WHAT LITIGATION FUNDERS CAN LEARN ABOUT SETTLEMENT RIGHTS FROM THE LAW OF LIABILITY INSURANCE

*Tom Baker**

A recent dispute regarding a litigation funder's right to veto the plaintiff's proposed settlement of a funded claim provides an opportunity to consider what plaintiff-side funders can learn from the law governing liability insurers' right to control the defense and settlement of lawsuits they insure. Liability insurance law supports the view that sophisticated plaintiffs should be permitted to assign settlement rights to their litigation funders, and those funders should be permitted to enforce that assignment through injunctions. More broadly, the article makes and supports the claim that liability insurance companies were the original commercial third-party litigation funders and, thus, liability insurance law provides useful precedents for courts deciding disputes in the context of the emerging plaintiff-side commercial third-party litigation funding market.

Introduction

In early 2023, the mammoth food distributor Sysco and the leading commercial litigation finance company Burford filed competing court actions in Illinois and New York.[1] Burford had just obtained—in arbitration—an injunction that prevented Sysco from settling an antitrust claim against its suppliers without Burford's consent. Sysco contended that the preliminary injunction, as well as the settlement veto provision in their litigation funding contract that the injunction was enforcing, violated public policy and therefore the arbitral injunction should be vacated.[2] Burford contended that sophisticated entities like Sysco have the freedom to assign the settlement right at issue, the injunction was necessary to preserve the benefits of that assignment, and therefore the arbitral award should be enforced.[3]

For insurance lawyers and law professors of a certain age, the public debate over this dispute summons up memories of the controversy in the late 1990s over the

* William Maul Measey Professor, University of Pennsylvania Carey Law School, and Reporter for the Restatement of the Law, Liability Insurance. Thank you to Will Marra and the participants at the conference, especially Ed Rock, for helpful comments, and Yu Miao and Neta Dagan for excellent research assistance. Professor Baker discloses that he has assisted certain litigation funders in their assessment of potential investments. He has never consulted for either Burford or Sysco.

1 *See generally* Petition to Vacate Arb. Award, Sysco Corp. v. Glaz LLC, No. 1:23-cv-01451 (N.D. Ill. Mar. 8, 2023) [hereinafter Sysco Petition to Vacate]; Petition to Confirm Arb. Award, Glaz LLC v. Sysco Corp., No. 651289/2023 (Sup. Ct. N.Y. Cnty. Mar. 10, 2023), NYSCEF No. 1 [hereinafter Glaz Petition to Confirm].

2 Sysco Petition to Vacate, *supra* note 1, at 25; Respondent's Opposition to Petition to Confirm Arb. Award, Glaz LLC v. Sysco Corp., No. 1:23-cv-02489-PGG, at 7 (S.D.N.Y. May 3, 2023).

3 Glaz Petition to Confirm, *supra* note 1, at *7.

Open Access. © 2024 The Author(s), published by De Gruyter. This work is licensed under the Creative Commons Attribution 4.0 International License.

third-party payment provisions in a preliminary draft of the Restatement of Law Governing Lawyers.[4] That controversy arose because the Restatement draft called into question whether and how the original commercial third-party litigation funders—liability insurance companies—could control the litigation and settlements they were funding.[5] The Restatement draft upset insurance lawyers and scholars because it failed to recognize liability insurers' extensive and routine control over the defense and settlement of insured liability claims.[6] They were concerned that, if adopted as then drafted, the Restatement would upset that settled practice, to the detriment of consumers and businesses that benefited from the lower prices and expertise that insurer control provided. As they knew, an explicit statement of the insurer's right to defend and discretion to settle had long been a standard feature of liability insurance policies.[7] As a result, insurers routinely appointed the lawyers who defended their policyholders in civil litigation, told the lawyers how to conduct the defense of those suits, and played an unabashedly controlling role in settlement.[8]

When presented with this settled practice, the Reporters for the Law Governing Lawyers Restatement had no real choice but to reconsider.[9] With the help of work by law professors Charles Silver and Kent Syverud and legendary scholar-practitioner William Barker, the Reporters drafted a good, if somewhat grudging, explanation of how this extensive liability insurer control could satisfy professional responsibility norms.[10] That explanation mollified most of the professional responsibility experts who had been concerned about the extent of liability insurers' control over defense and settlement.[11] As a result, the final draft of the Restatement sailed through the American Law Institute's approval process.[12]

More recently, the American Law Institute confirmed the noncontroversial nature of third-party control over defense and settlement when it approved the Restatement of Law Liability Insurance (RLLI) in 2018. Despite being accused of favoring policyholders over insurers,[13] the RLLI nevertheless recognizes as settled

---

4 *See, e.g.*, Charles M. Silver & Michael Sean Quinn, *Are Liability Carriers Second-Class Clients? No, but They May Be Soon—a Call to Arms Against the Restatement (Third) of the Law Governing Lawyers*, Coverage, May 1, 1996, at 21.

5 *Id.*

6 *Id.*

7 Tom Baker, Kyle D. Logue & Chaim Saiman, Insurance Law and Policy: Cases and Materials 578-79 (5th ed. 2021).

8 Tom Baker, *Liability Insurance Conflicts and Defense Lawyers: From Triangles to Tetrahedrons*, 4 Conn. Ins. L.J. 101, 107 (1998) ("[T]he insurance company selects the lawyer who will represent the insured, directs that lawyer' s handling of the case, and controls the investigation, negotiation and settlement of the case.").

9 *See, e.g.*, Kent D. Syverud, *What Professional Responsibility Scholars Should Know About Insurance*, 4 Conn. Ins. L.J. 17, 18 (1998).

10 Restatement (Third) of the L. Governing Lawyers § 134 cmt. d-f (Am. L. Inst. 2000); *see, e.g.*, Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 Duke L.J. 255, 361-62 (1995).

11 Thomas D. Morgan, *What Insurance Scholars Should Know About Professional Responsibility*, 4 Conn. Ins. L.J. 1, 13 (1997-98) (supporting the Restatement language as amended).

12 Voice vote at the A.L.I. 75th Annual Meeting (May 12, 1998), *in* 75 A.L.I. Proc. 107, 169-70 (1998).

13 *See* Tom Baker & Kyle D. Logue, *In Defense of the Restatement of Liability Insurance Law*, 24 Geo. Mason L. Rev. 767, 768 (2017) (defending against criticism that the RLLI has a pro-policyholder bias).

law liability insurers' *right* to control both the defense and settlement of insured claims when the insurance contract so states.[14] There are limits to these control rights to be sure, but they come into play only when an insurer declines to accept responsibility, fully and unreservedly, for the defense and settlement of a claim.[15] Thus, companies like Sysco clearly have the right to contract with defense-side funders on terms that give those funders even more control over the defense and settlement of litigation than Sysco gave Burford in this case.

The proposition that liability insurers were the original commercial third-party litigation funders, and therefore liability insurance law and practice should be a source of insight for plaintiff-side commercial third-party litigation funding, may be controversial, but it should not be. The label "commercial third-party litigation funding" surely fits liability insurance. Liability insurance is a commercial business,[16] and liability insurers are third parties that fund most of the costs incurred on the defense side of tort litigation.[17]

Of course, the circumstances are not identical. Burford was funding the pursuit of Sysco's antitrust claim, not the defense. Burford asserted only the right to veto a settlement, not to direct the defense or to settle over Sysco's objection. And liability insurers do not need injunctions to enforce their third-party control rights, so the injunction aspect of the Burford Sysco controversy could appear to be new.

But even these differences can be overstated. Insurers have entered the plaintiff side of litigation finance, among other ways by offering judgment protection insurance.[18] Burford will fund the defense side of litigation when there is some identifiable upside from a successful defense.[19] There are forms of "after the event" liability insurance in which policyholders pay premiums after a claim already exists, especially in jurisdictions with fee shifting rules.[20] And some law firms now have portfolio funding that allows them to bring claims that do not already exist.[21]

---

14 Restatement of Liab. Ins. §§ 10, 24 (Am. L. Inst. 2019).

15 *Id.* §§ 16, 25, 27.

16 While U.S. Supreme Court precedent held for over fifty years that insurance was not commerce, the Court came to its senses and recognized insurance as a form of commerce in the case of *Southeastern Underwriters*. *See* United States v. S.-E. Underwriters Ass'n, 322 U.S. 533, 553 (1944) ("No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance.").

17 *See* Kenneth S. Abraham & Catherine M. Sharkey, *The Glaring Gap in Tort Theory*, 133 Yale L.J. 2165 (2024) ("Our own estimate is that about eighty to eighty-five percent of annual direct tort costs—which we define as payments to claimants plus the costs of defense—are paid by liability insurance.").

