LITIGATION FINANCE UNDER SCRUTINY: NAVIGATING MANDATORY DISCLOSURE AND RISKS OF FUNDER INFLUENCE

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Though litigation finance is a growing industry, it remains unfamiliar to many within the legal community and largely unregulated in the United States. However, policymakers are increasingly raising concerns about the industry. Part I provides an overview of litigation finance by outlining its current practice and historical development. Part II surveys the current regulatory landscape for litigation financing in the U.S. and examines the key concerns motivating various policymakers, namely the concern for undue funder influence. Through a case study of the Sysco-Burford dispute, Part III illustrates a more nuanced story of the role of litigation financing in legal disputes. Part IV examines the potential drawbacks of broad disclosure requirements for litigation finance, arguing that such mandates may offer limited benefits while imposing costs that could deter legitimate funding and increase litigation complexity. This piece concludes by highlighting the importance of tailoring regulations to address well-defined risks without unnecessarily stifling innovation or limiting access to capital.

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Introduction

Part I of this Column will begin with a brief overview of the practice and history of litigation finance. Part II explores the current regulatory environment for litigation finance in the US. Part III delves into the Sysco-Burford dispute as a case study. Part IV considers the effects of broad disclosure requirements, suggesting that such mandates may provide minimal marginal benefits while creating costs that could deter legitimate funding and add complexity to litigation.

I. Prelude to the World of Litigation Finance

A. The Current Practice

Litigation finance refers to the practice of third-party litigation funding. In litigation finance, litigants contract with financiers to fund their litigation expenses in exchange for providing the third-party some interest in their claims.[1] In practice, litigation finance provides litigants with leverage to pursue legal claims. However, leverage in the context of litigation finance differs from traditional finance. Unlike a traditional loan, litigants are not obligated to repay their financiers if the litigation is unsuccessful. Rather, litigation funding is typically non-recourse—litigants only incur an obligation to share earnings but bear no obligation of repayment if the claim is unsuccessful.[2]

Litigants may pursue litigation financing for reasons other than an inability to fund their legal expenses. For instance, litigation financing can help a company preserve its profit and loss (P&L) for balance sheet purposes.[3] Additionally, litigation funds can provide a company access to working capital for their otherwise illiquid asset: the claim.[4]

Independent of the litigant's motivation for securing financing, litigation financiers receive a right to a portion of the expected value of the litigant's claim.[5] And, in rare cases, the firm may acquire complete ownership of the claim outright.[6]

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[1] U.S. Gov. Accountability Office, GAO-23-105210, *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* 1 (2022).

[2] Burford Capital, *Introduction to Legal Finance* 1, 4 (2023), https://www.burfordcapital.com/media/lq3l3hjd/legal-finance-101-burford-capital.pdf [https://perma.cc/6DF5-J8E4].

[3] A firm's health might be understated if they have substantial legal expenses but are unable to account for the expected value of legal claims as an asset. *Id.* at 2, 16.

[4] *Id.* at 22.

[5] *Id.* at 3.

[6] *See, e.g.*, *id.* at 3 ("A company in bankruptcy sold the right to assert a valuable claim, giving it an immediate cash infusion and relieving it of resources needed to pursue the claim.").

B. The Birth & Evolution

Litigation finance is a relatively new industry, in large part due to the traditional legal doctrines of Maintenance and Champerty. Maintenance prohibits parties from improperly encouraging litigation (*e.g.*, non-parties from funding legal cases), and Champerty prohibits Maintenance as a for-profit enterprise.[7] Together, these doctrines foreclosed the possibility of a third-party litigation financing in many Commonwealth countries.[8] In the mid-20th century, countries like Australia,[9] Canada,[10] and the United Kingdom[11] each took steps to decriminalize Maintenance and Champerty. Notwithstanding these decriminalization efforts, many jurisdictions still prohibited parties from entering into contractual litigation funding arrangements that would be contrary to public policy.[12]

Nonetheless, these liberalization efforts paved the way for a litigation finance market to form. For instance, in 1995, Australia's Parliament created a statutory exception to the rule against Champerty that allowed a trustee overseeing a bankruptcy to secure third-party financing for insolvency litigation.[13] Soon thereafter, a pool of insolvency litigation financiers emerged but eventually began financing cases beyond the realm of insolvency.[14] By 2006, Australia's budding litigation finance industry received a functional greenlight from the High Court of Australia, which formally permitted third-party litigation financing in jurisdictions that had decriminalized Maintenance and Champerty.[15] These developments positioned Australia as an early innovator in the global litigation finance market and laid the groundwork for the emergence of a US market.

