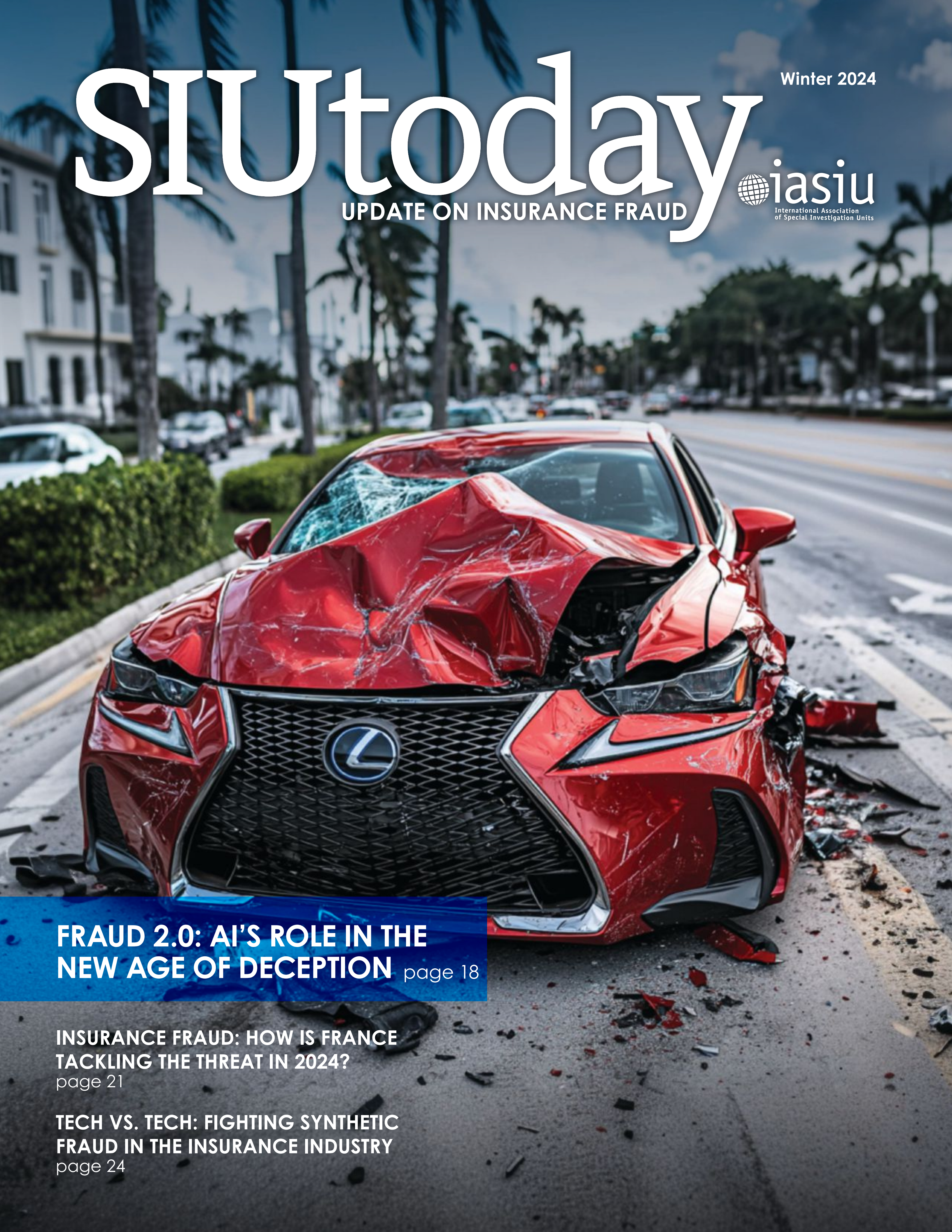

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UPDATE ON INSURANCE FRAUD

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THE HIDDEN COSTS OF THIRD-PARTY LITIGATION FUNDING

By Dennis B. Kass and Bailey Sack

Not too long ago, personal injury lawsuits were typically straightforward, often involving simple and relatively inexpensive treatments. However, something has changed over time. Now most cases seem to involve expensive treatment and procedures with larger and larger financial exposure. The era of simple chiropractic care is behind us. Today, cases often involve facet injections, epidural injections, platelet rich plasma injections, spinal cord stimulators, traumatic brain injuries and more. What has caused such a dramatic shift in the litigation landscape?

