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Opaque Capital and Mass-Tort Financing

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ABSTRACT. Complex litigation is resource intensive and places a staggering burden on all litigants. Large-scale mass torts resolved through multidistrict litigation or bankruptcy radically amplify this burden. In order to pursue a mass-tort case to conclusion, most plaintiffs' firms have to rely on third-party financiers to provide capital in exchange for a share of the fees that the firm ultimately realizes. Financiers have historically been passive partners. Because of this distance, courts rarely inquired about these relationships or reviewed funding agreements.

Mass-tort cases have grown in scale and frequency over the last decade, and plaintiffs' firms have encountered escalating resource demands. Coinciding with this evolution is the entrance of opaque capital: uniquely aggressive financiers who offer attorneys and plaintiffs access to vast pools of capital in their battle of attrition with wealthy corporate defendants. The prospect of leveling the playing field is alluring. But there is a catch—these financiers will never be passive partners. Opaque capital is moving into mass-tort financing to dictate outcomes.

This Essay casts a light on the shadowed corners of litigation finance. All the tools necessary for a financier to create and control a mass-tort case are available and unregulated. The potential for distortion is most visible at two points in a case's trajectory. Primarily, opaque capital pursues claim alchemy—the idea of employing unethical and potentially illegal tactics to create, enhance, and marshal apparently low-value claims and turn them into gold. I refer to this process as the Alchemist's Inversion. Further, opaque capital has discovered the contractual means to seize an individual plaintiff's right to decide when to settle their case. The luxury of choosing when to exercise this option creates sinister opportunities.

Scholars have underappreciated opaque capital's entrance into the litigation-finance theater. This Essay asserts that resolution levers in future mass-tort cases will be pulled not by the spotlighted figures before the audience but the shadowed financiers behind them. The ultimate effect will push victims further away from financial recovery.

> Are you familiar with the parable of the organ grinder's monkey? Now, the organ grinder's monkey is tiny in stature . . . [b]ut . . . [w]henever he ventures into the city to perform, he thinks, "What a powerful fellow I must be . . . . [W]here ever I go this music box must follow. And with it, this poor, downtrodden man . . . . And every time I do decide to dance, every time, he must play. Whether he wishes to or not."
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> —Jack Fincher, *Mank*[1]

1. Mank (Netflix International Pictures 2020).

INTRODUCTION

On December 8, 2019, Mikal Watts convened an emergency town hall meeting to assure his clients he was not a crook.[2] Watts and his law firm, Watts Guerra LLP, represented 16,000 fire victims in the PG&E bankruptcy case, which was rapidly approaching resolution. There were two competing plans of reorganization, both of which offered significant compensation to victims and a small fortune to Watts and his law firm. The problem was that Will B. Abrams—an unexpectedly vigilant claimant in the case—had made a troublesome discovery.[3] Watts Guerra was able to pursue protracted litigation because it had drawn down on a $100 million line of credit funded by a syndicate of investors that included private-equity firm Centerbridge Partners.[4] Centerbridge was also part of a group that had proposed one of the competing settlement plans in the case. Watts had enthusiastically recommended that his clients support the Centerbridge plan, which proposed paying victims $13.5 billion. Unfortunately, half of this value came in the form of PG&E stock, a troubling feature that indefinitely tethered victim compensation to the company's postbankruptcy performance.[5] The competing bondholder plan avoided this potential pitfall, and—for that reason—many claimants and commentators believed that it was superior.[6] Further complicating matters, Watts had not disclosed his convoluted relationship with Centerbridge to the court or his clients.

On April 20, 2020, Will Abrams filed a motion asking the bankruptcy court to disregard votes cast by Watts's clients because of his apparent conflict.[7] The court was clearly troubled by the possibility that Watts had undisclosed financial

2. The private meeting was recorded by one of Mikal Watts's clients, and a transcript of the meeting was emailed to Will B. Abrams. *See* William B. Abrams Motion to Designate Improperly Solicited Votes Pursuant to 11 U.S.C. §§ 1125(B) and 1126(E) and Bankruptcy Rule 2019 at 2, *In re* PG&E, No. 19-30088 (Bankr. N.D. Cal. Apr. 18, 2020) [hereinafter Abrams Motion to Designate].

3. *See* Lily Jamali, *Attorney for PG&E Fire Victims Funded by Wall Street Firms He's Negotiating Against*, KQED (Apr. 25, 2020), https://www.kqed.org/news/11813173/attorney-for-pge-fire-victims-funded-by-wall-street-firms-hes-negotiating-against [https://perma.cc/XE23-PMQK] ("In the emerging area of litigation financing, brokers like Stifel [Financial Corp.] act as a go-between for lawyers seeking to fund large cases and investors seeking part of the reward if a case ends in a payout.").

4. *See* Lily Jamali, *PG&E Bankruptcy Judge Weighs Potential Conflict of Interest of Fire Survivors' Lawyer*, KQED (May 12, 2020), https://www.kqed.org/news/11817486/pge-bankruptcy-judge-weighs-potential-conflict-of-interest-of-fire-survivors-lawyer [https://perma.cc/32NK-KLNH].

5. *See id.*

6. *See id.*

7. *See id.*; Abrams Motion to Designate, *supra* note 2, at 2-4.

incentives for supporting the Centerbridge plan.[8] The only defense Watts offered was his own assertion that the funding agreements did not authorize Centerbridge to control his litigation strategy, decision-making, or client representation. Based on this representation, the court concluded that the prepetition funding arrangement was not relevant to plan voting and denied the motion.[9] The court reached this conclusion even though Watts never answered any specific questions about the funding relationship, and the capital-provision agreement (CPA) between Centerbridge and Watts's firm was never provided to the court or opposing counsel.[10] In fact, there was no legal requirement that Watts produce it.[11]

On July 1, 2020, PG&E emerged from bankruptcy and continued operating as a California utility. But its stock price has languished in the years that followed, and claimants have openly questioned whether they voted for the right plan.[12] The frustration and confusion surrounding the legal process and the actors involved have culminated in one simple question: What if a third party had in fact controlled the outcome of the case and that possibility had been ignored?

Litigation finance was popularized in Australia in the 1990s,[13] and the diaspora reached the United States in 2010, drawn by the prospect of oversized returns.[14] Today, the field is populated with a diverse group of actors—the most prominent of which focus on business-to-business disputes and market their

8. *See* Jamali, *supra* note 4 ("'But the question is, does Mr. Watts put himself in a position where he at least needs to tell his clients that there is this relationship?' Montali asked during a hearing on the Abrams Motion to Designate. 'Who is his adversary?'").

9. *See* Steven Church & Mark Chediak, *PG&E Judge Rejects Bid to Throw Out Victims' Bankruptcy Vote*, CLAIMS J. (May 18, 2020, 7:58 PM EDT), https://www.bloomberg.com/news/articles/2020-05-15/pg-e-judge-rejects-bid-to-throw-out-victims-bankruptcy-vote [https://perma.cc/AG84-VJ65].

10. *See id.*; Jamali, *supra* note 4.

11. The Northern District of California, Civil Local Rule 16-9 provides a standing order that requires disclosure of third-party litigation funding agreements, but the order applies to only class actions. Standing Order for All Judges of the Northern District of California: Contents of Joint Case Management Statement 2 (Jan. 17, 2023), https://www.cand.uscourts.gov/wp-content/uploads/judges/Standing_Order_All_Judges_1.17.23.pdf [https://perma.cc/H5RZ-JUFZ].

12. Brandon Rittiman, *PG&E Victims Ask Bankruptcy Judge for More Money*, ABC10 (Mar. 3, 2023, 5:59 PM), https://www.abc10.com/article/news/local/pge-victims-ask-bankruptcy-judge-more-money/103-a2e7b2e9-70f5-4dc7-b580-1d604bd210d1 [https://perma.cc/UET8-F6AD].

13. *See* John Beisner, Jessica Miller & Gary Rubin, *Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States*, U.S. CHAMBER INST. LEGAL REFORM 9 (Oct. 2009), https://legaltimes.typepad.com/files/thirdpartylitigationfinancing.pdf [https://perma.cc/3M85-K2RR].

14. *See id.* at 4.

services to wealthy corporate clients by appealing to notions of efficiency and cost smoothing.[15] But this is not the area that is attracting the most aggressive financiers. The PG&E case and others like it have cast a light on the shadowed corners of litigation finance, and, in particular, the burgeoning field of mass-tort financing.[16] Mass torts present resolution complexity that dwarfs all other litigation disputes.[17] One of the most troublesome aspects of these cases is the recovery timeline. In order to run the elaborate gauntlet to recovery,[18] plaintiffs' firms must have large funding pools. This search for capital has forged unexpected alliances.

Hedge funds and private-equity firms chase yield regardless of industry.[19] This chase has recently brought these new financiers—which I refer to as opaque capital[20]—onto the litigation-finance landscape and in conflict with existing market norms in the consumer mass-torts space. Historically, litigation-finance companies have been silent partners, content to sit on the periphery and allow attorneys to develop strategy and execute game plans. But opaque capital has never operated in this way and has no intention of playing by existing rules. These financiers dictate outcomes, and the mass-torts space is plagued by regulatory gaps and monitoring voids that accommodate shadowed practices.

Despite a vast cannon of scholarship exploring this field, I assert that scholars and commentators are not asking the questions necessary to understand the future trajectory of litigation finance, especially in the mass-torts sphere.[21] The

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15. *See* Irina Fan et al., *US Litigation Funding and Social Inflation: The Rising Costs of Legal Liability*, SWISS RE INST. 7, 11-12 (Dec. 2021), https://www.swissre.com/dam/jcr:7435a896-5f4b-463b-a1e6-7d4ec17db556/swiss-re-institute-expertise-publication-us-litigation-funding-and-social-inflation-december2021.pdf [https://perma.cc/2VA4-D6HE].

16. For purposes of this Essay, the term "mass-tort financing" captures third-party capital devoted to nonclass aggregate litigation involving large numbers of mass-torts claims that are resolved through multidistrict litigation or bankruptcy.

17. *See* Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 425, 457-60 (2022). For purposes of this Essay, the term "mass torts" describes high-volume personal injuries and death caused by a particular product or event.

18. *See* Ronen Avraham, Lynn A. Baker & Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 REV. LIT. 143, 157 (2021) ("It will therefore be several years—sometimes as many as eight—before any significant number of the [mass-tort] claims are settled.").

19. *See* Samir D. Parikh, *Financial Disequilibrium*, 171 U. PA. L. REV. (forthcoming 2023) (manuscript at 47) (on file with author).

20. For purposes of this Essay, the term "opaque capital" will be used to describe private-equity firms, hedge funds, and other similar financiers that adopt an aggressive and unconventional approach in providing mass-tort financing; the terms "litigation financier" or "financier" include opaque capital and various other types of third-party litigation funders.

21. *See* Avraham, Baker & Sebok, *supra* note 18, at 147 ("The rapid growth of [multidistrict litigations (MDLs)] has been well documented . . . , but the concurrent rise of consumer-litigant funding in MDL mass torts has received no attention.").

focus should not be on how the machinery works. Current literature has addressed this quandary exhaustively.[22] The real question today is whether the machinery can be used to consistently achieve a distortive objective; if so, who could orchestrate this distortion and how would deployment occur? More specifically, can a litigation financier offering large pools of capital ostensibly create and control a multibillion-dollar mass-tort case? I argue that the answer is yes and that this possibility has been overlooked.

