

Protein, Profits, and Public Policy: Why Intervention by Third-Party Litigation Funders Threatens the American Civil Justice System

Sidney R. Aloisi *

ABSTRACT: Third-party litigation funding, often referred to as TPLF or litigation finance, is an arrangement where a third-party lender provides financial backing to a litigant pursuing a legal claim in exchange for a payout if the case is successful. The litigation finance industry has become increasingly popular as more claimants seek to avoid the high costs of litigation, yet, despite this growth, the United States has failed to implement any formal federal regulations on TPLF. This gap leaves an enormous amount of pressure on states and courts to try and police litigation funding arrangements. Three antitrust cases involving protein distributors and producers highlight an emerging issue in the litigation finance industry where funders are trying to enter a litigation by substituting themselves for the party they are financing. Even if the original party wants to settle, substitution allows funders to continue to pursue the claims in order to seek the highest possible return on their investment. Calling on the medieval doctrines of maintenance and champerty, as well as federal and state public policy considerations, courts are split as to whether or not litigation funders should be permitted to enter into a litigation midway through a suit. This Note argues that litigation funding agreements that contractually permit a funder to have control over a litigation are champertous and thus violate public policy. Further, substitution of litigation funders contravenes the foundational and well-grounded principle of “justice” within the Federal Rules of Civil Procedure and disregards the promotion of obtaining settlements within the American legal system.

* J.D. Candidate, The University of Iowa College of Law, 2026; B.A., The University of Michigan-Ann Arbor, 2021. Thank you to the hardworking *Iowa Law Review* editorial team and student writers for making this publication possible. To my dearly loved and now departed Phoenix, thank you for staying up late with me to write this Note. All views expressed here are my own. Any errors are my own.

INTRODUCTION	1710
I. UNDERSTANDING THE FUNDAMENTALS OF	
LITIGATION FINANCE.....	1714
A. <i>AN OVERVIEW OF THIRD-PARTY LITIGATION FUNDING</i>	1714
1. Litigation Funding in the United States.....	1714
2. The TPLF Glossary	1717
B. <i>MAINTENANCE AND CHAMPERTY</i>	1719
C. <i>LITIGATION FUNDING OVER TIME AND PARTY</i>	
<i>SUBSTITUTION</i>	1721
1. TPLF in Australia and the United Kingdom.....	1721
2. FRCP 25: Substitution of Parties.....	1723
II. SYSCO AND THE PROTEIN ANTITRUST CASES.....	1725
A. <i>THE BROILER CHICKEN CASE</i>	1727
B. <i>THE PORK AND CATTLE AND BEEF CASES</i>	1728
C. <i>THE LITIGATION FUNDING AGREEMENT BETWEEN BURFORD</i>	
<i>AND SYSCO</i>	1729
1. The Initial Sysco–Burford CPA	1729
2. Assignment of Sysco’s Claims	1730
3. Litigation Funders as “Passive” Providers.....	1732
D. <i>NAIL IN THE COFFIN: SYSCO BREACHES THE CONSENT</i>	
<i>PROVISION</i>	1733
E. <i>SPLIT DECISIONS FOR RULE 25(C) MOTIONS</i>	1734
1. Judge Docherty’s Reasoning for Denying	
Substitution Motion	1734
2. Judge Durkin’s Reasoning for Granting	
Substitution Motion	1737
III. LITIGATION FUNDERS SHOULD NOT BE PERMITTED TO	
SUBSTITUTE AS LITIGANTS	1739
A. <i>THE CONSENT PROVISION IN THE CPA IS CHAMPERTOUS AND</i>	
<i>VIOLATES PUBLIC POLICY</i>	1739
B. <i>FORCED LITIGATION VIOLATES THE FEDERAL RULES OF CIVIL</i>	
<i>PROCEDURE AND PUBLIC POLICY</i>	1741
CONCLUSION	1743

INTRODUCTION

Suppose you are a food company that wants to sue your distributor for price gouging, but you would like financial backing to help fund your litigation. To have greater financial security, you identify a third-party litigation funder who agrees to provide capital so that you can litigate your claims. You then

enter into a contract with them and agree that they will receive a percentage of the settlement or final judgment should your claims be successful. Other than financial backing, the funder has no other interest or ties to your case.

Years go by, and the litigation is still pressing on. Your business is interested in reaching a settlement, but the litigation funder disagrees with your decision. They have a lot of money at stake, and they want you to continue to vigorously fight for the highest payout possible. Feeling pressure from the funder, you agree to ask for their consent before reaching any settlements and effectively relinquish a great deal of control over the litigation to them. Later, when a disagreement arises over potential settlements, the funder decides that they want to replace you as the litigant to fight for an even higher settlement—even though you, the injured party, are no longer interested in continuing this fight. The funder's interest is purely financial—should the funder be allowed to replace you as the plaintiff?

If you think this hypothetical is oddly specific, your instinct is correct.¹ Currently pending across multiple states are massive class-action antitrust cases involving some of the largest protein producers and distributors in the world,² with litigation funders backing some of the plaintiffs' claims.³ Third-party litigation funding ("TPLF") has become increasingly popular in the United States as litigants attempt to avoid the increasingly high costs of litigation.⁴ Litigation funders will instead bear a majority of the risks and costs on behalf of their clients.⁵ The funders have no legal interest in a case and, in exchange

1. Although this hypothetical does not address every detail, it generally mirrors the circumstances of three class-action antitrust suits that are discussed within this Note. *See generally In re Broiler Chicken Antitrust Litig.*, No. 16-CV-08637 (N.D. Ill. filed Sept. 2, 2016) (Bloomberg Law); *In re Pork Antitrust Litig.*, No. 21-MD-02998 (D. Minn. filed June 22, 2021) (Bloomberg Law); *In re Cattle & Beef Antitrust Litig.*, No. 22-MD-03031 (D. Minn. filed June 3, 2022) (Bloomberg Law).

2. Several of the defendants are ranked as the top meat and poultry processors in the United States. *See* Fred Wilkinson, *2025 Top 100 Meat and Poultry Processors: Record Meat Sales Fuel Growth*, NAT'L PROVISIONER (May 20, 2025), <https://www.provisioneronline.com/articles/118845-2025-top-100-meat-and-poultry-processors-record-meat-sales-fuel-growth> [https://perma.cc/92Y8-VVVS].

3. The focus of this Note is on Burford Capital and its subsidiary Carina Venture, LLC's funding of claims made by Sysco Corporation in three class-action antitrust suits. Importantly, because litigation funding arrangements are not required to be disclosed publicly, it is difficult to determine the exact number of plaintiffs in these cases that utilize litigation funders.

4. *See* Paul Barrett, *The Business of Litigation Finance Is Booming*, BLOOMBERG (May 30, 2017, 4:00 AM), <https://www.bloomberg.com/news/articles/2017-05-30/the-business-of-litigation-finance-is-booming> (on file with the *Iowa Law Review*).

5. Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 871 (2015) ("[R]epayment [to the funder] is contingent upon the client winning its case.").

for financing the suit, receive an agreed-upon percentage of the final judgment or settlement.⁶

TPLF has both proponents and critics. Proponents argue that TPLF opens new doors for claimants by empowering them to bring meritorious claims against large corporate defendants.⁷ Judge Richard Posner also believes that “[l]itigation finance patches an important hole for businesses with valid claims who lack the funds to hire an attorney.”⁸ Conversely, the U.S. Chamber of Commerce Institute for Legal Reform (“ILR”) has repeatedly scrutinized the practice for, among other reasons, “prioritizing profit over justice.”⁹ In 2009, ILR published a report predicting that litigation funding would cause substantial litigation abuse and “serious ethical concerns,” including the potential for litigation funders to “undercut” plaintiffs’ claims and seek control over a litigation solely to “protect their investment.”¹⁰ In a 2020 follow-up report, the warnings discussed in 2009 “have proved well-grounded”—the litigation funding arrangements that have been released publicly “confirm that the practice [of TPLF] is threatening core ethical principles,” including a lawyer’s obligation to adequately represent class members and their interests within a class action.¹¹ The 2020 report also criticizes the TPLF industry for its claim that the doctrines of maintenance and champerty are no longer applicable since some states have chosen to abandon them.¹² Generally speaking, maintenance prohibits a third party from intermeddling with a suit in which they have no bona fide interest, while champerty, a subset of maintenance, “is financing someone else’s litigation for profit.”¹³ Although it is true that some states are moving away from these doctrines,¹⁴ others still maintain that litigation funders can violate maintenance and champerty when they exert too much control over a litigation.¹⁵

Recently, a new issue relating to litigation funding has surfaced: Should litigation funders be permitted to substitute as a party in a dispute if the

6. *What You Need to Know About Third Party Litigation Funding*, U.S. CHAMBER COM. INST. FOR LEGAL REFORM (June 7, 2024) [hereinafter *TPLF FAQ*], <https://instituteforlegalreform.com/what-you-need-to-know-about-third-party-litigation-funding> [<https://perma.cc/3E9g-CYVJ>].

7. See Joseph J. Stroble & Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, DEF. COUNS. J., Jan. 2020, at 1, 2.

8. Dan Packel, *Posner Casts Lot with Litigation Funding Underdog Legalist*, AM. LAW. (June 20, 2019, 3:40 PM), <https://www.law.com/americanlawyer/2019/06/20/posner-casts-lot-with-litigation-funding-underdog-legalist> (on file with the *Iowa Law Review*).

9. *TPLF FAQ*, *supra* note 6.

10. JOHN BEISNER, JESSICA MILLER & GARY RUBIN, *SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES* 1–2, 7–8 (2009).

11. JOHN H. BEISNER, JESSICA D. MILLER & JORDAN M. SCHWARTZ, *SELLING MORE LAWSUITS, BUYING MORE TROUBLE: THIRD PARTY LITIGATION FUNDING A DECADE LATER* 5, 18 (2020).

12. *Id.* at 19.

13. Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 725 (2014).

14. See Stroble & Welikson, *supra* note 7, at 7.

15. BEISNER ET AL., *supra* note 11, at 37 n.91.

funder disagrees with how the case is being managed? This question has divided both courts and legal scholars,¹⁶ creating murky precedent for future disputes involving substitution motions in cases with TPLF. These contradictory court rulings, on top of the sheer lack of federal regulations governing the TPLF industry,¹⁷ have paved a new way for litigation funders to enter into a lawsuit as a way to bolster their return on investment. This result is troubling when we consider the important notions of fairness and justice within the U.S. legal system, and how substitution of litigation funders for injured parties can implicate these foundational concepts. Currently, the issue of whether a litigation funder can substitute itself for a plaintiff is being litigated at the national stage. More specifically, this is the issue between Sysco Corporation (“Sysco”) and Burford Capital (“Burford”), the litigation funder backing Sysco’s claims in three major antitrust cases.

This Note contends that substituting a third-party litigation funder for an original party in a dispute should not be permitted. Part I of this Note provides a general overview and definition of litigation finance, discusses the industry’s history within the United States and internationally, and introduces the doctrines of maintenance and champerty. Part II dives into the three antitrust cases at issue and explores the litigation financing agreement between Sysco, Burford, and its subsidiary Carina Ventures, LLC (“Carina”) that gave rise to the substitution dispute. Finally, I argue in Part III that the Illinois court should not have allowed the substitution of Carina for Sysco in *In re Broiler Chicken Antitrust Litigation*. Part III further argues that allowing substitution of third-party litigation funders for original parties is champertous, violates the notion of “justice” in the Federal Rules of Civil Procedure (“FRCP”) and the American legal system more generally, and is

16. For contradictory court rulings, which are later discussed in this Note, compare *In re Broiler Chicken Antitrust Litigation*, No. 16-CV-08637 at *6 (N.D. Ill. Mar. 21, 2024) (Bloomberg Law) (order granting substitution of Carina Ventures for Sysco in the lawsuit), with *In re Pork Antitrust Litigation*, No. 21-MD-2998, 2024 WL 511890, at *12 (D. Minn. filed June 22, 2021) (order denying substitution of Burford Capital for Sysco in the lawsuit) (also applying to *In re Cattle & Beef Antitrust Litigation*, No. 22-CV-1750, (D. Minn. 2024)). A number of legal scholars are also contemplating this issue. For example, compare Anthony J. Sebok, *Should the Law Preserve Party Control? Litigation Investment, Insurance Law, and Double Standards*, 56 WM. & MARY L. REV. 833, 836 (2015) (arguing, in part, that the common law has long permitted contractual alienation of litigation control—as evidenced in the insurance context—and that arguments touting TPLF as a “threat” should be met with skepticism), with Maya Steinitz, *Zombie Litigation: Claim Aggregation, Litigant Autonomy and Funders’ Intermeddling*, 110 CORNELL L. REV. (forthcoming 2026) (addressing professional responsibility, public policy, and other concerns with a litigation funder’s ability to control a plaintiff’s case). See also Samir D. Parikh, *The Alchemist’s Inversion*, 110 CORNELL L. REV. (forthcoming 2026) (manuscript at 109) (on file with the *Iowa Law Review*) (coining the term “opaque capital” to describe litigation funders who, having used “unethical or potentially illegal tactics to create [and] enhance . . . low-value” mass torts claims, must then control the timing and terms of settlement to maximize their return). Given the rising interest in this issue—and the rapid pace at which TPLF is evolving in the United States—I imagine more scholarship will be published to address this question in the coming years.

