By Tarifa B. Laddon, Patrick Reilly, and Blake Angelino

On Litigation Funding: The Drug and Device Industry

■ Tarifa B. Laddon is a partner in the Los Angeles office of Faegre Baker Daniels LLP. Ms. Laddon protects the interests of innovative manufacturers of medical devices, food products, pharmaceuticals, agricultural products, and various other consumer products in product liability litigation all over the country. Ms. Laddon has specific expertise in defending mass torts and class actions. Patrick Reilly is a partner in the Indianapolis office who represents multinational and Fortune 500 clients in complex litigation, regularly acting as national coordinating counsel to manufacturers in product liability actions. He also advises on sports law matters. Blake Angelino is an associate in the Chicago office. He litigates, advises, and assesses risk on behalf of clients in complex litigation, including product liability and mass torts, as a member of the firm's nationally ranked product liability group.

In the past year, third-party litigation funding has exploded onto the scene as a major—and often not transparent—

factor in complex litigation such as class actions and multidistrict litigation. In fact, third-party litigation funders are increasingly shifting their million-dollar investments toward drug and device mass torts.

Drug and device cases are particularly attractive to litigation funders for several reasons: the cases are highly visible, easy to spot, and are relatively easy to collect *en masse*. The rise of third-party litigation funding, the grey area in which it currently operates, and the growth of it in product liability cases combine to create very real risks to drug and device manufacturers. One of the troubling consequences of its increase in product liability cases is that plaintiffs and their lawyers are fully well-funded with third-party money and yet the bankroll with a stake in the litigation is hidden from the defense's view.

Fortunately, there a number of mitigating actions that drug and device companies can take to address the issues that third-party litigation funding creates in the mass tort arena, which we will address below.

Exponential Growth of TPLF in Product Liability Suits

The growth rate of third-party litigation funding is staggering. The TPLF market in the United States is currently valued at around $5 billion dollars, with Burford Capital as the largest litigation funder in the United States. In fact, in one year, Burford increased its commitment to litigation financing from $200 million to $488 million. Since 2013, Burford has grown by over 400 percent. Other investors have taken note of the return and are either eager to enter the market or have already entered. Burford has disclosed that it has invested north of $100 million in a single, unidentified law firm's litigation portfolio. Today, more than 50 percent of Burford's capital is in case portfolios.

This growth is fueled by the transition from single-case litigation funding to so-called portfolio funding. Litigation funders, through portfolio funding, invest in an entire group of cases or inventory. Funders target drug and device manufacturers for portfolio investing, dumping as much money as possible into buying cases and more plaintiffs.

Often plaintiffs use the generous cash flow that litigation financiers provide to pay for large advertising campaigns to collect more cases. The effects of third-party litigation funding on plaintiff marketing are obvious: One consulting firm that tracks lawyer advertising said that "[i]n total, we think the amount spent on lawyers and other advertisers *targeting pharmaceutical companies and medical device makers has doubled in the past five years*."

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The Appeal of Mass Tort Claims to Third-Party Litigation Funders

There are several factors drawing litigation funders to the mass tort arena. First, there is a lot of money at issue. Second, litigation funders want control, and more so than individual one-off cases, mass torts put them in a unique position to be in the driver's seat. Third, the claims involved are highly visible and easy to spot. The result is a growing portion of the litigation funding market targeting drug and device manufacturers.

Drug and Device Manufacturers Have Money

Litigation funders see drug and device companies as wealthy, or at least as well-insured defendants. Third-party litigation funders are in it for the return on their investment, and they see drug and device companies as guaranteed money. The top five drug companies made over $30 billion in profits in 2017.

Litigation Funders Have Control and Trust Issues

Mass torts enable litigation funders to have the opportunity to control and drive litigation, especially because mass tort plaintiffs have little, if any, control over the litigation strategy themselves. In multidistrict litigation (MDL) and class actions, each individual client often has little to no sway over the overarching litigation once lead or class counsel is appointed. The parties and the courts select bellwethers, and those cases are worked up. The reality is that the other cases—and the plaintiffs in those cases—often languish for years without anything happening in their individual cases at all. As a result, a power vacuum emerges and allows third-party litigation funders to take advantage of it. In the aggregate, a party with an interest in a large amount of cases is able to have a role in steering litigation in the direction that it so desires. Defendants have always been able guide mass litigation because, unlike for the plaintiffs, all of the claims and information relevant to their defense are in one place.