By conceptualizing the future of mass-tort financing and exploring the role that opaque capital will play, this Essay is the first to bridge the gap between current scholarship and the front lines of third-party litigation finance. A new breed of apex predator has moved into mass-tort financing and is pursuing something akin to claim alchemy—the process of employing unethical and potentially illegal tactics to create, enhance, and marshal apparently low-value claims with the hope of turning them into gold. I describe this process as the Alchemist's Inversion. And once this transformation occurs, opaque capital must maintain control of its asset in order to maximize value. The means to effectuate this unique brand of distortion already exist and are entirely unregulated. I do not argue that these tactics are currently widespread. Instead, I argue that opaque capital's objectives are clear based on how these actors operate in other markets. Recent cases demonstrate that the arsenal is available, and deployment is underway.

The Alchemist's Inversion is most readily observable at two points in a nonclass, aggregate-litigation dispute. Primarily, opaque capital has the means to fuel and orchestrate the claim marshalling process in order to build—and in some instances create—a lucrative case. Lead generators and claim aggregators work with plaintiffs' attorneys to identify and marshal claimants. Financiers then provide the capital necessary to pursue aggressive marketing strategies.[23] These tactics ensure that all meritorious claimants have an opportunity to participate, but obscure how many nonmeritorious claims are allowed to enter the system. Corporate defendants with significant questions about claim integrity have begun exhibiting a reluctance to settle cases.

22. There is extensive literature exploring third-party funding in general litigation. *See, e.g.*, Maya Steinitz, *The Partnership Mystique: Law Firm Finance and Governance for the 21st Century American Law Firm*, 63 WM. & MARY L. REV. 939, 976-79 (2022); Anthony J. Sebok & W. Bradley Wendel, *Duty in the Litigation-Investment Agreement: The Choice Between Tort and Contract Norms When the Deal Breaks Down*, 66 VAND. L. REV. 1831, 1844-49 (2013); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 92-101 (2010).

23. *See* Roy Strom, *Camp Lejeune Ads Surge Amid "Wild West" of Legal Finance, Tech*, BLOOMBERG L. (Jan. 30, 2023, 5:02 AM), https://news.bloomberglaw.com/business-and-practice/camp-lejeune-ads-surge-amid-wild-west-of-legal-finance-tech [https://perma.cc/5GDY-VJRL].

Second, private equity has a history of relying on contractual and relational leverage to control outcomes affecting their investments. Mass-tort cases are uniquely susceptible to these tactics. For example, opaque capital is able to extend financing to individual claimants in exchange for the contractual right to veto or compel acceptance of settlement offers. In contrast, there is no indication that the earlier referenced financing arrangement between Mikal Watts and Centerbridge afforded that financier contractual control over the case. These contracts—commonly referred to as CPAs—also allow opaque capital to control counsel and strategy through a combination of ambiguous provisions and relational leverage.[24] The concern is that these financiers' incentives will diverge wildly from those of actual victims.

This Essay presents a primarily descriptive assessment of an important new trend in mass-tort financing, setting the stage for a more normative discussion in future scholarship. Despite the hidden nature of opaque financing, this Essay draws on numerous, off-the-record interviews I conducted with professionals and insiders involved in the litigation-finance industry. Part I provides a brief overview of the litigation-finance landscape and identifies mass-tort financing as occupying a hybrid category in that unique ecosystem. Part II details how hedge funds and private-equity firms have clandestinely moved into mass-tort financing, lured by the promise of oversized returns and the ability to operate unmonitored. I define the contours of what opaque capital represents and provide an example of how misaligned incentives can harm mass-tort victims. Part III presents the Alchemist's Inversion in full and explains how case creation and control are the governing dynamics. This Part unpacks various cases that demonstrate that the tools necessary to create and control a multibillion-dollar mass-tort case are readily available and unregulated.

Opaque capital's influence is shifting mass-tort resolution and prompting polarizing countermeasures by corporate defendants.[25] This Essay predicts that

24. *See* Parikh, *supra* note 19 (manuscript at 23 n.111) ("[M]any [business and legal] relationships are severely imbalanced, and the party that enjoys the ability to threaten material harm in future business transactions can exploit that position when faced with contractual ambiguity.").

25. For example, on January 30, 2023, the Third Circuit Court of Appeals ruled that LTL—the liability-burdened entity Johnson & Johnson (J&J) created through the clever "Texas Two-Step"—could not use the bankruptcy system to resolve pending tort claims. *See* Jonathan Randles & Peter Loftus, *J&J's Talc Bankruptcy Case Thrown Out by Appeals Court*, WALL ST. J. (Jan. 30, 2023, 9:39 PM ET), https://www.wsj.com/articles/j-js-talc-bankruptcy-case-thrown-out-by-appeals-court-11675096308 [https://perma.cc/F693-MNHR]. Many scholars, commentators, and journalists have focused on this opinion and its implications, which includes the possible wholesale elimination of the maneuver. But the Texas Two-Step is just a piece of the mass-torts puzzle. What has been overlooked are the developments—in particular, the effects of opaque capital and other maneuvers—that prompted J&J, 3M, and other mass-tort defendants to pursue extremely unorthodox and controversial maneuvers to resolve

the logical evolution of these practices will upend traditional dynamics in non-class, aggregate litigation and push victims further away from financial recovery.

I. THE LITIGATION-FINANCE LANDSCAPE

Litigation finance began in Australia in the 1990s.[26] Australia prohibits contingency fees for attorneys but allows contingent returns for investors.[27] Therefore, litigation finance filled a funding gap by acting as a vehicle to create contingency-fee arrangements for resource-intensive legal disputes.[28] In a relatively short period of time, the practice has become a ubiquitous feature of litigation around the world with over $17 billion of third-party capital flowing to litigants and the professionals that represent them.[29]

The litigation-finance diaspora quickly reached the United States, which is now the center of the litigation-finance universe.[30] In 2020, approximately $8.8 billion of the $17 billion invested into litigation funding globally involved litigation in the United States, more than six times the amount flowing into any other country.[31] Today, it is estimated that litigation funders have $13.5 billion in assets under management in the United States alone.[32] Annual investments are predicted to reach $31 billion by 2028.[33]

Litigation finance is arguably a mere extension of the model of shared ownership of legal claims.[34] But despite its resemblance to existing constructs and

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multibillion-dollar disputes. *See* Samir D. Parikh, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE 53, 57-59 (2022).

26. *See* Beisner, Miller & Rubin, *supra* note 13, at 9 ("Third-party financing originally developed in Australia in the 1990s for use in insolvency litigation.").

27. *See id.*

28. *See id.; see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO 23-105210, THIRD-PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA, AND TRENDS 29-31 (2022) [hereinafter GAO REPORT] (discussing the Australian litigation financing market).

29. *See* Fan et al., *supra* note 15, at 3.

30. *See* Beisner, Miller & Rubin, *supra* note 13, at 4.

31. *See* Fan et al., *supra* note 15, at 2.

32. *See* Patrick Leahy, *Shine Light on Third-Party Litigation Funding of US Patents*, BLOOMBERG L. (Apr. 28, 2023), https://news.bloomberglaw.com/us-law-week/shine-light-on-third-party-litigation-funding-of-us-patents [https://perma.cc/KM6A-4HTX].

33. *See* Fan et al., *supra* note 15, at 8.

34. *See* Suneal Bedi & William C. Marra, *The Shadows of Litigation Finance*, 74 VAND. L. REV. 563, 582 (2021) ("[I]t turns out that for centuries[] litigants have found ways to share the costs of litigation with third-parties . . . ."); Jayme Herschokopf, *Third-Party Litigation Finance*, FED. JUD. CTR., 2 (2017), https://www.fjc.gov/sites/default/files/materials/34/Third-Party_Litigation_Finance.pdf [https://perma.cc/KHV9-J2J2] ("Contingency fees and liability insurance are also models of shared ownership of legal claims.").

many benefits,[35] the practice's divergent evolution introduces a litany of business, legal, and ethical complexities. Litigation-finance relationships exist in various permutations and derivations—some of which are outside this Essay's scope—but all begin with the simple premise that a cause of action is property.[36] And even valuable property can represent an illiquid asset, the monetization of which can be extremely protracted and resource intensive. To the extent that a cause of action can be equated to a home or commercial building, the corollary is that it can be collateralized in order to secure funding. Third-party financiers are merely the lenders and investors willing to play a role in unlocking these funds.[37]

Litigation financiers have historically played the role of lender or equity stakeholder and engaged with litigants in either commercial[38] or consumer[39] spheres. Financiers typically provide nonrecourse[40] loans to individual and corporate plaintiffs as well as law firms, receiving a fixed payment upon a successful

35. Litigation finance presents a number of salutary features, including increasing access to justice for individuals and organizations who hold meritorious claims but lack the resources to pursue them. *See, e.g.*, Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. DAVIS L. REV. 1073, 1085 (2019).

36. *See* Parikh, *supra* note 17, at 488 n.325 ("The Supreme Court's constitutional property doctrine establishes that a cause of action is a 'property interest' of which a claimant cannot be deprived without due process of law."). Settlement is merely selling this asset to the defendant.

37. *See* Bedi & Marra, *supra* note 34, at 571-72.

38. The commercial sphere is populated by suits involving multimillion-dollar damage claims between sophisticated business entities. Litigation finance almost exclusively partners with corporate plaintiffs who have the financial wherewithal to pay litigation expenses but opt for litigation finance to (i) avoid expense spikes in particular quarters, (ii) share or spread risk, and (iii) access preeminent legal counsel with whom litigation financiers may enjoy strong relationships. *See* Bedi & Marra, *supra* note 34, at 578 (describing "liquidity constraints" and "risk constraints"); *see also* BURFORD CAP., INTRODUCTION TO LEGAL FINANCE: KEY CONCEPTS IN FINANCING COMMERCIAL LITIGATION & ARBITRATION 2 (on file with author). Capital in this sphere is typically used for attorneys' fees and costs. *See* Avraham, Baker & Sebok, *supra* note 18, at 150.

39. The consumer sphere is populated by suits generally involving financially unstable plaintiffs—typically an individual plaintiff in a minor personal injury or divorce proceeding. The upfront funding is used to cover basic financial support and living expenses during case pendency. *See* Avraham, Baker & Sebok, *supra* note 18, at 151.

40. A nonrecourse loan is one that is generally understood to allow the financier to recover only its initial investment and other fees and interest from a successful recovery or judgment in the plaintiff's favor. *See* Mariel Rodak, *It's About Time: A System's Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503, 506-07 (2006). But there is no binding universal definition of this term, the contours of which are ultimately established by the applicable capital-provision agreement (CPA).

judgment or settlement.[41] These loans are typically made against one pending case, but may be secured by a portfolio of cases where a law firm is the borrower.[42] In litigation that offers the potential of a windfall recovery—including high-stakes intellectual property and personal-injury disputes—a financier may extend capital and receive the right to an "equity-like participation" in litigation proceeds upon resolution.[43] In this regard, these finance relationships resemble contingency-fee arrangements.