While litigation tactics have surely become more sophisticated, including use of the Reptile Theory and waiving special damages, a new player has come on the scene, pumping billions of dollars into litigation. While litigation used to be about an injured party pursing compensation for their injuries, it seems that third-party litigation funding ("TPLF") has quietly added a new party to the lawsuit, exerting control over the lawsuit. Third parties provide financial backing to plaintiffs in exchange for a share of the settlement or judgment. On the surface, TPLF seems like a tool for leveling the playing field, giving litigants the means to pursue financial compensation. But beneath this promise lies a troubling reality: The potential for profit-driven motives that overshadow the genuine interests of the parties involved, turning lawsuits into legal battles where the plaintiff is a pawn in someone else's game and where they have little to no control over the litigation process or the outcome.

TPLF has ancient roots, dating back to Greece, but was prohibited during the Middle Ages in England under doctrines like champerty[1] and maintenance.[2] These restrictions gradually faded, especially in Australia and the United States, where TPLF re-emerged in the late 20th century with its first take off in personal injury cases, then expanding into commercial litigation.[3]

It is clear that verdict sizes are continually on the rise. In a June 2020 report by the American Transportation Research Institute ("ATRI")[4] they analyzed data from over 600 cases between 2006 and 2019,

[1] Champerty is "[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgement proceeds," Champerty, *Black's Law Dictionary* (11th ed. 2019).

[2] Carol Langford, *Betting on the Client: Alternative Litigation Funding Is An Ethically Risky Proposition for Attorneys and Clients* (2015) 49 U.S.F. L.Rev. 237, 238.

[3] Ari Dobner, *Litigation for Sale*, 144 U. PENN. L. REV. 1529, 1543 (1996).

[4] American Transportation Research Institute, *Understanding the Impact of Nuclear Verdicts on the Trucking Industry* (2020).

highlighting a dramatic surge in large jury verdicts. In 2010, when a verdict exceeded $1m, it averaged $2,305,736. In 2018, when a verdict exceeded $1m it grew to an average of $22,288,000—an increase of 867%.[5] Of course, since the pandemic verdicts have continued to rise to even greater heights.

This explosive growth in verdict size is not merely a statistical anomaly; it reflects a broader trend fueled by TPLF, where financial backers push for higher settlements to maximize their returns. Special damages are suddenly higher and hence settlements and judgment are higher. The ATRI report concluded that a comprehensive program is needed to address this trend, including changes in litigation strategies, safety standards, and fraud investigations.[6]

THE HIDDEN INFLUENCER

Given that litigation funding operates in a largely unregulated space, a significant issue is the lack of transparency, with agreements often cloaked in secrecy. This absence of oversight enables financiers to influence legal strategies and outcomes without being held accountable. When investors are involved, their primary objective is typically to maximize their financial returns, often ignoring the wants and needs of the plaintiff. Funders might even influence medical decisions, pushing for specific treatments or surgeries that could increase the value of a case, thereby enhancing their potential return on investment.

Courts have warned about the risks posed by excessive control exerted by the third-party funders over legal proceedings. In *Boling v. Prospect Funding Holdings, LLC*, the court determined that the terms of Prospect's funding agreement gave the TPLF entity "substantial control over the litigation."[7] The agreement limited the plaintiff's ability to change attorneys and included provisions that safeguarded the TPLF's financial interest, particularly if the proceeds were insufficient to cover the TPLF's initial capital.[8] According to The Institute for Legal Reform ("ILR") at the U.S. Chamber of Commerce, such provisions would undoubtedly influence the plaintiff's ability to settle the case.[9]

Additional concerns were also raised by the ILR in an antitrust case involving Burford Capital, which holds itself out as "the world's largest provider of commercial legal finance."[10] After financing antitrust lawsuits with over $140 million from Burford Capital, Sysco Corporation faced issues when Burford vetoed settlement agreements that Sysco negotiated.[11] This led to arbitration, where Burford obtained a restraining order preventing Sysco from finalizing settlements.[12] Subsequently, Sysco assigned its claims to Carina, a special-purpose vehicle created by Burford to litigate these claims.[13] When Sysco and Carina sought to substitute Carina as the plaintiff in the ongoing litigation, the Magistrate Judge denied the substitution, expressing concern that allowing a litigation funder with no real interest in the case beyond profit to override the decisions of the original party would undermine public policy and antitrust laws. The decision was upheld on appeal, with the court finding no clear error in denying the substitution.[14] The ILR noted that if the allegations are true, they would undermine Burford's "repeated public statement that it does not exercise *any* control or influence over the lawsuits it finances."[15] The ILR argued that disclosure could serve as a safeguard against the type of potential abuse alleged in the *Sysco* case, emphasizing that there may be hundreds of plaintiffs in situations similar to Sysco's.[16]

