

October 31, 2023

The Honorable James Comer
Chairman
Committee on Oversight and Accountability
U.S. House of Representatives
Washington, DC 20515

The Honorable Jamie Raskin
Ranking Member
Committee on Oversight and Accountability
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Comer and Ranking Member Raskin:

We appreciate the Committee's efforts to spotlight the rapidly growing threat third-party litigation funding ("TPLF") poses to America's economy, the federal judiciary, the U.S. business community, and national security. TPLF is the mechanism by which hedge funds and specialized firms invest in litigation matters in exchange for a substantial share of any recovery. Investor-funded litigation impacts a broad range of industries and litigation. As was noted during the Committee's September 13 hearing on this topic, TPLF has become a major global industry, with billions of dollars under management.

The core problem with TPLF is that the industry goes to great lengths to operate in complete secrecy. In the typical lawsuit, neither the court nor the defendant knows whether the matter is being sponsored by outside investors (or who they may be). In some instances, even the plaintiff is kept in the dark. Hidden TPLF players operate from the shadows and often manipulate civil litigation for their own purposes. While TPLF is thus radically altering U.S. civil litigation, it is evading the kind of oversight devoted to virtually all other financial services.

TPLF's negative effects on U.S. civil litigation are manifold. Most troublingly, as Prof. Maya Steinitz observed during the Committee's hearing, TPLF may encourage the filing of non-meritorious lawsuits particularly in the aggregate litigation context. As both majority and minority witnesses at the hearing stated, litigation funding raises serious ethical issues, especially in threatening lawyers' ability to exercise independent judgment. The clandestine nature of TPLF also denies defendants their right to know their accusers. Meanwhile, funders too frequently take self-interested steps that harm the interests of the actual plaintiffs for whom the litigation process is supposed to exist.

More specifically, funders can and do exercise their control or influence over cases to advance their own profit goals (all to plaintiffs' serious detriment), particularly by unreasonably prolonging cases and frustrating settlement prospects.¹ Finally, as former House Armed Services Committee Chairman Buck McKeon has observed, TPLF provides a "clear path for foreign adversaries to undermine U.S. national economic and security interests through the infiltration of the American litigation system."²

¹ TPLF industry members invariably deny that they are able to exercise such control or influence, but there are court rulings to the contrary. See, e.g., *Boling v. Prospect Funding Holdings, LLC*, 771 F. App'x 562, 579 (6th Cir. 2019).

² See Howard McKeon, *Some Third-Party Funders Pose a Threat to US National Security*, Bloomberg Law, Apr. 7, 2023.

The litigation abuses fostered by TPLF are becoming increasingly pernicious, as best illustrated by its effects on mass tort litigation. As Johnson & Johnson assistant general counsel Aviva Wein described to the Committee at the hearing, lawyers pitch their tort theory to third-party litigation funders, who furnish cash in exchange for a share of promised extraordinary yields. In turn, that cash is used to launch massive advertising campaigns to recruit many thousands of persons to file lawsuits alleging injury by the targeted product.³ The multidistrict litigation (“MDL”) courts to which claims are transferred for coordination normally do not require any threshold demonstration of the basic bona fides of each claim (e.g., showing that the plaintiff actually purchased/used the product or sustained the alleged injury). For that reason, mass tort MDL proceedings are often filled with tens of thousands of lawsuits rife with dubious claims.⁴ Counsel’s motivation to generate mountains of claims is simple — to create leverage for settlement. They know that the costs, burdens and disruptions caused by the sheer volume of claims will force many defendants to settle, even if the merits do not favor plaintiffs.

When settlements occur, big money goes to plaintiffs’ lawyers and their investors. For example, if there is a \$10 billion resolution of a funded matter, the standard 33-40% contingency fee arrangements will divert from plaintiffs’ hands upwards of **\$4 billion** of that amount (if not more) to the lawyers and their backers. As Chairman Comer shared at the September 13 hearing, a recent study by the Institute for Legal Reform found that for every dollar paid in damages through tort litigation, only 53 cents actually reaches the claimants’ pockets. Of course, that means that the persons who should be the focal points of the litigation process—the individuals seeking redress for their alleged injuries—are being overlooked in the mass tort game designed to generate profits for others. Thus, not surprisingly, mass tort MDL plaintiffs believe they are being ignored and mistreated by the process.⁵ On the other hand, litigation investors are strongly attracted to mass tort cases because they generally “outperform returns on risky asset classes such as venture capital and private equity” and are “largely uncorrelated with macroeconomic risks.”⁶ Bluntly, they are seen as the best money game in town.