Individual plaintiffs may be drawn to third-party funding as a way to pay down debts and other obligations during the pendency of the case or to receive an advance on a particularly strong cause of action. Various consumer rights are implicated in these types of lending arrangements, especially where a plaintiff's debt obligations increase over time. As such, there is a material risk that a plaintiff may agree to accept a small up-front payment from a financier and unwittingly surrender a large settlement or judgment award that represents many multiples of the initial loan amount.

Corporate plaintiffs embroiled in business-to-business disputes have been attracted to litigation finance to avoid budget volatility caused by potentially staggering professional expenses and to access preeminent legal counsel with whom litigation financiers may enjoy strong relationships. In these types of financing relationships, CPAs invariably resemble complex loan documents, providing financiers with a suite of rights and powers.[44]

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41. *See Informational Report to the House of Delegates*, AM. BAR ASS'N COMM'N ETHICS 20/20 6-7 (2012) [hereinafter ABA COMMISSION] https://lowellmilkeninstitute.law.ucla.edu/wp-content/uploads/2019/02/ABA-White-Paper-on-Litigation-Finance.pdf [https://perma.cc/H8XR-6W5L] ("In a typical transaction, the [financier] agrees to pay a given amount to the plaintiff . . . in exchange for a promise to pay the [financier] that amount plus a an additional amount (sometimes referred to as a 'fee') specified in the contract in the event of a positive outcome in the suit."); *see also* Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1301 (2013) (explaining that there are three main types of litigation-finance relationships: consumer legal funding, loans to plaintiffs' law firms, and commercial dispute funding).

42. *See* Burch, *supra* note 41, at 1302.

43. *See* Fan et al., *supra* note 15, at 5.

44. *See, e.g.*, Exhibit(s) in Support of Coalition of Abused Scouts for Justice Objection to TCC Modified Motion at 120-67, *In re* Boy Scouts of America, No. 20-10343 (Bankr. D. Del. Dec. 13, 2021).

Thus, while litigation financing is not new, mass-tort financing certainly is[45] and has received little attention.[46] The need for third-party capital is particularly acute in complex mass-torts because these cases present staggering resource demands coupled with an extremely long resolution timeline. The burden on plaintiffs' attorneys is unique,[47] and the risk of materially underfunded litigation is daunting.[48] In an apparent attempt to address this market deficiency, private equity[49] and other aggressive financiers have moved into this space,[50] providing

45. In 2017, third-party litigation funding was "not commonplace" in MDL proceedings. Advisory Comm. on Civ. Rules, *Agenda Book for the Advisory Committee's October 5, 2021 Meeting*, JUD. CONF. U.S. 372 (Oct. 5. 2021), https://www.uscourts.gov/sites/default/files/2021-10-05_civil_rules_agenda_book_final_1.pdf [https://perma.cc/T2ED-LWFW]. However, "mass tort claims pending in [multidistrict litigations] constitute the fastest growing sector of those seeking assistance" from third-party financiers. Avraham, Baker & Sebok, *supra* note 18, at 143; *see also* Steinitz, *supra* note 35, at 1087 ("[T]he fact that many areas of litigation, such as class and mass actions in the United States, have not yet been unlocked [suggests that] litigation finance is poised to continue seeing robust growth in coming years.").

46. *See* Avraham, Baker & Sebok, *supra* note 18, at 147 ("The rapid growth of MDLs has been well documented . . . but the concurrent rise of consumer-litigant funding in MDL mass torts has received no attention.").

47. *See* Tom Baker, *Where's the Insurance in Mass Tort Litigation*, 101 TEX. L. REV. 1569, 1586-87 (2023) (explaining how the "vendorization" of mass-tort litigation has increased funding demands); *see also* Burch, *supra* note 41, at 1286-87 (describing how attorneys must generate assets in order to initiate aggregate litigation).

48. *See* Burch, *supra* note 41, at 1294 ("Given aggregate litigation's expense, a real danger exists that the contingent-fee attorney may run out of resources with which to prosecute the case.").

49. *See* Steinitz, *supra* note 35, at 1075 ("This market in legal claims has attracted . . . private equity [and] hedge funds . . . looking for high-risk high-reward investments . . . . "); Leahy, *supra* note 32 ("Litigation investors . . . include groups like private equity funds that weaponize lawsuits as an investment strategy.").

50. *See* Fan et al., *supra* note 15, at 5; *see also* Emily R. Siegel, *J&J Talc Suits' Outside Funders Unveiled Via Little-Used NJ Rule*, BLOOMBERG L. (Apr. 10, 2023), https://news.bloomberglaw.com/business-and-practice/j-j-talc-suits-outside-funders-unveiled-via-little-used-nj-rule# [https://perma.cc/G292-D6G7]; (explaining that J&J's $8.9 billion settlement offer could create a windfall for "Virage Capital Management and TRGP Capital, funders who teamed up with [plaintiffs'] lawyers handling some of the claims"); Emily R. Siegel, *Litigation Funders Fight Over Loans to Houston Injury Law Firm*, BLOOMBERG L. (Apr. 19, 2023), https://news.bloomberglaw.com/business-and-practice/litigation-funders-fight-over-loans-to-houston-injury-law-firm [https://perma.cc/9GD2-KMYN] ("[M]ass torts have become so popular, all of these funds and the new funds springing up have become much more flexible in the way that they're giving capital."); Francesca Mari, *The Lawyer Whose Clients Didn't Exist*, ATL. (Apr. 16, 2020), https://www.theatlantic.com/magazine/archive/2020/05/bp-oil-spill-shrimpers-settlement/609082 [https://perma.cc/B9WF-88E7] ("A strange industry has grown up around mass torts, consisting of middlemen who bring potential suits to big-deal lawyers . . . and investors who help pay the expenses in return for a portion of the award from any victory."); Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women into Often-Unneeded Surgery*, N.Y. TIMES (Apr. 14, 2018), https://www.nytimes.com/2018/04/14/business/vaginal-mesh-surgery-lawsuits-law firms with funding and, in some cases, offering individual plaintiffs cash advances on a nonrecourse, fixed-interest basis.[51] These arrangements do not fit neatly in either the commercial or consumer funding baskets noted above. Instead, mass-tort financing represents a hybrid model, drawing aspects from both classifications and presenting unique opportunities and dilemmas.

II. AN OVERVIEW OF OPAQUE CAPITAL

The previous Part provides an overview of third-party financing in general litigation. In this Part, I argue that opaque capital[52] is moving into mass-tort financing[53] and is discarding most of the staid dynamics and market norms that have proliferated in the general litigation space. Mass-tort financing is attractive for various reasons, including the promise of oversized returns.[54] But its true value to an aggressive financier is the potential to clandestinely create and control a case.

There are three main types of funders: (i) dedicated, (ii) sporadic, and (iii) opaque capital.[55] Dedicated funder describes large firms with an arguably transparent business model and willingness to engage in public debate about litigation finance. Burford Capital, one of the largest litigation funders in the world

financing.html [https://perma.cc/6L93-5W3S] ("The industry has grown thanks in part to a gusher of money from mainstream financial institutions . . . . McSweeney Langevin, which has represented more than 1,000 women in mesh litigation, got backing from EJF Capital, a Virginia hedge fund with $10 billion in assets, according to corporate records.").

51. *See* Fan et al., *supra* note 15, at 5.

52. *See supra* note 20 for a definition of "opaque capital."

53. *See supra* note 16 for a definition of "mass-tort financing."

54. Mass-tort financing is alluring to opaque capital for a variety of reason, including: (i) a return on investment that exceeds other prominent asset classes and the average alternative asset, *see* Fan et al., *supra* note 15, at 2; Christoph Lattemann, Ilan Alon, & Emily Patig, *Case in Disruption: LexShares and the Litigation Finance Sector*, 38 Glob. Bus. & Org. Excellence 13, 14 (2019) (citations omitted); (ii) a return that is "largely uncorrelated with macroeconomic risks," Fan et al., *supra* note 15, at 8; (iii) the ability to operate in an unregulated space with few market norms and control a case through a CPA; (iv) the ability for an investor to enjoy unique influence because of the principal-agent problem that exists between plaintiffs' firms and potentially thousands of clients that they have never met and with whom they rarely—if ever—interact; (v) a unique level of anonymity because "[t]here is no nationwide requirement to disclose litigation funding agreements to courts or opposing parties in federal litigation" and only New Jersey, along with a few courts through standing orders, require acknowledgement of a funding relationship in federal nonclass aggregate litigation, *see* GAO Report, *supra* note 28, at 28; and (vi) limited competition from traditional lenders who eschew mass-tort financing because of its complexity, volatility, and liquidity risk.

55. *See* Fan et al., *supra* note 15, at 9.

with approximately $4.5 billion in assets under management, is an example.[56] These investors are involved in a wide array of diverse cases but often focus on business-to-business disputes. They are well known in the marketplace and, in some respects, represent the face of the industry.

Sporadic funders are less systematic than dedicated ones. This group is comprised of various individual and institutional investors that engage in litigation financing haphazardly and opportunistically. These funders are often involved in low stakes, personal-injury suits.[57] They are not high-profile participants and tend to receive public scrutiny only when they engage in some sort of malfeasance or unethical conduct.[58]

Opaque capital is the new breed of financier: aggressive hedge funds and private-equity firms that have established a litigation-finance group or have a group that acts as the functional equivalent. These financiers—flush with capital that needs to be deployed[59]—could exclusively invest in case portfolios through law firms and other intermediaries but understand that their chase for yield requires direct engagement in high-stakes, big-ticket disputes. They are less influenced by market norms.

I argue that opaque capital's engagement is unique because it is willing to work with a variety of professionals and service providers in order to dictate outcomes. As witnessed in distressed debt markets, these parties are adept at exploiting arbitrage opportunities to secure premium recoveries.[60] Opaque capital relies on intermediaries to contact potential mass-tort claimants and attempt to create and enhance claims.[61] Opaque capital is also willing to extend financing directly to claimants in exchange for various privileges and powers, including the right to veto settlement offers. And these financiers fund plaintiffs' attorneys for a specific case or through portfolio lending. By exerting leverage at each

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56. *See id.*

57. *See, e.g.*, Mize v. Kai, Inc., 2018 WL 1035084, at *5 (D. Colo. Feb. 23, 2018) (describing a third-party funder that provided capital for nuisance suits based on technical violations of the Americans with Disabilities Act).

58. *See id.* at *5-6.

59. *See* Steve Toplin, *What Is Dry Powder, and How Will It Affect Technology in 2023?*, FORBES (Mar. 17, 2023), https://www.forbes.com/sites/forbestechcouncil/2023/03/17/what-is-dry-powder-and-how-will-it-affect-technology-in-2023 [https://perma.cc/9JQG-3WJN] ("The dry powder for private equity globally is estimated to be $1.3 trillion, and that of venture capital is estimated to be $580 billion.").

60. *See generally* Parikh, *supra* note 19 (analyzing how private equity sponsors dictate outcomes in corporate bankruptcy cases).

