legal fees with a nonlawyer except in limited circumstances, and critics argue that TPLF arrangements may create prohibited conflicts of interest under this rule.[24]

Current regulatory and ethical frameworks, however, fall short of fully meeting the challenges raised by TPLF. In this Article, we offer a different way forward: developing a framework that redefines the relationship between the litigant and the TPLF firm as a form of limited partnership. The quasi-partnership model challenges conventional perceptions of TPLF as a simple contractual loan agreement, envisioning it instead as a collaborative venture where both parties pool resources to achieve a shared objective.[25] In this model, the litigant and the financier are "partners in claim," with distinct but complementary roles. The financier acts as a limited partner and provides the necessary capital but refrains from interfering with the legal strategy or case management, honoring the litigant's autonomy over legal decisions. The litigant, serving as the general partner, maintains control over the litigation but owes a fiduciary duty to the partnership.

This novel perspective can reshape fundamentally how we understand and engage with this rapidly evolving industry while helping to resolve existing concerns. First, the alignment of interests ensures that both the

champerty."); Jarrett Lewis, *Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 GEO. J. LEGAL ETHICS 687, 692 (2020).

22. *See, e.g.*, Johnson v. Wright, 682 N.W.2d 671, 678 (Minn. Ct. App. 2004) ("Although a few states have modified or abandoned the champerty doctrine, many still apply the doctrine."); Justinian Cap. SPC v. WestLB AG, N.Y. Branch, 28 N.Y.3d 160, 167 (2016) ("Judiciary Law § 489 is New York's champerty statute. Section 489(1) restricts individuals and companies from purchasing or taking an assignment of notes or other securities 'with the intent and for the purpose of bringing an action or proceeding thereon.'").

23. *See, e.g.*, Saladini v. Righellis, 687 N.E.2d 1224, 1226-27 (Mass. 1997); *see also* Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 98-99 (2011) (providing a list of states that recognize champerty, albeit with varying limitations; and analyzing limitations on maintenance).

24. Letter from Lisa A. Rickard, *supra* note 9, at 2, 14-15.

25. Although a joint venture closely resembles a partnership as a legal entity, the partnership model is more appropriate for our purposes for several reasons. A partnership is typically viewed as an arrangement for "carrying on a business" with a "view to profit," often involving a substantial long-term project with a complex web of transactions and requiring ongoing decision-making processes. By contrast, a joint venture is generally seen as a cost-sharing collaboration between distinct businesses, where only certain aspects are undertaken collectively while maintaining overall independence. Walter H.E. Jaeger, *Partnership or Joint Ventures*, 37 NOTRE DAME L. REV. 138, 138-43, 150-58 (1961) (comparing partnerships and joint ventures; and explaining the differences between the two). Moreover, the concept of a "limited liability partner" is central to our argument and better addressed through partnership law. The limited liability partnership (LLP) model is less suitable for this discussion because we differentiate the plaintiff from the funder, recognizing that the plaintiff has a greater stake in the case, beyond financial concerns.

litigant's and the financier's goals are aimed synergistically at achieving a favorable legal outcome. Next, this model addresses confidentiality and disclosure concerns between the litigant and the financier, as well as between them and the court. Finally, framing the funding relationship as a form of partnership also helps resolve ethical issues related to the litigant's lawyer, who is considered a part of the quasi-partnership. Consequently, the lawyer has a duty to promote the shared interests of the parties, ensuring that decisions are made in favor of the collective goals of both the plaintiff and the financier, rather than those of only the individual litigant.

Despite ongoing debate about the legality of selling equity rights in litigation to funders, lawyers are permitted to enter into contingency fee agreements, effectively funding their services in exchange for a share of the judgment. This practice, akin to champerty, acknowledges that legal rights can be treated as assets. This Article adopts this premise and explores how TPLF operates within this framework, focusing on cases involving a direct contractual relationship between clients and funders. Moreover, concerns about the growing trend of funders investing in portfolios of cases managed by law firms[26] are better addressed once a foundational model has been established. Similarly, the model can serve as a useful starting point for future analysis of the unique challenges of complex multiparty cases, such as mass torts, which are beyond the present discussion.[27] Finally, we distinguish between cases involving individual claimants, such as a tort victim, and those involving sophisticated business entities. The quasi-partnership model applies to both, but the practical implementation may differ depending on the circumstances.[28] Our conceptualization serves both descriptive and normative purposes. Descriptively, we argue that the quasi-partnership model reflects the underlying dynamics of these legal relationships effectively. Normatively, we assert that embracing this perspective can enhance the efficiency and fairness of the market.

The remainder of this Article proceeds as follows. Part I discusses the challenges and criticisms associated with TPLF, including increased litigation, interference in case management, high financing costs, and transparency issues. It shows that most of these problems arise from adverse selection and moral hazard, akin to those encountered in insurance markets. Part II introduces the framing of TPLF as a quasi-partnership, laying the groundwork for the subsequent discussions. Building on this foundation, Part III explores the lawyer's role in this model, focusing on how ethical and fiduciary obligations are reshaped by the partnership

26. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 18, at 8-9.

27. *See, e.g.*, Parikh, *infra* note 256, at 1695-97 (focusing on the role financiers play and the dynamics they create in billion-dollar mass-tort cases, as well as the unique challenges these settings pose, which may require some refinement of our proposed model).

28. For example, states should regulate consumer TPLF agreements by banning the funder's interference in litigation strategy while keeping the commercial partnership agreement more flexible. *See infra* Section IV.C.

analogy. Part IV elaborates, from a law-and-economics perspective, on managing legal proceedings under the quasi-partnership model, with particular attention to how it addresses the misalignment of incentives between the litigant and the financier.

I. What's Wrong with TPLF?

TPLF involves a financially sophisticated corporate entity that provides money to a litigant.[29] The litigant can be a corporation involved in commercial disputes (*commercial funding*)[30] or an individual, typically the victim in a personal-injury case, who usually has never been involved in litigation before (*consumer funding*).[31] In return, litigation-funding firms generally receive a large premium if the litigation is successful, which may be a percentage of the amount recovered, a multiple of the amount advanced, or a high interest rate.[32] TPLF has been criticized for encouraging frivolous litigation,[33] discouraging settlements,[34] interfering in the client-lawyer relationship,[35] and, in the context of consumer funding, exploiting vulnerable plaintiffs by setting outrageously high interest rates.[36]

29. There are three other forms of financial assistance to litigants that are not generally referred to as litigation funding and are not considered in this Article: (1) state funding for litigation, usually provided based on financial distress or a social interest in advancing the case; (2) individuals and charities donating funds to support litigation; and (3) lawyers financing litigation by taking cases *pro bono*, donating their time instead of money. For a discussion on the effects of donations on litigation, see Omer Y. Pelled, *Concealed Third-Party Litigation Funding*, 25 THEORETICAL INQUIRIES L. 279, 292, 295 (2025). For a discussion on alternatives to TPLF, see Winand Emons & Francesco Parisi, *The Economics of Litigation Financing* 9-27 (Ctr. for Econ. Pol'y Rsch., Working Paper No. 77800-1729092083, 2024).

30. STEVEN GARBER, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWNS, AND UNKNOWNS 13-15 (2010).

31. Ronen Avraham, Lynn A. Baker & Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 REV. LITIG. 143, 149-51 (2021) (explaining consumer funding is often requested by litigants in cases involving personal-injury claims).

32. There are many other possibilities. *See, e.g.*, Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third-Party Consumer Litigant Funding*, 104 CORNELL L. REV. 1133, 1135-36 (2019) (stating that there are many ways for litigation-funding firms to receive the premium from successful cases); Patrick M. Jones, *Third-Party Litigation Funding in Bankruptcy Cases*, BANKR. STRATEGIST, Dec. 2012, at 3 (explaining that litigation funding can be achieved in a variety of ways, the only limitation being the imagination of the investors and their counterparties).

33. Sasha Nichols, *Access to Cash, Access to Court: Unlocking the Courtroom Doors With Third-Party Litigation Finance*, 5 U.C. IRVINE L. REV. 197, 228 (2015); Cassandra Burke Robertson, *Optimizing the Litigation Funding Ecosystem*, 67 B.C. L. REV. 127, 142 (2026); Emons & Parisi, *supra* note 29, at 35. *See generally* Jeremy Kidd, *Modeling the Likely Effects of Litigation Financing*, 47 LOY. U. CHI. L.J. 1239 (2016) (discussing the problem of frivolous litigation arising from litigation funding).

34. Lyon, *supra* note 20, at 595-98; Andrew F. Daughety & Jennifer F. Reinganum, *The Effect of Third-Party Funding of Plaintiffs on Settlement*, 104 AM. ECON. REV. 2552, 2559 (2014).

35. Steinitz, *supra* note 7, at 1323-25; Lyon, *supra* note 20, at 601-05.

36. Avraham & Sebok, *supra* note 32, at 1137, 1152-54; Jenna Wims Hashway, *Litigation Loansharks: A History of Litigation Lending and a Proposal to Bring Litigation Advances Within the Protection of Usury Laws*, 17 ROGER WILLIAMS U. L. REV. 750, 751 (2012) (arguing that consumer-funding interest rates are high).

To grasp the benefits of TPLF fully and the challenges it poses, we must understand the dual role of these investment schemes. TPLF firms provide funding to litigants who face credit constraints while helping to reduce the risk associated with litigation. The risk-reduction function of TPLF is similar to insurance in many ways.[37] Some risk-averse litigants may choose not to invest in litigation—even when they have the funds and the case has a positive expected return—because they perceive the risk to be too high. Such is the case of consumers with small tort claims, but it can also extend to corporations caught up in costly commercial litigation.[38] By contrast, funders face very little risk. By diversifying their portfolio of cases, they mitigate the risk associated with any single case.[39] Additionally, TPLF investors may have valuable aggregate information about civil cases and develop expertise in assessing and litigating cases, which may increase the value of the cases they fund.[40] TPLF investors can also identify

37. *See generally* Charles Silver, *Litigation Funding Versus Liability Insurance: What's the Difference?*, 63 DEPAUL L. REV. 617 (2014), which compares TPLF to liability insurance more broadly, showing that much of the criticism about plaintiffs receiving TPLF is applicable to defendants who are covered by liability insurance. Our argument is more modest, stating that litigation funding transfers risk, giving rise to similar economic issues as other risk-sharing vehicles. For a discussion of the risk-sharing attribute of TPLF, see Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding: A Signaling Model*, 63 DEPAUL L. REV. 233, 235 (2014); and David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075, 1090 (2013), which argues that litigation financing allows the claimant to transfer part of the litigation risks to parties more suitable to bear them. If TPLF firms are able to receive a portion of the proceeds, the funding scheme resembles purchasing the case from the plaintiff. Robert Cooter considers a market in unmatured claims, in which insurers can purchase potential claims even before any harm occurs. *See* Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383, 383-87 (1989); Robert Cooter & Stephen D. Sugarman, *A Regulated Market in Unmatured Tort Claims: Tort Reform by Contract*, *in* NEW DIRECTIONS IN LIABILITY LAW 174 (W. Olsen ed., 1988). When considering the financial aspect, TPLF appears to work contrary to insurance: instead of paying premiums to an insurer and receiving a large payout if the insured event occurs, the plaintiff (or potential plaintiff in Cooter's suggested market) receives a small fee and transfers a significant financial asset to the TPLF firm if the insured event occurs. Robert Cooter and Ariel Porat appropriately named such a scheme anti-insurance and showed how it may benefit both potential plaintiffs and defendants. *See generally* Robert Cooter & Ariel Porat, *Anti-Insurance*, 31 J. LEGAL STUD. 203 (2002); ROBERT D. COOTER & ARIEL PORAT, GETTING INCENTIVES RIGHT: IMPROVING TORTS, CONTRACTS, AND RESTITUTION 105 (2014).

38. Although consumers are generally more risk-averse than businesses, corporations also seek to minimize risk when the stakes are sufficiently high, as demonstrated by corporate insurance markets.

39. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 406-07 (2004) (showing the effect of risk aversion on litigant willingness to invest in litigation or choose to settle); Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 495 (2012); Avraham & Wickelgren, *supra* note 37, at 263 (explaining that the funder reduces risk through diversification).

40. *See* Robert F. Weber, *Valuing Litigation Assets*, 59 CONN. L. REV. (forthcoming 2026) (manuscript at 28-30), https://ssrn.com/abstract=6683918 [https://perma.cc/T875-8C8N] (discussing the ability of TPLF investors to value lawsuits); Steinitz, *The Litigation Finance Contract*, *supra* note 39, at 498-500 (suggesting that TPLF firms make noncash contributions for their clients); Abrams & Chen, *supra* note 37, at 1087 (stating that litigation-funding firms provide references and expertise beside the funding). If TPLF firms can evaluate the strength of cases before funding, interest rates should be adjusted according to the likelihood of successful litigation, which can provide a valuable signal to the court adjudicating the case. *See generally* Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding with Informative*

plaintiffs who are unaware that they hold a valuable legal claim and offer them funding to pursue it.

When functioning perfectly, TPLF offers many advantages. As investors seek good investment opportunities, they fund only cases promising positive returns, which might not otherwise be litigated because of credit constraints and risk aversion.[41] Although it may seem that litigating these additional cases increases the caseload of the courts, it can achieve the opposite effect. Without funding, potential defendants are undeterred and invest suboptimally in compliance efforts. By encouraging plaintiffs to file meritorious cases, TPLF increases the share of potential cases that go to trial but simultaneously boosts deterrence, reducing the case pool.[42] Furthermore, funding can prevent litigants facing financial constraints who are concerned about lengthy procedures from accepting lowball settlements. Settling parties may have different time preferences,[43] leading to substantially different settlements than risk-neutral parties would reach.[44] Transferring the financial risk of litigation to a risk-neutral party allows litigants to negotiate settlements or litigate as they see fit, reaching an outcome that is closer to the strength of the case and to the correct verdict according to substantive law—and overall less affected by the parties' relative bargaining positions.[45]

Yet TPLF markets do not operate perfectly. TPLF firms face two problems they share with insurers: (1) litigants may have superior information about the potential of their case (a problem known as adverse selection) and (2) after receiving funding, litigants might change the way they manage their case, thus reducing its value (a problem known as moral hazard).

Signals: Equilibrium Characterization and the Effects of Admissibility, 61 J.L. & ECON. 637 (2018) (contending that making the funding contract admissible evidence enables the funder to reduce the interest rate, signaling to the courts that the plaintiff has a strong case).

41. *See infra* note 65.

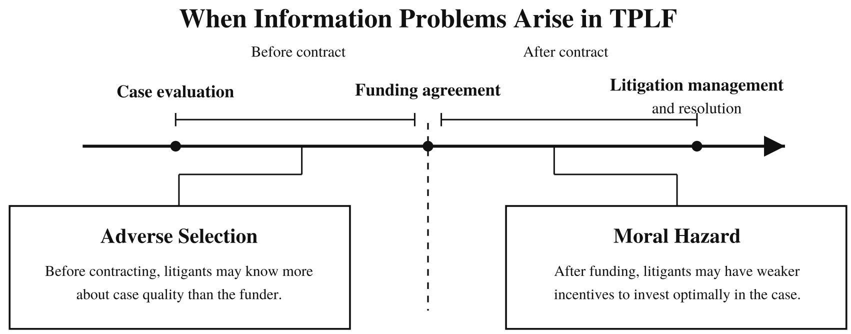
42. *See generally* Suneal Bedi, *The Business Ethics of Litigation Finance*, 25 THEORETICAL INQUIRIES L. 255 (2025) (arguing that litigation funding may directly create legal compliance by encouraging ethical behavior).

43. Differences in time preferences for resolving litigation reflect variations in discount rates. A plaintiff who prioritizes immediate financial compensation over future payments elicits a higher discount rate than someone who places less emphasis on the timing of the payout.

44. *See generally* Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65 (2010) (arguing that selling legal claims and defenses to risk-neutral third parties ensures that lawsuits are resolved according to their legal merit and that settlements are not unfairly low).

45. *See* Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 414-16 (2009) (noting that transfer of risk to third parties allows litigants to negotiate from a bargaining position that reflects the strength of their case).

Figure 1: Adverse Selection and Moral Hazard in TPLF



In insurance markets, adverse selection refers to the asymmetric information between insurers and the insured regarding the insured risk.[46] Insurers address adverse selection by setting premiums based on average risk. Low-risk individuals, however, may forgo insurance because the premiums are too high relative to their risk level, leaving only high-risk individuals to purchase it, which leads, in turn, to higher premiums. The litigation-financing market may face the same issue if parties seeking funding possess better information about the litigation than the TPLF firm.[47] In this case, plaintiffs may persuade funders to finance frivolous cases,[48] whereas those with very promising cases might be unwilling to agree to the financing deal because the terms of the TPLF do not align well with the potential of the case.

Moral hazard in insurance refers to the situation where insured individuals become less vigilant about risk management, leading to an

46. *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488-92 (1970) (demonstrating how asymmetric information creates adverse selection); ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 48-49 (6th ed. 2016) (explaining the problem of adverse selection in general and how it affects the insurance market); Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223, 1226-35, 1240-63 (2004) (explaining the problem of adverse selection in insurance; and claiming that adverse selection is not a significant problem for the insurance market).

47. Because of its access to extensive data on a large number of cases, a TPLF firm may have better information about potential litigation outcomes than the litigant. Theoretically, the superior knowledge could enable the firm to negotiate a higher return on its investment or a larger share of any legal award than it might otherwise obtain in a highly competitive market. But this advantage is less worrisome for two reasons: (1) TPLF firms generally aim to invest in cases that have a substantial likelihood of success rather than frivolous ones, which means that although they may negotiate harder, they do not typically contribute to inefficiencies in the legal process by funding unworthy cases; and (2) if the TPLF market operates competitively, the presence of multiple funding options for litigants ensures that firms offer rates that are consistent with actual costs, preventing any single firm from exploiting its informational advantage to impose overly burdensome terms on litigants.

48. *See supra* note 33; U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 18, at 5-7.

increase in their insured risk.[49] For example, a vehicle operator may drive less carefully after purchasing liability and first-party insurance.[50] The same problem exists in litigation financing, where the outcome of a legal dispute depends largely on the efforts of the parties involved and their attorneys.[51] The litigant's incentive to invest in the case diminishes after a portion of the proceeds is allocated to the TPLF firm,[52] making the expected return lower than the initial projection.[53] This problem exists regardless of whether plaintiffs receive an upfront sum of money to use at their discretion, which is common in consumer funding, or if they receive funding only to cover litigation expenses, which is typical in commercial funding. In both settings, the claimant does not fully internalize the benefits of maximizing the value of the claim, which can distort incentives during the litigation process. In commercial funding, the claimant typically controls major litigation decisions while bearing only part of the upside. In consumer funding, counsel typically directs much of the litigation effort, so the distortion may manifest in the plaintiff's reduced incentive to cooperate fully and in an increased willingness to settle prematurely.[54] Having recognized the inherent problems associated with these investment schemes, we now turn to examine the various criticisms that have been raised concerning this market.

