



# American Tort Reform Association

1101 Connecticut Avenue, NW • Suite 400 • Washington, DC 20036-4351  
(202) 682-1163 • Fax (202) 682-1022 • [www.atra.org](http://www.atra.org)

September 11, 2023

The Honorable James Comer  
Chairman

Committee on Oversight and Accountability  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Jamie Raskin  
Ranking Member

Committee on Oversight and Accountability  
U.S. House of Representatives  
Washington, D.C. 20515

Re: Hearing on “Unsuitable Litigation: Oversight of Third-Party Litigation Funding”

Dear Chairman Comer, Ranking Member Raskin, and Members of the Committee:

Thank you for holding this hearing and for the opportunity to share the American Tort Reform Association’s (ATRA) concerns with the rise of third party litigation funding.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms. Our mission is to establish and advance a predictable, fair, and efficient civil justice system through the enactment of legislation, filing *amicus curiae* (friend of the court) briefs in litigation, and public education. ATRA recently documented the rise of third party litigation funding (TPLF), the public policy concerns this practice raises, and potential solutions in “The Hidden Money Behind the Litigation: The Problematic Expansion of Third Party Litigation Funding” (June 2022).<sup>1</sup> ATRA is also among the organizations that has urged the federal judiciary to address TPLF, thus far, to no avail.

The influx of outside money into generating, advancing, and prolonging civil litigation – with the expectation that funders will receive a substantial return on their investment – is a key ingredient in the mass tort litigation machine that has taken hold of our federal courts. In this environment, the sheer volume of cases, rather than the merits of each case, is the driving force behind the litigation. Faced with investigating the validity of thousands of dubious claims and endlessly litigating them, businesses often make the rational choice to enter a global settlement, sometimes for hundreds of millions or billions of dollars. They do so even when the claims are unsupported by sound science or would otherwise likely be dismissed if evaluated on their individual merits.

---

<sup>1</sup> Available at [https://www.atra.org/white\\_paper/the-hidden-money-behind-the-litigation-the-problematic-expansion-of-third-party-litigation-funding/](https://www.atra.org/white_paper/the-hidden-money-behind-the-litigation-the-problematic-expansion-of-third-party-litigation-funding/).

## The Rapid Growth of Third Party Litigation Funding

TPLF is the practice of investors buying an interest in the outcome of a lawsuit. Hedge funds, institutional investors, and public and private companies are pouring billions of dollars into funding litigation.<sup>2</sup> The lawsuit-investment industry is rapidly expanding, with startup businesses joining the fray, seeing a lucrative opportunity.<sup>3</sup> Litigation funders report that their business has grown over the past year, while attorneys indicate an increased willingness to consider outside funding.<sup>4</sup>

Attorney ethics rules and common law doctrines traditionally prevented the outside financing of litigation, but those are falling by the wayside. Champerty, for example, long prohibited a stranger to a lawsuit agreeing to help pursue a litigant's claim in exchange for a portion of the case's proceeds. Courts considered such agreements void and unenforceable, reasoning that the bar stops "officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law."<sup>5</sup> In recent years, however, some courts have relaxed or abolished these rules.

Now, third-party litigation funders front money to law firms in exchange for an agreed-upon cut of any settlement or money judgment. Investors are attracted by the prospect of a large profit. For example, the CEO of Burford Capital, the largest litigation funder, has indicated that, on average, they will "largely double our money" when investing in a case and sometimes walk away with more than the plaintiff.<sup>6</sup> According to a recent GAO report, litigation funding is present in a wide range of cases, including commercial and intellectual property disputes, antitrust litigation, and personal injury litigation.<sup>7</sup> The use of TPLF in mass tort and class action litigation, where lawyers drive the litigation on behalf of clients that have little or no involvement, exacerbates the likelihood of conflicts of interest.<sup>8</sup>

---

<sup>2</sup> See U.S. Gov't Accountability Office, GAO-23-105210, *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* 11-12 (Dec. 2022) ("GAO Report").

<sup>3</sup> See, e.g., Matt Wirz, *The 26-Year-Old Dropout Lapping the Hedge-Fund Field*, Wall St. J., Apr. 26, 2022.