61. *See infra* Section III.A.

process point, opaque capital is pursuing a model that it has perfected in other markets.[62]

But opaque capital cannot be understood until one appreciates the multifaceted approach it takes to outcome maximization. Private-equity firms systematically employ a crossholder investment strategy. Crossholders are creditors who own debt at different levels of a firm's capital structure and may even own equity in a firm's parent company.[63] These parties can appear to be aligned with a particular group but possess unique incentives. For a crossholder, a suboptimal settlement for one creditor group to which it belongs may be acceptable if it is necessary to secure an oversized return from a different position.[64] This is what I call the crossholder's luxury; a crossholder may lose a battle but still win the war. This phenomenon is regularly witnessed outside the mass-torts sphere,[65] but we are now seeing it inside as well. For example, as noted in the Introduction, Centerbridge and Apollo funded mass-tort litigation against PG&E. As the bankruptcy case unfolded, Centerbridge accumulated 1.6% of PG&E stock, and Apollo purchased more than $500 million in PG&E debt.[66] Both also held insurance claims against PG&E.[67] Because these parties could profit from their crossholder positions, they may have been willing to accept a diminished recovery in

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62. *See* Parikh, *supra* note 19 (manuscript at 26) ("To balance out the obvious risks that come with over-leveraged companies, private equity sponsors have been subtly modifying debt documents to eliminate restrictive covenants and open loopholes that would allow for new and creative ways to rehabilitate distressed companies.").

63. *See* Samir D. Parikh, *Creditors Strike Back: The Return of the Cooperation Agreement*, 72 DUKE L.J. ONLINE (forthcoming 2023) (manuscript at 26) ("For example, in the Caesars's dispute, Canyon Capital owned first-lien bonds, second-lien bonds, and equity in the private equity sponsor. Canyon Capital's incentives did not align with the second-lien bondholders, who were the lone holdouts in that case. Canyon was fixated on settlement with Caesars and pushed the second-lien bondholder group to accept offers that were well below what was reasonable under the circumstances. Canyon's fear was a prolonged lack of consensus creating chaos that could decimate its other positions." (citations omitted)).

64. *See id.*; *see also* Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Petition to Vacate the Arbitral Award at 6, Sysco Corp. v. GLAZ LLC, No. 1:23-cv-01451, (N.D. Ill. Mar. 27, 2023) ("A funder may therefore insist on a client taking a legal position in one case that may harm that client's interests so as to maximize revenue for its portfolio of cases, or delay settlement . . . to increase the funder's settlement leverage in other cases.").

65. *See* Parikh, *supra* note 19 (manuscript at 34-39).

66. *See* Jamali, *supra* note 5; *see also* Mark Chediak & Peter Blumberg, *Apollo, Centerbridge Backed PG&E, Funded Loan to Firm Suing It*, BLOOMBERG L. (Apr. 30, 2020), https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/X9IGMBC000000 [https://perma.cc/PGL4-2CSC] ("It's not unusual for big investment companies to loan money to law firms. But Centerbridge and Apollo's positions in the loan . . . underscores how Wall Street titans were on multiple sides in the largest utility bankruptcy in U.S. history.").

67. *See* Chediak & Blumberg, *supra* note 66.

one position if it was necessary to realize a recovery that was commensurately larger in another.

The primary concern with this strategy is that crossholder positions are rarely disclosed or fully appreciated.[68] This dynamic allows clandestine maneuvering and influence that could undermine cases and litigants in unforeseen ways. Imagine that a litigation-finance division of an investment firm is funding large-scale, personal-injury, mass-tort litigation against a subsidiary of BigCo — a prominent publicly held company. The litigation financier has contracted for a veto right on any settlement offer that the mass-tort claimants in that case receive and enjoys leverage over counsel in the case because of an extensive lending relationship. An affiliated investment subsidiary of the same investment firm takes a significant short position on BigCo stock.

As the case progresses, the litigation financier strategically releases information about the litigation to various journalists, strongly indicating that the litigation will ultimately decimate BigCo's profitability.[69] This action supports the affiliated investment subsidiary's short position. Further imagine that the financier takes a particularly aggressive posture in negotiations and, as the case drags on, this approach boosts its affiliated entity's short. The litigation financier always knows that it can inform its affiliate when it decides to be less recalcitrant and settlement prospects improve. With this information, the affiliate would be able to exit its short position at the perfect time.

The litigation financier's actions in this scenario may lead to a diminished recovery for plaintiffs and, thereby, a lower recovery for itself based on its contingency arrangement. But the investment firm has maximized its outcome if the delta based on the litigation financier's maneuvering is more than offset by the increased return on the affiliated entity's short.[70]

This is just one example of how opaque capital can create chaos in this space. The next Part provides a detailed analysis of the distortive power that opaque capital is in the process of seizing and the preliminary instances where it has already been used. Creation and control are the governing dynamics.

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68. *See* Parikh, *supra* note 63 (manuscript at 28-29).

69. Johnson & Johnson is an example of how a subsidiary's legal woes can impact a parent entity. On January 6, 2023, Johnson & Johnson's stock was valued at $180.25 per share. On January 30, 2023, the Third Circuit Court of Appeals ostensibly dismissed LTL's bankruptcy case. *See* Randles & Loftus, *supra* note 25. J&J's stock price dropped consistently over the next 60 days. On March 28, 2023, the stock was valued at $151.82. *See* JNJ Historical Prices & Data, YAHOO FIN., https://finance.yahoo.com/quote/JNJ/history [https://perma.cc/N5U3-2RDE]. The New York Stock Exchange Composite Index was basically flat during this period. NYSE Composite Historical Prices & Data, YAHOO FIN., https://finance.yahoo.com/quote/%5ENYA/history [https://perma.cc/Q9NY-LLBV].

70. Naturally, this conduct would be prohibited by securities laws, inter alia, but policing this type of strategic information sharing is extremely difficult.

III. CREATION AND CONTROL

Part II highlighted the confluence of factors that have drawn opaque capital into mass-tort financing and offers a glimpse of the potential harm. This Part unpacks two points in the trajectory of a mass-tort case where opaque capital's influence can be most distortive.

A. The Alchemist's Inversion

Financiers in general litigation bear the risk of claim infirmities and, therefore, must filter potential suits as part of their underwriting process. Only "investment grade" claims—ones that present an overwhelmingly high probability of success—are worth pursuing.[71] These financiers must avoid frivolous claims, and their preliminary assessment can be a valuable signal to litigants.[72] But game theory dynamics in nonclass aggregate litigation are unlike those in general litigation matters. In mass torts, opaque capital can perform a type of alchemy that makes claim volume—not merit—the guiding light. The Alchemist's Inversion is the term I use to describe a litigation financier's use of unethical and potentially illegal tactics to create, enhance, and marshal apparently low-value claims with the objective of turning them into gold.

1. The Grim Reality of Nonmeritorious Claims

In general product-liability litigation, an attorney considering representing an alleged victim on a contingency basis needs to verify that the individual actually used the product in question and suffered the injury alleged. These gatekeeper issues would customarily be resolved in the initial screening. The probability of the defendant and the court system discovering a nonmeritorious claim is material. The contingency attorney bears the risk of loss, and internalizing this risk prompts investigation. Class aggregation presents similar dynamics. Various procedural safeguards force attorneys to internalize the risk that their client may be undeserving of compensation. At the very least, "a plaintiffs' lawyer must . . . overcome a motion to dismiss and stand a strong chance of prevailing on class certification in order to exert maximal settlement leverage."[73]

71. *See* Bedi & Marra, *supra* note 34, at 607.

72. *See id.*

73. Andrew J. Pincus, Archis A. Parasharami, Kevin Ranlett & Carmen Longoria-Green, *Mass Arbitration Shakedown: Coercing Unjustified Settlements*, U.S. CHAMBER COM. INST. LEGAL REFORM 29 (Feb. 2023), https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf [https://perma.cc/7ZXP-TYMW].

These ubiquitous incentives diverge in nonclass aggregate litigation. As a result, nonmeritorious[74] claims exist alongside meritorious ones in the claims pool of any large-scale mass-tort case.[75] In some instances, a claimant has sensed an opportunity for an unverified distribution and freely thrown their hat in the ring. In cases with thousands of claims, false positives[76] are unavoidable as convoluted causation inquiries[77] mix with settlement imperatives.[78]

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74. Following Professor Nora F. Engstrom, I use the term "nonmeritorious" to describe claims that lack the ability to satisfy basic evidentiary requirements necessary for a colorable cause of action; as to these claims, the plaintiff has an extremely low chance of winning if the claim was actually litigated. *See* Nora F. Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 22-23 (2019).

75. *See id.* at 24 ("Generally, in mass-tort cases, some injury victims will have suffered a bona fide impairment . . . . But, sensing a payday, other individuals (no one knows how many) are also apt to be sucked in, typically claiming that they have sustained an injury that is, in fact, either nonexistent, grossly exaggerated, or unrelated to the instant defendant's conduct."); *see also* Nora F. Engstrom & Todd Venook, *Harnessing Common Benefit Fees to Promote MDL Integrity*, 101 TEX. L. REV. 1623, 1631-33 (2023) (listing several recent cases that appeared to contain large numbers of nonmeritorious claims, including *Vioxx*, *Deepwater Horizon*, *Fosamax*, *Digitek*, *Abilify*, *Zostavax*, and *3M*). We saw this in the Boy Scouts of America litigation. The heinous acts perpetuated by the organization's volunteers and administrators over the course of numerous decades are undeniable. But the means to accurately assess and verify claims were often lacking. *See, e.g.*, Opening Brief of Certain Insurers at 21-22, *In re* Boy Scouts of Am., 1:22-cv-01237 (D. Del. Sept. 22, 2022), ECF 45 [hereinafter Boy Scouts Opening Brief] (explaining that the claims filed after a marketing blitz were much more difficult to assess because they (i) were based on incidents that allegedly occurred 50-60 years ago, (ii) made allegations that were generally unreliable, and (iii) involved claimants who had not previously reported abuse); *see also* James Nani, *Oakland Diocese Insurers, Abuse Victims Spar Over Claim Rules*, BLOOMBERG L. (July 12, 2023), https://news.bloomberglaw.com/bankruptcy-law/oakland-diocese-insurers-abuse-victims-spar-over-claim-rules# [https://perma.cc/NV88-8CZD] ("The diocese's proposed procedures for filing sex abuse claims . . . don't require claimants to disclose facts to prove their allegations are valid under California law, the insurers said in court papers . . . . The insurers contended that the proposed rules will lead to a flood of invalid claims.").

76. *See, e.g.*, Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 961 (1995) ("[M]ass tort actions attract . . . and pay[] a large number of claims that are insubstantial—or, in the words of one experienced plaintiffs' lawyer, 'junk.'").

77. *See* Boy Scouts Opening Brief, *supra* note 75, at 21 (describing the causation challenges that arise when tortious events are alleged to have occurred 50-60 years before the litigation).