Funders are eager to fill the vacuum because the economics involved are compelling and there is an open driver's seat. However, problems emerge when a litigation funder's ability to "drive" litigation (controlling, encouraging, or enabling litigation or settlement) goes completely unchecked, especially in light of ethical rules prohibiting such involvement by a third party.

Funders generally attempt to dismiss control concerns by stating that they do not control litigation strategy and funding agreements demonstrate as much. But some litigation funding "best practices" generally include and contemplate control over litigation by funders. Sometimes, control takes the form of "managing a litigant's

litigation expenses," which allows funders to see the day-to-day litigation costs and approve or deny things such as briefing and experts. More importantly for defendants, control shows up in the settlement context. Some funders demand notice of settlement demands and offers, input on any response, and participation in settlement decisions. Funders require "project plans" and the appointment of "nominated lawyers," which clearly will control the flow of money, monitor the costs of litigation, and monitor strategy.

Recognizing these issues, United States District Court Judge Dan Polster, who presides over the opioid MDL, *In re National Prescription Opiate Litigation*, ordered disclosure of all third-party funding agreements. In addition, Judge Polster ordered the parties to submit to the court a letter identifying and describing the financing as well as two sworn affirmations (one from counsel and one from the lender) that the funding does not "(1) create any conflict of interest for counsel, (2) undermine counsel's obligation of vigorous advocacy, (3) affect counsel's independent professional judgment, (4) give to the lender any control over litigation strategy or settlement decisions, or (5) affect party control of settlement." Judge Polster further ordered that counsel have an ongoing duty to inform the court of new or additional third-party financing and a duty to update their affirmations and disclosures. Further, Judge Polster wrote, "The Court will deem unenforceable any [TPLF] financing agreements that are not compliant with this Order." We hope that this is the trend of the future.

Plaintiffs with Potential Claims Are Easy to Spot

Some potential mass torts can be seen from a mile away. For instance, a U.S. Food and Drug Administration (FDA) warning or recall can immediately spark large-scale litigation. Attorney general actions often have the same effect. In other cases, medical records identify a cause, a device is removed, or large groups of commercials tell plaintiffs they are entitled to money simply by virtue of taking a drug or having a device implanted. One prominent legal funder advertises that even "[i]f you have a retrievable IVC filters [sic] implanted but haven't noticed any symptoms or complications, you may still be eligible for a [claim]. These claims are called Product in Place, or PIP." When an individual commercial case requires significant due diligence before a third-party litigation funder agrees to step in, mass torts lend themselves to very simple bright line tests.

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The Claims Are Easy to Collect in Huge Groups

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We have encountered third-party litigation funding recently in large product liability litigation for which the lawyers amass as many "faceless clients as possible," without adequately investigating the merits of the claims. The ideal business model was highlighted publicly in a recent lawsuit filed by a former employee of a plaintiff's firm in connection with the use of third-party litigation funding. The firm used litigation funding for its allegedly defective transvaginal mesh litigation. The suit shone a spotlight on the business model for third-party litigation funding in the mass tort context: (1) borrow as much money as possible; (2) buy as many television advertisements and faceless clients as possible; (3) wait on lawyers somewhere to establish liability against somebody for something; (4) use those faceless clients to borrow even more money or buy even more cases; (5) hire attorneys to settle the cases for whatever they can get; (6) take 40 percent of the settlement from the thousands and thousands of plaintiffs who never met with their lawyers, let alone the funders bankrolling their litigation; and (7) do it all over again, sometimes simultaneously.

More Pooled Cases, More Financial Return

Simple economics also plays into the growth of third-party litigation funding in the drug and device context. The more claimants the litigation funders drum up, the more potential for profit. As a result, litigation funders have quickly become the largest interest holder in mass torts.

Drug and Device Companies Cannot Ignore Third-Party Litigation Funding

Third-party litigation funding will affect the bottom line of drug and device companies. It will increase the amount of litigation faced by these companies (for the funders will regularly seek to turn each individual lawsuit into a mass of lawsuits), make litigation more contentious and expensive, and drive up settlement costs.