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[7] Standing Committee of Attorney's General, *litigation funding in Australia* 1, 4 (2006) https://dcj.nsw.gov.au/documents/about-us/engage-with-us/public-consultations/unsorted/litigationfundingdiscussionpapermay06.pdf [https://perma.cc/NK63-DHSX].

[8] *A Brief History of Litigation Finance*, Harvard Law Sch. Ctr. Legal Profession (2019) https://clp.law.harvard.edu/knowledge-hub/magazine/issues/litigation-finance/a-brief-history-of-litigation-finance/ [https://perma.cc/PZ2Y-7MFD]; *but see* Justice Sarah Derrington, *Litigation Funding: Access and Ethics*, Federal Court of Australia, (2018), https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20181004 [https://perma.cc/K9AL-4BEC] (discussing *Sear v. Lawson*, an 1880 opinion that permitted third-party litigation funding in insolvency proceedings).

[9] *A Brief History of Litigation Finance*, *supra* note 8 ("By the mid-1990s, a handful of Australian states had already done away with Maintenance and Champerty offenses such that they were no longer crimes or torts.").

[10] Derrington, *supra* note 8 (In Canada, "Maintenance and Champerty were removed from the Criminal Code in 1953").

[11] *Id*. ("the *Criminal Law Act* 1967 (UK) abolished criminal and tortious liability for maintenance and champerty.").

[12] *Id*. ("Nevertheless, 14(2) preserved any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.").

[13] The legitimacy of which was clarified by the Federal Court of Australia *Movitor* case. Movitor Pty Ltd (in liq) v Sims, (1996) 64 FCR 380 (Austl.).

[14] *A Brief History of Litigation Finance*, *supra* note 8.

[15] *See* Campbells Cash and Carry Pty. Ltd. v Fostif Pty. Ltd., (2006) 229 CLR 386 (Austl.).

The United States' first commercial litigation financing institution emerged in 2006 with the formation of Credit Suisse's Litigation Risk Strategies group.[16] After Credit Suisse ceased its operations, the group spun off into Parabellum Capital. After twelve years of operation, Parabellum recently raised a $754 million litigation finance fund.[17] The market leader in US litigation finance, Burford Capital, launched its IPO at $130 million in 2009, and now reports a portfolio of over $7 billion in commercial litigation and arbitration assets.[18] Assets under management across US litigation funders exceeded $15 billion in 2023.[19]

But this growth has not occurred without raising the concern of policymakers, judges, and regulators.[20]

II. Exploring US Regulatory Landscape Treatment

A. A Survey of State & Federal Regulation

Though the litigation finance industry has grown considerably in recent years, it remains largely unregulated.[21] Now, several state and federal lawmakers are keen to change that – they plan to regulate the industry through various disclosure mandates. As discussed below, these disclosure mandates range from a conditional disclosure of the existence of a financing agreement (*e.g.*, when the financier is of a foreign country of concern) to an unconditional disclosure of the underlying financing agreement.

In 2018, Wisconsin became the first state to mandate third-party litigation finance disclosures, including disclosure of the underlying financing

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[16] *A Brief History of Litigation Finance*, *supra* note 8, at 5.

[17] Emily Siegel, *Parabellum's New $754 Million Litigation Fund Is Among Largest*, Bloomberg (Jan. 16, 2024), https://news.bloomberglaw.com/business-and-practice/parabellums-new-754-million-litigation-fund-is-among-largest, [https://perma.cc/LDA2-E2F8].

[18] Burford Capital, *Legal finance at 15: Global law firm professionals on the state of the industry* (Oct. 1, 2024), https://www.burfordcapital.com/insights-news-events/insights-research/2024-research-legal-finance-at-15/ [https://perma.cc/V54B-6TGJ].

[19] Sara Merken, *US litigation funding in 'state of flux' as deal commitments dip, says report*, REUTERS (Mar. 27, 2024), https://www.reuters.com/legal/transactional/us-litigation-funding-state-flux-deal-commitments-dip-says-report-2024-03-27, [https://perma.cc/7Z6F-9GVW]; *see also* Westfleet Advisors, *$2.7 Billion of Capital Committed in U.S. Commercial Litigation Finance Industry in 2023*, PRNEWSWIRE (March 27, 2024), https://www.prnewswire.com/news-releases/2-7-billion-of-capital-committed-in-us-commercial-litigation-finance-industry-in-2023--302100047.html, [https://perma.cc/8TP7-ULER].