78. *See* Engstrom, *supra* note 74, at 28 ("[G]roundless claiming is most apt to proliferate when (1) injuries are hard to discern; (2) specific causation is contestable; (3) defendants have a diminished incentive or capacity to scrutinize claims prior to payment; (4) filing rates are unusually high; and . . . (5) restraints typically imposed by the contingency fee are relaxed or altogether inoperative."). For example, the lead attorneys in the *Vioxx* settlement acknowledged that there were thousands of claims filed by individuals that never even took the drug, but that did not preclude an extremely lucrative settlement. *See* Ctr. on Civ. Just., *MDL at 50—The 50th Anniversary of Multidistrict Litigation, Theory of Aggregation: Class Actions, MDLs, Bankruptcies, and More*, at 27:41-27:57, N.Y.U. SCH. L. (Oct. 12, 2018),

More recently, a staggering number of nonmeritorious claims have entered mass-tort cases not because an opportunistic claimant independently determined it was in their best interests to do so, but because some shadowed actor told them it was. In this sphere, opaque capital is focused on marshalling as many claims as possible—sometimes without regard to merit. The idea is to amplify claim volume by enhancing claims in some cases and actually creating claims in others. Policing this type of opportunistic behavior is extremely difficult and represents an intractable feature of the current system. Multidistrict litigation (MDL) and bankruptcy courts have historically encountered crippling obstacles in their attempts to filter unsupportable claims.[79] Plaintiffs' attorneys who originally interview potential claimants bear the burden of vetting claims, but many refuse to fulfill this obligation.[80] Indeed, the potential benefit of adding a nonmeritorious claim is greater than the cost for a variety of reasons.[81]

Primarily, many practitioners believe that courts are not adept at filtering nonmeritorious claims,[82] and even when detected there is no record of courts fining counsel when blatantly baseless claims have been discovered. "[T]he bigger an MDL . . . gets, the less individualized scrutiny each claim will realistically receive, creating incentives for ever more claims to be filed" with the hope the case settles before true claim assessment occurs.[83] Many of the most famous

https://www.law.nyu.edu/centers/civiljustice/2018-early-fall-conference-mdl-at-50 [https://perma.cc/YP2B-5U53].

79. *See, e.g.*, M. Casey Rodgers, *Vetting the Wether: One Shepherd's View*, 89 UMKC L. REV. 873, 873-74 (2021) ("MDLs have no built-in uniform mechanism for efficiently filtering out [unsupportable] claims . . . . [T]he sheer volume of unsupportable claims in some MDLs can grossly distort the true merit and size of the litigation."); *see also In re* Fosamax Prods. Liab. Litig., No. 06-MD-1789, 2012 WL 5877418, at *3 (S.D.N.Y. Nov. 20, 2012) ("[T]he Court has reason to believe that spurious or meritless cases are lurking" because "more than 50% of the cases set for trial have been dismissed, and some 31% of cases that have been selected for discovery have been dismissed.").

80. *See* Boy Scouts Opening Brief, *supra* note 75, at 20 ("Although the proof of claim forms required the signatory to attest to the trust of the claim, plaintiffs' attorneys elected to sign thousands of forms themselves, . . . at times without even bothering to review the forms, speak with their clients, or confirm their accuracy." (citations to depositions omitted)).

81. *See* Engstrom, *supra* note 74, at 31.

82. *See* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 495 (1994) (explaining that many mass-tort attorneys choose to "suck up good and bad cases, hoping that they can settle in gross").

83. *See* Engstrom, *supra* note 74, at 29; *see also* D. Theodore Rave, *Multidistrict Litigation and the Field of Dreams*, 101 TEX. L. REV. 1595, 1602 (2023) ("If the MDL judge focuses on discovery and motions relating to common issues first, leaving individual issues until later in the litigation . . . then weak or meritless cases may go untested until late in the game. And the litigation may settle before any such testing occurs . . . .").

mass-tort cases settled years before there was any scientific consensus about causation.[84]

Further, inventory volume is a powerful weapon because of the critical-mass effect. "[D]efendants reportedly feel more 'pressure' to settle when up against a lawyer with a large 'volume of cases.'"[85] A significant number of unresolved claims creates lingering uncertainty for a corporate defendant; this uncertainty can be seen as a black cloud that suppresses market capitalization by forcing investors to discount valuations to account for the potential litigation exposure.[86] Therefore, once a critical mass of claims is secured, defendants may be forced to settle, merit notwithstanding.

Finally, attorneys[87] are also reluctant to filter claims because "coveted and remunerative positions" on key steering committees in large cases are awarded

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84. *See* Parikh, *supra* note 17, at 459. ("For example, various studies indicate that a woman's use of talcum powder on her body does not increase the risk of ovarian cancer, but there is currently a lack of consensus in the scientific community."); David E. Bernstein, *The Breast Implant Fiasco*, 87 CALIF. L. REV. 457, 459, 479-80 (1999) (explaining that Dow Corning was forced to file for bankruptcy to address claims that silicone gel breast implants caused cancer even though there was ostensibly no scientific evidence supporting the claims); *see also* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 43 (1995) (discussing how breast-implant cases "will be largely disposed of by settlement before the key issues of science have been definitively decided").

85. *See* Engstrom, *supra* note 74, at 32 (citing Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1732 (2002)).

86. *See* Parikh, *supra* note 17, at 462; *see also id.* ("Credit markets are affected similarly, but the results are increased borrowing costs or—in the doomsday scenario—restricted access to credit.").

87. There are many well established plaintiffs' firms that do not rely on third-party financing and do an outstanding job of honestly and vigilantly representing their clients' interests. There are other similar firms that have enough leverage where they would not have to accept terms that distort their representation in a particular case. However, there are—what I call—"hungry firms" that do not enjoy these luxuries. Hungry firms are lured to the mass-tort space for the same reason that opaque capital is: the potential for oversized returns. Mass-tort litigation can be a leveled playing field because new entrants can compete with established firms if the new entrants are able to secure enough capital and build a large inventory of claims. Claims inventory is the true equalizer in these disputes. Capital is the key, and that is exactly what opaque capital is offering. I argue that hungry firms often possess insufficient leverage to push back on opaque capital's demands—contractual or otherwise. *See* Burch, *supra* note 41, at 1335 ("[O]utside funding increases competition among the plaintiffs' bar in that it allows smaller or less established firms to litigate cases they might not otherwise be able to afford."); *see also* Baker, *supra* note 47, at 1587 (quoting a plaintiff lawyer stating "There used to be a small number of firms who had the experience and the money and were willing to go the distance [in mass-tort litigation]. When funding became available, it not only allowed experienced lawyers without money who were willing to go the distance, it also allowed a new kind of law firm").

based on the size of an attorney's case inventory,[88] and inventory volume provides leverage to dictate case trajectory.[89] All of these factors lead to "exceptionally high rates of claim initiation" in mass-tort cases.[90]

A simple reality emerges against this backdrop: at the outset of a dispute, the probability of financial success is premised entirely on marshaling as many claims as possible—even if the vast majority of those claims prove to be baseless.

2. *The Alchemist's Process*

Based on the critical-mass effect, opaque capital and plaintiffs' attorneys have expanded their use of claim aggregators—also known as lead generators—to marshal claims.[91] Television advertising alone has tripled in the past decade,[92]

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88. *See* Engstrom, *supra* note 74, at 32; Jamie Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 350 (2014) ("[H]ighly coveted leadership positions are appointed, in part, based upon the size of counsel's inventory . . . ."); *see also* Mari, *supra* note 50 ("The government's theory was that Watts had engineered the massive client list to secure a spot on the Plaintiffs' Steering Committee—for which his firm would pocket $17 million . . . .").

89. *See* Boy Scouts Opening Brief, *supra* note 75, at 18 (observing that one plaintiff attorney in the bankruptcy case noted that their goal was to "keep focused on marketing and media efforts going full tilt . . . [to secure] control [of] 80% of the claims, I.e. [sic] our coalition controls the case").

90. *See* Engstrom, *supra* note 74, at 30.

91. Advisory Comm. on Civ. Rules, *supra* note 45, at 373 ("Disclosure proponents point to reported instances of [third-party-litigation] financing used to support outreach of 'claims aggregators' who collect claims and funnel them to lawyers."); *see also* Goldstein & Silver-Greenberg, *supra* note 50 ("Lawyers building [mass-tort cases] sometimes turn to marketing firms to drum up clients."); Strom, *supra* note 23 ("Advertising is the main method to find claimants, and it's handled by an ecosystem of lawyer-specific ad agencies known as lead generators. They find clients, and some sign them up through their own call centers. Some even retrieve client medical records. Then they sell the cases to law firms at a price that adjusts based on how many lawyers are advertising for the case and what's going on in the litigation."); Paul M. Barrett, *Need Victims for Your Mass Lawsuit? Call Jesse Levine*, BLOOMBERG BUS. (Dec. 12, 2013), https://www.bloomberg.com/news/articles/2013-12-12/mass-tort-lawsuit-lead-generator-jesse-levine-has-victims-for-sale [https://perma.cc/9TRC-H3TV] (profiling the owner of multiple claim aggregation companies, one of which was used in the Avandia mass tort case against GlaxoSmithKline); Mari, *supra* note 50 ("'We are going to get you 5,000 to 7,000 clients,' Guerra emailed Watts in May 2010. 'We are going to need $900,000.' Later Guerra emailed, 'I will get you 20,000 claims if you want them.' Watts did. He upped his investment to $5 million for 20,000 plaintiffs, then $10 million for 40,000, . . ." but only four actual claimants existed).

92. *See* Fan et al., *supra* note 15, at 15; Julie Triedman, *Arms Race: Law Firms and the Litigation Funding Boom*, LAW.COM (Dec. 30, 2015), https://www.law.com/americanlawyer/almID/1202745121381 [https://perma.cc/7FUA-CLWL] ("[I]nvestment in a claims-bundling firm, known not for trial work but for multimillion-dollar TV blitzes aimed at potential mass tort claimants, was a far cry from the funder's usual customers . . . ."); Engstrom, *supra*

and more than $145 million has already been spent in 2022 marshaling claims in the Camp Lejeune tainted water litigation—a number that is projected to double.[93] "The industry tries to keep the network of marketers and financiers out of sight," but the impact of these actors is glaring.[94]

Claim aggregators employ a litany of outreach tactics, including (i) direct calling; (ii) television advertising; (iii) television "infomercials"; (iv) online videos posted on Facebook and other social media platforms; (v) websites created specifically to engage with potential claimants; and (vi) direct emails.[95] Sophisticated aggregators also maintain their own repository of claimants from other cases and will solicit from this group as well.[96] These resource-intensive measures are "financed by large investors who view mass torts as an increasingly lucrative asset class, and are likely to bet even more money on similar cases to diversify their holdings."[97]

note 74, at 30 n.124. These tactics are also prevalent in mass-tort cases destined for arbitration. *See* J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1330-32 (2022); *see also* Respondents' Opposition to Petitioners' Motion to Compel Arbitration at 7-11, Wallrich v. Samsung Elecs. Am., Inc., 1:22-cv-05506, Docket No. 27 (N.D. Ill. Dec. 5, 2022) [hereinafter Samsung's Opposition] ("Labaton launched a mass arbitration solicitation campaign against Samsung . . . [t]hrough misleading advertisements . . . as well as direct e-mail campaigns.").

93. *See* Strom, *supra* note 23 ("More than $145 million had been spent on television and social media advertising by year's end, according to ad data reviewed by Bloomberg Law. Insiders predict that number could easily double . . . ."). Note that Congress removed the Federal Tort Claims Act's attorney fee caps as to claims filed in the Camp Lejeune case. Therefore, attorneys can seek a much larger contingency fee—perhaps more than 40%. This development has fueled an extraordinary level of marketing outreach. *See* John Beisner & John Masslon, Opinion, *The Camp LeJeune Plaintiffs' Bar is Monetizing Tragedy*, BLOOMBERG L. (Mar. 23, 2023), https://news.bloomberglaw.com/us-law-week/the-camp-lejeune-plaintiffs-bar-is-monetizing-tragedy [https://perma.cc/A5E3-LVTL].