17. TPLF FAQ, *supra* note 6 (“There are no rules governing TPLF investments in litigation.”).

contrary to public policy. Thus, litigation funders should not be permitted to substitute as a litigant, especially since the interest of the funder is purely financial gain.

I. UNDERSTANDING THE FUNDAMENTALS OF LITIGATION FINANCE

This Part outlines several key principles of TPLF. Section I.A provides an overview of the industry, defines important terms, and briefly summarizes the current state of TPLF in the United States. Section I.B then introduces the doctrines of maintenance and champerty, which frame the foundational legal issues surrounding litigation finance. Finally, Section I.C discusses the origins of TPLF in Australia and the United Kingdom and explains how party substitution under the FRCP relates to modern litigation funding.

A. AN OVERVIEW OF THIRD-PARTY LITIGATION FUNDING

TPLF, or simply “litigation funding,” is an arrangement where a litigation funder provides funding to a party in a lawsuit in exchange for an agreed-upon percentage of the final settlement or judgment.¹⁸ This model allows parties, typically plaintiffs, to bring forward disputes without fear of shouldering the financial burden of litigation.¹⁹ It also gives plaintiffs the opportunity to bring forth meritorious claims they would have otherwise settled prematurely “due to the exhaustion of funds.”²⁰ TPLF usually falls into two categories: consumer and commercial. Consumer funding arrangements generally involve a plaintiff seeking monetary support from a funder for expenses related to personal injury claims.²¹ Commercial funding arrangements are between a funder and a corporate entity in a single case or multiple large-scale cases.²² This Note focuses on cases involving *commercial* funding arrangements, specifically.

1. Litigation Funding in the United States

Litigation funding emerged in the United States in the early 2000s and was mainly limited to consumer funding arrangements in personal injury

18. *Id.*

19. *An Overview of How Third-Party Litigation Funders Are Being Addressed by Courts and Policymakers*, BAKER BOTTS (June 3, 2024), <https://www.bakerbotts.com/thought-leadership/publications/2024/june/an-overview-of-how-third-party-litigation-funders-are-being-addressed-by-courts-and-policymakers> [https://perma.cc/2A5Y-6KXK].

20. Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1276 (2011) (discussing justifications and reasons for utilizing litigation funding).

21. U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105210, THIRD-PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA, AND TRENDS 5 (2022), <https://www.gao.gov/assets/gao-23-105210.pdf> [https://perma.cc/2XVS-Y2CZ].

22. *Id.*

cases.²³ In 2006, Credit Suisse Securities (USA) LLC²⁴ formed a litigation risk strategies unit for specialized commercial litigation funding arrangements.²⁵ Following Credit Suisse, more funders began to focus on the U.S. litigation market—Juridica Investments Limited went public in 2007, and Burford followed in 2009.²⁶

Litigation finance has grown over the past decade into an estimated \$15 billion industry globally.²⁷ Burford, “the only publicly traded U.S. litigation finance company,”²⁸ reported its annual revenues to be approximately \$1.087 billion in 2023.²⁹ But despite the massive growth and financial success of commercial litigation funding, “state statutory regulations for TPLF are disjointed . . . and federal regulation is effectively non-existent,”³⁰ generating calls to tighten the reins on TPLF regulations and guidelines.³¹ As it currently stands, the industry is largely regulated through a “patchwork of state statutes and judicial decisions.”³² These variations include, among others,

23. Lake Whillans, *The History and Evolution of Litigation Finance*, ABOVE L. (Jan. 27, 2017, 11:11 AM), <https://abovethelaw.com/2017/01/the-history-and-evolution-of-litigation-finance> [https://perma.cc/9PE2-3D3R].

24. Credit Suisse was acquired by UBS in June 2023. *Creating Sustainable Value*, UBS, <http://www.credit-suisse.com/about-us/en.html> [https://perma.cc/9YEQ-DTNC].

25. Whillans, *supra* note 23.

26. Julie Triedman, *Arms Race: Law Firms and the Litigation Funding Boom*, LAW.COM (Dec. 30, 2015, 5:16 PM), <https://www.law.com/article/almID/1202745121381> (on file with the *Iowa Law Review*).

27. Brett Clements & Elyse Shimada, *Dark Money: Why Courts Should Enforce Disclosure of Third-Party Litigation Funding*, WASH. LEGAL FOUND. (May 17, 2024), <https://www.wlf.org/2024/05/17/publishing/dark-money-why-courts-should-enforce-disclosure-of-third-party-litigation-funding> [https://perma.cc/2FQ2-ZPS2]. Some reports have, however, estimated the industry to be worth more. See Emily R. Siegel, *Insurers Wage ‘Logically Inconsistent’ War on Lawsuit Investors*, BLOOMBERG L. (July 29, 2025, 4:00 AM), <https://news.bloomberglaw.com/business-and-practice/insurers-wage-logically-inconsistent-war-on-lawsuit-investors> (on file with the *Iowa Law Review*) (estimating the litigation finance industry to be worth approximately \$16.1 billion).

28. Sara Merken, *Litigation Funder Burford Eyes Law Firm Investments, AI with Lenkner Hire*, REUTERS (Sept. 16, 2024, 2:07 PM), <https://www.reuters.com/legal/legalindustry/litigation-funder-burford-eyes-law-firm-investments-ai-with-lenkner-hire-2024-09-16> [https://perma.cc/2K7C-SDUR]; *Investor Relations*, BURFORD, <https://investors.burfordcapital.com/overview/default.aspx> [https://perma.cc/X26H-KQU6].

29. Burford Cap. Ltd., Annual Report (Form 10-K) 49 (Mar. 3, 2025). However, litigation funder revenues notably took a dip in 2024. *Id.* (noting that Burford’s annual revenue was \$546 million in 2024); Sara Merken, *U.S. Litigation Funding in ‘State of Flux’ as Deal Commitments Dip, Says Report*, REUTERS (Mar. 27, 2024, 10:28 AM), <https://www.reuters.com/legal/transactional/us-litigation-funding-state-flux-deal-commitments-dip-says-report-2024-03-27> [https://perma.cc/3EJJ-CTM5].

30. Julianna Marandola, Note, *In for a Penny and Out for Profit: A Federal Approach to Consumer Third-Party Litigation Funding*, 64 B.C. L. REV. 1763, 1765 (2023).

31. Merken, *supra* note 29.

32. Austin T. Popp, Note, *Federal Regulation of Third-Party Litigation Finance*, 72 VAND. L. REV. 727, 729 (2019).

differences in rules for disclosing agreements, underwriting, obtaining funding as an individual, and obtaining funding as a corporation.³³

In an effort to create uniformity of litigation funding requirements, Congress has recently made strides toward regulating the industry more stringently. The House Oversight Committee Chairman, James Comer, sent a letter to Chief Justice John Roberts in July 2024 asking for the U.S. Judicial Conference to examine TPLF “and to consider enacting rules requiring disclosures of third-party litigation funding.”³⁴ On October 10, 2024, the Judicial Conference’s Advisory Committee on Civil Rules established a subcommittee to evaluate the necessity of promulgating a rule to require the disclosure of litigation funders in lawsuits.³⁵ At a January 2025 Advisory Committee meeting, the subcommittee stated that they planned to, among other things, “learn how pervasive funding is . . . how it could be defined, and what . . . rulemakers should do about it.”³⁶ In a similar vein, several congressmen introduced the Litigation Transparency Act of 2025, which would require the disclosure of litigation funders in civil lawsuits.³⁷ The Act has received support from a handful of large entities, including Google and Uber,³⁸ and is currently in the initial stages of review before the House Committee on the Judiciary.

Congress has also attempted to tax profits earned through TPLF arrangements. The Senate’s sweeping tax and spending bill—known as the “One Big Beautiful Bill”—initially proposed a tax on litigation funders’ profits at a rate of nearly 41% (which was later revised to 31.8%).³⁹ The proposal ultimately did not make it to the final version of the bill because “[t]he Senate parliamentarian ruled the proposed tax was not compliant with the expedited procedure Republicans [were] using to pass the legislation”⁴⁰ Insurance companies were large proponents of the tax, arguing that litigation

33. *Id.* at 745.

34. Letter from James Comer, Chairman, H. Comm. on Oversight & Accountability, to John Roberts, C.J., U.S. Sup. Ct. (July 12, 2024), <https://oversight.house.gov/wp-content/uploads/2024/07/TPLF-Letter-07122499.pdf> [<https://perma.cc/7K3T-P5LQ>].

35. Nate Raymond, *U.S. Judicial Panel to Examine Litigation Finance Disclosure*, REUTERS (Oct. 10, 2024, 4:41 PM), <https://www.reuters.com/legal/government/us-judicial-panel-examine-litigation-finance-disclosure-2024-10-10> [<https://perma.cc/3C4N-9P3P>].

36. ADVISORY COMM. ON CIV. RULES, AGENDA: MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 26 (2025), <https://www.uscourts.gov/sites/default/files/2025-03/2025-04-civil-rules-committee-agenda-book-final-updated-3.28.25.pdf> [<https://perma.cc/CQQ2-VXUC>].

37. Litigation Transparency Act of 2025, H.R. 1109, 119th Cong. (2025).

38. Press Release, Darrell Issa, Congressman, House of Representatives, Issa, House Colleagues Launch Reform of Third-Party Financed Civil Litigation (Feb. 7, 2025), <https://issa.house.gov/media/press-releases/issa-house-colleagues-launch-reform-third-party-financed-civil-litigation> [<https://perma.cc/KZT5-BYDW>].

39. Roy Strom & Chris Cioffi, *Litigation Finance Levy Cut from Tax Bill by Senate Referee* (1), BLOOMBERG L. (June 30, 2025, 4:41 PM) (on file with the *Iowa Law Review*).

40. *Id.*

funders are “flooding the courts and driving up premiums.”⁴¹ Senator Thom Tillis—who initially proposed the TPLF tax in the One Big Beautiful Bill—also introduced a bill to amend the Internal Revenue Code of 1986 called the “Tackling Predatory Litigation Funding Act.”⁴² The bill would impose a tax on profits earned by litigation funders equal to the highest individual rate, 37%, plus an additional 3.8%.⁴³ It would also bar litigation funders from offsetting their gains “by other ordinary or capital losses, even those generated by other litigation financing arrangements.”⁴⁴ The bill is still pending, but has faced criticism for, among other things, overriding “a number of long-standing income tax principles such as the treatment of partnerships and forward contracts, favorable tax treatment for tax-exempt entities and foreign governments, and the portfolio interest exemption.”⁴⁵

TPLF is an enormous industry that will continue to grow—by 2028, annual investments in TPLF are estimated to reach \$31 billion.⁴⁶ Financial strides aside, as TPLF continues to make its way into more litigations, it is becoming increasingly important to understand the basics of these arrangements and stay informed on the progression of legislative attempts to regulate the industry.

2. The TPLF Glossary

Before proceeding any further, it is necessary to define certain terms that are associated with TPLF. First, as this Note has already mentioned (and as it may be obvious), the funders are typically called “litigation funders.” Litigation funders are not parties in the dispute and have no connection with the suit aside from their financial contributions.⁴⁷ They provide capital to cover litigation and other associated costs “on a non-recourse basis contingent on the outcome of the case.”⁴⁸ “Non-recourse” means that unless the case is decided in favor of the borrower, there is no obligation to repay the funder.⁴⁹ Litigation funders tend to be private institutions that specialize in TPLF, but they can also be publicly traded companies, like Burford, or

41. Siegel, *supra* note 27.

42. Tackling Predatory Litigation Funding Act, S. 1821, 119th Cong. (2025).

43. *Id.*

44. Andi Mandell, Chaim Stern, Boris Ziser & Sarah J. McNeill, *Proposed Bill Would Create New Tax Regime Introducing Uncertainty and Threatening Broad Credit Markets and Beyond*, MCDERMOTT WILL & SCHULTE (June 18, 2025), https://www.srz.com/en/news_and_insights/alerts/proposed-bill-would-create-new-tax-regime-introducing-uncertainty-and-threatening-broad-credit-markets-and-beyond [<https://perma.cc/TJ9N-G7UZ>].

