# Grim Realities

## Debunking Myths in Third-Party Litigation Funding

August 2024

U.S. Chamber of Commerce
Institute for Legal Reform

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# Executive Summary

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Third-Party Litigation Funding (TPLF)—the practice by which non-parties invest in litigation by paying money to a plaintiff or his/her counsel in exchange for a contingent interest in any proceeds from the lawsuit—has become a dominant feature of the civil justice system in the United States and abroad. But despite its ubiquity, TPLF operates largely in secret without any meaningful oversight, distinguishing it from virtually every other industry.

Because there is no uniform disclosure requirement for TPLF agreements in civil litigation, neither the court nor the opposing parties typically even know whether TPLF is at play in a given case, much less whether it raises any particular legal or ethical issues. One of the primary reasons why TPLF has evaded such basic transparency is because the funding industry has successfully promoted a series of myths that boil down to the claim that TPLF is a benign—and usually salutary—business model that increases litigants' access to justice and that should be of little interest to courts and lawmakers. This paper seeks to debunk this false narrative by chronicling recent examples that illustrate the potential abuses of TPLF, all of which have led judges and policymakers to start taking a closer look at TPLF, potentially laying the groundwork for much-needed reforms.

Part I of this paper addresses the longstanding myth touted by the funding industry that TPLF is essentially a benevolent business model designed to increase access to justice. This repeated claim was highly dubious when TPLF first emerged in the U.S. civil justice system more than a decade ago, given the longstanding policy in this country to permit plaintiffs' lawyers to work on a contingency-fee basis and to protect plaintiffs from the consequences of bringing losing claims with the American rule against fee shifting. Indeed, recent examples confirm that far from serving as an altruistic business endeavor for allegedly injured claimants, TPLF is just a vehicle for maximizing funders' return on their investments—often to the detriment of the plaintiffs whose claims they are bankrolling. Specifically, Part I chronicles several examples in which investors have: (1) attempted to or successfully seized control of the litigations they finance to the detriment of actual claimants; (2) provided a means for foreign interests to potentially evade sanctions, or harass or even steal information from American companies or those from allied countries; or (3) siphoned off significant

funds intended to make litigants whole.

Part II of this paper details the increasing concerns expressed by courts, judges, legislators, and regulators regarding the secrecy surrounding TPLF and the potential abuses the practice inflicts upon our civil justice system, as reflected by the recent examples just mentioned. In particular, several states have already taken the lead in trying to rein in these distortive effects of TPLF by, for example, mandating disclosure of TPLF in all civil cases, making funders jointly liable for costs and sanctions due to the abuses associated with litigation funding, or prohibiting such investors from exercising any control or influence over litigation or settlement decisions. And while there remains no uniform federal disclosure regime, more and more individual judges are inquiring about TPLF and requiring litigants to disclose whether they are using it in their cases. In short, contrary to the funding industry's claims, TPLF is very much on judges' and policymakers' radar, which suggests that the time is ripe for robust reform of this clandestine practice.

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# Litigation Funders Are Not Altruistic Investors

Chapter

02

One of the most common refrains from the funding industry and its supporters is that TPLF is entirely benign, if not beneficial. They claim that the industry provides increased access to the justice system by providing funds to litigants who would otherwise not be able to access the courts. However, as the recent examples discussed below show, non-party litigation investors have one goal: to maximize profits regardless of the effects on the litigants whose claims they seek to profit from.

## Funders Can Exercise Immense Control Over Litigations in Which They Invest

One of the most notorious myths pushed by litigation funders is that they are nothing more than passive investors who do not exert any control over litigation. Promoting that claim has been key to stymying efforts to adopt an amendment to the Federal Rules of Civil Procedure requiring the production of funding agreements at the outset of a lawsuit. Indeed, in response to such a proposal, the Committee on Rules of Practice and Procedure wrote that "[n]o specific examples [of control] are provided" and that "[t]hird-party funders meet these arguments by direct denial."[1] And funders have continued to push the narrative that they have no influence or control over the course of litigation.[2]

However, recent developments demonstrate that this claim cannot be squared with reality. The most notable recent example is a dispute involving Burford Capital, one of the largest TPLF firms, which publicly claims that it merely "monitors cases as a passive investment partner"[3] and "does not control strategy, settlement or other litigation-related decision-making."[4] In March 2021 and June 2022, Sysco Corporation filed a pair of antitrust lawsuits against suppliers of pork and beef, alleging that they had engaged in conspiracies to "fix, raise, maintain, and stabilize" the prices of pork and beef in violation of the Sherman Act.[5] Those litigations proceeded largely as expected, until suddenly, in March 2023, Sysco filed "stipulations" that its counsel, Boies Schiller, was withdrawing from the litigations and sought a stay while it tried to find new counsel.

What apparently caused the souring of Sysco's relationship with its attorneys was Burford. Unbeknownst to the court, Burford had bet on the litigation in hopes of collecting a payday by financing Sysco to the tune of "approximately $140 million" over the years.[6]

The consideration Burford negotiated was far more than a potential return on a mere passive investment; rather, the funding agreement required that Sysco immediately email Burford any settlement offer it received and that it "shall not accept a settlement without [Burford's] prior written consent, which shall not be unreasonably withheld."[7] In other words, Sysco was not allowed to settle its own case unless Burford approved of the settlement. Once Sysco began receiving settlement offers it found to be reasonable and in its best interest, Burford allegedly sought to obstruct further settlement negotiations, fearing the amounts were too low.[8] In short, even though the parties to the lawsuit believed they had found a fair price and no longer wanted to continue litigation, according to Sysco Burford was forcing it to push on and prolong the litigation.

Moreover, Burford's meddling did not stop at simply refusing to consent to Sysco's acceptance of settlement offers. Instead, Burford instituted proceedings to enjoin Sysco from finalizing settlements, and an arbitral panel granted an ex parte temporary restraining order in Burford's favor.[9] Even worse, Burford allegedly turned Sysco's own counsel against it—counsel who had been representing Burford in other matters and allegedly "played a role in counseling its client Burford to veto its other client Sysco's" settlements.[10] As described by Sysco, Burford then took further steps to control the litigation, writing Sysco a letter "demand[ing]" that it take certain litigation actions, including:
(i) withdrawing certain litigation motions;
(ii) suggesting that Sysco retain a law firm that had reached out to Burford seeking to be retained in the matter; and
(iii) "initiat[ing] an entirely new lawsuit against a number of Sysco's key suppliers of turkey."[11]

According to Sysco, Burford even "threatened that if Sysco does not comply with each of these extraordinary demands," Burford would "invoke [] a 'nuclear option' in the original funding agreement that would allow Burford to seize complete control of Sysco's claims (including by hiring and firing Sysco's counsel)."[12]

Eventually, Sysco—in an attempt to extricate itself from litigation it no longer wished to pursue—reached an agreement with Burford under which Sysco's claims were assigned to a Burford affiliate, Carina Ventures LLC (Carina).[13] While the magistrate judge overseeing a series of the cases permitted the assignment of the claims from Sysco to Carina, he ultimately rejected Carina's motion to substitute as the plaintiff, reasoning that "condoning Burford's efforts to maximize its return on investment would" cause the harm of "forcing litigation to continue that should have settled."[14] As the court

explained, the "litigation burden caused by Burford's efforts to maximize return on investment" was "enormous," consisting of a "state court in New York and two federal district courts" being involved in litigation "over enforcement of the arbitration award Burford obtained" in addition to the arbitration proceedings themselves.[15] Even beyond that, the court was forced to "partially stay two of the largest cases on its docket for 60 days" and deal with the bevvy of motions accompanying the dispute between Burford and Sysco.[16]

Moreover, the reason Burford went to such lengths to enforce its funding agreement with Sysco and effectively exercise veto power over settlements Sysco deemed to be in its best interest was obviously not to further the interests of any aggrieved claimant but rather to maximize Burford's own returns, including in other cases. As the court observed, there "seem[ed] to be in place" other "as-yet-undisclosed financing agreements" between Burford and other parties, meaning that if Sysco's settlement went through, it would "set benchmarks for other settlements with other defendants" that were too low, whereas if Sysco's settlement were higher, Burford would realize a higher return in its other cases as well.[17] Put another way, Burford was effectively controlling one case because of how it might affect other potential investments.

In June 2024, the District Court upheld the magistrate judge's order over Sysco and Carina's objections, noting that "[t]he Magistrate Judge was rightly concerned that allowing substitution … could encourage litigation financers everywhere to use mid-litigation assignments and substitutions to undermine agreements between parties otherwise willing to settle."[18] By contrast, another district court judge in the Northern District of Illinois allowed the substitution in a related case, implicitly countenancing Burford's conduct.[19] In a perfunctory order, the judge there reasoned that "Sysco is a sophisticated and large corporation, and not a simple and ordinary individual who is vulnerable to the temptation of a 'wicked' non-party 'willfully' intending to 'stir up' or 'foment useless … or meritless litigation … for the sake of harassment'" and found that defendants' "concern that Carina's substitution will meaningfully frustrate any future attempts for settlement discussions" was "insufficient" to stop the maneuver.[20] The divergence of judicial opinions on Burford's conduct illustrates conflicting approaches to

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Importantly, the Sysco dispute is not anomalous. The allegations of control there are consistent with numerous other examples of actual TPLF agreements that grant a TPLF entity authority to control or influence aspects of the funded litigation.[21] The recent episode involving Sysco and Burford is just the most recent and most publicized on a list of examples illustrating that the funding industry's representations about its purportedly hands-off approach to litigation are simply not credible.[22] In short, at least in some cases, the TPLF industry is not opening the courthouse

Taken together, the information leaked in connection with the various lawsuits regarding an otherwise secretive industry reveals how TPLF funders can seek to control every aspect of the mass arbitrations they fund and view themselves, and not the litigants whose claims they finance, as the primary clients of those litigants' attorneys.

doors or providing funds for litigants that their counsel would not otherwise be able to expend via contingency-fee arrangements, but rather is actively using parties in litigation as vehicles to maximize profits.

