

STATEMENT OF THE  
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION

BEFORE THE  
HOUSE 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**

The American Property Casualty Insurance Association (APCIA) is the primary national trade association for auto, home, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back over 150 years. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the U.S. and across the globe.

Property casualty insurers provide personal and commercial lines insurance contracts that include coverage against liability for losses suffered by third parties. Often, those coverages include a defense obligation when claims turn into litigation. APCIA and its member insurers therefore have a strong interest in the role that third-party litigation funding (TPLF) plays in fueling the growing number of lawsuits filed in United States courts, particularly to the extent that the third party is neither injured nor a legal representative of an injured party, but has an investment stake and a profit motive driving the outcome of the lawsuit.

As detailed in our statement below, to the extent that TPLF helps raise the costs of litigation, particularly the growth of non-economic damages, with the principal benefit not to the litigants, but to the outside funders and their unnamed investors, it turns our judicial system away from its goals of truth, justice, and dispute resolution and towards a profit incentive associated with private competitive markets, not advocacy before the third branch of government. APCIA commends the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet for holding this hearing to discuss third party litigation financing and the need for common sense reforms such as transparency that re-orient the U.S. judicial system towards its original goals – namely, engagement in the judicial system as advocacy and putting the parties’ interests first.

**The Number of Lawsuits and the Size of Damage Awards Continue to Increase, Impacting Insurance Affordability and Availability**

Litigation conditions in the U.S. continue to devolve with verdicts, litigation rates and litigation costs rapidly increasing, which erodes the affordability and availability of insurance.<sup>1</sup> The impact of sky-rocketing costs – including crippling costs from legal system abuse – was highlighted by the Wall Street Journal editorial board in an article entitled “A Politically Made Insurance Panic” published yesterday.<sup>2</sup> Liability claims costs rose 16% on average for the last five years, well above average rates of inflation at around 4%.<sup>3</sup> As the following chart demonstrates, the average annual loss severity increases for each major casualty line

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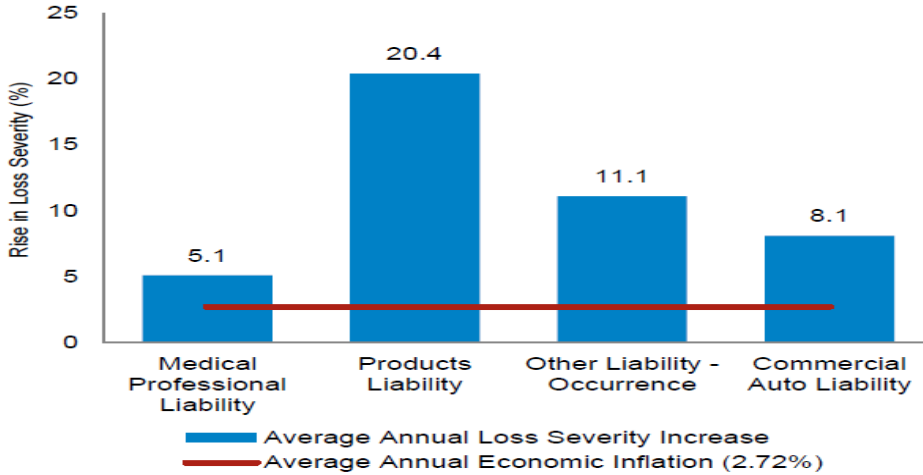
<sup>1</sup> *What Is Third-Party Litigation Funding and How Does It Affect Insurance Pricing and Affordability?* Insurance Information Institute (July 27, 2022).

<sup>2</sup> [https://www.wsj.com/articles/insurance-rates-home-auto-elizabeth-warren-federal-insurance-office-952400ba?st=z6gncpjt0jq3ot&reflink=article\\_email\\_share](https://www.wsj.com/articles/insurance-rates-home-auto-elizabeth-warren-federal-insurance-office-952400ba?st=z6gncpjt0jq3ot&reflink=article_email_share).

