Safeguarding Litigants and the Judicial Process: The FJRI Supports HB 1157 and Regulation of Third-Party Litigation Financing

Litigation finance involves institutional investors who invest in litigation by providing finance in return for an ownership stake in a legal claim and a contingency in the recovery. This in turn enables parties to shift the financial burden of legal disputes off their own balance sheets and minimize the risk of pursuing litigation.

But the practice also increases the probability that meritless claims will be brought, inserts questions about who is actually controlling the litigation, results in inevitable conflicts of interest among the lawyer, client, and litigation funder, and makes settling lawsuits far more difficult and expensive. *See* American Bar Association Best Practices For Third-Party Litigation Funding at 6 (Aug. 2020).[1]

Thus, the Florida Justice Reform Institute supports passage of HB 1157, a bill designed to regulate third-party litigation financing ("TPLF") by mandating disclosure of funding agreements—particularly those involving foreign entities—and prohibiting financier conduct that can undermine the attorney-client relationship. Such transparency would enable all parties to make informed strategic decisions grounded in a realistic assessment of the case's dynamics. Moreover, mandatory disclosure would safeguard vulnerable plaintiffs, who may not fully comprehend the extent of control or influence conferred upon funders through TPLF agreements.

Background

TPLF agreements are part of a relatively new industry wherein institutional investors provide capital to fund lawsuits. Florida courts permit these types of arrangements, *see Kraft v. Mason*, 668 So. 2d 679, 684 (Fla. 4th DCA 1996), and as a consequence, Florida has been cited as an attractive state for investing in litigation, particularly given its size. *See* Michael McDonald, Above the Law, *The Best and Worst States for Litigation Finance (Part II)* (July 11, 2017).[2] Importantly, the problems with TPLF extend further than the financier. The necessity for regulation is underscored by the emergence of a commercialized ecosystem surrounding modern mass litigation. The traditional attorney-client-financier relationship is often complicated by a fourth party: a lead-generating firm that solicits potential plaintiffs and sells their information to law firms. This business model creates a tripartite arrangement between the lead generator, the law firm, and the financier, which risks reducing clients to mere assets in a portfolio.

The problems associated with litigation finance are readily apparent, as these parties are motivated by maximizing their investment rather than furthering the best interests of the underlying plaintiff. Indeed, TPLF firms are typically accountable to investors; in late 2021, funder

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[1] *Available at* https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf.
[2] *Available at* https://abovethelaw.com/2017/07/the-best-and-worst-states-for-litigation-finance-part-ii/.

Longford Capital boasted of $682 million that it had raised for a new fund.[3] These investors, like investors in any other enterprise, are looking for a return on their capital, and they are under pressure to deliver. As others have warned, giving a third-party funder "a financial stake in a lawsuit" will "naturally" result in that funder "seek[ing] to control the lawsuit and, as a result, the lawyers being funded by that third party will be controlled by that third party, sometimes to the detriment of the actual party in interest." U.S. Chamber Institute for Legal Reform, *Selling More Lawsuits, Buying More Trouble: Third-Party Litigation Funding a Decade Later* at 18 (Jan. 2020).[4]

TPLF Agreements Raise Numerous Ethical Questions

There are many junctures in litigation at which a funder's interest may deviate from the plaintiff's. For example, who is the lawyer to listen to when a funder and a plaintiff disagree about whether to settle a claim early or press on for a substantial but unlikely jury verdict? In this situation, the funder, driven by the desire to maximize its profit, may be more willing to take the risk of trial in hopes of a windfall. As an executive of a prominent litigation finance company acknowledged, litigation funders "make it harder and more expensive to settle cases." Jacob Gershman, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, Wall St. J. (Mar. 21, 2018).[5]

Numerous example TPLF agreements demonstrate the problematic dynamics at play and underscore why timely disclosure of these arrangements is imperative. As shown below, TPLF agreements frequently grant non-party funders explicit authority to direct key aspects of the litigation. In other instances, these agreements confer substantial influence by contractually obligating plaintiffs and their counsel to continue prosecuting claims even when they may prefer to settle, requiring efforts to monetize equitable relief, and empowering funders to withdraw financial support at any stage.