[20] *See generally* Michael Legg, *The Rise and Regulation of Litigation Funding in Australian Class Actions*, 4 ERASMUS L. REV. 228–34 (2021).

[21] Thibault Denamiel, Matthew Schleich, and William Alan Reinsch, *Is Third-Party Litigation Financing a National Security Problem?*, CSIS (Feb. 23, 2024), https://www.csis.org/analysis/third-party-litigation-financing-national-security-problem#:~:text=Details%20of%20TPLF%20agreements%20are,things%2C%20a%20series%20of%20disclosures [https://perma.cc/UN46-AHP3].

agreement.[22] This summer, Louisiana enacted a law that introduces mandatory disclosure requirements when a third-party financier is from a "foreign country of concern."[23] The law also makes litigation financing agreements discoverable in civil actions and attempts to curb undue influence from third-party litigation financiers.[24]

At the federal level, Congress has considered various litigation finance bills since at least 2018 but has failed to enact substantive legislation.[25] In lieu of congressional action, federal courts have taken up the regulatory mantle. As of 2018, "[s]ix U.S. Courts of Appeals ha[d] local rules which require[d] identifying litigation funders" and "roughly 25% of all U.S. District Courts require[d] disclosure of the identity of litigation funders in a civil case."[26] In 2021, the U.S. District Court for the District of New Jersey amended their local rules to require that all parties in civil litigation make third-party litigation financing disclosures, including the "the nature of the terms and conditions relating to [a funder's] approval [right]."[27] A year later, Chief Judge Connolly of the District of Delaware issued a standing order imposing a similar disclosure mandate, modeled after the New Jersey Rule.[28] Chief Judge Connolly was motivated by a concern for "the abuse of our courts and the lack of transparency as to who the real parties before the Court are [and] about who is making decisions in these types of litigation."[29]

Earlier this month, Congressmen Darrell Issa (CA-48) and Scott Fitzgerald (WI-05) introduced the Litigation Transparency Act of 2024 (H.R. 9922).[30] The Bill would require parties to disclose third-party financing sources and produce the financing agreement to both the court and "each other named party to the civil action."[31] The bill is currently pending review by the House Committee on the Judiciary.[32]

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[22] James D. Russell, et al., *Wisconsin mandates third-party litigation finance disclosure*, Daily J. (Apr. 16, 2018), https://www.skadden.com/-/media/files/publications/2018/04/wisconsinmandatesthirdpartylitigationfinancedisclo.pdf [https://perma.cc/4ZCF-J6QU].

[23] Sara Merken, *Louisiana law places new rules on litigation funders*, Reuters (June 24, 2024), https://www.reuters.com/legal/government/louisiana-law-places-new-rules-litigation-funders-2024-06-24, [https://perma.cc/FE6C-4XX8].

[24] La. S.B. 355 at 9 (2024), (A litigation financier "shall not decide, influence, or direct the party or the party's attorney with respect to the conduct of the underlying civil proceeding or any [related] settlement.").

[25] Litigation Funding Transparency Act of 2018, S.2815, 115th Cong. (2018).

[26] Nimitz Techs. v. CNET Media, Inc., Civ. 21-1247-CFC 7–8 (D. Del. Nov. 30, 2022).

[27] D.N.J. L.R. Civ. P. 7.1.1, *Disclosure of Third Party Litigation Funding* (2021).

[28] District of Delaware, Order dated 04/18/2022, Standing Order Regarding Third-Party Litigation Funding Arrangements; *see* Nimitz Techs., *supra* note 25, at 7.

[29] Nimitz Techs., *supra* note 25, at 2 (quotations omitted).

[30] Press Release, Darrell Issa, Issa Introduces Legislation Reforming Third-Party Financed Civil Litigation (Oct. 7, 2024), https://issa.house.gov/media/press-releases/issa-introduces-legislation-reforming-third-party-financed-civil-litigation [https://perma.cc/7V7H-XU3J].

[31] Litigation Transparency Act of 2024, H.R.9922, 118th Cong. at 2 (2024).

[32] *H.R.9922—Litigation Transparency Act of 2024*, https://www.congress.gov/bill/118th-congress/house-bill/9922 [https://perma.cc/UZ52-RNG8] (last visited Nov. 26, 2024).

B. Underlying Policy Motivations

Litigation finance has raised several concerns among legislators and courts. Although the Maintenance and Champerty-era concerns of courts being abused and overrun by litigation funding remain,[33] the principal concern in the eyes of policymakers today appears more similar to the concern articulated by Chief Judge Connolly: a concern for hidden, undue, or nefarious (or otherwise contrary to public policy) influence of litigation funders on named parties and their counsel.