THE ROLE OF DISCLOSURE IN SAFEGUARDING RIGHTS

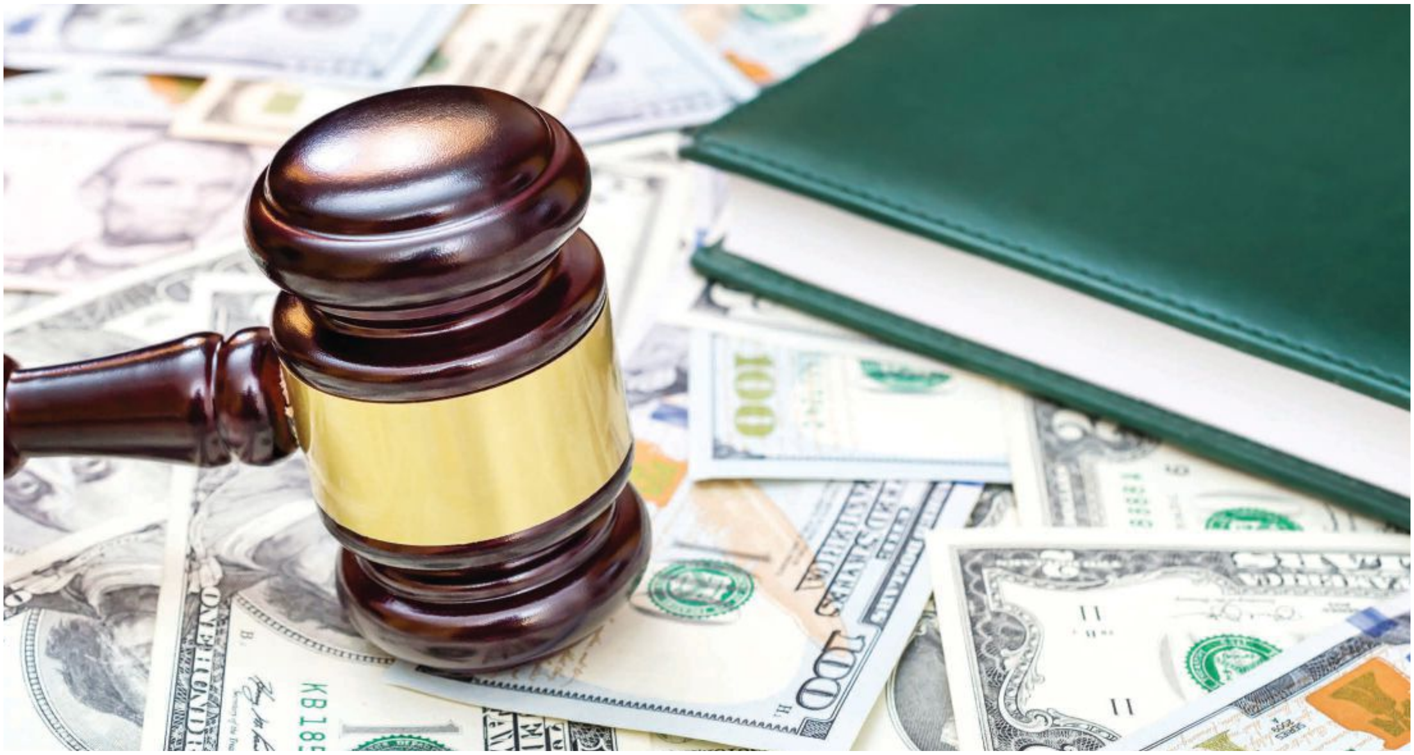
What does this mean in the SIU context? Defense attorneys should prioritize obtaining disclosure of all TPLF agreements. Although such requests are likely to encounter strong resistance from the opposing side, they are essential for ensuring transparency in the legal process. Its disclosure ensures that the case is not swayed by hidden financial motives unrelated to the actual injuries or genuine needs of the parties involved.