## Third-Party Funders Move Into Mass Arbitrations

Mass arbitrations have proven ripe for abuse by unscrupulous attorneys who routinely use unsuspecting plaintiffs to essentially shake down corporate defendants.[23] These abuses have been compounded by the addition of TPLF money that has turbocharged these efforts, often with the stated understanding that the attorneys who bring these claims will do no work on the arbitration except for recruiting the plaintiffs used as leverage. The realities of TPLF use and manipulations of mass arbitrations recently exploded into view following the public airing of grievances in connection with four separate lawsuits among and between a mass arbitration plaintiffs' firm (Zaiger LLC (Zaiger)), an attorney and former partner of that firm (William Bucher), a third-party litigation funder (Black Diamond Capital Management (Black Diamond)), and the target of one of the firm's TPLF-funded mass arbitrations (Valve Corporation (Valve)). The recriminations contained within the complaints and their vitriolic language show just how bitter the disputes can become between litigation funders and the attorneys they see as nothing more than a conduit for pecuniary gain.

The saga began in April 2023, when Mr. Bucher filed a nine-count suit against Zaiger, employees of Zaiger, and Black Diamond alleging, among other things, wrongful termination, false advertising, and tortious interference with business expectancies.[24] In response, Zaiger filed suit against Mr. Bucher, alleging fraud, unfair competition, and tortious interference with contractual relations.[25] Based on the information disclosed in those lawsuits, Valve then filed suit against Bucher, Zaiger, and Black Diamond alleging abuse of process and tortious interference with the contracts between it and its customers.[26] Taken together, the information leaked in connection with the various lawsuits regarding an otherwise secretive industry reveals how TPLF funders can seek to control every aspect of the mass arbitrations they fund and view themselves, and not the litigants whose claims they finance, as the primary clients of those litigants' attorneys.

Prior to August 15, 2022, Zaiger had a single client, Black Diamond, and represented only that entity, its subsidiaries, and its employees and their spouses.[27] In fact, according to Mr. Bucher, "Black Diamond essentially created Zaiger LLC as a captive law firm to perform legal work

for Black Diamond and its affiliates"; thus, the two entities "were (and are) intertwined in fundamental ways that are unheard of in the legal industry."[28] Prior to his involvement with Zaiger and Black Diamond, Mr. Bucher's legal practice had focused on defending corporate clients against mass arbitrations.[29]

In January 2022, however, Mr. Bucher met Jeff Zaiger, the principal of Zaiger LLC, to discuss the possibility of building a plaintiff-side mass arbitration practice at Zaiger.[30] In an effort to convince Mr. Bucher to join the firm, Mr. Zaiger "represented that he could not only offer [Mr. Bucher] the infrastructure and resources of an existing firm to build [the] practice but that he [also] had a close relationship with Black Diamond … as a potential source of funding mass arbitration cases."[31] As Mr. Bucher himself noted, that potential funding was critical:

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"[m]ass arbitration cases are very capital intensive for a plaintiff because they must have the resources to file initial arbitration filing fees for tens of thousands of consumers. This means millions must be spent at the outset of a case, and without the funding to file the cases, a mass arbitration strategy cannot get off the ground."[32]

To that end, in June 2022, Messrs. Zaiger and Bucher created a slide deck outlining their proposal to bring a mass arbitration action against Valve that Mr. Zaiger in turn shared with Black Diamond for consideration.[33] Among other things, the slide deck (1) provided a "lifecycle of investment" detailing how Black Diamond's investment would be put to work,[34] (2) set forth a proposal to bring 75,000 arbitration claims against Valve in connection with claims that the company had engaged in monopolistic behavior,[35] and (3) estimated that Black Diamond could expect a return of almost 19 times on an investment of $6.5 million.[36]

Mr. Bucher began working for Zaiger less than two months later, on August 15, 2022.[37] The next day, Black Diamond entered into an agreement (the "Seed Funding Agreement") to provide $500,000 in seed funding for the mass arbitration strategies.[38] According to Bucher, by November 2022 he and Zaiger had recruited more than 20,000 prospective clients for a mass arbitration against Valve and by February 2023, they had recruited more than 48,000.[39] However, according

to Bucher, Black Diamond never actually provided any of the $500,000 in promised seed funding under the Seed Funding Agreement; Mr. Zaiger funded the initial recruitment out of his own funds.[40]

Shortly thereafter, the CEO of Black Diamond proposed new terms for the parties' contract. According to Bucher, chief among them was a requirement that Zaiger would agree to terminate the mass arbitration against Valve if the company did not immediately settle the case upon notice that the mass arbitration plaintiffs had paid their filing fees.[41] Indeed, Black Diamond allegedly made clear that it would not provide any investment unless it controlled the venture, including whether to continue the litigation, as "litigation of the cases after Valve had paid its arbitration fees would be fruitless."[42] After Bucher expressed concern at those terms and tried to secure alternate funding for the mass arbitration,[43] Black Diamond allegedly forced Zaiger to terminate Bucher and seized control of the mass arbitrations.

In sum, the Valve saga shows that when lawyers comply with their duty of loyalty to ensure their clients have final say about the prosecution of their cases, TPLF firms may attempt to wrest control of the litigation from those lawyers. This episode is yet another example of TPLF investors being active (rather than passive) actors and subordinating the interests of purportedly aggrieved claimants to their own objective of maximizing profit.[44]

## Foreign Entities Are Investing in U.S. Litigation, Raising National Security and Sanctions Evasion Concerns

In addition to undermining plaintiff control and the professional independence of attorneys, TPLF also poses serious national security concerns.[45] Several prominent legislators have recently voiced their concerns regarding the risks of foreign influence in TPLF, most recently including Sens. John Cornyn (R-TX) and Thom Tillis (R-NC). In a July 11, 2024 letter to the Committee on Rules of Practice and Procedure of

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the Administrative Office of the United States Courts, the Senators warned that "[l]itigation funding is an available weapon for foreign investors to attack domestic businesses" and that "[f]oreign adversaries could use litigation funding mechanisms to weaken critical industries or obtain confidential materials."[46] Sens. Cornyn and Tillis urged the Committee to promulgate a rule addressing these concerns.[47]

These concerns echo those expressed by U.S. Sens. Marco Rubio (R-FL) and Rick Scott (R-FL) in November 2023. In letters to the chief judges of Florida's federal district courts, the Senators "highlight[ed] the dangers of foreign [TPLF] and the need for more transparency in the federal judiciary as it relates to this matter."[48] They explained that foreign funding can originate from several sources, including sovereign wealth funds (SWFs), and may influence both the nature and direction of a litigation through often undisclosed financial contributions.[49] Specifically, they noted that the most concerning outcome would be that "these foreign funders have the potential to provide hostile foreign actors with sufficient ways to exert undisclosed influence on litigation moving through the federal judiciary."[50]

These concerns were also at the forefront of a December 2023 report by the House Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party. In that report—titled Reset, Prevent, Build: A Strategy to Win America's Economic Competition with the Chinese Communist Party—the Select Committee recommended that Congress "[d]etermine, and then establish, what guardrails are needed to address the possibility of foreign adversary entities obtaining sensitive IP through funding third-party litigation in the United States."[51] The Select Committee also recommended "requir[ing] enhanced disclosures for foreign adversary entities and provid[ing] judges with the authority to require enhanced disclosures for certain entities under foreign adversary entity control regarding their funding, and, when appropriate, ownership and connection with the foreign adversary government and dominant political party."[52]

The Executive Branch has also become increasingly concerned about the risks surrounding foreign TPLF in U.S. litigation. For example, at the state level, 14 state attorneys general sent a letter to the U.S. Department of Justice, bemoaning the secrecy surrounding TPLF and questioning what U.S. Attorney General Merrick Garland and other top officials are doing to ensure that the practice is not threatening U.S. national security interests.[53]

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Similarly, in his first remarks after assuming the role in December 2023, Foreign Agents Registration Act (FARA) Unit Chief Evan Turgeon addressed this important topic in detail.[54] Among other things, Mr. Turgeon discussed FARA's application to foreign funding of litigation in the U.S.[55] And he specifically identified three potential risks of "undisclosed and undiscoverable" third-party foreign funding of U.S. litigation:

- Foreign entities doing business in the U.S. may seek to create a competitive advantage as compared to their U.S. competitors by tying up U.S. companies in lengthy and expensive court cases.

- Foreign funders of U.S. litigation may gain access to proprietary and sensitive commercial information through litigation discovery.

- Foreign adversaries may fund litigation on political issues that are divisive within the U.S. public.[56]

These concerns are not new. More than a decade ago, TPLF expert Professor Maya Steinitz warned that SWFs, like the China Investment Corporation (CIC), "could file suit against an American company in a sensitive industry such as military technology" and over the course of that litigation, receive "highly confidential documents containing proprietary information regarding sensitive technologies from the American defendant-corporation."[57] In 2023, Sen. John Kennedy (R-LA) highlighted similar concerns in a letter to Chief Justice John Roberts and Attorney General Merrick Garland, warning that solely "by financing litigation in the United States against influential individuals, corporations, or highly sensitive sectors, a foreign actor can advance its strategic interests in the shadows since few disclosure requirements exist in jurisdictions across our country."[58]

While the secrecy surrounding TPLF makes it impossible to ascertain the precise extent and intention of foreign-sourced TPLF in the U.S., it is clear that foreign investment in U.S. litigation is occurring. For example, SWFs are undeniably involved in U.S. litigation.[59] The details of traditional funders' relationships with SWFs have largely remained hidden, but two companies with ties to Russia and China raise serious questions about whether litigation is being manipulated by foreign interests.