18 *See* Andy Lundberg, *How Legal Finance Adds Value to Judgment Preservation Insurance*, Carrier Management (Jan. 18, 2024), https://www.carriermanagement.com/features/2024/01/18/257906.htm (discussing the mechanics of judgment protection insurance).

19 *See Financing the Defense*, Burford Capital, https://www.burfordcapital.com/what-we-do/case-studies/case-study-financing-the-defense/ (discussing a case where Burford funded a defendant).

20 *See* Collin M. Davison, *Fee Shifting and After-the-Event Insurance: A Twist to A Thirteenth Century Approach to Shifting Attorneys' Fees to Solve a Twenty-First Century Problem*, 59 Drake L. Rev. 1199, 1202 (2011) (describing after-the-event insurance).

21 Emily R. Siegel, *Quinn Emanuel Inks $40 Million Deal to Fund Private Equity Suits*, Bloomberg Law (April 11, 2024, 6:00 AM), https://news.bloomberglaw.com/business-and-practice/quinn-emanuel-inks-40-million-deal-to-fund-private-equity-suits.

Like the controversy over the draft of the Restatement Governing Lawyers, the controversy over Sysco's plaintiff-side litigation funding contract represents a clash between the views of people who have not had the occasion to think deeply about how and why our civil justice system already has embraced commercial third-party control of civil litigation and the practical reality of the need to manage incentives and obligations when parties seek litigation funding.[22]

In sorting out the current controversy, it does not help that liability insurers oppose plaintiff-side third-party litigation funding, thereby silencing what otherwise could be useful public voices from the organizations most experienced in exercising third-party control over civil litigation.[23] Nor does it help that some plaintiff-side litigation funders resist the liability insurance analogy just as firmly, for fear that they will be subject to the same disclosure requirements as liability insurers and perhaps even similar solvency and market conduct regulation.[24]

My goal in this article is to explain why liability insurance law supports the view that sophisticated plaintiffs like Sysco should be permitted to assign to their litigation funders a veto right over settlement, and why injunctions are an appropriate way to enforce that right. For a longtime insurance law professor, the dispute between Burford and Sysco provides a welcome opportunity to use liability insurance law to make a few important points about commercial litigation funder control at a time when people may listen. Those points are:

- The law allows everyone to assign control over the defense and settlement of litigation to a defense-side third-party litigation funder (i.e., a liability insurance company),[25] suggesting that the burden of persuasion should be on those asserting that sophisticated entities cannot assign partial control over settlement to their plaintiff-side funder.
- Courts routinely enforce defense-side funders' right to require defendants to continue litigating even when both the defendant and the plaintiff would prefer to settle,[26] indicating that neither the public policy in favor of settlement nor party control over litigation prohibits the exercise of that right.

---

22 *See, e.g.*, Silver and Quinn, *supra* note 4.

23 *See, e.g.*, Swiss Re Inst., US Litigation Funding and Social Inflation: The Rising Costs of Legal Liability 1 (2021), https://bit.ly/3vspYkJ.

24 For an example of authority suggesting that funder control would prompt additional examination, without justifying or even explaining that position, *see, e.g.*, In re Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018) (requiring in camera review of "(A) a letter identifying and briefly describing the 3PCL financing; and (B) two sworn affirmations—one from counsel and one from the lender—that the 3PCL financing does not: (1) create any conflict of interest for counsel, (2) undermine counsel's obligation of vigorous advocacy, (3) affect counsel's independent professional judgment, (4) give to the lender any control over litigation strategy or settlement decisions, or (5) affect party control of settlement"). For arguments against this, see Garrett Ordower, *Litigation Finance Disclosure — It's the Claimant's Choice, for Now*, Lake Whillans, https://lakewhillans.com/articles/litigation-finance-disclosure-its-the-claimants-choice-for-now/ ("Insurance coverage and litigation finance, however, function and impact litigation dynamics in different ways.").

25 Restatement of Liab. Ins. §§ 10, 24 (Am. L. Inst. 2019).

26 *Id.* at § 10 (discussing cases).

- Assigning such rights on the defense side need not conflict with the professional responsibility rules protecting lawyer independence and loyalty,[27] and no one has identified compelling differences on the plaintiff side that would inhibit lawyers paid by a funder from complying with professional responsibility rules.
- Courts have successfully managed conflicts arising from the assignment of such rights on the defense side,[28] suggesting that courts could also manage conflicts of interest on the plaintiff side.
- Courts regularly use preliminary injunctions and specific enforcement to preserve the value of defense-side litigation funding,[29] demonstrating that such remedies are not unusual in the litigation funding context.

Part I briefly describes the dispute between Burford and Sysco. Part II draws on insurance law scholarship and the Restatement of Law Liability Insurance to describe the basic framework of funder control over defense and settlement and how liability insurance law manages conflicts of interest that can arise from that control. Part III discusses the lessons from the liability insurance experience that could be applied to plaintiff-side litigation funding deals between funders and commercial plaintiffs like Sysco.[30] Part IV applies those lessons to the Burford and Sysco dispute. Part V concludes with some preliminary thoughts on the future of commercial third-party funder control over litigation and the likely involvement of courts in shaping that control. While I conclude that plaintiff-side funders are unlikely to rush to assert the level of control routinely exercised by their defense-side counterparts, liability insurance law provides ample precedent to allow them to do so if and when the plaintiff-side litigation funding market evolves in that direction.

I. Burford and Sysco in a Nutshell

Most people living in cities in the U.S. have seen trucks bearing the Sysco logo, and they likely have eaten food transported in those trucks, but they would be very unlikely to have had direct dealings with Sysco—because Sysco is a distributor.

---

27 Restatement (Third) of the L. Governing Lawyers § 134 cmt. d-f (Am. L. Inst. 2000). *See, e.g.*, Silver & Syverud, *supra* note 10, at 361.

28 *See generally* Baker, *supra* note 8 (discussing the various conflicts between, and the rules governing, insurers, defense attorneys, liability defendants, and liability plaintiffs).

29 *See infra* notes 70 and 74 and the accompanying text (discussing the availability of injunctive remedies to enforce payer obligations).

30 As of 2024, most plaintiff-side commercial third-party litigation funding deals are made between law firms and funders, not between commercial plaintiffs and funders. But funders are actively seeking to provide financing directly to claimholders like Sysco, among other reasons because such deals provide the opportunity to finance a larger share of the claim. *See A Practical Guide to Patent Litigation Funding*, Woodsford, https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://woodsford.com/wp-content/uploads/2022/09/A-Practical-Guide-to-Patent-Litigation-Funding.pdf&ved=2ahUKEwjqhKz2sb2FAxVIM1kFHeRVA60QFnoECBwQAQ&usg=AOvVaw1STJpbsaa4QQIqigP1Fx1S (appealing directly to holders of patent claims, for example). It is noteworthy that funding in the tens or hundreds of millions of dollars, as is the case when the funders provide funding directly to claimholders, vastly exceeds the costs and fees funding that would be available if funded through attorneys. *See* Glaz Petition to Confirm, *supra* note 1, at ¶ 8 (noting $140 million in funding to Sysco).

Sysco buys food from all kinds of suppliers and then resells that food to thousands of restaurants, hospitals, schools, stores, and other establishments that sell or serve food.[31] As a huge purchaser, Sysco is a crucial player in the ongoing litigation regarding alleged antitrust violations by suppliers of chicken and other protein products such as Tyson Foods.[32] Much of the civil litigation has been consolidated in a multi-district litigation (MDL) proceeding in the U.S. District Court for the Northern District of Illinois.[33] That civil litigation includes class actions that Sysco has opted out of, preferring to pursue its own very substantial claims separately.[34] To support those claims, Sysco entered into a series of funding agreements with Burford, in which Burford agreed to pay Sysco $140 million, in return for a share of whatever Sysco recovered.[35]

These antitrust claims are tricky for Sysco because the parties in the antitrust litigation include many of Sysco's important business partners. The claims are against Sysco's protein product suppliers, which allegedly colluded to raise the prices charged to Sysco and others.[36] If true, this collusion also inflated the prices that Sysco charged its customers. This means that the settlement payments will come from Sysco's suppliers, and Sysco's customers could well expect Sysco to share some of those payments with them, whether through partial reimbursement of the amounts the customers paid in the past or discounts on future purchases.