45. *Id.*

46. MICHAEL E. LEITER, JOHN H. BEISNER, JORDAN M. SCHWARTZ & JAMES E. PERRY, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, *A NEW THREAT: THE NATIONAL SECURITY RISK OF THIRD PARTY LITIGATION FUNDING* 4 (2022).

47. *TPLF FAQ*, *supra* note 6.

48. *Id.*

49. *Id.*

hedge funds.⁵⁰ They can receive their capital from several sources, including, but not limited to, “sovereign wealth funds, pension funds and endowments.”⁵¹

Litigation funders commonly invest in multiple cases, which is referred to as “portfolio funding.”⁵² Portfolio funding is a form of financing that is secured against a group of cases that are cross-collateralized.⁵³ Cross-collateralization allows funders to diversify and reduce their risk across multiple litigations, “enabling the funder to reduce its overall cost of capital, especially when compared to single-case financing.”⁵⁴ In this regard, portfolio financing “allows for efficiencies through risk diversification.”⁵⁵

The contract defining the terms of the arrangement between the litigation funder and the borrower is called the “litigation funding agreement.” The agreement typically includes the identity of the litigation funder, how much capital they are willing to invest, how payments will be scheduled and, importantly, “whether the funder may exercise any strategic control over the litigation.”⁵⁶ Notably, these funding agreements are not required to be disclosed except in a limited number of jurisdictions that have implemented TPLF disclosure requirements.⁵⁷ For example, the Northern District of California requires disclosure from

any persons, associations of persons, firms, partnerships, corporations . . . or any other entities, other than the parties themselves, known by the party to have either: (i) a financial interest of any kind in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.⁵⁸

Similarly, in 2022, Chief Judge Colm F. Connolly of the U.S. District Court for the District of Delaware issued a standing order requiring parties to

50. *Id.*

51. *Id.*

52. *Id.*

53. Peter Petyt, *Insights on Portfolio Funding for Law Firms*, LEGAL FUNDING J. (Jan. 10, 2024), <https://legalfundingjournal.com/perspectives/insights-on-portfolio-funding-for-law-firms> [https://perma.cc/M3N6-78AX].

54. *Id.*

55. Liz Bigham & Suzanne Grosso, *How Does Portfolio Finance Work?*, BURFORD (Nov. 30, 2023), <https://www.burfordcapital.com/insights-news-events/insights-research/video-portfolio-finance> [https://perma.cc/5HZ9-2J3D].

56. TPLF FAQ, *supra* note 6.

57. See WIS. STAT. ANN. § 804.01(2)(bg) (West Supp. 2024) (“[A] party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.”); W. VA. CODE ANN. §46A-6N-5 (LexisNexis 2023) (discussing both disclosure and litigation funding agreement requirements).

58. N.D. CAL. CIV. LOC. R. 3-15, https://cand.uscourts.gov/rules-forms-fees/local-rules/civil-local-rules#_Toc210374855 [https://perma.cc/LNU3-5MSP].

disclose litigation funding agreements and allow parties to seek additional discovery of the terms of the agreement.⁵⁹ Without disclosure requirements, it is virtually impossible to know if there is TPLF in a case.

B. MAINTENANCE AND CHAMPERTY

Maintenance and champerty are medieval doctrines that underlie some of the issues with the litigation funding industry.⁶⁰ Maintenance prohibits a third party “who has no bona fide interest in the case” from “meddling in someone else’s litigation.”⁶¹ Champerty, a subset of maintenance, is “[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant’s claim as consideration for receiving part of any judgment proceeds.”⁶² Maintenance and champerty were created to preclude “frivolous litigation.”⁶³

Globally, some foreign jurisdictions have decided to abolish champerty. Australia and the United Kingdom are key players in this movement, “tak[ing] progressive strides . . . to loosen . . . champerty restrictions and to develop markets for third-party funding.”⁶⁴ The rising prominence of TPLF in Australia and the United Kingdom largely “hinge[s] on how jurisdictions in these two countries altered the effects of laws and regulations relating to [m]aintenance and [c]hamperty.”⁶⁵ A handful of Australian states in the 1990s eliminated champerty offenses,⁶⁶ and the United Kingdom enacted the Criminal Law Act of 1967 which abolished maintenance and champerty as crimes.⁶⁷ English courts acknowledged the antiquity of champerty laws and began to evolve with growing changes to public policy.⁶⁸

59. C.J. COLM F. CONNOLLY, D. DEL., *STANDING ORDER REGARDING THIRD-PARTY LITIGATION FUNDING ARRANGEMENTS* (Apr. 18, 2022), <https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf> [https://perma.cc/B7MW-G73D].

60. Steinitz, *supra* note 20, at 1286–91 (“The primary barrier [to TPLF] is the doctrine of maintenance and champerty.”). See generally Anthony J. Sebok, *What Do We Talk About When We Talk About Control?*, 82 FORDHAM L. REV. 2939 (2014) (discussing the intersection of TPLF and champerty).

61. *Maintenance*, BLACK’S LAW DICTIONARY (12th ed. 2024).

62. *Champerty*, BLACK’S LAW DICTIONARY (12th ed. 2024).

63. Jarrett Lewis, *Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 GEO. J. LEGAL ETHICS 687, 690 (2020) (discussing the doctrines of maintenance and champerty as a former justification for precluding litigation funding).

64. Steinitz, *supra* note 20, at 1278.

65. *A Brief History of Litigation Finance*, HARV. L. SCH. CTR. ON LEGAL PRO. (Sept./Oct. 2019), <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/litigation-finance/a-brief-history-of-litigation-finance> [https://perma.cc/XF6S-GZWU].

66. Will Atfield & Greg Williams, *The Rise and Minor Fall of Litigation Funding in Australia*, DEF. COUNS. J., Apr. 2020, at 1, 3.

67. Criminal Law Act, 1967, c. 58, § 14 (U.K.).

68. *See R (Factortame Ltd.) v. Sec’y of State for Transp.* [2002] EWCA (Civ) 932 [62] (Eng.).

Domestically, some states also believe the doctrines are antiquated and have elected to eliminate maintenance and champerty laws, including Massachusetts and South Carolina. In *Saladini v. Righellis*, the Massachusetts Supreme Judicial Court stated that the champerty doctrine is “no longer . . . needed to protect against the evils once feared,” including “financial overreaching by a party of superior bargaining position.”⁶⁹ Similarly, in *Osprey, Inc. v. Cabana Ltd. Partnership*, the Supreme Court of South Carolina “abolish[ed] champerty as a defense because [the court] believe[s] it no longer is required to prevent the evils traditionally associated with the doctrine as it developed in medieval times.”⁷⁰

Although some states have abolished these doctrines, other common law states still utilize them—with some defending the laws more zealously than others. For example, in *Maslowski v. Prospect Funding Partners LLC*, the Minnesota Court of Appeals upheld the common law rule against champerty, defending the doctrine as discouraging “intrusion [in litigation] for the purpose of mere speculation in the troubles of others.”⁷¹ Similarly, in *Johnson v. Wright*, the Minnesota Court of Appeals stated that “an agreement in which [a party] had no interest otherwise, and when he is in no way related to the party he aids, is champertous and void as against public policy.”⁷² Delaware also maintains traditional champerty restrictions. In *Hall v. State*, the Delaware Superior Court stated that “[i]t is the duty of the court to dismiss a case in which the evidence discloses that the assignment of the cause of action sued upon was tainted with champerty.”⁷³ Additionally, in *Wilson v. Harris*, the Alabama Court of Civil Appeals struck down a litigation funding agreement after finding it, in part, to be “opposed to the public interest because it condones speculation in litigation, makes sport of the judicial process, and . . . [is] closely akin to champerty.”⁷⁴

Other states that still uphold maintenance and champerty prohibitions have taken less restrictive views. For instance, in New York, where champerty remains illegal,⁷⁵ no court in the state has found traditional TPLF arrangements to be champertous.⁷⁶ This is largely due to the safe harbor provision that

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

70. *Osprey, Inc. v. Cabana Ltd. P'ship*, 532 S.E.2d 269, 279 (S.C. 2000).

71. *Maslowski v. Prospect Funding Partners LLC*, 890 N.W.2d 756, 763 (Minn. Ct. App. 2017) (quoting *Hackett v. Hammel*, 241 N.W. 68, 69 (Minn. 1932)).

72. *Johnson v. Wright*, 682 N.W.2d 671, 678 (Minn. Ct. App. 2004) (citing *Hackett*, 241 N.W. at 69).

73. *Hall v. State*, 655 A.2d 827, 830 (Del. Super. Ct. 1994); see also *Hannigan v. Italo Petroleum Corp. of Am.*, 178 A. 589, 591 (Del. Super. Ct. 1935) (“[O]ur courts have held that agreements of [champertous] character are necessarily absolutely void . . .”).

74. *Wilson v. Harris*, 688 So. 2d 265, 270 (Ala. Civ. App. 1996).

75. See N.Y. JUD. LAW § 489(1) (Consol. Supp. 2023).

76. DAVID G. LISTON, ALEX G. PATCHEN & GINA K. KIM, LITIGATION FUNDING: USA - NEW YORK 6 (Jonathan Barnes & Steven Friel eds., 2021). The “traditional” TPLF arrangement is the one discussed in the introduction and Section I.A of this Note, where “the third-party litigation

New York created, exempting any transaction in excess of \$500,000 from the prohibition against champerty.⁷⁷ This safe harbor provision “serve[s] to protect just about any litigation funding arrangement from being prohibited [in New York] as champerty.”⁷⁸

Although some states have limited or abolished maintenance and champerty, they remain important considerations for the TPLF industry. Because the application varies across jurisdictions, funders have to navigate a patchwork of rules, as litigation funding agreements that are enforceable in one state may be void in another. Indeed, their continued enforcement in certain states means that litigation funders risk facing legal challenges if they fail to account for these doctrines. In this way, maintenance and champerty seem to function less as absolute bars to TPLF and instead serve as guardrails that influence how these financing agreements are structured.

C. LITIGATION FUNDING OVER TIME AND PARTY SUBSTITUTION

Even though litigation funding is a relatively new industry in the United States, it has existed internationally for centuries. In fact, there is evidence suggesting that litigation funding dates back to ancient Greece and Rome where funders were motivated to be involved in suits for sociopolitical advantages rather than financial gain.⁷⁹ But even though TPLF has been around for quite some time, the issue of litigation funders attempting to substitute themselves as a party in a dispute is new.

1. TPLF in Australia and the United Kingdom

Rather than tracing TPLF’s origins back to ancient times, a more “useful entry point[.]” for understanding the development of modern litigation finance is to discuss its emergence in Australia and the United Kingdom.⁸⁰ As previously discussed in Section I.B, Australia and the United Kingdom have moved toward limiting the doctrines of maintenance and champerty to allow for more TPLF arrangements.

Australia historically prohibited TPLF because it believed it would create a more hostile and frivolous litigation culture,⁸¹ but these concerns

funder makes a non-recourse loan to the holder of a claim to cover legal fees or costs in exchange for a portion of the proceeds (whether through court action or settlement) arising from the holder’s enforcement of its claim.” *Id.* at 5.

77. N.Y. JUD. LAW § 489(2) (Consol. Supp. 2023).

78. LISTON ET AL., *supra* note 76, at 6.

79. Gian Marco Solas, *Third Party Litigation Funding: A Comparative Legal and Economic Analysis and the European Perspective* 41 (Jan. 1, 2017) (Ph.D. dissertation, University of Cagliari and Maastricht University), <https://cris.maastrichtuniversity.nl/ws/portalfiles/portal/23667739/c5816.pdf> [<https://perma.cc/GSG7-BVA5>].

80. *A Brief History of Litigation Finance*, *supra* note 65.

81. See Sarah C. Derrington, President, Australian L. Reform Comm’n, Australian Academy of Law Lecture: Litigation Funding: Access and Ethics (Oct. 4, 2018), <https://www.fedcourt.gov.au>.

were eventually rebutted—class-action filings grew steadily rather than exponentially,⁸² and public policy began to shift toward acceptance of third-party funding for entities with “a legitimate commercial interest in the outcome.”⁸³ Australian bankruptcy courts initially permitted litigation funding as a means to increase capital for insolvency cases,⁸⁴ but the arrangement eventually expanded to securities and antitrust actions.⁸⁵ Australian legislatures also recognized that TPLF would give a layperson greater access to justice and started to “relax[] champerty restrictions through legislative action.”⁸⁶

A foundational decision in Australia’s litigation funding movement was *Campbells Cash & Carry Pty Ltd. v. Fostif Pty Ltd.*⁸⁷ In *Fostif*, a litigation funder filed a representative action⁸⁸ to recover \$100 million in licensing fees from several wholesale tobacco companies on behalf of small tobacco retailers.⁸⁹ The litigation funder, a small accounting firm in Sydney, developed the claim, actively recruited the retailers to join as plaintiffs, and, under the litigation funding agreement, contracted to receive one-third of the awarded judgment.⁹⁰ The defendants argued that the recruitment of plaintiffs constituted “officious intermeddling” in a lawsuit,⁹¹ which is champertous and therefore impermissible.⁹² The High Court, however, disagreed, finding that the litigation funding arrangement was neither contrary to public policy nor an abuse of process.⁹³ *Fostif* thus demonstrates the Australian court’s acceptance of a funder having broad control over a litigation.⁹⁴

The United Kingdom followed swiftly behind Australia in 2005 with *Arkin v. Borchard Lines Ltd.*,⁹⁵ which fundamentally changed the legal landscape for the litigation funding industry. The English Court of Appeal held that,

ov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20181004 [https://perma.cc/L9AY-KUDH].

