

**KANSAS HOUSE JUDICIARY COMMITTEE  
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ON BEHALF OF THE U.S. CHAMBER OF COMMERCE  
INSTITUTE FOR LEGAL REFORM**

**HOUSE BILL 2510 – PROPONENT TESTIMONY**

Thank you for the opportunity to testify in support of H.B. 2510, third party litigation funding (“TPLF”) disclosure legislation. My name is Mark Behrens and I am a partner at Shook, Hardy & Bacon L.L.P. I am appearing on behalf of the U.S. Chamber of Commerce Institute for Legal Reform (“ILR”). The U.S. Chamber is the world’s largest business organization representing companies of all sizes across every sector of the economy. Many Kansas businesses are members of the U.S. Chamber.

As part of its core mission, ILR has been studying the effects of TPLF for more than a decade. ILR has sponsored a number of nonpartisan conferences and published reports on TPLF. In addition, ILR has engaged in advocacy before state legislatures, the U.S. Congress, and the judiciary. ILR welcomes the opportunity to explain the problems large scale TPLF poses to Kansas’s civil justice system and why H.B. 2510 should be enacted as a modest step to mitigate some of those problems.

**Large Scale TPLF: An Overview**

Hedge funds, institutional investors, foreign sovereign wealth funds, and wealthy individuals are pouring enormous sums of money into funding lawsuits in the U.S. These “third party” funders front money to law firms in exchange for a portion of any recovery the firm may obtain in a settlement or court award on a client’s behalf. “The funding is typically in the millions of dollars,” according to the U.S. Government Accountability Office (“GAO”).<sup>1</sup> TPLF arrangements occur across a range of cases, including mass tort litigation, antitrust, asset recovery, commercial disputes, and patent cases.

Investors view TPLF as a lucrative opportunity, because they can earn hefty returns that are not tied to economic or market conditions.<sup>2</sup> For example, the CEO of TPLF heavyweight, Burford Capital, told *60 Minutes*, “On an average basis, we’ll largely double our money.”<sup>3</sup> He added, “We’re right about 90% of the time....”<sup>4</sup>

Large scale TPLF is different from consumer lawsuit lending. Those arrangements are between a funder and an individual, such as the plaintiff in a personal injury case. In consumer lawsuit lending situations, “the funder provides a relatively small amount (typically under \$10,000) to the plaintiff, who uses it for living expenses.”<sup>5</sup>

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<sup>1</sup> U.S. Gov’t Accountability Office, GAO-23-105210, *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* (Dec. 2022) [hereinafter GAO Report].

<sup>2</sup> Sara Randazzo, *Litigation Financing Attracts New Set of Investors*, Wall St. J, May 15, 2016 (“Well-heeled investors are seeing the appeal in returns that are largely untethered to the wider markets.”).

<sup>3</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 Burford CEO Christopher Bogart) [hereinafter 60 Minutes].

<sup>4</sup> *Id.*

<sup>5</sup> GAO Report, *supra*.

My testimony today focuses on large scale TPLF because this particular financial product is fundamentally changing the civil justice environment in America. As Professor Maya Steinitz, an expert on litigation finance, told *60 Minutes*:

TPLF is “reshaping every aspect of the litigation process—which cases get brought, how long they are pursued, when are they 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>6</sup>

Professor Donald Kochan has similarly noted that “[TPLF] turns the American justice system into a financial playground by transforming lawsuits into investment vehicles.”<sup>7</sup>

### **Large scale Litigation Funding is Rapidly Expanding**

Large scale TPLF began in Australia, made its way to the UK and Europe, and arrived in the U.S. about a decade ago. The practice has taken off with the loosening of common law doctrines on maintenance, champerty and barratry that prohibited the outside financing of litigation.

According to the Westfleet Advisors, a leading U.S. litigation finance advisory firm, some 44 active funders had \$13.5 billion in assets under management and had committed \$3.2 billion to new litigation financing agreements in 2021.<sup>8</sup> GAO found that TPLF funding “more than doubled” from 2017 to 2021.<sup>9</sup> Experts predict that TPLF investment will continue to grow<sup>10</sup> and could reach \$31 billion by 2028.<sup>11</sup>

About 70% of TPLF is invested in “portfolio” litigation rather than individual cases, which means it is funding massive litigation and recruitment campaigns.<sup>12</sup>

### **Large scale TPLF Raises Serious Concerns**

Proponents of TPLF claim that the practice levels the field between large, well-financed litigants who are used to fighting in court and individuals or small to mid-sized companies who may find themselves outgunned.<sup>13</sup> There are, however, serious downsides to these investments.

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<sup>6</sup> *60 Minutes*, *supra* (interview with Prof. Maya Steinitz).