49. *See* COOTER & ULEN, *supra* note 46, at 48, 238 (explaining moral hazard in general and moral hazard in the insurance market, specifically).

50. *See generally* Sarit Weisburd, *Identifying Moral Hazard in Car Insurance Contracts*, 97 REV. ECON. & STAT. 301 (2015) (identifying the moral-hazard problem in the car-insurance market); AMY FINKELSTEIN, MORAL HAZARD IN HEALTH INSURANCE (2014) (showing the effects of the moral-hazard problem in health insurance).

51. Parties involved in litigation must make various investment decisions, such as determining the amount of time and effort to allocate to evidence collection and how far in advance to prepare for testimony. These decisions affect the cost of litigation and its expected outcome. For an analysis of investment decisions in litigation, see ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 141-71 (2005); and RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 532-33 (3d ed. 1986).

52. Litigants often have multiple motivations for pursuing a lawsuit, which extend beyond the simple monetary value of the case. For example, to avoid nonlegal consequences such as damage to reputation or future liabilities, insured defendants may choose to litigate rather than settle even when their liability is entirely covered by insurance. *See, e.g.*, Anthony J. Sebok, *Should the Law Preserve Party Control? Litigation Investment, Insurance Law, and Double Standards*, 56 WM. & MARY L. REV. 833, 888-89 (2015); Eric Helland & Gia Lee, *Bargaining in the Shadow of the Website: Disclosure's Impact on Medical Malpractice Litigation*, 12 AM. L. & ECON. REV. 462, 466 (2010) (discussing physicians' unwillingness to settle because of their belief that the settlement will hurt their reputation); James M. Fischer, *Insurer-Policyholder Interests, Defense Counsel's Professional Duties, and the Allocation of Power to Control the Defense*, 14 CONN. INS. L.J. 21, 40 (2008) (discussing unwillingness to settle because of the fear of stigma). Nevertheless, the introduction of a TPLF arrangement, which typically requires sharing proceeds from the lawsuit with the funder, can diminish the litigant's motivation to pursue litigation as aggressively as they might if they stood to retain the full benefit of any award or settlement.

53. For an analysis of how TPLF affects the litigants' incentives to invest in litigation and settle their case, see Pelled, *supra* note 29, at 287-95.

54. *Id.*

A. Increase in Litigation

Opponents of TPLF argue that funding litigation will result in an overwhelming increase in cases and a burden to courts,[55] which are already struggling to handle current backlogs.[56] Encouraging more plaintiffs to file claims, they argue, will exacerbate an already growing problem. This concern is particularly acute if TPLF enables the filing of frivolous suits by plaintiffs hoping to extract nuisance-value settlements.[57] In addition, where claimants possess superior information about the strength of their claims, TPLF may generate an adverse-selection problem, in which weak claims seek funding more aggressively than strong ones.[58]

These concerns, however, should not be overstated. The goal of the legal system is not simply to minimize the number of filed cases, but to promote the filing of meritorious ones and thereby improve compliance with the law. Many plaintiffs, particularly those with limited financial resources, cannot pursue legitimate claims because of high litigation costs.[59] This lack of access to justice weakens deterrence, allowing potential defendants to violate rights at lower expected cost.[60] By relaxing plaintiffs' liquidity constraints, TPLF increases the credible threat of enforcement, which may initially increase filings but should also encourage greater compliance and, over time, reduce underlying rights violations.[61]

Nor is it clear that TPLF will systematically fund frivolous claims. Frivolous cases are poor investments that generate negative expected returns, giving funders little reason to support them.[62] In commercial

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55. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 18, at 4-5; Paul H. Rubin, *Third-Party Financing of Litigation*, 38 N. KY. L. REV. 673, 681 (2011); Avraham & Wickelgren, *supra* note 37, at 235 (arguing that litigation funding may cause excessive litigation and harm the private-law system).

56. For example, the number of pending civil cases in federal courts increased by more than 80% since 2014, from 323,441 cases to 583,543 pending cases as of March 2023. *See Federal Judicial Caseload Statistics 2023*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023 [https://perma.cc/6JFS-CWT4].

57. *See generally* I.P.L. P'ng, *Strategic Behavior in Suit, Settlement, and Trial*, 14 BELL J. ECON. 539 (1983) (suggesting that plaintiffs may rationally bring a lawsuit hoping to get a settlement offer); Jeong-Yoo Kim, *Filing a Nuisance Claim to Induce Successive Lawsuits*, 6 AM. L. & ECON. REV. 208 (2004) (suggesting that plaintiffs may file a nuisance lawsuit if they expect their initial claim to encourage other potential plaintiffs to do the same).

58. *See supra* notes 46-47 and accompanying text.

59. Commercial entities may also encounter cash-flow limitations, rendering them unable to cover costly litigation.

60. The enforcement gap is especially acute in employment law, where more than ninety-five percent of federal employment-discrimination and wage-and-hour claims are privately enforced, yet many low-value wage-and-hour claims are economically irrational to pursue individually. *See Developments in the Law—Labor and Employment*, 136 HARV. L. REV. 1585, 1654-60 (2023) (claiming that employment law is in crisis because individual-rights enforcement depends on plaintiffs' resources to pursue litigation).

61. *See* Bedi, *supra* note 42.

62. Empirical studies of the TPLF market show that firms examine and decline many applicants with unpromising cases. *See* Avraham et al., *supra* note 31, at 164-65 (finding that 40 to 45% of applications are denied); Avraham & Sebok, *supra* note 32, at 1144-48 (noting that 52%

funding, firms typically conduct substantial due diligence before investing. Even in consumer funding, funders gather significant information about the cases they finance and develop expertise and databases for evaluating claim quality.[63] Moreover, much of the relevant legal information is provided by lawyers who have reputational and professional reasons not to deceive funders.

B. Interfering With Litigation Decisions

A significant concern raised in the literature, case law, and by regulators is that TPLF firms may interfere with the litigation process, discourage litigants from settling their cases, and undermine the attorney-client relationship.[64] In consumer litigation-funding arrangements, consumers receive the funds from the TPLF firm to use as they see fit. TPLF firms may seek to maintain some control over the litigation because litigants often face a moral-hazard problem after securing funding. Consider the following example.

Example 1. *Litigation funding*. Assume Lucy is suing Jim for damaging her car. To initiate her case, she needs to invest \$20, and as the case progresses, she will incur an additional \$30 in legal costs. She is considering obtaining \$50 from a TPLF firm, agreeing to repay the firm from the damages award if she wins. Initially, Lucy estimates she has a 50% chance of winning the case and securing \$300 in damages.

How could the funding agreement influence Lucy's decision to invest in the case, assuming that once she secures the funding, she can use the money as she pleases? First, let us consider the potential settlement offers Lucy may consider if she self-finances her case. Assuming that Lucy does not urgently need money and is not risk-averse, the expected value of her case is \$150, with a total cost of \$50. This suggests that Lucy would be willing to settle for any amount above \$100 before committing to the case. After spending \$20 to initiate the litigation, Lucy would consider only settlement offers exceeding \$120.[65]

of applications are not funded, 60% of which are denied outright, without an extensive examination of their claim).

63. *See supra* note 47.

64. Steinitz, *supra* note 7, at 1323-25; Lyon, *supra* note 20, at 601-05; Nichols, *supra* note 33, at 229-31; Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 616-17 (2007) (raising ethical concerns about TPLF, arguing that it increases the likelihood of interference with the litigants' control over the case or with attorney-client privilege); Maslowski v. Prospect Funding Partners LLC, 978 N.W.2d 447, 457 (Minn. Ct. App. 2022) (invalidating the litigation funding arrangement, which interfered with a party's control over the suit by restricting her ability to settle). For the argument that litigants have the contractual right to allow funders to intervene in litigation decisions, see generally Bradley W. Wendel, *Controlling the Delegation of Control*, 25 THEORETICAL INQUIRIES L. 63 (2025).

65. The incentive dilemma is broadly applicable, as illustrated by a simple economic model: denote the cost of filing the case as C_f, the cost of fully litigating the case as C_l, the probability of winning as p, and the amount of damages as D. A self-financing, risk-neutral plaintiff will file the case only if $C_f < (pD - C_l)$, that is, if the cost of filing is less than the expected net

Now, suppose that Lucy received $50 from the TPLF firm and, in return, agreed to pay half of her settlement or trial amount. At first, the TPLF firm may view this as a good investment because Lucy had a 50% chance of winning, giving the TPLF firm a 50% return on its investment (as the value of 50% of the case is $75).[66] But Lucy's perspective changes after agreeing to share half of the proceeds. She now realizes that she can spend $50 on litigation to pursue the case and receive $150 if she wins, with a 50% chance, leading to a net value of only $25 for litigating the case. If Jim were to offer Lucy, before starting the lawsuit, a settlement of slightly over $50, she would agree. For example, if Jim offered Lucy $60 to settle the case, she would receive $30 in the settlement, which is preferable to spending $50 on litigation costs for a 50% chance of receiving $150. In this case, the TPLF firm will receive only $30 on a $50 investment, resulting in a net loss of $20.[67] The same problem arises if Lucy has already initiated the case for $20. In this case, the net value of her case rises to $45, and Lucy will agree to settle for $90, lower than the $120 she requires if she self-finances the proceedings.

The issue is similar when it comes to making investment decisions in litigation. Suppose Lucy can invest an initial $20 for a 35% chance of winning, and if she increases her investment by $30, the probability of winning goes up to 50%. If Lucy is funding the case on her own, she will invest the extra $30 because it raises the value of the case from $105 (35% × $300) to $150. But if she knows that she must pay the TPLF firm 50% of the earnings, she will choose not to invest the extra $30 because it would increase the value of her share only by $22.50. The following table summarizes the incentive distortions for funded plaintiffs (Lucy).

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outcome after considering the costs of litigation. After incurring the initial cost of filing, the plaintiff will settle for any amount S exceeding $(pD - C_l)$, which represents the expected net outcome minus the cost of proceeding with the litigation. If the plaintiff receives funding F in exchange for filing and promises the funder a share q of the winnings, the filing decision changes. The plaintiff will file if $C_f < [(1-q)pD - C_l + F]$ (i.e., if the cost of filing is less than the plaintiff's share of the expected outcome, after accounting for litigation costs and the funding received). Note that the funder will provide funding only if $F < qpD$ (i.e., if the funder's share of the expected outcome is higher than the funding it provides). This stipulation ensures that the condition for filing the case for self-funding plaintiffs $(pD - C_l)$ is less stringent than for funded cases $(pD - C_l - qpD + F)$. The result is that funding does not encourage the filing of additional cases that self-funding plaintiffs would not have otherwise pursued. Post-funding, the incentive to settle also changes; plaintiffs will accept a settlement whenever their share of the settlement offer, $(1-q)S$, is greater than their expected share of the verdict net of litigation costs, $(1-q)pD - C_l$. This means that a funded plaintiff is more likely to accept lower settlements than a similarly situated, self-financing plaintiff.

66. The expected value of the investment is $75 (50% × $150) which is 50% higher than the $50 investment.

67. This moral-hazard problem arises whether the agreement is to pay a share of the profit (an equity investment) or the principal amount with high interest on a nonrecourse basis (a debt investment). For an economic analysis of debt and equity investments in litigation, see Pelled, *supra* note 29, at 291-95.

Table 1: Incentive Distortions for Funded Plaintiff Lucy in Example 1

	Self-Financed	**TPLF-Funded (50% Share)**
Expected Value of Claim	$150	$75
Litigation Costs	$50	$50
Net Expected Value	$100	$75
Minimum Settlement (Pre-Filing)	$100	$50
Minimum Settlement (Post-Filing)	$120	$90
Incentive to Invest Additional $30	Yes (net gain $15)	No (net loss $7.50)

Retaining control over litigation decisions helps TPLF firms address this moral-hazard problem, which is inherent in the arrangement when plaintiffs do not bear the full financial risk of their decisions. By maintaining a say in key strategic decisions, TPLF firms can prevent misaligned incentives and ensure that the plaintiff's litigation strategy remains focused consistently on achieving the best possible outcome for the firm.[68] However, although the desire to intervene in litigation may be based on reasonable motives, interference by TPLF firms creates two problems. First, although the litigant might invest too little and settle too readily after receiving funding, TPLF firms face an opposite but still distorted incentive problem: they want litigants to invest too much in the

68. This solution is similar to how insurers deal with moral hazard. For example, insurers covering fire hazards often require the implementation of risk-reducing measures. *See* Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 209, 231 (2012) (discussing how insurers refuse to insure in the absence of certain precautions or adjust the premium to the extent of precautions); Am. Way Cellular, Inc. v. Travelers Prop. Cas. Co., 216 Cal. App. 4th 1040, 1043-44 (2013) (conditioning coverage on existence of a functioning sprinkler system on the property). Similarly, third-party liability insurance usually prohibits the insured from settling the case or admitting fault. *See* Ronen Avraham, *The Economics of Insurance Law—A Primer*, 19 CONN. INS. L.J. 29, 81-82 (2012) (stating that to prevent insured claimants from settling too often, liability policies impose on the insurer the duty to defend the claim); Freeman v. Leader Nat'l Ins. Co., 58 S.W.3d 590, 598 (Mo. Ct. App. 2001) (holding that insurers have the right to control settlements and litigation, which also creates a fiduciary relationship between the insurer and the insured). Most commentators agree that TPLF firms are prohibited from intervening in litigation, but the law is more willing to allow liability insurers to participate in litigation decisions. *See* RESTATEMENT OF THE L. OF LIAB. INS. §§ 10, 24 (A.L.I. 2019) (recognizing the insurers' right to control the defense and settlement of insured claims when the insurance contract allows it). *See generally* William T. Baker, *Insurer Control of Defense: Reservations of Rights and Right to Independent Counsel*, 71 DEF. COUNS. J. 16 (2004) (discussing the insurers' right to control and its limitations); Charles Silver, *Litigation Funding Versus Liability Insurance: What's the Difference?*, 63 DEPAUL L. REV. 617 (2014) (comparing litigation funding and liability insurance).

litigation and be too reluctant to settle.[69] Consider again Lucy's litigation example. Without funding, Lucy would have agreed to settle for $100 or more. Giving control to Lucy after receiving funding encourages her to sell the case for a lower price. But if the TPLF firm controls settlements, it would not agree to settle for $100. From the perspective of the firm, taking the case to trial offers an expected value of $150 at no additional cost, so the firm will agree only to a settlement offer of $150 or more.[70]

Another reason for the divergence of interests between the litigant and the TPLF firm is the difference in their time and risk preferences. The difference in attitude to risk is one of the reasons plaintiffs seek funding,[71] but unless they sell the entire case,[72] the risk is not eliminated. We can measure litigation risk as the difference between the potential outcomes of the case.[73] In Lucy's example, without funding, she may lose $50 or win $250, making the difference $300. After receiving funding, Lucy may receive nothing or win $150, making the difference $150. Therefore, funding transfers half of Lucy's risk to the TPLF firm, meaning the TPLF firm shares the other half of the risk. If Lucy is more risk-averse than the TPLF firm, Lucy's desire to settle will be higher than that of the firm. Similarly, Lucy may set a higher discount rate for future payments. If Lucy urgently needs money to fix her car, for example, she may be willing to accept a lower settlement amount to receive payment sooner rather than later. Although the TPLF firm also prefers earlier payment, it is not as urgent for the firm, which is willing to invest time to negotiate a higher settlement amount.[74]

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69. The issue arises because the parties involved in a joint venture share the benefits but not equally the costs. When one party bears a greater share of the costs, it prefers that the parties invest less, whereas the party that bears a smaller share of the costs prefers investing more. For a comprehensive analysis of this phenomenon and its relationship to partnership law, see Omer Y. Pelled, *The Proportional Internalization Principle in Private Law*, 11 J. LEGAL ANALYSIS 160, 164-72, 195-96 (2019).

70. The TPLF firm has already paid for the funding, so it is a sunk cost that will not affect future decision-making. *See* POSNER, *supra* note 51, at 7 (explaining sunk costs); Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 ORG. BEHAV. & HUM. DECISION PROCESSES 124, 124-26 (1985) (explaining sunk costs and their effect).

71. *See supra* notes 37-39.

72. For a discussion of the consequences of allowing claimants to sell their entire case, see Keith N. Hylton, *Toward a Regulatory Framework for Third-Party Funding of Litigation*, 63 DEPAUL L. REV. 527, 529-30 (2014) (explaining a scenario in which the third party purchases the entire claim and its implications for the risks associated with the case and control over the case).

73. We can think of risk as the level of dispersion of possible outcomes. *See* SHAVELL, *supra* note 39, at 258-59 (explaining risk aversion); RICHARD BREALEY, STEWART C. MYERS, FRANKLIN ALLEN & ALEX EDMANS, PRINCIPLES OF CORPORATE FINANCE 184-89, 195-99 (14th ed. 2023) (arguing that dispersion is equivalent to risk and that diversification can reduce risk). Several dispersion measures exist, such as variance, mean deviation, or quartile deviation, all of which refer to the dispersion of outcomes. For simplicity, we think of litigation as having only two possible outcomes: winning and losing, so the difference between them represents the dispersion of possible outcomes.

74. The difference in the parties' discount rates indicates their valuations of identical future payments. Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*,

The diverging attitudes toward risk and payment time suggest that promoting the interests of one party may conflict with those of the other, even without considering the moral-hazard issue. Contracting parties often have conflicting interests that must be reconciled, but a solution that grants decision-making power in litigation to the TPLF firm may interfere with the attorney-client relationship and contradict the lawyer's fiduciary duty to the client.[75] Allowing the funder control over aspects of the litigation, for example, by granting them settlement decision rights, impairs the professional independence, judgment, and loyalty of the counsel representing the claim owner in the funded transaction.[76] Lawyers have various duties toward their clients based on contract, agency, tort, and professional ethics. These duties may limit the scope of actions that the TPLF firm can direct, even if the client consented. This is the case, for example, if the lawyer believes that the instructions of the TPLF firm interfere with the effective representation of the client.[77]

Similar concerns may arise in commercial cases. Commercial parties may resolve their misaligned interests contractually, but several real-world examples show that this is not always the case. A prominent example is the recent legal dispute between Sysco and Burford Capital.[78] Sysco Corporation, a large food distributor, engaged in antitrust litigation against its poultry and meat suppliers, alleging price-fixing conspiracies to inflate

122 YALE L.J. 1826, 1870 (2013) (stating that different people can have different discount rates in different life circumstances).