### Russian TPLF and Sanctions Evasion

In an effort to evade international sanctions, Russian billionaires with ties to Vladimir Putin have financed lawsuits around the world through their investment firms.

Specifically, Bloomberg investigated A1, a company that is a subsidiary of the Russian investment company Alfa Group. It was discovered that "A1 has spent about $20 million in ongoing bankruptcy cases in New York and London on behalf of a Russian agency seeking to recover assets from a brother and sister accused of embezzling more than $2 billion from a Moscow bank."[60] After three A1 directors were sanctioned in the UK, they sold A1 for the token sum of $900 to another A1 director. During a subsequent bankruptcy proceeding, the director who purchased A1, Alexander Fain, conceded that he had purchased A1 because of a "'complicated geopolitical situation' potentially affecting the litigation."[61]

UK courts have considered and agreed that A1's maneuver essentially constituted an attempt to evade sanctions. In May 2024, a UK judge held that there is reasonable cause to suspect that Russian litigation funder A1 is owned or controlled by people sanctioned in the UK.[62] In her opinion, Justice Sara Cockerill echoed concerns raised in a February 2023 proceeding, in which another judge, Lady Justice Falk, held that it was "impossible … to dispel the concern that the March 2022 transaction was not genuine, but instead to give the appearance that A1 is no longer under the control of sanctioned individuals."[63] Judge Cockerill also noted that although A1 is no longer funding the case, it has been replaced by another Russian company and third-party payor, Cezar Legal Consulting Agency.[64]

A1's maneuver has appropriately raised serious concerns within the U.S. government. After Bloomberg's investigation, Deputy Treasury Secretary Wally Adeyemo specifically addressed litigation investment financing by foreign actors in a Senate hearing. In his testimony, he noted that the Treasury Department needs "to both work on and try and address" the use of litigation funding by foreign actors.[65] This remains particularly important given the varied levels of control foreign investors may exert. In this instance, A1 "actively participated" in the New

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York and London litigations, ranging from involvement in day-to-day decisions to directing legal strategy from Russia.[66] The A1 example illustrates the potential of foreign litigation funders using litigation in the U.S. and in allied countries like the UK to avoid international sanctions, which would constitute a blatant (and highly concerning) circumvention of longstanding national security protocols.

### Chinese TPLF and Improper Disclosure of Discovery Materials

In addition to potential evasion of U.S. and international sanctions, foreign investment in U.S. litigation also raises concerns over the misuse of confidential information by foreign actors, including potential adversaries. Recent disputes involving Purplevine IP Operating Co., Ltd. (Purplevine) are ground zero for these serious concerns. Purplevine, a China-based firm that markets itself as a one-stop IP service provider, is financing at least four intellectual property lawsuits in U.S. courts against Samsung Electronics Co. (Samsung) and a related subsidiary.[67] Unlike in most cases, Purplevine's role within the litigation was involuntarily disclosed during litigation in Delaware due to a standing order that the judge overseeing the case—Chief U.S. District Judge Colm Connolly—had previously entered requiring certain basic TPLF-related disclosures.[68] This disclosure, subsequent reporting, and facts learned at trial revealed a tangled relationship between this litigation funder and the patent claims at issue and suggest that Purplevine may have received and relied upon privileged, confidential, and highly sensitive information in bankrolling Staton Techiya, LLC's (Techiya) patent infringement claims against Samsung.

In recent redacted filings, Samsung summarized the history of its dispute with Techiya, which began when Techiya alleged that Samsung had infringed several of its patents.[69] Samsung disputed these allegations and alleged that Techiya had (1) violated the Defend Trade Secrets Act (DTSA), and (2) assisted two former in-house lawyers' breach of their fiduciary duties, asserting an unclean hands defense.[70] During an initial trial, it emerged that the two former in-house lawyers had stolen privileged and confidential analysis of the patents and relevant reports.[71] In particular, Samsung's investigation revealed that the privileged analysis was sent to both Purplevine and PV Law, Techiya's outside counsel, and that Purplevine considered this information when deciding to fund the case.[72] Samsung also suggested that while Purplevine had intentionally sought to minimize its relationship with PV Law, this was not credible given the abbreviation (PV) and the two entities' shared address.[73]

Samsung now argues that both Purplevine and PV Law should be added as

counterclaim defendants to the lawsuit due to their misappropriation of trade secrets, noting that they "encouraged and benefited from the theft of Samsung's privileged and confidential information."[74] Samsung describes both Purplevine's and PV Law's actions, one as a litigation funder and the other as the "strategic U.S. law firm partner" of the same, as a "subversion of our adversarial system of litigation and an invasion of the attorney-client privilege."[75] Although the patent technology at issue in the case before Judge Connolly related to sound systems and did not directly implicate national security concerns per se,[76] the alleged misappropriation of discovery and other confidential litigation materials in the case illustrates the kind of misconduct that could unfold when a foreign entity chooses to fund litigation involving sensitive technology (e.g., semiconductors) that is critical to U.S. national security. Indeed, another case, funded by a subsidiary of a foreign bank, resulted in a $2.2 billion judgment against Intel, which is one of the largest manufacturers of highly sensitive U.S. semiconductor technology.[77] The reality is that it is simply a matter of time before an intellectual property case is funded by a foreign adversary seeking to undermine American national security, if it has not already occurred. Indeed, Chinese companies pose a particular concern given that many high-ranking Communist Party officials serve as officers and directors of entities that otherwise appear to have no connection to the Chinese state.

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While this case appears to be the first documented example of a foreign litigation funder allegedly being part of the misappropriation of confidential information, the only reason it came to light was because the court overseeing the original litigation happened to have in place a standing order requiring basic TPLF-related disclosures. Because such orders are the exception rather than the norm, and given the plaintiffs' bar's and the funding industry's vociferous resistance to disclosing TPLF

arrangements in their cases, there is no way to know with any certainty whether Purplevine, SWFs, or even potential adversaries are manipulating TPLF in a similar or even more nefarious manner. But "[g]iven the concerted effort and enormous resources expended by foreign adversaries to pursue their national security goals, there is no reason to believe that exploiting litigation financing would be excluded from their toolbox."[78] The example involving Samsung highlights the very real risk of improper disclosure of sensitive discovery materials to foreign interests and suggests that Professor Steinitz's decade-old warning was well-grounded.

## Litigation Funders Bleed Off Recovery Intended for Litigants

One of the most deceptive claims promoted by the funding industry is that TPLF helps make purportedly injured claimants whole. The opposite is often true. Indeed, while the percentage that each TPLF funder demands for its investment is a closely guarded industry secret, one recent report explained that investors typically seek returns of three to four times their investment for a single lawsuit, or around 18% when they invest in a portfolio of lawsuits.[79] That 18% figure is roughly equivalent to a very high-interest loan, or roughly 1.25 times the current average yield of a "junk bond" (14%)—

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typically the last resort of companies seeking capital.[80] It is therefore no surprise that TPLF investors are proactive in influencing and controlling their investments—i.e., protecting them. As previously discussed, that can consist of exercising influence over litigation strategy and effectively wielding veto power over settlement decisions. And as elaborated below, such a strategy also entails TPLF investors aggressively enforcing one-sided funding agreements that enrich themselves to the detriment of the plaintiffs whose claims they are financing.

A recent dispute between Arigna Technology Limited (Arigna) and TPLF company Longford Capital Fund III, LP (Longford), illustrates the lengths to which funders may be willing to go to enforce agreements that favor the interests of the investors over those of the plaintiffs. In August 2020, Arigna retained Susman Godfrey L.L.P. (Susman) to enforce its intellectual property rights against various entities.[81] The engagement letter between Arigna and Susman defined the attorney-client relationship between Susman and Arigna and outlined a number of patent enforcement actions Susman would pursue on Arigna's behalf.[82] The engagement letter also explained that Arigna would not finance the patent enforcement actions itself.[83] Instead, in exchange for some portion of the settlement proceeds secured by the enforcing campaign, Longford agreed to pay all the up-front costs, expenses and fees associated with the campaign. The funding agreement and the engagement letter were executed on the same day, and each was attached as an exhibit to the other.[84]

In November 2023, Arigna entered into a settlement agreement against one of the targets of the enforcement campaign.[85] Pursuant to that agreement, one of Arigna's affiliates received a $100 million payment.[86] Shortly thereafter, Longford asserted that pursuant to the funding agreement, it was entitled to $32 million, or 32% of the settlement.[87] Arigna demurred, asserting that the funding agreement only entitled Longford to collect from the portion of the settlement paid to Susman under the engagement agreement, and not from the entire $100 million settlement.[88]

Seeking to vindicate its position, Arigna filed suit in Delaware federal court on January 9, 2024.[89] Arigna sought a declaration from the court that Longford's claim to any settlements achieved from the patent enforcement campaign was limited to the amounts paid to Susman, and not the total settlement value.[90] In response, Longford filed an arbitration action in Houston and sought to compel arbitration to resolve the question.[91]

On June 5, 2024, the Court granted Longford's motion and denied Arigna's countermotion to enjoin Longford's arbitration action.[92] While the outcome of this dispute is not yet clear, Longford's successful motion to compel arbitration may be a harbinger of an ultimate arbitral decision that endorses Longford's position that it is entitled to 32% of the $100 million settlement. Such an amount would be in addition to whatever money Arigna owes its counsel, which is typically between 25% and 33% of the overall proceeds. Accordingly, if Longford ultimately has its way, well over half of the settlement proceeds will be going to the lawyers and investors, underscoring that TPLF further dilutes compensation to claimants.[93]

Courts and judges have begun taking note of the aggressive terms often demanded by TPLF funders, expressing growing concern about outside investors draining settlement

**"Accordingly, if Longford ultimately has its way, well over half of the settlement proceeds will be going to the lawyers and investors, underscoring that TPLF further dilutes compensation to claimants."**

funds intended for those who have allegedly been injured by a defendant's purported misconduct. For example, in August 2023, the judge presiding over the Combat Arms Earplug (CAE) multidistrict litigation proceeding and a recent $6.8 billion settlement between 3M and thousands of U.S. military veterans issued an extraordinary order that required plaintiffs' counsel "to disclose all third-party litigation funding agreements entered into by any CAE claimant they represent, whether the agreement was executed before or after a settlement of the CAE claimant's claim."[94] Indeed, the court promised it would "review those contracts with a high degree of scrutiny" after noting that "for at least the past decade, settlements of th[e] size and nature [of the 3M settlement] have often attracted the attention of third-party litigation funding entities intending to prey on litigants, including settlement participants seeking litigation funding pending the receipt of potential settlement funds."[95] Judge Casey Rodgers did not mince words, recognizing that these agreements often included "exorbitant fees and rates of interest."[96] Thus, to ensure that the 3M plaintiffs were "not exploited by predatory lending practices, such as interest rates well above market rates, which [could] interfere with their ability to objectively evaluate the fairness of their settlement options," the court ordered plaintiffs' counsel to disclose any TPLF agreements.