<sup>7</sup> Donald J. Kochan, Op-ed, *Keep Foreign Cash Out of U.S. Courts*, Wall St. J., Nov. 24, 2022, at A13. Burford Capital LLC once explained in an Annual Report:

A litigation claim is an asset. It may seem strange to think of litigation in that way, but if one strips away the drama and the collateral dynamics associated with the litigation process, a litigation claim is nothing more than an effort to get money to change hands. In other words, a litigation claim is just like any other receivable.

Burford Capital, *2015 Annual Report*, at 4.

<sup>8</sup> Westfleet Advisors, *The Westfleet Insider: 2022 Litigation Finance Market Report*, at 3 [hereinafter Westfleet Insider report].

<sup>9</sup> GAO Report, *supra*, at 11; see also Sara Randazzo, *Investors Flock to Back Lawsuits in Exchange for a Cut of Settlements*, Wall St. J, Sept. 18, 2017.

<sup>10</sup> Annie Pavia, *Analysis: Are Boom Times Ahead for Litigation Finance?*, Bloomberg L., Nov. 13, 2022.

<sup>11</sup> Thomas Holzheu et al., *U.S. Litigation Funding and Social Inflation: The Rising Costs of Legal Liability*, at 8 (Swiss Re Inst. Dec. 2021).

<sup>12</sup> Westfleet Insider report, *supra*, at 6.

<sup>13</sup> Jennifer Smith, *Litigation Investors Gain Ground in U.S.*, Wall St. J, Jan. 12, 2014 (“Litigation funders say they help level the playing field for cash-strapped litigants involved in large scale disputes with wealthier opponents.”).

## **TPLF Poses Serious Ethical Issues**

Lawyers have an ethical obligation to exercise independent judgment and zealously represent their clients' interests. TPLF "weakens the traditional attorney-client relationship and raises serious questions concerning the funder's place in that relationship.... Funders have no historical duty to represent their clients zealously and guard their confidences. Rather, funders are only in the business of making money for their investors."<sup>14</sup>

Thus, it may be in a client's interest to settle a case, but a funder whose sole motivation is to pursue the largest possible recovery may reject a reasonable settlement to go for a "nuclear verdict." Recently, for example, a dispute between food distributor Sysco Corp. and Burford Capital exposed the funder actively working to prevent its client from settling claims.<sup>15</sup> The dispute seemed to contradict public statements by Burford's CEO that funded parties are "free to run their litigations as they see fit."<sup>16</sup>

Presently, in most states, TPLF arrangements generally do need not be disclosed—and therefore largely remain hidden from public scrutiny. Further, unlike other financial products, TPLF is largely unregulated. The practice operates with little to no transparency, making it difficult for judges and parties to know who has an interest in the outcome of the litigation.

"[J]udges and parties need to know when and how TPLF is being used, so that appropriate steps can be taken to avoid conflicts of interest, to ensure compliance with ethical rules, and to protect the legitimate interests of all litigants," according to then-U.S. House of Representatives Judiciary Committee Chair Bob Goodlatte.<sup>17</sup>

## **TPLF Encourages Speculative Litigation, Prolongs Litigation, and Raises Costs**

Like a gambler playing with house money, TPLF may fuel speculative lawsuits. TPLF "reduces—even eliminates—the claimant's downside risk of testing questionable claims in court."<sup>18</sup> Further, "unlike individual claimants, funding companies are able to spread the cost of litigation over a broad portfolio of cases and among numerous investors...."<sup>19</sup>

A funder's presence also may unreasonably prolong cases and frustrate settlements. The presence of a third party litigation funder can change what is essentially a two-party negotiation into a multi-party settlement with a "behind the table" constituent. In fact, a leading funder's chief investment officer told the *Wall Street Journal*, "We make it harder and more expensive to settle cases."<sup>20</sup>

Kansas should require disclosure of TPLF agreements so parties and courts know when an outsider may be influencing a case or complicating settlement.

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<sup>14</sup> U.S. Chamber Inst. for Legal Reform, *Third Party Financing: Ethical & Legal Ramifications in Collective Actions*, at 3 (Nov. 2009).

<sup>15</sup> Editorial, *The Litigation Finance Snare*, Wall St. J., Mar. 21, 2023; Hannah Albarazi, *When a Litigation Funder is Accused of Taking Over the Case*, Law360, Mar. 15, 2023; Emily Siegel, *Sysco Says \$140 Million Litigation Funder Blocking Lawyer Change*, Bloomberg L., Mar. 21, 2023.

<sup>16</sup> *60 Minutes*, *supra* (interview with Christopher Bogart, Burford's CEO).