Thus, the pursuit and settlement of the antitrust litigation poses complications for Sysco's ongoing relationships with its customers and suppliers. As would have been obvious to any potential litigation funder, Sysco could manage the litigation and settlement process in a manner that advanced Sysco's long-term business relationships rather than maximizing the cash recovered from the antitrust litigation. Because Sysco would share with the funder any cash recovered through settlement but would keep for itself any benefits from advancing the ongoing business relationships, Sysco would have an incentive to structure the settlements to promote those relationships at the expense of the cash recovery. For example, settling cheap with a supplier or assigning claims for cheap to customers in expectation of favorable future supplier or customer contracts would benefit Sysco, not the funder. It is therefore hardly surprising that the initial Burford-Sysco agreement contained provisions to protect

---

31 Sysco Petition to Vacate, *supra* note 1, at 7.

32 *Id.*

33 *Id.* An MDL is a consolidation of separate similar cases into a single court for the purpose of resolving common issues. MDL cases have become an increasingly large share of cases in federal courts. *See* Andrew D. Bradt, *Something Less and Something More: MDL's Roots As A Class Action Alternative*, 165 U. Pa. L. Rev. 1711, 1714-16 (2017) (discussing the history of MDLs); Zachary D. Clopton, *MDL As Category*, 105 Cornell L. Rev. 1297, 1314 (2020) ("At the start of 2018, there were approximately 340,000 pending civil cases in federal courts overall, meaning that MDLs likely comprised about one-third of the federal docket.").

34 *Id.*

35 Glaz Petition to Confirm, *supra* note 1, at ¶ 8.

36 Second Amended Complaint, Sysco Corp. v. Tyson Foods, Inc., No. 18-cv-700, ¶ 13 (N.D. Ill. June 30, 2021); Complaint, Sysco Corp. v. Cargill, Inc., No. 0:22-cv-01750-JRT-JFD, ¶¶ 1-2 (S.D. Tex. June 24, 2022); Complaint, Sysco Corp. v. Agri Stats, Inc., No. 0:21-cv-01374-JRT-HB, ¶¶ 4-6 (S.D. Tex. Mar. 8, 2021).

Burford from such settlements.[37] Initially, those provisions did not include any right to control or veto a settlement.

As Burford contends, as the arbitral panel credited, and as Sysco did not in its public filings or statements dispute, Sysco violated those provisions in one or more settlement deals with important business partners without notifying Burford or obtaining reasonable cash consideration.[38] To make up for that apparently admitted breach of the funding contract, Sysco agreed to substantially increase Burford's share of any remaining recoveries. At that point, Sysco's remaining share of the recovery became so small as to tempt Sysco to make other similar settlements to curry favor with its business partners. Accordingly, Sysco and Burford also agreed to amend their agreement to prevent Sysco from giving in to that temptation, by requiring Sysco to obtain Burford's consent before settling with anyone.[39] This consent requirement is what Sysco sought to prevent Burford from specifically enforcing.[40]

As this abbreviated description of the Burford and Sysco situation indicates, Burford and Sysco did not in their initial agreement plan to give Burford any authority over Sysco's settlements. Nor, to my informed but certainly not comprehensive knowledge,[41] do Burford or its competitors routinely seek such authority. Instead, they act as passive investors, available for consultation to claimholders and their lawyers if the claimholders and lawyers so choose, with rights to be kept informed of developments in the litigation and to terminate their funding if certain milestones are not met, but with no formal authority over the management or settlement of the claims.[42]

Some of the public statements by litigation funders, and some of the work by legal scholars who study and write about litigation funding, suggest that funders do not seek control because they are concerned that exercising such control would be improper.[43] For example, Maya Steinitz concludes that, because New York Rule of Professional Responsibility 1.2 obligates a lawyer to "abide by a client's decision

37 Glaz Petition to Confirm, *supra* note 1, at ¶¶ 10-11.

38 Glaz LLC v. Sysco Corp., L.C.I.A. No. 225609 (Mar. 10, 2023) (Shore, Arb.) (Order), No. 651289/2023 (Sup. Ct. N.Y. Cnty. Mar. 10, 2023), NYSCEF No. 5) and Petition to Confirm, *supra* note 1, at ¶ 11 (asserting that Sysco "assigned away [to its customers] nearly 30% of its claims against chicken suppliers, and substantial percentages of its claims against the pork, beef, and turkey suppliers").

39 Glaz Petition to Confirm, *supra* note 1, at ¶ 10.

40 Sysco Petition to Vacate, *supra* note 1, at ¶ 16.

41 Starting in the summer of 2021, I have been engaged in qualitative research on the plaintiff-side litigation funding market, using participant observation and semi-structured interviews. For the first report of the results of that research, see generally Tom Baker, *Where's the Insurance in Mass Tort Litigation?*, 101 Tex. L. Rev. 1569 (2023).

42 Expert Rep. of Professor Maya Steinitz in Support of Sysco Corp.'s Petition to Vacate Arb. Award, Sysco Corp. v. Glaz LLC, No. 1:23-cv-01451, ¶ 69 (N.D. Ill. Mar. 8, 2023) ("To my knowledge, there is wall-to-wall consensus—among courts across the nation that had the occasion to rule on the matter; bar associations; scholars; and funders as far as we know from their public representations and standard no-control clauses—that ceding control over settlement decisions to a third-party funder is impermissible under current law and regarded as against public policy in the United States.").

43 *E.g.*, Anthony J. Sebok, *The Rules of Professional Responsibility and Legal Finance: A Status Update*, 57 Wake Forest L. Rev. 777, 785 n. 65 (2022) ("[A] lawyer should counsel a client to refuse any funding agreement that allows a funder to take control of 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.").

whether to settle a matter," a client cannot contract away any discretion over the decision to settle.[44] Because of such concerns, funders have been careful to craft their deals to avoid formal rights to control. Indeed, they have been so careful that the Burford and Sysco dispute was the first high-profile case to put to the test whether companies like Sysco have the right to contract with plaintiff-side litigation funders on terms that give the funders some control over settlement.[45]

Yet companies like Sysco clearly have the right to contract with defense-side funders on terms that give those funders even more control over the defense and settlement of litigation than Sysco gave Burford in this case.[46] Is there something different about being a plaintiff that deprives them of that right? To answer that question, I will begin by explaining the liability insurance rules of the road that govern defense-side funder control.

II. Liability Insurance Law Rules of the Road

There were early legal objections to the propriety of liability insurance altogether, but those objections quickly fell away in the face of the demand for liability insurance.[47] What remained for courts to address were disputes arising out of conflicts of interest that arose from liability insurance funding and control over the defense side of civil litigation. In resolving those disputes, courts developed liability insurance law rules that manage these conflicts. These rules define and manage three sets of specialized duties, in addition to the general duty of good faith and fair dealing from which these specialized duties emanate.[48]

These three sets of duties are the insurer's defense duties, the insurer's settlement duties, and the policyholder's cooperation duties. These duties create the "rules of the road" for insurers and policyholders to follow when defending and settling insured or potentially insured lawsuits. Significantly, all three sets of duties start from an expectation that a third-party funder (the liability insurer) ordinarily will control the defense and settlement of those lawsuits. The subsections that follow describe each of these sets of duties and some of the ways that insurance law rules manage conflicts of interest that arise in the course of fulfilling these duties. My goal is to demonstrate that courts have the ability to craft rules that manage the conflicts of interest that can arise from that control.

---

44 Steinitz, *supra* note 42, at ¶ 64. *See also* Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. Davis L. Rev. 1093, 1114-15 (2019) (praising Judge Polster's order in the opioid MDL, which requires law firms and funders to affirm that any plaintiff-side litigation funding "does not … give to the lender any control over litigation strategy or settlement decision").

45 Steinitz, *supra* note 42, at ¶ 45 (noting that this is a question of first impression in the forum state, Illinois).

46 *See supra* notes 14-16 and accompanying text; discussion *infra* Section II.B.

47 *See* Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11 14-15 (2008) (summarizing this history).

48 Restatement of Liab. Ins. § 24 cmt. a (Am. L. Inst. 2019) (noting that the duty to make reasonable settlement decisions has "its origins in the duty of good faith and fair dealing").

A. Liability Insurers' Settlement Duties

Liability insurers' settlement *duties* originated in disputes over how insurers exercised their *right* to settle (or not settle) any case that policyholders asked them to pay for.[49] If courts ever had any objections to insurer control over settlement in the ordinary, fully insured case, those objections have been lost to history. Insurers insisted on control over settlement because it was their money at stake. Rational people do not ordinarily like to be sued, and rational people usually would pay almost any amount of someone else's money to make a lawsuit filed against them go away. Thus, not surprisingly, no liability insurance contract that I have ever seen or heard about gives policyholders a blank check to settle using the insurer's money whenever they like.