Some of these concerns raise broader national security considerations. Consider, for instance, PurpleVine IP, a Shenzhen, China-based "global facing IP service provider" that "provide[s] one-stop, full-service patent solutions to [their] clients."[34] PurpleVine has come under scrutiny for its role in funding patent litigation that would support China's technology industry.[35] But PurpleVine is just one piece of a larger story: roughly 30% of U.S. patent disputes now involve an often undisclosed third-party financier.[36] National concerns are only made worse by stories of companies opting to dismiss their cases rather than disclose their funders, as was the case in VLSI's 2019 patent litigation against Intel.[37] Recent reports also revealed that Russian oligarchs have utilized litigation finance to evade sanctions. For instance, A1, a subsidiary of a major Russian financial institution, spent roughly $20 million in New York and London-based bankruptcy proceedings to recover otherwise-sanctioned assets.[38]

Instances such as these have raised concerns about foreign entities using litigation finance to wield influence in US courts. In response, lawmakers introduced the Protecting Our Courts from Foreign Manipulation Act of 2023, which, in addition to imposing disclosure requirements, prohibits third-party

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[33] *See, e.g.*, Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 725 (N.D. Ill. 2014); *but see id.* at 25 (rejecting defendants' argument and noting the "common-law offense of maintenance was abolished long ago by statute"); *see also* Max Baucus, *It's Time for the U.S. to Tackle Patent Trolls*, HARV. BUS. REV. (Sep. 16, 2022) (discussing various issues associated with patent troll litigation), https://hbr.org/2022/09/its-time-for-the-u-s-to-tackle-patent-trolls [https://perma.cc/V7NA-WXU7].

[34] PurpleVine IP, *About Us*, (Dec. 2, 2024, 4:58 PM), https://www.purplevineip.com/en/about.php [https://perma.cc/S3AU-U8QF].

[35] *See, e.g.*, Joseph Matal, *Patent Lawsuits Are a National-Security Threat*, WALL ST. J. (Mar. 20, 2024) https://www.wsj.com/articles/patent-lawsuits-are-a-national-security-threat-secretly-funded-litigation-f3cd5bd4 [https://perma.cc/3HGQ-4LHT].

[36] *Id.*

[37] VLSI, who is owned by Fortress, a hedge-fund with substantial ownership stake held in Abu Dhabi, agreed to a dismissal following Judge Connolly's ordered greater disclosures on the identities of the litigation's fundings. *See id.*

[38] Emily Siegel & John Holland, *Putin's Billionaires Dodge Sanctions by Financing Lawsuits (1)*, BLOOMBERG LAW NEWS, Mar. 28, 2024. https://news.bloomberglaw.com/litigation-finance/putins-billionaires-sidestep-sanctions-by-financing-lawsuits, [https://perma.cc/XC4F-HVQD].

litigation funding by foreign states and sovereign wealth funds.[39] Yet, it seems policymakers' fears about the undue influence of litigation funders extends beyond clearly "nefarious" foreign actors; increasingly, policymakers are concerned about domestic institutional finance firms as well.[40] However, the efficacy of disclosure requirements in the latter context appears less clear given a potential overstatement of undue influence at-large.

III. A Case Study: The Sysco-Burford Dispute

Policymakers offer the Sysco litigation as a paradigmatic example of the need for greater transparency in litigation finance—a tale of a greedy litigation finance firm who indiscriminately struck down reasonable settlement offers from well-meaning litigants.[41] However, the facts of the Sysco-Burford dispute suggest, at the very least, that the story is more complicated.

Earlier this year, a price-fixing dispute between Sysco Corp. and several meat suppliers garnered attention for the role Sysco's litigation financier, Burford Capital, played in Sysco's litigation process. Since 2019, Burford has invested over $140 million to support Sysco's antitrust claims against several chicken, beef, pork, and turkey suppliers ("Defendants").[42] Sysco's original Capital Provision Agreement ("CPA") with Burford stipulated that Burford would provide Sysco with over $140 million in non-recourse litigation financing, collateralized by Sysco's antitrust claims.[43] Under the CPA, Burford was barred from "control[ling] or direct[ing] the conduct of the Claims, or . . . requir[ing] settlement thereof."[44] However, the CPA also prohibited Sysco from assigning away their collateral.[45]

As the litigation progressed, Sysco received significant pressure from its end-customers, who, because of the alleged price-fixing scheme by meat

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[39] Protecting Our Courts from Foreign Manipulation Act of 2023, S.2805, 118th Cong. § 2(c)(d) (2023).