When advocating for its disclosure, it is important to emphasize that this is a matter of public policy, highlighting the need to ensure that financial interests do not compromise the fairness of proceedings. Just as insurance policies are discoverable,[17] TPLF agreements should undergo similar scrutiny. Insurance coverage is discoverable because the policy can influence potential settlements and litigation strategies of both parties, ensuring a fair fight by allowing both parties to engage in settlement discussions on equal footing. This transparency prevents one side from leveraging hidden information to gain an unfair advantage, aligning legal strategies with the realities of the case, and fostering quicker, more equitable resolutions. The underlying policy here supports the disclosure of TPLF agreements.

Defense attorneys must also be prepared to address the common arguments against transparency, which often rests on the idea that it could potentially compromise the fairness of proceedings, weaken the parties' positions, or infringe on their privacy. However, courts routinely manage sensitive information—such as trade secrets and privileged communications—under protective orders that prevent misuse or public disclosure. Similarly, the details of TPLF arrangements can be disclosed to the court and opposing parties without being made public, if necessary.

Comparing other jurisdictions where disclosure is mandatory is useful to demonstrate that it is reasonable to allow this one party

[5] *Id*. at 18.
[6] *Id*. at 61-65.
[7] 771 F. App'x 562, 579 (6th Cir. 2019).
[8] *Id*.
[9] Statement of the U.S. Chamber of Commerce Institute for Legal Reform Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary, 118th Cong. (June 12, 2024), https://docs.house.gov/meetings/JU/JU03/20240612/117421/HHRG-118-JU03-20240612-SD011.pdf
[10] burfordcapital.com/about-us/ (last visited August 14, 2024).
[11] Statement of the U.S. Chamber of Commerce Institute for Legal Reform, at 10.
[12] *In re Pork Antitrust Litigation*, 2024 WL 2819438 (D.Minn., 2024).
[13] *Id*.
[14] *Id*.
[15] Statement of the U.S. Chamber of Commerce Institute for Legal Reform, at 10.
[16] *Id*. at 11.
[17] Cal. Civ. Proc. Code § 2017.210 (in California, insurance coverage is discoverable if the coverage is meant to satisfy, indemnify, or reimburse any portion of a judgment); Fed. R. Civ. P. 26(a)(1)(A)(iv) (in federal jurisdictions, insurance coverage is discoverable if the insurance company may be liable to satisfy all or part of a possible judgment or to indemnify or reimburse payments made to satisfy the judgment).



to discover this one agreement. For instance, a New Jersey local federal rule mandates the disclosure of the identity of any third-party funder, the nature of the funder's interest, and the terms of the funding agreement to the opposing party.[18] Wisconsin has adopted a similar rule.[19]

THE PRACTICAL IMPLICATIONS FOR DEFENSE ATTORNEYS

Given the financial motivations behind TPLF and the potential impact on a lawsuit, defense attorneys should be prepared to be proactive in discovering TPLF agreements in order to protect their clients effectively.

In a fight for discoverability and transparency, some considerations may be given for the following tools and requests:

1. Ask questions about TPLF in depositions and examinations under oath;
2. Ask about TPLF in written discovery;
3. Ask doctors about any TPLF in their depositions;
4. Subpoena agreements when they are exposed and depose identified TPLF witnesses;
5. If opposing counsel will not respond to discovery re RPLF, push motions to compel. It is crucial that we begin to educate judiciary on the influence that TPLF may have on a lawsuit.
6. Check for UCC-1s filed to secure interests in a lawsuit. Consider searching under the name of the plaintiff, plaintiff's attorney, doctor or known finance company.
7. Amass information within your organization.
8. Work to legislate discoverability of TPLF agreements and for transparency. The fight should be about admissibility at trial, not discoverability.

CONCLUSION

A new player has arrived on the scene, exerting control over lawsuits and particularly personal injury lawsuits. Insurance companies and defense attorneys should learn whether TPLF is involved in their case and if so, the influence it has over the special damages, control over the case and any other influence the TPLF may exert. Transparency is key to understanding outside influences and preventing illicit or improper impact on claims.

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[18] Local Rule 7.1.1 of the U.S. District of New Jersey.

[19] Wis. Civ. Pro. § 804.01(2)(b) (requiring parties to disclose any agreement entitling someone other than party attorneys to receive compensation that is contingent on proceeds from a civil action)