

Testimony in Support of H.B. 1372
Legislation Relating to Litigation Financing
Cary Silverman
On Behalf of the American Tort Reform Association
Before The North Dakota House Industry, Business, and Labor Committee
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Chairman Warrey and members of the Committee, thank you for the opportunity to testify in support of H.B. 1372, legislation that addresses the growing practice of the outside entities funding of litigation in our courts. We would like to thank Representative Klemin and Senator Larson for sponsoring this important legislation.

I am testifying today on behalf of the American Tort Reform Association (ATRA). ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources with the goal of ensuring fairness, balance, and predictability in civil litigation. I am an attorney with a national law firm, Shook, Hardy & Bacon L.L.P., and serve as counsel to ATRA.

In recent years, we have seen a proliferation of third parties investing money in litigation, viewing the civil justice system not as a way of resolving disputes and providing fair compensation, but purely as a profit-making opportunity. Dedicated litigation finance firms, hedge funds, institutional investors, foreign sovereign wealth funds, and wealthy individuals are investing billions of dollars each year into funding U.S. lawsuits in exchange for a portion of the recovery obtained by a law firm. Commercial litigation funders invest both in individual cases and “portfolio” litigation, dockets of cases.¹ Funders back the law firms behind mass tort, intellectual property, antitrust, and other litigation.² Major litigation funders alone had more than \$15 billion invested in U.S. litigation in 2023.³ TPLF investments in what is referred to as commercial litigation funding are projected to double to about \$30 billion over the next few years.⁴

As experts on litigation finance have explained, TPLF is “reshaping every aspect of the litigation process—which cases get brought, how long they are pursued, when are they settled.”⁵ An outside funder’s presence can turn what is traditionally a negotiation between two opposing parties into a multi-party affair with a “behind the scenes” funder interested solely in maximizing a return on investment. These TPLF arrangements can create serious ethical and other problems.

First, outside funders can interfere in an attorney’s ethical obligation to the client and to exercise independent judgment. Funders may exert control over potential case settlements or other major litigation decisions in place of the law firm’s client. We’ve seen this occur in antitrust litigation, where a major funder, Burford, blocked proposed settlements as too low and sought to take over the litigation.⁶ Another funder, Fortress Investment Group, which

¹ Westfleet Advisors, *supra*, at 6, 8.

² Emily R. Siegel, *Fortress’ Billions Quietly Power America’s Biggest Legal Fights*, Bloomberg Law, Oct. 16, 2024.

³ Westfleet Advisors, *The Westfleet Insider: 2023 Litigation Finance Market Report*, at 3 (2024).

⁴ Swiss Re Institute, *U.S. Litigation Funding and Social Inflation*, at 8 (Dec. 2021).

⁵ Leslie Stahl, *Litigation Funding: A Multibillion-dollar Industry for Investments in Lawsuits with Little Oversight*, CBS’s “60 Minutes,” Dec. 18, 2022 (interview with Prof. Maya Steinitz).

⁶ See 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. A federal magistrate judge in Minnesota observed that Burford’s actions created an “enormous” litigation burden for Sysco and caused “serious practical problems” that proposed to “allow

funds mass tort and IP litigation, is described by insiders as intricately involved in the litigation it funds. As the funder’s own managing partner indicated, “We see where funds go. If you do something you’re not supposed to do, we’re gonna be upset.”⁷ Indeed, major funders recognize, and even tout, that their presence “make[s] it harder and more expensive to settle cases.”⁸

Second, the money doesn’t just fund lawsuits, it may create them. In some instances, the funding supports advertising intended to generate thousands of claims,⁹ making it easier for law firms to pursue speculative lawsuits or assert more questionable claims for a chance at a financial windfall. As a federal judge observed, courts should not become “casinos where people should just go to profit.”¹⁰

Third, TPLF can be misused by foreign adversaries to undermine the competitiveness of U.S. businesses,¹¹ attempt to obtain access to trade secrets exchanged in discovery,¹² and even to evade international sanctions.¹³

The full measure of how TPLF is impacting the U.S. legal system is unclear. That is because these investments typically occur in secret and are not disclosed to courts or parties. Accordingly, a critical step to assess and respond to concerns is to provide basic transparency in TPLF arrangements.