<sup>4</sup> See Annie Pavia, *Analysis: Are Boom Times Ahead for Litigation Finance?*, Bloomberg Law, Nov. 13, 2022.

<sup>5</sup> *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 2019-20 (Ohio 2003).

<sup>6</sup> Leslie Stahl, *Litigation Funding: A Multibillion-dollar Industry for Investments in Lawsuits with Little Oversight*, CBS's "60 Minutes," Dec. 18, 2022 (interview with Christopher Bogart, CEO of Burford Capital).

<sup>7</sup> See GAO Report, *supra*, at 9, 13. According to a Swiss Re analysis, in 2021, mass tort litigation led TPLF investments (38%), followed by commercial litigation (37%) and personal injury litigation (25%). Swiss Re Inst., *US Litigation Funding and Social Inflation* 8 (Dec. 2021).

<sup>8</sup> See Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. Davis L. Rev. 1073, 1105 (2019).



## Adverse Consequences and Concerns of Undisclosed TPLF

Courts, litigants, and the public know very little about these hidden arrangements, which may complicate the ability to fairly resolve disputes and hide conflicts of interest or potentially unethical or illegal conduct. TPLF arrangements are rarely disclosed in court.<sup>9</sup>

The presence of an unknown third party with a stake in the outcome can change what is essentially a two-party negotiation into a multi-party process with a “behind-the-scenes” influencer. For example, it may be in the best interests of plaintiffs to accept an early, fair settlement offer that would provide reasonable compensation for their injuries. On the other hand, a litigation funder that is solely motivated by profit may pressure the attorneys involved to reject the offer in the hopes of receiving a jackpot verdict. Although litigation funders often state that they do not control the course of litigation or its settlement, these representations cannot be confirmed without disclosure and recent events have cast doubt on such claims.<sup>10</sup>

In addition, attorneys who receive TPLF will make higher settlement demands because they need to not only provide their clients with meaningful compensation after subtracting their own 33% to 40% contingency fee plus expenses, but also pay the lawsuit lender its agreed-upon share. As a TPLF company executive has acknowledged, litigation funding “make[s] it harder and more expensive to settle cases.”<sup>11</sup>

TPLF can enable litigation that is driven by ulterior motives, rather than what the parties and court would understand from the complaint. A defamation action may be bankrolled by a wealthy individual with a vendetta against the defendant.<sup>12</sup> A breach of contract action may stem from a funder’s desire to put a competing business at a disadvantage or gain trade secrets. There are also concerns that foreign governments, or sovereign wealth funds, could secretly invest in U.S. litigation to obtain sensitive technologies from American defendants, target U.S. rivals or dissidents, or destabilize the economy.<sup>13</sup>

### TPLF Enables the Mass Tort Machine

TPLF can create litigation, not just fund it. Investments by outside funders have enabled the growth of mass tort litigation by covering upfront costs for maximizing the

---

<sup>9</sup> See Bloomberg Law, *Litigation Finance Survey 2022*, at 3.

<sup>10</sup> See, e.g., Hannah Albarazi, *When A Litigation Funder is Accused of Taking Over the Case*, Law360, Mar. 15, 2023; Mike Scarcella, *Litigation Funder Burford Sues Sysco Over \$140 Mln Antitrust Investment*, Reuters, Mar. 13, 2023; see also Editorial, *The Litigation Financing Snare*, Wall St. J., Mar. 21, 2023.

<sup>11</sup> Jacob Gershman, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, Wall St. J., Mar. 21, 2018 (quoting Allison Chock, chief investment officer for IMF Bentham Ltd.’s U.S. division).

<sup>12</sup> See, e.g., Michael M. Grynbaum, *Thiel Makes a Bid for Gawker.com, a Site He Helped Bankrupt*, N.Y. Times, Jan. 12, 2018; Matt Drange, *Peter Thiel’s War on Gawker: A Timeline*, Forbes, June 21, 2016.

<sup>13</sup> See Donald J. Kochan, Op-ed, *Keep Foreign Cash Out of U.S. Courts*, Wall St. J., Nov. 24, 2022.



number of claims to flood the courts and overwhelm defendants, and by spreading the risk of filing speculative lawsuits.