75. 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, 634-35 (2012) (explaining how litigation funding aggravates the principal-agent problem in a way that harms the attorney-client relationship); Carol Langford, *Betting on the Client: Alternative Litigation Funding Is an Ethically Risky Proposition for Attorneys and Clients*, 49 U.S.F. L. REV. 237, 242 (2015) (explaining that in cases with litigation funding, the attorney has two mutually conflicting fiduciary duties, which creates a conflict of interest); Nichols, *supra* note 33, at 229-30 (noting that litigation funding can result in a breach of a lawyer's fiduciary duty to the client because control over the decision-making in the case transfers from the client to the funder). When a TPLF firm provides funding directly to a lawyer instead of the client, it creates conflicting duties for the lawyer. In this situation, the lawyer has a fiduciary duty to promote the client's interests but also a contractual duty to maximize the return on the funding investment. For a discussion of lawyers' funding, see generally Nora Freeman Engstrom, *Re-Re-Financing Civil Litigation: How Lawyer Lending Might Remake the American Litigation Landscape, Again*, 61 UCLA L. REV. DISC. 110 (2013); Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377 (2014); and Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1302-03 (2012).

76. Nichols, *supra* note 33, at 229-30. For the contrary position, see Anthony J. Sebok, *The Rules of Professional Responsibility and Legal Finance: A Status Update*, 57 WAKE FOREST L. REV. 777, 779 (2022), which explains the importance of applying ethical rules to litigation-funding cases but noting that concerns over funders interfering with the lawyers' independence are probably exaggerated because the interests of the client and funder are aligned.

77. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 134 cmt. d (A.L.I. 2000) (citations omitted).

78. Petitioner's Memorandum of Law in Support of Petition to Vacate Arbitration Award at 3, Sysco Corp. v. Glaz LLC, No. 1:23-cv-01451(N.D. Ill. Mar. 8, 2023), ECF No. 5.

prices.[79] To support these claims, Sysco secured $140 million in funding from Burford Capital, a prominent litigation-finance firm.[80] Burford structured the investment using three special-purpose vehicles: Glaz LLC, Posen Investments LP, and Kenosha Investments LP.[81] Initially, the funding arrangement granted Sysco control over the litigation strategy, with Burford acting as a passive investor,[82] but a dispute erupted when Sysco sought to settle with some defendants for amounts considered too low by Burford.[83] The conflict escalated further when Sysco assigned some of the claims to its customers without Burford's consent, violating their agreement. This case exemplifies the same structural problems we have discussed concerning consumer funding, where the funder's financial interests may clash with the litigant's broader objectives.[84] The structure of the funding arrangement, with Burford having a significant financial stake but limited control over the litigation, exacerbated this misalignment of incentives, leading to a legal battle over settlement decisions and control over the lawsuits.

C. Exploiting the Poor

In the *consumer* litigation-funding market, there is significant concern that funders may leverage their superior knowledge and bargaining power to extract most of the value from a lawsuit, ultimately leaving the plaintiff with little.[85] State responses have varied widely; some have prohibited funding, while others allow these arrangements only in the form of nonrecourse loans.[86] The most visible manifestation of this concern is the

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79. *In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2024 U.S. Dist. LEXIS 105654, at *44 (N.D. Ill. June 14, 2024).

80. *In re* Broiler Chicken Antitrust Litig., No. 25-1110, 2026 U.S. App. LEXIS 3725, at *32 (7th Cir. Feb. 5, 2026).

81. Petition to Vacate Arbitration Award at 2, Sysco Corp. v. Glaz LLC, No. 1:23-cv-01451(N.D. Ill. Mar. 8, 2023), ECF No. 1.

82. *Id*. at 8-9.

83. Glaz LLC v. Sysco Corp., LCIA Case No. 225609, Order on Claimants' Preliminary Injunction Application, at 16 (London Ct. Int'l Arb. Mar. 10, 2023).

84. Victoria Shannon Sahani, *A Proposed Framework for Third-Party Litigation Finance*, 103 MINN. L. REV. 2341, 2370 (2019).

85. The claim that TPLF exploits the poor is relevant mostly to consumer-litigation funding. In the commercial-litigation funding market, both the funder and the litigant are sophisticated parties and have sufficient bargaining power, suggesting that the allocation of the expected surplus from litigation should be balanced.

86. States that allow consumer funding arrangements only in the form of nonrecourse loans argue that a transfer of a share of the proceeds is a form of prohibited assignment of tort claims. *See, e.g.*, Integrated Sols., Inc. v. Serv. Support Specialties, Inc., 124 F.3d 487, 490 (3d Cir. 1997) (holding that New Jersey public policy "clearly forbids the assignment of prejudgment tort claims," so any attempted sale of such tort claims, before judgment, is void). However, states that limit or prohibit TPLF still allow lawyers to work on contingent fees even though contingent fee agreements are litigation-funding contracts between lawyers and their clients. *See* Molot, *supra* note 44, at 90; Michael K. Velchik & Jeffrey Y. Zhang, *Islands of Litigation Finance*, 24 STAN. J.L. BUS. & FIN. 1, 15-16 (2019); Suneal Bedi & William C. Marra, *The Shadows of Litigation Finance*, 74 VAND. L. REV. 563, 583-84 (2021) (explaining that contingency fee

exceptionally high interest rates that consumer TPLF arrangements typically charge.

Most *consumer funding* arrangements structure financing as nonrecourse loans with very high interest rates. Empirical studies consistently report rates in the range of 30% to 80% per annum,[87] significantly higher than traditional consumer credit markets.[88] Two competing explanations for these rates have emerged: a consumer-side explanation that attributes high rates to moral hazard and a funder-side explanation that attributes them to exploitative market conditions.

The consumer-side explanation points to moral hazard. Because regulations prevent TPLF firms from controlling litigation decisions, funders face the risk that plaintiffs will settle early or underinvest in their cases after receiving funding, requiring higher rates to compensate for this added risk.[89] The funder-side explanation emphasizes market power. Litigants seeking TPLF typically face severe credit constraints and cannot access alternative financing, allowing funders to act as "lenders of last resort" and extract excessive returns through their superior bargaining position.[90]

agreements are a form of litigation financing); A. Mitchell Polinsky & Daniel Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 AM. L. & ECON. REV. 165, 243 (2003) (analyzing the advantages and disadvantages of contingent fees). Litigants can try to circumvent the regulatory restrictions by transferring a portion of the case to their attorney and having the attorney make an agreement with a TPLF firm with whom the attorney divides their share. In most states, however, this type of arrangement is prohibited because it violates ethical rules against sharing legal fees with non-lawyers. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 5.4(a) (A.B.A. 2025) (prohibiting fee sharing with non-lawyers); N.Y. City Bar Ass'n, Op. 2018-5 (stating that lawyers violate the fee-splitting rule if they undertake a financing deal with a nonlawyer where future payments depend on receiving legal fees); Steinitz, *supra* note 7, at 1291-92 (stating that fee sharing and its application to litigation funding is prohibited); Steinitz, *supra* note 39, at 487 (presenting the prohibition on fee sharing as an ethical problem arising in litigation funding); W. Bradley Wendel & Joshua P. Davis, *Complex Litigation Funding: Ethical Problem or Ethical Solution?*, 74 HASTINGS L.J. 1459, 1466-67 (2023) (noting that law-firm financing may cause fee-sharing issues).

87. Avraham and Sebok's study has shown that while the median agreement in their study required an interest rate of around 100% per annum, consumers paid back less than what was required in the agreement so that, in practice, the median interest rate was closer to 50% per annum. *See* Avraham & Sebok, *supra* note 32, at 1142. For other studies on consumer-funding interest rates, see Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 88 (2004) (arguing that financing firms may be charging too much and discussing a case in which the plaintiff received litigation financing with interest rates of 180% and 280%); Avraham et al., *supra* note 31, at 159-165 (exploring consumer-funding interest rates empirically).

88. According to the Federal Reserve, the average annual interest rate in the consumer-credit market ranged in 2024 from 6.2% for new car loans up to 21.58% for credit-card plans. *See Consumer Credit (G.19)*, BD. GOVERNORS FED. RSRV. SYS. (Dec. 5, 2025), https://www.federalreserve.gov/releases/g19 [https://perma.cc/PBE9-9HTR]. The Federal Reserve surveys the average annual percentage interest rates of commercial banks (for new car loans, credit-card plans, and personal loans) and finance companies (for new car loans).

89. *See supra* note 67 and accompanying text; Pelled, *supra* note 29, at 292-95.

90. Avraham & Sebok, *supra* note 32, at 1157; Ronen Avraham, Anthony Sebok & Joanna Shepherd, *The Whac-A-Mole Game: An Empirical Analysis of the Regulation of Litigant*

The available evidence tentatively supports the consumer-side explanation. When several states imposed rate caps designed to curb exploitation, TPLF firms ceased operations in those jurisdictions entirely, suggesting that high rates reflect genuine costs rather than excessive profits.[91] If moral hazard is indeed the primary driver of high interest rates, addressing this structural problem, rather than simply capping rates, could make consumer funding both more affordable and more sustainable.

D. Lack of Transparency

The lack of transparency in TPLF raises concerns about both judicial integrity and consumer protection, given that the terms of funding agreements, or even their existence, are not disclosed to opposing parties. Some commentators argue that disclosure is necessary to regulate inherently problematic arrangements,[92] but, assuming TPLF is not per se harmful, the case for disclosure rests on other grounds. These concerns operate at two levels: protecting the integrity of judicial proceedings and safeguarding unsophisticated consumers from exploitative terms.

First, disclosure may be necessary for judges to assess potential conflicts of interest or biases that funder involvement might introduce.[93] Although most TPLF is profit-driven, some funders pursue alternative

Third-Party Financing, 25 THEORETICAL INQUIRIES L. 117, 120-21 (2025) (noting that TPLF helps plaintiffs cover different expenses, such as medical bills and living costs).

91. Robertson, *supra* note 33, at 146-47. For example, see ARK. CODE ANN. § 4-57-109 (2024), which prohibits annual interest rates over 17%; and TENN. CODE ANN. § 47-16-110(a) (2024), which prohibits annual interest rates over 10%. An alternative explanation is that TPLF firms with constrained capital preferred to relocate to unregulated markets with higher profit margins even though they remained profitable under rate caps.

92. Based on this view, revealing the details of TPLF agreements to opposing parties and the court is essential for regulating them, potentially rendering them invalid. *See* Anusheh Khoshsima, *Malice Maintenance Is Runnin' Wild: A Demand for Disclosure of Third-Party Litigation Funding*, 83 BROOK. L. REV. 1029, 1048-49 (2018) (explaining the concern with lack of transparency); Alec J. Manfre, *The Debate Over Disclosure in Third-Party Litigation Finance: Balancing the Need for Transparency with Efficiency*, 86 BROOK. L. REV. 561, 576-81 (2021) (discussing the debate over disclosure in TPLF); Anthony Sebok, *White Paper on Mandatory Disclosure in Third-Party Litigation Finance*, *in* MANDATORY DISCLOSURE RULES FOR DISPUTE FINANCING 5, 9-21 (2020) (discussing the arguments for TPLF disclosure); William C. Marra, *What's So New About Litigation Finance? Disclosure and Regulation of a New Take on an Old Practice*, *in* MANDATORY DISCLOSURE, *supra*, at 81, 93-100 (discussing possible implications for disclosure in TPLF). Some states require the disclosure of litigation funding. Robertson, *supra* note 33, at 146-47. For example, see W. VA. CODE ANN. § 46A-6N-5 (West 2019), which requires the disclosure of the "total amount due from the consumer, in six-month intervals for 42 months, including all charges and fees."

93. Jeffrey James Groholz, *In the Shadows: Third-Party Litigation Funding Agreements and the Effect Their Nondisclosure Has on Civil Trials*, 47 FLA. ST. U. L. REV. 481, 494-96 (2020) (stating that the disclosure of TPLF can result in fairer management of the proceedings); Avraham & Wickelgren, *supra* note 37, at 233-54 (discussing the possible effect of the signal model on reducing interest rates and increasing the accuracy of judges' rulings through the disclosure of the financing contract).

agendas—political objectives,[94] competitive advantages, or personal vendettas.[95] Defendants in both *consumer* and *commercial* litigation face particular challenges when undisclosed funders shape litigation strategy, potentially prolonging disputes or deterring reasonable settlements. Courts thus have a legitimate interest in knowing that third-party funding exists and, in some cases, the identity of the funder.

Second, *consumer* protection demands transparency about funding terms. Consumer litigants typically lack the legal and financial expertise of their funders and may unwittingly agree to terms that benefit the funder disproportionately.[96] Clear disclosure of all material terms could help consumers make informed decisions. Yet, such requirements may increase costs and procedural burdens by triggering ancillary disputes over the disclosure and confidentiality of funding agreements, which funders often seek to keep private in order to protect sensitive business practices and profit structures.[97] More fundamentally, disclosure alone may be insufficient if the underlying problem is not an information deficit but structural incentive misalignment.

E. Summary

The criticisms of TPLF detailed above—increased litigation, interference with case management, exploitation of consumers, and lack of transparency—are serious concerns that any regulatory framework must address. Yet these concerns should not obscure TPLF's affirmative value.

94. Recently, billionaire Reid Hoffman funded E. Jean Carroll's defamation case against former president Donald Trump to damage Trump's political career. *See* Benjamin Weiser & Charlie Savage, *LinkedIn's Co-Founder Helped Fund the Suit Accusing Trump of Rape*, N.Y. TIMES (Apr. 13, 2023), https://www.nytimes.com/2023/04/13/nyregion/trump-carroll-lawsuit-hoffman-linkedin.html [https://perma.cc/J8P6-YVUK]. Trump later sought to present evidence to the jury about the identity of the funder and his political views but the court declined, reasoning that the jury was already aware of Carroll's aversion to Trump and that the potential prejudice from such evidence would significantly outweigh its probative value. *See* Carroll v. Trump, No. 20-CV-7311 (LAK), 2024 U.S. Dist. LEXIS 4453, at *4 (S.D.N.Y. Jan. 9, 2024).

95. For example, in the well-known case of *Bollea v. Gawker*, wrestler Hulk Hogan sued Gawker Media for invasion of privacy, only later revealing that billionaire Peter Thiel funded the litigation possibly to further a personal vendetta against Gawker. *See In re* Gawker Media LLC, No. 16-11700 (SMB), 2017 Bankr. LEXIS 1798, at *2 (Bankr. S.D.N.Y. June 28, 2017). Nonmonetary motivation for funding a lawsuit has the potential to distort incentives more than for-profit funding. *See* Pelled, *supra* note 29, at 291-95 (arguing that donations to litigants could lead to an increase in frivolous lawsuits, prolong litigation unnecessarily, and contribute to a reduced willingness of litigants to settle cases).

96. Nicholas Beydler, *Risky Business: Examining Approaches to Regulating Consumer Litigation Funding*, 80 UMKC L. REV. 1159, 1164-67 (2012) (describing the content and terms of TPLF agreements).

97. Manfre, *supra* note 92, at 587-88 (describing the burden that disclosure imposes on litigants and courts); Jonas J. Anderson, Third-Party Patent Litigation Funding 6-7, 12-13, 17-18, 25-33 (Oct. 2024) (unpublished manuscript) (on file with the authors) (analyzing the influence of one judge's requirement of disclosure on TPLF cases litigated in his courtroom).

When functioning properly, TPLF serves critical access-to-justice objectives that current alternatives cannot fully achieve.

TPLF relaxes credit constraints that prevent meritorious claims from being pursued, particularly for risk-averse litigants who cannot self-finance expensive litigation. By transferring risk to diversified, risk-neutral funders, TPLF enables parties to pursue claims based on the case's legal merit rather than the litigant's financial resources or risk tolerance. This improved access to justice provides wider benefits: it enhances deterrence by motivating potential defendants to increase compliance efforts, ultimately shielding potential plaintiffs before a legal conflict occurs. Moreover, by providing liquidity, TPLF prevents plaintiffs from accepting inadequate settlements driven by immediate financial need rather than case strength, leading to outcomes more closely aligned with substantive law.

The challenge, then, is to structure TPLF to preserve these benefits while mitigating its risks. The critiques examined above share a common thread: they arise primarily from misaligned incentives and information asymmetries between funders and claimants. Adverse-selection problems lead to concerns about frivolous litigation; moral-hazard problems drive high interest rates and interference concerns; asymmetric information and bargaining power create exploitation risks. Disclosure requirements, rate caps, and prohibitions on funder control treat these symptoms, but they do not address the underlying structural causes. As Part II below demonstrates, reconceptualizing TPLF as a quasi-partnership offers a principled framework that realigns incentives, clarifies obligations, and addresses the root causes of TPLF's current deficiencies.

II. A (Limited) Partnership Model of TPLF

The criticism summarized in the previous Section, rooted in the misaligned incentives among parties to the TPLF agreements, motivates our proposed partnership model of TPLF. Part II outlines the analytical foundation for our proposal by mapping the structure and principles of U.S. partnership law. We begin with a detailed explanation of the structure of partnerships and the duties partners owe to one another. To streamline the discussion, we focus on the core features of general and limited partnerships, emphasizing the purposes these rules are designed to uphold. Our analysis draws on both statutory frameworks and relevant case law, while acknowledging that specific rules may vary across U.S. jurisdictions.[98] This is followed by a brief overview of the history and

98. *Compare* Congel v. Malfitano, 31 N.Y.3d 272, 289 (2018) (holding that a partner's unilateral dissolution of a partnership can constitute wrongful dissolution where the partnership agreement specifies exclusive methods of dissolution), *with* Robertson v. Hyde Park Mall, No. A-0085-19 (N.J. Super. Ct. App. Div. May 19, 2022) (per curiam) (discussing the question of dissolving a partnership wrongfully).

foundational principles of U.S. partnership law. We then examine the potential similarities between the structure of TPLF and relationships governed by partnership law, together with points of divergence. This analogy, we argue, clarifies the organizational form of TPLF and, as Part IV shows, provides a basis for addressing the concerns raised in the literature.

A. Partnership Structure: Formation, Management, and Duties

A partnership is "a voluntary, contractual association in which persons carry on a business for profit as co-owners."[99] The question of whether a partnership exists does not depend only on whether the parties have documented their intentions in a written agreement. A partnership can be established without any formalities, as there is no requirement for the agreement to be in writing or to include specific language, such as the words "partner" or "partnership."[100] Although there is no test to determine the existence of a partnership, "courts consult a variety of factors including whether the parties intended to proceed as partners, have shared profits or losses, had the right to participate in the control of the enterprise, or commonly held real property."[101]

As its name suggests, this legal institution is based on cooperation between two or more parties to achieve a common objective. Because the partnership is a product of the parties' shared intent, these parties are generally free to structure their goals, roles, and other aspects of their relationship through contractual agreements.[102] Any issues not addressed in the partnership agreement are resolved by the default provisions in the

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99. *Congel*, 31 N.Y.3d at 278.

