

Statement
of the
National Association of Mutual Insurance Companies
to the
United States House
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet
Hearing on
The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-
Party Investors and Foreign Entities

June 12, 2024



Introduction

The National Association of Mutual Insurance Companies (NAMIC) is pleased to provide comments to the U.S. House Judiciary Committee Subcommittee on Courts, Intellectual Property, and the Internet for its June 12 hearing entitled, “The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities.”

NAMIC is the largest property/casualty insurance trade association with a diverse membership of nearly 1,500 local, regional, and national member companies, including seven of the top 10 property/casualty insurers in the United States. NAMIC member companies represent a cross-section of the property/casualty insurance industry ranging in size from a one-person farm mutual operating in a single county to local and regional insurers on main streets across America to national insurers operating throughout the country and around the globe.

NAMIC members lead the personal lines sector representing 68 percent of the homeowner’s insurance market, 56 percent of the auto market and 31 percent of business insurance markets. Through our advocacy programs we promote public policy solutions that benefit NAMIC member companies and the policyholders they serve and foster greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

TPLF Fuels Abuse of the U.S. Legal System

In recent years, interest has grown around the issue of legal system abuse in general and third-party litigation funding (“TPLF”) specifically. TPLF gives strangers to disputes a direct financial stake in specific cases or portfolios of litigated matters.¹ In a 2022 analysis, the Insurance Information Institute correctly pointed out that TPLF has become about “speculative investors getting richer as they focus on cases more likely to win the big settlements.”² It should come as no surprise, then, that in the absence of rigorous oversight, the negative effects of TPLF are well documented. These include incentivizing frivolous litigation and loss of control over lawsuits by plaintiffs, who often have to return \$2 for every dollar borrowed, and threats to national and economic security by foreign actors seeking to capitalize off a woeful lack of disclosure.³

In addition to imposing financial costs on individuals and the legal system, TPLF is contributing to the backlog of cases in our civil courts – “due to the rapid growth of TPLFs and their increased involvement in litigation, cases often take a year longer to resolve than they would if a TPLF was not involved in the case.”⁴

¹ https://www.namic.org/pdf/publicpolicy/230203_the_center_social_inflation_paper.pdf

² https://www.iii.org/sites/default/files/docs/pdf/triple_i_third_party_litigation_wp_07272022.pdf

³ <https://www.uschamber.com/improving-government/pulling-the-curtain-back-on-foreign-influence-in-third-party-litigation-funding>

⁴ <https://riskandinsurance.com/third-party-litigation-funding-and-its-impact-on-commercial-auto-part-two/>

Such extensions of litigation harm every party involved in litigation except the funder, whose existence may not even be known by the defendant, while interfering with the attorney-client relationship and forcing defendants to absorb massive losses with downstream effects on everyday Americans through higher prices. The secrecy surrounding TPLF entanglements disadvantage both plaintiffs and defendants and sow seeds of doubt into the veracity of our civil justice system— “the TPLF phenomenon is somewhat amorphous because TPLFs often hide in the background, and defendants are often not even aware that a third party is financing a plaintiff’s case.”⁵

While the origins of TPLF began in England and Australia,⁶ the U.S. has become “the centre of the world’s third-party litigation finance (TPLF) industry... of the USD 17 billion investment into litigation funding globally in 2020, more than half was deployed in the U.S.”⁷ Litigation funding companies invest in consumer and commercial litigation by funding legal action in return for a percentage of a successful claim sum.” The Center for Strategic International Studies found that in 2022, over \$3.2 billion was invested in court cases on behalf of third-party financiers, representing a 16% increase from the prior year, further legitimizing national security concerns about sanctioned foreign entities financing intellectual property lawsuits in U.S. courts, which by some estimates make up 30% of all such claims.⁸⁹

In fact, a since-deleted report showed an unnamed sovereign wealth fund injected \$1 billion into a prominent TPLF firm in 2018, and that same firm also saw its assets triple over recent years. A March 2024 report from Bloomberg Law even exposed Russian oligarchs utilizing TPLF to sidestep international sanctions and finance lawsuits in the wake of the country’s ongoing war with Ukraine, effectively “put[ting] the U.S. judicial system on par with the New York Stock Exchange.”¹⁰

Welcome Awareness at the State & National Levels

Fortunately, federal and state policymakers are turning much needed attention to TPLF practices and the problematic loopholes they can create. Bills were introduced in more than 10 states in 2023 seeking to address different components of TPLF with requirements around registration, transparency, discovery, fee caps, and limitations on foreign investments. Due to the prominence of the issue, the National Council of Insurance Legislators at its 2024 Spring Meeting introduced the “Transparency in Third Party Litigation Financing Model Act.”¹¹

⁵ <https://riskandinsurance.com/third-party-litigation-funding-and-its-impact-on-commercial-auto-part-one/>

⁶ <https://www.gao.gov/products/gao-23-105210>

⁷ <https://www.swissre.com/institute/research/topics-and-risk-dialogues/casualty-risk/us-litigation-funding-social-inflation.html>