<sup>3</sup> <https://www.swissre.com/institute/research/sigma-research/Economic-Insights/us-liability-claims.html>.

outpaced inflation for the ten-year period from 2013 to 2022.<sup>4</sup>

**Average Annual Loss Severity Increase by Casualty Line of Business, 2013-2022**

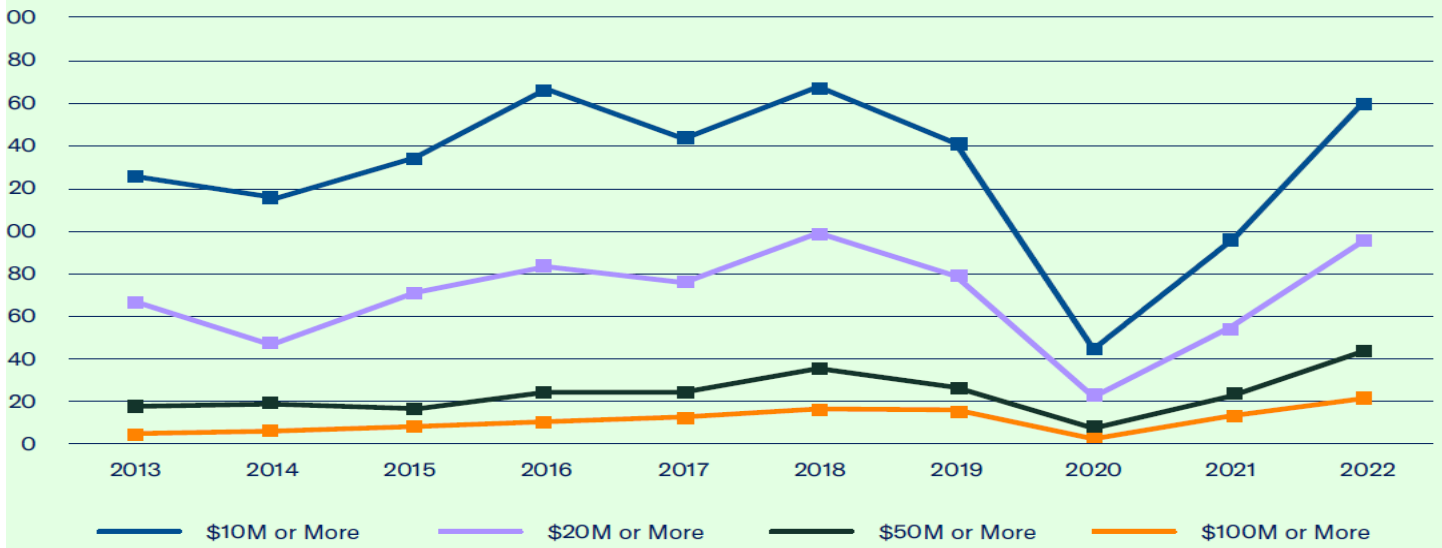


Source: AM Best data and research

The current rate of liability claims inflation (15% in 2022) is reportedly unsustainable.<sup>5</sup> Median personal injury verdict awards have more than tripled in the last decade, nearly a 220% increase from 2010 to 2020.<sup>6</sup>

Disproportionally high jury awards known as “nuclear verdicts” (those above \$10 million), are also growing in both amount and frequency. Median nuclear verdicts grew 27.5% from 2010 to 2019, far outpacing inflation.<sup>7</sup> A decade ago, there were multi-million-dollar verdicts across the U.S., but now the top verdicts are measured in the billions of dollars. Nuclear verdicts have been shown to increase claim costs and potentially threaten the affordability of insurance coverage. When a nuclear verdict is awarded, it affects not just the one claim, but also all other open claims and settlements, as plaintiffs’ attorneys seek similar verdicts or settlements.<sup>8</sup>

**Figure 2: Number of Reported Nuclear Verdicts, 2013 – 2022**



U.S. Chamber of Commerce Institute for Legal Reform |

<sup>4</sup> A.M. Best Report, Social Inflation Remains a Thorn In the Side of Casualty Insurers, May 9, 2024

<sup>5</sup> Id.