100. GARY S. ROSIN, BRUCE A. MCGOVERN & MICHAEL L. CLOSEN, AGENCY, PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 273 (2d ed. 2013). Especially when the rights of third parties are concerned, the conduct of the parties and the circumstances surrounding their relationship and transactions determine the factual question. *See* Hilco Prop. Servs., Inc. v. United States, 929 F. Supp. 526, 536 (D.N.H. 1996).

101. *Hilco Prop. Servs.*, 929 F. Supp. at 537 ("[U]nder UPA, 'statements of the parties as to whether they have intended to form a partnership [are] not conclusive on the question of whether a partnership is formed,' even where parties expressly disavow the intent to form partnership in writing, because 'if they intend to do a thing which in the law constitutes a partnership, they are partners whether their expressed purpose was to create or avoid the relationship[.]'" (quoting *In re* Cooper, 128 B.R. 632, 636 (Bankr. E.D. Tex. 1991))).

102. Dean K. Worcester, *The Drafting of Partnership Agreements*, 63 HARV. L. REV. 985, 986 (1950). When drafting the partnership agreement, partners can determine the contributions each will make to the business, specifying both financial investments and responsibilities. Robert S. Ashby, *Partnership Agreements*, 27 TENN. L. REV. 165, 176 (1960). The agreement can also outline the mechanisms for decision-making and voting procedures, how profits will be shared and distributed, and the intended duration of the partnership. This allows the partners to establish clear roles, ensuring smooth operation of the partnership from the outset.

relevant laws, which serve to fill gaps.[103] In addition to the contract, the relationship is also subject to mandatory rules that the parties cannot alter.[104] This remains true even under the recent regulations,[105] which determine the parties' ability to structure their contracts.

Similar to general partnerships, a limited partnership (LP) is "a creature of both statute and contract,"[106] and the partnership agreement is pivotal in determining the relationships between the partners.[107] Limited partnerships are relatively simple to establish and maintain, with fewer formalities than corporations.[108] Unlike a general partnership, however, which does not require any formalities for its creation, forming a limited partnership requires filing a certificate of limited partnership with the Secretary of State. The limited partnership is officially formed only when the certificate becomes effective and at least two individuals have become partners, consisting of at least one general partner and one or more limited partners.[109] Due to legal requirements, once a limited partnership is established, a partnership agreement is inherently in place;[110] however, the term "partnership agreement" is defined broadly.[111] This broad definition underscores the fact that, despite the formalities required, the limited partnership remains fundamentally a creation of law and not solely of contract.

The distinctions between general and limited partnerships extend beyond their formation. General partners typically have full control over the management of the business and bear unlimited personal liability for

103. UNIF. P'SHIP ACT § 105(b) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1997) [hereinafter UPA (1997)]; UNIF. LTD. P'SHIP ACT § 105(b) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2001) [hereinafter ULPA (2001)].

104. Douglas K. Moll, *Contracting out of Partnership*, 47 J. CORP. L. 753, 773 (2022) (discussing default rules in ULPA); *see also* ULPA § 105(c) (2001) (listing provisions of the statute that a partnership agreement may not vary).

105. *See, e.g.*, UPA § 105(c) (1997) (disallowing, under the terms of the partnership agreement, the elimination of the contractual obligation of good faith and fair dealing under subsection (6); the exoneration of liability for bad faith, willful or intentional misconduct, or a knowing violation of law under subsection (8); and the modification of a partner's power to dissociate from the partnership under subsection (9)). Note also that the UPA has been amended several times since its initial enactment in 1914. *See infra* note 155.

106. Cantor Fitzgerald, L.P. v. Cantor, No. 18101, 2001 WL 1456494, at *5 (Del. Ch. Nov. 5, 2001).

107. ULPA § 105 (2001).

108. This form of organization also has potential drawbacks. For example, transferring ownership can be complicated because of restrictions outlined in the partnership agreement. *See* George W. Coleman & David A. Weatherbie, *Special Problems in Limited Partnership Planning*, 30 SW. L.J. 887, 912-14 (1976); Larry E. Ribstein, *An Applied Theory of Limited Partnership*, 37 EMORY L.J. 835, 892-93 (1988) (noting difficulties stemming from transferring an ownership interest in a limited partnership (LP)).

109. ULPA § 201(d) (2001).

110. *Id.* § 105.

111. *Id.* § 102(14) ("'Partnership agreement' means the agreement, whether or not referred to as a partnership agreement and whether oral, implied, in a record, or any combination thereof, of all the partners of a limited partnership concerning the matters described in Section 105(a).").

its financial obligations. By contrast, limited partners have little-to-no involvement in day-to-day operations and do not participate in decision-making. As the relevant regulation stipulates, "[e]xcept as otherwise provided in this [Act], any matter relating to the activities and affairs of the partnership is decided exclusively by the general partner or, if there is more than one general partner, by a majority of the general partners."[112]

The authority of a general partner falls under the domain of agency law[113] and depends on the contents of the partnership agreement. If the agreement is silent on certain matters, default rules can help define the general partner's authority.[114] Conversely, "a limited partner *qua* limited partner has no power to bind the limited partnership,"[115] meaning that limited partners are excluded from the ordinary management of the partnership. This separation between control (vested in the general partner) and capital provision (by limited partners) gives rise to classic agency costs[116]—that is, the risk that the general partner may have incentives to act in its own interest rather than in the principals' interests. These agency costs, in turn, justify the imposition of fiduciary duties and other governance mechanisms designed to align incentives and constrain opportunistic behavior.[117]

Another important aspect of the partners' duties has to do with the liability of limited partners,[118] who are generally protected from personal liability, and whose financial exposure is limited to the extent of their investment.[119] Under previous acts, if limited partners participated in the control of the business, they could be held liable for the partnership's

112. *Id.* § 406(a).

113. RESTATEMENT (THIRD) OF AGENCY § 3.01 (A.L.I. 2006).

114. ULPA § 406(a) cmt. (2001).

115. *Id.* § 302.

116. *See generally* Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, 63 AM. ECON. REV. 134 (1973) (articulating the agency problem as one of misaligned incentives).

117. *See* Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1053-61 (1991) (describing the legal duties imposed on fiduciaries, mainly the duty of loyalty, as incentive mechanisms designed to resolve the misalignment between the agent's and the principal's incentives).

118. Hedge funds and real estate investment funds are frequently structured as limited partnerships (LPs) to shield investors from the financial risks associated with a potential business failure. *See* Houman B. Shadab, *The Law and Economics of Hedge Funds: Financial Innovation and Investor Protection*, 6 BERKELEY BUS. L.J. 240, 247-48 (2009) (noting that hedge funds are being created as LPs and explaining the reasons why).

119. Limited partners also enjoy the tax benefits of a pass-through entity, which avoids corporate double taxation. Stockholders in a corporation can receive dividends only when the company shows a profit. In such cases, the company first pays corporate taxes, after which the stockholders pay additional taxes upon receiving the dividends. By contrast, partners in a limited partnership are taxed only once, as profits pass directly to the partners, who report them on their individual tax returns. *See* Daniel S. Kleinberger, *Two Decades of "Alternative Entities": From Tax Rationalization Through Alphabet Soup to Contract as Deity*, 14 FORDHAM J. CORP. & FIN. L. 445, 447-48 (2009) (explaining the distinction between taxation of organizations classified as partnerships and organizations classified as corporations).

debts.[120] To determine whether liability should be imposed, some courts have considered whether third parties reasonably believed the limited partner was acting as a general partner. Other courts, however, have concluded that mere participation in control is sufficient to impose liability on the limited partner, regardless of any intent to deceive or reliance by creditors.[121] Under the new Act, the limited partners' liability does not change even if they participate in the management and control of the limited partnership. According to the comment included in the Act,[122] the decision to eliminate the so-called "control rule" was based on the logic of "bringing limited partners into parity with corporate shareholders, LLC members, and LLP partners."[123] It was further pointed out that "in a world with LLPs, LLCs and . . . LLLPs," the control rule "is an anachronism."[124] Nevertheless, in most U.S. states, the connection between management rights and liability remains the prevailing rule, given that many states have yet to adopt the new Act.

The clear distinction between the management rights of general and limited partners also affects their obligations. In a general partnership, the obligations of all the partners toward the partnership and one another derive primarily from their status as fiduciaries. Partners occupy a position of trust, being entrusted with information, authority, and opportunities owing to their role in the partnership. Consequently, because they act as agents for one another, the law imposes fiduciary duties on them. As indicated by one court, "[i]n the partnership and corporate context, fiduciary duties are not born of statutory language—the underlying fiduciary duties pre-exist the statutes, and those duties exist as such unless limited by statute."[125] These duties also apply to general partners in a limited partnership.[126]

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120. REVISED UNIF. LTD. P'SHIP ACT § 303 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1985) ("[A] limited partner is not liable for the obligations of a limited partnership unless he [or she] . . . participates in the control of the business.").

121. Pierce, *infra* note 151, at 1302.

122. ULPA § 303 cmt. (2001).

123. *Id.* In 1995, a Drafting Committee was formed to amend RUPA by incorporating provisions authorizing the creation of a new form of general partnership, the LLP. The amendments addressed key issues, including the structure of LLPs, the scope of the partners' liability, and the requirements for annual filings. Following these changes, between 2009 and 2013, the Uniform Law Commission (ULC) undertook efforts to harmonize all uniform acts focusing on unincorporated organizations. *See* UPA Prefatory Note 4, 6 (1997).

124. ULPA Prefatory Note 3 (2001). The text clarifies that the Act addresses primarily two types of enterprises: "sophisticated, manager-entrenched commercial deals whose participants commit for the long term" and "estate planning arrangements (family limited partnerships)." *Id.* at 1. The exact meaning and legal content of these different structures, however, is beyond the scope of the current project.

125. George Wasserman & Janice Wasserman Goldstein Fam. LLC v. Kay, 14 A.3d 1193, 1210 (Md. Ct. Spec. App. 2011).

126. As one court pointed out, "those in control of a business must deal fairly with the interests of the other investors and this is so regardless of whether the business is in corporate or partnership form." *See* Lichtyger v. Franchard Corp., 18 N.Y.2d 528, 537 (1966); *see also* RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (A.L.I. 2006) (explaining that "the general

As fiduciaries, partners owe a duty of loyalty, meaning that they are obliged to act primarily for the benefit of the partnership in matters related to the business. Loyalty is a central element of fiduciary law, applicable to various fiduciary relationships in different legal circumstances.[127] The duty aims both to minimize the potential for fiduciaries to misuse their power within these relationships[128] and to address inherent information asymmetries that are often unobservable or unverifiable.[129] In one of the most cited cases regarding fiduciary duties, Justice Cardozo explained:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.[130]

The specific content of the duty may vary and is determined by the nature of the relationship it governs.[131] The duty of loyalty requires fiduciaries primarily to avoid any conflicts of interest between their personal interests and their obligations.[132] This duty sets a general standard of conduct (acting in the interests of others) and also includes concrete formal rules, some statutory, that define "what would be considered a breach of loyalty."[133] Under agency law, the duty of loyalty is further divided into specific obligations, such as those related to the agent's material benefits, competition with the principal, and the use of the principal's property.[134] The partnership statute provides other examples of conduct that may be considered a breach of duty, but it clarifies that the

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fiduciary principle requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship"); Plank v. Cherneski, 231 A.3d 436, 450 (Md. 2020) (discussing the common-law criteria for fiduciary relationships (citing *Wasserman*, 14 A.3d at 1210)). *See generally* Kann v. Kann, 344 Md. 689 (1997) (representing a seminal breach-of-fiduciary-duty case in Maryland).

127. Yifat Naftali Ben Zion, *Good Faith & Loyalty*, 98 TUL. L. REV. 471, 480 (2024); *see* MATTHEW CONAGLEN, FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES 1 n.5 (2010).

128. Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 986-87 (2013).

129. Amir N. Licht, *Motivation, Information, Negotiation: Why Fiduciary Accountability Cannot Be Negotiable*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 159, 159 (D. Gordon Smith & Andrew S. Gold eds., 2018).

130. Meinhard v. Salmon, 249 N.Y. 458, 463-64 (1928).

131. Yifat Naftali Ben Zion, C*leaning up the Corporate Opportunity Doctrine Mess: A First Principles Approach*, 80 WASH. & LEE L. REV. 1609, 1621-22 (2023).

132. Naftali Ben Zion, *supra* note 127, at 481.

133. Yifat Naftali Ben Zion, *Moving Along the Continuum of Loyalty: From a Standard Towards Rules*, 35 CAN. J.L. & JURIS. 187, 196 (2022).

134. Moreover, similarly to company directors or trustees managing property for beneficiaries, partners must refrain from making unauthorized profits and must disclose relevant information to their fellow partners. *See* Robert H. Sitkoff, *Other Fiduciary Duties: Implementing Loyalty and Care*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 419, 429 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

codification of fiduciary duties is not exhaustive.[135] The regulation concerning limited partnerships, which modeled its relevant provisions after the general-partnership statute,[136] similarly indicates that the list of fiduciary duties is not comprehensive.[137]

Yet general partners do not breach their duties simply because their actions also further their own interests. They necessarily wear two hats: one as a manager or comanager of the partnership and another as a party to the limited partnership,[138] with rights and obligations under the partnership agreement. When acting in their capacity as a partner, general partners remain subject to the duty of good faith and fair dealing, but acting in self-interest does not inherently constitute a breach of fiduciary duty.[139]

Unlike general partners, limited partners are not considered fiduciaries merely by virtue of their status. Although the older regulation did not specify their duties, the updated version clarifies that a limited partner "does not have any [fiduciary] duty to the limited partnership or to any other partner solely by reason of acting as a limited partner."[140] This distinction is justified because the duty of loyalty imposes strict, non-negotiable obligations with limited opportunities to opt out.[141] Fiduciary duties typically attach to individuals with substantial control over another's interests. Because limited partners have little influence over the partnership's day-to-day affairs, imposing such duties on them merely owing to their status would be unwarranted.[142]

While limited partners are not considered fiduciaries, they are still subject to certain limited duties. Primarily, they are required to exercise any rights under the Act in accordance with the contractual obligation of good faith and fair dealing.[143] This duty cannot be eliminated by the partnership agreement, but the agreement, "if not manifestly unreasonable," can specify the standards by which the performance of this obligation is to be assessed. Moreover, although limited partners are not considered to be fiduciaries simply based on their status, given that the list of fiduciary duties mentioned in the text is not exhaustive, courts may determine that certain conduct should be reviewed under fiduciary law.

135. UPA Prefatory Note 4-5 (1997).

136. ULPA § 409 cmt. (2001).

137. For example, courts have recognized the duty of full disclosure as part of the fiduciary obligations owed by general partners. *See, e.g.*, Lonergan v. EPE Holdings, LLC, 5 A.3d 1008, 1023 (Del. Ch. 2010); Exxon Corp. v. Burglin, 4 F.3d 1294, 1298 (5th Cir. 1993).

138. ULPA § 409(e) (2001).

139. *Id.* § 409(e) cmt.

140. *Id.* § 305(b).

141. Naftali Ben Zion, *supra* note 127, at 481.

142. *See, e.g.*, Lichtyger v. Franchard Corp., 18 N.Y.2d 528, 536 (1966) (noting that "the limited partner is in 'a position analogous to that of a corporate shareholder,' an investor who likewise has limited liability and no voice in the operation of an enterprise").

143. ULPA § 305 (2001).

Such characterization depends on the given circumstances, but a court could conclude that "[a] partner, as a fiduciary, is required to fully disclose material facts and information relating to partnership affairs to the other partners."[144]

A final issue relevant to this discussion is access to information in limited partnerships. General partners have broad rights to inspect and copy "required information" about the partnership's activities, finances, and affairs, without needing a specific purpose.[145] Minor restrictions may be included in the partnership agreement, but such limitations are rare.[146] Because the regulation treats the limited partnership as a separate entity, it imposes on the partnership a duty to furnish certain material information to general partners without demand.[147] At the same time, general partners are responsible for ensuring the partnership's compliance and may be held accountable if it fails to do so.[148] By contrast, the limited partners' right to information is more restricted. They may request "required information" with ten days' notice, but additional requests must follow a certain procedure. The Act balances transparency with the partnership's need to protect confidential business data and intellectual property. Moreover, access is subject to a "just and reasonable" standard, ensuring that information is sought for a legitimate purpose. Under given conditions, the partnership may impose reasonable restrictions on access to information.[149] We now briefly present the historical background and core principles of the relevant regulatory framework.

B. The Legal Framework: U.S. Partnership Law

Partnerships are not newcomers to the legal world. Business partnerships are among the most ancient legal institutions, with their roots in Roman law and the concept of *societas*.[150] These partnerships were inherently personal, allowing any partner to dissolve the agreement at will, and they automatically terminated upon the death of a partner.[151] The idea

144. Fate v. Owens, 27 P.3d 990, 998 (N.M. Ct. App. 2001).

145. ULPA § 407(a)-(b) (2001).

146. *Id.* § 407 cmt.

147. *Id.* § 407(c).

148. *Id.* § 407(c) cmt. The duty to furnish information formally rests on the partnership as a separate legal entity even though, in practice, it acts through its general partners. Accordingly, general partners are both beneficiaries of the information right and responsible for ensuring the partnership's compliance, and they are separately obligated to disclose material information within their knowledge.

149. *Id.* § 304.

150. *See* Harwell Wells, *The Personification of the Partnership*, 74 VAND. L. REV. 1835, 1838 (2021) (explaining the history of the business partnership, which included various forms of partnership agreements, ranging from a consortium between heirs, who chose to hold assets jointly rather than divide them, to broader partnerships for trade and commerce).

151. Larry E. Ribstein, *The Evolving Partnership*, 26 J. CORP. L. 819, 821-24 (2001); Salvo Randazzo, *The Nature of Partnership in Roman Law*, 9 AUSTL. J. LEGAL HIST. 119, 130 (2005); *see also* Michael K. Pierce, *Limited Partner Control and Liability Under the Revised*

of a limited partnership also has historical roots.[152] As trade and commerce expanded, wealthy individuals sought ways to invest capital without engaging in management, leading to arrangements where merchants handled operations while investors provided the necessary funds. These early legal concepts laid the foundation for modern partnership law.[153]

Today, the 1997 Uniform Partnership Act (UPA) serves as the legal framework for regulating business partnerships in almost all U.S. states.[154] Early drafts were based on the mercantile or "entity" theory of partnerships, which assigned rights and duties to the partnership itself. Later versions of the Act were based on the common law "aggregate" theory.[155] Traditionally, under common law, partnerships were viewed as an aggregate of individual partners rather than a separate legal entity. According to this view, unlike companies, partnerships were not understood as completely independent entities but rather as a relational state that arises when two or more individuals collaborate to run a business for profit.[156] This theoretical distinction has played a significant role in shaping partnership law. For example, the aggregate theory tended to place too much emphasis on individual rights and obligations, often

Uniform Limited Partnership Act, 32 SW. L.J. 1301, 1302 (1978) (noting that traditional partnership law treated partners as personally liable participants in a joint enterprise).