⁸ <https://www.csis.org/analysis/third-party-litigation-financing-national-security-problem>

⁹ <https://news.bloomberglaw.com/business-and-practice/china-firm-funds-us-lawsuits-amid-push-to-disclose-foreign-ties>

¹⁰ <https://news.bloomberglaw.com/litigation-finance/putins-billionaires-sidestep-sanctions-by-financing-lawsuits>

¹¹ <https://ncoil.org/wp-content/uploads/2024/03/NCOIL-TPLF-Model-Draft-3-13-24.pdf>

Congress has also taken notice. As foreign entities threaten the integrity of federal courtrooms, bipartisan, bicameral legislation called the Protecting Our Courts from Foreign Manipulation Act (H.R. 5488/S. 2805) was introduced in the fall of 2023 by Sens. Joe Manchin, D-W.Va., and John Kennedy, R-La., as well as now-Speaker Mike Johnson, R-La. The legislation would address national security concerns through disclosure requirements from any foreign person or entity participating in civil litigation as a third-party litigation funder in U.S. federal courts; ban sovereign wealth funds and foreign governments from participating in litigation finance as a third-party litigation funder; and commission an annual report by the Department of Justice’s National Security Division on foreign TPLF throughout the federal judiciary.

Foreign litigation funding has also caught the attention of the House Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party and at the federal agency level, the DOJ. In fall 2023, the Select Committee in bipartisan fashion recommended enhanced disclosure requirements of foreign TPLF in federal courts. In the meantime, the DOJ made public comments about TPLF being utilized by foreign entities for strategic advantages against U.S. competitors as they’re tied up in lengthy and expensive court cases.¹²

Additionally, a report from the non-partisan Government Accountability Office in December of 2022 laid out numerous disadvantages of TPLF, including its expense, the tendency to deter settlement, and the increased cost of litigation for defendants, among others. The report further highlights the types of claims (“including intellectual property, antitrust, asset recovery, fraud, and class actions...”) the importance litigation funders place on “factors such as whether the region had an existing TPLF market and a legal system favorable to TPLF”, and specifically notes that whether the defendant has insurance is a factor funders evaluate before deciding whether to provide funding.¹³

Another major target of TPLF in recent years has been the commercial auto industry, a key contributor to driving higher insurance premiums. “The rise in large verdicts on commercial auto cases is partially attributable to social inflation and the rise of third-party litigation financing.... TPLFs have turned their focus toward commercial litigation and class actions in an effort to seek out much larger recoveries...” and “as the claims increase in cost, so do insurance premiums, and therefore policyholders are forced to bear the brunt of the cost. TPLFs therefore have a significant effect on how risks are underwritten in insurance policies.”¹⁴

¹² <https://instituteforlegalreform.com/blog/tackling-foreign-manipulation-the-urgent-need-for-reform-in-third-party-litigation-funding/>

¹³ <https://www.gao.gov/assets/gao-23-105210.pdf>

¹⁴ <https://riskandinsurance.com/third-party-litigation-funding-and-its-impact-on-commercial-auto-part-one/>

There is additional evidence that individuals and small businesses are increasingly turning to TPLF in bankruptcy cases, which have seen a steep rise since 2023. “Because the practice largely developed during the economically prosperous years that followed the Great Recession, it hasn’t before featured in a wide-scale distress cycle. But with Chapter 11 cases swelling this year at a pace not seen since the aftermath of the financial crisis, it appears the time has come.”¹⁵

Lastly, recent reporting indicates another area of significant concern – the creation of secondary market agreements whereby a TPLF sells some of its existing portfolio of deals further placing these agreements in the murky shadows of nameless, faceless profiteers.¹⁶

Conclusion

Proposals with transparency and foreign disclosure requirements are encouraging signs that those in the states and Congress are taking the issue of TPLF seriously. NAMIC also supports additional deterrence methods such as fee capping to ensure fair compensation, ensuring fair and appropriate tax treatment of TPLF, registration of those doing business, and admissibility of these agreements where relevant in court cases.

NAMIC believes it is critical for Congress to address the growing costs of TPLF, the leading facilitator of legal system abuse, ideally with fixes taking effect at the national level and thus at a larger scale. Foreign disclosure is a step in the right direction, as our nation’s courts and national security remain vulnerable due to adversarial tactics, dark money, and lack of regulation or proper safeguards. Policies like the Protecting Our Courts from Foreign Manipulation Act should advance in order to shine a spotlight on TPLF’s secrecy, account for national and economic security threats to American businesses, and meaningfully contribute to insights related to the increasingly negative consequences for consumers.

As Justice Brandeis famously wrote “sunlight is said to be the best of disinfectants.” Particularly where TPLF is concerned, NAMIC could not agree more. We trust that the important work and focus the Committee is undertaking on this critical issue will bring much needed oversight and welcome developments that will help force the unfair and untenable practice out of the shadows.

¹⁵ <https://news.bloomberglaw.com/bankruptcy-law/litigation-funders-see-growing-opportunities-in-bankruptcy-boom>

¹⁶ <https://www.glsca.com/litigation-finance-trends-2024/>