Litigation Funding Causes More Cases to Be Filed

Litigation funding will increase the number of cases filed because litigation funding empowers more plaintiffs who would not otherwise have sufficient funds, to bring suit. The result is that litigation funding breeds *more plaintiffs*, with *more bargaining power.*

Litigation funding transforms financially unfeasible claims into feasible ones. Litigation funding allows plaintiffs' lawyers to *accept* cases that they would not normally be able to accept. It allows plaintiffs' lawyers to handle more cases simultaneously. One plaintiff-side lawyer recently posited the situation in the following manner in an online article: "I can handle more cases than I normally would… instead of referring out cases to other lawyers or firms at our level we can

handle more cases ourselves because we have funding available." Plaintiffs' lawyers sometimes turn less attractive claims away, or they expire, simply because they take too much money to work up. Litigation funding resolves these opportunity-related cost problems, and now those weaker cases are being filed.

Third-party litigation funding gives law firms extraordinary cash flow to invest billions in advertising. The pelvic mesh litigation is a perfect example of a litigation exploding after the introduction of litigation funding. In the mesh litigation, hedge funds loaded law firms with advertising dollars. They bankrolled waves of television advertising and online marketing that stimulated tens of thousands of cases. Johnson & Johnson revealed that $45 million that was spent on attorney advertising in part of 2014 alone spawned 24,000 cases. Many of those cases involved plaintiffs that *did not even receive a Johnson & Johnson device*. Gerchen Keller, another litigation-financing firm, spent $90 million to advertise the litigation and acquire interests in 14,000 pelvic mesh lawsuits, according to an ex-employee.

Estimates show that the number of lawyers and advertisers targeting pharmaceutical companies and medical device manufacturers has doubled in the last five years alone, and it doesn't stop with advertising dollars. Counsel Financial, a litigation finance company out of New York, has a program called "Enter Mass Torts." The program is designed to bring lawyers up to speed on the world of mass torts and help them get up and running. It "is designed to provide non-mass tort lawyers the opportunity to learn this highly specialized area of litigation while avoiding common mistakes often made by those not conversant in the field." The program even provides lawyers with mass tort "mentors" to help them out.

Whether plaintiffs are suing because they see a commercial, or because they are newly financially able, third-party financing is a breeding ground for litigation, particularly against drug and device companies. With $100 million in advertising alone, third-party litigation funding makes it easy to amass enormous caches of "faceless clients."

Third-Party Litigation Funding Allows Plaintiffs to Litigate Longer

Third-party litigation funding neutralizes a few traditionally defense-friendly benefits in mass tort litigation. First, third-party litigation funding enables plaintiffs to equalize resources. In terms of a one-to-one comparison, a company usually has vastly superior resources to the typical plaintiff. In addition, defendants usually know that poorly financed plaintiffs cannot or do not wish to litigate for an extended period of time. However, if a plaintiff is funded, the plaintiff is more able to resist low settlement offers because the plaintiff has the resources, from the funder, needed to endure long litigation. As a result, equalizing resources shifts the power dynamic.

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Third-Party Litigation Funding Costs Drug and Device Companies More Money

Drug and device companies will pay more money when third-party litigation funding is involved because the litigation funding demonstrably increases plaintiff payouts. Plaintiffs are more able to withstand extended litigation, and this gives them more leverage at the bargaining table. Further, there are more hands in the pot. Litigation funding seeks somewhere between 5 percent and 40 percent of a given outcome. In July 2018, Judge Anita Brody, who oversees the National Football League concussion settlement, ordered the settlement claims administrator to pay *nearly half* of an amount awarded to a former player to third-party litigation funder RD Legal. Earlier in the litigation, the judge voided the third-party litigation financing agreements, and in July, ordered $343,000 of the plaintiff's $700,000 settlement to be paid to the funder. Because of such situations plaintiffs and lawyers necessarily seek more money because a third party more often than not takes a significant portion of the payout.