82. *Id.*

83. CIV. JUST. COUNCIL, IMPROVED ACCESS TO JUSTICE – FUNDING OPTIONS AND PROPORTIONATE COSTS 54 (2007), https://www.harbourlitigationfunding.com/wp-content/uploads/2015/08/cjc_future_funding_of_litigation_paper2007.pdf [https://perma.cc/V47X-FW4X].

84. Steinitz, *supra* note 20, at 1279.

85. Michael Legg, Edmond Park, Nicholas Turner & Louisa Travers, *The Rise and Regulation of Litigation Funding in Australia*, 38 N. KY. L. REV. 625, 628 (2011) (discussing the evolution of claims utilizing TPLF in Australia).

86. Steinitz, *supra* note 20, at 1279.

87. *See generally* *Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd.* (2006) 229 CLR 386 (Austl.).

88. A “representative” action in Australia is equivalent to a class action in the United States. *See Class Actions (Representative Proceedings) in the Federal Court*, FED. CT. AUSTL., <https://www.fedcourrt.gov.au/law-and-practice/class-actions> [https://perma.cc/5LEE-2K7C].

89. *Fostif*, 229 CLR ¶¶ 23, 275.

90. *See id.* ¶¶ 25–26, 117.

91. *Id.* ¶ 87.

92. *Id.* ¶ 126.

93. *Id.* ¶ 88.

94. Steinitz, *supra* note 20, at 1279.

95. *See generally* *Arkin v. Borchard Lines Ltd* [2005] EWCA (Civ) 655 (Eng.).

although TPLF is not against public policy, a litigation funder is *not* permitted to control a litigation.⁹⁶ The majority wrote:

Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable. Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation.⁹⁷

Arkin also created what is referred to as the “Arkin cap,” which limits a commercial litigation funder’s liability for adverse costs to the amount of capital they invested in the claim.⁹⁸ However, a court decision in 2020 clarified that the “Arkin cap” is discretionary rather than binding,⁹⁹ prompting litigation funders to perhaps think more critically about the amount they invest.

The *Fostif* and *Arkin* holdings seem at odds with who ultimately controls the litigation: the claimant or the litigation funder? On one hand, *Fostif* seems to suggest that funders have broad discretionary power over a case, particularly because courts are hesitant to involve themselves with business dealings between parties of “full age and capacity.”¹⁰⁰ But on the other hand, *Arkin* suggests that the claimant, not the litigation funder, should ultimately control the litigation. These cases do not provide a clear international consensus on the level of control a litigation funder has over a dispute, leaving limited guidance for other countries facing TPLF challenges to follow.

2. FRCP 25: Substitution of Parties

The Federal Rules of Civil Procedure, which govern civil proceedings within the United States, assert in relevant part that the rules “should be construed, administered, and employed by the court and the parties to secure the *just* . . . determination of every action and proceeding.”¹⁰¹ So where does litigation funding fit into this? Some legal scholars have argued that the litigation funding arrangement contributes to the notion of a “just” litigation by giving parties greater access to civil legal services.¹⁰² Other scholars, in

96. *Id.* [40].

97. *Id.*

98. *See id.* [38]. *See generally* ‘Arkin Cap’: Update on Commercial Litigation Funding, EVERSLEDs SUTHERLAND (Jan. 6, 2022), <https://www.eversheds-sutherland.com/en/global/insights/arkin-cap-update-on-commercial-litigation-funding> [<https://perma.cc/78RV-D8L7>] (describing the *Arkin* decision as an approach rather than a cap).

99. *ChapelGate Credit Opportunity Master Fund Ltd. v. Money & Ors* [2020] EWCA (Civ) 246, [38] (Eng.) (“Judges . . . retain a discretion and, depending on the facts, may consider it appropriate to take into account matters other than the extent of the funder’s funding and not to limit the funder’s liability to the amount of that funding.”).

100. *Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd.* (2006) 229 CLR 386, ¶ 92 (Austl.).

101. FED. R. CIV. P. 1 (emphasis added).

102. Lewis, *supra* note 63, at 688–89.

contrast, have questioned how litigation funding impacts the parties' ability to participate in legal processes such as discovery, which greatly contributes to the overall fairness and efficacy of a litigation.¹⁰³ To achieve a just litigation, it is thus unclear if litigation funding helps or hinders this goal. A rule that has not been discussed in depth as it relates to litigation funding is FRCP 25, which sets out the guidelines for substituting a party in a dispute.¹⁰⁴

Rule 25 may be "amongst the most obscure" in the FRCP, as it has rarely been addressed by courts.¹⁰⁵ Rule 25 governs the substitution of parties under circumstances relating to death, incompetency, and transfer of interest.¹⁰⁶ Whenever any one of these circumstances occurs in the post-filing stage, Rule 25 may allow for substitution and enable the litigation to proceed.

Rule 25(c) is relevant to litigation funding because it addresses the transfer of an interest in a dispute.¹⁰⁷ The rule reads that "if an interest [in the case] is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party."¹⁰⁸ Typically, substitution under Rule 25(c) occurs when a litigant assigns their rights to a third party,¹⁰⁹ but it has also been used when businesses merge with other entities, or when they dissolve into a single legal entity.¹¹⁰

The applicability of Rule 25(c) to litigation funding is at issue in three class-action antitrust cases: *In re Broiler Chicken*,¹¹¹ *In re Pork*,¹¹² and *In re Cattle and Beef*,¹¹³ which are collectively referred to in this Note as the "Protein Antitrust Cases." Burford and its subsidiary, Carina, are litigation funders involved in these cases, and Sysco is one of the original parties that utilizes Burford and

103. Justin Boes, *Lawyers, Funds, & Money: The Legality of Third-Party Litigation Funding in the United States*, 49 RUTGERS L. REC. 118, 128–31 (2022) (using case studies to discuss litigation funding in the context of discovery); see also Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 68 (2004) (arguing that disclosure requirements can add protection for parties using TPLF).

104. FED. R. CIV. P. 25.

105. Shaun P. Martin, *Substitution*, 73 TENN. L. REV. 545, 545 (2006) (discussing FRCP 25 and its limited appearance in litigation).

106. FED. R. CIV. P. 25.

107. *Id.*

108. *Id.*

109. See, e.g., *Fischer Bros. Aviation, Inc. v. NWA, Inc.*, 117 F.R.D. 144, 147 (D. Minn. 1987) (allowing former stockholders of the dissolved corporation to substitute for the original plaintiff under Rule 25(c)).

110. See, e.g., *Hirsch v. Bruchhausen*, 284 F.2d 783, 786 (2d Cir. 1960); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 13 (N.D. Ga. 1973).

111. *In re Broiler Chicken Antitrust Litig.*, No. 16-CV-08637 (N.D. Ill. filed Sept. 2, 2016) (Bloomberg Law).

112. *In re Pork Antitrust Litig.*, No. 21-MD-02998 (D. Minn. filed June 22, 2021) (Bloomberg Law).

113. *In re Cattle & Beef Antitrust Litig.*, No. 22-MD-03031 (D. Minn. filed June 3, 2022) (Bloomberg Law).

Carina to financially back its claims. Part II will go into greater detail, but in short, the funders argue that Rule 25(c)—in addition to their litigation funding agreements with Sysco—allows them to become a party in the litigation. If permitted, the funders can try and reach a judgment that is financially more advantageous and acceptable to them compared to settlements that Sysco may have tried to pursue on its own, which went against their funding agreement.

The judge presiding over *Broiler Chicken* permitted Burford to step in and substitute as the plaintiff, whereas the presiding judge over *Pork and Cattle and Beef* denied the motion for substitution.¹¹⁴ These contradictory rulings, in combination with the lack of guidance and federal regulations for TPLF, create poor precedent as “to what extent litigants should be able to contract away litigation and settlement autonomy in exchange for funding.”¹¹⁵

II. SYSCO AND THE PROTEIN ANTITRUST CASES

Whether a litigation funder can use substitution under Rule 25(c) to exert control over a litigation is currently being decided in the Protein Antitrust Cases, which collectively involve some of the largest producers and manufacturers of meat in the United States. Sysco—an American multinational corporation involved in the distribution and marketing of food and non-food products¹¹⁶—is one of the plaintiffs in the Protein Antitrust Cases.¹¹⁷ The company alleges that producers in the protein industry have engaged in illegal price-fixing in violation of the Sherman Act, which is the primary source of competition law in the United States.¹¹⁸ All three of the Protein Antitrust Cases involve Rule 25(c) motions and discuss the implications (or in *Broiler Chicken*, the benefits) of permitting funders to substitute the litigants they are funding.

The Sherman Act, codified in 15 U.S.C. §§ 1–7, is enforced by the U.S. Department of Justice and is both a civil and criminal statute.¹¹⁹ The Act

114. See sources cited *supra* note 16.

115. Anaid Reyes-Kipp, Jeremy Heep, Matthew H. Adler, Victoria Alvarez & Savannah Billingham-Hemming, *Minnesota Court Denies Substitution Motion: Implications for Litigation Funders*, TROUTMAN PEPPER LOCKE (Mar. 6, 2024), <https://www.troutman.com/insights/minnesota-court-denies-substitution-motion-implications-for-litigation-funders> [<https://perma.cc/5AN2-NXR7>].

116. *The Sysco Story*, SYSCO, <https://www.sysco.com/about/company-profile/the-sysco-story> [<https://perma.cc/RV6X-5R5Q>]. Sysco's revenues totaled \$81.37 billion at the end of the fiscal year on June 28, 2025. *Sysco Corporation (SY)*, STOCK ANALYSIS, <https://stockanalysis.com/stocks/syy/revenue> [<https://perma.cc/S7RS-K9P3>].

117. Motion for Reassignment Based on Relatedness at 3–4, *In re Broiler Chicken Antitrust Litig.*, No. 16-CV-08637 (N.D. Ill. Jan. 31, 2018) (Bloomberg Law); Conditional Transfer Order at 2, *In re Cattle & Beef Antitrust Litig.*, No. 22-MD-03031 (D. Minn. July 11, 2022) (Bloomberg Law); Transfer Order at 3, *Sysco Corp. v. Agri Stats, Inc.*, No. 21-CV-01374 (D. Minn. June 10, 2021) (Bloomberg Law).

118. 15 U.S.C. §§ 1–7 (2018).

119. See ANTITRUST DIV., U.S. DEP'T OF JUST., PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR 1 (2021), <https://www.justice.gov/dg/pages/attachments/2016/01/05/211578.pdf> [<https://perma.cc/9DG9-5BKG>].

prohibits individuals from creating or entering into agreements with “competitors to fix prices [or wages], rig bids, or engage in other anticompetitive activity.”¹²⁰ Section 1 of the Act prohibits any “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce” that unreasonably restricts competition.¹²¹ Section 2 of the Sherman Act makes it illegal “to monopolize, conspire to monopolize, or attempt to monopolize a market for products or services.”¹²² An unlawful monopoly arises when a single company holds market power over a product or service, and that power is gained or preserved not through fair competition, but by restricting rivals through anticompetitive practices.¹²³ Pertinent to the Protein Antitrust Cases is section 1 of the Sherman Act, where the plaintiffs in these cases allege that protein producers and meat packers have engaged in unlawful price-fixing practices.

To help fund Sysco’s claims, Burford offered to provide Sysco with \$140 million to pursue antitrust cases against the defendant suppliers.¹²⁴ The funding from Burford would help Sysco to have both greater financial ability to litigate its claims and mitigate the risks associated with litigation.¹²⁵ William Kovacic, a former Federal Trade Commission chair, noted that antitrust cases can be particularly expensive because parties may wait years to see a return on their investment.¹²⁶ As a result, entities often turn to litigation financing to manage the costs and risks of these lengthy proceedings.¹²⁷

This Part examines the Protein Antitrust Cases more closely in Sections II.A and B. Section II.C then analyzes the litigation funding agreement between Burford and Sysco, and Sysco’s subsequent breach of that agreement. Lastly, Section II.D discusses the central issue of this Note: split rulings regarding Sysco’s Rule 25(c) motions.