Mass tort litigation is not the only realm being adversely affected by TPLF usage. Consumer class actions—lawsuits brought on behalf of thousands (and sometimes millions) of unnamed individuals alleging economic losses—are often replete with ethical issues resulting

³ The success of this strategy is evidenced in the fact that our federal courts are being overwhelmed by mass tort cases, as upwards of **70% of all civil actions pending nationwide in the federal system are such mass tort lawsuits.**

⁴ According to a report of the Federal Advisory Committee on Civil Rules, 20%-30% of mass tort claims are wholly “unsupportable”; in some litigations, the figure “may be as high as 40% or 50%” https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

⁵ A recently released survey of plaintiffs in mass tort MDL proceedings indicates that “only 16.6 percent ever even spoke with their lawyer on the phone,” and only “a trifling 1.8 percent felt like their lawsuit accomplished what they hoped it would.” Elizabeth Chamblee Burch, *MDL for the People*, 108 Iowa L. Rev. 1016, 1018 (2023).

⁶ Swiss Re Institute, *US Litigation Funding and Social Inflation* at 4, 8 (Dec. 2021); see also Roy Strom, *Camp Lejeune Ads Surge Amid “Wild West” of Legal Finance, Tech*, Bloomberg Law, Jan. 30, 2023 (investors “view mass torts as an increasingly lucrative asset class, and are likely to bet even more money on similar cases to diversify their holdings”).

from a combination of attorney self-dealing and TPLF proliferation. Because the unnamed class members have virtually no control over their claims and very little incentive to monitor ongoing litigation, class action attorneys essentially have carte blanche to run the show, frequently resulting in settlements that primarily benefit counsel. This dynamic has been exacerbated by the increasing use of TPLF in class actions, which further dilutes the class members' status in the litigation and siphons off even more recovered money to a financially interested non-party.⁷

Patent litigation has also been adversely affected by TPLF. Federal courts are currently struggling to uncover the extent to which funders are manipulating intellectual property disputes for their own benefit.⁸ More and more, litigation investment entities are paying close attention to intellectual property assets, with TPLF now involved in approximately 30% of all patent litigation cases.⁹ As former Sen. Patrick Leahy characterizes the problem, litigation funders “weaponize [patent] lawsuits as an investment strategy, . . . own[ing] or creat[ing] shell companies that [seek to] extract payments through legal action.”¹⁰

As increasingly frequent multi-billion-dollar litigations and settlements divert precious resources from development of innovative, publicly beneficial products and undermine U.S. companies' positions on the world stage, TPLF must be brought into the sunshine. We therefore hope that the record the Committee is developing on this issue will be a catalyst for further oversight and crafting corrective legislation or rules.

⁷ See U.S. Chamber of Commerce Institute for Legal Reform, *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform*, at 32-33 (Aug. 2022).

⁸ Jacob Gershman, *Delaware Judge Targets Secret Funding of Lawsuits*, Wall St. J., May 22, 2023 (“the lack of transparency around who is bankrolling infringement lawsuits has helped fuel a growth in nuisance litigation that is often cheaper to settle than to defend”); Michael Shapiro, *Judge Threatens Litigation Funders in Apple Case With Sanctions*, Bloomberg Law, July 19, 2023.

⁹ Jonathan Stroud, General Counsel, Unified Patents, *Third-Party Litigation Funding: Disclosure to Courts, Congress, and the Executive*, PATENTLY-O, Feb. 22, 2023, https://patentlyo.com/patent/2023/02/litigation-disclosure-executive.html#_ftnref9

¹⁰ Patrick Leahy, *Shine Light on Third-Party Litigation Funding of Patents*, Bloomberg Law, Apr. 28, 2023.

Sincerely,

The Allstate Corporation

AT&T Inc.

Bayer US

Becton, Dickinson and Company

Comcast Corporation

Chubb

Exxon Mobil Corporation

GSK LLC

The Hartford Financial
Services Group, Inc.

The Home Depot, Inc.

Intel Corporation

Johnson & Johnson

Liberty Mutual Insurance

Lyft, Inc.

Merck & Co., Inc.

Schneider National, Inc.

Shell USA, Inc.

State Farm Mutual Automobile
Insurance Company

Travelers

Turner Construction Company

Uber Technologies Inc.

UPS

Verizon Communications Inc.

Westfield

Zurich North America

cc: Members of the House Committee on Oversight and Accountability