<sup>6</sup> Source: APCI using Jury Verdict Research and Trends In Personal Injury Lawsuits, Insurance Information Institute, 2020

<sup>7</sup> Chamber of Commerce ILR Nuclear Verdicts Report, May 2024

<sup>8</sup> A.M. Best Report: Social Inflation Remains a Thorn in the Side of Casualty Insurers, May 9, 2024

These excessive tort costs to the U.S. economy result in an annual “tort tax” of more than \$1,424 paid by every American and \$3,681 paid by every household,<sup>9</sup> which erodes affordability and economic growth.<sup>10</sup>

### **TPLF Contributes to Growth in Lawsuits and Costs, Exacerbating the Problem**

By its very nature, TPLF increases litigation costs. Studies demonstrate that TPLF is a leading indicator of social inflation, driving “rising legal costs, such as those resulting from an increase in the number of outsized jury awards and legal proceedings that take longer than reasonably expected to resolve.”<sup>11</sup> Last month, A.M. Best reported that TPLF not only drives up loss costs for insurers and contributes to worsening loss ratios for excess liability, commercial auto and general liability insurance, but also leads to higher premiums for consumers.<sup>12</sup> Similarly, an analysis by the Swiss Re Institute found that TPLF involvement in a claim will result in higher award amounts and total liability costs.<sup>13</sup> And an empirical study of medical malpractice litigation duration and awards demonstrated that funding was associated with a 60.5% increase in claims payment, a 140% increase in resolution duration, and a 35.7% decrease in the probability of settlement.<sup>14</sup> None of these changes in awards or claims payments benefit the injured party. The increases almost exclusively inure to the benefit of third-party funders.

Adding to the problem, litigation financiers not only fund lawsuits, but they also generate them. Financiers are injecting huge amounts of unregulated investment capital into leveraging the civil justice system in an attempt to drive liability outcomes regardless of the merits. The investments that third-party investors pump into mass torts typically help pay for the aggressive advertising campaigns and lead generation services that attorneys use to identify possible claimants. Between 2017 and 2021, financiers spent \$6.8 billion on 77 million ads, as the number of trial lawyer ads on television, radio and billboards increased by more than 30%.<sup>15</sup> According to reports, Camp Lejeune toxic water claims are “saturated” with third-party litigation funding, with estimates of \$2 billion having been invested by funders.<sup>16</sup> The loans either support the actual case work by firms or go towards claims acquisition firms that sign up clients using advertising.<sup>17</sup> According to Morning Investments, a service provider for alternative investments including litigation financing, funders invested \$16.9 billion in mass tort claims last year, which is almost 20% of its 2023 market size.<sup>18</sup>

### **The Lack of Transparency Prevents Knowledge of the True Impact of TPLF on Judicial System Outcomes and Costs**

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. What we do know – from the limited information available – is that TPLF activity is growing, and the increased outside investment is not improving recovery for plaintiffs, while it is prolonging lawsuits at the expense of settlements.<sup>19</sup>

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<sup>9</sup> <https://cala.com/wp-content/uploads/2023/01/Perryman-Tort-Reform-Impact-12-20-2022-1.pdf>

<sup>10</sup> <https://www.forbes.com/sites/waynewinegarden/2023/07/20/tort-reform-offers-a-win-win-stimulus-for-the-economy/>

<sup>11</sup> “What Is Third-Party Litigation Funding and How Does It Affect Insurance Pricing and Affordability?”, Insurance Information Institute, July 27, 2022.

<sup>12</sup> A.M. Best, “Social Inflation Remains a Thorn in the Side of Casualty Insurers,” May 9, 2024.

<sup>13</sup> <https://www.swissre.com/institute/research/topics-and-risk-dialogues/casualty-risk/us-litigation-funding-social-inflation.html>

<sup>14</sup> Xiao; “Consumer Litigation Funding and Medical Malpractice Litigation”; Journal of Empirical Legal Studies, 2017.

<sup>15</sup> American Tort Reform Association, “Legal Services Advertising Spending – 2017-2021,” Feb. 22, 2022.

<https://www.atra.org/2022/02/22/study-trial-lawyers-spent-1-4-billion-on-advertising-in-2021/>.

<sup>16</sup> *Litigation Funders Bet Billions on Veterans’ Toxic Water Claims*, US Law Week, July 20, 2023, <https://news.bloomberglaw.com/us-law-week/litigation-funders-bet-billions-on-veterans-toxic-water-claims>

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Third party medical financing (TPMF), another form of TPLF, also currently operates with virtually no oversight. While not the subject of the June 12, 2024 hearing, disclosure and regulation should similarly be required of the medical funding industry. Although the specific structure and form of TPMF varies, in general these opaque arrangements involve a third-party entity assuming responsibility for payment of medical services outside of traditional health insurance in personal injury and mass torts lawsuits. In exchange, the injured party transfers their right to recover the medical bills to the third-party funder in the form of a medical “lien.” Issues associated with TPMF can include artificially inflated medical bills, questionable procedures, and a complex web of relationships between referral