94. Goldstein & Silver-Greenberg, *supra* note 50.

95. Strom, *supra* note 23; Goldstein & Silver-Greenberg, *supra* note 50 ("Plaintiffs' firms turned to marketers to recruit clients. Women with mesh implants said they soon started receiving torrents of unsolicited phone calls . . . ."); *see also* Samsung's Opposition, *supra* note 92, at 7-11 (describing web-based solicitation of potential arbitration claimants); Philip Sherwell, *BP Oil Spill: Louisiana Makes a Dash for BP's Cash*, DAILY TEL. (Aug. 2, 2013), https://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/10218968/BP-oil-spill-Louisiana-makes-a-dash-for-the-cash.html [https://perma.cc/2QHM-QQ85] (noting that in the Deepwater Horizon litigation, attorneys advertised in a solicitation letter that claimants could "be compensated for losses that [were] unrelated to the spill").

96. *See* Samsung's Opposition, *supra* note 92, at 9 ("These e-mail solicitations reveal that . . . Labaton is using e-mail addresses obtained by them in connection with a $650 million BIPA class settlement against Facebook to recruit participants for an array of unrelated mass arbitration opportunities . . . .").

97. *See* Strom, *supra* note 23.

A complaint filed by a finance broker[98] who worked with a prominent plaintiffs' firm recently described the process as

> (i) borrow as much money as possible; (ii) buy as many television ads and/or faceless clients as possible; (iii) wait on real lawyers somewhere to establish liability against somebody or something; (iv) use those faceless clients to borrow even more money or buy even more cases; (v) hire attorneys to settle the cases for whatever they can get; (vi) take a plump 40% [contingency fee]; and (vii) lather, rinse, and repeat.[99]

The idea of aggressively marshalling nonmeritorious claims is well known,[100] but this practice is the precursor to a more sinister one: claim alchemy—the idea of creating or enhancing claims. I describe this as the Alchemist's Inversion, a phenomenon where opaque capital employs unethical and potentially illegal tactics to create, enhance, and marshal apparently low-value claims with the hope of turning them into gold. The pelvic mesh dispute is an example.

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98. "Finance broker" is a term for an individual who connects litigation-finance companies with plaintiffs' attorneys; *see also* Jamali, *supra* note 3 (explaining how firms financed mass-tort litigation after California's PG&E wildfires).

99. *See* Plaintiff's Original Petition and Request for Disclosure at ¶ 76, Shenaq v. Akin, No. 2015-57942 (Tex. Dist. Ct. Harris Cty. Sept. 29, 2015); *see also id.* at ¶ 23-24 (describing the business relationship between the plaintiffs' finance broker and the plaintiffs' firm).

100. The Combat Arms MDL is the largest MDL in U.S. history and contained more than 280,000 claimants at its apex. *See* Nate Raymond, *3M Owes $58 Million to Two Veterans in Latest Combat Earplug Trials*, REUTERS (Mar. 26, 2022), https://www.reuters.com/legal/litigation/jury-says-3m-owes-50-mln-us-army-veteran-latest-earplug-trial-2022-03-25 [https://perma.cc/46RD-PV2R]. In 2021, a random sample of five hundred claimants designated "Wave 1" plaintiffs was required to produce evidence supporting their claims. Case Management Order No. 31 (Wave Order #1) at 2, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 19md2885 (N.D. Fla. Nov. 22, 2021). Of that group, 126 (25.2%) produced nothing and ostensibly dropped out of the case. Informational Brief of Aearo Technologies, LLC at 35, *In re* Aearo Techs., LLC, No. 22-02890-JJG-25-28 (Bankr. S.D. Ind. July 26, 2022) [hereinafter, "Aearo Informational Brief"]; *see also* Declaration of David Horowitz in Support of Debtors' Motion for Declaratory and Injunctive Relief at ¶ 23, *In re* Aearo Techs., LLC, No. 22-50059 (Bankr. S.D. Ind. July 26, 2022) (noting that Wave 1 included 374 active cases after accounting for dismissals). Overall, there was no record of nearly 75% of Wave 1 plaintiffs ever having used Combat Arms earplugs, and more than 65% of this group affirmatively reported using different hearing-protection devices. Aearo Informational Brief, *supra*, at 38. Of the subset that had used the earplugs in question, more than 85% had "normal hearing" according to World Health Organization criteria during the periods they had alleged to have used the Combat Arms earplugs. Aearo Informational Brief, *supra*, at 40.

In the late 1990s, mesh implants designed to correct pelvic organ prolapse were surgically inserted into millions of women worldwide.[101] In 2008, many recipients began complaining that the implants were causing bleeding and discomfort.[102] Soon there were around 100,000 suits pending in state and federal court.[103] Plaintiffs claimed that the implants "were poorly designed and made from materials not intended to be implanted in the vaginal area."[104]

Plaintiffs' attorneys soon realized that the value of a claim increased dramatically if the implant had been removed from a plaintiff's body.[105] Removing the mesh, however, can be extremely complicated because the device is made of material that is designed to bond with human tissue.[106] Only half of all plaintiffs had had the implant removed.[107] Therefore, the presumption was that a plaintiff who received a doctor's approval to have the implant removed must have been suffering serious complications and would be entitled to a much larger recovery.[108] Seizing on this idea, litigation financiers engaged firms to call mesh recipients who had not had the device removed and convince them to do so.[109]

Preying on often times "desperate and unsophisticated patients," these firms began calling women who had not had their mesh implants removed.[110] In some instances, the caller would tell victims that they needed to remove the mesh implant immediately because any delay could lead to their death.[111] But there was good news: a financier could pay for the procedure and had already contracted with a surgeon willing to remove the implant.[112] The financier could further

101. *See* Goldstein & Silver-Greenberg, *supra* note 50; *see also* Holly Cooper Ford, *Safe or Not-So-Safe? The Truth Behind the Vaginal Mesh Controversy*, UVA Health (Aug. 1, 2022), https://blog.uvahealth.com/2022/08/01/the-story-behind-vaginal-mesh [https://perma.cc/9U6Q-848G].

102. Alison Frankel & Jessica Dye, *Investors Profit by Funding Surgery for Desperate Women Patients*, REUTERS (Aug. 18, 2015), https://www.reuters.com/article/usa-litigation-mesh/special-report-investors-profit-by-funding-surgery-for-desperate-women-patients-idUSL3N10S54U20150818 [https://perma.cc/9G4G-9X23].

103. *Id.*

104. *Id.*

105. *See* Goldstein & Silver-Greenberg, *supra* note 50 (quoting plaintiff's counsel's statement that "defendants have offered next to nothing to settle cases involving mesh products that have not been removed").

106. *See* Frankel & Dye, *supra* note 102; *see also* Goldstein & Silver-Greenberg, *supra* note 50.

107. *See* Frankel & Dye, *supra* note 102.

108. *See id.*

109. *See* Goldstein & Silver-Greenberg, *supra* note 50; Frankel & Dye, *supra* note 102.

110. Frankel & Dye, *supra* note 102.

111. *See* Goldstein & Silver-Greenberg, *supra* note 50.

112. *See* Frankel & Dye, *supra* note 102.

cover the victim's travel expenses and connect them with an attorney.[113] But for many who accepted this offer, no determination was ever made that the plaintiff needed to have the mesh implant removed. In many cases, there was no basis for removal, which could itself cause extreme complications.[114] The claim-alchemy process was shockingly corrupt. "[W]omen [were] sucked into [an] assembly-line-like system . . . fueled by banks, private equity firms and hedge funds [that] provide[d] financial backing" and then manipulated into having a radically invasive procedure that few needed.[115]

The pelvic-mesh case demonstrates that opaque capital has the means and the inclination to create and enhance causes of action through unethical and potentially criminal means. Though this case is over two decades old, it reflects ways that opaque capital may exploit claimants today. Nonmeritorious claims entering a given case undermine the judiciary and harm various stakeholders, including actual victims.[116] As with any limited-fund case, nonmeritorious claimants usurp scarce funds. Every dollar received by a false victim is one less dollar received by a meritorious one. Further, plaintiffs' attorneys have believed for years that aggressive claim aggregation was a shortcut to settlement; a means to place extreme pressure on a corporate defendant who would be desperate to settle. Unfortunately, as questionable claims enter the system, they artificially inflate resolution values. And corporate defendants are now beginning to balk at settlement price tags. Volume still creates various public, investor, and judicial pressures that can compel settlement.[117] However, based on my conversations

113. *See id.*

114. *See id.*; Goldstein & Silver-Greenberg, *supra* note 50.

115. Goldstein & Silver-Greenberg, *supra* note 50.

116. *See* Rave, *supra* note 83, at 1616-17 (noting that an excess of weak claims in an MDL "could raise problems for plaintiffs as well"). For example, in bankruptcy, claimants are often allowed to vote on a proposed plan of reorganization prior to any meaningful vetting; therefore, there is a possibility that mass-tort claimants holding nonmeritorious claims could vote in favor of a plan and wind up binding those holding meritorious claims who vote against the plan. *See* Motion of the Official Committee of Talc Claimants for Entry of an Order (I) Authorizing an Estimation of Current Talc Claims for Voting Purposes, (II) Appointing Kenneth R. Feinberg as Expert Pursuant to Federal Rule of Evidence 706, and (III) Establishing Procedures and Schedule for Estimation Proceedings at 14, *In re* LTL Mgmt., No. 21-12825 (Bankr. D.N.J. July 12, 2023), Docket No. 1020-1 (explaining the risk).

117. *See* Engstrom, *supra* note 74, at 32. Johnson & Johnson's talcum-powder litigation demonstrates the power of claim volume. *See* Peter Loftus & Andrew Scurria, *Johnson & Johnson Seeks $9 Billion Settlement of Talc Lawsuits*, Wall St. J. (Apr. 5, 2023, 10:36 AM ET), https://www.wsj.com/articles/johnson-johnson-proposes-paying-9-billion-to-settle-talc-lawsuits-2fcc672a [https://perma.cc/8NWA-T6F2].

with industry insiders,[118] I believe that corporate defendants will become even more reluctant to settle as new cases are infected with a disproportionately large number of nonmeritorious claims. If realized, this phenomenon would push out resolution timelines as defendants feel exploited and begin to more frequently jump from state court to federal court, from MDL to bankruptcy, trying to find a venue they believe will see through the fog to the merits of these cases.[119] Opaque capital is built for the decade-long slog, but actual victims rarely are. In the long run, these tactics will only prolong cases and diminish recoveries.

Various industry insiders I spoke with believe that opaque capital is employing a unique brand of alchemy that ostensibly requires the reckless—perhaps illegal—marketing described above.[120] But winning the race for inventory is only half of the equation.

B. Settlement Levers and the Corollary to the Alchemist's Inversion

The litigation-finance industry has consistently propounded the premise that financiers do not manage attorneys, oversee litigation strategy, or control settlement in any form. And this may be true for the vast majority of engagements.[121] But the quaint notion of the passive investor evaporates in the mass-torts sphere; the capital commitments and potential recoveries are too monumental for a financier to blithely cede control. The true value of claim alchemy is only realized if the financier can dictate resolution. Therefore, I argue that a corollary to the Alchemist's Inversion is that the litigation financier must maintain control over the asset it has created in order to maximize value when it is sold.