Courts uniformly enforce the insurer's contractual right to prevent the policyholder from settling with the insurer's money, provided the insurer has agreed to cover the claim and the insurer's decision is reasonable.[50] Both the general rule—insurers can veto settlement—and the limits that the courts have placed around that rule provide significant precedent supporting the decision of the arbitrators to enforce Burford's right to veto the Sysco settlement. The relevance of the general rule to the Burford situation is obvious. The limits around the general rule, however, are just as instructive. They address conflicts of interest that could allow the insurer to take advantage of the policyholder and therefore illustrate the ability of courts to recognize and manage the conflicts of interest that can arise when third parties exercise control over settlement.[51]

The first limit on insurers' discretion to veto settlement developed very early in the history of liability insurance, when courts recognized the conflict of interest that arises when the potential verdict in a case would exceed the amount of the liability insurance.[52] In such cases, rational insurers evaluated their downside risk only in relation to the amount of coverage under the policy, not the total potential judgment. Thus, they routinely vetoed settlements that were reasonable in light of the expected verdict but were not reasonable in light of the risk to the insurer (i.e., the amount of the policy). Policyholders who were forced to go to trial and were then found liable for judgments substantially greater than their insurance coverage sued their insurers, alleging that the insurers' refusal to accept a reasonable settlement breached the implied duty of good faith and fair dealing. Courts were receptive,[53] reasoning that evaluating the downside risk in this way led insurers to "gamble with the policyholder's money." In response, courts created a new liability rule that the RLLI calls the "duty to make reasonable settlement decisions," the breach of which obligates the insurer to pay the full amount of the verdict.

---

49 *See* Kent D. Syverud, *The Duty to Settle*, 76 Va. L. Rev. 1113, 1178 (1990) (examining the origins of the duty-to-settle doctrine).

50 Restatement of Liab. Ins. § 29 cmt. e (Am. L. Inst. 2019) ("When an insurer has breached the duty to make reasonable settlement decisions, the insured (or another insurer acting on the insured's behalf) may protect itself from a potential excess verdict by entering into a reasonable and noncollusive settlement.").

51 Restatement of Liab. Ins. § 25, 27 (Am. L. Inst. 2019).

52 Syverud, *supra* note 49, at 1119-22 (discussing the procedure of a potentially excess judgment case).

53 *Id.* at 1121-22.

This duty is instructive for several reasons. Notably, it does not take away the insurer's control over settlement. Instead, it creates a liability rule that shapes how insurers exercise that control, by forcing them to consider the full amount of the potential verdict when deciding whether to settle. Moreover, the duty protects the policyholder only from losses associated with a judgment above the amount of the insurance coverage. It does not give the policyholder a cause of action when there is a verdict that is fully covered, even if the insurer unreasonably refused to accept a lower settlement offer and thereby exposed the policyholder to reputational damage and other harm from that unreasonable conduct.[54] That means an insurer can avoid any potential risk of liability for breaching the duty by waiving the policy limits (i.e., by agreeing to pay any judgment), so that the policyholder does not face any risk of being obligated to pay an excess judgment.[55] As this reveals, the purpose of the settlement duty rule is not to (a) protect policyholders from the aggravation and inconvenience of litigating for much longer than they would prefer to, (b) further a public policy in favor of settlement, or (c) recognize a non-defeasible autonomy interest to control or settle civil litigation. Rather, the purpose is simply to discourage the insurer from exercising its control over settlement in a way that exposes the policyholder to an unreasonable risk of a judgment that exceeds the available insurance coverage.

A second limit on insurers' discretion to veto settlements developed more recently, as courts came to better appreciate the vulnerability of policyholders in a contested coverage case—i.e., a case in which the insurer asserts a contract-based reason that it may not have to pay a judgment entered in the case.[56] In such a case, when calculating its expected exposure, a rational insurer will discount the expected value of a judgment against the policyholder according to the strength of the insurer's basis for contesting coverage, and this rational insurer will evaluate whether to accept a settlement offer accordingly.[57] So calculated, the expected value of the insurer's downside risk will be less, perhaps substantially less, than the expected value of the potential judgment, with the result that the insurer would be willing to reject a settlement that is reasonable in light of that potential judgment. This leaves the policyholder exposed to a significant risk of an uncovered judgment.

In this context, the ordinary liability rule (the duty to make settlement decisions) is not adequate to prevent insurers from gambling with the policyholder's money, because that rule does not change the fact that a rational insurer will discount its risk based on the strength of its coverage defenses. Accordingly, courts have increasingly permitted policyholders to settle without the insurer's consent in those circumstances and then to sue the insurer to get coverage.[58] Before settling, the policyholder must first give the insurer reasonable notice and the opportunity to withdraw the reservation of rights. If the insurer withdraws the reservation of

54 *Id.* cmt. b ("[T]he duty is owed only with respect to the exposure to such excess damages.").
55 *Id.* ("[A]n insurer can eliminate the risk that gives rise to that duty by waiving the policy limit.").
56 Restatement of Liab. Ins. § 25 (Am. L. Inst. 2019).
57 *Id.* § 25 cmt. e.
58 *Id.*

rights, the policyholder can no longer settle without insurer consent. But if the insurer declines that opportunity, the policyholder can settle and then sue the insurer for coverage. As should be clear, this newer limit on insurers' control over settlement does more than shape how insurers exercise that control. It sometimes abrogates that control. Thus, this insurance law precedent suggests that there could be special circumstances in which plaintiff-side funders might also lose control. In considering that possibility, it is important to understand that, despite losing control over settlement in these narrow circumstances, insurers retain the primary (legitimate) benefits of control over settlement—the assurance that any settlement will be reasonable and the ability to contest coverage for the claim.[59] The insurer does lose the ability to control the bargaining with the plaintiff, which is a legitimate benefit, but it gets two very significant benefits in return. First, a policyholder-funded settlement caps the insurer's downside risk by eliminating the possibility of a large verdict. Second, the settlement terminates the costs of defense that the insurer would otherwise be paying. Indeed, allowing policyholders to "settle and then chase" provides such substantial benefits to insurers that they regularly encourage policyholders to do so even in jurisdictions in which the insurance law rules do not clearly require them to do so.[60]

Moreover, it is important to remember that insurers can retain control over settlement by waiving their coverage defenses. Thus, like the duty to make reasonable settlement decisions, the rule allowing policyholders to settle a contested coverage case does not protect the policyholder from the consequences of unreasonably prolonged litigation, nor does it recognize a non-defeasible autonomy interest that prohibits a party from assigning settlement rights to others.

---

59 The assurance that the settlement will be reasonable follows not only from the insurer's ability to contest the reasonableness of the settlement, but also because the policyholder is settling with its own money, giving it greater incentive to strike a good deal than if it were settling with the insurer's money. The insurer's ability to contest coverage follows from the fact that the policyholder must prove not only that the settlement was reasonable but also that the settlement is covered under the policy before the insurer has to pay. Importantly, the insurer does not retain the *illegitimate* benefit of control over settlement in a contested coverage case: the ability to exploit the fact that the policyholder is between a rock and a hard place to extract concessions in their coverage dispute.

60 In fact, settle-and-chase is very common in some contexts, such as mass tort coverage disputes. *See* Baker, *supra* note 41, at 1584-85 (discussing the prominence of settle-and-then-chase in mass tort litigation). This is true even though insurer approval for settlement is a condition precedent to coverage for that claim in many jurisdictions. *See, e.g.*, PB Americas, Inc. v. Continental Cas. Co., 690 F. Supp. 2d 242, 249-50 (S.D.N.Y. 2010) ("New York law views an insurer's right to consent to any settlement as a condition precedent to coverage."); Travelers Indem. Co. v. Northrop Grumman Corp., 4 F. Supp. 3d 599, 611-12 (S.D.N.Y. 2014) (holding that the insured contractor was not entitled to indemnification for over $5 million of environmental remediation costs it incurred without its insurers' consent and explaining that an insurer "may deny coverage where the insured assumes financial obligations without the insurer's participation or consent"); Cont'l Cas. Co. v. Ace Am. Ins. Co., No. 07-cv-958, 2009 WL 857594, at *3-4 (S.D.N.Y. Mar. 31, 2009) ("Under New York law, consent-to-settle provisions are a condition precedent to coverage and are routinely enforced" and "[f]ailure to obtain such consent absolves [the insurer] of any liability for payment under the settlement."); Bear Wagner Specialists, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., No. 650261/08, 2009 WL 2045601, at *7 (N.Y. Sup. Ct. July 7, 2009) (noting that a reservation of rights is not a repudiation of coverage).

In summary, insurance law permits policyholders to assign control over settlement to insurers, and insurance policies generally include provisions making that assignment. In response to cases demonstrating the serious conflicts of interest that insurer control can create, courts have crafted rules limiting that control. Those rules demonstrate the ability of courts to manage conflicts of interest.

B. Liability Insurer's Defense Duties

Insurers' defense duties similarly originated in disputes over the way insurers exercised their right to defend, a right that has been explicitly stated in liability insurance policies since at least the 1890s.[61] Insurers insisted on that right as a condition of their agreement to pay for civil judgments. Because it was their money at stake, liability insurers wanted to make sure the defense was as effective as reasonably possible.

Although, to my knowledge, there have never been serious objections to insurers' right to defend in general, there are context-specific objections that shape how liability insurance law manages conflicts of interest that arise from defense-side litigation funding. As with the rules that emerged from disputes over insurers' settlement rights and duties, litigation funders have much to learn from the rules that emerged over disputes from insurers' defense rights and duties.