What made Judge Rodgers' order truly extraordinary, however, was that it went beyond simply requiring disclosure of the agreements.[97] In perhaps the first order of its kind, Judge Rodgers ruled that "as of the date of entry of [her] Order, [plaintiffs' counsel] must not participate in, consent to, or approve any third-party litigation funding agreement to a CAE claimant."[98] The judge also prohibited any plaintiff from "obtain[ing] third-party litigation funding, absent the filing of a motion with, and obtaining the prior approval of, [the] Court."[99] Judge Rodgers' concerns are well-founded, given that in 2022, 70% of TPLF funding went to mass tort portfolios.[100]

Judge Rodgers' order and the two orders in the Arigna litigation are the latest illustrations of a fundamental reality: TPLF is designed to maximize funders' return on investment, not to promote the interests of claimants. TPLF incentivizes investors taking a substantial percentage of money supposedly intended to make litigants whole, which, as Judge Rodgers noted, can make parties reject otherwise reasonable settlements in an attempt to recover the funds they actually need to properly recover.

In sum, recent examples belie the longstanding myth promoted by the funding industry that TPLF is an essentially benevolent business model designed to increase access to justice. Rather, as the examples in this chapter show, TPLF investors have: (1) attempted to or successfully seized control of the litigations they finance to the detriment of the plaintiffs; (2) provided a means for foreign interests to potentially evade sanctions or harass or even steal information from American companies or those from allied countries; or (3) siphoned off significant funds intended to make litigants whole. In so doing, TPLF has undermined our civil justice system.

# Decision Makers Are Growing Increasingly Concerned About TPLF

Chapter

03

Another myth spread by the TPLF industry is that judges, lawmakers and policymakers have rejected attempts to make TPLF more transparent, and that they are somehow indifferent about its potential abuses on our civil justice system. Essentially, TPLF investors are perpetuating a narrative that the existence of TPLF and the content of funding agreements are off-limits and completely immune from transparency and government oversight. This myth is just as fallacious as the claim by TPLF funders that they exist solely to increase access to justice and are merely passive investors.

In truth, TPLF is very much on government's radar at both the state and federal levels (as well as abroad).[101] As discussed below, the courts, legislatures, and regulators are becoming increasingly proactive in scrutinizing TPLF and requiring greater transparency of the practice, and are setting the stage for much-needed reform of its usage.

## Actions by Courts and Judges

In recent years, there has been increasing judicial recognition of the need to make TPLF more transparent, with a growing number of district courts and individual judges requiring some form of TPLF disclosure. As previously discussed, Judge Rodgers recently issued an unprecedented order in the 3M litigation to mitigate the abuses of TPLF. A number of district courts and individual judges have also started taking TPLF more seriously by requiring some basic transparency related to this practice.

### Federal District Court Rules

Several district courts have adopted local rules requiring TPLF-related disclosures. These disclosure requirements vary. For example, the District of New Jersey requires that each party must file a certification within 30 days of docketing of the case that discloses the identity of any litigation funder (name, address, place of formation), states whether the funder's approval is necessary for litigation and settlement decisions, and provides a description of the nature of the financial interest.[102] The order also authorizes discovery related to TPLF, including production of the funding agreement itself, "upon a showing of good cause that the [funder] has authority to make material litigation decisions or settlement decisions."[103]

An older and more modest approach to TPLF transparency is reflected in a standing order in the Northern District of California. Unlike the more recent rules summarized above, the Northern

District of California's standing order requires parties to provide limited identifying information, has no provisions for additional discovery of the terms of any agreements, and only applies to class, collective, and representative actions.[104]

### Individual Judges' Orders and Inquiries

In addition to district court rules, a growing chorus of federal judges has begun addressing TPLF by entering their own standing orders or making inquiries in the cases they are overseeing. Most notably, Chief Judge Connolly of the U.S. District Court for the District of Delaware has adopted a standing order applicable to cases on his docket that largely mirrors the District of New Jersey's approach.[105] As previously discussed, it was that standing order that led to the revelations involving Purplevine, bringing into public view the potential national and economic security threats posed by foreign investment in U.S. litigation. A number of other federal judges have also taken steps to increase TPLF transparency in their courtrooms. For example:

- Judge Yvonne Gonzalez Rogers of the U.S. District Court for the Northern District of California orally asked each attorney seeking a leadership position in the social media addiction multidistrict litigation (MDL) proceeding to divulge in open court whether he or she is using (or plans to use) TPLF.[106]

- Judge Dan A. Polster of the U.S. District Court for the Northern District of Ohio required that lawyers connected with the opioid MDL proceeding in his court disclose the existence of any third-party funding.[107]

- Judge J. Philip Calabrese, also of the U.S. District Court for the Northern District of Ohio, has a standing order similar to that of Judge Connolly, requiring the parties to disclose any TPLF funding agreements they may have. The parties may submit those disclosures ex parte by email to chambers.[108]

- Judge Paul W. Grimm of the U.S. District Court for the District of Maryland has also required lawyers leading an MDL proceeding concerning a data breach of Marriott hotels to make similar disclosures.[109]

### Pending Proposal to Amend the Federal Rules of Civil Procedure

The Advisory Committee on Civil Rules (the body responsible for overseeing changes to the Rules of Civil Procedure) continues to consider a proposed amendment to Rule 26 that would require the production of TPLF agreements as a matter of course in all civil cases. Under that proposal, a party

... Chief Judge Connolly of the U.S. District Court for the District of Delaware has adopted a standing order applicable to cases on his docket that largely mirrors the District of New Jersey's approach. ... [I]t was that standing order that led to the revelations involving Purplevine, bringing into public view the potential national and economic security threats posed by foreign investment in U.S. litigation.

**"Most recently, on July 12, 2024, Rep. James Comer (R-KY) wrote to Chief Justice Roberts urging the Judicial Conference (the federal judiciary's rule-making body), to review the role of litigation finance. Specifically, Rep. Comer called for concrete judicial reform, including a potential requirement that TPLF in federal lawsuits be disclosed as a matter of course."**

would have to disclose "any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise."[110]

While the increased judicial scrutiny of TPLF is a very important step in the right direction, there are growing calls by lawmakers for the courts to do even more. As previously discussed, Sens. Rubio (R-FL) and Scott (R-FL) have been advocating for judicial action since November 2023.[111] Most recently, on July 12, 2024, Rep. James Comer (R-KY) wrote to Chief Justice Roberts urging the Judicial Conference (the federal judiciary's rule-making body) to review the role of litigation finance.[112] Specifically, Rep. Comer called for concrete judicial reform, including a potential requirement that TPLF in federal lawsuits be disclosed as a matter of course.[113] That letter was sent just one day after Sens. Cornyn and Tillis called for the Advisory Committee to adopt the disclosure proposal previously discussed.[114] While Justice Roberts has not publicly commented on TPLF, his chief deputy and advisor, Judge Robert M. Dow, Jr., has reportedly suggested that disclosing TPLF agreements privately to the judges and parties involved in lawsuits could allay concerns over litigation funders taking control of cases.[115]

With the increased examples of disturbing behavior by funders, it is unsurprising that both courts and lawmakers alike have taken a much greater interest in TPLF over the last several years, and there is every reason to believe such increased scrutiny will continue and ultimately result in the establishment of concrete safeguards for our civil justice system.

## Actions by Legislatures

### U.S. Congress

The U.S. Congress is also actively considering the risks posed by opaque TPLF and how to address them. Most recently, following a hearing on TPLF usage in U.S. courts,[116] Rep. Darrell

Issa (CA-48), Chairman of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, introduced a discussion draft of the Litigation Transparency Act of 2024.[117] The bill would require the production of TPLF agreements at the outset of any federal civil case, just as defendants are required to turn over insurance agreements to plaintiffs under Rule 26 as a matter of course.

Another proposal currently pending before Congress is the Protecting Our Courts From Foreign Manipulation Act (POCFMA) of 2023—a bipartisan bill introduced by Sens. John Kennedy of Louisiana and Joe Manchin of West Virginia.[118] Speaker Mike Johnson of Louisiana introduced the House version of the legislation. That bill would: (1) require disclosure of foreign sources of TPLF in American courts; (2) ban SWFs and foreign governments from investing in U.S. litigation; and (3) require the DOJ's national security division to submit a report on foreign TPLF to the federal judiciary. As the Senators explain, "[f]oreign actors such as China and Russia use third-party litigation funding to support targeted lawsuits in the United States, undermining our economic and national security," and this Act "would put necessary safeguards in place to ensure that foreign nations, private equity funds and SWFs linked to hostile governments are not tipping the scale in federal courtrooms."[119] The bills have been referred to the House and Senate Judiciary Committees and are awaiting further action.