1. The Capital-Provision Agreement

Capital-provision agreements (CPAs) are the means by which opaque capital secures control.[122] Unfortunately, "litigation financing contracts are confidential,

118. Confidential Interview with Law Firm Partner (Mar. 23, 2023); Confidential Interview with Law Firm Partner (Mar. 30, 2023); Confidential Interview with Law Firm Partner (Mar. 15, 2023).

119. *See generally* Aearo Informational Brief, *supra* note 100 (describing 3M's odd bankruptcy ploy with its Aearo subsidiary); *see also* Parikh, *supra* note 25, at 56 (describing Johnson & Johnson's controversial use of the Texas Two-Step to access bankruptcy for its talcum subsidiary).

120. Confidential Interview with Law Firm Partner (Mar. 23, 2023); Confidential Interview with Law Firm Partner (Mar. 30, 2023); Confidential Interview with Law Firm Partner (Mar. 15, 2023).

121. *See supra* note 87 for a discussion of "hungry firms."

122. *See* John H. Beisner, Jessica D. Miller & Jordan M. Schwartz, *Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding a Decade Later*, U.S. CHAMBER INST. LEGAL and only . . . a few [have] come to light."[123] Financiers aggressively guard these agreements and can be quite defiant even when compelled to divulge information pursuant to court order.[124] In an effort to demystify the funding process, a number of financiers have willingly released examples of past work and

REFORM 19 (Jan. 2020), https://instituteforlegalreform.com/wp-content/uploads/2020/10/Still_Selling_Lawsuits_-_Third_Party_Litigation_Funding_A_Decade_Later.pdf [https://perma.cc/QH35-ZW42] (providing examples of specific terms that can be inserted into a CPA in order to allow financiers to control the settlement decision).

123. Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 719 (2014). "There is no nationwide requirement to disclose litigation funding agreements to courts or opposing parties in U.S. federal litigation." GAO REPORT, *supra* note 28, at 26. The District of New Jersey is one of the few federal jurisdictions that expressly require the disclosure of a third-party litigation financing relationship at the outset of a case. D.N.J. Civ. R. 7.1.1. However, this order does not require the disclosure of the CPA itself. D.N.J. Civ. R. 7.1.1. A party in a case may seek disclosure of the actual CPA but would need a "showing of good cause that the nonparty has authority to make material litigation decisions or settlement decisions, the interests of parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case." D.N.J. Civ. R. 7.1.1. Some federal judges have standing orders to the same effect. For example, Chief Judge Connelly of the District of Delaware recently issued a standing order requiring "[a] brief description of the nature of the financial interest" held by any third-party financier in cases pending in his court. *See* Colm Connolly, *Standing Order Regarding Third-Party Litigation Funding Arrangements*, D. DEL. (Apr. 18, 2022), https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf [https://perma.cc/5QDB-39Q8]. Finally, courts have the inherent power to order (i) an in-camera review of a CPA, and (ii) that the defendant be allowed to review these agreements, *see* Hon. David G. Campbell, *Report of Advisory Committee on Civil Rules*, ADVISORY COMM. CIV. RULES 4 (Dec. 2, 2014), https://www.uscourts.gov/sites/default/files/fr_import/CV12-2014.pdf [https://perma.cc/K5MX-5ZLS], but few have, especially in nonclass aggregate litigation. *See* Charles M. Agee, Lucian T. Pera & Steven A. Vickery, *Litigation Funding and Confidentiality: A Comprehensive Analysis of Current Case Law*, WESTFLEET ADVISORS (June 2019), https://www.westfleetadvisors.com/wp-content/uploads/2019/08/2019June_Westfleet_LitigationBooklet1.pdf [https://perma.cc/S5PL-U36X] ("[A]fter analyzing 37 trial court decisions, we found courts most often deny or limit discovery of funding agreements and communications with funders . . . ."). And even if a court is inclined to order production of the CPA, the document may not be discoverable for various reasons, including the work-product doctrine and an attorney-client privilege supported by the common-interest doctrine. *See* Steinitz & Field, *supra*, at 730-35. The Litigation Funding Transparency Act is currently pending in Congress and would require disclosure of funding relationships in civil actions. *See Lawmakers Reintroduce Litigation Funding Transparency Bill*, CHUCK GRASSLEY (Mar. 19, 2021), https://www.grassley.senate.gov/news/news-releases/lawmakers-reintroduce-litigation-funding-transparency-bill [https://perma.cc/572H-U5P2].

124. *See* Avraham, Baker & Sebok, *supra* note 18, at 160 ("Each funder jealously guards its data. Indeed, even armed with an order from the federal judge in the NFL concussion litigation, class counsel was not able to obtain any systematic information from the funders regarding the terms of their contracts with the players.").

contract templates over the years.[125] All of these agreements describe a benign relationship where the financier is a passive investor, attorneys have absolute autonomy, and the plaintiff has unquestioned, decision-making authority.[126] But we know that many cases do not exhibit these dynamics. The few agreements that parties have been *compelled* to release provide a glimpse into the shadows.

2. *Seizing Decision-Making Power*

Litigation-finance firms will oftentimes directly provide capital to plaintiffs on a nonrecourse basis in exchange for securing various rights and benefits through a CPA.[127] An attorney working on a contingency basis can absorb certain court-filing fees and other related fees but cannot provide financial assistance to a client[128] nor acquire an interest in the client's cause of action, aside from her contingency fee.[129] Mass-tort plaintiffs facing a potential decade-long litigation battle may be desperate for bridge financing to cover basic health-care expenses and other costs. Opaque capital—invariably brought in by plaintiffs' counsel—can provide this unique and elusive funding but has the right to demand a suite of powers and benefits in return. Indeed, opaque capital can require a plaintiff to assign all decision-making authority regarding her claim.[130] With

125. *See* BURFORD CAP., LEGAL FINANCE CASE STUDIES (2022); *see, e.g.*, LIONFISH LITIG. FIN. LTD. & ROSENBLATT LTD., SAMPLE LITIGATION FINANCE AGREEMENT.

126. ABA COMMISSION, *supra* note 41, at 26 ("The Working Group reviewed numerous contracts submitted by [litigation financiers] that expressly disclaim any control by the [financier] over the settlement decision."). Voluntarily releasing select CPAs may represent a tactic that allows financiers to preserve their public image as passive investors.

127. *See, e.g.*, Matthew Goldstein, *Judge Dismisses Federal Suit Accusing Firm of Defrauding 9/11 Responders*, N.Y. TIMES (Sept. 12, 2018), https://www.nytimes.com/2018/09/12/business/september-11-attacks-nfl-concussion-settlements.html [https://perma.cc/2YC3-9AFB] (discussing the practice of extending cash advances to people with pending cases, such as 9/11 responders).

128. *See* MODEL RULES PRO. CONDUCT, r. 1.8(e) (AM. BAR ASS'N 2021) ("A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client . . . .").

129. *See id.* at r. 1.8(i) ("A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may . . . contract with a client for a reasonable contingent fee in a civil case.").

130. *See* ABA COMMISSION, *supra* note 41, at 23 ("In an arm's-length transaction, however, these fiduciary considerations are absent. There would seem to be no reason, as a matter of contract law, to regard these contractual provisions [granting decision-making authority to a financier] as unenforceable, absent some facts establishing a defense such as duress or unconscionability."); W. Bradley Wendel, *Third-Party Litigation Financing*, *in* TEXAS BUSINESS LITIGATION 1293, 1306 (Sofia Androgué & Caroline Baker eds., 2022) ("Although it has not yet been such authority, opaque capital would have the affirmative right to accept or reject a settlement offer as long as its decision was made in good faith.[131]

Boling v. Prospect Funding Holdings, LLC demonstrates how an aggressive financier can use its leverage to control a suit.[132] In *Boling*, plaintiff Christopher Boling had been injured by a gas can manufactured by Blitz USA. Boling filed suit in 2009 and subsequently entered into four CPAs (collectively, the "Boling Funding Agreements").[133] The Boling Funding Agreements provided a nonrecourse loan to the plaintiff but contained arguably usurious rates of interest.[134] After settlement of the dispute with Blitz USA, the litigation funder in the case asserted that Boling owed it over $300,000.[135] Boling brought suit in federal district court alleging that the Boling Funding Agreements were void and unenforceable based in large part on their usurious provisions, and the district court ruled in his favor. The litigation funder appealed.

The circuit court reviewed key provisions in the Boling Funding Agreements and found that the funder had a troubling level of control over the plaintiff's litigation with Blitz USA. The Boling Funding Agreements:

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litigated in the United States, it is conceivable that some modest degree of control by a funder would be permissible if it were similarly subject to a duty to exercise control in good faith."); Order on Claimants' Preliminary Injunction Application at ¶ 203, Glaz LLC v. Sysco Corp., No. 225609 (London Ct. Int'l Arb. Mar. 10, 2023) (agreeing with an expert witness's statement that "[e]very litigant has the autonomy to decide when and whether to settle. Every litigant also has the autonomy to contract that right away unless there is some legal or ethical barrier to doing so" (emphasis omitted)) (on file with author). *But see* Anthony J. Sebok, *The Rules of Professional Responsibility and Legal Finance: A Status Update*, 57 WAKE FOREST L. REV. 777, 788 n.65 (2022) ("[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." (emphasis added)).

131. A plaintiff could certainly ask that the delegation be revocable. *See* ABA COMMISSION, *supra* note 41, at 26-27 ("In principle there would appear to be no reason why the client could not delegate revocable settlement authority to other agents. Under general agency law principles, any delegation of authority can be revoked by the principal." (citation omitted)). But it is unclear if she will have the leverage or foresight to secure this option. More importantly, there does not appear to be any restriction on a plaintiff delegating *irrevocable* settlement authority. *See id.* at 27 ("[A]s a matter of contract law a client may be able to enter into an enforceable provision in a contract with a[] [financier], giving the [financier] the right to accept or reject a proposed settlement."). Even if the plaintiff balked at such a provision, opaque capital could easily include contractual provisions that would indirectly give it this power. For example, a CPA could allow the plaintiff to retain settlement authority or revoke settlement authority if delegated, but may require an immediate return of the advanced funds plus interest and fees if the plaintiff rejects the financier's recommendation.

132. 771 Fed. Appx. 562 (6th Cir. 2019).

133. *See id.* at 564.

134. *See id.* at 564-65.

135. *See id.* at 565.

- Identified all of Boling's case files—including his medical records, litigation documents, and anything relating to his case—as "collateral" that could be reviewed by the funder without restriction;
- Allowed the funder to seek specific performance if Boling defaulted on any of the covenants in the agreements;
- Precluded Boling from changing attorneys unless (i) he secured the funder's consent; or (ii) repaid all funds owed under the four agreements immediately;
- Made Boling liable for the full amount of the loan plus all interest and fees upon default in performance of any obligation required to protect and preserve the litigation.[136]

In affirming the district court's ruling that the interest rates charged were usurious, the circuit court noted that the agreements raised questions about whether the plaintiff could act independently. The agreements appeared to give the funder power to "interfere with or discourage settlement . . . ."[137]

Similar control provisions were discovered in other cases where the plaintiff was compelled to disclose the governing CPA.[138] Even without explicit control, a financier can have de facto control through various provisions. Indirect control is apparent through attorney-selection clauses[139] and attorney "ombudsmen" provisions, which allow the financier to have an agent overseeing all litigation decisions.[140] Further, the CPA could have a clause that requires the client to

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136. *See id.* at 579-80, 579 n.13.