For example, the organized bar has objected to specific insurer practices regarding the defense of claims that, according to the bar, undermined the professional autonomy of lawyers and deprived policyholders of effective representation, for example by using insurer staff counsel rather than an independent private law firm.[62] These objections are part of the history and ongoing maintenance of the exercise of independent professional judgment embodied in the Model Rules of Professional Responsibility.[63] As reflected in the Restatement (Third) of Law Governing Lawyers, the consensus position is that the insurer may pay for and direct the lawyer in the ordinary full coverage case, subject to the informed consent of the defendant-policyholder, but the insurer may not keep the lawyer from using his or her best judgment in advising the policyholder in that defense.[64]

Liability insurance law has managed these ordinary conflicts by deferring to the law governing lawyers' professional responsibility. Thus, liability insurance law incorporates these professional responsibility rules by declaring that "when the law of lawyering provides additional protection for the insured, that protection is incorporated in the insurer's duty to defend through the general obligation to appoint a defense lawyer under conditions that comply with the law governing lawyers."[65]

---

61 *See, e.g.*, Fenton v. Fid. & Cas. Co. of N.Y., 56 P. 1096 (Or. 1899) (referring to a policy in which the insurer "shall thereafter have exclusive right and power to settle and adjust any claim therefor, and control all legal proceedings in connection therewith").

62 *See, e.g.*, Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle Over the Law Governing Insurance Defense Lawyers*, 4 Conn. Ins. L.J. 205, 237-56 (1997-98) (discussing the ethical questions surrounding staff counsel).

63 Model Rules of Pro. Conduct r. 1.8(f), 2.1, 5.4(c) (Am. Bar Ass'n 1983).

64 Restatement (Third) of L. Governing Lawyers § 134 (Am. L. Inst. 2000).

65 Restatement of Liab. Ins. § 14 cmt. d (Am. L. Inst. 2019).

Litigation funding contracts similarly will be deemed to incorporate by operation of law lawyers' professional responsibility rules, and the law governing litigation funding should similarly at least start from the position that lawyers' professional responsibility rules are adequate to manage conflicts of interest in the ordinary case.

When the insurer is providing a defense but has reserved the right not to pay a judgment, the potential arises for conflicts that may require a more structural solution. Accordingly, courts have fashioned special liability insurance law rules that limit insurers' control in that context. As courts have recognized, when there is a significant possibility that the insurer will not be obligated to pay a judgment entered in a case, the policyholder's and the insurer's interests are not as fully aligned as they are in the ordinary, fully insured case.[66] For example, depending on the basis for contesting coverage, the insurer could have an incentive to conduct the defense in a manner that prejudices the policyholder. When that incentive exists, courts require the insurer to give up the right to control the defense and, instead, to pay for an independent counsel who is not subject to the insurer's direction.[67]

A tort case arising out of a bar fight provides the classic circumstance in which the liability insurer loses the right to defend in that manner. In that context, an insurer could well decide that it has a good basis for contesting coverage under the standard intentional injury exclusion in liability insurance policies. Nevertheless, insurance law would compel the insurer to provide a defense as long as there was any possibility that the claim would be covered (for example, if there was the possibility that the injury was the result of the policyholder's negligent self-defense).[68] Accordingly, the insurer would provide a defense, but that defense would be subject to a reservation of the right to refuse to pay the claim under the intentional injury exclusion.

In that case, the insurer and the policyholder would both prefer to defeat the plaintiff, but they would have differing interests in the state of the world in which the plaintiff wins. If the plaintiff wins, the insurer would prefer that the facts show that the defendant intentionally injured the plaintiff, because that would mean the insurer would not have to pay the judgment. Obviously, the policyholder prefers the contrary. To avoid the possibility that the insurer will shape or use the defense to advance its coverage position, insurance law in most states requires the insurer to give up control over the defense and, instead, pay for the policyholder's chosen lawyer, referred to as "independent counsel."[69] Courts are so serious about this rule that policyholders can obtain preliminary injunctive relief if an insurer refuses to pay for independent counsel, on the grounds that the failure to provide independent counsel causes irreparable injury.[70]

---

66 Baker, *supra* note 41, at 1584 ("Under liability insurance law in most states, an insurer that reserves the right to deny coverage based on conduct that is also at issue in the underlying litigation loses the right to control the defense because of the conflict of interest presented.").

67 Restatement of Liab. Ins. § 16 (Am. L. Inst. 2019).

68 *Id.* § 13.

69 *Id.* § 16.

70 *See* Li v. Certain Underwriters at Lloyd's, 183 F. Supp. 3d 348, 364 (E.D.N.Y. 2016) (granting a preliminary injunction requiring independent counsel in a conflict-of-interest situation); Valley Forge Ins. Co. v. Hartford Iron & Metal, Inc., 148 F. Supp. 3d 743, 754 (N.D. Ind. 2015) (same); Pendergest-Holt v. Certain

Today many liability insurance policies sold to very large organizations provide for an independent counsel in all circumstances, with the insurer simply paying the costs of defense and possessing the right to associate in the defense, but not the right or duty to defend.[71] When those policies obligate the insurer to pay the costs of defense on an ongoing basis, many of the legal rules governing the insurer's duty to defend apply to these defense cost indemnification policies as well.[72] These legal rules include the duty to pay for the costs of defense of the whole claim as long as any part of the claim is potentially covered, the duty to accept all of the facts alleged in an underlying claim as true for the purposes of determining whether there is a duty to pay for the costs of defense, and the duty to keep paying for the costs of defense unless and until that duty is terminated in a specified, often onerous, court-supervised manner.[73] Policyholders also have the ability to seek a preliminary injunction to require the insurer to provide these defense services.[74]

The lessons to be learned here are, once again, that liability insurance law has developed administrable rules that address potential conflicts of interest that can arise when the insurer reserves the right to contest coverage for the claim, and second, that courts use preliminary injunctions to preserve the value of defense-side litigation funding. Thus, the fact that conflicts of interest could arise from plaintiff-side funder control should not be a reason to prohibit that control, and there is precedent for the use of injunctions to preserve rights under litigation funding agreements.

Underwriters at Lloyd's of London, 681 F. Supp. 2d 816 (S.D. Tex. 2010) (same); Emons Indus., Inc. v. Liberty Mut. Ins. Co., 749 F. Supp. 1289, 1293 (S.D.N.Y. 1990) (granting a preliminary injunction to the insured on grounds that replacing its chosen counsel with insurer-appointed counsel would constitute irreparable injury); Ladner v. American Home Assurance Co., 201 A.D.2d 302, 607 N.Y.S.2d 296 (App. Div. 1994) (granting a preliminary injunction requiring independent counsel in a conflicted coverage case); Pepper Constr. Co. v. Cas. Ins. Co., 145 Ill. App. 3d 516, 495 N.E.2d 1183 (1st Dist. 1986) (affirming the grant of a preliminary injunction requiring the insurer to provide independent counsel in a conflict-of-interest situation); Ill. Masonic Med. Ctr. v. Turegum Ins. Co., 168 Ill. App. 3d 158, 522 N.E.2d 611 (1st Dist. 1988) (same).

71 *E.g.*, Tom Baker & Sean J. Griffith, Ensuring Corporate Misconduct: How Liability Insurance Undermines Shareholder Litigation 130 (2011) ("D&O insurance policies provide the insurance company with the right to 'associate' in the defense of the claim, meaning that the insurer is entitled to receive information about the defense of the claim and to provide input to the defense lawyers, but the clear understanding and practice are that the policyholder, not the insurance company, controls the defense of the claim."); Tom Baker & Rick Swedloff, *Mutually Assured Protection Among Large U.S. Law Firms*, 24 Conn. Ins. L.J. 1, 46-47 (2017) (describing LPL policies); Baker, *supra* note 41, at 1583 (describing liability insurance policies issued to large commercial organizations). The RLLI refers to these policies as "defense cost indemnification" policies. Restatement of Liab. Ins. § 22 (Am. L. Inst. 2019).

72 *Id.* § 22(2).

73 *Id.* §§ 13, 15, 18, 20.

74 *See also In re* WorldCom, Inc. Sec. Litig., 354 F. Supp. 2d 455, 458 (S.D.N.Y. 2005) (granting a preliminary injunction to policyholders under defense cost reimbursement policies pursuant to which policyholders are always entitled to independent counsel); XL Specialty Ins. Co. v. Level Glob. Invs., L.P., 874 F. Supp. 2d 263, 266 (S.D.N.Y. 2012) (same); Rochester Drug Coop., Inc. v. Hiscox Ins. Co., 466 F. Supp. 3d 337, 363 (W.D.N.Y. 2020) (same).

