

Erica Klenicki

Deputy General Counsel, Litigation

June 12, 2024

The Honorable Darrell Issa
Chairman
Committee on the Judiciary,
Subcommittee on Courts Intellectual
Property and the Internet
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Henry Johnson
Ranking Member
Committee on the Judiciary,
Subcommittee on Courts Intellectual
Property and the Internet
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Issa, Ranking Member Johnson, and Members of the Committee:

The National Association of Manufacturers (NAM) applauds the Subcommittee for providing much needed oversight over the growing practice of outside entities using our nation's courts as an investment mechanism. Undisclosed third-party litigation funding (TPLF) contributes to intellectual property and mass tort litigations where extraordinary sums of money are invested to influence courts and profit from other people's disputes. The NAM's members find themselves the targets of these litigations, which may be designed solely to produce a financial return to the funder, not advance justice.

The NAM is the largest manufacturing association in the United States, representing manufacturers of all sizes in every industrial sector and in all fifty states. Manufacturing employs roughly 13 million Americans, contributes \$2.81 trillion to the U.S. economy annually, pays workers more than 20% more than the average for all businesses and has one of the largest sectoral multipliers in the economy. Taken alone, manufacturing in the United States would be the eighth-largest economy in the world, and it relies on a properly working civil justice system.

Undisclosed TPLF is a threat to the judicial system and manufacturing. Today, litigation financiers secretly invest billions of dollars in speculative litigation to profit from disputes they help generate. One estimate put the size of the U.S. litigation funding market at \$13.5 billion with an additional \$3.2 billion in new investments in 2022 alone (Westfleet Advisors, 2022). Because litigants often do not have to disclose TPLF, it is impossible to evaluate how widespread it truly has become. What we do know is that TPLF is adversely influencing the courts' ability to administer lawsuits in a fair and predictable way.

Specifically, undisclosed TPLF is distorting intellectual property and mass tort litigations. With patent cases, which is the focus of this hearing, TPLF drives patent trolls and non-practicing entities that claim rights in technology they never used. Or, foreign companies, investors and sovereign wealth funds pay for litigation as a way to drain American manufacturers' time and resources, and potentially access their intellectual property. As an industry, U.S. manufacturing relies on American ingenuity and innovation, investing more than \$360 billion annually in R&D.

June 12, 2024

This investment is possible only because the resulting intellectual property is protected. These protections safeguard our members' patents, trade secrets and other proprietary and confidential information.

TPLF is compromising these critical safeguards. Already, it was reported that Chinese firms are financing multiple intellectual property cases against manufacturers in U.S. courts. Given the lack of disclosure, these cases could be just the tip of the spear. Even still, former acting director of the U.S. Patent and Trademark Office Joe Matal told *Bloomberg Law* that this development "is our worst fears confirmed." He said "nothing [in China] is really independent" and that with "hundreds of patent lawsuits filed every year that receive financing from third parties, it's past time for the U.S. to require disclosure of third-party litigation funding." Disclosure is the necessary first step to understanding and, potentially, regulating the influence of outside money on our judicial system.

These reforms are also needed to protect manufacturers from mass tort litigation fabricated by funders to overwhelm the federal courts. By investing hundreds of millions of dollars on television commercials, social media ads, and call centers, litigation funders work with plaintiffs' lawyers to generate thousands of dubious lawsuits against manufacturers that are consolidated in federal multi-district litigations where most cases will never be scrutinized. These claims are rarely vetted to make sure the plaintiffs actually used the product or suffered the injury at issue. In 2018, the Federal Rules Advisory Committee reported that there was widespread agreement among lawyers and judges that up to half of the claims in these MDLs are unsupported (Advisory Committee on Civil Rules, Agenda Book, Nov. 1, 2018, at 142). Yet, facing the prospect of endless lawsuits, manufacturers can be compelled into global settlements just to end the litigation.

Often in these mass tort cases, the plaintiffs themselves have no idea their lawyers have leveraged their claims to third party investors. And, in all cases, the funders can exert hidden control over the litigation—outside the purview of the parties and courts. When a manufacturer attempts to resolve a litigation, it often does not know whether someone not at the negotiating table is really calling the shots and rejecting settlement no matter how reasonable in the hopes of scoring a larger return on investment.

The NAM has urged the federal judiciary to address the concerns raised by TPLF for a decade. In 2014, the NAM was among five organizations that urged the Advisory Committee on Civil Rules to adopt an amendment to the Federal Rules of Civil Procedure that would require disclosure of TPLF at the outset of a lawsuit. The NAM renewed this call in 2017 with a larger coalition of concerned organizations. Yet, even as TPLF has grown exponentially, the federal judiciary has not acted on this proposal. Congress can and should act.

Again, the NAM is encouraged by the Subcommittee's attention to this issue. And, there is a well-developed model for this body to follow. Congress has created a regime of disclosure, reporting requirements and limits when outside money has tried to influence its decisions. A comparable approach should be applied to outside money trying to drive outcomes in the federal judiciary.

June 12, 2024

It is our hope that the spotlight placed on the influx of outside investment into civil litigation will, at the very least, lead to more transparency in these arrangements.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Erica Klenicki". The signature is fluid and cursive, with a large initial "E" and a long, sweeping tail.

Erica Klenicki
Deputy General Counsel, Litigation
National Association of Manufacturers