U.S. Chamber of Commerce

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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:

The U.S. Chamber of Commerce commends you for holding this week's hearing on "Unsuitable Litigation: Oversight of Third-Party Litigation Funding." For too long, the litigation funding industry has been hiding in the shadows as it actively supports and funds crippling litigation against the American business community. Furthermore, the practice of "sue and settle" – whereby secretive organizations sue and then work with federal agencies to change policy – is extremely problematic. This week's hearing is an important effort to shine a spotlight on these troubling practices and their negative impact on the American economy and legal system.

Third-Party Litigation Funding

According to a recent report by the Government Accountability Office, investor groups are pouring billions of dollars into financing litigation in the United States. They are attracted by the prospect of hefty returns that are not tied to economic or market conditions, and they are indifferent to the numerous economic, ethical, and national security consequences of doing so.

Third party litigation funding (TPLF) allows hedge funds and other financiers to invest secretly in lawsuits in exchange for a percentage of any settlement or judgment. The practice started overseas and then spread to the United States. Without disclosure requirements and other commonsense safeguards, TPLF funders may fuel speculative litigation, take over cases and make them more difficult to settle, violate legal ethics, and enable foreign adversaries to undermine U.S. national and economic security.

Allowing outsiders to secretly use courtrooms as a trading floor incentivizes the filing of non-meritorious litigation. Litigation is extremely expensive. Businesses try to avoid it, but often have no choice but to settle cases, rather than engage in protracted litigation, regardless of whether the claims are legitimate. Since TPLF is offered on a non-recourse basis, it lets plaintiffs and their lawyers off the hook for legal costs. As a result, there is little risk for them to advance non-meritorious claims with the hope of scoring a jackpot.

TPLF allows third party funders to exercise undue control or influence over the litigation they fund, ultimately changing what is essentially a two-party negotiation, into a multi-party settlement with an unknown “behind the curtain” player. For example, some TPLF agreements allow funders to make strategic decisions, such as deciding when or even whether to settle a case and for how much – even if the plaintiff would rather resolve the case differently. Unlike attorneys, funders do not owe a fiduciary duty to the plaintiffs, nor do they have legal or ethical obligations. As a result, they may be secretly acting against the best interest of the plaintiff to line their own pockets. This not only prolongs the case – increasing the costs to the judicial system and to the parties – it also prevents the client from reaching a resolution that is in their best interest because what is in their best interest does not maximize the profit that the third-party funder desires. And a plaintiff may not even know their lawyer has entered into an agreement with a funder.

TPLF also contravenes various legal ethics requirements, such as the Model Rules of Professional Conduct, which are designed to ensure that lawyers act in the best interest of their clients. For example, Rule 5.4 prohibits fee-splitting between a lawyer and a nonlawyer. Certain TPLF agreements violate Rule 5.4’s fee-splitting prohibition because funders often are paid a percentage of the legal fees secured by the plaintiff’s attorney. Rule 5.4 also prohibits nonlawyers from having an ownership interest in law firms. Some litigation funders would like to abolish Rule 5.4 to acquire ownership interests in law firms, which would allow them to streamline their business model at the expense of a lawyer’s independence and professional judgement.

The opaque nature of TPLF also allows entities to conceal the use of funding to facilitate illicit activity. For example, in 2018, the *New York Times* published an article on litigation funders financing unnecessary and abusive surgery taking place in strip mall surgery mills, to increase potential pain-and-suffering damage awards for women involved in the litigation over surgical mesh.

Finally, there is a growing concern that a large volume of foreign-sourced money may be pouring into U.S. courts via TPLF, raising significant national and economic security risks. The limited information available because of the secrecy of the practice suggests that sovereign wealth funds and non-U.S. citizens are participating in TPLF against U.S. companies. The result is that a foreign actor could control the litigation and influence its strategy to advance their own national interests, such as to gain access to sensitive information, damage U.S. companies, and influence U.S. policy to advance its own strategic interests at the expense of competing U.S. priorities.

Sue and Settle

In the practice of “sue and settle,” organizations suing federal agencies work and collude behind closed doors with the agencies they sue. The agencies agree to enter into consent decrees or settlement agreements “compelling” them to issue rules

that the agency otherwise would not be able to promulgate for various reasons. The public, and those directly affected by the regulations, are not given notice of the lawsuits or the closed-door negotiations and thus do not have a meaningful voice in the process.

The federal rulemaking process is governed by principles of open government and public participation. Through the practice of "sue and settle," good government principles are secretly circumvented to achieve the policy objectives of special interests. Federal agencies should be required to provide notice of lawsuits and ensure that there is a reasonable opportunity for parties to intervene and provide public comments to protect the interests of the public.

The Chamber looks forward to working with you as you investigate these important issues and commends you for giving these practices the exposure needed to address them.

Sincerely,

Neil Bradley
Executive Vice President, Chief Policy Officer, and
Head of Strategic Advocacy
U.S. Chamber of Commerce

cc: Members of the Committee on Oversight and Accountability