C. Policyholders' Cooperation Duties

The final set of duties governs the conduct of the funded party—the policyholder. As with the law governing insurers' defense and settlement duties, the law governing policyholders' cooperation duties starts from the proposition that liability insurer control over litigation and settlement is legitimate, ordinary, and expected. Indeed, the purpose of the duty to cooperate is to protect insurers' rights to the benefit of that control. Because cooperation duties govern the conduct of the policyholder, the details are much less relevant to the Burford and Sysco situation than settlement and defense duties. There would therefore be little benefit to discussing them further here. The upshot is simply that the development and enforcement of the duty to cooperate illustrates just how strongly courts enforce parties' freedom to assign control over the defense and settlement of litigation. If parties could not assign that control, there would be no need or occasion for courts to develop or limit policyholders' duty to cooperate with insurers' defense and settlement of their claims.

III. Lessons for Commercial Third-Party Litigation Funding

These liability insurance law rules of the road provide (at least) five lessons for plaintiff-side litigation funding. The first is obvious: the law allows everyone to assign to their *defense-side* litigation funders the rights to manage and settle (or not) the litigation to which they are party. The ubiquity of this right on the defense side suggests that (a) the objections to this right on the plaintiff side may be just objections to plaintiff-side litigation funding, and (b) the burden of persuasion should be on those who propose to limit this right on the plaintiff side.[75]

The second lesson is that assigning these rights need not conflict with professional responsibility norms and rules. The risks to lawyer independence loom just as large on the defense side as on the plaintiff side.[76] Yet, as explained in the Restatement of

75 *See* Charles Silver, *Litigation Funding Versus Liability Insurance: What's the Difference?*, 63 DePaul L. Rev. 617, 624 (2014) ("It is, of course, well and good to remind readers of the limits of analogical reasoning. But it is also reasonable to ask people who support one practice while opposing another to offer compelling distinctions."); Sebok, *supra* note 43, at 827 ("I am optimistic that, in the same way the courts, ethics committees, and stakeholders involved were able to develop legal and contractual responses to the problem of the 'dual loyalty' of defense lawyers retained on behalf of insureds by insurers, responses can be developed here."). For one, ultimately unsuccessful, effort by an insurance law scholar to explain why plaintiff-side funding is different, *see* Michelle Boardman, *Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation*, 8 J.L. Econ. & Pol'y 673, 698-99 (2011-12) (concluding that the two are different because "[i]nsurer defense funding stems from an existing relationship with a separate aim"). For a persuasive response, see Silver, *supra* note 75, at 623-29 (contending that "the similarities between liability insurance and litigation funding are stronger than the differences Boardman points out"); *see also* Bogart, *supra* note 24 (arguing that litigation funding is functionally different); Ordower, *supra* note 24 ("Insurance coverage and litigation finance, however, function and impact litigation dynamics in different ways.").

76 *See, e.g.*, Stephen L. Pepper, *Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice*, 4 Conn. Ins. L.J. 27, 48 (1997-98) (noting the obviousness of the risks to lawyer independence); Silver, *supra* note 75, at 623-29 (discussing similarities between the liability insurance and litigation funding).

Law Governing Lawyers, insurers can and do fund and direct defense lawyers all the time, subject to the requirements laid out in that Restatement and the professional responsibility rules in force in the relevant jurisdiction.[77] Those same professional responsibility rules apply on the plaintiff's side. As with liability insurance contracts, plaintiff-side funding contracts include by operation of law the funder's obligation to work with the funded party's counsel on terms that comply with professional responsibility rules. Thus, just like a defense-side funder (liability insurer) that manages litigation in a manner that violates professional liability rules, a plaintiff-side litigation funder that does the same will be subject to redress through a breach of contract action by counterparties who are harmed as a result.[78] And if the violation is egregious—as has happened in the liability insurance context—the aggrieved counterparty surely will use the liability insurance precedents to demand similar serious and potentially punitive relief.[79]

The third lesson is that courts can manage the conflicts of interest that arise when a funding contract assigns litigation management or settlement rights to the funder. On the defense side, courts started with the proposition that people and businesses have the freedom to assign litigation management and settlement rights to liability insurers. That baseline allowed the liability insurance market to flourish and, over time, exposed courts to the conflict-of-interest situations I have addressed.[80] Courts developed legal rules—now embodied in the RLLI—that limit insurer control on the margin, leaving commercial policyholders free to choose among the menu of defense and settlement control options available in the market. Notably, the policyholders arguably most in need of protection from insurers, namely consumers and small businesses, have only one option in the contemporary liability insurance market: the duty-to-defend, discretion-to-settle liability insurance policies that assign near total control to the liability insurer.[81] This strongly suggests that insurance regulators agree that allowing consumers and small businesses to assign that control provides substantial benefits and does not undercut the legitimacy of the civil justice system.

The fourth lesson is that courts routinely enforce defense-side funders' right to use their control to force all the parties—including the insured—to continue litigating cases that they would prefer to settle, notwithstanding the public policy in favor of settlement and other objections to funder control asserted by Sysco in its dispute with Burford. For example, courts routinely enforce the "no voluntary payments"

---

77 Restatement (Third) of L. Governing Lawyers § 134 (Am. L. Inst. 2000). *See supra* notes 14-16, 34-35 and accompanying text and Section II.C discussion.

78 Restatement of Liab. Ins. § 12 (Am. L. Inst. 2019).

79 *See, e.g.,* Parsons v. Continental National American Group, 550 P. 2d 94, 99 (Ariz. 1976) (finding an insurer liable for the entire personal injury judgment, notwithstanding that the amount of such judgment was twice the policy limits, where the insurer engaged in litigation misconduct involving a dual representation with an insured).

80 *See* Baker, *supra* note 8, at 113-34 (discussing various conflict of interest hypotheticals).

81 *See* Insurance Law and Policy, *supra* note 7, at 578-79 (discussing common commercial general liability policies); *see also id.* at 603 (noting that these policies "giv[e] the insurer total discretion over settlement decisions," even "in situations in which there is a claim against the insured that is potentially in excess of the policy limit").

aspect of the duty to cooperate in liability insurance policies by ruling that, except in the limited circumstances described in the previous section, liability insurers do not have to pay for a settlement to which they did not consent.[82] Notably, unlike plaintiff-side funders, liability insurers do not need an injunction to enforce their right to veto a settlement, because the policyholder's voluntary payment relieves the insurer of any further obligation for the claim. Because the insurer is better off than it would have been if the policyholder had not settled, there would be no occasion for an insurer to seek an injunction preventing the policyholder from breaching the duty to cooperate in that manner. Indeed, the insurer is better off even in those exceptional circumstances in which courts do not enforce the insurer's right not to settle, because a policyholder-funded settlement caps the insurer's downside risk and ends the defense spend while preserving the insurer's ability to contest coverage and the reasonableness of the settlement.

The final lesson is that courts regularly grant preliminary injunctions and specific enforcement in defense-side litigation funding disputes. Courts issue preliminary injunctions that require insurers to pay the costs of defense on an ongoing basis.[83] And courts could order specific enforcement of the insurer's obligation to pay a judgment or settlement. They rarely if ever actually do the latter, however, because the availability of prejudgment interest for breach of contract means that policyholders always request damages rather than specific performance.

IV. Why Haven't More Plaintiff-Side Funders Sought Control Over Settlement?

With these lessons in mind, it's worth pausing to consider why plaintiff-side funders generally have not asked for an assignment of rights related to settlement or management of the litigation they fund, and therefore why courts have not had occasion to consider whether the defense-side precedents should apply on the plaintiff side. For this purpose, I will set aside legal concerns related to champerty and focus instead on an economic analysis, for several reasons. First, champerty should as a matter of logic also apply to liability insurance, yet it has never been used in that way.[84] Second, there are an increasing number of jurisdictions that never adopted or have explicitly abandoned champerty and related doctrines.[85] Third, unlike legal doctrines, the economic explanations cannot be legislated or ruled away.

---

82 *See supra* text accompanying notes 61-62 and discussion pp. 14-15.

83 *See supra* notes 70, 74 and accompanying text.

84 Steinitz, *supra* note 42, at ¶ 23 ("[C]hamperty is allowed in two contexts where fiduciary duties and other regulation promises to protect the funded party (plaintiffs, in the contingency fee case, and defendants, in the case of insurance), the courts, and the public.").

85 *See, e.g.*, Estate of Cohen, 152 P.2d 485, 489 (Cal. Ct. App. 1944) (reinforcing California's rejection of champerty); Saladini v. Righellis, 687 N.E.2d 1224, 1224 (Mass. 1997) (espousing that champerty doctrine is no longer needed to protect against suspect practices in financing litigation); Maslowski v. Prospect Funding Partners LLC, 944 N.W.2d 235, 238 (Minn. 2020) (abandoning champerty due to social and legal profession changes rendering it unnecessary).