[40] *See generally* Austin Rucker, *Pay to Play or Get Rich Quick: A Look at Litigation Finance in the United States.*, 7 Bus. Entrepreneurship & Tax L. Rev. 332 (2024) (highlighting many sweeping statewide legislations without regard for foreign influence alone).

[41] *See, e.g.*, *ILR Applauds Introduction of Litigation Transparency Act by Rep. Darrell Issa*, U.S. Chamber of Com. Institute for Legal Reform (Oct. 10, 2024), https://instituteforlegalreform.com/blog/ilr-applauds-introduction-of-litigation-transparency-act-by-rep-darrell-issa/ [https://perma.cc/8DVZ-F6E9].

[42] Mike Scarcella, *US judges split over litigation funder Burford's role in Sysco cases*, Reuters, Jun. 4, 2024, https://www.reuters.com/legal/litigation/us-judges-split-over-litigation-funder-burfords-role-sysco-cases-2024-06-04/ [https://perma.cc/CY4V-C9W5]; Mot. to Stay, Sysco Corp. v. Glaz LLC, No. 1:23-cv-01451 (N.D. Ill. Mar. 7, 2023).

[43] Mot. to Stay, *Sysco Corp. v. Glaz LLC*, No. 1:23-cv-01451 (N.D. Ill. Mar. 7, 2023), 2–3.

[44] *Id.* at 3.

[45] *Id.* at 3–4 ("[Sysco] shall not dispose of, transfer, encumber or assign, nor otherwise create, incur, assume, or permit to exist any Adverse Claim with respect to, all or any portion of such Claim (or any interest therein) or any Proceeds thereof (or any right to such Proceeds)," absent written consent from Burford.).

suppliers, had been paying higher prices to Sysco as the intermediary in the supply chain. In turn, by 2021 Sysco had started assigning "billions of dollars of purchase value against suppliers" to their customers without Burford's consent.[46]

Following several breaches of the original CPA by Sysco, the parties executed an amendment to CPA (the "Amended CPA") in March 2022.[47] The Amended CPA placed efforts and obligations on Sysco and substantially increased the portion of litigation claims to be received by Burford.[48] Most notably, the Amended CPA prohibited Sysco from accepting a settlement offer for any of its claim-collateral without Burford's prior consent, while clarifying that Burford could not "mandate" or "unreasonably prevent a settlement."[49] Shortly after executing the Amended CPA, Sysco made Burford aware that they were considering accepting several settlement offers, notwithstanding a lack of consent from Burford.[50] Burford then won an arbitration award preventing Sysco from such settlements, which also resulted in Sysco transferring its claims to a new Burford vehicle, Carina.[51]

The effort to transfer Sysco's claims to Carina was accompanied by an effort to formally substitute Carina as the plaintiff of interest in the Sysco litigation.[52] This effort has been met with strong pushback from Defendants, who argued the substitution would "meaningfully frustrate any future attempts for settlement."[53] This argument has received varying treatment from judges.[54]

IV. Misguided Concerns: Assessing Funder Influence and the Case Against Broad Disclosure

The Chamber of Commerce has offered the Sysco-Burford dispute as evidence to disprove the "myth" that "litigation funders don't exert control over litigation" given that Burford "prevented [Sysco] from accepting reasonable settlements" and "effectively trapp[ed] Sysco in a lawsuit it wished to settle."[55]

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[46] *Id.* at 4.
[47] *Id.*
[48] *Id.*
[49] Mot. to Stay, Sysco Corp. v. Glaz LLC, No. 1:23-cv-01451 (N.D. Ill. Mar. 7, 2023), 4–5.
[50] *Id.*
[51] *Supra* note 41.
[52] *In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2024 WL 1214568, at *1 (N.D. Ill. Mar. 21, 2024).
[53] *Id.* at *2.
[54] *Supra* note 41; *see also In re* Pork Antitrust Litig., No. 18-CV-1776 (JRT/JFD), 2024 WL 511890, at *9 (D. Minn. 2024), *aff'd*, No. CV 18-1776 (JRT/JFD), 2024 WL 2819438 (D. Minn. 2024) (considering the policy implications underlying heightened requirements for antitrust standing).
[55] U.S. Chamber of Com., *Setting the Record Straight on Third-Party Litigation Funding*, (Oct. 15, 2024), https://www.uschamber.com/lawsuits/setting-the-record-straight-on-third-party-litigation-funding, [https://perma.cc/3NZZ-LGCH].