### The States

The growth of TPLF and its attendant problems have also attracted the attention of state legislatures and governors. As summarized below, a number of states have recently enacted laws requiring the disclosure of TPLF arrangements and establishing important protections addressing excessive interest rates and foreign investment in state court proceedings. For example:

- In 2018, Wisconsin became the first state to require that "a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person … has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise."[120]
- West Virginia enacted a TPLF disclosure law in 2019, which, like Wisconsin's law, requires disclosure of agreements where a litigation financier has a right to receive

compensation from the lawsuit.[121] In March 2024, West Virginia's governor signed into law amendments that, among other things: (1) updated the definition of "consumer" to include non-natural people (i.e., businesses); (2) removed commercial tort claims from the list of items excluded from the definition of TPLF; and (3) clarified that counsel are subject to the disclosure requirement.[122]

- Montana recently enacted a bill requiring the disclosure of TPLF agreements that are used to finance lawsuits brought by consumers.[123] This legislation was passed with a unanimous vote in both chambers of the state legislature. The new law also requires that litigation funders register with the Montana secretary of state, makes funders jointly liable for costs, and establishes a 25% cap on the amount that a funder may receive or recover from a lawsuit.

- Indiana also recently passed a law similarly requiring the disclosure of TPLF agreements with consumer parties.[124] Indiana amended that law to also ban funding by certain foreign parties, prohibit commercial litigation financiers from making litigation and settlement decisions, bar parties from providing sealed or protected documents to their litigation funders, and make the contents of commercial litigation funding agreements discoverable.[125]

- Most recently, on June 19, 2024, Louisiana Gov. Jeff Landry signed into law Senate Bill 355.[126] The newly enacted law requires, among other things, (1) foreign funders to disclose certain information to Louisiana's attorney general, (2) prohibits funders from influencing or making certain litigation and settlement decisions, and (3) makes the existence of TPLF agreements subject to discovery under Louisiana's Code of Civil Procedure and Code of Evidence rules.[127]

## Foreign Governmental Examination and Regulation of TPLF

Concern about the scale and spread of TPLF is not limited to the United States. Even abroad, legislators and judiciaries are taking action to better understand the quickly expanding phenomenon of TPLF and how it should be regulated and controlled. Some of the most notable developments concern actions taken by the European Union and the United Kingdom.

### European Parliament/ European Commission

In June 2021, Member of the European Parliament (MEP) Axel Voss introduced a legislative own-initiative

report titled Responsible Private Funding of Litigation, which called on the European Commission (EC) to legislate on TPLF via a European Union (EU) Directive.[128, 129] That report and its recommendations further highlight the growing consensus that TPLF should be more transparent and be governed by meaningful safeguards. Among other things, the report noted that "[w]here third-party litigation funding activity is permitted, a system for the authori[z]ation and supervision of litigation funders by independent administrative bodies in the Member States is necessary to ensure that such litigation funders meet the minimum criteria and standards laid down in this Directive. Litigation funders should be subject to oversight in a manner similar to that of the existing prudential supervision system applicable to financial services providers."[130] MEP Voss's report also stated that "in order to ensure access to justice for all and that justice systems prioriti[z]e redress for injured parties, and not the interests of private investors who might only be seeking commercial opportunities from legal disputes, it is necessary to establish common minimum standards at Union level, which address the key aspects relevant to TPLF, including transparency, fairness, and proportionality...."[131]

In light of those findings, the report called on the EC to introduce an EU Directive on TPLF and detailed specific safeguards that should be applied to this secretive industry, including: (1) holding funders responsible for adverse costs (i.e., implementing a "loser pays" rule in the event a TPLF-funded lawsuit is unsuccessful);

**"Even abroad, legislators and judiciaries are taking action to better understand the quickly expanding phenomenon of TPLF and how it should be regulated and controlled."**

(2) requiring disclosure of funding agreements and their terms to the court and, to some degree, to defendants; (3) banning undue funder control over proceedings; and (4) ensuring the licensing of funders by an independent supervisory authority in the Member States.[132] In September 2022, MEP Voss's report was adopted as a resolution by an overwhelming majority (over 80%) of the European Parliament.[133]

On December 1, 2022, the EC sent its official response

"'Litigation funders should be subject to oversight in a manner similar to that of the existing prudential supervision system applicable to financial services providers.'"

to the Parliament's resolution on TPLF to Parliament President Roberta Metsola. In a major step towards the regulation of TPLF, the EC agreed to fully engage with Parliament on this issue and follow up on the resolution with an external study. Since then, the EC has asked a consortium of organizations—the German firm Civic Consulting, the British Institute of International and Comparative Law (BIICL), and the Dutch Asser Institute—to conduct the study on TPLF.[134] The study should be completed by January 2025 and is being overseen by the EU Commission Directorate-General for Justice and Consumers.[135]

### European Law Institute

In addition to the study commissioned by the EC, another project co-funded by the EU and conducted by the European Law Institute is seeking to develop certain "safeguards" that would "balance[] the availability of [TPLF] with the interests of claimants and defendants and a healthy litigation market."[136] As the authors of the project recognize, one of the drivers behind conducting the study was that "the amount of money now involved in litigation funding and the number of cases where it is involved … means that some form of regulation or control is now widely perceived as of considerable importance."[137] The project is set to be completed in October 2024, and the organizers hope that the project will, among other things, ultimately "serve as a source of inspiration for legislators considering regulation of TPLF arrangements."[138]

### United Kingdom

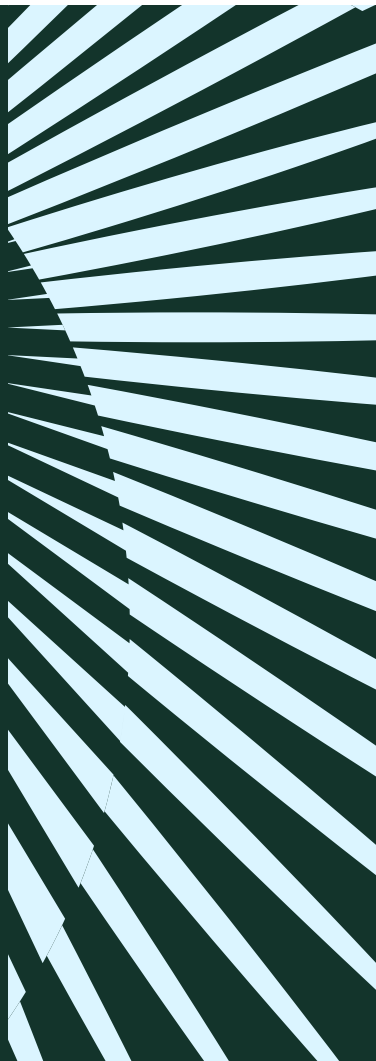
The United Kingdom (UK) recently took on a similar initiative, with the UK's Civil Justice Council (CJC) announcing that it was conducting a review of TPLF, aiming to get an interim report completed in 2024 and a final report in 2025.[139] While the CJC acknowledges that TPLF (which it refers to as "TPF") in the UK is "currently subject to self-regulation," the review will consider "[t]he background to TPF's development in England and Wales; … [t]he current position concerning self-regulation; [a]pproaches to the regulation of TPF in other jurisdictions," and "[h]ow TPF is located within the broader context of funding options."[140] The CJC hopes to "[s]et out clear recommendations for reform," including "whether and how and, if required, by whom, TPF should be regulated," what "role that rules of court, and the court itself, may play in controlling the conduct of litigation supported by TPF," and considerations of the "[d]uties concerning the provision of TPF, including potential conflicts of interest between funders, legal representatives and funded litigants."[141]

The CJC's efforts have taken on new urgency in light of two recent developments: the UK Supreme Court's July 2023 decision in *PACCAR*

*Inc & Ors v Competition Appeal Tribunal & Ors (PACCAR)* and the ongoing scandal surrounding the small recoveries received by the 555 sub-postmasters and mistresses wronged by the UK Post Office. In *PACCAR*, the UK Supreme Court considered whether "litigation funding agreements ('LFAs') pursuant to which the funder is entitled to recover a percentage of any damages recovered constitute 'damages-based agreements' ('DBAs') within the meaning of the relevant statutory scheme of regulation."[142] The answer to that question posed a serious threat to the TPLF industry in the UK because "[i]f the LFAs at issue ... [were] DBAs within the meaning of the relevant legislation, they [would be] unenforceable and unlawful since they did not comply with the formal requirements for such agreements."[143] Indeed, the Court specifically acknowledged that a finding that LFAs were unenforceable would throw the TPLF industry in the UK into chaos.[144] Nonetheless, by a 4-1 majority, that is exactly what the Court found.[145]

Although the TPLF industry's allies in Parliament initially tried

Indeed, the Court specifically acknowledged that a finding that LFAs were unenforceable would throw the TPLF industry in the UK into chaos. Nonetheless, by a 4-1 majority, that is exactly what the Court found.



to reverse the *PACCAR* decision through legislation, those efforts appear to have been halted by the UK's recent general election.[146] It remains to be seen whether the new government will be open to a bill reversing *PACCAR*. The new government's appetite for such a bill may well be dampened by the increasing public outrage at the small amount—around £20,000 each—received by the 555 sub-postmasters and mistresses wronged by the British Post Office, in one of the widest miscarriages of justice in UK history.[147] That small recovery was entirely due to the amounts lawyers and litigation funders took out of the settlement fund set up by the Post Office by lawyers and litigation funders.[148] This issue animated the debate on the bill proposed under the last government essentially to reverse the *PACCAR* decision,[149] and it has added even more importance to the results of the Civil Justice Council's work.[150]

In short, policymakers in the EU and the UK are becoming more aware of the problems posed by opaque and unregulated TPLF. The specific reforms that are implemented in the EU and the UK will be shaped by the outcome of the studies being conducted in those two jurisdictions.