120. *Id.*

121. 15 U.S.C. § 1.

122. *The Antitrust Laws*, ANTITRUST DIV., U.S. DEP’T JUST. (Dec. 20, 2023), <https://www.justice.gov/atr/antitrust-laws-and-you> [<https://perma.cc/Y3Q4-7BVU>]; see 15 U.S.C. § 2.

123. *The Antitrust Laws*, *supra* note 122.

124. Emily R. Siegel & Katie Arcieri, *Judge’s Order Deals Blow to Sysco, Burford Capital in Pork Suits*, BLOOMBERG L. (Feb. 14, 2024, 4:00 AM), <https://news.bloomberglaw.com/business-and-practice/judges-order-deals-blow-to-sysco-burford-capital-in-pork-suits> (on file with the *Iowa Law Review*).

125. Even though companies like Sysco have a great deal of wealth, companies will still use TPLF to help mitigate the risks and high costs associated with litigation. See Giugi Carminati, *Litigation Finance: A Modern Financial Tool for Corporate Counsel*, AM. BAR ASS’N (Dec. 12, 2022), https://www.americanbar.org/groups/business_law/resources/business-law-today/2022-december/a-modern-financial-tool-for-corporate-counsel [<https://perma.cc/4ERM-WFJ2>] (“With litigation finance, however, businesses can lift the financial burden of litigation, reduce financial risk, build a stronger case, and achieve fairer legal outcomes in court.”).

126. Siegel & Arcieri, *supra* note 124 (“[A]ntitrust claims are a very common area for financing, says Rebecca Berrebi, a litigation finance broker.”).

127. *Id.*

A. THE BROILER CHICKEN CASE

In 2016, Maplevalle Farms, a food services provider,¹²⁸ filed a class action on behalf of itself and other food service distributors against several poultry producers alleging violations of section 1 of the Sherman Act by conspiring to fix the price of broiler chickens.¹²⁹ The defendants in *Broiler Chicken* altogether control around ninety percent of the wholesale broiler market.¹³⁰ The complaint alleged that “broiler chicken producers coordinated their efforts to artificially reduce the supply of broiler chickens for sale in the United States, knowing that those supply reductions would increase prices.”¹³¹ One of the law firms representing the plaintiffs specifically alleged that “[d]efendants coordinated their supply reductions by sharing confidential production information with one another, closing plants, exporting hatching eggs, and destroying their breeder hens. As a result, . . . broiler chicken prices have increased nearly 50%.”¹³²

The complaint further alleged that the defendants manipulated broiler chicken pricing “by coordinating and limiting production and exchang[ing] detailed information about prices, capacity and sales volume through data compiler Agri Stats Inc.,” who is also named as a defendant in *Broiler Chicken* and *Pork*.¹³³ Agri Stats allegedly provided reports to the defendants that contained confidential production information and competitive pricing schemes.¹³⁴ The plaintiffs contend that the data “is sufficiently detailed to [allow defendant companies to] determine producer-level data on production and cost, allowing the companies to share confidential information.”¹³⁵

Since its initial filing in 2016, the *Broiler Chicken* case has seemingly gone in a million directions. In December 2021, the court approved “settlements totaling \$181 million with six of the . . . defendants, including Tyson Foods, Fieldale Farms, Peco Foods, George’s Inc., Pilgrim’s Price Corp. and Mar-Jac.”¹³⁶ Later, numerous suits were consolidated to the Northern District of

128. *About Our Family at Maplevalle Farms Inc.*, MAPLEVALE FARMS, <https://www.maplevallefarms.com> [https://perma.cc/Q8A5-KZW6].

129. Eric Kroh, *Poultry Producers Hit with Chicken Price Antitrust Suit*, LAW360 (Sept. 2, 2016, 5:13 PM), <https://www.law360.com/articles/836204> (on file with the *Iowa Law Review*).

130. Class Action Complaint at 2, *In re Broiler Chicken Antitrust Litig.*, No. 16-CV-08637 (N.D. Ill. Sept. 2, 2016) (Bloomberg Law). See *id.* at 1 n.1 for a definition of “broilers” to avoid a chicken definition debacle similar to *Frugaliment Importing Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).

131. *Broiler Chicken Antitrust Litigation*, LOCKRIDGE GRINDAL NAUEN PLLP (July 20, 2021), <https://www.locklaw.com/litigations/broiler-chicken-antitrust-litigation> [https://perma.cc/GNQ2-NP6T]; Class Action Complaint, *supra* note 130, at 33.

132. *Broiler Chicken Antitrust Litigation*, *supra* note 131.

133. Kroh, *supra* note 129.

134. *Current Cases: In re Broiler Chicken Antitrust Litigation*, COHEN MILSTEIN, <https://www.cohemilstein.com/case-study/re-broiler-chicken-antitrust-litigation> [https://perma.cc/6YTR-96YJ].

135. Kroh, *supra* note 129.

136. *Current Cases: In re Broiler Chicken Antitrust Litigation*, *supra* note 134.

Illinois before Judge Thomas M. Durkin, who divided the *Broiler Chicken* class of plaintiffs into three groups: “direct purchasers (mostly large companies who buy from chicken producers directly), commercial and institutional indirect purchaser[s] (who buy from middlemen and sell to consumers, like independent stores and restaurants), and end-user consumers.”¹³⁷ In May 2022, “the [c]ourt granted class certification to the . . . direct purchasers, . . . [commercial and institutional] indirect purchasers and end-user consumers.”¹³⁸ The case is still pending, but the classes have either reached settlements or are in the later stages of negotiations.¹³⁹

B. THE PORK AND CATTLE AND BEEF CASES

The plaintiffs in the *Pork* antitrust suit filed their initial complaint on June 28, 2018, in the U.S. District Court for the District of Minnesota.¹⁴⁰ Their complaint alleged that the defendants—Agri Stats, Clemens Food Group, Hormel, Indiana Packers, JBS USA, Seaboard Foods, Smithfield Foods, Triumph Foods, and Tyson Foods—“entered into a conspiracy . . . to fix, raise, maintain and stabilize the price of pork” in violation of section 1 of the Sherman Act.¹⁴¹ Sysco initially filed an individual suit against the defendant pork producers in March 2021, but transferred and consolidated its action to the District of Minnesota to join the *Pork* multidistrict litigation (“MDL”) against the defendants later that year.¹⁴²

In June 2022, Sysco also filed suit in the Southern District of Texas against beef producers—including Cargill, Cargill Meat Solutions Corporation, JBS S.A., JBS USA, Swift Beef Company, JBS Packerland, National Beef Packing Company, Tyson Foods, and Tyson Fresh Meats—for allegedly “conspiring to limit the supply, and fix the prices, of beef sold to [Sysco] in the U.S. wholesale market” in violation of section 1 of the Sherman Act.¹⁴³ Sysco transferred the case to the District of Minnesota on July 12, 2022, and consolidated its case into the *Cattle and Beef* MDL.¹⁴⁴

137. *In re Broiler Chicken Antitrust Litigation*, HAMILTON LINCOLN L. INST. (Nov. 10, 2021), <https://hlli.org/in-re-broiler-chicken-antitrust-litigation> [<https://perma.cc/2YSP-897Z>].

138. *Current Cases: In re Broiler Chicken Antitrust Litigation*, *supra* note 134.

139. *See generally In re Broiler Chicken Antitrust Litig.*, No. 16-CV-08637 (N.D. Ill. June 30, 2025) (Bloomberg Law) (order granting end-user consumer plaintiffs’ motion for final approval of class settlements).

140. *See generally* Class Action Complaint, *In re Pork Antitrust Litig.*, No. 18-CV-01776 (D. Minn. June 28, 2018) (Bloomberg Law).

141. *Id.* at 1.

142. Transfer Order, *In re Pork Direct & Indirect Purchaser Antitrust Litig.*, 544 F. Supp. 3d 1379, 1379–81 (J.P.M.L. June 9, 2021).

143. Complaint at 4, *Sysco Corp. v. Cargill, Inc.*, No. 2022-CV-02049 (S.D. Tex. June 24, 2022) (Bloomberg Law).

144. Conditional Transfer Order (CTO-3) at 1, *In re Cattle & Beef Antitrust Litig.*, No. 22-MD-03031 (J.P.M.L. July 11, 2022) (Bloomberg Law).

C. THE LITIGATION FUNDING AGREEMENT BETWEEN BURFORD AND SYSCO

As mentioned previously, Sysco received a proposal from Burford Capital to aid in financing its actions and “offered to provide Sysco with non-recourse capital in exchange for a share of the proceeds of any future settlements or judgments.”¹⁴⁵ Following negotiations, Sysco and Burford entered into a capital provision agreement (“CPA”) in October 2019. This Section discusses (1) the initial CPA; (2) Sysco’s eventual breach of the CPA and the CPA’s subsequent amendment; and (3) how Burford and other litigation finance firms consider themselves as taking on a “passive” role in TPLF, even though the CPA between Sysco and Burford required Burford to give consent before Sysco could assign or settle its claims.

1. The Initial Sysco–Burford CPA

Also known as “capital contribution agreements,” CPAs involve at least two parties and “outline[] the conditions of an investment made by one party into another.”¹⁴⁶ These agreements lay out how the funds are to be used, who benefits from the agreement and in what manner, and what happens if the parties do not comply with their obligations.¹⁴⁷ A CPA will also declare the equity each party is entitled to as a return on their investment.¹⁴⁸ The CPA between Sysco and Burford was filed under seal and not released to the public; however, court documents have revealed some of the provisions concerning the extent of Burford’s control over Sysco’s claims. These provisions are specifically what Judge Tunheim and Judge Durkin refer to in their rulings on Sysco and Burford’s Rule 25(c) motions.

Barrett Flynn, who formerly served as associate general counsel to Sysco, stated that the “CPA repeatedly and unambiguously set forth the parties’ mutual intent and agreement that Sysco would always retain complete control over its claims in the [*Broiler Chicken* case], which was a topic of concern for Sysco in entering into the relationship with Burford.”¹⁴⁹ According to the CPA, Sysco maintained overall control over the claims and any resolutions thereof, and Burford and its affiliates were prohibited from “control[ing] or direct[ing] the conduct of the Claims, or . . . requir[ing] settlement

145. Amended Petition to Vacate Arbitration Award at 10, Sysco Corp. v. Glaz LLC, No. 23-CV-01451 (N.D. Ill. Mar. 20, 2023) (Bloomberg Law).

146. *Capital Contribution Agreement: Definition, Terms, Example*, CONTRACTSCOUNSEL, <https://www.contractsounsel.com/t/us/capital-contribution-agreement> [<https://perma.cc/X9RY-8QU4>].

147. *Id.*

148. *Id.*

149. Amended Petition to Vacate Arbitration Award, *supra* note 145, at 10.

... ”¹⁵⁰ The CPA further stated that neither Burford nor its affiliates could try to take control over Sysco’s claims.¹⁵¹

Because Burford and its affiliates were not given control over Sysco’s management of the “day-to-day litigation,” the agreement also contained an anti-assignment provision that prohibited Sysco from assigning all or any portion of its claims.¹⁵² This provision essentially works to ensure that Sysco does not attempt “to undermine the value of the collateral” provided by Burford, and “prevents Sysco from assigning away the sole security for [Burford’s] investment.”¹⁵³ Specifically, the anti-assignment provision states that 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),” without Burford or its affiliates’ written consent.¹⁵⁴

Burford and Sysco decided in June 2020 to expand the scope of their CPA after Burford expressed an interest in also funding Sysco’s direct action in the *Pork* case.¹⁵⁵ Later that same year, the parties entered into an operative financing agreement to include even more business dealings that Burford wanted to invest in, including Sysco’s opt-out claim in the *Cattle and Beef* case.¹⁵⁶ The operative financing agreement is known as the “Second Amended and Restated Capital Provision Agreement” in court documents, and is the key source of the issues being arbitrated.¹⁵⁷

2. Assignment of Sysco’s Claims

As time went on and litigation continued to ensue, Sysco, in violation of the CPA’s anti-assignment provision, began to assign portions of its claims to indirect purchasers of the products sold by the defendants in the Protein Antitrust Cases.¹⁵⁸ Sysco did not receive consent from Burford nor any of its affiliates to make these assignments.¹⁵⁹ However, if “Sysco [had] not assigned claims to customers asserting contractual rights to receive . . . them, Sysco

150. Motion to Stay at 3, Sysco Corp. v. Glaz LLC, No. 23-CV-01451 (N.D. Ill. Mar. 27, 2023) (Bloomberg Law) (quoting CPA § 5.2(b)) (alterations in original). The CPA is filed under seal, but the court has released information on specific provisions within its opinions. *Id.*

151. Amended Petition to Vacate Arbitration Award, *supra* note 145, at 14.

152. Motion to Stay, *supra* note 150, at 3–4.

153. *Id.*

154. *Id.* (citing CPA § 5.3(b)(viii)).