Funders Often Exercise Expansive Control Over Litigation, Including the Right to Resolve It

Some agreements explicitly grant the non-party funder the right to control litigation and direct counsel, defying the parameters of the ordinary attorney-client relationship. For example, the litigation funding agreement between International Litigation Partners LTD and Laurence John Bolitho (the "ILP Agreement")[6] provides that "the Lawyers and ILP will determine what Claims should be pursued in the Proceedings" and that "ILP will give day-to-day instructions to the Lawyers on all matters concerning the Claims and the Proceedings and may give binding instructions to the Lawyers and make binding decisions on behalf of the Plaintiff in relation to the Claims," *see* § 5.1. These rights are reinforced by other provisions, including a requirement that the plaintiff instruct the lawyers to "comply with all instructions given by ILP," *see* § 6.3.1, that

[3] Longford Capital, *Longford Capital Raises $682 Million for New Investment Fund* (Sept. 22, 2021), *available at* https://www.longfordcapital.com/media/longford-capital-raises-682-million-for-new-investment-fund.
[4] *Available at* https://instituteforlegalreform.com/wp-content/uploads/2020/10/Still_Selling_Lawsuits_-_Third_Party_Litigation_Funding_A_Decade_Later.pdf.
[5] *Available at* https://www.wsj.com/articles/lawsuit-funding-long-hidden-in-the-shadows-faces-calls-for-more-sunlight-1521633600.
[6] *See* Appendix A.

ILP's "management services" include "providing day-to-day instructions to the Lawyers," *see* § 7.1.2, and that the funder's decision to cease funding requires counsel to "discontinue the prosecution of the Claim," *see* § 5.3.

Similarly, the litigation funding agreement between Therium Litigation Funding IC, Jacqueline A Perry QC, and Neil J. Fraser (the "Therium Agreement")[7] authorizes the class action lawyers to take only ***three*** actions without Therium's consent, and otherwise requires that "the Proceedings shall be prosecuted in accordance with the Project Plan" and "subject to Therium's prior agreement to any proposed variation of the Project Plan," *see* § 7.

The TPLF agreement between Sysco Corporation and several capital providers (the "Sysco Agreement")[8] makes the consequences of the funded plaintiff's breach explicit, stating that the breach of the agreement would allow the funders to take over the conduct and settlement of the litigation and require the plaintiff to appear "at any hearings" at the direction of the funder notwithstanding the plaintiff's desires, *see* § 13.1.

Some TPLF contracts expressly grant the funder the right to accept or reject settlement offers. In the ILP Agreement,[9] the funded plaintiff cannot "discontinue, abandon, withdraw or settle" the litigation or "reject any Settlement offer made by any Defendant" without the funder's prior consent, *see* § 6.2. If the plaintiff and funder disagree about whether to settle the case, the agreement provides that counsel will decide—the same counsel who takes direction expressly from the funder, *see* §§ 13.2, 13.5. The Sysco Agreement, as amended,[10] states that the plaintiff "shall not accept a settlement offer" without the funders' prior written consent, although the provision attempts to soften the language by also stating that the funders may not unreasonably withhold that consent, *see* § 7. Similarly, the agreement between Vicki Mize and Litigation Management and Financial Services, LLC (the "LMFS Agreement")[11] states that the plaintiff agrees: not to dispose of or discontinue any claims without the funder's prior consent, *see* § 2.b.iii, iv; to give the funder "full and complete authorization to negotiate and accept any settlements of Claims"; and "to cooperate and consent to any settlement deemed reasonabl[e]" by the funder, *see* § 7.b. That TPLF agreements can essentially force plaintiffs to continue litigation even when they wish to settle or otherwise end the litigation creates "zombie" cases driven by funders.

Funders Often Require Plaintiffs to Maximize Monetary Relief Over Equitable Relief

Some TPLF agreements require plaintiffs to maximize monetary recoveries over equitable relief including injunctions, specific performance, restitution, and declaratory relief. For example, section 4.3 of the Litchfield Ventures, LLC funding agreement with the Fresh Acquisitions Liquidating Trust (the "Litchfield Agreement")[12] provides:

> If [Fresh Acquisitions] supports or accepts (to the extent such acceptance is within [Fresh Acquisitions'] power) any offer to Settle the Litigations that includes non-

[7] *See* Appendix B.
[8] *See* Appendix C.
[9] *See* Appendix A.
[10] *See* Appendix C, Amendment No. 1.
[11] *See* Appendix D.
[12] *See* Appendix E.