A recent examination of TPLF found that it “outperform[s] returns on risky asset classes such as venture capital and private equity” and is “largely uncorrelated with macroeconomic risks.”<sup>20</sup> Westfleet Advisors, a litigation finance advisory firm which the GAO (Government Accountability Office) relied upon for its estimates, found investments in U.S. litigation financing rising to \$15.2 billion in 2023.<sup>21</sup> This growth is expected to continue as demand for litigation financing persists. New capital commitments to law firms and their clients grew by nearly 16% in 2022, the largest year-over-year growth rate in at least four years, when Westfleet began reporting on these metrics.<sup>22</sup> 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*.<sup>23</sup> Seeing these opportunities, even Harvard University made a commitment of \$500 million to one financier.<sup>24</sup>

### **Why TPLF is a Problem**

University of Iowa Law Professor Maya Steinitz, an expert on litigation finance who has testified before Congress, has stated that litigation funders “are reshaping every aspect of the litigation process—which cases get brought, how long they are pursued, when they are settled. But all of this is happening without transparency. So, we have one of the three branches of government, the judiciary, that’s really being quietly transformed.”<sup>25</sup>

TPLF feeds the growing misconception that investment in U.S. judicial outcomes is no different than any other market investment. In turn, promoting this misconception underscores a view that lawsuits do not need to focus on injured parties or “standing” to bring suits, but can instead focus increasingly on investment return as a legitimate, singular goal. TPLF injects into legal matters unknown third parties whose only interest is increasing the return on their investment. This skews litigation by encouraging maximum financial return over fair reparation for plaintiffs. It turns civil justice into a profit center for third party strangers to the litigation. This outside financial stake pushes ever more money and resources into funding litigation and advertising lawsuits.

Worse still, as the Swiss Re Institute study *Litigation Funding and Social Inflation* found, litigation financing reduces the recovery for claimants themselves.<sup>26</sup> Analysts estimated that “plaintiff compensation decreases by 21% relative to the same award in a case without TPLF.”<sup>27</sup> The Swiss Re Institute study concluded similarly that TPLF involvement tended to increase costs, which largely benefited the funders, not the plaintiffs: “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).”<sup>28</sup>

Moreover, litigation funding on a broad scale redistributes money from those seeking justice into the pockets of wealthy funders. As noted in a recent Insurance Information Institute (III) report, it is “no longer about David vs. Goliath, but about

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sources, medical providers and third-party funders that may result from efforts to maximize an “investment” in the outcome of the lawsuit.

<sup>20</sup> 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>.

<sup>21</sup> WestFleet Insider, 2023 Litigation Finance Market Report, at <https://www.westfleetadvisors.com/publications/2023-litigation-finance-market-report/>.

<sup>22</sup> <https://www.westfleetadvisors.com/publications/2022-litigation-finance-report>.

<sup>23</sup> 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>.

<sup>24</sup> M. McDonald, “Harvard Invests in Litigation Strategy That Posted Big Gains,” *Bloomberg.com*, June 26, 2019.

<sup>25</sup> Litigation Funding: “A Multibillion-dollar Industry for Investments in Lawsuits with Little Oversight”, 60 Minutes / CBS News, Dec. 18, 2022.

<sup>26</sup> *Litigation Funding and Social Inflation*, at <https://www.swissre.com/institute/research/topics-and-risk-dialogues/casualty-risk/us-litigation-funding-social-inflation.html>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

speculative investors getting richer as they focus on cases more likely to win the big settlements.”<sup>29</sup> And as New York Assemblyman William Magnarelli observed, “Some of the fees being charged by the [funding] companies were so high that whatever the verdict was, the victims ended up getting very little or close to nothing.”<sup>30</sup>

Another major concern is that, unlike attorneys who have an ethical duty to act in the interests of their clients, funders are solely motivated by their own financial interests.<sup>31</sup> Strategic legal decisions — for example, choosing whether to accept a settlement agreement — may be impaired by the profit motive of the financier. A funder may direct attorneys to reject reasonable settlement offers that may be in a plaintiff’s best interest and hold out for a higher potential payment that maximizes investment return.<sup>32</sup> In this way, TPLF subverts client-centered objectives.<sup>33</sup>