The two main economic explanations for plaintiff-side funders' choice not to ask for settlement or litigation control involve concepts that the insurance world knows well: moral hazard and adverse selection.[86] Moral hazard is the economic term for behaving differently when you do not bear the costs of your behavior than you would if you did bear those costs.[87] In the litigation funding context, that would include a plaintiff spending too much on litigation expenses because the plaintiff only bears those costs if the plaintiff wins,[88] and depending on the situation, refusing a reasonable settlement because all the money will go to the funder or accepting an unreasonably low settlement because there is so little upside left for the plaintiff that continuing the litigation is not worth the aggravation and inconvenience.[89]

Adverse selection is the economic term for the phenomenon that results in loan portfolios of less careful underwriters consisting disproportionately of high-risk loans and the insurance pools of less careful underwriters consisting disproportionately of high-risk policyholders.[90] In the litigation funding context, adverse selection could result from claimholders seeking funding for weaker cases and self-funding the strong cases and seeking funding for cases that they know they would want to settle on the cheap while keeping the cases for which they would try to get top dollar.[91]

While there are a variety of complicated ways for a plaintiff-side funder to manage moral hazard and adverse selection, the simplest way is to make sure that the plaintiff's and the plaintiff's lawyer's interests are aligned with the funder. The simplest way to do that is to structure the funding so that the plaintiff gets the larger share of a favorable settlement and to insist that the plaintiff's law firm be paid on contingency, at least in part. Leaving most of the upside with the plaintiff gives the plaintiff greater incentive to manage the litigation to achieve the highest possible return, thereby managing moral hazard and discouraging adverse selection. That approach lies behind what one litigation funding broker described to me as the "rule of ten," meaning that funders will not provide funding for a claim in an amount that exceeds ten percent of the expected value of the claim.[92] That means the funder can

86 These economic concepts originated in the insurance trade. *See generally* Tom Baker, *On the Genealogy of Moral Hazard*, 75 Tex. L. Rev. 237 (1996); Tom Baker, *Containing the Promise of Insurance: Adverse Selection and Risk Classification*, *in* Risk and Morality 258 (Richard V. Ericson & Aaron Doyle eds., 2003).

87 Baker, *supra* note 87, at 268 (discussing the modern economic usage of the term).

88 This dynamic is exacerbated by the framing effect identified in prospect theory. Because the costs are paid out of forgone future gains, parties discount those costs more than would be justified by the time delay. *See* Baker, *supra* note 41, at 1588-89 (applying prospect theory to litigation expenses).

89 *Cf.*, Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 L. & Soc'y Rev. 275, 308-10 (2001) (discussing circumstances in which plaintiffs refuse a reasonable settlement offer because there is a large workers' compensation lien that needs to be paid before the plaintiff gets paid).

90 Tom Baker, *Containing the Promise of Insurance: Adverse Selection and Risk Classification*, *in* Risk and Morality 258, 259 (Richard V. Ericson & Aaron Doyle eds., 2003).

91 This is an example of what Amy Finkelstein and her coauthors have called "adverse selection" on "moral hazard." *See* Liran Einav et al., *Selection on Moral Hazard in Health Insurance*, 103 Am. Econ. Rev. 178, 178-79 (2013) (introducing the concept).

92 Confidential interview with a litigation funding broker. For a description of the field research project in which this interview took place, *see* generally Baker, *supra* note 41; *see also* Woodsford, *supra* note

aim for a return of three or four times its investment while still giving the claimant the larger share of the expected value.

Contingency fees protect against moral hazard because they provide an incentive for the law firm to recommend optimal settlement behavior. Contingency fees also protect against adverse selection because the plaintiff's law firm often has better access to information about the plaintiff and the plaintiff's claim than the funder, and the law firm's willingness to go on contingency signals that the claim is a valuable one.[93]

In combination, contingency fees and the rule of ten sufficiently align the interests of the claimant and the funder that the funders have generally not needed the control that liability insurers need on the defense side—at least so far. Looking ahead, however, funders have already begun to realize that this protection from moral hazard and adverse selection comes at a cost. The rule of ten limits the size of the investment that a funder can make in any single case or set of cases. As the volume of investable funds to be put to work on the plaintiff side increases, funders may need to relax that rule. When they do, they will need more tools to manage adverse selection and moral hazard. One such tool is the contractual requirement that is at issue in the dispute between Burford and Sysco: the right to veto a settlement that the funded plaintiff would prefer to make. As this need for new tools suggests, there is much more at stake for the litigation funding market in the Burford and Sysco dispute than preserving Burford's potential upside in the deal at issue.

V. Revisiting Burford and Sysco

The Burford and Sysco dispute appears to be a case of the "rule of ten" gone wrong, not one in which Burford set out to create precedent on plaintiff-side litigation funder control. Burford ended up in that place, however, because of the usual suspects in the risk transfer business: moral hazard and adverse selection.

Moral hazard: Because Sysco shared with Burford only the cash settlements, not the benefits from improving its relationships with customers, Sysco had an incentive to structure its settlements with antitrust litigation counterparties to favor the latter over the former. Apparently, Sysco did just that, thereby breaching the Sysco and Burford funding agreement. Whether Sysco would have taken the same steps if it did not have litigation funding is, of course, impossible to know. What can be said, however, is that the risk of this kind of deal was an important reason why funding Sysco's antitrust claim posed a significant moral hazard risk to Burford.

Adverse selection: The public filings suggest that Burford was aware at the outset of the risk that Sysco would cut deals that did not maximize the cash from Sysco's

30 ("[I]n cases to be brought to a litigation funder, litigants should ensure that the expected damages are at least ten times greater than the proposed amount of funding, ensuring that all parties involved have room for a successful investment.").

93 For a persuasive explanation of why the hybrid fee arrangements typically used in commercial plaintiff-side funding agreements better align the parties' interests than a straight contingency fee, *see* Brian Fitzpatrick & William Marra, *Agency Costs in Third-Party Litigation Finance Reconsidered*, 25 Theoretical Inquiries in L. 1 (2025).

antitrust claims. Burford tried to address that risk through a contract provision that obligated Sysco to maximize the cash portion of any settlement, reasoning (perhaps naively) that Sysco would comply with that provision. But it turned out that Sysco was willing to breach the contract and force Burford to undertake the difficult task of proving the damages caused by the breach. It therefore seems that Burford underestimated the full extent of that (moral hazard) risk, suggesting that there was at least some adverse selection. This is an example of what economists call "adverse selection on moral hazard"—a double information problem that is particularly difficult to address.[94]

Notwithstanding the many parallels between plaintiff- and defense-side litigation funding, the Burford and Sysco dispute reveals an important difference in the structural position of defense-side and plaintiff-side litigation funders. On the defense side, the liability insurer has a powerful self-help remedy when a counterparty breaches: the insurer can simply refuse to pay. If the policyholder takes charge of the defense and hires its own lawyers in violation of the defense and voluntary payment provisions in the liability insurance policy, that constitutes a material breach of the insurance contract that would relieve the insurer's obligation to pay, except in special circumstances (such as when the policyholder is entitled to an independent defense). So too when the policyholder settles without the insurer's consent, except in the special circumstances in which the policyholder is authorized to do so. And even in those special circumstances, a policyholder-funded settlement benefits the insurer. The settlement terminates the insurer's defense spend and caps the potential indemnity risk, while leaving the insurer's coverage defenses intact and providing a new basis for avoiding payment: challenging the reasonableness of the settlement. Thus, it is not surprising that insurers do not seek injunctive relief to enforce their right not to settle.

On the plaintiff side, the funder's only self-help remedy is to withhold payment of future litigation expenses. That remedy provides no protection from an unreasonable settlement, as the Burford and Sysco dispute illustrates. If the settlement fully resolves the litigation, there are no more litigation expenses to be paid. If the settlement does not fully resolve the litigation (as in the Burford and Sysco case), continuing to support the litigation remains the best way for the funder to get paid, notwithstanding the breach.

Thus, even if Burford could have predicted that Sysco would attempt to breach their agreement yet again, it's hard to imagine what path would have made more sense than the one Burford took. Although accepting a larger share of future settlements as satisfaction for the first breach increased the moral hazard, that was less problematic than might seem. Short of an assignment of the entire claim to Burford, it was too late to change the allocation of the proceeds in a way that *reduced* the moral hazard in settlement, because that would cut even further into Burford's return and reward Sysco for the first breach. From Burford's perspective, that initial breach demonstrated that Sysco already was willing to give up its own and Burford's cash

94 *See* Einav et al., *supra* note 91, at 178-79.

upside to make a deal with its business partners that provided noncash benefits to Sysco. Settling their initial dispute by agreeing to take more of the cash upside was therefore unlikely to make the situation worse for Burford.