152. *See* Fred W. Chel, *The Limited Partnership*, 2 UCLA L. REV. 105, 105 n.2 (1954) (noting the LP was a response to social norms that viewed direct engagement in commerce as an unworthy occupation for "decent people," unlike politics or warfare, which were considered to be honorable).

153. Despite the availability of other forms of organization, partnerships remain a prevalent business structure in the United States. This is evident from the large number of partnerships that filed tax returns in recent years; for example, approximately 5,117,987 partnerships filed tax returns in 2023. *See Internal Revenue Service Data Book, 2023*, INTERNAL REVENUE SERV. 6, 16 (2023), https://www.irs.gov/pub/irs-prior/p55b--2024.pdf [https://perma.cc/2V7E-4RYC].

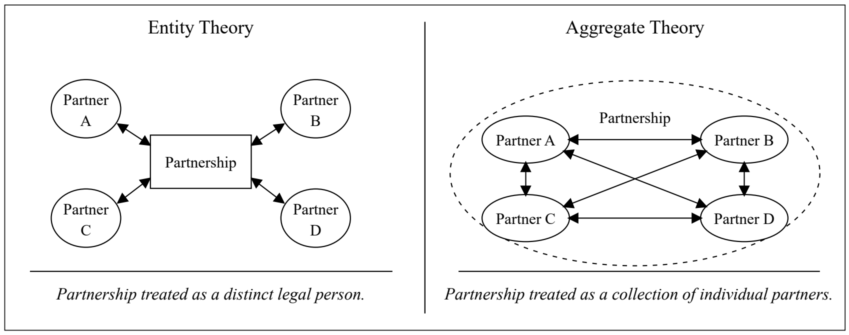
154. UPA was proposed by the ULC, which first considered drafting a uniform law for partnerships in 1902. Except for Louisiana, the UPA has been adopted in all states, where it has been the subject of very few amendments. In time, the UPA (1914) has undergone several amendments; these updates and the revised version are often referred to as the Revised Uniform Partnership Act (RUPA). Yet, because the use of RUPA is less common and may create unnecessary confusion, we will use the term UPA. *See* UPA Prefatory Note 2 (1997).

155. UPA Prefatory Note 1 (1997); *see also* Wells, *supra* note 150, at 1838 (discussing how the UPA incorporated elements of both the aggregate and entity theories of partnership). The final draft of the Uniform Partnership Act was approved by the Conference of 1914. This version incorporated aspects of both theories.

156. Ribstein, *supra* note 151, at 822-23 (comparing companies with partnerships). An LLP is another form of legal entity. In some U.S. states, LLPs are restricted to being formed by certain professionals, such as physicians or lawyers. Unlike in an LP, all partners in an LLP are allowed to participate in the management of the business without forfeiting their limited-liability protection. *See* Christopher J.H. Donald, *Limited Partnerships and the Control Liability of Limited Partners*, 44 CAN. BUS. L.J. 398, 398 (2007); Kenneth L. Bennight Jr. & Troy S. Martin III, *Limitation of Liability of Limited Partners While Affording Control of Partnership Affairs to Limited Partners*, 22 ST. MARY'S L.J. 5, 6 (1990) (describing the partners' liability in an LP); Lynn Bai & Sarah Harden, *Limited Liability Partnerships: An (Overlooked) Hole in the Shield*, 23 U. PA. J. BUS. L. 862, 864 (2021) (describing partners' liability in LLPs).

neglecting the collective rights and responsibilities of the partnership as a whole.[157]

Figure 2: The Entity Theory and Aggregate Theory of Partnership



In the years following its original approval in 1914, UPA underwent significant revisions before reaching its current version.[158] Perhaps the most notable among them was the approval of the Revised Uniform Partnership Act by the American Bar Association in August 1994.[159] A central tenet of the revised law is its emphasis on the partnership agreement, recognizing it as the key document governing the rights, duties, and obligations of the partners. The revised law also strengthened the "entity" treatment of partnerships in various circumstances.[160] At the same time, despite the centrality of the agreement between the parties, the Act retains an irreducible core of fiduciary duties.[161]

157. Rosin et al., *supra* note 100, at 274; *see also* Gary S. Rosin, *The Entity-Aggregate Dispute: Conceptualism and Functionalism in Partnership Law*, 42 ARK. L. REV. 395, 466 (1989) ("The UPA's existing functional approach is exactly what is called for by modern corporation law scholars. It does not bother with a 'partnership entity,' but instead looks to the underlying relationships and emphasizes the centrality of the joint business. Thus, it is ironic that the UPA revision process seems to be moving partnership law in exactly the opposite direction by enshrining the entity concept.").

158. The revisions were initiated by a subcommittee of the American Bar Association, which issued a detailed report in 1986 recommending extensive changes to the Act. *See* UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations, *Should the Uniform Partnership Act Be Revised?*, 43 BUS. LAW. 121, 121-24 (1987).

159. UPA Prefatory Note 2 (1997).

160. *Id. See generally* Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 BUS. LAW. 1 (1993) (providing an overview of the structure, goals, and major doctrinal changes introduced by the Revised Uniform Partnership Act); Elisa Feldman, Comment, *Your Partner's Keeper: The Duty of Good Faith and Fair Dealing Under the Revised Uniform Partnership Act*, 48 SMU L. REV. 1931 (1995) (analyzing the duty of good faith and fair dealing as codified in the Revised Uniform Partnership Act).

161. UPA Prefatory Note 2 (1997).

Two important lessons emerge from this short review of the regulatory framework governing *partnerships* in the United States. First, although the theoretical understanding of partnerships has evolved over the years, placing greater emphasis on the parties' agreements, modern revisions have rendered the codification of fiduciary duties non-exhaustive.[162] In other words, modern regulation acknowledges the ability of sophisticated parties to design their relationships according to their preferences but also reaffirms the centrality of fiduciary law as an essential legal mechanism for governing these types of relationships.

Second, modern regulation increasingly regards partnerships as distinct legal entities,[163] streamlining governance and liability. From this perspective, the partnership is treated as separate from the partners; it can sue and be sued in its own name, and property can be acquired, held, and conveyed in the partnership's name.[164] Although partnerships can still arise from two individuals collaborating to advance a common project, modern law increasingly views the joint endeavor as a distinct entity, separate from the personal interests and intentions of the partners.

For *limited partnerships*, statutory guidance was provided through the Uniform Limited Partnership Act (ULPA), which was originally promulgated in 1916.[165] The updated version of the Act became known as the Revised Uniform Limited Partnership Act (RULPA). The latest version of the Act, ULPA 2001, was amended in 2013. It retained the fundamental structure of limited partnerships but sought to enhance their ability to meet the needs of both partners and third parties conducting business with them. In response to changes in modern business practices,[166] the updated law aimed to provide greater flexibility and protection for sophisticated parties.[167]

The most significant change is that, unlike previous versions, ULPA 2001 is a stand-alone statute, no longer tied to the UPA.[168] Whereas the

162. *Id.* at 4-5.

163. Particularly with the UPA of 1997, which defines partnerships as "an association of two or more persons to carry on as co-owners a business for profit formed under this [Act]." *See* UPA § 102(11) (1997); UPA Prefatory Note 2 (1997).

164. Wells, *supra* note 150, at 1842-43.

165. Together with UPA, the ULPA was the basic law governing limited partnerships in the United States. The Act was later amended by the Revised Uniform Limited Partnership Act in 1976, and further amendments were enacted in 1985. In 2001, the ULC replaced RULPA with an updated version. *See* ULPA Prefatory Note 1-2 (2001).

166. For example, the rise of alternative entities like LLPs and LLCs.

167. *The Uniform Limited Partnership Act (ULPA) (2001) (Last Amended 2013): A Summary*, UNIF. L. COMM'N 1, https://www.uniformlaws.org/viewdocument/enactment-kit-67?CommunityKey=d9036976-6c90-4951-ba81-1046c90da035&tab=librarydocuments [https://perma.cc/4QSX-E27Z].

168. *See Why Your State Should Adopt the Uniform Limited Partnership Act (ULPA) (2001) (Last Amended 2013)*, UNIF. L. COMM'N, https://www.uniformlaws.org/viewdocument/enactment-kit-67?CommunityKey=d9036976-6c90-4951-ba81-1046c90da035&tab=librarydocuments [https://perma.cc/2MSF-Z4ES] (noting that the independence makes it more comprehensive and substantively more detailed than earlier

previous version of the law, RULPA 1985, was adopted by most U.S. states, fewer than thirty states have replaced this version with some form of ULPA 2001.[169] The fact that the most recent version is no longer tied to the UPA, whereas the more widely adopted version still relies on it, has introduced additional complexities to the legal landscape.[170] Given our purposes, the precise wording of the Act in individual states is less important. Therefore, despite efforts of modern legislation to separate the laws governing general partnerships from those applicable to limited partnerships, our insights are drawn from both regulations.[171]

C. Understanding TPLF Through the Limited Partnership Model

We now proceed to examine the relationship between the parties to a TPLF agreement and analyze how the partnership model can assist in our understanding of the relationships between funders, clients, and their lawyers. Similar to limited-partnership agreements, TPLF agreements are voluntary contractual arrangements facilitating cooperation between two or more parties with a shared goal. In both structures, relationships are governed by contract, allowing parties to define the terms and conditions of their collaboration. At the same time, viewing TPLF agreements as quasi-partnerships indicates that contractual foundations do not preclude legal regulation. Although many partnership rules serve as default provisions, legislation recognizes that certain duties and rights are mandatory and beyond the parties' discretion.

To clarify how the limited-partnership model structures these relationships, the discussion proceeds along several dimensions. First, it

versions); *see also* UPA Prefatory Note 3 (1997) ("Partnership law no longer governs limited partnerships pursuant to the provisions of RUPA itself."); Robert W. Hillman, *RUPA and Former Partners: Cutting the Gordian Knot With Continuing Partnership Entities*, 58 LAW & CONTEMP. PROBS. 7, 9 (1995) (discussing other aspects of the changes made in the Act). Under the earlier versions of the UPA, Section 6(2) explicitly stated that the UPA governed limited partnerships in situations not covered by the Uniform Limited Partnership Act. In the most updated version, this section was removed, and the definition of partnerships no longer includes limited partnerships. *See* ULPA Prefatory Note 1-2 (2001).

169. *See Limited Partnership Act, Revised, Legislative Bill Tracking*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?communitykey=d9036976-6c90-4951-ba81-1046c90da035#LegBillTrackingAnchor [https://perma.cc/3HD4-BDPF]. At its recent 133rd Annual Meeting, held in July 2024, the ULC also discussed updates to the partnership law. *See Two New Uniform Acts and Amendments to Acts Approved at ULC's 133rd Annual Meeting*, UNIF. L. COMM'N, https://www.uniformlaws.org/discussion/two-new-uniform-acts-and-amendments-to-acts-approved-at-ulcs-133rd-annual-meeting [https://perma.cc/9LQ4-UM8B].

170. For further reading, see generally Daniel S. Kleinberger, *A User's Guide to the New Uniform Limited Partnership Act*, 37 SUFFOLK U. L. REV. 647 (2004).

171. The ULC website states that the most recent version of the UPA has been enacted by a majority of states, but the list does not specify the variations each state may have adopted, and some states still follow the previous law. *See Partnership Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?communitykey=52456941-7883-47a5-91b6-d2f086d0bb44 [https://perma.cc/5A7R-WCAK]. Even when statutory language is identical, courts in different states may interpret it differently. The distinction between the regulations governing general and limited partnerships is not always absolute.

examines the appropriate scope of funder involvement in litigation decision-making. Second, it considers the allocation of fiduciary duties between plaintiffs and funders, and explains the role of these obligations in mitigating moral hazard. Third, it analyzes information rights and disclosure. Finally, it considers the implications of this framework for defendants, and the extent to which funding arrangements should be disclosed. Taken together, these dimensions illustrate how the quasi-partnership model can both explain and normatively structure TPLF relationships.

The first issue that must be addressed is the appropriate level of involvement by the financier in decision-making throughout the legal process. As noted, broad societal considerations underpin the common-law doctrines of champerty and maintenance, determining that only directly interested parties should have decision-making authority in litigation.[172] Viewing TPLF agreements through the lens of a limited partnership further reinforces the fact that, even without external considerations, the inherent nature of the relationship between the parties justifies restricting management rights to the plaintiff alone.

Limited partners are typically not involved with managing the business itself; their primary interest lies in the investment, relying on the general partner's ability to generate profits. Similarly, litigation funders, particularly in *consumer funding*, are not concerned with the legal or personal outcomes of the case but instead focus on the potential financial return, assessing the likelihood that the plaintiff's claim will result in a monetary award. Plaintiffs, however, may have additional reasons for pursuing a legal claim.[173] As the outcome may affect various aspects of their lives, such as their reputation, professional relationships, or standing with their employer, plaintiffs have a vested interest in maintaining control over the legal process and participating in its key decisions.[174]

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172. *See, e.g.*, Letter from Lisa A. Rickard, *supra* note 9, at 11-13 (quoting a court decision explaining that a TPLF agreement violates the doctrine of champerty, for "the funding company would exercise significant control over the litigation"); *supra* notes 20-24 and accompanying text; Lyon, *supra* note 20, at 580-81; Glickman, *supra* note 20, at 1052-53 (describing champerty and maintenance and explaining their history and the considerations at their core).

173. *Cf.* MacDonald Est. v. Martin, [1990] 3 S.C.R. 1235, 1235, 1239-40 (Can.) (discussing a potential conflict of interest where a lawyer with access to a client's confidential information later joined opposing counsel, illustrating that client motivations extend beyond monetary interests to include protecting confidentiality and the integrity of the legal profession); *see also supra* note 52 and accompanying text (discussing nonmonetary motivations of litigants, such as reputational concerns, and their effect on litigation decisions).

174. When the underlying wrong is deliberate or relational, giving the claimant the final word on litigation strategy is normatively imperative: the public act of "having one's day in court" vindicates autonomy and democratic legitimacy in ways financial redress alone cannot. See Hanoch Dagan, Avihay Dorfman & Issi Rosen-Zvi, It's (Not All) Personal: Civil Litigation and the Values of Rights of Action 20-23, 30-36 (Feb. 21, 2025) (unpublished manuscript) (on file with the authors).

The understanding that claimant control over the legal process is normatively imperative is further reinforced by insights from procedural-justice theory. This body of work demonstrates convincingly that perceptions of fairness, voice, and legitimacy influence individuals' willingness to comply with legal outcomes and cooperate with legal authorities significantly. In particular, the process-based model of regulation suggests that people's responses to legal authority are shaped, often to a surprising degree, by their assessment of the fairness of the procedures used rather than solely by the outcomes themselves.[175] Furthermore, social-psychology research has identified several key elements that contribute to perceptions of procedural justice during dispute resolution. These include an opportunity to express one's views ("voice") and evidence that these views are considered in an even-handed manner by both the third-party neutral and the opposing side.[176] Such factors facilitate conflict resolution, support compliance with outcomes, and strengthen the legitimacy of the institutions resolving such disputes.[177] Notably, studies have shown that voice has intrinsic value, regardless of whether it influences the legal outcome.[178] From this perspective, an unjust procedure may leave even a claimant who obtains a favorable judgment feeling disempowered, thereby undermining the overall utility of the legal process.[179] This further strengthens the importance of ensuring that plaintiffs retain meaningful control over key decisions in managing their claims.

When considering whether the funding party should be involved in case management, the "control rule," according to which a limited partner who manages the business actively may be liable for its debts, provides strong support for limiting such involvement. This principle stipulates that a limited partner should remain passive, refraining from management responsibilities and avoiding the associated liabilities. In the case of *consumer* TPLF, funders focus on financial returns and lack the litigant's personal, reputational, or legal stakes in the case. The idea that control entails responsibility is, therefore, highly relevant.[180] The funders' interest

175. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003).

176. *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982) ("[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that '*some* form of hearing' is required before the owner is finally deprived of a protected property interest." (quoting Board of Regents v. Roth, 408 U.S. 564, 570-71 n.8 (1972))).

177. Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 52-53 (2004).

178. *Id.* at 53.

179. *Id.*

180. Although this rule was eliminated under ULPA (2001), the text clarifies that those using the new law will likely desire "strong centralized management, strongly entrenched, and passive investors with little control over or right to exit the entity." ULPA Prefatory Note 3 (2001). Thus, although the new Act removed the official link between control and liability, the

is narrow, and their influence should be equally restricted. Allowing funders to direct litigation creates an imbalance, giving them undue influence without accountability.[181] Thus, there is no justification for funders taking a role in case management.

Second, this framing imposes responsibilities on the plaintiff as well. As noted, fiduciary law provides the regulatory foundation for partnership dynamics,[182] particularly where contract and tort law fall short.[183] Designed for relationships where one party controls another's interests, fiduciary duties prevent the misuse of decision-making power.[184] Like general partners in a partnership, plaintiffs have decision-making authority that grants them significant power over the interests of the funders, who have a legitimate stake in ensuring that their interests are protected. A fiduciary framework helps resolve this tension by ensuring that responsibilities are properly balanced. As one court noted, "[a] breach of . . . fiduciary duty adversely affects in the same way the interests of every investor who has no voice in the operations of the business."[185]

A potential concern is whether funders will continue to commit capital if their control rights are further restricted under the quasi-partnership model. Currently, funders already operate under significant constraints on their ability to intervene in litigation, which, as noted, may give rise to agency costs.[186] The fear is then that further restriction might exacerbate the moral-hazard problem. As discussed above, when plaintiffs receive funding but retain full control without corresponding duties, they have distorted incentives to underinvest in the case or settle prematurely, eroding the expected value of the funder's investment.[187]

The quasi-partnership model addresses this economic problem directly. While funders as limited partners indeed cannot control litigation strategy, they gain something more valuable: the protection of fiduciary duties owed by both the plaintiff (as general partner) and the lawyer (to the partnership as a whole). These duties mitigate moral hazard substantially by legally obligating the plaintiff to pursue the shared litigation goal rather than act opportunistically after receiving funding.[188]

rationale that views limited partners as passive investors remains foundational to these relationships under the law.

181. *See, e.g.*, CONAGLEN, *supra* note 127, at 4 (describing the importance of institutional safeguards to avoid conflicts of interest and ensure the protection of beneficiaries).

182. *See generally* Reza Dibadj, *The Misguided Transformation of Loyalty Into Contract*, 41 TULSA L. REV. 451 (2006) (arguing against a trend in the law of unincorporated associations of transforming the duty of loyalty into a contractarian construct).

183. Naftali Ben Zion, *supra* note 131, at 1619.

184. *See, e.g.*, Naftali Ben Zion, *supra* note 127, at 474; Andrew S. Gold, *The Fiduciary Duty of Loyalty*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 134, at 385.