Litigation funders claim to exercise no control over the litigation or its resolution but ask that this unsupported claim be taken only on faith instead of providing transparency. Despite the industry’s assurances otherwise, situations have been revealed in which lenders influenced a party’s choice of counsel or vetoed settlements as too low. For example, the largest third-party litigation financier, Burford Capital, invested \$140 million in Sysco’s antitrust lawsuits against meat suppliers. However, when Sysco wanted to settle those lawsuits, Burford blocked the settlements and forced Sysco to keep litigating. Sysco sued Burford over this interference. After settling Sysco’s lawsuit against it, Burford (through a subsidiary), took complete control of the existing claims and was also filing new suits against meat producers despite no initial connection to the claim.<sup>34</sup>

In early 2024, a Minnesota judge, in a strongly worded opinion, rejected Burford’s attempt to replace Sysco as the plaintiff and highlighted Burford’s economic incentives in the litigation, stating that Burford’s “private interests” in maximizing future profits could not “overcome the strong public policy in favor of settling lawsuits,” that the “litigation burden caused by Burford’s effort to maximize [ROI] has been enormous,” and that the substitution would “contravene the important public policy granting control of litigation to the parties who claim to have actually suffered injury[.]”<sup>35</sup>

### **The Threat of Foreign Investment Including in Intellectual Property Litigation**

Another vulnerability that TPLF introduces into the U.S. legal system is a potential backdoor for adverse foreign powers to access sensitive information that arises from a lawsuit. Given the lack of TPLF disclosure, the extent of the role foreign investors play in U.S. litigation is mostly unknown as few states and courts require disclosure of the practice. The involvement of hostile foreign actors is one of the reasons for regulating disclosure when third-party money is behind a case.

Foreign actors could use TPLF to unfairly gain a competitive advantage over the U.S. by encouraging or exploiting dubious lawsuits against U.S. businesses in the national defense and other highly sensitive sectors.<sup>36</sup> The U.S. Chamber of Commerce Institute for Legal Reform, among others, has highlighted that litigation funding could allow foreign competitors to advance their strategic interests against individuals, companies, and whole industries, using the U.S. judicial system.<sup>37</sup> Indeed, foreign competitors, like China, have sent strong signals that they are ramping up their focus on intellectual property.<sup>38</sup>

Billions of dollars are being wagered in this manner by foreign sovereign wealth funds and foreign individuals. For instance,

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<sup>29</sup> [https://www.iii.org/sites/default/files/docs/pdf/triple\\_i\\_third\\_party\\_litigation\\_wp\\_07272022.pdf](https://www.iii.org/sites/default/files/docs/pdf/triple_i_third_party_litigation_wp_07272022.pdf).

<sup>30</sup> Sams; “*Litigation Funding Bills Crop Up in State Houses Across the Country*”; Claims Journal, 2020.

<sup>31</sup> <https://finance.yahoo.com/news/litigation-funder-burford-sues-sysco-182500350.html?guccounter=1>

<sup>32</sup> See Sysco Corp. v. Glaz LLC et al. (N.D. Ill. Case No. 23-C-1451).

<sup>33</sup> As Allison Chock, the Chief Investment Officer with Omni Bridgeway f/k/a Bentham IMF, candidly admitted, “*We make it harder and more expensive to settle cases.*” J. Gershman, “*Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight,*” *Wall Street Journal*, March 21, 2018.

<sup>34</sup> <https://www.reuters.com/legal/litigation/column-sysco-cedes-antitrust-claims-litigation-funder-burford-two-sides-drop-2023-06-29/>

<sup>35</sup> See *In Re: Pork, Cattle and Beef*, 2024 WL 511890, (D. Minn. Feb. 9, 2024). See also, “*Judge’s order deals blow to Sysco, Burford Capital in pork suits: Bloomberg Law*, Feb. 14, 2024

<sup>36</sup> <https://news.bloomberglaw.com/us-law-week/some-third-party-litigation-funders-pose-a-threat-to-us-security>.

<sup>37</sup> <https://institutelegalreform.com/research/ilr-briefly-a-new-threat-the-national-security-risk-of-third-party-litigation-funding/>.