One study showed that a ban on third-party litigation funding reduced claim payments by *37.7 percent* and caused claims to be resolved 2.4 times faster, and allowing third-party litigation funding increased both the amount paid and the length of litigation. Lawsuits happen more frequently because of third-party litigation funding, too. Defendants in the pelvic mesh litigation saw frivolous lawsuits become the norm when plaintiffs' lawyers were encouraged to compile as many clients as possible, without regard to the viability of their claims. So companies are paying more to fight, they're fighting more often, and they're paying more at the end of the fight, too.

Additional parties sitting at the table make settlement more cumbersome and expensive. The end result is that litigation is more likely than not ultimately more expensive for drug and device companies in total.

It Does Not Stop with Funding Litigation Directly

Litigation funders are not stopping at supporting litigation or law firms drumming up mass torts. DePuy Orthopaedics recently asked a court to compel a surgical funder, MedStar, to provide information on settlement liens because of allegations of a scheme to "artificially inflate damages claims." Surgical funding is basically investing in operations of injured plaintiffs in which, for example, a plaintiff allows a treating surgeon to discount the doctor's bill and sell it to a medical lender. The lender places a lien for the entire cost of the care against a future legal award. Those liens can "spiral as much as 10 times what health insurers would pay for the same procedures." Some surgical funders offer

"VIP" services such as cash advances, hotel rooms, and travel arrangements. Damages rapidly balloon as uninsured surgeries, deductibles, or surgeries by out-of-network doctors become routine. Unnecessary treatments can cost defendants 10 times a usual and customary charge.

In 2015, DePuy was the first major company to challenge this practice, after MedStar sought payment directly from DePuy, rather than patients. DePuy argued that MedStar was attempting to collect four times as much as the reasonable cost for patients' care. Similar issues were raised in the pelvic mesh litigation. According to Reuters, liens on settlements grew to 10 times what an insurer or government program such as Medicaid would pay.

How Drug and Device Companies Can Be Proactive

Drug and device companies have a number of options to push back on the effects due to third-party litigation funding. Some of these proactive measures include watching changes in the field closely, supporting disclosure requirement and transparency, and leveraging the fact the plaintiffs are funded wherever possible.

Another way to be proactive is to push for disclosure in ongoing litigation. Ongoing litigation presents the opportunity to (1) seek an order regarding disclosure of litigation funding, and (2) use the outcome of such an order to change the optics of the litigation (*i.e.*, just because there is smoke, there is not actually fire). Judge Polster's recent order requiring disclosure of third-party litigation funding agreements and affirmations by counsel is one example when pushing for disclosure has been successful. Judge Poster did not, however, allow discovery into third-party litigation funding.

Drug and Device Manufacturers Can Shape Third-Party Litigation Funding Law

The law is currently developing because third-party litigation funding is aggressively expanding. At the recent Duke Law Judicial Studies Center conference, "Documenting and Seeking Solutions to Mass-Tort MDL Problems," one of the panels specifically addressed third-party litigation funding.

Traditionally, the common law doctrine of champerty stood as a barrier to third parties financially backing one of the parties. To avoid that prohibition, litigation funding generally puts the funders at arm's length and not "in control" of the proceedings, and at this point, no state court has outright barred third-party litigation funding as champertous. However, the fight for and against third-party litigation funding appears to come to a head in one crucial area: disclosure. The law appears to be moving in the right direction, and in April 2018, Wisconsin became the first state to require disclosure of third-party litigation funding that is contingent on the outcome of cases. The new Wisconsin law requires disclosure of third-party litigation funding in state court civil litigation and requires disclosing the third-party litigation funding agreement itself.

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Drug and Device Manufacturers Need to Encourage Disclosure Requirements

Mandatory disclosure of litigation funding is a great start. Transparency is the cornerstone of litigation in the United States. The U.S. District Court for the Northern District of California, in recognition of the benefits of disclosing third-party litigation funding, requires disclosure in class, collective, or representative actions. Notably, though, funding agreements do not need to be disclosed even in the U.S. District Court for the Northern District of California.