With the increased examples of disturbing behavior by funders, it is unsurprising that both courts and lawmakers alike have taken a much greater interest in TPLF over the last several years ...

# Conclusion

Chapter

04

TPLF funders have consistently shrouded themselves and their agreements with litigants in secrecy in an effort to protect the myth that they offer beneficial services that come at little cost to the litigants in whose cases they invest. The reality, as the examples just described show, is starkly different.

TPLF funders are not "white knights" or "good Samaritans"; rather, they are opportunistic investors who seek to wring out the greatest amount of profit from cases without regard for the harm it may cause to the litigants whose cases they invest in and who are owed counsel's loyalty. That is perhaps the most pernicious myth of all, that TPLF does not create an ethical quagmire that often results in counsel turning against the very clients to whom they owe their duty of loyalty. And even where a litigation funder's and client's interests are aligned, as in the cases of foreign funders, sometimes those interests could be diametrically opposed to those of the United States and its allies. Indeed, there is increasing evidence that offshore investors may be using TPLF to harm American interests, gain access to information, or even avoid sanctions.

That is why, contrary to the TPLF industry's claims, judges and lawmakers are concerned about the proliferation of litigation funding and why they are increasingly taking action to curb its expansion. Indeed, the many examples outlined above of both American and foreign efforts to regulate, or at the very least, force the TPLF industry into the open should put to rest any claim that decision makers are not concerned about TPLF's apparent and indisputably corrosive effect on the civil justice system. These efforts should be applauded and supported, as without proper attention and regulation, TPLF risks seriously undermining the very access to justice that litigation funders claim to provide.

**"That is perhaps the most pernicious myth of all, that TPLF does not create an ethical quagmire that often results in counsel turning against the very clients to whom they owe their duty of loyalty."**

# Endnotes

[1] Report of the Advisory Committee on Civil Rules at 14 (Dec. 6, 2017), https://www.uscourts.gov/sites/default/files/2017-12-6-civil_rules_committee_report.pdf.

[2] Statera Capital, https://stateracap.com/litigation-finance-services/ ("Statera is a passive investor and does not control your litigation."); Law & Economics Center, Panel 6: *The Evolution of Third-Party Litigation Funding*, Sixteenth Annual Judicial Symposium on Civil Justice Issues (Oct. 10, 2022), https://masonlec.org/events/sixteenth-annual-judicial-symposium-on-civil-justice-issues/ ("I don't know how to say this more clearly, we don't control settlement."); Lesley Stahl, *Litigation Funding: A multibillion-dollar industry for investments in lawsuits with little oversight*, 60 Minutes (Dec. 18, 2022), https://www.cbsnews.com/news/litigation-funding-60-minutes-2022-12-18 (Burford CEO stating that "clients are free to run their litigations as they see fit.... And we don't interfere with that relationship. It's not uncommon for them to come and ask for our advice but it's advice. And the client is free to disregard that advice and take its own path."); Burford, *What we do*, https://www.burfordcapital.com/what-we-do/ (Burford describing itself as "a passive investment partner").

[3] Burford, *What we do*, https://www.burfordcapital.com/what-we-do/.

[4] Burford, *Fees & Expenses*, https://www.burfordcapital.com/what-we-do/fees-expenses/.

[5] Complaint ¶¶ 4, 228, *Sysco Corp. v. Agri Stats, Inc*., No. 21-cv-1374, ECF No. 1 (D. Minn. filed Mar. 8, 2021); Complaint ¶¶ 2, 346, *Sysco Corp. v. Cargill, Inc.*, No. 22-cv-1750, ECF No. 1 (D. Minn. filed June 24, 2022).

[6] Order (Feb. 9, 2024 *In re Pork* Order) at 6-7, *In re Pork Antitrust Litig*., No. 18-cv-1776, ECF No. 2104 (D. Minn. Feb. 9, 2024).

[7] Declaration of Patrick C. Swiber, Ex. B at 5, *Glaz LLC v. Sysco Corp.,* No. 1:23-cv-02489, ECF No. 21-2 (S.D.N.Y. filed May 3, 2023).

[8] *See* Amended Petition to Vacate Arbitration Award (Sysco Amended Petition) ¶¶ 30-40, *Sysco Corp. v. Glaz LLC*, No. 1:23-cv-01451, ECF No. 18 (N.D. Ill. filed Mar. 20, 2023).

[9] See *id*. ¶¶ 41-58.

[10] Feb. 9, 2024 *In re Pork* Order at 7.

[11] *Sysco* Amended Petition ¶ 70.

[12] *Id.* ¶ 71.

[13] Feb. 9, 2024 *In re Pork* Order at 9.

[14] *Id.* at 17.

[15] *Id.* at 9.

[16] *Id.* at 9-10.

[17] *Id.* at 17.

[18] Order at 11-12, *Sysco Corp. v. Agri Stats, Inc*., No. 0:21-cv-01374, ECF No. 41 (D. Minn. June 3, 2024).

[19] See Order, *In re Boiler Chicken Antitrust Litig*., No. 1:16-cv-08637, ECF No. 7184 (N.D. Ill. Mar. 21, 2024).

[20] *Id.* at 3, 5.

[21] For example, the elaborate funding agreement utilized by Burford in class action litigation against Chevron "provide[d] control to the Funders" through the "installment of 'Nominated Lawyers'"—lawyers "selected by the Claimants with the Funder's approval." Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 472 (2012). Similarly, in *Boling v. Prospect Funding Holdings, LLC*, the U.S. Court of Appeals for the Sixth Circuit concluded that the terms of the funding agreements involved in that matter "effectively g[a]ve Prospect [Funding Holdings, LLC (a TPLF entity)] substantial control over the litigation," including terms that "may interfere with or discourage settlement" and otherwise "raise[d] quite reasonable concerns about whether a plaintiff can truly operate independently in litigation." 771 F. App'x 562, 579-80 (6th Cir. 2019). In a lawsuit filed in 2018, White Lilly, LLC, a TPLF entity, affirmatively asserted that it had the contractual right to exercise control over the litigation in which it had invested by, *inter alia*, requiring that specified counsel (who had an existing relationship with the TPLF company) serve as one of the plaintiff's counsel in the funded lawsuit. *See* Compl. ¶ 35, *White Lilly, LLC v. Balestriere PLLC*, No. 1:18-cv-12404 (S.D.N.Y. filed Dec. 31, 2018). And in *Gbarabe v. Chevron Corp.*, the funding agreement contained several key provisions that suggested Therium Litigation Funding IC, a Jersey-based litigation funder, sought to influence the course of the litigation, including one prohibiting the lawyers from engaging any co-counsel or experts without the funder's consent. Litigation Funding Agreement, § 1.1, *Gbarabe v. Chevron Corp*., No. 14-cv-00173-SI, ECF No. 186-4, 69-91 (N.D. Cal. filed Sept. 16, 2016). Notably, Bentham IMF—now Omni Bridgeway—specifically contemplated funder control over litigation strategies in its 2017 "best practices" guide for U.S. matters, highlighting the importance of setting forth specific terms in TPLF agreements that give the funder authority to:

"[m]anage a litigant's litigation expenses"; "[r]eceive notice of and provide input on any settlement demand and/or offer, and any response"; and participate in settlement decisions. Bentham IMF, Code of Best Practices (Jan. 2017).

22 Editorial Board, *The Litigation Finance Snare*, The Wall Street Journal, (May 21, 2023), https://www.wsj.com/articles/burford-capital-litigation-financing-sysco-lawsuit-boies-schiller-a4b593fb.

23 *See generally* Andrew J. Pincus, Archis A. Parasharami, Kevin Ranlett, and Carmen Longoria-Green of Mayer Brown LLP, U.S. Chamber of Commerce Institute of Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* (February 2023), https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf.

24 *See generally* Complaint (Bucher Compl.) ¶ 5, *Bucher v. Zaiger LLC*, No. 3:23-cv-00452, ECF No. 1 (D. Conn. Apr. 10, 2023).

25 *See generally* Complaint, *Zaiger LLC v. Bucher Law PLLC*, No. 154124/2023, ECF No. 1 (N.Y. Cnty. Sup. Ct. May 9, 2023).

26 *See generally Valve Corp. v. Bucher Law*, No. 23-2-20447-6 (Wash. Super. Ct. Oct. 20, 2023); *Valve Corp. v. Zaiger LLC*, No. 2:23-cv-01819 (W.D. Wash. Nov. 27, 2023).

27 Bucher Compl. ¶ 1.

28 *Id.* ¶ 29.

29 Affidavit of W. Bucher ¶ 6, *Zaiger LLC v. Bucher Law PLLC*, No. 154124/2023, ECF No. 29 (N.Y. Cnty. Sup. Ct. May 9, 2023).

30 *Id*.

31 *Id.*

32 *Id.* ¶ 10.

33 *Id.* ¶ 14.

34 *Id*., Ex. A, at 5 (32 of 106).

35 *Id.* at 7 (34 of 106).

36 *Id.* at 9 (36 of 106).

37 Bucher Compl. ¶ 52.

38 *Id.* ¶ 53.

39 *Id.* ¶¶ 3, 65.

40 *Id.* ¶ 86.

41 *Id.* ¶ 107.

42 *Id.*

43 *Id.* ¶ 124.