There is another form of litigation funding in which outsiders invest in lawsuits in exchange for a portion of the recovery: consumer litigation funding. Here, lenders provide immediate cash to individuals who are plaintiffs in pending litigation, typically personal injury lawsuits. Unlike commercial TPLF, which funds the litigation expenses themselves, consumer lawsuit lending provides money directly to a plaintiff (rather than a law firm) and funds a plaintiff’s personal expenses during litigation, rather than fund the litigation itself. Lenders often refer to these arrangements as “pre-settlement advances.” They are sometimes advertised as “cash for lawsuits.” This form of lawsuit lending is the “legal equivalent of the payday loan.”¹⁴

Lenders are repaid out of the judgment or settlement, though, in many (if not most) cases, recovery is a sure thing. Often, the only question is timing – when will the settlement be finalized and when will the check arrive? Experience has shown that these types of loans can come with sky-high interest rates and fees that can leave borrowers with little to no recovery.

a financier with no interest in the litigation beyond maximizing profit on its investment to override decisions made by the party that actually brought suit.” *In re Pork Antitrust Litig.*, No. 18-cv-1776 (JRT/JFD), 2024 WL 511890, at *1 (D. Minn. Feb. 9, 2024), *aff’d*, 2024 WL 2819438 (D. Minn. June 3, 2024). The federal judge that affirmed that ruling also noted that an agreement allowing a funder to take over litigation “threatens the public policy favoring the settlement of lawsuits.” *In re Pork Antitrust Litig.*, 2024 WL 2819438, at *4 (D. Minn. June 3, 2024).

⁷ Emily R. Siegel, *Mass Tort Marketer Hires Ex-LexShares CEO to Lead Funding Program*, Bloomberg Law, Aug. 20, 2024.

⁸ 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)).

⁹ Siegel, *Mass Tort Marketer Hires Ex-LexShares CEO to Lead Funding Program*, *supra*.

¹⁰ Michael Shapiro, *Courts Not a Casino, Says Judge Seeking Third-Party Transparency*, Bloomberg Law, Mar. 28, 2024 (quoting Chief Judge Colm Connolly of the U.S. District Court for the District of Delaware).

¹¹ Donald J. Kochan, Editorial, *Keep Foreign Cash Out of U.S. Courts*, Wall St. J., Nov. 24, 2022, at A13.

¹² Emily R. Siegel, *Litigation Finance Trade Group Shrugs Off Disclosure Push*, Bloomberg L., Nov. 15, 2023.

¹³ Emily R. Siegel & John Holland, *Putin’s Billionaires Dodge Sanctions by Financing Lawsuits*, Bloomberg Law, Mar. 28, 2024.

¹⁴ Ashby Jones, *Loan & Order: States Object to ‘Payday’ Lawsuit Lending*, Wall St. J., Apr. 28, 2013.

At payback, a consumer may owe the lender three, five, or even 10 times the advanced amount.¹⁵ Victims have included 9/11 first responders,¹⁶ former professional football players,¹⁷ veterans who brought product liability cases,¹⁸ and ordinary people who have experienced an injury.¹⁹ In North Dakota, these “advances” are not subject to the types of safeguards applicable to payday lending²⁰ or small consumer loans.²¹

Consumer litigation financing industry representatives say that the average lawsuit loan is about \$2,000,²² but the amounts can be far greater. A quick internet search for companies offering these cash advances in North Dakota found separate companies offering up to \$2 million,²³ up to \$1 million,²⁴ and up to \$250,000,²⁵ in as little as 24 hours. The websites do not disclose the repayment obligations for consumers, other than that the lender will be paid out of the consumer’s recovery. The lenders take their share from what is left after the plaintiffs’ lawyer collects his or her contingency fee, which is typically a third or more.

In addition to predatory lending concerns, these agreements can create improper conflicts of interest and improperly deter the reasonable settlement of cases. As one judge observed, plaintiffs “may want to make up the amount they will be forced to repay the funder.”²⁶ If a plaintiff knows that all of his or her settlement will go to his lawyer and to repay the “cash advance,” that plaintiff may reject a reasonable, even generous, settlement. The other parties and the court will not know this is happening.

¹⁵ Shawn Cohen et al., *Inside the Cottage Industry that’s Fleecing NYC Taxpayers*, N.Y. Post, Jan. 2, 2018.

¹⁶ See Leslie Stahl, *Litigation Funding: A Multibillion-dollar Industry for Investments in Lawsuits with Little Oversight*, 60 Minute / CBS News, Dec. 18, 2022 (reporting the case of NYPD officer Donald Sefcik, who took a \$25,000 lawsuit loan while awaiting a \$90,000 victims’ compensation fund payment, and had to pay the lender \$64,800 of his recovery).

¹⁷ Mike Scarcella, *Litigation Funder Thrivest Loses Challenge Over NFL Concussion Payouts*, Reuters, Oct. 27, 2023; Ken Belsen, *Widespread Deceptive Practices May Reduce Payouts in N.F.L. Concussion Settlement*, N.Y. Times, Sept. 19, 2017; Ken Belsen, *N.F.L. Concussion Payouts Have Lenders Circling*, N.Y. Times, May 9, 2016.