> cash Litigation Proceeds, [Fresh Acquisitions] shall take all actions necessary to move the Court to cause the monetization of all such non-cash Litigation Proceeds, to obtain the cash value of such non-cash Litigation Proceeds as soon as practicable, and to cause the payment of the cash Litigation Proceeds received in accordance with this Agreement.

The TPLF agreement between Therium Finance AG IC and Dominion Minerals Corp. (the "Therium Dominion Agreement")[13] provides that if the plaintiff receives any recovery in the form of "Non-Monetary Proceeds," then it must pay the funder the market value of those proceeds to be established by an independent expert (whose fees the plaintiff also must pay), *see* § 13. The funding agreement between Longford Capital Fund I, LP and Quest Patent Research Corporation (the "Longford Agreement")[14] defines the term "Proceeds" to expressly include the cash value of "injunctions" and nonmonetary relief, *see* § 2.34. The amendment to the Sysco Agreement states that the plaintiff "shall take such actions as are reasonable and appropriate to maximize the Proceeds received from each Claim, giving priority to cash Proceeds," *see* § 7. The TPLF agreement between Legalist Fund II, L.P. and DiaMedica Therapeutics Inc. (the "Legalist Agreement")[15] goes even further and requires that the plaintiff "shall . . . pay . . . an amount equal to the Non-Monetary Claim Proceeds Fair Market Valuation," *see* § 3.2.

Monetization requirements in TPLF agreements can distort the relief plaintiffs seek, often forcing them to prioritize cash recovery over other forms of resolution. If these provisions are concealed, courts and parties may be unable to negotiate settlements or craft appropriate remedies. Defendants may have reasonable settlement offers rejected, not realizing the plaintiff is contractually obligated to maximize financial recovery, even at the expense of other interests. Plaintiffs who wish to settle or pursue less aggressive litigation strategies may be powerless if the funder demands strict adherence to profit-maximizing terms. These provisions allow funders to treat any deviation from maximizing proceeds as a breach, creating economic pressure that complicates case management, impedes settlement, and overrides the plaintiff's own judgment about the best resolution.

Funders Are Often Granted the Right to Discontinue Funding with Little Warning

TPLF contracts also sometimes have the concerning feature of allowing the funder to withdraw funding with minimal or no restrictions. For example, the LMFS Agreement[16] states that when "new circumstances come to light," and such circumstances make the prospect of success lower than anticipated, the funder "shall be entitled to terminate this agreement in whole or in part without notice and to cease any further funding of Claimant's Claims," § 6.c. The Therium Dominion Agreement[17] outlines a structure by which the funder commits only to the first tranche of funding, with subsequent tranches funded only in the funder's "sole discretion," § 2. In addition, the agreement grants the funder the right to terminate the agreement unilaterally if it "ceases to be satisfied as to the merits of the Claim" or "reasonably believes that the Claim is no longer

[13] *See* Appendix F.
[14] *See* Appendix H.
[15] *See* Appendix G.
[16] *See* Appendix D.
[17] *See* Appendix F.

commercially viable," § 16.3.

Some TPLF contracts require giving the plaintiff prior notice before terminating, but nothing else. For example, the ILP Agreement[18] grants the funder "sole discretion" to "cease to fund any Claim" subject to 14 days' written notice to the plaintiff, § 5.2; the funder can decide to get out of its obligations entirely by giving 14 days' written notice too, § 18.1.

These provisions, alone or combined with other control mechanisms, give funders effective veto power over all case decisions, regardless of boilerplate disclaimers. Plaintiffs and their counsel, dependent on funders, risk losing financial support and lack the resources to litigate independently or challenge the funder in court. Disclosure of these types of agreements is thus essential as it would enable judges and parties to understand who truly controls the litigation.