<sup>38</sup> <https://news.bloomberglaw.com/us-law-week/some-third-party-litigation-funders-pose-a-threat-to-us-security>

Fortress Investment Group recently disclosed it is managing \$6.8 billion in investments devoted to litigation finance.<sup>39</sup> Just recently, the *Financial Times* reported that Fortress is now owned by one of the United Arab Emirates' sovereign wealth funds, Mubadala Investment Company.<sup>40</sup> According to Mubadala's website, it works "to generate sustainable financial returns for its shareholder, the Government of Abu Dhabi."<sup>41</sup>

Perhaps even more troubling, *Bloomberg Law* recently reported that Russians close to President Vladimir Putin are using TPLF to evade sanctions leveled at them by both the U.S. and Great Britain following the invasion of Ukraine.<sup>42</sup> Treasury Deputy Secretary Wally Adeyemo recently called for TPLF transparency, so the government and the American people understand who funds lawsuits.<sup>43</sup> He also noted the sophistication with which Russian oligarchs have worked to avoid U.S. sanctions and confirmed TPLF is one way they seek to do so.<sup>44</sup>

Litigation finance firms like Burford Capital, Fortress Investment Group, IMF Bentham and Therium Capital Management all have announced publicly that they have received sovereign wealth fund investments. The issues relating to sovereign wealth investment in litigation finance have been noted by multiple outside experts.

In December 2022, an unnamed outside association warned the U.S. Government Accountability Office that sovereign wealth funds could seek to influence litigation decisions via these funds.<sup>45</sup> Professor Maya Steinitz noted, "a sovereign wealth fund or a foreign government may seek to advance foreign policy or military goals."<sup>46</sup> A recent report by the U.S. Chamber of Commerce echoed similar concerns.<sup>47</sup> In December 2022, several Attorneys General asked the U.S. Department of Justice to investigate foreign funding into litigation finance.<sup>48</sup>

Importantly, intellectual property litigation in the U.S. is increasingly being targeted by third party litigation funders in exchange for some of the proceeds.<sup>49</sup> This practice was nearly nonexistent as recently as 2010, but industry reports now show that patent litigation accounts for approximately 30% of all new commitments by funders in 2021, with new deal commitments for TPLF seeing an increase of 61%.<sup>50</sup> The government doesn't know who pays for or controls these lawsuits. That could allow foreign adversaries to profit from our legal system and threaten U.S. national security.

Concerns related to patent litigation include that foreign governments could leverage their investment to obtain valuable intellectual property information from the companies being sued.<sup>51</sup> The lack of transparency potentially gives nefarious actors undue exposure to sensitive information belonging to U.S. firms that is critical to national security," the Center for Strategic and International studies says in an analysis.<sup>52</sup>

In April 2022, the Chief Judge for the Delaware Federal District Court, Colm Connolly, instituted standing orders requiring disclosure of third-party litigation funding in cases being heard in his courtroom. Despite challenge to his orders<sup>53</sup>, they were eventually successful in revealing not only third party litigation financing but foreign investment, including that a China-based investment entity, PurpleVine IP, was financing an intellectual property case in his court. The PurpleVine case in Connolly's

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<sup>39</sup> <https://www.fortress.com/what-we-do/asset-backed-finance/legal-assets>

<sup>40</sup> <https://www.ft.com/content/a8f3b524-ff45-4935-96da-cc08bd32e138>.

<sup>41</sup> <https://www.mubadala.com/en/who-we-are/about-mubadala>.

<sup>42</sup> <https://news.bloomberglaw.com/litigation-finance/putins-billionaires-sidestep-sanctions-by-financing-lawsuits>, March 28, 2024

<sup>43</sup> The Honorable Adewale O. Adeyemo, Deputy Secretary, United States Department of the Treasury, *An Update from the Treasury Department: Countering Illicit Finance, Terrorism and Sanctions Evasion*, Hearing before the United States Senate Committee on Banking, Housing and Urban Affairs (April 9, 2024) at <https://www.banking.senate.gov/hearings/an-update-from-the-treasury-department-countering-illicit-finance-terrorism-and-sanctions-evasion>.

<sup>44</sup> *Id.*

<sup>45</sup> [https://www.atra.org/white\\_paper/trial-lawyer-playbook/](https://www.atra.org/white_paper/trial-lawyer-playbook/).

<sup>46</sup> <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/litigation-finance/follow-the-money/>.

<sup>47</sup> <https://institutelegalreform.com/research/ilr-briefly-a-new-threat-the-national-security-risk-of-third-party-litigation-funding/>.

<sup>48</sup> <https://news.bloomberglaw.com/business-and-practice/china-firm-funds-us-lawsuits-amid-push-to-disclose-foreign-ties>.