44 The secrecy surrounding mass arbitrations obscures the full extent of TPLF in these proceedings. *See* J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1340 n.296 (2022) ("Because litigation-funding arrangements tend to be confidential, it is not possible to determine whether a particular mass arbitration was funded."). Nonetheless, one professor has explained that the availability of TPLF is directly responsible for the explosion of mass arbitrations:

> The emergence of a multibillion-dollar litigation-funding industry is relevant to the development of mass arbitration in at least three ways. One, third-party funding may well have enabled a number of mass arbitrations, especially at the beginning.[] Two, the availability of third-party funding—nonexistent during the arbitration revolution—made mass arbitration a more realistic possibility for firms that needed (or wished) to hedge against the model's substantial risks. Three, third-party litigation-funding arrangements are more available for individualized claiming models like mass arbitration than they are for class-action suits. []

*Id.* at 1340 (citations omitted).

45 *See generally* Michael E. Leiter, John H. Beisner, Jordan M. Schwartz and James E. Perry of Skadden, Arps, Slate, Meagher & Flom LLP, U.S. Chamber of Commerce Institute of Legal Reform, *ILR Briefly*, *A New Threat: The National Security Risk of Third Party Litigation Funding* (November 2022) (A New Threat), https://instituteforlegalreform.com/research/ilr-briefly-a-new-threat-the-national-security-risk-of-third-party-litigation-funding/.

46 Letter, U.S. Senators John Cornyn & Thom Tillis (July 11, 2024) (Sens. Cornyn-Tillis Letter), https://www.cornyn.senate.gov/wp-content/uploads/2024/07/7.11.24-TPLF-Letter.pdf.

47 *Id.*

48 Press Release, U.S. Senator Marco Rubio, *Rubio, Scott Push for Transparency for Foreign Third Party Litigation Funding in U.S. Courts* (Nov. 3, 2023) (Sen. Rubio Release), https://www.rubio.senate.gov/rubio-scott-push-for-transparency-for-foreign-third-party-litigation-funding-in-u-s-courts/.

49 *See id.*

50 *See id.*

51 House Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party, *Reset, Prevent, Build: A Strategy to Win America's Economic Competition with the Chinese Communist Party* (Dec. 12,

2023), at 21, https://selectcommitteeontheccp.house.gov/sites/evo-subsites/selectcommitteeontheccp.house.gov/files/evo-media-document/reset-prevent-build-scc-report.pdf.

[52] *Id.*

[53] *See generally* Hon. Christopher Carr (GA), Hon. Jason Miyares (VA), *et al.*, Letter to U.S. DOJ re: Threats Posed by Third-Party Litigation Funding (Carr 12/22/22 Letter) (Dec. 22, 2022), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2022/pr22-55-letter.pdf.

[54] *See generally* R. Kelner, B. Smith, A. Langton, Law360, *DOJ Officials' Remarks Signal New Trends In FARA Activity* (December 14, 2023), https://www.law360.com/articles/1776917/doj-officials-remarks-signal-new-trends-in-fara-activity.

[55] *Id.*

[56] *Id.*

[57] Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1270 (2011).

[58] Press Release, U.S. Senator John Kennedy, *Kennedy Urges Roberts, Garland to Take Action to Protect National Security From Foreign Actors Meddling in U.S. Courts* (Jan. 9, 2023), https://www.kennedy.senate.gov/public/press-releases?ID=1FBC312C-94B8-409B-B0A3-859A9F35B9F5; Letter from Sen. John Kennedy to Honorable Merrick Garland & Honorable John Roberts (Jan. 6, 2023), https://www.kennedy.senate.gov/public/_cache/files/0/7/077acc52-6622-453b-b9a5-bbecd358e136/32C50A661400A5B670DC1D48B8D75E73.letter-to-ag-garland-cheif-justice-roberts.pdf.

[59] GAO, Report to Congressional Requesters, Third-Party Litigation Financing, Market Characteristics, Data, and Trends, at 10 & n.24 (Dec. 2022), https://www.gao.gov/assets/gao-23-105210.pdf. For example, in its 2023 shareholder newsletter, Burford reported that "our partnership with our sovereign wealth partner … provided 88% of our Burford-only asset management income in 2023." *See* Burford Capital 2023 Shareholder Letter at VI, https://s201.q4cdn.com/169052615/files/doc_financials/2023/q4/2024-03-14-Burford-Capital-2023-Shareholder-Letter-FINAL-1447611-1.pdf. Burford also boasted that it has extended the size and duration of its partnership with this unnamed foreign funder. *See Burford Capital expands and further extends sovereign wealth fund arrangement*, (Nov. 9, 2023), https://www.burfordcapital.com/insights-news-events/news-press-releases/burford-capital-expands-and-further-extends-sovereign-wealth-fund-arrangement/.

[60] Emily R. Siegel & John Holland, *Putin's Billionaires Dodge Sanctions by Financing Lawsuits*, Bloomberg Law (Mar. 28, 2024), https://news.bloomberglaw.com/litigation-finance/putins-billionaires-sidestep-sanctions-by-financing-lawsuits.

[61] *Id.*

[62] Emily R. Siegel, *UK Judge Rules Funder is Likely Owned by Sanctioned Russians*, Bloomberg Law (May 7, 2024), https://news.bloomberglaw.com/business-and-practice/uk-judge-rules-funder-is-likely-owned-by-sanctioned-russians.

[63] *Vneshprombank LLC v. Bedzhamov* [2024] EWHC (Ch) 1048 [3-4].

[64] *Vneshprombank LLC v. Bedzhamov* [2024] EWHC (Ch) 1048 [4]; Emily R. Siegel, *UK Judge Rules Funder is Likely Owned by Sanctioned Russians*, Bloomberg Law (May 7, 2024), https://news.bloomberglaw.com/business-and-practice/uk-judge-rules-funder-is-likely-owned-by-sanctioned-russians.

[65] An Update from the Treasury Department: Countering Illicit Finance, Terrorism and Sanctions Evasion: Hearing Before Senate Comm. on Banking, Housing, and Urban Affairs, 118 Cong. (April 9, 2024) (Testimony of W. Adeyemo); Emily R. Siegel, *UK Judge Rules Funder is Likely Owned by Sanctioned Russians*, Bloomberg Law (May 7, 2024), https://news.bloomberglaw.com/business-and-practice/uk-judge-rules-funder-is-likely-owned-by-sanctioned-russians.

[66] Emily R. Siegel & John Holland, *Putin's Billionaires Dodge Sanctions by Financing Lawsuits*, Bloomberg Law (Mar. 28, 2024), https://news.bloomberglaw.com/litigation-finance/putins-billionaires-sidestep-sanctions-by-financing-lawsuits.

[67] Emily R. Siegel, *China Firm Funds US Suits Amid Push to Disclose Foreign Ties*, Bloomberg Law (Nov. 6, 2023), https://news.bloomberglaw.com/business-and-practice/china-firm-funds-us-lawsuits-amid-push-to-disclose-foreign-ties; https://www.purplevineip.com/en/.

[68] *See* Plaintiff's Statement Regarding Third-Party Litigation Funding Arrangements, *Staton Techiya, LLC v. Harman Int'l Indus., Inc.*, No. 1:23-cv-00801-JCG, ECF No. 7 (D. Del. Aug. 24, 2023).

[69] *See* Samsung's Motion for Leave to Amend Answer & Counterclaims to Join Purplevine and PV Law as Counterclaims Defendants at 6, *Staton Techiya, LLC v. Samsung Elecs. Co.*, No. 2:23-cv-00319-JRG-RSP, ECF No. 65 (E.D. Tex. June 13, 2023).

[70] *See id.* at 5-6.

[71] *Id.* at 7.

[72] *Id.* at 9.

[73] *Id.* at 7, 11.

[74] *Id.* at 5-6.

[75] *Id.* at 15.

[76] *See generally* Complaint, *Staton Techiya, LLC v. Harman Int'l Indus., Inc.*, No. 1:23-cv-00801-JCG, ECF No. 1 (D. Del. July 25, 2023).

[77] Michael B. Mukasey, *Patent Litigation Is a Matter of National Security*, Wall Street Journal, (Sept. 11, 2022), https://www.wsj.com/articles/patent-litigation-is-a-matter-of-national-security-chips-and-science-act-intellectual-property-theft-lawsuit-technology-scammers-manufacturing-11662912581. The Mukasey op-ed specifically addresses patent infringement initiated by VLSI Technology LLC, which is beneficially owned by numerous entities, including sovereign wealth funds such as Fortress Investment Group (FIG). *See id.*; *see also* Mem. Order, *VLSI Tech. LLC v. Intel Corp.*, C.A. No. 18-966-CFC-CJB, ECF No. 975 (D. Del. Aug. 1, 2022). Notably, FIG was recently acquired by Mubadala, an Abu Dhabi-owned sovereign wealth fund. See https://www.bloomberg.com/news/articles/2022-09-06/abu-dhabi-s-mubadala-said-to-near-2-billion-deal-for-fortress. Mubadala also happens to be the largest owner of Global Foundries, a chip manufacturer. These circumstances illustrate the web of foreign connections and raise serious questions about whether the sources of funding for lawsuits in the United States are either directly or indirectly competitors of American companies engaged in sensitive industries.

[78] *See* A New Threat, *supra* note 45, at 11.

[79] Robert Freedman, *Litigation Funding Seen as Strategic Tool for Pursuing Lawsuits*, Legal Dive (July 1, 2022), https://www.legaldive.com/news/litigation-funding-seen-as-strategic-tool-for-pursuing-lawsuits/626488/.

[80] MacroMicro, US - High-Yield Bond Effective Yield, https://en.macromicro.me/collections/9/us-market-relative/117/us-junk-bonds-yield (last visited July 12, 2024).

[81] Memorandum Order at 1, *Arigna Tech. Ltd. v. Longford Cap. Fund III, LP*, No. 1:23-01441-GBW, ECF No. 56 (D. Del. June 5, 2024).