An entire industry has developed to generate and settle mass tort litigation. Law firms and businesses known as “lead generators” spend extraordinary sums on lawsuit advertising. Between 2017 and 2021, they invested \$6.8 billion on more than 77 million television ads.<sup>14</sup> These ads have also inundated social media. Sometimes presented as “medical alerts,” the ads urge viewers who have taken a medication, been treated with a medical device, or used a consumer product to “call right now” because “you may be entitled to substantial compensation.”

For example, spending on ads seeking plaintiffs for lawsuits blaming talcum powder or Roundup for a person’s cancer or alleging the blood thinner Xarelto led to side effects *each* has exceeded \$100 million.<sup>15</sup> Call centers, sometimes in other countries, gather medical and other information from those who respond, then package and sell potential claims to interested law firms. In some instances, strangers have solicited individuals for lawsuits by phone, apparently through misuse of their medical records.<sup>16</sup> One law firm filed over 5,000 complaints in a mass tort docket in a single week.<sup>17</sup>

Even when sound science does not support these lawsuits, mass tort lawyers and their investors understand that if they quickly generate thousands of claims tying a widely used product to a common illness, the targeted company will face strong pressure to reach a global settlement. That settlement will result in a substantial payout to both the contingency-fee lawyers and investors. The strategy is to pressure a company to settle regardless of the merits of the litigation because of the challenge of suddenly defending thousands of lawsuits. A business must also consider the damage to its reputation, brand, and shareholders resulting from a barrage of negative ads.

That strategy is working for the plaintiffs’ bar, but is detrimental to the fairness of our civil justice system and is transforming the federal judiciary. In 2020, for the first time in history, multidistrict litigation (MDL), primarily product liability mass tort cases, made up more than half of the federal civil caseload.<sup>18</sup> That percentage reached an astounding 73% as of the conclusion of the 2022 fiscal year.<sup>19</sup> The percentage of cases in federal MDLs has doubled over the past decade and more than tripled over the past two decades. In some

---

<sup>14</sup> See Am. Tort Reform Ass’n, *Legal Services Advertising in the United States 2017-2021*, at 4 (2022).

<sup>15</sup> See Roy Strom, *Camp Lejeune Ads Surge Amid ‘Wild West’ of Legal Finance, Tech*, Bloomberg Law, Jan. 30, 2023. Congress may be interested to learn if outside funders bankrolled the \$145 million spent, as of the end of 2022, on television and social media ads to solicit Camp Lejeune claims against the federal government, and, if so, what cut they may be taking from the \$6 billion authorized for veteran payments. See *id.*

<sup>16</sup> See Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, N.Y. Times, Apr. 14, 2018.

<sup>17</sup> See David Nayer, *Analytics Show One Firm Filed Over 5,000 Lawsuits in a Week*, Law Street, Feb. 8, 2023.

<sup>18</sup> See Daniel S. Wittenberg, *Multidistrict Litigation Dominating the Federal Docket*, ABA J., Feb. 19, 2020.

<sup>19</sup> See Rules for MDLs, Press Release, *73% of Federal Civil Cases Are in MDLs as of Fiscal Year 2022*, Apr. 27, 2023 (reporting that 392,374 civil cases out of 536,651 civil cases in federal courts, excluding Social Security and prisoner cases, reside in MDLs as of the end of FY22).



instances, companies have settled this litigation at levels in the hundreds of millions of dollars even after prevailing in *every* bellwether trial.<sup>20</sup>

Federal judges have expressed concern with the impact that the flooding of the courts with mass tort claims has on the civil justice system. When overseeing an MDL including 850 lawsuits targeting a medical device, the Chief Judge of the U.S. District Court for the Middle District of Georgia observed that lawyers file “cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action” in an MDL because they believe clear deficiencies in their claims will not be scrutinized when the claim is swept into a global settlement.<sup>21</sup> Another federal judge, who has overseen product liability mass tort litigations, explained that it is difficult to apply the ordinary procedural safeguards used to verify claims when “the volume of individual cases in a single MDL can number in the hundreds, thousands, and even hundreds of thousands.”<sup>22</sup> He cautioned that the “high volumes of unsupportable claims clog the docket, interfere with a court’s ability to establish a fair and informative bellwether process, frustrate efforts to assess the strengths and weaknesses of the MDL as a whole, and hamper settlement discussions.”<sup>23</sup> A Federal Advisory Committee on Civil Rules report provides a troubling estimate of the percentage of claims, likely generated through advertising funded through TPLF, that are unsupportable: 20% to 30% and, in some litigation, as many as 40% to 50%.<sup>24</sup>

TPLF is a key contributor to this mass tort litigation machine in which federal MDL dockets go from zero to tens of thousands of questionable claims in only a few months, many of which are meritless, with the expectation of a global settlement that will provide a handsome return to investors.