<sup>49</sup> <https://www.wsj.com/articles/patent-lawsuits-are-a-national-security-threat-secretly-funded-litigation-f3cd5bd4>.

<sup>50</sup> <https://patentlyo.com/patent/2023/02/litigation-disclosure-executive.html>.

<sup>51</sup> <https://www.legaldive.com/news/bloomberg-law-report-could-fuel-litigation-finance-disclosure-push/711654/>.

<sup>52</sup> <https://www.csis.org/analysis/third-party-litigation-financing-national-security-problem>.

<sup>53</sup> <https://www.reuters.com/legal/government/delaware-judge-justifies-litigation-funding-inquisition-thriller-order-2022-12-02/>.

court was transferred to another court. However, Daniel Staton, the majority owner of the tech firm Staton Techiya, voluntarily disclosed PurpleVine’s role in three other cases filed in a federal court in Texas after a reporter contacted him about the case in Connolly’s U.S. District Court.

According to the former acting director of the U.S. Patent and Trademark Office Joe Matal, “The disclosure of a litigation funder tied to China “is our worst fears confirmed. Anything China does is concerning because nothing over there is really independent.”<sup>54</sup>

Since the issuance of his disclosure order, plaintiffs’ lawyers have pulled their cases from Judge Connolly’s docket rather than reveal their third-party investors.<sup>55</sup> In one high profile case, VLSI Technology LLC, whose parent company is Fortress Investment Group, walked away from years of litigation and patents they had alleged were worth billions rather than disclosing their specific investors. VLSI had resisted revealing the identities of the investors in its litigation but when ordered to disclose, the company dismissed its case.<sup>56</sup> This was an extraordinary act. VLSI had pursued its lawsuit against Intel for several years. Nearly 1,000 filings had been entered in the case, and the company reportedly spent millions on the proceedings. Yet VLSI preferred to dismiss its lawsuit although it continues to file and litigate, including against Intel, in other jurisdictions such as the Western District of Texas, where TPLF disclosure is not required.<sup>57</sup>

VLSI has also revealed that its investors include “sovereign wealth funds”—i.e., foreign governments. China, for example, operates such a sovereign wealth fund, the China Investment Corp. Beijing also files patent lawsuits in the U.S. through entities such as PurpleVine IP, which doesn’t disclose in court who controls it unless it’s forced to do so.

The risks posed by foreign money third party investment were one of the main drivers in Congress for The Protecting Our Courts from Foreign Manipulation Act of 2023 (H.R. 5488/S. 2805). House Speaker Mike Johnson (R-La.) and two other lawmakers introduced this bill to require disclosure of foreign entities funding lawsuits in U.S. courts. The bill would ban sovereign wealth funds and foreign governments from engaging in the practice.

### **What Should Be Done: A Need for Transparency**

Given its growing presence and impact, an increasing number of states and courts are taking steps to require disclosure of TPLF in litigation. As the Committee proceeds with its work, we ask that it consider doing the same.

Indiana, Montana, Wisconsin, and West Virginia all have enacted legislation requiring disclosure. Moreover, U.S. District Courts in Northern California, Delaware, and New Jersey have adopted some form of disclosure in litigation. This year:

- Indiana enacted a law to (1) block foreign entities from funding lawsuits in the state, (2) forbid the companies from influencing the outcome and (3) require the funding to be disclosed in the litigation.
- West Virginia enacted a law that requires automatic disclosure and bars funding companies from (1) offering commissions to attorneys and medical providers who refer clients to the company, (2) advertising false or misleading information, (3) referring clients to specific attorneys, and (4) attempting to waive settlements.
- At least 10 other states have considered legislation concerning litigation funding.

Just as insurance protecting civil defendant consumers and businesses must be disclosed in nearly all jurisdictions and in the U.S. district courts,<sup>58</sup> it is indeed peculiar that those backing litigation financially are not similarly obligated to disclose their involvement. The re-introduction of the Litigation Funding Transparency Act would provide a uniform rule that applies to all

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<sup>54</sup> <https://news.bloomberglaw.com/business-and-practice/china-firm-funds-us-lawsuits-amid-push-to-disclose-foreign-ties>.