155. Declaration of Barrett G. Flynn in Support of Petition to Vacate Arbitration Award at 2–3, Sysco Corp. v. Glaz LLC, No. 23-CV-01451 (N.D. Ill. Mar. 8, 2023), ECF 1–1.

156. *Id.*

157. See, e.g., Amended Petition to Vacate Arbitration Award at 12, Sysco Corp. v. Glaz LLC, No. 23-CV-01451 (N.D. Ill. Mar. 20, 2023) (Bloomberg Law).

158. Amended Petition to Vacate Arbitration Award, *supra* note 145, at 12.

159. Motion to Stay, *supra* note 150, at 4.

may have incurred litigation risk.”¹⁶⁰ Professor Maya Steinitz, an expert in litigation finance,¹⁶¹ says that “certain contractual provisions ‘are the very essence’ of a litigation funding agreement, and ‘any breach by the plaintiff of those provisions is presumptively material.’”¹⁶² Breaching these provisions “entitles a funder to the serious remedy of ‘an immediate refund’ of its investment, as well as the retention of its upside in the claim proceeds.”¹⁶³ Sysco both at the time of breach and later in arbitration admitted to violating the anti-assignment provision.¹⁶⁴

To settle the anti-assignment provision breaches, Sysco and Burford amended the CPA on March 31, 2022.¹⁶⁵ Burford would release its claims against Sysco for the “unlawful assignments” in exchange for an increase to “Burford’s economic stake in the [remaining] unassigned claims.”¹⁶⁶ The restructuring gave rise to concerns about “a misalignment of economic incentives” between Burford and Sysco.¹⁶⁷ Burford was particularly concerned that Sysco might lack the incentive to pursue the claims vigorously and instead choose to accept “low-ball settlement[s].”¹⁶⁸

As a safeguard, the parties further amended the CPA to include a consent provision that gives Burford a say over settlements. Specifically, the new provision stated that Sysco “shall not accept a settlement offer without [Burford’s] prior written consent, which shall not be unreasonably withheld.”¹⁶⁹ Sysco also agreed to “take such actions as are reasonable and appropriate to maximize the Proceeds received from each Claim.”¹⁷⁰ Although Sysco agreed to a limited consent right for settlements, it insisted that Burford not have full control over proposed settlements and “sought reassurances” that Burford was not attempting to exercise such authority.¹⁷¹ Burford agreed that it “[has] no right to exercise control over the independent professional judgment of

160. Amended Petition to Vacate Arbitration Award, *supra* note 145, at 12 n.5.

161. Maya Steinitz, B.U. SCH. L., <https://www.bu.edu/law/profile/maya-steinitz> [<https://perma.cc/4MU3-6S2K>].

162. Dai Wai Chin Feman, *Breaching a Litigation Funding Agreement—the Sysco/Burford Story*, U.S. L. WK. (Mar. 29, 2023, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/breaching-a-litigation-funding-agreement-the-sysco-burford-story> (on file with the *Iowa Law Review*).

163. *Id.*

164. Motion to Stay, *supra* note 150, at 4.

165. *Id.*

166. *Id.*; Ashwini Jayaratnam, *Litigation Financier’s Battle Against Sysco Provides Food for Thought*, DARROW EVERETT LLP (Oct. 19, 2023), <https://darroweverett.com/sysco-vs-burford-litigation-financing-case-analysis> [<https://perma.cc/P43V-MF6W>].

167. Motion to Stay, *supra* note 150, at 4; *accord* Amended Petition to Vacate Arbitration Award, *supra* note 140, at 13.

168. Jayaratnam, *supra* note 166.

169. Exhibit T at ¶ 196(ii), Sysco Corp. v. Glaz LLC, No. 23-CV-01451 (N.D. Ill. 2023) (Bloomberg Law) (citing Exhibit A, Glaz LLC v. Sysco Corp., No. 651289/2023 (N.Y. Sup. Ct. Mar. 10, 2023)).

170. *Id.*

171. Amended Petition to Vacate Arbitration Award, *supra* note 145, at 13.

Sysco's lawyers,"¹⁷² and stated that it "cannot mandate settlement, nor can [it] unreasonably prevent settlement."¹⁷³ Burford also "expressly affirmed to Sysco that Sysco would remain in *complete control* of its claims and of the settlement of those claims."¹⁷⁴ These affirmations later become important to the issues of substitution and transfer of interest.

3. Litigation Funders as "Passive" Providers

Despite Burford contractually obligating Sysco to withhold reaching settlements without its consent, the firm holds itself out as having "passive" involvement in litigations. Burford has made statements to government agencies, including the U.S. Securities and Exchange Commission ("SEC"), the public, "and its investors that it does not seek to control the claims in which it invests."¹⁷⁵ In its 2020 SEC Form 20-F filing,¹⁷⁶ Burford disclosed that its "legal finance business . . . financ[es] a client *who retains decision-making authority in the litigation*."¹⁷⁷ Andrew Cohen, who is currently a managing director at Burford, stated at a judicial symposium: "I don't know how to say this any more clearly, *we don't control settlement*."¹⁷⁸ Burford's Chief Executive Officer Christopher Bogart said that "[c]lients are free to run their litigations as they see fit. . . . And we don't interfere with that relationship. . . . [T]he client is free to disregard . . . advice and take its own path."¹⁷⁹

Burford is not alone in claiming that litigation funders have no control over a litigation. The former executive director of the International Legal Finance Association, Gary Barnett, stated that "[l]itigation funders are passive providers of capital."¹⁸⁰ Further, he said that funders are "there to potentially provide some strategic advice on budgeting issues but they don't stand in the shoes of a client and they don't control the litigation strategy."¹⁸¹ In light of these assertions, Burford's own statements, and the consent provision of

172. Exhibit T, *supra* note 169, at ¶ 199(iii).

173. Motion to Stay, *supra* note 150, at 5.

174. Amended Petition to Vacate Arbitration Award, *supra* note 145, at 13 (emphasis added).

175. *Id.* at 11.

176. SEC Form 20-F is an annual report filing for "foreign private issuers" with equity shares listed on exchanges in the United States. See Will Kenton, *SEC Form 20-F: Definition, Requirements, and Filing for Foreign Issuers*, INVESTOPEDIA (Sept. 18, 2025), <https://www.investopedia.com/terms/s/sec-form-20-f.asp> [<https://perma.cc/73SK-A44B>].

177. Burford Cap. Ltd., Annual Report (Form 20-F) 10 (Sept. 11, 2020) (emphasis added).

178. Andrew Cohen, Managing Dir., Burford Cap., Panel 6: The Evolution of Third-Party Litigation Financing at the Law & Economics Center Sixteenth Annual Judicial Symposium on Civil Justice Issues (Oct. 10, 2022) (emphasis added).

179. Lesley Stahl, *Litigation Funding: A Multibillion-Dollar Industry for Investments in Lawsuits with Little Oversight*, CBS NEWS: 60 MINUTES (Dec. 18, 2022, 7:36 PM), <https://www.cbsnews.com/news/litigation-funding-60-minutes-2022-12-18> [<https://perma.cc/92ZS-MXNC>].

180. Robert Freedman, *Sysco Accuses Litigation Funder of Trying to Dictate Legal Strategy*, LEGAL DIVE (Mar. 10, 2023), <https://www.legaldiver.com/news/sysco-burford-litigation-funding-dispute-dictate-legal-strategy-chicken-case/644720> [<https://perma.cc/6K36-QN26>].

181. *Id.*

the CPA, it is difficult to view Burford of its affiliates' actions as merely "passive."

D. NAIL IN THE COFFIN: SYSCO BREACHES THE CONSENT PROVISION

In 2022, Sysco engaged in settlement discussions with several of its defendant suppliers in the Protein Antitrust Cases.¹⁸² After months of negotiating between both outside counsel and in-house counsel to the parties, Sysco secured settlement offers from certain defendants in late August 2022, including those in the *Broiler Chicken* litigation.¹⁸³ Burford objected to the settlements on September 2, 2022, arguing that they undervalued Sysco's claims.¹⁸⁴ After failed attempts at a resolution, Burford invoked the CPA's dispute resolution clause and initiated arbitration in the London Court of International Arbitration to prevent Sysco from finalizing the settlements.¹⁸⁵

Eventually, the tribunal issued Burford a temporary restraining order ("TRO") and entered a preliminary injunction enjoining Sysco from finalizing the proposed settlements.¹⁸⁶ The tribunal reasoned that "Sysco's proposed settlements would . . . affect the settlement market," and that the economic "ripple effect would be adverse and irreparable to Burford's interests" and "the entire portfolio of [the parties'] protein antitrust cases."¹⁸⁷ Also, Sysco knowingly entered into a contract with the understanding that Burford had consent rights over future settlements, so it should not have come as a shock to Sysco that Burford would object.¹⁸⁸ Further, the tribunal found that "[a]bsent the injunction, Sysco [would] execute . . . settlement proposals, which would . . . permanently deprive Burford of the ability to seek specific performance of its prior consent contractual right," and that "the breach of contract damages that Burford would conceivably be able to prove would not constitute adequate compensation for the harm suffered."¹⁸⁹

In Burford's view, the preliminary injunction award was necessary since Sysco violated the CPA by attempting to execute settlements without Burford's prior written consent.¹⁹⁰ Sysco on the other hand believed that "the Tribunal's interpretation of the CPA violated public policy by allowing the litigation funder to take control of settlement."¹⁹¹ According to Sysco, the preliminary

182. Amended Petition to Vacate Arbitration Award, *supra* note 145, at 15.

183. *Id.*

184. *Id.* at 16–17.

185. Jayaratnam, *supra* note 166.

186. Amended Petition to Vacate Arbitration Award, *supra* note 145, at 9.

187. Jayaratnam, *supra* note 166; Exhibit T, *supra* note 169 at ¶¶ 191, 194(ii).

188. Exhibit T, *supra* note 169 at ¶199.

189. *Id.* ¶ 194.

190. Jayaratnam, *supra* note 166.

191. *Id.*; Amended Petition to Vacate Arbitration Award, *supra* note 145, at 30.

injunction was Burford's "secret dream come true: unfettered control over the settlement of its clients' federal antitrust litigation claims."¹⁹²

To resolve their differences, Sysco and Burford ultimately chose to assign Sysco's antitrust claims to a "special purpose vehicle" created by Burford: Carina Ventures, LLC.¹⁹³ Carina was created by Burford in June 2023 for the sole purpose of litigating Sysco's antitrust claims.¹⁹⁴ The parties moved to dismiss the Illinois action on the same day Carina was created,¹⁹⁵ and the New York action was dismissed the following day.¹⁹⁶ Following this settlement, Sysco and Burford filed a joint motion to substitute Carina for Sysco as the litigant in the Protein Antitrust Cases pursuant to Rule 25(c) of the FRCP.¹⁹⁷ Rule 25(c) permits such substitution at "the Court's discretion to determine 'that the transferee's presence would facilitate the conduct of the litigation.'"¹⁹⁸

E. SPLIT DECISIONS FOR RULE 25(C) MOTIONS

The issue that this Note centers around arises here: Can a litigation funder substitute themselves for the plaintiff they originally funded?¹⁹⁹ After the motions for substitution were filed in both the Northern District of Illinois for *Broiler Chicken* and in the District of Minnesota for *Pork* and *Cattle and Beef*, the judges presiding over the cases gave contradictory rulings. Judge Durkin, presiding over *Broiler Chicken*, granted Sysco and Carina's motion to substitute,²⁰⁰ but Judge Tunheim, presiding over *Pork* and *Cattle and Beef*, adopted U.S. Magistrate Judge John F. Docherty's recommendation to deny Carina's substitution.²⁰¹

1. Judge Docherty's Reasoning for Denying Substitution Motion

The defendants in *Pork* and *Cattle and Beef* strongly opposed Carina's substitution for Sysco. Specifically, they "ask[ed] the Court to find the

192. Amended Petition to Vacate Arbitration Award, *supra* note 145, at 2.

193. *In re Pork Antitrust Litig.*, No. 18-CV-1776, 2024 WL 511890, at *1 (D. Minn. Feb. 9, 2024) (order denying motion to substitute party).