### **A Needed First Step: Transparency in TPLF**

The extent to which TPLF is present in mass tort and other litigation cannot be fully understood since TPLF arrangements are not disclosed during litigation and remain hidden from public scrutiny. Nor can it be determined, in a specific mass tort litigation or individual case, whether an outside funder is behind the lawsuit, using the litigation for an improper purpose, or interfering with the ability of the parties to enter a reasonable settlement.

TPLF agreements should be disclosed at the outset of litigation or upon entering an agreement to receive outside funding, and courts should allow use of discovery to investigate the nature of litigation funding and its influence on the litigation. Disclosure of the agreement allows the parties and court to know whether an outside funder may be calling the shots in the litigation.

---

<sup>20</sup> See, e.g., *Bayer and Johnson & Johnson Settle Lawsuits Over Xarelto, a Blood Thinner, for \$775 Million*, N.Y. Times, Mar. 25, 2019.

<sup>21</sup> *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2016 WL 4705827, at \*2 (M.D. Ga. Sept. 7, 2016).

<sup>22</sup> Judge M. Casey Rodgers, *Vetting the Wether: One Shepherd’s View*, 89 UMKC L. Rev. 873, 873 (2021).

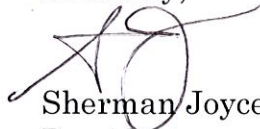
<sup>23</sup> *Id.*

<sup>24</sup> Advisory Committee on Civil Rules, *Agenda Book*, Nov. 1, 2018, at 142.

Six years ago, ATRA was among thirty organizations that asked the Federal Advisory Committee on Civil Rules to amend the rules to require automatic disclosure of TPLF agreements in all civil actions in federal courts.<sup>25</sup> This proposal is consistent with federal rules that mandate automatic disclosure of insurance agreements in litigation because this transparency enables counsel on both sides to evaluate the case and influences decisions about settlement and trial.<sup>26</sup> This proposal has remained stagnant even as the use of TPLF explodes and examples of funders influencing litigation mount.<sup>27</sup>

ATRA commends the Committee for holding this hearing and shining a light on an issue that is critical to the proper functioning and continued fairness of our civil justice system. ATRA urges Congress to address TPLF by, at minimum, requiring disclosure of such arrangements to other parties and the court.

Sincerely,



Sherman Joyce  
President

American Tort Reform Association

cc: Members of the House Oversight Committee

---

<sup>25</sup> See Letter to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, [Renewed Proposal to Amend Fed. R. Civ. P. 26\(a\)\(1\)\(A\)](#), June 1, 2017 (Document No. 17-CV-O).

<sup>26</sup> [Fed. R. Civ. P. 26\(a\)\(1\)\(A\)\(iv\)](#) and Adv. Comm. Notes – 1970 Amendment.

<sup>27</sup> Three federal district courts require disclosure of TPLF, demonstrating that transparency works. District courts in Delaware and New Jersey require parties to disclose the identity of any litigation funder, whether the funder may influence litigation decisions or settlements, and the nature of the funder's financial interest in the litigation, demonstrating that viability of disclosure. See [Standing Order Regarding Third-Party Litigation Funding Arrangements](#) (D. Del. Apr. 18, 2022); [Disclosure of Third-Party Litigation Funding](#), N.J. Civ. R. 7.1.1 (June 21, 2021). The Northern District of California has adopted a similar disclosure requirement that applies to any proposed class action. See [Standing Order for All Judges of the Northern District of California, Contents of Joint Case Management Statement](#), ¶ 18 (N.D. Cal. Jan. 17, 2023).