<sup>55</sup> [https://www.wsj.com/articles/delaware-judge-targets-secret-funding-of-lawsuits-b0fe608b?mod=hp\\_lead\\_pos4](https://www.wsj.com/articles/delaware-judge-targets-secret-funding-of-lawsuits-b0fe608b?mod=hp_lead_pos4)

<sup>56</sup> Id.

<sup>57</sup> See e.g., <https://patentlyo.com/patent/2023/02/litigation-disclosure-executive.html>

<sup>58</sup> Currently, 48 states allow discovery of insurance policies and insurance coverage information and New Hampshire permits discovery of this information for settlement purposes in cases in which the insurer is joined as a party. *See Thomas v. Oldfield*, 279 S.W.3d 259, 263–64 (Tenn. 2009). Moreover, in 1993, the Federal Rules of Civil Procedure were further amended to make insurance agreements subject to mandatory initial disclosure. Fed.R.Civ.P. 26(a)(1)(A)(iv) (2008).

class actions and multi-district proceedings in federal courts. It would require counsel to disclose in writing to the court and to all named parties in 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.

Regulations should include transparency surrounding TPLF agreements. Disclosure of such arrangements at the outset of litigation or upon entering into a funding agreement would provide parties and courts with vital information to assess the influence of funders on the litigation. More states should follow the lead of Indiana, Montana, West Virginia and Wisconsin and pass laws to bring this booming, shadowy business operating in our civil justice system into the light.

Among the arguments made by funders against disclosure is that somehow discovery could potentially reveal sensitive “trade secrets,” such as insight into strategy. However, that is entirely different from refusal to produce a copy of the agreement and it ignores the fact that any details in the agreement that may reveal how a funder may have valued the case will almost certainly be protected, just as insurance reserves are protected even though insurance agreements are required to be produced in civil litigation. The funder has purchased part of the claim and paid for a contingent interest in the outcome of the litigation and owns part of the case, yet they are not visible before the court or the parties in any way and not accountable to the court. If for some reason a TPLF agreement happens to contain information regarding business strategy as opposed to documenting a business transaction, precedent demonstrates that arguments regarding appropriate safeguards can always be made to the court and the court has the opportunity to require that such information be redacted or shielded.

Needless to say, financial and conflict of interest transparency and disclosure is not a novel reform measure. Rather, as is well understood, the concept of shining a light on outside money used to influence governmental outcomes is already a bedrock principle for the executive and legislative branches. In terms of the executive branch, federal statutes, as well as codes of conduct make this a principal part of a federal regulatory scheme intended to prevent officials from benefiting personally from their offices. To make conflicts of interest between officials’ public duties and private financial interests transparent, Congress enacted mandatory disclosure requirements to “promote the integrity of public officials and institutions.”<sup>59</sup> Also, the Lobbying Disclosure Act (LDA)<sup>60</sup> requires transparency of outside financial interests. The purpose of the LDA is to make public the federal lobbying activities of business entities, nonprofit organizations, and paid lobbyists. The LDA requires an organization that employs at least one “lobbyist” to register with the Senate and House of Representatives if the organization’s spending on lobbying activities during a quarterly period reaches a certain level. A registrant must file reports that disclose approximately how much it has spent on lobbying activities and describe the lobbying activities undertaken and which lobbyists participated in them. The activities of third-party litigation funders are quite similar – they provide capital to the party whose position they are backing to obtain a favorable outcome in the judicial branch of government. Consequently, the public policy rationale behind the LDA should also apply to litigation funders, and Congress should require a similar degree of disclosure.

In summary, federal and state action is needed to address the use of outside money to influence the judicial branch of government. When outside money is used to influence the executive or legislative branches of government, disclosure and reporting requirements help assure there is transparency. Similar requirements are needed here. Specifically, disclosure of TPLF is a needed first step to shine a light on adverse foreign investment in U.S. judicial outcomes, allow courts to consider potential conflicts of interest, address ethical violations, consider improper motives underlying litigation, and respond to predatory arrangements that exploit plaintiffs.

Again, we want to thank you and the Committee for examining this important subject. Our shared goal is to preserve the integrity of the U.S. judicial system. The reforms under consideration by this Committee would accomplish that goal.

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<sup>59</sup><https://crsreports.congress.gov/product/pdf/LSB/LSB10949#:~:text=The%20Ethics%20in%20Government%20Act,Justices%20of%20the%20Supreme%20Court.>

<sup>60</sup> 2 U.S.C. § 1601 *et seq*