185. Lichtyger v. Franchard Corp., 18 N.Y.2d 528, 536 (1966).

186. *See supra* notes 20-24. For a comprehensive list of regulatory measures taken by each state until 2020, see Avraham et al., *supra* note 90, at app. 1.

187. *See supra* Section I.B; *supra* notes 65-68 and accompanying text.

188. *See infra* Section III.B.

This protection should reduce the risk premium funders must charge, making TPLF more affordable while maintaining profitability for funders.[189] The model thus offers funders a more attractive proposition than attempting to control litigation directly, an approach that not only faces regulatory barriers but also, as we have shown, leads to inefficient outcomes when funders and claimants have different time preferences and risk tolerances.[190]

This structure finds analogues in other successful passive-capital investment models. Venture capital limited partnerships, for instance, operate on similar principles: limited partners provide capital but generally cannot direct the portfolio companies' business decisions, instead relying on the fiduciary duties owed by the general partners who manage the fund.[191] Real estate investment trusts similarly channel passive capital into projects where investors have limited operational control but benefit from the fiduciary and statutory protections built into the investment structure.[192] These markets thrive because of the separation between capital provision and operational control—as long as appropriate accountability mechanisms protect investors' interests.

Thus, reconceptualizing funders as limited partners with corresponding fiduciary protections is not only normatively justified—as it preserves claimant autonomy over their own legal rights—but also economically sustainable. It addresses the core market failure that currently plagues TPLF (moral hazard) without requiring the heavy-handed intervention that funders would need to protect their investments in the absence of fiduciary safeguards. Some reduction in overall market size might occur if certain funders exit in favor of markets with fewer constraints, but such a development would likely represent a feature rather than a bug: the remaining capital would flow to more efficient

189. In the insurance market, reducing moral hazard leads to lower insurance premiums and allows insurers to cover a larger portion of the risk. For a discussion of this phenomenon, see generally Ralph A. Winter, *Optimal Insurance Under Moral Hazard*, *in* HANDBOOK OF INSURANCE 155 (Georges Dionne ed., 2000).

190. *See supra* notes 71-74 and accompanying text.

191. This governance structure parallels other passive-capital investment models, such as private equity and venture capital limited partnerships, where investors (LPs) provide capital but do not participate in operational decisions, relying instead on fiduciary duties and reputational mechanisms to align interests. *See, e.g.*, Kobi Kastiel & Yaron Nili, *Opting Out of Court? Reputation and Informal Norms in Private Equity* 5, 7 (Eur. Corp. Governance Inst., Law Working Paper No. 833, 2025), https://ssrn.com/abstract=5407006 [https://perma.cc/U28E-FR65].

192. Real estate investment trusts, or REITs, were designed by Congress to be passive conduits for real estate investment. They pool capital from many investors and channel it into real estate projects, similar to how mutual funds pool money to invest in stocks. Limited partners in a REIT cannot intervene in the management of the trust and must rely on other legal technologies to monitor and discipline managers. *See* Jason S. Oh & Andrew Verstein, *A Theory of the REIT*, 133 YALE L.J. 755, 800-01 (2024) (suggesting that the unique characteristics of REITs, including a prohibition on reinvesting profits and their tax structure, create an efficient oversight mechanism that might explain their growth).

arrangements that better serve both parties' interests and align with the normative requirements of the litigation system.

It should be pointed out, however, that in the case of *consumer funding*, a distinct concern arises from the fact that TPLF firms are repeat players with substantial expertise in drafting funding agreements,[193] while many consumer litigants lack comparable resources or understanding.[194] This asymmetry creates a risk that funders may employ one-sided boilerplate provisions that favor their interests disproportionately. The model addresses this concern through a two-pronged approach. First, by imposing fiduciary duties on consumer litigants acting as general partners, the framework mitigates the moral-hazard problem that would otherwise drive funders to demand excessive interest rates or restrictive terms. When funders can rely on the plaintiff's fiduciary obligation to pursue the litigation diligently rather than to underinvest or settle prematurely, they face lower risks and can offer more favorable financing terms—particularly in competitive funding markets.[195] Second, and equally important, existing regulatory protections designed to address bargaining-power asymmetries should remain in place.[196] Most critically, prohibitions on funder control over litigation decisions serve as nonwaivable baseline protections that parties cannot contract around in consumer funding. These mandatory rules ensure that no matter how a funding agreement is drafted, the consumer retains ultimate authority over case management and settlement decisions. Thus, while the partnership agreement governs much of the relationship, it does so within guardrails established both by fiduciary law's irreducible core and by regulatory measures that protect consumers.

Although funders are sophisticated players,[197] they are at a disadvantage in litigation management compared to the plaintiff, who retains discretion over case strategy, makes key decisions, and possesses greater factual knowledge. Viewing TPLF as a quasi-partnership safeguards against situations where, after securing funding, a plaintiff acts exclusively in his own interests and disregards the funder's shared objectives. By recognizing the plaintiff's fiduciary duty toward the partnership, and by extension, to the limited partner, this framework moderates the funder's influence and ensures the protection of both parties' interests.

193. *See* Steinitz, *supra* note 7, at 1305.

194. Avraham et al., *supra* note 31, at 150-51.

195. This dynamic mirrors how insurers adjust premiums based on moral-hazard mitigation: reduced risk translates to better pricing for consumers.

196. This also includes the good-faith and fair-dealing duties that would apply to limited partners. *See supra* notes 143-144.

197. *Cf.* Celine Esmeir, Plank v. Cherneski*: Maryland Opts in to "Opt-Out" in the LLC Fiduciary Duty Debate*, 81 MD. L. REV. 1302, 1303 (2022) (noting that fiduciary duties in limited partnerships "comport with traditional common law principles of equity [and] protect unsophisticated parties and parties with unequal bargaining power").

As in the case of partnerships, the plaintiffs are not automatically in a conflict of interest that breaches fiduciary duties simply because they have a personal stake in the outcome.[198] Classifying plaintiffs as fiduciaries does not require them to disregard their personal interests entirely when acting as a "partner."[199] Particularly in *consumer funding*, there is no intent to impose an unreasonable standard of conduct on customers when they act as ordinary "partners" rather than managers. Furthermore, given that the investment in the common project is nonrecourse, this duty does not obligate the plaintiff to repay the funder. Rather, when assuming the "manager's" role, plaintiffs are required by fiduciary principles to act in a manner that advances the shared interests of the parties, which is to maximize the return on the investment.

In the case of *commercial funding*, the balance of power between the parties may shift, with funders becoming the party most interested in managing the case, whereas the commercial clients may seek primarily to monetize their legal rights.[200] As in partnership law, our model does not restrict parties from structuring their agreements to suit their preferences. Yet our approach is not merely descriptive. Although we argue that the quasi-partnership model best captures the nature of these relationships, we also contend that it should normatively govern them. Accordingly, if the parties to a commercial-funding contract choose to grant the funder greater control, that control must be accompanied by corresponding responsibilities. This may occur, for example, when a funder insists on influencing settlement decisions, whether through a veto right or a consent requirement, as was argued by Sysco in the dispute with Burford.[201] It may also involve efforts to direct or replace the claimant's outside counsel, or attempts to acquire ownership, partnership status, or decision-making authority over the claim. In such situations, the funder's role resembles that of a general partner closely—rather than that of a limited one.[202]

Under such a design of the relationship, a funder who directs litigation would assume fiduciary duties toward the commercial client. In other words, the funder may, with the commercial client's agreement, assume greater influence over the process. However, doing so would trigger heightened fiduciary obligations. This framework preserves the flexibility that commercial actors need to structure tailored arrangements, while

198. *See supra* note 138.

199. *See supra* note 139.

200. *See* Abrams & Chen, *supra* note 37, at 1087 (observing that litigation-funding firms offer resources and expertise alongside capital).

201. *See* Petitioner's Memorandum of Law in Support of Petition to Vacate Arbitration Award, *supra* note 78, at 7.

202. Georgia state law acknowledges the funder's direct liability in specific situations. *See* Georgia Courts Access and Consumer Protection Act, S.B. 69, 158th Gen. Assem., Reg. Sess. (Ga. 2025). The quasi-partnership model supports this liability when the funder participates in the case management actively.

ensuring that funders do not use their control to advance their own interests at the expense of the shared litigation goals.

Third, the partnership-law framework primarily governs disclosure obligations after the quasi-partnership is formed and litigation is underway, addressing *information asymmetry* and *confidentiality* challenges during the legal process. Before formation, disclosure requirements are a matter of negotiation between individual parties, not partners, and are shaped by contractual bargaining. Once the partnership exists, the comparison with limited partnerships suggests that in both *consumer* and *commercial funding*, funders should have access to information relevant to their investment in the "partnership." However, as the "general partner," litigants may restrict the funders' access if they believe that confidentiality serves the best interests of the partnership.[203] Additional restrictions may also be imposed on the limited partners' access to prevent potential misuse of information.[204]

In *consumer* funding, where litigants often disclose sensitive personal or financial information in the course of pursuing their claims, the interest in confidentiality may be even more pronounced. The partnership framework supports this by recognizing that the "general partner" has both the authority and the fiduciary duty to provide information, or to withhold disclosure, when doing so would protect the legitimate interests of the partnership. However, if, in *commercial funding*, greater transparency is required, parties should be able to further define the means of disclosure, as the courts acknowledge that partnership management involves "the weighing and balancing of disparate considerations to which the court does not have access."[205]

Our model further reveals how clients can protect their rights when funders attempt to exploit their status or market power, particularly regarding disclosure. Under partnership law, limited partners have a requirement of good faith and fair dealing when exercising their rights.[206] Although they are generally not considered fiduciaries, they may assume fiduciary duties under agency law if their actions make them *de facto* agents of the partnership.[207] Similarly, funders can also bear fiduciary responsibilities in certain cases. For example, if before the TPLF agreement is signed or during the litigation process, they gain access to sensitive partnership information or receive confidential details from the plaintiff and misuse them to harm the shared interests of the

203. *Cf.* Exxon Corp. v. Burglin, 4 F.3d 1294, 1303-04 (5th Cir. 1993) (holding that a general partner did not breach their fiduciary duty to limited partners by not disclosing information pursuant to an agreement permitting the general partner to determine what information was confidential and imposing no duty to disclose nonconfidential information).

204. *See supra* notes 145-149.

205. Betz v. Chena Hot Springs Grp., 657 P.2d 831, 835 (Alaska 1982).

206. *See supra* notes 143-144.

207. *See supra* notes 127, 149.

"partnership,"[208] they could be held liable for breaching their fiduciary duty.

Finally, another key insight from the comparison with limited partnerships concerns the defendant's position in the litigation. Critics argue that TPLF operates "in the shadows," allowing funders to influence litigation strategy and settlements while remaining undisclosed.[209] Whereas general partnerships can exist without formalities,[210] limited partnerships require registration.[211] By analogy, defendants should be informed of the funders' economic interest in the case because it may affect the defendants' rights, but this does not mean that the full agreement must be disclosed. The comparison suggests the need to acknowledge such interests without further disclosing contractual specifics.

III. The Lawyer's Loyalty to the Client and the "Partnership"

This Part proceeds in two steps. First, it identifies the core fiduciary concerns that structure the lawyer-client relationship. Second, it examines how these concerns arise in the TPLF context and shows how the quasi-partnership framework can clarify and recalibrate the lawyer's duties toward both the client and the funder. In doing so, it addresses three central dimensions: the risk of divided loyalties, the protection of confidential information, and the preservation of trust in the legal profession.

A. The Lawyer's Loyalty

The lawyer-client relationship is often described as the "archetype for the fiduciary obligation."[212] Courts have noted that although these relationships may also be contractual, they are accompanied by fiduciary responsibilities that may include obligations beyond the express contract terms.[213] As lawyers today play an increasingly prominent role in many

208. *See supra* notes 140-141 (describing instances when funders might position themselves in a role similar to that of an agent).

209. *See, e.g.*, Letter from Lisa A. Rickard, *supra* note 9, at 2.

210. *See supra* note 100.

211. Note, however, that only the limited partnership's existence, not the agreement details, must be disclosed. *See supra* notes 107-109.

212. Sande Buhai, *Lawyers as Fiduciaries*, 53 ST. LOUIS U. L.J. 553, 554 (2009); *see* Richard W. Painter, *Fiduciary Principles in Legal Representation*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 134, at 265. The American Restatement of the Law Governing Lawyers explains that "[a] lawyer is a fiduciary" and hence the lawyer's "competence, diligence, and loyalty" should be dedicated to the client. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 16 cmt. b (A.L.I. 2000).

213. *See, e.g.*, Flatt v. Super. Ct., 9 Cal. 4th 275, 279 (1994) (addressing a situation in which an irreconcilable conflict with an existing client gave rise to a mandatory and nonwaivable duty for the lawyer to decline representation of a new client).

spheres of life,[214] the law aims to ensure that they do not misuse their influence over private individuals. Classifying lawyers as fiduciaries imposes a duty of loyalty, requiring them to act in their client's best interests and to avoid any conflicts between their interests and those of the client.[215] Promoting the client's best interests is a broad principle that can be further refined into concrete rules that help lawyers handle situations where conflicts of interest may arise[216] and that clarify the scope of their duty of confidentiality.[217] The lawyer-client relationship is further shaped by other areas of private law, such as contract and tort law, as well as by ethical rules established and enforced by local bar associations.[218] These rules define how attorneys should manage competing interests while maintaining client trust, ensuring their professional conduct aligns with fiduciary obligations.

Criticism of TPLF agreements extends beyond the financier-claimant relationship to the role of the claimant's lawyer. For example, some contend that TPLF agreements may violate the ethical canons of lawyers and "threaten core ethical and legal principles that undergird our civil justice system."[219] Critics argue that funder involvement in litigation is incompatible with a lawyer's fiduciary duties, further complicating an already intricate legal framework governing attorneys' obligations. After noting key concerns within the broader client-lawyer relationship, we show that criticism of the effect of TPLF on this relationship mirrors concerns that have arisen in other areas and explain how viewing TPLF as a quasi-

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214. *See, e.g.*, Daniel Markovits, *Legal Ethics From the Lawyer's Point of View*, 15 YALE J.L. & HUMAN. 209, 286-87 (2003); Daniel Markovits, *Further Thoughts About Legal Ethics From the Lawyer's Point of View*, 16 YALE J.L. & HUMAN. 85, 118-19 (2004); DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 171 (2008); Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice*, 10 GEO. J. LEGAL ETHICS 631, 632 (1997); Alice Woolley, *The Lawyer as Fiduciary—Defining Private Law Duties in Public Law Relations*, 65 U. TORO. L.J. 285, 291 (2015).

215. The American Restatement of the Law Governing Lawyers, for instance, explains that "[a] lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary"; therefore, the lawyer's "competence, diligence, and loyalty" must be dedicated to serving the client. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 16 cmt. b (A.L.I. 2000); *see* Menkel-Meadow, *supra* note 214, at 640.

216. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.7, 1.9, 1.10 (A.B.A. 2025).

217. MODEL RULES OF PRO. CONDUCT r. 1.6 (A.B.A. 2025).

218. Courts often struggle to define the precise boundaries of these obligations. In many cases, duties overlap, making it difficult to distinguish where negligence ends and fiduciary obligations begin. For discussions on this matter, see W. Bradley Wendel, *Lawyers' Constrained Fiduciary Duties: A Comment on Paul R. Tremblay, At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 FLA. L. REV. F. 7, 10-11 (2018); Donald Nicolson & Julian Webb, *Lawyers' Duties, Adversarialism and Partisanship in UK Legal Ethics*, 7 LEGAL ETHICS 133, 136 (2004); and Julian Webb & Donald Nicolson, *Institutionalizing Trust: Ethics and the Responsive Regulation of the Legal Profession*, 2 LEGAL ETHICS 148, 156 (1999).

219. See Letter from Lisa A. Rickard, *supra* note 9, at 11.

partnership clarifies the lawyer's duties to both the client and the funder, mitigating these concerns.[220]

In the landmark case *Flatt v. Superior Court*, the California Supreme Court articulated the doctrine of conflicted representation.[221] The issue before the court concerned the extent of an attorney's duty when, after accepting a new client, the attorney realizes that the representation—particularly filing a lawsuit—creates an irreconcilable conflict with the duty of loyalty owed to an existing client, who would be the target of the proposed litigation.[222] Such situations raise the issue of *dual loyalty*, prompting the fundamental question: whose interests should the lawyer prioritize? In similar cases, courts have held that "the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect or give the appearance of affecting, the obligations of the professional relationship."[223] The Connecticut Supreme Court similarly held that "[w]hen a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion."[224]

In *Flatt*, the court explained that two distinct interests underlie such conflict-of-interest issues. When potential conflicts arise from *successive* representation of clients, the primary concern is the client's *confidentiality*.[225] In such cases, the court examines the "substantial relationship" between the subjects of the prior and current representations. If the two are connected, it is presumed that the attorney

220. Naturally, we cannot discuss every intricate technical detail of the attorney-client relationship and how financing influences it. For a more in-depth discussion, see Seth Katsuya Endo, *Preventive Transparency in Third-Party Litigation Funding*, 120 NW. U. L. REV. 501, 537-43 (2025); Robertson, *supra* note 33, at 140-45, 154-55.

221. Flatt v. Super. Ct., 9 Cal. 4th 275, 278 (1994). The case has been cited widely in both court decisions and legal scholarship, and it is becoming a key reference in discussions of conflicted representation. *See* People *ex rel*. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc., 20 Cal. 4th 1135, 1143-44 (1999) (articulating relevant considerations as to whether contacts and discussions were sufficient to represent the party for purposes of a conflict-of-interest analysis and, if such a conflict should have been imputed to the lawyer's firm, requiring its disqualification).

222. There have been many efforts to develop a comprehensive definition of attorney-client conflicts of interest, particularly in cases involving the representation of multiple clients. The American Bar Association's 1981 Model Code of Professional Responsibility, for example, determines that "[e]xcept with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests." MODEL CODE OF PRO. RESP. DR 5-101(A) (A.B.A. 1981). For a more recent version of these rules, see MODEL RULES OF PRO. CONDUCT r. 1.8(a) (A.B.A. 2025), which states that the lawyer shall not enter into a transaction with or acquire an interest adverse to a client unless the terms are fair and reasonable to the client and fully disclosed and transmitted in writing. *See also* Endo, *supra* note 220, at 537-43 (discussing the application of legal ethics to TPLF).