¹⁸ Case Management Order No. 61 (Third Party Litigation Funding), *In re: 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-02885 (N.D. Fla. Aug. 29, 2023), at 1.

¹⁹ See, e.g., *Boling v. Prospect Funding Holdings, LLC*, 771 Fed. Appx 562 (6th Cir. 2019) (finding Kentucky law prohibited an arrangement in which a plaintiff who was seriously injured in a gas-can explosion was contractually required to repay \$340,000 of his settlement to a consumer lawsuit lender as a result of taking four advances totaling \$30,000 when the lawsuit settled, an effective annual rate of 79%).

²⁰ N.D. Cent. Code § 13-08-01 et seq. requires “deferred presentment service providers” to obtain a license, limits loans to \$500, prohibits finance charges exceeding 20% of the amount advanced, provides a maximum term of 60 days, among other requirements.

²¹ Lenders that loan consumers amounts of \$35,000 cannot charge them an interest rate that is currently about 10%. See N.D. Dep’t of Financial Institutions, *ND Usury Rates for Non-regulated Lenders*, <https://www.nd.gov/dfi/sites/www/files/documents/Usury/usury%20chart1.pdf>. This usury rate is 5.5% above the current cost of money as reflected by the average rate of interest payable on U.S. Treasury Bills maturing within six months, but not lower than 7%. N.D. Cent. Code § 47-14-09.

²² See, e.g., *Testimony of Eric Schuller*, President, The Alliance for Responsible Consumer Legal Funding (ARC), Before the Kansas House Committee on Judiciary, H.B. 2694, Feb. 15, 2022.

²³ Tribeca, *Get A Lawsuit Loan in North Dakota*, <https://tribecalawsuitloans.com/states/north-dakota-lawsuit-loans/>.

²⁴ Mayfair Legal Funding, *Get Pre-Settlement Legal Funding in North Dakota within 24 Hours*, <https://mayfairlegalfunding.com/lawsuit-loans/north-dakota/>.

²⁵ Uplift Legal Funding, <https://upliftlegalfunding.com/car-accident-loans/north-dakota/>.

²⁶ *Id.* at 2.

H.B. 1372 responds to concerns stemming from both types of third party litigation funding. It both closes a regulatory gap and provides needed transparency. The bill:

- Requires litigation funders to obtain a license from the Commissioner of Financial Institutions and subjects them to regulation.
- Prohibits conduct by litigation funders that raises conflict of interest and other ethical issues, such as influencing the litigation or settlement, offering or providing legal advice to a consumer, accepting or receiving commissions, or referring consumers to a person providing goods or services (such as a medical clinic).
- Requires certain disclosures to consumers in litigation financing contracts, so that they have a better sense of how much what may seem like a small loan will ultimately cost them.
- Prohibits a litigation funder from receiving more than 36% of the amount of the judgment or settlement. That should help avoid situations in which a plaintiff ends up with less than his attorney and the funder.
- Prohibits foreign adversaries from funding litigation.

Perhaps most importantly, the bill requires disclosure of litigation financing contracts. Disclosure of the agreement allows all parties to have an understanding of who has a financial interest in the litigation and is potentially influencing its direction and settlement. It also allows the parties to alert the court if the agreement raises other ethical issues, such as conflicts of interest between funders, lawyers, and clients. The bill treats litigation funding agreements in the same manner as how North Dakota requires disclosure of insurance agreements. Both “enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation.”²⁷

In the consumer litigation finance context, transparency is also key. It will discourage lenders from entering into predatory arrangements by bringing these contracts into the sunlight. This is particularly critical since the bill does not limit interest rates or fees, or set a maximum loan amount or a maximum term during which interest can accumulate, as some states do. Parties need to know that the reason a plaintiff is unable or unwilling to enter what seems to be a generous settlement is because, after the lawyer and lender take their shares, he or she will get nothing. There also may be provisions in the agreement that directly or indirectly give a lender the ability to influence or block a settlement.

In requiring disclosure of third party litigation funding and adopting other safeguards, North Dakota will join other states that have taken similar steps in recent years, such as Indiana, Louisiana, Montana, West Virginia, and Wisconsin.

ATRA supports this legislation and urges the Committee to issue a favorable report. Thank you for your consideration.

²⁷ Fed. R. Civ. P. 26, Notes of Advisory Committee on Rules—1970 Amendment, Subdivision (b)(2)—Insurance Policies.