Disclosure is currently being discussed by the federal judiciary. As recently as April 10, 2018, the federal Advisory Committee on Rules of Civil Procedure discussed third-party litigation financing agreements. A proposed change to Rule 26(a)(1)(A)(v) would require automatic disclosure of many third-party litigation financing agreements. After declining the change in 2014 and 2016, "the advisory committee recognized the issue is complicated." The committee referred the issue to the MDL subcommittee, which is considering a proposal requiring third-party litigation financing disclosure in the MDL context, because "funding agreements are often used in MDL proceedings." The advisory committee discussed the proposed change to Rule 26 at a meeting in November 2017, too.

Drug and device companies can support disclosure requirements in a variety of ways. For example, they can and should continue to seek, and insist on, disclosure in new and ongoing litigation, absent rules requiring disclosure. Rules are being shaped in jurisdictions around the United States, and drug and device companies can proactively set the bar for disclosure in the future. Otherwise, neglecting to combat unchecked litigation funding will cost more than ignoring the fight.

Include Third-Party Litigation Financing in Proportionality, Cost-Shifting, and Sanctions Discussions

The permissible scope of discovery should be changed when plaintiffs are funded. Federal Rule of Civil Procedure 26 contemplates the resources of the parties as relevant to any discussion of proportionality. Since litigation funders have real interests in litigation, courts should consider their contributions and resources in any discussion of proportional discovery, cost sharing, or a comparison of resources.

For example, mass tort plaintiffs have argued for multi-plaintiff bellwethers because of a claimed "disparity in resources." Without disclosure of third-party litigation financing in mass torts, any discussion regarding comparative resources would be unjustly incomplete.

More importantly, given the stakes that litigation funders have in litigation and the control that they exert—including the ability to veto settlements—courts should put funders on the hook for misconduct, sanctions, or costs. Rule 11 bars frivolous lawsuits and allows for sanctions, and Rule 37 allows sanctions for discovery misconduct. Putting third-party litigation financing agreements in the discussion and funders'

assets on the line alleviates some concerns about potential abuses.

For example, if litigation funders were accountable for the barrage of unsupported litigation resulting from millions and millions of advertising to spread the pelvic mesh litigation, it is hard to imagine that so many claims would have been filed unchecked.

Litigation funders should be liable to the extent that they encourage frivolous, baseless lawsuits. Drug and medical device manufacturers are in the best position to push for those changes, given that they are the biggest victims of mass advertising and meritless lawsuits.

Leverage Litigation Funding Stigma

Third-party litigation funding still has a pervasive stigma. Drug and device manufacturers can leverage plaintiffs' third-party funding and the stigma that comes with it in a few ways. For example, in-house counsel, and outside counsel, should use the stigma to help paint the "nameless, faceless plaintiff" picture (primarily for the judge). Using plaintiffs' litigation funding in that way can help change the narrative of the overall litigation. For example, many judges assume smoke (*e.g.*, the filing of many cases) means fire (*e.g.*, valid claims with merit). It can take bellwether trials, or overwhelming evidence, to convince judges otherwise. Highlighting plaintiffs' funding sources and the associated growth of a particular mass tort can help persuade a judge that many claims are without merit, or that particular discovery is necessary to weed out the bad claims from the good ones.

In the same vein, counsel can use the stigma to support a *Lone Pine* order, potentially earlier than one is typically available. Such an order would allow a defendant to clear out large amounts of cases at once, thus whittling down a mass tort fairly quickly.

The pelvic mesh litigation demonstrates the issue well. Once millions of dollars poured in from hedge funds, plaintiffs' counsel filed tens of thousands of cases, even when many of those cases did not involve the product at issue.

Defendants should be able to demonstrate to judges that a blossoming litigation is simply the result of well-funded, aggressive plaintiffs.

The Takeaways

Third-party litigation funding is growing, especially in the drug and device context, and the mass tort plaintiffs' bar is currently eating it up. As a result, drug and device companies should expect the third-party litigation financing to continue to grow and its associated risks and costs for drug and device companies to grow as well. It drives up the costs, equalizes traditionally unequal resources, and saps some of the benefits that the defense has when defending mass torts.

Accordingly, drug and device companies should fight to stay vigilant. They should make sure that in-house counsel, or outside counsel, stay mindful of the changing landscape. They should also support pushes in the right direction wherever they are able, and finally, leverage the money-hungry, shadowy stigma that surrounds third-party litigation funding.