137. *See id.* at 580.

138. *See* Mize v. Kai, Inc., No. 17-cv-00915, 2018 WL 1035084, at *5 (D. Colo. Feb. 23, 2018) (analyzing the applicable CPA and finding that the agreement prohibited the plaintiff from settling the case without the funder's prior consent and required her to settle if so directed by the funder); Abu-Ghazaleh v. Chaul, 36 So. 3d 691, 693 (Fla. Dist. Ct. App. 2009) (observing that the financier had the right "to approve the filing of the lawsuit; controlled the selection of the plaintiffs' attorneys; recruited fact and expert witnesses; received, reviewed and approved counsel's bills; and had the ability to veto any settlement agreements"); *see also* Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 472 (2012) (explaining that the CPA in the Chevron/Ecuador dispute provided the litigation financier in that case control through provisions that allowed it to select and remove counsel in the case without restriction).

139. *See* Exhibit 13 to Declaration of Caroline Mitchell at §§ 1.1, 10.1, Ogola v. Chevron Corp., No. 14-cv-00173, (N.D. Cal. Sept. 16, 2016) (creating control over the case by allowing the litigation financier to monitor plaintiffs' counsel and restrict retention of any professional not previously approved).

140. *See* Complaint at ¶ 35, White Lilly, LLC v. Balestriere PLLC, No. 18-cv-12404 (S.D.N.Y. Jan. 2, 2019).

reimburse the financier for all litigation expenses if she rejects counsel's advice to settle and ultimately loses at trial or accepts a subsequent settlement for less than the initial one.[141] This would create a Hobson's choice for the plaintiff who disagrees with its financier.

Boling offers a glimpse of the Alchemist's Inversion. *Sysco v. Burford Capital* reveals the full picture. In that case, an antitrust class action alleging price fixing was filed in 2016 on behalf of various injured parties, including Sysco, against more than a dozen chicken suppliers.[142] Two years later, Sysco opted out of the class action and filed its own direct-action complaints.[143]

Sysco's causes of action were valuable but illiquid. Scott E. Gant at Boies Schiller Flexner was Sysco's outside counsel at the time.[144] Gant suggested that his client consider collateralizing its potential litigation-revenue stream.[145] Burford Capital, a third-party financier, was willing to provide nonrecourse financing for the litigation in exchange for a portion of the ultimate recovery in the case.[146] If the lawsuits failed to produce a damages award, Sysco owed Burford nothing.[147] This financing proposal was particularly attractive because it could provide Sysco much-needed liquidity.

In 2019, Sysco and Burford agreed to a CPA, pursuant to which Burford provided approximately $140 million to finance the antitrust litigation in return for a significant portion of any potential recovery Sysco received.[148] The agreement established Burford and its affiliates as "passive providers of external capital" for the litigation.[149] Sysco would make all key decisions and Gant would execute the

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141. *See* Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: A Response to Engstrom*, 129 YALE L.J. F. 64, 74 (2019) (describing an example of such a clause). There are countless possible forms these types of control provisions can take.

142. *See* Petition to Vacate Arbitration Award at ¶ 18, Sysco Corp. v. Glaz LLC, No. 23-cv-01451 (N.D. Ill. Mar. 8, 2023) [hereinafter Petition to Vacate]; Declaration of Barrett G. Flynn in Support of Petition to Vacate Arbitration Award at ¶ 3, Sysco Corp. v. Glaz LLC, No. 23-cv-01451 (N.D. Ill. Mar. 8, 2023).

143. *See, e.g.*, Complaint, Sysco Corp. v. Cargill Inc., No. 22-cv-1750 (D. Minn. June 24, 2022); Complaint, Sysco Corp. v. Agri Stats Inc., No. 21-cv-1374 (D. Minn. Mar. 8, 2021); Complaint, Sysco Corp. v. Tyson Foods, No. 18-cv-700 (N.D. Ill. Jan. 30, 2018).

144. *See* Petition to Vacate, *supra* note 142, at ¶ 26.

145. *See* Ross Todd, *How a Boies Schiller Litigator Got Caught Up in the Fracas Between a Litigation Funder and a Client*, AMLAW LITIG. DAILY (Mar. 15, 2023), https://12ft.io/proxy?q=https%3A%2F%2Fwww.law.com%2Flitigationdaily%2F2023%2F03%2F15%2Fhow-a-boies-schiller-litigator-got-caught-up-in-the-fracas-between-a-litigation-funder-and-a-client%2F [https://perma.cc/ZGM4-T4NW].

146. *See* Petition to Vacate, *supra* note 142, at ¶ 19.

147. *See id.*

148. *See* Todd, *supra* note 145; *see also* Petition to Vacate, *supra* note 142.

149. *See* Petition to Vacate, *supra* note 142, at ¶ 20.

company's directives. This arrangement captured the historical dynamic between litigation-finance companies and their clients.

In December 2020, however, the parties entered into an amended CPA, which was subsequently followed by additional amendments (collectively, the "New Sysco CPA").[150] These new provisions effectuated a subtle but dramatic shift. Under the revised agreements, Sysco was still deemed to have "control" over the antitrust litigation, but the new language gave Burford unilateral power to veto any settlement offer in the case.[151]

In 2022, Sysco decided to settle the antitrust suits, and Barrett G. Flynn—Sysco's associate general counsel—and Gant were able to reach tentative settlements in many cases. Flynn set up a conference call to tell Burford the good news.[152] Unfortunately, representatives from Burford did not share Flynn's excitement, informing him that the amounts were unreasonably low and would cause Burford to "lose hundreds of millions of dollars."[153] Invoking its power under the New Sysco CPA, Burford's representatives informed Flynn that he was not allowed to settle the cases and instructed him to continue litigating.[154] Flynn was shocked by the response and asked Gant to confirm that the settlement numbers were lucrative and reasonable under the circumstances. But Gant refused, stating that he agreed that Flynn had undervalued the claims.[155]

Many attorneys scoffed at the notion that a litigation financier could veto a plaintiff's good-faith decision to settle an action. But an arbitration panel ultimately ruled in Burford's favor, finding that the New Sysco CPA afforded Burford a consent right to make "the initial determination on whether to accept or reject a settlement offer."[156]

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150. *See id.* at ¶ 22; *see also* Motion to Dismiss Amended Petition Without Prejudice and Stay Action at 4-5, Sysco Corp. v. Glaz LLC, Posen Invs. LP, & Kenosha Invs. LP, Case No. 23-cv-01451, Docket No. 26 (N.D. Ill. Mar. 27, 2023). The litigants dispute the need for these amendments, but that matter is outside this Essay's scope.

151. *See* Andrew Strickler, *Burford Has "Initial Control" in Sysco Settlements, Panel Says*, LAW360 (Mar. 13, 2023, 4:24 PM), https://www.law360.com/pulse/articles/1584981/burford-has-initial-control-in-sysco-settlements-panel-says [https://perma.cc/V7CX-UB8R].

152. *See* Petition to Vacate, *supra* note 142, at ¶ 33.

153. *See* Strickler, *supra* note 151.

154. *See* Petition to Vacate, *supra* note 142, at ¶ 34; Strickler, *supra* note 151.

155. *See* Petition to Vacate, *supra* note 142, at ¶ 34.

156. *See* Strickler, *supra* note 151. Further, the panel ruled that the consent right did not fall within the applicable definition of "champerty." Under New York state law, the "champerty" statute prohibits "the purchase of claims with the intent and for the purpose of bringing an action that . . . may involve parties in costs and annoyance, where such claims would not be prosecuted if not stirred up . . . in [an] effort to secure costs." Trust for the Certificate Holders of the Merrill Lynch Mortg. Invs., Inc. v. Love Funding Corp., 918 N.E.2d 889, 895 (N.Y. 2009) (internal quotations omitted). The statute does not apply when the purpose of an assignment

Sysco—a Fortune 100 behemoth—was rendered helpless by a litigation-finance company that bludgeoned it with the provisions of a carefully drafted CPA.[157] Burford cannot be described as opaque capital,[158] but its dispute with Sysco crystalizes the power inherent in CPAs for those seeking control. Burford demonstrated that it could seize decision-making power in exceptional cases to protect its investment. Why not seize that power in all cases?

A financier with enough leverage can dictate outcomes. Capital can be used to provide upfront funding to victims in exchange for these individuals signing a CPA in which they abdicate key decision-making authority in the case. The agreement could also be used to secure a suite of powers and privileges for the financier. If a significant number of claimants in an attorney's claim inventory accepts this deal, the financier enjoys veto power over that collective; if the subset represents a large enough portion of the overall outstanding claims, the financier has an unknown blocking position in settlement discussions. Coupled with a potential funding relationship with counsel—not unlike what we saw with Mikal Watts and Centerbridge—the financier would have the power to control the contours and timing of settlement for their benefit rather than that of claimants. These dynamics highlight the crossholder's luxury discussed in Part II, *supra*. Case control is certainly valuable to opaque capital, but to affiliated entities speculating on the stock price of corporate defendants, the nonpublic information that accompanies this power is perhaps even more valuable.[159]

CONCLUSION

The Alchemist's Inversion is the most important trend in mass-tort financing. Over the last few years, opaque capital has begun surreptitiously deploying an unregulated arsenal and asserting leverage at various process points in order to create and control mass-tort cases. The extent of distortion remains a mystery, but the ultimate effect on the judiciary and actual victims will be decidedly negative.

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of a legal cause of action is the collection of a legitimate claim. Trust for the Certificate Holders of the Merrill Lynch Mortg. Invs., Inc. v. Love Funding Corp., 918 N.E.2d 889, 895 (N.Y. 2009).

157. The parties ultimately settled the dispute. *See* Hailey Konnath, *Burford, Sysco Agree to Drop Litigation Funding Suits*, LAW360 (June 28, 2023), https://www.law360.com/articles/1694223/burford-sysco-agree-to-drop-litigation-funding-suits [https://perma.cc/EFT2-JBB2].

158. *See supra* Part II.

159. As legal claims have evolved into mere commodities to financiers, a secondary market has also emerged, allowing funders to sell investment positions. The ability to exit a position at an artificial high can create incentives for funders to push outcomes that appear to improve resolution prospects but could actually create long-term consequences for plaintiffs, future investors, and the judiciary.

This Essay offers a primarily descriptive treatment in order to spotlight the challenges posed by opaque capital. I argue that uncovering opaque capital's objectives and arsenal helps clarify the dynamics and risks these new actors present. Insight into the opaque capital topography allows for a discussion of the measures necessary for systemic reform. Proposals may focus on (i) requiring disclosure of financing relationships, (ii) enhancing regulation of claims marshalling, (iii) imposing a fee to file a claim, (iv) reassessing the ways courts and attorneys verify claims, or (v) imposing fiduciary duties on financiers. Perhaps more than a few systemic changes are necessary to address the multi-faceted issues in this space.

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