TPLF Contingency Fee Arrangements Create Divergent Incentives

Understanding how contingency fees are divided between lawyers and non-party funders is essential for courts and parties as well. Fee-splitting arrangements can create incentives and conflicts of interest that may influence attorneys' decisions, potentially distorting case management and resolution strategies. The Therium Dominion Agreement's[19] structure, where the client pays the contingent fee to the funder who then "shares" any recovery with counsel through a separate agreement, *see* Recital C, fundamentally alters counsel's economic incentives in ways that may diverge from the court's and other parties' expectations, as well as the funded plaintiff's interests. The Therium Agreement[20] requires the lawyers to "recover the maximum possible Contingency Fee," which is the lawyers' share of the proceeds, not the recovery to the class, § 3.1.3.

These ramifications increase when funders invest in multiple cases involving the same law firm and "cross-collateralize" those investments—i.e., using profits from one case to cover expenses in another. These arrangements may alter how and when counsel's contingent fees are calculated, sometimes resulting in fees that exceed ethical limits. Cross-collateralization skews counsel's incentives in individual cases based on the performance of other funded matters, distorting litigation and settlement dynamics. Without disclosure of the TPLF agreement, courts and parties cannot identify or address these risks.

TPLF Disclaimers About Funders' Control Are Often Illusory

While TPLF contracts may contain blanket representations that the funder is a passive investor and does not control the litigation or settlement, such provisions are frequently contradicted by specific powers granted in the agreement. For instance, in the Therium Agreement[21] the funder claims to disavow any control of the litigation, *see* § 9.2; at the same time, however, the agreement says the lawyers may only join an additional party, add a new cause of action, or commence additional proceedings without first giving notice to the funder, § 7. In other words, the claim that the funder is not exercising control appears meaningless in light of other

[18] *See* Appendix A.
[19] *See* Appendix F.
[20] *See* Appendix B.
[21] *See* Appendix B.

provisions clearly granting the funder that control. For instance, an arbitrator restrained Sysco from settling claims without funder Burford Capital LLC's consent despite multiple statements in their funding agreement that Burford did not control resolution.[22]

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These examples illustrate only a fraction of the troubling provisions routinely embedded in TPLF agreements—provisions that undermine party autonomy, distort litigation strategy, and create significant ethical risks. They are not unique to federal court either. Florida state courts have encountered similar litigation finance arrangements that grant funders sweeping control over case management, attorney selection, and settlement decisions, to the detriment of plaintiffs and the integrity of the judicial process. *See, e.g.*, *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 693 (Fla. 3d DCA 2009).

Several States Regulate TPLF Agreements and Require Disclosure

Seven states—Indiana,[23] Kansas,[24] Louisiana,[25] Montana,[26] Oklahoma,[27] West Virginia,[28] and Wisconsin[29]—regulate litigation funding, although these regulations vary significantly in scope. For example, Indiana's regulations prohibit litigation financing by "a foreign entity of concern" and foreclose funders from directing the litigation. *See* Ind. Code §§ 24-12-11-2, 24-12-11-4. West Virginia requires litigation funders to register with the state and to ensure their agreements meet detailed statutory requirements. W. Va. Code §§ 46A-6N-2(a), 46A-6N-3, 46A-6N-4, 46A-6N-5. Oklahoma and Wisconsin's regulations, in contrast, merely specify that litigation funding arrangements are within the scope of discovery in litigation. *See* Okla. Stat. tit. 12, § 3226(B)(1)(c); Wis. Stat. § 804.01(2)(bg).

The most common effect of these laws is to regulate disclosure of funding arrangements—either by requiring disclosure automatically or by authorizing requests for such agreements in discovery. *See, e.g.*, Mon. Code § 31-4-108(1) ("Except as otherwise stipulated or ordered by a court of competent jurisdiction, a consumer or the consumer's legal representative or a party or a party's legal representative shall, without awaiting a discovery request, disclose and deliver to the following persons the litigation financing contract": the parties, the court or tribunal, and any known person with a preexisting contractual obligation to indemnify or defend a party to the action). Some states also require specific disclosures regarding the influence of a litigation funder. For example, Kansas requires a party to disclose whether a funder has approval rights for settlement and case resolution. *See* Kan. Stat. § 60-226.