What Burford and Sysco needed to move forward was not a change in incentives, but a contract right that would prevent Sysco from cutting special deals yet again. What they chose was the contract right that liability insurers have always used to prevent their counterparties from using the insurers' cash to cut special deals: the *right not to settle*.

The difference, of course, was that Burford's right not to settle was not self-enforcing. Because Burford had already paid Sysco, it didn't have the self-help remedy that a liability insurer has (refusing to pay for the settlement of a claim). So when Sysco tried to cut another sweetheart deal, Burford took another page from the liability insurance law playbook, seeking a preliminary injunction to prevent Sysco from destroying the value of their deal, just as insurance policyholders seek preliminary injunctions to prevent insurers from withholding defense costs.

Eventually, Burford and Sysco settled their dispute. The settlement is private, but we know from court filings that it includes an assignment of Sysco's entire set of remaining claims to Burford.[95] Now that the Burford affiliate owns the claims, there is no longer any risk of Sysco settling all or part of the claims out from under Burford. And there is no longer any opportunity to learn what the New York courts would have said about the enforceability of Burford's arbitral award. Nevertheless, the settlement itself provides further evidence that the arbitrators were right in deciding that there was nothing wrong with Sysco's grant of the settlement veto right to Burford and that an injunction was a proper remedy to enforce that right. By reminding us that Sysco had the freedom to assign 100% of the rights in the lawsuit to Burford, the settlement supports Burford's position that Sysco should have the freedom to assign something less than 100% of those rights to Burford.

Conclusion: Some Observations about Conflicts of Interest on the Plaintiff Side

The experience provided by over a century of liability insurer control over the litigation and settlement of ordinary insured claims has given courts and commentators ample opportunity to understand when that control presents serious problems and to find solutions to those problems. They have learned that those problems emerge when the policyholder faces significant risks from the lawsuit that are not insured: a judgment

95 *In re* Broiler Chicken Antitrust Litigation, Case No: 16-cv-08637, Docket No. 7184 (N.D. Ill) (June 28, 2023) (joint motion for substitution of plaintiff). As of April 2024, the federal courts had reached conflicting decisions on whether they would permit Burford to be substituted as a plaintiff in midstream. *Compare In re* Pork Antitrust Litig., No. 22-cv-1750, 2024 WL 511890, at *1 (D. Minn. Feb. 9, 2024) (recognizing that antitrust claims can be assigned but denying motion to substitute in midstream), *with In re*: Chicken Antitrust Litigation, No. 16 C 8637, 2024 WL 1214568, at *3 (N.D. Ill. Mar. 21, 2024) (granting motion to substitute).

above the limits, a judgment within the limits that may not be insured, or loss of reputation or goodwill.[96] In those situations, the insurer may have opportunities to control the litigation to favor its interests over those of the insured, typically by not settling when, taking all the risks into account, it would be rational to settle.[97] In response, courts have developed the protective legal rules described in Part II.

By contrast, commercial plaintiff-side litigation funders have only about fifteen years of significant experience, and they have largely eschewed explicit control over litigation, further reducing the opportunity to learn when that control would create serious problems. Moreover, as in the Burford-Sysco deal, commercial funding contracts typically include arbitration provisions, thereby shielding whatever the parties do learn from public consideration. With that said, the preceding discussion provides a basis for offering the following observations about the future of funder control over litigation and the potential role of courts in shaping that control.

First, because the funding market has been able to operate without giving funders control over the settlement of funded litigation, I suspect that courts will be suspicious of funder control in circumstances in which that control does not seem necessary to protect the funder's interests.[98] If funders agree with me, the Burford and Sysco dispute seems unlikely to open the floodgates of plaintiff-side funder control.

According to Burford, it took control only after Sysco breached the funding agreement by shortchanging Burford, thereby demonstrating that Burford needed the control to preserve what was left of their bargain. By this account, the Burford and Sysco case presents too easy a case for funder control. Could Burford or another funder skip the first step in the next case in which it pays a commercial plaintiff for a large share of the upside of a claim and contract for a settlement veto right at the outset? Would it matter whether that plaintiff had a similar opportunity to obtain noncash benefits by settling? We are not going to find out courts' answers to these and other similar questions unless and until funders start taking more control and disputes over that control leak out of arbitration into courts.

Second, Sysco only assigned Burford the right to block a settlement, not the full control to make a settlement that liability insurers possess. Giving a plaintiff-side funder the authority to settle a case presents a different set of risks than giving a liability insurer that authority. When a liability insurer negotiates and pays a settlement on behalf of the defendant, the insurer is giving the defendant exactly what it paid for: indemnification. Unless the insurer is settling early to exhaust the policy and avoid paying for other claims,[99] the insured defendant does not care how

96 Baker, *supra* note 8, at 134-49 (discussing these conflicting interests).

97 *Id.*

98 *See, e.g.*, Order Regarding Third Party Litigation Funding, *In re* National Prescription Opiate Litigation, No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018) (requiring law firms to affirm that they are not funded by any lender with "any control over litigation strategy or settlement decisions").

99 In the unusual case in which the settlement exhausts the policy and leaves the policyholder exposed to subsequent similar suits, liability insurance law limits the insurer's discretion. Restatement of Liab. Ins. § 26 (Am. L. Inst. 2019).

much the insurer paid in relation to the potential liability or how hard the insurer litigated before paying.

The same seems less likely to be true on the plaintiff side, especially if the return structure under the funding agreement gives the funder a larger share of the first tranche of any settlement (as is usually the case). In that circumstance, it is easy to imagine courts using the duty of good faith and fair dealing to second-guess a funder's settlement decision, reasoning by analogy from the liability insurance company's duty to make reasonable settlement decisions.[100] Given that risk, a prudent funder would first obtain the plaintiff's consent before settlement. And in expectation that it would not settle without the plaintiff's consent, that prudent funder may well be satisfied with a mutual consent-to-settle provision in the funding agreement, among other reasons in the belief that it will be easier to get and enforce the right to veto a settlement if the counterparty has that same right. Thus, we may never learn whether a party can unconditionally assign the right to settle to the funder.[101]

Third, thinking about the details of the Burford-Sysco situation in relation to the liability insurance precedents has reminded me that the liability insurance law rules discussed in Part II address only easy conflict-of-interest situations: those in which insurer control affects only what the RLLI calls the "judgment risks" and what, on reflection, should have been called "damages risks."[102] Those are the risks regarding the likelihood or size of the damages judgment that may be entered in the lawsuit, and not the risks that the defendant may face outside the courtroom, such as loss of reputation, relationships with business partners, or future lawsuits.[103] When the insurer's control over a lawsuit affects those "nonjudgment risks," liability insurance law offers only the vague and difficult-to-enforce duty of good faith and fair dealing.[104]

That general duty surely applies to litigation funding contracts as well. But at least at this early point in the development of the law governing plaintiff-side litigation funding, the existence of that duty provides little guidance to parties structuring litigation finance contracts or to courts or tribunals adjudicating disputes under those contracts. Yet, as the Burford-Sysco dispute demonstrates, settlements often involve noncash benefits. In addition to the business relationships implicated in the Burford and Sysco dispute, there may be a choice between injunctive relief and damages. Moreover, because of the opportunity to include remedies beyond those a court has the authority to grant, settlements often provide parties the opportunity to reach a more satisfactory resolution than the simple damages judgment upon which the return structure of the usual funding agreement is predicated. For example, in the insurance context with which I am most familiar, the settlement of an insurance

100 Restatement of Liab. Ins. § 24 (Am. L. Inst. 2019).

101 There are plenty of examples of important insurance law questions that remain unanswered after 150 years of opportunity. *See* Tom Baker & Kyle Logue, *Mandatory Rules and Default Rules in Insurance Contracts*, *in* Research Handbook on the Law and Economics of Insurance, 377, 377 (Daniel Schwarcz & Peter Siegelman eds., 2017)

102 Restatement of Liab. Ins. § 14, *comment b* (Am. L. Inst. 2019). This concept was first expressed in Baker, *supra* note 8, at 105.

103 *Id.* at 105 n.8.

104 *Id.*

coverage dispute could include provisions governing the price and other terms of *future* insurance contracts between the parties.

All this suggests that, at least when it comes to commercial litigation funding, courts are likely to be less involved in setting limits on how the parties to plaintiff-side funding agreements assign control over litigation than courts have been involved in setting limits on defense-side funder control. Plaintiff-side funders seem less likely to seek the same level of control. The volume of plaintiff-side funding contracts granting the funder control will for the foreseeable future pale in comparison to the volume of liability insurance contracts with control. Disputes about that control under those contracts are less likely to be decided in court. And the complexities involved in dealing with "non-damages risks" in the plaintiff-side funding context suggest that it will be more difficult to identify the kind of simple, relationship-shaping conflict-management rules that have appeared in the liability insurance context.