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 3.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.* at 4.

[91] *Id.*

[92] *See generally id.*

[93] The Arigna debacle also illustrates another danger posed by TPLF agreements: the risk that clients may be deprived of their counsel of choice when they attempt to push back against an aggressive litigation funder. Specifically, just two days after the District of Delaware granted Longford's motion to compel arbitration to adjudicate the scope of its entitlement to Arigna's settlement, the District Court for the District of Columbia granted Susman's motion to withdraw as counsel for Arigna in a different case after concluding that Susman could be forced "to choose between preparing to sue Arigna on the one hand and zealously advocating for Arigna on the other" in connection with the Longford arbitration. *See* Mem. Op. at 8, *Bayerische Motoren Werke AG v. Arigna Tech. Ltd.*, No. 1:23-cv-01190-RC, ECF No. 59 (D.D.C.). Specifically, the court noted that because Susman and Arigna "appear to be at an impasse with respect to whether the representation agreement [between them] requires Arigna to indemnify and advance defense costs to Susman for the LCF arbitration, there is at least the specter that Susman will sue Arigna." *Id.* For that reason, the court found that it was "in the interests of justice to permit Susman to withdraw as counsel in [the] case." *Id.* Thus, even if Longford ultimately fails to collect from Arigna's settlement, it has at the very least deprived Arigna of its counsel of choice to pursue the patent enforcement campaign.

[94] Case Mgmt. Order No. 61 at 3, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-02885-MCR-HTC, ECF No. 3815 (N.D. Fla. Aug. 29, 2023).

[95] *Id.* at 1, 3.

[96] *Id.* at 1.

[97] *Id.* at 3.

[98] *Id.*

[99] *Id.*

[100] Sens. Cornyn-Tillis Letter, at 1.

[101] Brenna Goth, *Third-Party Funding for Litigation Faces States' Scrutiny,* Bloomberg Government, (Aug. 5, 2024), https://news.bgov.com/bloomberg-government-news/third-party-funding-for-litigation-comes-under-states-scrutiny.

[102] *See* D.N.J. L. Civ. R. 7.1.1(a).

[103] *Id*.

[104] Standing Order for All Judges of the Northern District of California (Nov. 1, 2018).

[105] *See* Standing Order Regarding Third-Party Litigation Funding Arrangements, https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf.

[106] Hr'g Tr. 12:21-24, *In re Soc. Media Adolescent Addiction/Pers. Injury Prods. Liab. Litig*., MDL No. 3047 (N.D. Cal. Nov. 9, 2022) ("I want to know explicitly whether you use [TPLF] or intend to use it in this case.").

[107] *See In re Nat'l Prescription Opiate Litig*., No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018).

[108] *See* Rule 26(f) Report of the Parties, Standing Orders, Judge J. Philip Calabrese (N.D. Ohio), https://www.ohnd.uscourts.gov/sites/ohnd/files/Rule%2026%28f%29%20Report%20of%20the%20Parties%20%281.2.2024%29.pdf.

[109] *See* Case Mgmt. Order Regarding Model Leadership Appls. for Consumer Track at 2-3, *In re Marriott Int'l Customer Data Sec. Breach Litig*., MDL No. 19-md-2879, ECF No. 171 (D. Md. filed Apr. 11, 2019).

[110] Document No. 17-CV-O, as supplemented by letter dated November 3, 2017, Document No. 17-CV-GGGGGG.

[111] *See generally* Sen. Rubio Release.

[112] Letter from Rep. James Comer to Honorable John Roberts (July 12, 2024).

[113] Emily R. Siegel, *Comer Urges Chief Justice Roberts to Examine Litigation Funding*, Bloomberg Law (July 12, 2024), https://news.bloomberglaw.com/business-and-practice/comer-urges-chief-justice-roberts-to-examine-litigation-funding.

[114] *See generally* Sens. Cornyn-Tillis Letter.

[115] *Id.*

[116] The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities: Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet, 118 Cong. (June 12, 2024).

[117] *See* Press Release, Representative Darrell Issa, *Issa Introduces Discussion Draft of Legislation Reforming Third-Party Financed Civil Litigation* (July 11, 2024), https://issa.house.gov/media/press-releases/issa-introduces-discussion-draft-legislation-reforming-third-party-financed.

[118] At the time of publication, the bill's sponsors were seeking to include its provisions as an amendment to the National Defense Authorization Act for 2025. *See* S.A. 2333 – 118th Congress (2023-2024): Protecting Our Courts From Foreign Manipulation, Amendment to S. 4638, 118th Cong. (July 11, 2024), https://www.congress.gov/118/crec/2024/07/11/170/115/CREC-2024-07-11-pt1-PgS4667-4.pdf.

[119] Press Release, *Senator Kennedy, Kennedy, Manchin Introduce Bipartisan Protecting Our Courts from Foreign Manipulation Act to End Overseas Meddling in U.S. Litigation* (Sept. 14, 2023), https://www.kennedy.senate.gov/public/2023/9/kennedy-manchin-introduce-bipartisan-protecting-our-courts-from-foreign-manipulation-act-to-end-overseas-meddling-in-u-s-litigation.

[120] 2017 Wis. Act 235, https://docs.legis.wisconsin.gov/2017/related/acts/235.

[121] W. Va. Code Ann. § 46A-6N-6 (enacted 2019).

[122] S.B. 850, 2024 Reg. Sess. (W.V. Mar. 9, 2024) (signed Mar. 27, 2024).

[123] See MT LEGIS 360 (2023), 2023 Montana Laws Ch. 360 (S.B. 269) (enacted 2023).

[124] IN LEGIS 63-2023 (2023), 2023 Ind. Legis. Serv. P.L. 63-2023 (H.E.A. 1124) (enacted 2023).

[125] Ind. Code § 24-12-1.05, et. seq.

[126] Mark Popolizio, *Louisiana Enacts New Third-Party Litigation Funding (TPLF) Law*, Verisk (June 27, 2024), https://www.verisk.com/blog/louisiana-enacts-new-third-party-litigation-funding-tplf-law/.

[127] *See generally* https://legis.la.gov/legis/ViewDocument.aspx?d=1382655.

[128] An EU "'directive' is a legislative act that sets out a goal that EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals." EU, *Types of Legislation,* https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en.

[129] *See generally* Report A9-0218/2022, *REPORT with recommendations to the Commission on Responsible private funding of litigation, Committee on Legal Affairs,* European Parliament (July 25, 2022), https://www.europarl.europa.eu/doceo/document/A-9-2022-0218_EN.html#_section5.

[130] *Id*. at Annex to The Motion For a Resolution: Recommendations as to the Content of The Proposal Requested, ¶ 9.

[131] *Id.* at Introduction point 3.

[132] *See generally*, Report A9-0218/2022.

[133] *See* Texts Adopted, *Responsible private funding of litigation,* European Parliament (September 13, 2022), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.html.

[134] *See generally* British Institute of International and Comparative Law, *Projects: Mapping Third Party Litigation Funding in the European Union,* https://www.biicl.org/projects/mapping-third-party-litigation-funding-in-the-european-union.

[135] In addition to these efforts, the EU Directive on Representative Actions (RAD) includes additional safeguards for funding, all related to the "qualified entity" bringing the claim. The text of the RAD states that a qualified entity should be independent and not influenced by third parties, including litigation funders, and that it should have measures in place to prevent conflicts of interest between itself, its funding providers, and the interests of consumers. The qualified entity must also disclose to the court the sources of funding for a particular representative action. The RAD empowers courts or administrative authorities in the Member States to require the qualified entity to refuse or make changes to the funding agreement. *See* RAD Art. 4, 10, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020L1828. Pursuant to the authority given to Member States by the RAD, certain Member States have put in place additional restrictions on TPLF. For example, Czechia, Germany, and Portugal have added additional transparency measures for TPLF to their legislation implementing the RAD, and the practice has been banned in class actions in Greece and Ireland.

[136] European Law Institute, *ELI Third Party Funding of Litigation*, https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/eli-third-party-funding-of-litigation/.

[137] *Id.*

[138] *Id.*

[139] UK Courts and Tribunals Judiciary, *Litigation Funding*, https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/third-party-funding/.

[140] *Id.*

[141] *Id.*

[142] *R (on the application of PACCAR Inc and others) (Appellants) v. Competition Appeal Tribunal and others (Respondents)*, 2023 UKSC 28, ¶ 3, https://www.supremecourt.uk/cases/docs/uksc-2021-0078-judgment.pdf.

[143] *Id.*

[144] *Id.* ¶ 13.

[145] *Id.* ¶¶ 95-99.

[146] Robert Li, *UK Election Stymies Anti-PACCAR Bill*, CDR (May 24, 2024), https://www.cdr-news.com/categories/third-party-funding/20717-uk-election-stymies-anti-paccar-bill.

[147] Ben Rigby & John Malpas, *The Post Office Scandal's Far-Reaching Impact on Litigation Funding*, Global Legal Post (May 3, 2024), https://www.globallegalpost.com/news/the-post-office-scandals-far-reaching-impact-on-litigation-funding-2128628694. The scandal, in which more than 900 sub-postmasters were prosecuted for stealing due to a software malfunction, has been widely covered by the British Press. *See, e.g., Post Office Horizon Scandal: Why Hundreds Were Wrongly Prosecuted*, BBC (May 24, 2024), https://www.bbc.com/news/business-56718036.

[148] *Id.*

[149] *Id.*

[150] *See generally* Fair Civil Justice, *Establishing Fairness in Litigation Funding: A British Roadmap to Protect Consumers, SMEs and Other Parties in Funded Legal Actions* (June 24, 2024). https://faircivilljustice.org/wp-content/uploads/2024/06/1452C_TPLF_4_RGB_Pages.pdf.

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