194. Reyes-Kipp et al., *supra* note 115; *In re Pork Antitrust Litig.*, 2024 WL 511890, at *1.

195. Stipulation of Dismissal at 1, Sysco Corp. v. Glaz LLC, No. 23-CV-01451 (N.D. Ill. Jun. 28, 2023) (Bloomberg Law).

196. Stipulation of Dismissal at 1, Glaz LLC v. Sysco Corp., No. 23-CV-02489 (S.D.N.Y. Jun. 29, 2023) (Bloomberg Law).

197. Reyes-Kipp et al., *supra* note 115; *In re Pork Antitrust Litig.*, 2024 WL 511890, at *1.

198. *In re Broiler Chicken Antitrust Litig.*, No. 16-CV-08637, at *1 (N.D. Ill. Mar. 21, 2024) (Bloomberg Law) (memorandum opinion and order) (quoting *Otis Clapp & Son, Inc. v. Filmcore Vitamin Co.*, 754 F.2d 738, 743 (7th Cir. 1985)).

199. Although there are other issues that could be discussed about the party's contract and Sysco's breach thereof, the focus of this Note is on the Rule 25(c) motions, specifically.

200. *Id.* at *6.

201. *In re Pork Antitrust Litig.*, No. 18-01776, at *4 (D. Minn. June 3, 2024) (Bloomberg Law) (memorandum opinion dismissing the appeal and affirming the magistrate judge's order) (also applying to *In re Cattle & Beef Antitrust Litig.*, No. 22-3031 (D. Minn. 2024)).

assignment of Sysco's federal antitrust claims to Carina illegitimate because it violates the rule against champerty," and "to disallow the substitution of Carina for Sysco."²⁰² Judge Docherty issued an order on February 9, 2024, denying the Rule 25(c) motions,²⁰³ and Judge Tunheim, presiding over the case, affirmed this opinion on June 3, 2024.²⁰⁴

Judge Docherty utilized Minnesota case law to determine that Minnesota public policy strongly favors parties to a lawsuit maintaining control over a litigation, particularly with regard to settlements. Of particular importance, Judge Docherty cites to *Maslowski*, which states that "'it is difficult to conceive of any stipulation more against public policy' than a contract term requiring the litigation financier's permission to settle the underlying litigation."²⁰⁵ The court in *Maslowski* also said that "[c]ourts and attorneys should . . . be careful to ensure that litigation financiers do not attempt to control the course of the underlying litigation."²⁰⁶ Judge Docherty also quoted Professor Anthony Sebok, a recognized expert on legal ethics²⁰⁷ and one of the ethics advisors for Burford,²⁰⁸ who once wrote: "[A] lawyer should counsel a client to refuse any funding agreement that allows a funder to take control of any settlement, which would be seen as against public policy in every state or withdraw from representation if the client persists in granting the funder control."²⁰⁹

Judge Docherty found that granting Carina's substitution would "contravene the important public policy granting control of litigation to the parties who claim to have actually suffered injury and their counterparties."²¹⁰ Of particular importance "is the specific control that the parties should have over the decision to settle a lawsuit and on what terms."²¹¹ Although he observed that champerty "is no longer an automatic route to dismissal," he emphasized that "the reasons behind the champerty doctrine are significant factors to the Court's discretion."²¹² In other words, while champerty may not mandate dismissal in every case, the doctrine's core

202. *In re Pork Antitrust Litig.*, 2024 WL 511890, at *6.

203. *Id.* at *12.

204. *In re Pork Antitrust Litig.*, No. 18-01776, at *14.

205. *Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235, 241 (Minn. 2020) (quoting *Huber v. Johnson*, 70 N.W. 806, 808 (Minn. 1897)).

206. *Id.*

207. Anthony Sebok, CARDOZO L., <https://cardozo.yu.edu/directory/anthony-sebok> [<https://perma.cc/H4D2-U8DV>].

208. Anthony Sebok, BURFORD, <https://www.burfordcapital.com/about-us/our-team/anthony-sebok> [<https://perma.cc/Y632-Y8UW>].

209. Anthony J. Sebok, *The Rules of Professional Responsibility and Legal Finance: A Status Update*, 57 WAKE FOREST L. REV. 777, 788–89 n.65 (2022).

210. *In re Pork Antitrust Litig.*, No. 18-1776, 2024 WL 511890, at *8 (D. Minn. Feb. 9, 2024) (order denying motion to substitute party).

211. *Id.*

212. *Id.*

concern—preventing third parties from usurping a litigant’s control over their own case, including settlement—remains important to the court’s analysis.

Precedent from the Eighth Circuit and Minnesota courts demonstrate that substitution contravenes strong public policy favoring settlement.²¹³ In *Smith v. Questar Capital Corp.*, the court found “[t]here is a public policy which favors the settlement of disputes, and preserving the integrity of a negotiated settlement is important in promoting the private settlements of class action disputes.”²¹⁴ In an attempt to avail themselves of this public policy notion, Sysco and Carina argued that “the assignment of claims from Sysco to Carina was part of the settlement of the dispute between Sysco and Burford Therefore . . . the Court should uphold the assignment because doing so furthers the public policy in favor of settlement.”²¹⁵ As Judge Docherty rightly points out, “[t]he Sysco-Burford settlement, put plainly, is a settlement that was meant to prevent other settlements.”²¹⁶ Thus, this argument was unconvincing.

Finally, Sysco and Carina cited to no authority to support their argument that a litigation funder should be allowed to substitute a party under Rule 25(c).²¹⁷ Importantly,

[b]ased on the cases cited by the parties and the Court’s independent research, no court has ever before been asked to ratify a substitution under Rule 25(c) of a party with undoubted Article III and antitrust standing with a newly formed shell company created mid-suit for the sole purpose of litigating assigned claims on behalf of a litigation funder, which has no stake in the litigation other than maximizing its return on an investment it made in the outcome of the litigation. If such a case exists, neither the parties favoring substitution nor the parties opposed to substitution have directed the Court’s attention to it.²¹⁸

The absence of precedent alone was not sufficient in itself to deny substitution; rather, the combination of public policy considerations, precedent from case law, and the unique nature of the party’s request led this court to

213. *Id.* The order cites to several cases, such as *Associated Electric Cooperative, Inc. v. Mid-America Transportation Co.*, 931 F.2d 1266, 1272 (8th Cir. 1991) (finding that public policy favors settlements), and *Digi-Tel Holdings, Inc. v. Proteq Telecommunications (PTE), Ltd.*, 89 F.3d 519, 524–25 (8th Cir. 1996) (“[C]ourts have hesitated to use unsuccessful settlement discussions as ‘contacts’ for jurisdictional purposes” because “[g]iving jurisdictional significance to such activities may work against public policy by hindering the settlement of claims.”). *Id.*

214. *Smith v. Questar Cap. Corp.*, No. 12-CV-2669, 2015 WL 1963019, at *12 (D. Minn. Apr. 30, 2015).

215. *In re Pork Antitrust Litig.*, 2024 WL 511890, at *8 (citation omitted).

216. *Id.*

217. *Id.* at *11.

218. *Id.*

be particularly cautious when evaluating the motion.²¹⁹ In reaching his decision, Judge Docherty stated that he “must consider that allowing this substitution will lead to other such requests being made . . . in scenarios far removed from the one in this case . . . presenting courts with significant challenges in addressing numerous mid-suit motions for substitution.”²²⁰

2. Judge Durkin’s Reasoning for Granting Substitution Motion

The defendants in *Broiler Chicken* also objected to Sysco and Carina’s motion for substitution. They argued:

[I]t will ‘not facilitate the litigation’ but ‘will make this case even harder to manage;’ and [that] the assignment is not valid because of ‘its champertous nature,’ which . . . ‘may render the agreement invalid as contrary to public policy, or mean that Carina lacks Article III and/or statutory standing.’²²¹

Judge Durkin dismissed both of these arguments. As to argument one, Judge Durkin held that it “ignores reality.”²²² He reasoned that the litigation agreement between Burford and Sysco and the proposed assignment to Carina were “one small aspect” of an already complicated and slow-moving case.²²³ In his opinion, Judge Durkin stated that “[l]ike litigation funding agreements, such assignments are a fact of modern litigation.”²²⁴ He further reasoned:

Even if Defendants are correct that the assignment might add some time to an already extended case, absent some palpable prejudice to case management or the rights of the parties, it is generally not the Court’s place to interfere with sophisticated parties’ business decisions about the value of their claims.²²⁵

“Standing, champerty, and public policy” are all tied into the defendant’s second contention.²²⁶ Judge Durkin dismissed the lack of standing argument for Carina, citing *Sprint Communications Co. v. APCC Services, Inc.* which held that an assignee “may properly bring suit to redress the injury originally suffered by his assignor.”²²⁷ Illinois law also generally allows claims to be assignable.²²⁸ As to champerty, Judge Durkin stated that Illinois law only

219. *Id.* at *12.

220. *Id.*

221. *In re Broiler Chicken Antitrust Litig.*, No. 16-CV-08637, at *1 (N.D. Ill. Mar. 21, 2024) (Bloomberg Law) (memorandum opinion and order) (citation omitted).

222. *Id.* at *2.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 287 (2008).

228. *See* *Liu v. T & H Mach., Inc.*, 191 F.3d 790, 797 (7th Cir. 1999).

prohibits the doctrine “when there is ‘officious intermeddling,’ meaning when an uninjured party ‘volunteer[s] [their] services where they are neither asked for nor needed.’”²²⁹ Judge Durkin reasoned that the defendants did not allege that this is the circumstance that occurred, and that the court was “not aware of the circumstances leading to the initial funding agreement between Sysco and Burford.”²³⁰ Thus, he found that issues of champerty were not present in the case.

However, this finding is curious—if the court was trying to determine Carina’s potentially champertous nature, would it not be in the best interest of the court to understand the business dealings of this entity? Carina was created solely to litigate Sysco’s claims—does that not raise concerns that require further exploration into the circumstances effectuating this litigation agreement? It is also difficult to believe that the court was unaware of the circumstances leading to the agreement when they are clearly documented in previous court filings.

Judge Durkin further found that because “Sysco is a sophisticated and large corporation,” it is not as “vulnerable to the temptation of a ‘wicked’ non-party ‘willfully’ intending to ‘stir up’ or ‘foment . . . meritless litigation . . . for the sake of harassment’” as an ordinary person.²³¹ He stated: “Sysco’s relationship with Burford, including the recent assignment to Carina, are simply not the kind of circumstance contemplated by the ancient law prohibiting champerty. And because the circumstances here are outside the scope of Illinois champerty law, they also cannot be said to violate Illinois public policy.”²³² Judge Durkin acknowledged within a footnote that finding no public policy violation differs from the Minnesota opinion, but stated that Illinois public policy was not at issue in that case.²³³

Although both judges addressed important factors in deciding whether or not substitution was appropriate, neither opinion gives courts a clear test or procedure for determining if substitution is permissible in future circumstances. From Judge Docherty’s opinion it would seem that ethical implications are important in determining whether substitution is appropriate; in contrast, Judge Durkin’s opinion seems to suggest that substitution may just be a new aspect of modern litigation, and that the sophistication of the parties should be a relevant factor in making substitution determinations.

This issue is novel and complex, and without concrete regulations and guidelines for courts to follow, the question of litigation funder substitution will remain vague. Aside from the need for formal federal and state regulations,

229. *In re Broiler Chicken Antitrust Litig.*, No. 16-CV-08637, at *3 (N.D. Ill. Mar. 21, 2024) (Bloomberg Law) (memorandum opinion and order) (quoting *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 725 (N.D. Ill. 2014)).

230. *Id.*

231. *Id.* (quoting *Miller*, 17 F. Supp. 3d at 725).

232. *Id.* at *4–5.

233. *Id.* at *5 n.1.

stakeholders and policymakers must also recognize and address the ways in which TPLF arrangements and substitution motions can undermine principles of fairness and justice in the American legal system. Because of the discrepancies between these two rulings and the strong likelihood of a similar scenario arising again, it is paramount to address this issue.

III. LITIGATION FUNDERS SHOULD NOT BE PERMITTED TO SUBSTITUTE AS LITIGANTS

The purpose of the FRCP is “to secure the *just, speedy, and inexpensive* determination of every action and proceeding.”²³⁴ Sysco and Burford’s motions for substitution do not abide by this founding principle. Although TPLF is not inherently problematic—and can, in some cases, expand access to justice by enabling meritorious claims that would otherwise go unfilled—it must operate within boundaries that preserve party autonomy and the integrity of the judicial process. The parties admittedly sought out substitution for one main reason: Burford thought Sysco’s proposed settlements were too low, and it wanted to try and maximize its *own* profits by taking over as a litigant.²³⁵ The Minnesota court correctly called out that substitution in this case would cause a forced and unnecessarily prolonged litigation. Given the continuous upward trend in TPLF utilization,²³⁶ it is imperative that the United States recognize TPLF not as categorically harmful, but as a mechanism that poses serious risks when funders exert control over core litigation decisions. This Part first argues that permitting a litigation funder to control settlements is champertous and violates public policy. It then argues that litigation funders should not be permitted to substitute as a litigant when the funder’s interest is purely financial.