<sup>17</sup> Letter from Hon. Bob Goodlatte, Chair, U.S. House of Representatives, Committee on the Judiciary, to Ms. Rebecca Womeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the U.S. Courts, Nov. 1, 2017, No. 17-CV-FFFFF.

<sup>18</sup> U.S. Chamber Inst. for Legal Reform, *Third Party Financing: Ethical & Legal Ramifications in Collective Actions*, at 2 (Nov. 2009).

<sup>19</sup> *Id.*

<sup>20</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's U.S. division (now Omni Bridgeway)).

Courts also might be more open to defendant requests for cost-shifting in cases involving burdensome discovery if they are aware that there is not a wide disparity in each side’s ability to pay. A multi-million dollar hedge fund that is making a business decision to invest in a case for profit should not be entitled to the same producer-pays free ride as an impecunious citizen.

Further, where sanctions are appropriate for misconduct, courts need to know about the presence of a third-party in the litigation to determine how to impose sanctions or other costs.

### **TPLF Provides A Way for Foreign Adversaries to “Weaponize the Courts”**

A newer concern is the potential for foreign financiers to exploit the lack of transparency with regard to TPLF to “weaponize the courts for strategic goals.”<sup>21</sup>

In 2022, GAO found that TPLF investors include “foreign sovereign wealth funds, which are government-controlled funds that seek to invest in other countries...”<sup>22</sup> For example, it has been reported that Burford Capital, one of two publicly traded litigation funders, has an \$872 million funding arrangement with a sovereign wealth fund and that, last year, a sovereign investor based in Abu Dhabi was buying up 90% of the equity in Fortress Investment Group, a U.S.-based entity.<sup>23</sup>

Foreign interests may fund lawsuits in the U.S. to “weaken critical industries” or “obtain confidential materials through the discovery process.”<sup>24</sup> A former chair of the U.S. House Armed Services Committee says “[t]he longer we wait to put a spotlight on litigation investment entities, the larger the threat grows. . . .”<sup>25</sup>

In December 2022, Kansas Attorney General Derek Schmidt and a dozen other state attorneys general wrote the U.S. Department of Justice asking U.S. Attorney General Merrick Garland and other top officials about steps being taken to protect the country against potential national security threats posed by TPLF. The state attorneys general wrote: “It is impossible to know the extent that foreign adversaries are spending on American litigation through TPLF, which leads to significant concern that TPLF is being used to harm our States and threaten our country’s economic and national security.”<sup>26</sup>

In November 2023, Bloomberg reported that a “Chinese firm is financing four intellectual property lawsuits in US courts as Congress members scrutinize the role of foreign investment in American litigation and seek to ban the practice in some instances.”<sup>27</sup> The disclosure of a litigation funder tied to China “is our worst fears confirmed,” said a former acting director of the U.S. Patent and Trademark Office.<sup>28</sup> He added, “Anything China does is concerning because nothing over there is really independent.”<sup>29</sup>

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<sup>21</sup> Kochan, *Keep Foreign Cash Out of U.S. Courts*, *supra*.

<sup>22</sup> 2022 GAO Report, *supra*, at 10.

<sup>23</sup> Emily R. Siegel, *Litigation Finance Trade Group Shrugs Off Disclosure Push*, Bloomberg L., Nov. 15, 2023.

<sup>24</sup> Kochan, *Keep Foreign Cash Out of U.S. Courts*, *supra*; see also Michael E. Leiter et al., *A New Threat: The National Security Risk of Third Party Litigation Funding* (U.S. Chamber Inst. for Legal Reform Nov. 2022).

<sup>25</sup> Howard “Buck” McKeon, Editorial, *Some Third-Party Litigation Funders Pose a Threat to US Security*, Bloomberg L., Apr. 7, 2023.

<sup>26</sup> Letter from Attorneys General of Georgia, Virginia, Alabama, Arkansas, Indiana, Kansas, Kentucky, Montana, Nebraska, Ohio, South Carolina, Tennessee, Utah and West Virginia to U.S. Attorney General Merrick Garland et al. re *Threats Posed by Third-Party Litigation Funding*, Dec. 22, 2022.

<sup>27</sup> Emily R. Siegel, *China Firm Funds US Suits Amid Push to Disclose Foreign Ties*, Bloomberg L., Nov. 6, 2023.