223. Kelly v. Greason, 23 N.Y.2d 368, 376 (1968).

224. Grievance Comm. of Bar of Hartford Cnty. v. Rottner, 152 Conn. 59, 65 (1964).

225. *Flatt*, 9 Cal. 4th at 283.

had access to confidential information during the first representation, and disqualification from representing the second client becomes mandatory.[226] In practice, the central inquiry is what information held by the lawyer should be inaccessible to the new client. If, however, the conflict involves *simultaneous* representation, a different standard applies. In these cases, the primary concern is *loyalty*, and the test imposed by the court is more stringent: representation may be denied even if the cases are unrelated and confidentiality is not at risk. The court indicated that allowing such representation would likely damage "the existing client's sense of trust and security—features essential to the effective functioning of the fiduciary relationship."[227] Thus, these situations also raise *institutional concerns*, as they undermine the client's trust in the legal profession and the broader pursuit of justice.

Another seminal case relevant to the *institutional concern* at hand is *E.F. Hutton & Company, Inc. v. Brown*.[228] This case involved a client who argued that, because of his prior relationship with the law firms representing his opponents, those firms should be disqualified from representing the other party. The court examined whether the firms should be disqualified. Two key points from *Hutton* are particularly relevant to our discussion. First, the court ruled that "the ethical standards for attorneys must be formulated and construed in a way that best protects the interests of clients and upholds the dignity of the legal profession."[229] Additionally, it warned that allowing an attorney to avoid disqualification by claiming not to have received confidential information may leave the client, who once trusted the attorney, feeling that "the attorney has escaped on a technicality."[230] Focusing exclusively on protecting client disclosures rather than preserving the trust inherent in the attorney-client relationship risks "undermin[ing] the public's confidence in the legal system as a means for adjudicating disputes."[231]

Second, the law firms in *Hutton* attempted to rely on previous cases where disqualification requests had been denied, but the court clarified that those cases were inapplicable because they involved situations where the attorney had jointly represented the parties. The court explained that "information imparted to the common attorney relating to the subject of the joint representation is imparted for the mutual benefit of all the joint clients and is therefore not privileged against any of them."[232] Here, it is

226. *Id.* at 283; *see also* Rosenfeld Constr. Co. v. Super. Ct., 235 Cal. App. 3d 566, 575 (1991) (affirming the substantial-relationship test as the proper standard to end an inquiry and order disqualification).

227. *Flatt*, 9 Cal. 4th at 282.

228. 305 F. Supp. 371 (S.D. Tex. 1969). According to Westlaw, the case has been cited over six-hundred times.

229. *Id.* at 395.

230. *Id.*

231. *Id.*

232. *Id.* at 393.

clear that the conclusion of the court aims to address the *confidentiality concern.*

In sum, we note that this jurisprudence highlights several concerns within the client-lawyer relationship. First, the issue of dual loyalty raises questions about prioritizing the conflicting interests of multiple clients. Second, the confidentiality concern involves the potential misuse of information that a lawyer may access. Third is an institutional concern regarding trust in the legal profession. The quasi-partnership model must therefore be structured to navigate these three pillars, ensuring that funder involvement does not compromise the attorney's undivided loyalty to the client.

B. The Lawyer's Duties to the TPLF Quasi-Partnership

Let us now examine how these concerns manifest in the TPLF context and explain how our model addresses them. In doing so, we will further clarify the lawyer's relationships with the client and the quasi-partnership.

1. The Dual-Loyalty Concern

As noted, courts have scrutinized cases where lawyers represent multiple clients simultaneously.[233] Though funders are not necessarily "clients" of the lawyers, it is clear why concerns about the lawyers' ability to balance their fiduciary duties to their clients with their relationships with the funders have surfaced in the case of TPLF.[234] As the courts often explain, when a client employs an attorney, they have a right to presume that the lawyer "has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided" and that "he has no interest, which may betray his judgment, or endanger his fidelity."[235]

In relation to TPLF, it has been shown that these agreements may create conflicts of interest between the plaintiff, the attorney, and the funder. If the lawyer has contracted directly with the TPLF firm and has contractual duties to it, these duties may be inconsistent with the lawyer's duty of loyalty to the client.[236] This concern is exacerbated by the fact that lawyers are often repeat players and frequently facilitate connections with

233. *See supra* notes 222-224 and accompanying text.

234. Some of these concerns focused on the argument that TPLF violates the common-law doctrine of champerty. *See* Letter from Lisa A. Rickard, *supra* note 9, at 11-12.

235. Williams v. Reed, 29 F. Cas. 1386, 1390 (C.C.D. Me. 1824) (No. 17,733).

236. *See, e.g.*, Wendel & Davis, *supra* note 86, at 1466-70 (discussing the practice of funding portfolios of cases, rather than individual cases, in law-firm financing arrangements, and the ethical concerns that may arise as a result); Steinitz, *supra* note 7, at 1291-92 (noting that arrangements allowing nonlawyers to share in litigation proceeds raise concerns related to prohibited fee-sharing under Rule 5.4 of the ABA Model Rules, which is designed to protect the lawyer's independent judgment and prevent external control over litigation).

the funders.[237] One commentator argues that the tendency of some lawyers to share their legal fees with funders could compromise the lawyers' professional independence of judgment and risk granting nonlawyers control over the practice of law or enable lay persons to practice law without authorization.[238]

To understand how conceptualizing TPLF as a quasi-partnership could help address these challenges, we must bear in mind the "nature" of a partnership.[239] It is useful to begin with the relational (aggregate) conception of partnerships. Under this view, a partnership is understood as a relational state, which allows for a more precise account of individual roles within the partnership. Under certain conditions, particularly when considering the duties of the litigant, it is helpful to focus on the relationship between the general and limited partners rather than exclusively on the collective rights and responsibilities of the partnership toward third parties.[240]

At the same time, recent regulations have codified the status of partnerships as distinct entities in various circumstances.[241] When examining the relationship between the claimant, the funder, and the lawyer in a TPLF agreement, it seems more appropriate to apply the entity theory of partnership because it offers a more cohesive framework for understanding the fiduciary duties of lawyers. Viewing the management of the legal process as a joint project, somewhat independent of the plaintiff, can help clarify the lawyer's duties in this arrangement—particularly how lawyers can protect the financier's interests while maintaining their duty of loyalty to the plaintiff. In a case discussing a lawyer's fiduciary obligations, the court explained that "an attorney's duty of loyalty to a client is not one that is capable of being divided," particularly in situations where the ethical obligation to avoid representation is mandatory rather than subject to disclosure and client consent.[242]

Viewing the relationship between the funder and the plaintiff as a form of partnership helps address concerns about divided loyalties on the part of the lawyer. By framing the lawyer's obligations as promoting "the best interests of the joint project," we ensure both the protection of the client's interests, because the client hires the lawyer to exercise the client's legal rights, and the interests of the TPLF firm, which seeks to prevent the client from exercising excessive control over the legal process to pursue an outcome that may not be the most efficient ex ante.

237. *See* Letter from Lisa A. Rickard, *supra* note 9, at 14-15; *see also* Steinitz, *supra* note 7, at 1324-25 (noting that attorneys often serve as repeat players in litigation financing arrangements and may facilitate relationships between litigants and funders).

238. Letter from Lisa A. Rickard, *supra* note 9, at 14.

239. *See supra* notes 154-157, 165.

240. *See supra* notes 112-115 and accompanying text.

241. *See supra* notes 163-165 and accompanying text.

242. Flatt v. Super. Ct., 9 Cal. 4th 275, 282 (1994).

As already discussed, classification as a partnership significantly limits the funder's ability to interfere in the decision-making process. Accordingly, concerns that the lawyers may face conflicts of interest because of their relationships with the funding party should be greatly reduced. Any contractual obligations of the lawyer with the funder would be constrained by the overarching principle that the lawyer must prioritize the interests of the partnership. Under this model, a funding firm classified as a limited partner cannot make demands that undermine the shared goals of the partnership. Moreover, attempts to do so would expose the firm to the duties and liabilities of a general partner. An effort to advance the funder's interests unilaterally at the expense of the "partnership" would therefore constitute a breach of the duty of loyalty by the funder, as well as by any lawyer who collaborates in such conduct.[243]

At the same time, requiring the lawyer to promote the joint interests of the parties entails acknowledging that neither party will always achieve its preferred outcome fully. While the funder may at times be constrained in pursuing its desired return, the claimant may likewise be prevented from acting solely based on personal preferences, such as by terminating the litigation without sufficient justification once their share of the potential recovery appears adequate.

Thus, such an arrangement would impose a disclosure obligation on the lawyer, ensuring that the client understands that in this setting, the lawyer's loyalty is due not only to the client personally but to the joint interests of the client and the funder. As long as the client receives full clarification in advance and agrees to this arrangement—similarly to other situations where a lawyer represents multiple clients with shared interests—this structure is ethically permissible.[244] Similar *dual-loyalty* concerns arise when the lawyer acquires financial interests in the legal outcome.[245] In these cases, even if ultimate discretion remains with the plaintiff, the lawyers' knowledge and expertise, together with their significant control over litigation management, make it appropriate to classify them as general partners in these relationships. In this role, the lawyers would owe fiduciary duties to the partnership, and by extension, to the financier and the plaintiff, which would influence how they manage the proceedings.

243. *Cf. supra* note 127-134 (noting partners' duty of loyalty).

244. *Cf.* MODEL RULES OF PRO. CONDUCT r. 1.7(b)(4) (A.B.A. 2025) (allowing lawyers to represent multiple clients as long as there is informed consent and no significant risk of material harm).

245. *Cf.* Saul Levmore, *Commissions and Conflicts in Agency Arrangements: Lawyers, Real Estate Brokers, Underwriters, and Other Agents' Rewards*, 36 J.L. & ECON. 503, 522-23 (1993) (demonstrating that limits are placed on the ways in which lawyers may hold financial stakes in their clients' cases).

2. The Confidentiality Concern

Our proposed model also addresses concerns about the lawyer's fiduciary duty to protect client confidentiality. We noted a concern that litigation financing would harm confidentiality if these agreements "require plaintiffs to disclose privileged information to the financier."[246] In joint representation, the lawyer may share only the information necessary to advance the *shared* goal. Unlike situations discussed in case law, where clients felt that their lawyer's agreement to represent a new client was made at their expense and harmed their interests, when a lawyer is hired to promote a common project, both parties have a clear understanding of the expectations of the legal representation and the sharing of information between them.[247]

3. The Institutional Concern

Finally, these situations also raise the question of trust in the legal profession. We suggest that ensuring that the lawyer is focused on the best interests of the partnership would help maintain the trust and security of all parties, concerns that courts have identified as central to the effective functioning of the fiduciary relationship and to maintaining public confidence in the legal system.[248] Just as a general partner may have a strong business idea but lack the financial resources to carry it out, clients who cannot afford to finance litigation might seek a lawyer who can represent their interests in winning the case and also secure the necessary funding. Focusing on the joint interests of the parties helps uphold the dignity of the legal profession by addressing conflicts of interest openly. It provides clear guidance to lawyers—who, as mentioned above, are often familiar with representing multiple parties with common interests—on how to mitigate these conflicts if they arise. Although fiduciary duties compel lawyers to act in a certain way, they also allow courts to oversee the conduct of attorneys.

Drawing on Supreme Court precedent from over two-hundred years ago, federal courts have recognized that "the court before which an action is pending has a significant interest in maintaining the ethical standards of the members of its bar."[249] This supervisory role ensures that lawyers

246. *See* Letter from Lisa A. Rickard, *supra* note 9, at 14.

247. *Cf.* Robertson, *supra* note 33, at 152-62 (addressing attorney-client privilege).

248. *See, e.g.*, *Flatt*, 9 Cal. 4th at 290 (discussing the "very practical effects on client morale and trust presented by the spectacle of an attorney simultaneously representing adverse parties, even as to matters that are unrelated"); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 395 (S.D. Tex. 1969) ("If courts protect only a client's disclosures to his attorney, and fail to safeguard the attorney-client relationship itself—a relationship which must be one of trust and reliance—they can only undermine the public's confidence in the legal system as a means for adjudicating disputes.").

249. *Hutton*, 305 F.Supp. at 382 (citing *Ex parte* Burr, 22 U.S. (9 Wheat.) 529 (1824)).

adhere to their ethical obligations, protecting the integrity of both the legal process and the clients they serve. The responsibility of the court to uphold ethical standards stems from its obligation to ensure that neither it nor the legal system falls into disrepute.[250] Because the quasi-partnership model requires the court to be informed of the existence of a funding party, it ensures the court can effectively supervise the lawyers' actions, confirming that they genuinely promote the shared purpose of the partnership, without prioritizing the interests of one partner over the other.

IV. Rethinking TPLF Through Fiduciary Law

The previous Part developed the quasi-partnership model of TPLF and explained the fiduciary structure that follows from it. We now show how that framework addresses the principal criticisms of TPLF in practice. The main challenges associated with TPLF—adverse selection and moral hazard—give rise to four key criticisms: increased workload from frivolous claims, undue interference in case management, high financing costs, and insufficient transparency.[251] Reconceptualizing TPLF as a quasi-partnership can resolve these concerns at each stage of the claimant-funder relationship: during the formation of the partnership, at the initiation of the lawsuit, and throughout the management of legal proceedings, particularly decisions on whether to settle. As in the case of a limited partnership, the parties remain free to define most rights and duties in their agreement, but some obligations are mandatory: funders cannot assume direct control of the litigation, and litigants cannot opt out of their fiduciary responsibilities toward the partnership.

A. Forming a Partnership

The litigant and the TPLF firm effectively form a partnership when they sign the funding agreement. Viewing this agreement through a partnership lens changes the nature of disclosure requirements. In traditional business partnerships, transparency is expected both between partners and, to a lesser extent, toward external entities through, for

250. *Id.*; *see also* Endo, *supra* note 220, at 508-09 (discussing disclosure rules and federal district judges). Although we lack the space to explore this issue fully in the present Article, the extent of judicial oversight in TPLF may vary based on the nature of the litigation. In large-scale cases, such as class actions and mass torts, courts may have a stronger justification for intervention because of rational indifference, when plaintiffs with small individual stakes may not monitor their attorneys or funders closely. By contrast, individual commercial disputes may warrant a more limited role for the court, as clients are more likely to oversee their legal representation and financial arrangements.

251. See *supra* notes 33-36 and accompanying text. From a social perspective, TPLF firms distribute funds for investments between potential litigants, making them act, in the economic sense, as a general coordination mechanism. Roger Myerson demonstrated that every coordination mechanism is challenged by the same two problems: adverse selection and moral hazard. *See* Roger B. Myerson, *Perspectives on Mechanism Design in Economic Theory*, 98 AM. ECON. REV. 586, 589-90 (2008).

example, formal disclosure requirements such as partnership registration.[252] Applying this principle to TPLF mitigates the bilateral asymmetric-information problem. As noted, adverse selection arises when litigants possess private information about the potential of the case that they do not share with the TPLF firm.[253] Requiring more extensive disclosure from the litigant reduces the risk of adverse selection and the likelihood that frivolous cases will receive funding.

Furthermore, this extended disclosure requirement mandates a clear understanding of the terms of the agreement and the roles and responsibilities of all stakeholders, including the litigant, the funder, and potentially the lawyer. For example, researchers have suggested that in consumer funding, some firms hide the effective interest rates on loans in various ways, making it difficult for consumers to assess the true cost of credit.[254] Such practices contradict the good-faith-and-fair-dealing requirement between partners, and therefore, would be deemed illegal under the quasi-partnership model.

Last, as a general partner, the litigant has ongoing rather than one-time disclosure duties and must maintain open communication about developments that could affect the litigation outcome. These duties serve to reduce information asymmetries and agency costs, much like disclosure obligations imposed on corporate directors to ensure that those managing another's interests act in an accountable manner.[255] As noted, litigants are not required to share with the "limited partner" any personal information about their role as a "partner" rather than a "manager," provided that such information does not pertain to the shared objective of winning the legal case.[256]

252. *See, e.g.*, ULPA § 201 (2001) (specifying that formation of a limited partnership requires the filing of a certificate of limited partnership with the secretary of state).

253. *See supra* notes 46-47 and accompanying text.

254. *See* Avraham & Sebok, *supra* note 32, at 1172 (stating that TPLF firms hide true costs from their clients).

255. *See, e.g.*, Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1048 (1995) ("[T]he principal purpose of mandatory disclosure is to address certain agency problems that arise between corporate promoters and investors, and between corporate managers and shareholders. Disclosure can help reduce the cost of monitoring promoters' and managers' use of corporate assets for self-interested purposes.").

256. We propose recognizing the structure of TPLFs as akin to that of an LP. An alternative could be to perceive the equity investments made by TPLF firms and contingent-fee lawyers as establishing a legitimate LP that requires registration. Although we believe that most funding agreements may not necessitate this formalization, creating an LP can offer clarity about the responsibilities of funders, particularly in complex multiparty cases like mass torts. In such scenarios, the role of litigation-funding firms introduces unique considerations that extend beyond the scope of this discussion. For a critical analysis of third-party funders' involvement in complex cases, see generally Samir D. Parikh, *The Alchemist's Inversion*, 110 CORNELL L. REV. 1693 (2026); Maya Steinitz, *Zombie Litigation: Claim Aggregation, Litigant Autonomy, and Funders' Intermeddling*, 110 CORNELL L. REV. 1771 (2026).

B. Initiation of the Lawsuit

As the litigation process moves into the stage of initiating a lawsuit, viewing the funding arrangement as a quasi-partnership offers coherent solutions to the ongoing debates about the duties to disclose the TPLF involvement to both the court and the opposing party. In particular, this approach supports the argument for a limited duty of disclosure that aligns with the legal principles governing limited partnerships.

In a traditional limited partnership, the partners must register the partnership, creating a limited transparency obligation concerning its existence and the identity of its members. This structure limits the scope of disclosure; third parties may have a legitimate reason to know that they are dealing with a limited partnership, but they do not require access to the partnership agreement as long as the limited partner does not actively participate in the management of the partnership.[257] This distinction reflects the functional role of disclosure in partnership law. Where the limited partner remains passive, disclosure of the partnership's existence and structure is sufficient for third parties to assess liability, as the limited partner does not influence the partnership's conduct. By contrast, when a limited partner assumes an active role in management, the partnership's actions may depend on that party's incentives, and additional disclosure may be warranted to allow third parties to evaluate how decision-making authority is exercised.

Under this quasi-partnership model, the duty to disclose the existence of the funding arrangement to the court and the opposing party should be similarly limited. Full disclosure of the financial arrangement could expose the litigants' strategic position unnecessarily, potentially undermining their bargaining power or inviting undue scrutiny from the opposing side. However, a limited duty to disclose, focused on revealing that funding exists without specifying the details of the agreement, can ensure transparency where it matters most. For example, disclosure to the court could help reassure the court that potential conflicts of interest have been eliminated,[258] ensuring that the judge is aware of third-party involvement without revealing sensitive financial details that may influence the litigation.