This narrative overstates the risk of undue influence by litigation funders—Burford only gained a control right after Sysco deliberated the breaching of the terms of their original CPA by assigning away claim collateral.[56]

The risk of Burford exerting some undue, nefarious control over Sysco was arguably already mitigated by structural, contractual, and situational factors. Structurally, Burford's fund is not dissimilar from PE or VC funds; they also have limited partners ("LPs") who pledge capital to fund certain types of cases. And, like a PE or VC fund, Burford's LPs do not retain any day-to-day managerial control or influence.[57] Contractually, as previously mentioned, Burford's agreements already prohibited Burford from attempting to control or direct the conduct of Sysco's claims, such that an attempt could constitute a breach. Additionally, Sysco is a sophisticated party with sophisticated counsel who collectively have fiduciary, ethical, and other obligations guiding their action. Considering these protections, it is unclear that mandatory disclosures for firms like Burford present any marginal risk mitigation benefit.

Regulators also appear to be misrepresenting the efficacy of disclosure in the case of domestic institutional finance firms. If the "boogeymen" keeping the regulators up at night are litigation funds like Burford exerting undue influence on parties and counsel, it is possible that disclosure might do more harm than good. Consider the cost of a mandatory disclosure regime that extends to domestic institutional litigation funders. At first glance, one might ask, if Burford is not a nefarious Russian shell company, what is the harm of disclosing its status as a financer? The potential negative externality of a broad mandatory disclosure regime is illustrated by Burford's prior financing to plaintiffs in a dispute arising from the Argentinian government's 2012 seizure of YPF SA, an Argentinian oil company. In that case, the Argentinian government tried to leverage the mere presence of a litigation funder by pursuing costly collateral litigation and attempting to decrease damages owed to plaintiffs.[58] Judge Preska rejected "the Republic's effort to inject Burford Capital into proceedings" and clarified that Burford's involvement does not change the case "brought by plaintiffs against a defendant for its wrongful conduct towards them."[59] Judge Preska then said that "the relevant question is what the Republic owes Plaintiffs to compensate them for the loss of the use of their money," which is "no more or less because of Burford Capital's involvement."[60]

[56] *Supra* note 43.

[57] Or, at least none beyond that which would exist in a venture capital or private equity context as well. *See, e.g.*, Ting Yao, *Exit Pressure in Venture Capital*, PALGRAVE ENCYCLOPEDIA OF PRIVATE EQUITY, Dec. 21, 2023.

[58] Petersen Energia Inversora, S.A.U. v. Argentine Republic¸ 15 Civ. 2739, 14 n.17 (S.D.N.Y. 2023).

[59] *Id.*

[60] *Id.*

Conclusion

How to best weigh the value of increased transparency against these administrability considerations remains an open issue, not just in the US, but in the international arena as well.[61] In its most favorable interpretation, an over-inclusive disclosure regime might disincentivize or detect bad actors that, for instance, conduct their nefarious activities through unassuming shell companies. However, even under those circumstances, proponents of disclosure regimes have not made clear why *in camera* disclosure would be insufficient.[62] Regulators must be careful to tailor policy according to well-defined problems to avoid overly broad strokes that could stifle innovation and limit access to capital. To do so, regulators must exert due care in identifying the scope and nature of the true "control" issue at hand. The misrepresentation of their purportedly paradigmatic case raises concerns that regulators may be off the mark. If the concern is broadly construed as an issue of litigation funder control, might we also need to reconsider class actions, where settlement is, in practice, controlled by funders rather than the dispersed class? To that end, we should all remain mindful of the potential influence of private industry in framing the funder-control issue, and more broadly in shaping the regulatory agenda on litigation finance.

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[61] *See* U.N. Comm'n on Int'l Trade L., *Rep. of Working Group III (Investor-State Dispute Settlement Reform on the work of its Thirty-Ninth Session)*, U.N. Doc. A/CN.9/1044 (Nov. 10, 2020) (report on the debate around proposed third-party funding rules).

[62] The benefit of *in camera* disclosure would be that a court could still assess the potential threat of a litigation funder, but without forcing a party to potentially reveal strategic information to an opposing party. *See, e.g.*, Alec J. Manfre, *The Debate Over Disclosure in Third-Party Litigation Finance: Balancing the Need for Transparency with Efficiency*, 86 Brook. L. Rev. 561, 588–91 (2021).