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

<sup>29</sup> *Id.*

Foreign governments also may secretly fund lawsuits to retaliate against dissidents or for political purposes.<sup>30</sup>

### **TPLF Fuels Misleading Legal Services Advertisements**

In 2022, Kansas enacted legislation to regulate misleading legal services advertisements sponsored by individuals or entities that are not attorneys or law firms, such as lead generating companies.<sup>31</sup> These “campaigns are often made possible by third-party financing.... From 2017 to 2021, an astonishing \$6.8 billion was spent on legal advertising, underscoring the magnitude of this issue.”<sup>32</sup>

### **TPLF Can Facilitate Fraudulent Litigation**

An example is Steven Donziger’s securing of an \$18 billion foreign judgment against an energy company through alleged corruption, which he then attempted to collect in U.S. courts.<sup>33</sup>

### **Despite These Concerns, TPLF is Typically Hidden**

A 2022 *Bloomberg Law* survey found that TPLF is never or rarely disclosed in court.<sup>34</sup> Parties may seek disclosure of litigation funding arrangements through discovery, but opponents routinely assert objections on relevance grounds and claim attorney-client or work product privilege with mixed results.<sup>35</sup>

### **States Increasingly Require TPLF Disclosure.**

Wisconsin became the first state to statutorily require disclosure of all TPLF agreements in 2018.<sup>36</sup> Montana enacted broad TPLF disclosure legislation in 2023.<sup>37</sup> Other states require disclosure of consumer litigation funding agreements.<sup>38</sup> Additional states are considering disclosure measures this year, with bills already heard and reported from committees in the Florida and Indiana legislatures.<sup>39</sup> Adoption of a disclosure rule in Kansas would be consistent with a trend toward transparency.<sup>40</sup>

Furthermore, requiring TPLF disclosure is consistent with insurance disclosure. Federal Rule of Civil Procedure 26 requires a party to a lawsuit to provide all parties with “any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to

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<sup>30</sup> For example, questions arose as to whether individuals and entities affiliated with the Chinese Communist Party had funded a defendant’s litigation expenses in a dispute with a company closely tied to a prominent Chinese dissident. *Eastern Profit Corp. Ltd. v. Strategic Vision US, LLC*, 2020 WL 7490107 (S.D.N.Y. Dec. 18, 2020).

<sup>31</sup> Kan. S.B. 150 (2022).

<sup>32</sup> American Tort Reform Ass’n, *Trial Lawyer Playbook*, at 3 (Oct. 2023); see generally Cary Silverman, *Gaming the System: How Lawsuit Advertising Drives the Litigation Lifecycle* (U.S. Chamber Inst. for Legal Reform Apr. 2020).

<sup>33</sup> *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 474-81 (S.D.N.Y. 2014), *aff’d*, 833 F.3d 74 (2d Cir. 2016); see also Steven Mufson, *Patton Boggs Becomes Mired in an Epic Legal Battle With Chevron Over Jungle Oil Pits*, Wash. Post, June 29, 2013. Mr. Donziger was later disbarred and convicted of criminal contempt. See *United States v. Donziger*, 38 F.4th 290 (2d Cir. 2022), *cert. denied*, 2023 WL 2634529 (U.S. Mar. 27, 2023); *In the Matter of Steven R. Donziger*, 80 N.Y.S.3d 269 (App. Div. 2018).

<sup>34</sup> Bloomberg L., *Litigation Finance Survey 2022*, at 3.

<sup>35</sup> Joseph J. Stroble & Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, Def. Counsel J., Jan. 2020, at 13-16.

<sup>36</sup> Wis. Stat. Ann. § 804.01(2)(bg).

<sup>37</sup> Mont. Code § 31-4-006.

<sup>38</sup> Ind. Code § 24-12-4-2; Mont. Code § 31-4-006; W. Va. Code Ann. § 46A-6N-6.

<sup>39</sup> Florida *SB 1276* and *HB 1179*; Indiana *HB 1160*

<sup>40</sup> David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, DRI Ctr. for L. & Pub. Pol’y, Third Party Litigation Funding Working Group, at 31-32 (2018).

indemnify or reimburse for payments made to satisfy the judgment.”<sup>41</sup> Similar rules exist for most state court actions, including in Kansas.<sup>42</sup>

*H.B. 2510*

H.B. 2510 would shine much needed light on TPLF. The bill is simply a disclosure bill, and does not ban large scale TPLF agreements. The bill states;

*Third-party agreements. A party may obtain discovery of the existence and content of any third-party agreement under which any person, other than an attorney representing a party, has agreed to pay expenses directly related to prosecuting the legal claim and has a contractual right to receive compensation that is contingent on and sourced from any proceeds. Information concerning the third-party agreement is not, by reason of disclosure, admissible as evidence at trial.*

The bill promotes transparency in light of the proliferation of TPLF agreements that may conceal the true nature of the interests underlying a litigation and may enable a third party to exert influence on a party or attorney. Because such an agreement carries a potential to significantly impact the just, speedy, and inexpensive determination of an action, disclosure should be required.

For these reasons, ILR supports enactment of H.B. 2510.

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<sup>41</sup> Fed. R. Civ. P. 26(1)(A)(iv).

<sup>42</sup> Kan. Stat. § 60-226(3).