A limited duty to disclose ensures that the key ethical concerns about TPLF, such as conflicts of interest and potential interference, are addressed without overburdening the process with excessive disclosure

257. *Cf.* Laws. for Civ. Just. & U.S. Chamber of Com. Inst. for Legal Reform, *A Necessary Disclosure: Why Rule 7.1 Should Provide Judges Information About Non-Party Contingent Financial Interests That Could Require Recusal*, U.S. CTS. 3 (Mar. 14, 2024), https://www.uscourts.gov/sites/default/files/24-cv-d_suggestion_from_lcj_and_ilr_-_rule_7.1.pdf [https://perma.cc/ZU2Z-M6FF] (arguing that judges need access to the information necessary to discern whether they have a financial interest in a case through its TPLF agreement).

258. *See supra* notes 204-208 and accompanying text.

that could deter the use of funding. By maintaining confidentiality about the precise terms of the arrangement, the litigant retains autonomy to negotiate and settle the case based on its legal merits, not on its financial exposure. Thus, aligning the disclosure obligations of TPLF with the principles of limited partnerships provides a balanced approach that serves both the judicial process and the practical needs of litigants and funders alike.

At the same time, we recognize that there are compelling arguments for requiring more extensive disclosure in consumer cases, where the plaintiff is a private individual with limited resources and may be more vulnerable to potential exploitation by funders. Additionally, the fact that funders are repeat players in this market can further distort the power dynamics between the parties. We therefore leave open the question of whether courts should, in appropriate circumstances, have the authority to require the agreement between the parties to be disclosed to the court (but not to the defendants), while maintaining its confidentiality.

Although partnership law does not fully resolve the issue of how much information should be disclosed, it establishes a clear minimum standard: the existence of the relationship must be disclosed. This foundational requirement would enable courts to demand additional information when necessary.

C. Management of Legal Proceedings

During the management stage of legal proceedings, the quasi-partnership model provides a coherent framework to address the conflicting incentives of the litigant and the financier. These tensions can be understood as a classic agency-cost problem: the funder supplies capital but does not control litigation decisions, while the litigant exercises control without fully bearing the economic consequences of those decisions.[259] On one hand, litigants have an excessive incentive to settle early or underinvest in their case, especially if they are risk-averse.[260] This behavior can lead to suboptimal outcomes, where valuable claims are settled prematurely for less than their full worth. On the other hand, financiers have an incentive to prolong litigation in pursuit of a larger return on their

259. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976) (defining agency relationships as involving a separation between ownership and control, and identifying the resulting agency costs); Bengt R. Holmstrom & Jean Tirole, *The Theory of the Firm*, *in* HANDBOOK OF INDUSTRIAL ORGANIZATION 61, 63, 67-69 (R. Schmalensee & R.D. Willig eds., 1989) (describing firms as networks of agency relationships in which decision-making authority is delegated and incentives must be aligned); Ronald H. Coase, *Accounting and the Theory of the Firm*, 12 J. ACCT. & ECON. 3, 4, 8-9 (1990) (linking the organization of firms to the allocation of decision-making authority and information).

260. *See supra* Section I.B.

investment, which may not align with the litigant's best interests or the broader goals of the legal process.[261]

These conflicting interests can be better managed when viewing the TPLF arrangement as a quasi-partnership. In a limited partnership, the general partner (here, the litigant) retains control over the litigation and the key decision-making, and the limited partner (the financier) assumes a passive role, providing financial support without direct involvement in day-to-day management. This structure helps prevent the TPLF firm from inserting its desires into the legal strategy because its role as a limited partner prevents further interference. If limited partners become actively involved in management, they risk losing the protections associated with their passive role and could expose themselves to greater liability (including, for example, financial responsibility for litigation expenses owed to the defendant).[262] This legal boundary ensures that the litigant retains autonomy in pursuing the case and that the financier cannot influence legal decisions unduly for its own benefit, reducing the risks of prolonged litigation motivated by the funder's financial incentives.

This framework could also alleviate defendants' concerns regarding the involvement of a third party with potentially conflicting interests in the legal process, such as the risk that undisclosed funders may influence litigation strategy, distort settlement incentives by encouraging excessive delay, or obscure who effectively controls the prosecution of the claim. In consumer funding, such a strict separation is essential, but in commercial arrangements, where both parties are typically more sophisticated, the parties can negotiate modifications to the default structure. They may agree, for instance, to grant the financier a greater role in strategic decision-making, provided that such adjustments are balanced by corresponding fiduciary safeguards and clearly delineated accountability mechanisms. For example, granting the financier the role of general partner allows it to control various aspects of the litigation but subjects the financier to a fiduciary duty toward the litigant.[263] This flexibility enables

261. *Id.*

262. Interestingly, in *Abu-Ghazaleh v. Chaul*, the Florida District Court of Appeal decided that, since under Florida law, "a 'party' 'is defined . . . as any person who participates in litigation regardless of whether or not [the party is] actually named in the pleadings,'" a TPLF funder who obtained a veto right regarding the choice of counsel, settlement, and other litigation decisions, is jointly responsible, alongside the plaintiff, for the attorney's fees of the defendant. 36 So. 3d 691, 694 (Fla. Dist. Ct. App. 2009) (quoting Visoly v. Security Pac. Credit Corp., 768 So. 2d 482, 489 (Fla. Dist. Ct. App. 2000)); *see also* Stan Lee Media, Inc. v. Walt Disney Co., No. 12-cv-02663-WJM-KMT, 2015 U.S. Dist. LEXIS 119086, at *5-6 (D. Colo. Sep. 8, 2015) (allowing discovery against TPLF funders to determine their level of involvement since, if a separate funder controls vexatious litigation, they can be considered a party responsible for paying costs and attorneys' fees).

263. In some commercial settings, the funder may offer a contribution to the litigant beyond cash, for example, as access to information and valuable connections. Leveraging these assets may require the litigant to allow the funder to take an active role in the litigation. *See supra* note 40. We can compare this arrangement with a traditional secured creditor under Article 9 of the Uniform Commercial Code. To secure an underlying debt, a secured creditor

commercial parties to tailor the partnership to their mutual interests and still preserve the overall integrity of the litigation process, mitigating potential conflicts.

The quasi-partnership model further protects the interests of the TPLF firm. The litigants, as partners, cannot abuse their position to achieve their goals at the expense of the TPLF firm. As the Supreme Court stated in *Latta v. Kilbourn*,

> [o]ne partner cannot, directly or indirectly . . . carry on the business of the partnership for his private advantage; . . . he cannot be permitted to secure for himself that which it is his duty to obtain, if at all, for the firm of which he is a member; nor can he avail himself of knowledge or information which may be properly regarded as the property of the partnership, in the sense that it is available or useful to the firm for any purpose within the scope of the partnership business.[264]

Moreover, when litigants make decisions regarding the management of the case, they act as the general partner and owe a fiduciary duty toward the partnership and its limited partners.[265] This means that they cannot prioritize their own interests at the expense of the partnership's goals. Consider the following variation of Example 1.

Example 2. *Quasi-partnership*. Lucy is suing Jim for damaging her car. Lucy entered a funding agreement with a TPLF firm, agreeing to share 50% of any sum received in settlement or judgment in exchange for $50. To initiate her case, Lucy needs to invest $20, and as the case progresses, she will incur an additional $30 in legal costs. Lucy initially estimates she has a 50% chance of winning the case and securing $300 in damages.

We have seen that under similar circumstances, Lucy had an incentive to underinvest in the case and settle too soon. Indeed, if she receives the funding up front, she might not initiate the lawsuit at all. If Lucy has no obligation toward the TPLF firm, she can choose between keeping the $50 she received and taking the risk of losing the $50 by pursuing a lawsuit, which, from her perspective, is only worth $75.[266] Therefore, she may prefer the first option over the second if she is risk averse. The TPLF firm can protect itself against the risk of Lucy not pursuing the case or not investing enough in it by including a contractual requirement for her to litigate. But

may hold a security interest in the proceeds of a claim, but it does not exercise control over litigation strategy and does not owe fiduciary duties to the debtor. *See* U.C.C. § 9-109(a)(1), (d)(9) (A.L.I. & Unif. L. Comm'n 2022) (governing security interests in personal property but specifying that Article 9 does not apply to the assignment of a right represented by a judgment). By contrast, when a funder assumes a managerial role in the litigation, its position more closely resembles that of a general partner, carrying both control rights and corresponding fiduciary obligations.

264. Latta v. Kilbourn, 150 U.S. 524, 541 (1893).

265. *See supra* notes 112-115, 126 and accompanying text.

266. Lucy believes that she has a 50% chance of winning $300, of which she will have to pay $150 to the TPLF firm, making the expected value only $75.

if Lucy has a fiduciary duty to the TPLF firm and the partnership, there may be no need for contractual provisions to intervene in the litigation process. For example, deciding not to litigate is a breach of Lucy's fiduciary duty because the decision goes against the goals of the partnership and uses the partnership's resources for private gain. Knowing that she might face liability toward the TPLF firm now changes Lucy's options, and she must consider the risk that if she does not file a claim, the TPLF firm might sue her for breach of fiduciary duty, with an exposure of at least $50.[267] Moreover, Lucy faces an ongoing risk because the statute of limitations under fiduciary law is more lenient.[268]

Note, however, that while this mutual constraint protects both parties from opportunism, it does not imply that financial gain is the sole shared purpose of the joint project. In many cases, the aim of the quasi-partnership will be uncontested: namely, to maximize the expected value of the legal claim. Yet, as discussed above in relation to control over the legal process, our model also recognizes that claimants may hold legitimate interests that go beyond purely financial considerations, including those relating to reputation, professional relationships, or workplace standing. This raises the question of whether such interests should also be considered part of the partnership's purpose.

We suggest that where the interest advanced by the plaintiff is significant—even if nonmonetary—and the motivation is justifiable, asserting that interest should not be considered a breach of the plaintiff's fiduciary duties as a general partner. In *commercial* contexts, the parties are free to contract over these objectives explicitly, and an express articulation of the partnership's shared project would assist the court in determining that the plaintiff's actions did not violate those duties. Still, in the absence of such agreement, the court's analysis should be guided by our model's normative premise: control over the litigation resides with the claimant. Accordingly, when the claimant has a legitimate objective (e.g., reputational harm), courts should recognize such interests as part of the shared purpose of the partnership. Where such interests conflict with the funder's pursuit of a higher monetary recovery, both should be weighed and balanced in light of the normative premise.

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267. In addition to the principal amount, Lucy might be liable for the interest rate she saved by not taking a loan on the $50.

268. Moreover, contributory-negligence defenses generally do not apply. The claimant is not required to prove actual damages resulting from a breach of the duty of loyalty and may instead seek remedies such as profit disgorgement. Given these distinctions, pursuing a claim for breach of fiduciary duty may offer significant advantages. *See* Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 701 (2006) (discussing the remedy of disgorgement for breaches of fiduciary duty); *see also* Stephen E. McConnico, Jennifer Knauth & Robyn Bigelow, *Unresolved Problems in Texas Legal Malpractice Law*, 36 ST. MARY'S L.J. 989, 1025 (2005) (comparing professional-malpractice and breach-of-fiduciary-duty claims); Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1156 (1999) (addressing remedies for breach of fiduciary duty).

Furthermore, the lawyer, who owes a fiduciary duty to the partnership as a whole (both the litigant and the financier), is bound to act in the combined interests of both parties. This duty ensures that the lawyer's strategic decisions take into consideration both the success of the litigation and the financier's investment, balancing the interests of both parties without allowing one to dominate the other, as often arises when representing artificial legal entities whose stakeholders disagree over the entity's purpose. Lawyers are accustomed to managing such conflicts and are well-positioned to apply similar judgment here.

Under these circumstances, both the TPLF firms and the litigants should welcome the lawyer's dual duty toward them. When one party exerts too much control over litigation decisions, its incentives can become distorted, reducing the overall expected value of the case.[269] With the lawyer mediating between the two parties' interests, the decisions are made as if they were managed by a single actor, optimizing the balance between risk and reward. The commitment to aligned case management increases expected profits for both parties, lowers their collective risk, and encourages the financier to demand lower interest rates for the same loan, thus aligning with the interests of the client. Finally, the lawyer's fiduciary duties to the partnership help mitigate concerns raised by third parties about the potential influence of the funder on decision-making or the incentive to settle. Under this framework, the lawyer's responsibilities ensure that the funder's legitimate interests are protected without undue funder interference in the legal process.

Accordingly, this approach can also reduce the demand for excessively high interest rates in the *consumer-funding* market. To the extent that these interest rates are the result of consumer-side moral hazard, addressing this hazard allows funders to charge lower rates while remaining profitable. Because funders price the risk of plaintiff opportunism into their nonrecourse advances, replacing that risk with enforceable fiduciary duties lowers the funders' risk premium, theoretically driving down rates in a competitive market.[270] Yet, a potential concern in these arrangements remains that, given the repeat nature of their interactions, both the lawyer and the funder might be tempted to

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269. Any time several parties share the costs and benefits of an endeavor disproportionately, none of them has an incentive to invest efficiently. *See* Pelled, *supra* note 69, at 161-62, 166-68.

270. See *supra* notes 46-54 and accompanying text, which explains that nonrecourse litigation funding operates analogously to insurance pricing, where the funder sets the price of capital by reference to expected loss and variance. Just as insurers incorporate policyholder moral hazard into premiums, funders incorporate the risk of plaintiff opportunism—such as inefficient settlement decisions or strategic behavior that reduces expected recovery—into the pricing of advances. To the extent that fiduciary constraints imposed on the lawyer mitigate this opportunism, they reduce the variance and expected downside of the investment, thereby lowering the risk-adjusted return required by funders. In a competitive market, this reduction in risk should be reflected in lower pricing (i.e., lower effective interest rates or funding multiples) offered to plaintiffs.

conspire to override the plaintiff's interests.[271] Given that only liquidity-constrained plaintiffs seek funding through the consumer-litigation funding market, the lawyer may assume that the consumer lacks the resources to challenge such collusion.

We argue that the deterrent effect of fiduciary remedies remains robust. Any breach of fiduciary duty—manifested through the lawyer's collusion with the funder to subvert the plaintiff's wishes—would carry significant negative consequences.[272] These include monetary damages and disgorgement of profits improperly obtained,[273] as well as stringent ethical sanctions imposed by the state bar.[274] In addition, fiduciary law permits holding the funder liable for the attorney's breach of duty under the doctrine of aiding and abetting a breach of fiduciary duty.[275]

Given that both the lawyer and the funder are long-term, repeat players whose future professional prospects depend on maintaining a reputation for high ethical standards, the risk of triggering these penalties serves as a powerful disincentive against collusion. In this way, the quasi-partnership model inherently safeguards the plaintiff's interests by

271. Like other fiduciaries, lawyers hold a position of power in identifying and advocating for their clients' legal interests, but they do not possess full discretion in decision-making. A lawyer's primary role is to enable clients to exercise their judgment rather than make decisions on the clients' behalf. Acting against the client's wishes may be viewed as a violation of the lawyer's ethical duties. Woolley, *supra* note 214, at 314.

272. *See, e.g.*, Daniel B. Kelly, *On Disgorgement and Punitive Damages in Trust Law*, 107 IOWA L. REV. 2079, 2106-08 (2022) (discussing the remedies available for fiduciary breach and explaining that equitable remedies deter the trustee from engaging in opportunistic behavior).

273. *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 552-54 (2016) (explaining that monetary compensation is a standard remedy for wrongs generally and that accounting for profits/disgorgement is typically available against fiduciaries to recover gains from conscious wrongdoing).

274. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.2(a), 1.7(a)(2), 1.8(f), 5.4(c), 8.4(a), 8.4(c)-(d) (A.B.A. 2025) (requiring lawyers to abide by client decisions; barring conflicted representation and third-party-funder interference with professional judgment; and treating violations of the model rules, dishonesty, and conduct prejudicial to justice as professional misconduct).

275. Under the doctrine of aiding and abetting a breach of fiduciary duty (or tortious act), one who knows that a fiduciary is breaching a duty and knowingly and substantially assists or induces that breach is liable to the injured beneficiary even though he owed the beneficiary no fiduciary duty of his own. *See* Wolf v. Liberis, 505 N.E.2d 1202, 1208 (Ill. App. Ct. 1987) (noting that the defendant must be aware of his role in the wrongful activity and provide substantial assistance to the fiduciary's breach (citing RESTATEMENT (SECOND) OF TORTS § 876(b) (A.L.I. 1979))). A lawyer's duties of loyalty and independent professional judgment run to the client, and a lawyer "shall not permit a person who recommends, employs, or pays the lawyer . . . to direct or regulate the lawyer's professional judgment." *See* MODEL RULES OF PRO. CONDUCT r. 5.4(c), 1.8(f)(2) (A.B.A. 2025). A third-party litigation funder that induces counsel to subordinate the client's interests to the funder's, therefore, may be exposed to liability for aiding and abetting the resulting breach of fiduciary duty. *See* Wickline v. Lexshares, Inc., No. 25STCV14807, 2026 Cal. Super. LEXIS 10151, at *3 (Cal. Super. Ct. Jan. 26, 2026) (ruling on a motion in a case against litigation funders "primarily based upon a claim of aiding and abetting the breach of fiduciary duty of the Attorney Defendants"); *cf.* Peterec-Tolino v. Ciacci, 225 A.D.3d 433 (N.Y. App. Div. 2024) (mem.) (entertaining a breach-of-fiduciary-duty theory arising from a litigation-funding arrangement but dismissing the claim where the client's signed funding agreement established a defense as a matter of law).

ensuring that breaches of duty are both economically and reputationally costly.

Conclusion

Conceptualizing TPLF as a quasi-partnership offers distinct advantages over traditional legal models by providing a cohesive framework to address core issues such as misaligned incentives and lack of transparency. Currently, TPLF arrangements are governed by contracts between the parties, together with a multitude of regulations ranging from strict prohibitions rooted in the ancient doctrine of champerty to restrictions on various aspects of the loan agreement, such as disclosure requirements and limitations on interest rates and the involvement of the TPLF firm. The current regulatory environment is fragmented, lacks economic reasoning, and is often overly restrictive, hindering the benefits that the TPLF market can provide. It also lacks legal coherence, addressing each critique against the TPLF market in isolation, as a stand-alone issue.

The framework we propose aligns the interests of the litigant and the financier through clearly defined roles, fiduciary duties, and balanced control over litigation decisions. It ensures transparency, limits undue influence by funders, and promotes fair litigation outcomes. By redefining TPLF arrangements based on partnership principles, our model improves both the integrity of the judicial process and access to justice. We hope this Article will contribute to a more unified and principled understanding of litigation funding—one that encourages thoughtful regulation grounded in both legal theory and economic reality. More broadly, by clarifying the normative structure of TPLF, we aim to help chart a path toward a more coherent and functional legal system. Courts and state legislatures should therefore evaluate TPLF arrangements through this partnership-based framework, using it as a guiding interpretive lens when assessing the validity, enforceability, and regulation of such agreements.