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SENIOR VICE PRESIDENT
FEDERAL GOVERNMENT RELATIONS

September 11, 2023

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

Re: House Committee on Oversight and Accountability
Unsuitable Litigation: Oversight of Third-Party Litigation Funding

Dear Chairman Comer:

The American Property Casualty Insurance Association (APCIA) supports your committee's examination of third-party litigation funding (TPLF) and its impact on our civil justice system. APCIA is the primary trade association for home, auto, and business insurers. For 150 years, we have promoted the viability of private competition for the benefit of consumers and insurers. APCIA members represent all sizes, structures, and regions – protecting families, communities, and businesses in the U.S. and across the globe. APCIA's members defend American consumers and business in civil litigation every day.

By encouraging ever more litigation and damages so they may profit, litigation financiers are impacting American consumers and businesses daily. Nonetheless, very little is known about this segment of the financial sector because in most states TPLF firms are not required to disclose their activities, even in the very cases they are funding. The committee's examination is an important step forward as our nation begins to reckon with the consequences of encouraging ever more and often frivolous litigation and damages. We strongly endorse your examination and greatly appreciate your leadership in doing so.

TPLF Continues to Grow

A recent examination of TPLF found that it “outperform[s] returns on risky asset classes such as venture capital and private equity” and are “largely uncorrelated with macroeconomic risks.”¹ Not surprisingly then, TPLF is growing rapidly. Westfleet Advisors, a litigation finance advisory firm, found investments in US litigation financing now rising to \$13.5 billion in 2022,

¹ Swiss Re Institute, *US Litigation Funding and Social Inflation* at 4, 8 (Dec. 2021) (*Litigation Funding and Social Inflation*) at <https://www.swissre.com/institute/research/topics-and-risk-dialogues/casualty-risk/us-litigation-funding-social-inflation.html>

with new capital commitments growing by nearly 16% year over year.² The leading financier of litigation has seen its assets increase 355% over the last several years, including the addition of nearly \$1 billion by **an unknown, foreign sovereign wealth fund**.³ Seeing these opportunities, even Harvard University has made a commitment of \$500 million to one financier.⁴

Why TPLF is a Problem

By its very nature, TPLF increases litigation and costs. As one leading lawsuit lender senior executive candidly admitted at a conference, “**We make it harder and more expensive to settle cases**,”⁵ highlighting TPLF’s distortion of our civil justice system.

TPLF is the growing dark money of civil litigation. TPLF injects unknown third parties into matters whose only interest is increasing the return on their investment. It makes civil justice a profit center for third party strangers to the litigation. Worse still, as the study *Litigation Funding and Social Inflation* found, litigation financing reduces the recovery for claimants themselves (which stands to reason as the financiers will reap greater returns):

We find TPLF contributes to higher awards, longer cases and greater legal expenses. Longer cases increase claim costs, on average, due to higher legal expenses and compound interest on the litigation finance. **TPLF also diverts a greater share of legal awards to the funder rather than the plaintiff.** We estimate that **in US TPLF cases, up to 57%** of legal costs and compensation go to lawyers, funders and others, **compared with an average of 45%** in typical tort liability cases (emphasis added).⁶

Examples of this inverse effect on claimant recoveries and financier profits are being increasingly documented.⁷ A very prominent and early example is a severely disabled 9/11 first responder receiving an advance of \$35,000 but required to pay a financier \$63,636—or \$28,636 over the advance—when he received his compensation fund check only 3 months later, an effective annual interest rate of 250%.⁸

What Should Be Done

Given its growing presence and impact, states and courts have begun to take steps to require disclosure of TPLF in litigation. Indiana, Montana, Wisconsin and West Virginia all have some requirement for disclosure now and US District Courts or US District Court Judges in Northern

² WestFleet Insider, 2022 Litigation Finance Market Report, at <https://www.westfleetadvisors.com/wp-content/uploads/2023/02/WestfleetInsider-2022-Litigation-Finance-Market-Report.pdf>

³ Neil Rose, *Burford unveils \$1bn investment from sovereign wealth fund*, Litigation Futures (December 1, 2018) at <https://www.litigationfutures.com/news/burford-unveils-1bn-investment-from-sovereign-wealth-fund>.

⁴ M. McDonald, "Harvard Invests in Litigation Strategy That Posted Big Gains," *Bloomberg.com*, June 26, 2019.

⁵ J. Gershman, "Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight," *Wall Street Journal*, March 21, 2018 at wsj.com (quoting Allison Chock with Bentham IMF).

⁶ *Litigation Funding and Social Inflation* at 2

⁷ Additional examples available by request.

⁸ See Complaint, CFPB v. RD Legal Funding, ¶¶ 29-32, 1:17-cv-00890 (SDNY 2017) at https://files.consumerfinance.gov/f/documents/201702_cfpb_RD-Legal-complaint.pdf.

California, Delaware and New Jersey have adopted some form of disclosure in litigation. As the Committee proceeds with its work, we ask that it consider the same. As insurance protecting civil defendant consumers and businesses must be disclosed in nearly all jurisdictions and in the US District Courts, it is indeed peculiar that those backing litigation financially are not similarly obligated to disclose their involvement.

Lawmakers in both chambers of Congress have been working on legislation to shine a light on the financial interests or potential conflicts involving TPLF. During the last session of Congress, Senator Grassley (R-IA) and Representative Issa (R-CA) introduced the Litigation Funding Transparency Act and they plan to reintroduce the legislation soon. That legislation would provide a uniform rule that would apply to all class actions and multi-district proceedings in federal courts and require counsel to disclose in writing to the court and to all named parties to the case the identity of any commercial enterprise that has a right to receive payment that is contingent on the receipt of monetary relief in the case. In addition, Representative Cuellar (D-TX) has reintroduced the Highway Accident and Litigation Fairness Act, H.R. 2936, which would, among other things, require disclosure when third-party litigation financing firms are involved in highway accident litigation.

Again, we want to thank you and the Committee for examining this important subject. We would be happy to answer any questions you may have or assist you in any manner we can.

Sincerely,



Nathaniel F. Wienecke