A. THE CONSENT PROVISION IN THE CPA IS CHAMPERTOUS AND VIOLATES PUBLIC POLICY

The TRO awarded to Burford is contrary to public policy. It effectively allows Burford to control Sysco’s settlement decisions through the CPA, which is champertous. What renders an agreement champertous varies amongst jurisdictions, but “a fundamental animating principle . . . which has been unchanged despite evolutions in applicable law . . . is that the *plaintiff controls*

234. FED. R. CIV. P. 1 (emphasis added).

235. See *In re Pork Antitrust Litig.*, No. 18-CV-1776, 2024 WL 511890, at *8 (D. Minn. Feb. 9, 2024) (order denying motion to substitute party) (“Sysco and Carina frankly admit that their motive to substitute Carina for Sysco is that Sysco was planning to settle these antitrust claims for lower amounts than Burford wanted. Put more starkly, a non-party has interfered with the decision of a party to settle that party’s claims, because of reasons specific to the non-party.”).

236. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 21, at 11.

its claim and *in particular the decision to settle*.”²³⁷ The consent provision in the CPA, along with Burford’s motion for substitution, is in clear violation of this principle, as it effectively eliminates Sysco’s ability to settle claims and forces the continuation of a litigation against the wishes of the injured parties in the suit.

As discussed previously, Judge Durkin in the *Broiler Chicken* case argued that Burford and Sysco’s relationship is “simply not the kind of circumstance contemplated by the ancient law prohibiting champerty.”²³⁸ However, even if the court in *Broiler Chicken* found that champerty should not dismiss the substitution provision, there are more modern doctrines that would. For instance, the “intermeddling” that champerty originally sought to preclude has been reinforced by doctrines such as “unconscionability and equity or simply . . . the unquestioned principle of plaintiffs’ autonomy over their cases.”²³⁹ Even in jurisdictions that no longer recognize the doctrine of champerty, “its underlying rationales remain protected.”²⁴⁰

Further, jurisdictions that have abolished champerty as a defense have still found financing agreements unenforceable due to officious intermeddling. In *Osprey v. Cabana*, the Supreme Court of South Carolina stated that the “abolition of champerty as a defense does not mean that all such agreements are enforceable as written.”²⁴¹ In the court’s discussion on what makes a funding agreement unenforceable, it noted that a litigation funder can “become[] an officious intermeddler when . . . [they] attempt[] to control the litigation for the purpose of stirring up strife or continuing a frivolous lawsuit.”²⁴² When champerty was first introduced, it was well recognized that people of power attempting to control a party in a suit and abuse the legal process violated legal ethics.²⁴³ Thus, while the specific circumstance of a Rule 25(c) motion to substitute a funder may not be directly found in ancient doctrine like the *Broiler Chicken* court suggests, the underlying rationale of seeking to prevent controlling behavior from a third party is robustly documented and prevalent.²⁴⁴

Contrary to the court’s assertion, Illinois still permits champerty as a viable common law doctrine and prohibits maintenance by statute.²⁴⁵ Specifically, the maintenance statute prohibits an individual from “officiously

237. Expert Report of Professor Maya Steinitz in Support of Sysco Corporation’s Petition to Vacate Arbitration Award at 5–6, *Sysco Corp. v. Glaz LLC*, No. 23-CV-01451 (N.D. Ill. Mar. 8, 2023) (Bloomberg Law) [hereinafter Steinitz Expert Report] (emphasis added).

238. *In re Broiler Chicken Antitrust Litig.*, No. 16-CV-08637, at *4.

239. Steinitz Expert Report, *supra* note 238, at 10.

240. *Id.*

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

242. *Id.*

243. *Id.* at 273 n.2.

244. See Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 94 (2011).

245. 720 ILL. COMP. STAT. 5/32-12 (2015).

intermeddl[ing] in an action that in no way belongs to or concerns that person, by maintaining or assisting either party, with money or otherwise, to prosecute or defend the action, with a view to promote litigation.”²⁴⁶ The American Bar Association has also stated that “champerty is generally permissible as long as the supplier is not . . . ‘intermeddling’ with the conduct of the litigation (e.g. determining trial strategy or *controlling settlement*).”²⁴⁷ Although courts have narrowed what they consider to be champertous,²⁴⁸ Professor Steinitz argues that they have simultaneously moved “*towards* an approach which seeks to protect the public policies underlying the prohibition of champerty.”²⁴⁹

For the reasons addressed above, this Note contends that the Illinois court should have found the CPA champertous because it affirmatively blocks Sysco from reaching settlements and unnecessarily prolongs the litigation, implicating what the doctrine of champerty seeks to prevent. This finding more closely aligns with Illinois case law²⁵⁰ and the state’s public policy views on champerty. Additionally, although Judge Durkin found that “it is generally not the Court’s place to interfere with sophisticated parties’ business decisions about the value of their claims,”²⁵¹ it is the court’s place to defend litigants from being manipulated and coerced by third parties. In a state with limited litigation funding precedent, denying the motion for substitution would have enabled the court to draw a firm line against funder-driven control over a litigation.

B. FORCED LITIGATION VIOLATES THE FEDERAL RULES OF CIVIL PROCEDURE AND PUBLIC POLICY

Carina’s substitution is a clear violation of what the FRCP aim to protect: a “just” and “speedy” litigation.²⁵² One way that the law encourages a just and speedy litigation is through the promotion and protection of settlement. The U.S. Supreme Court has long promoted and encouraged settlement.²⁵³ New York law, which governs the CPA, encourages parties to

²⁴⁶. *Id.*

²⁴⁷. AM. BAR ASS’N, COMMISSION ON ETHICS 20/20: INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 11 (2012) (emphasis added), <https://lowellmilkeninstitute.law.ucla.edu/wp-content/uploads/2019/02/ABA-White-Paper-on-Litigation-Finance.pdf> [<https://perma.cc/E4FN-E7SP>].

²⁴⁸. See *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 727 (N.D. Ill. 2014) (“[O]ver the centuries, maintenance and champerty have been narrowed to a filament.”).

²⁴⁹. Steinitz Expert Report, *supra* note 238, at 15.

²⁵⁰. See generally *Todd v. Franklin Collection Serv., Inc.*, 694 F.3d 849 (7th Cir. 2012) (finding the plaintiff’s assignment of claims to be void under Illinois public policy).

²⁵¹. *In re Broiler Chicken Antitrust Litig.*, No. 16-CV-08637, at *2 (N.D. Ill. Mar. 21, 2024) (Bloomberg Law) (memorandum opinion and order).

²⁵². FED. R. CIV. P. 1.

²⁵³. See *Hennessy v. Bacon*, 137 U.S. 78, 78 (1890) (“A settlement of a disputed claim . . . will be supported by a court of equity.”); *Williams v. First Nat’l Bank*, 216 U.S. 582, 595 (1910) (“Compromises of disputed claims are favored by the courts.” (citing *Hennessy*, 137 U.S. at 78)).

engage in settlement negotiations during the pendency of the suit.²⁵⁴ Additionally, the local rules for the Northern District of Illinois encourage settlement by requiring the lawyers and parties in civil cases “to undertake a good faith effort to settle” before proceeding to trial.²⁵⁵ Notably, Judge Durkin has previously acknowledged “the strong federal policy favoring the voluntary resolution of disputes” in another Illinois case in 2017.²⁵⁶

Settlement is important to public policy because it, among other things, promotes judicial efficiency and helps to reduce court costs for the parties. To uphold the important notion of settlement, a litigation funder should not be permitted to prolong a litigation for the sole purpose of maximizing their profits.²⁵⁷ Specifically, a litigation funder should not be allowed to substitute themselves as a plaintiff under FRCP 25. Allowing a litigation funding agreement to contravene widespread public policy favoring settlement egregiously disregards the protections afforded to parties within the American legal system.

Proponents of litigation funding have pushed back against imposing regulations on the industry, arguing that it is still “young” and should therefore not be overregulated by “broad” legislation given the variety of cases that funders are involved with.²⁵⁸ But without stricter legal requirements, there is no clear way to protect parties from problematic funding arrangements like we see in the Protein Antitrust Cases. Accordingly, to formally capture a prohibition on litigation funder substitution, we need to create a federal framework that governs and regulates litigation funding arrangements. Although individual state laws are a step in the right direction, federal regulations for TPLF would help create more uniformity, reduce circuit splits, protect litigants, and ensure there is a consistent, transparent treatment of TPLF arrangements.

Finally, because TPLF touches on so many ethical issues, like we see in the Protein Antitrust Cases, it might indeed be necessary for regulations to be broad. For example, the Rules of Professional Conduct for attorneys in New York state that “[t]he touchstone of the client-lawyer relationship is the lawyer’s obligation to assert *the client’s position* under the rules of the adversary

254. UNIF. CIV. RULES FOR N.Y. STATE TRIAL CTS. § 202.12-A (2022) (Residential Mortgage Foreclosure Actions; Settlement Conference), <https://ww2.nycourts.gov/rules/trialcourts/202.shtml#12a> [https://perma.cc/R323-E5KK]; *id.* § 202.26 (Settlement and Pretrial Conferences).

255. N.D. ILL. R. 16.1 (Standing Order Establishing Pretrial Procedure), <https://www.ilnd.uscourts.gov/attorney/ViewRuleDetails.aspx?xD2R+pWgR4U=> [https://perma.cc/82KG-R6GW].

256. *Miksis v. Evanston Twp. High Sch. Dist. # 202*, 235 F. Supp. 3d 960, 987 (N.D. Ill. 2017).

257. See Mark Behrens, *Third-Party Litigation Funding: A Call for Disclosure and Other Reforms to Address the Stealthy Financial Product That Is Transforming the Civil Justice System*, 34 CORNELL J.L. & PUB. POL’Y 1, 30–31 (2025) (“To maintain lawyers’ ethical obligations to their clients, funders should be prevented from making litigation or settlement decisions.”).

258. Julia Gewolb & Joshua Libling, *Insight: The Fall of Champerty and the Future of Litigation Funding*, BLOOMBERG TAX (June 16, 2020, 3:00 AM), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/us-law-week/XE5EJPJOooooo?bna_news_filter=us-law-week#cite (on file with the *Iowa Law Review*).

system . . . and to act with loyalty during the period of the representation.”²⁵⁹ New York’s Rules of Professional Conduct further state that it is the client’s right to accept or reject a settlement offer,²⁶⁰ not a third party or the lawyers themselves. Illinois also has this rule,²⁶¹ and requires a lawyer to withdraw from a case if a funding agreement compromises their independent judgment in upholding this rule.²⁶² Although the Rules of Professional Conduct for attorneys and judges do not directly apply to litigation funders, they “serve to illustrate that there is a universally recognized public policy *in favor of* client control over settlement, and *against* any interference with that control.”²⁶³

Taken together, these considerations underscore the incompatibility of Carina’s substitution with the principles that animate the federal procedural system. The FRCP’s commitment to just, efficient, and party-driven litigation depends heavily on encouraging voluntary settlement, a principle embedded not only in federal precedent but also in state law and local court rulings. Permitting a litigation funder to prolong a case or assume control of it through a Rule 25(c) motion would erode that principle and undermine the very policies designed to safeguard litigants’ autonomy and the integrity of the civil justice system.

CONCLUSION

Although it is understandably important for parties in litigation funding arrangements to protect their assets and financial interests, it should not come at the expense of an injured litigant’s right to control their litigation strategy, including settlement. As this Note demonstrates, contracting away a party’s ability to manage their own litigation contravenes public policy and effectively weakens the principle of justice afforded to litigants through the FRCP and the American civil justice system generally. To prevent funders from exerting improper control over a litigation, courts should prohibit substitution under Rule 25(c) in TPLF arrangements and treat agreements granting litigation funders settlement or case management rights as contrary to public policy and therefore champertous.

259. NYSBA N.Y. RULES OF PRO. CONDUCT 1 (N.Y. STATE BAR ASS’N 2025) (emphasis added).

260. *Id.* at 123–24 (r. 1.16 cmt. 7A).

261. ILL. RULES OF PRO. CONDUCT § 1.2 (2010) (Scope of Representation and Allocation of Authority Between Client and Lawyer).

262. *Id.* § 5.4(c) (Professional Independence of a Lawyer) (“A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.”).

263. Steinitz Expert Report, *supra* note 238, at 24 (“Forcing Sysco to litigate against its will rather than allowing Sysco to accept a settlement offer it wishes to accept is contrary to [public policy].”).