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[22] Mark Behrens, *Third-Party Litigation Funding: A Call for Disclosure and Other Reforms to Address the Stealthy Financial Product that is Transforming the Civil Justice System*, 34 Cornell J. of Law & Pub. Pol'y 1, 8-9 (2025), https://community.lawschool.cornell.edu/wp-content/uploads/2025/03/Behens-final.pdf.
[23] *See* Appendix I (Ind. Code §§ 24-12-11-1 to -5).
[24] *See* Appendix J (Kan. Stat. § 60-226).
[25] *See* Appendix K (9 La. Rev. Stat. §§ 3580.12, 3580.13).
[26] *See* Appendix L (Mon. Code § 31-4-108).
[27] *See* Appendix M (Okla. Stat. tit. 12, § 3226(B)(1)(c) (effective Nov. 1, 2025)).
[28] *See* Appendix N (W. Va. Code §§ 46A-6N-1 to -9).
[29] *See* Appendix O (Wis. Stat. § 804.01(2)(bg)).

Florida Should Regulate TPLF Agreements

Florida should join these states in further regulating TPLF. Requiring disclosure of litigation financiers' involvement would also align Florida with the best practices recommended by the American Bar Association. *See* U.S. Gov't Accountability Office, *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* 27-29 (Dec. 2022).[30]

HB 1157 is thus a step in the right direction. The bill would authorize courts to review litigation financing agreements in certain judicial proceedings. In a class action, a court could consider such an agreement to determine if the class representative and class counsel can fairly and adequately protect the interests of the class. In actions that involve a common question of law or fact, the court could similarly review a financing agreement when assessing whether lead counsel or co-lead counsel can adequately and fairly represent the parties. (Proposed § 69.103, Fla. Stat.)

The bill also establishes several prohibitions for litigation financiers. Under the proposed law, a financier would be barred from:

- directing or making decisions regarding the course of the legal action, including any settlement;
- receiving a share of the proceeds greater than the collective amount recovered by the plaintiffs after fees and costs are paid;
- paying or offering referral fees or other consideration to any person, including attorneys or healthcare providers, for referring a potential client;
- assigning or securitizing a litigation financing agreement; or
- acquiring any rights to the underlying claim, except for the right to receive proceeds as stipulated in the financing agreement. (Proposed § 69.105, Fla. Stat.)

Furthermore, the bill introduces specific disclosure requirements for agreements involving foreign funding. If a party or their counsel enters into a litigation financing agreement with a foreign person, foreign principal, or sovereign wealth fund, they must file a notice with the court. This notice must be filed within 14 days of executing the agreement or 7 days after filing the action, whichever is earlier. The disclosure must identify the existence of the funding agreement, the legal name and jurisdiction of the foreign funder, and any foreign entities that own 3% or more of the financier. However, the agreement's dollar amounts, financing terms, and other proprietary details are not required to be disclosed. (Proposed § 69.107, Fla. Stat.)

This section also prohibits foreign financiers from using domestic affiliates to evade these disclosure rules or sharing proprietary, privileged, or national security-related information with a foreign entity. These prohibitions apply if a foreign entity directly or indirectly contributes 5% or more of the funds provided under the litigation financing agreement. (Proposed § 69.107, Fla.

[30] *Available at* https://www.gao.gov/assets/gao-23-105210.pdf.

Stat.)

Finally, any litigation financing agreement executed in violation of these provisions would be considered void and unenforceable. (Proposed § 69.111, Fla. Stat.)

As one commentator noted, "[w]ith the court finally aware of the presence of the third-party funder, it will have the opportunity to address any suspicious legal strategies and hold lawyers accountable. Requiring disclosure of any personal interest in the lawsuit will ensure that the court is privy to any improper personal agenda or serious conflicts of interest." Anusheh Khoshsima, *Malice Maintenance is "Runnin' Wild": A Demand for Disclosure of Third-Party Litigation Funding*, 83 Brook. L. Rev. 1029, 1053-54 (2018). By mandating disclosure, Florida courts will be equipped not only to detect and address conflicts of interest, but also to preserve the integrity of the judicial process by ensuring that all parties' true interests and sources of influence are transparent and subject to appropriate scrutiny. Further, the prohibitions on litigation financiers are designed to preserve the integrity of the legal process by safeguarding the attorney-client relationship, preventing conflicts of interest, and ensuring that the plaintiff, rather than the financier, remains the principal beneficiary of the action.

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For far too long, institutional investors have been allowed to invest in Florida litigation with little oversight, to the detriment of the parties and the court system itself. The Florida Justice Reform Institute thus HB 1157 and regulation of TPLF agreements.