LITIGATION AND DISPUTE RESOLUTION FUNDING

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Third-party litigation funding (TPLF), first pioneered in Australia two decades ago, is now a global, multi-billion-dollar business.

The returns for investors who undertake to finance plaintiff litigation are reported to be as high as 400%. Advocates point out that TPLF enables injured parties who might not otherwise be able to afford to bring a lawsuit if they had to depend solely on their own resources, a lifesaving source of financing that is always non-recourse. However, critics believe there are downsides that adversely affect judicial and administrative proceedings worldwide. As is often the case with exceptional opportunity: The greater the risk, the greater the reward.

A TPLF Primer

TPLF (or dispute resolution funding) is a financial arrangement whereby the funder of litigation agrees to pay a litigant's legal fees and expenses in exchange for receiving a significant percentage of any recovery upon the plaintiff obtaining a judgment or reaching a settlement with the defendant. Those expenses can be quite substantial and include such items as expert witness fees, possibly lab testing fees, and other similar outside costs. Despite the fact that TPLF started off as a litigation-funding mechanism, it has now been expanded to include funding for arbitration cases. The key factor for the funders is how strong is the likelihood of a solid, winning recovery, whether by trial, settlement, or arbitration award. Thus far, their track record for picking cases that are likely to bear financial fruit is quite good, with a reported 96%-98% recovery success rate. And hedge funds that invest in TPLF boast an average return that is ten times that of the global average for hedge funds.

Structuring the Financing

The agreement entered into between the funder and the plaintiff is not a loan agreement; rather, the funder extends non-recourse financing up to a certain cap amount. At that point, all risk is on the funder due to the fact that if, in the end, there is no recovery out of the claim, then the funder will lose their investment, the plaintiff is not liable for anything, and there is no recourse for the total-loss investment.

But in exchange for taking such a risk, the funder stands to reap quite a windfall out of the plaintiff's successful judgment or settlement, with the typical percentage being 25%-40%. If the plaintiff's attorney carves out another 33%, the plaintiff may be left with the smallest portion of the recovery of anyone, despite having gone through the pain, suffering, and often times considerable future suffering from personal injury, medical malpractice, or workers' compensation injuries. And that—according to some critics of the TPLF practice—is where the system works an injustice on the true victim of the claim.

TPLF and Class Actions

Aside from the aforementioned relatively paltry recovery percentages that plaintiffs receive under TPLF-structured financing, there is also criticism that given the very deep pockets behind the funded litigation and the lack of upfront risk on the plaintiff, there is a strong tendency to go full-bore through the trial process rather than reach an early and amicable settlement. This, in turn, overly burdens the judicial system, further clogging already backed-up dockets. Furthermore,

Executive Summary

› The Issue
What are the risks and rewards of TPLF?

› The Gravamen
With a 96%-98% success rate, and stratospheric rates of return, the risk for the funder is negligible and the reward great, while for the plaintiff, the choice is to agree to a small cut of the recovery or no recovery at all.

› The Path Forward
TPLF plays an important role globally in accessing otherwise unattainable litigation options but must have greater oversight put in place.

legal reform advocates argue that TPLF lacks transparency and in practice turns 'whether to sue' litigation decisions over to outside investors.

In particular, TPLF plays a significant role in Class Action lawsuits—expensive undertakings to begin with—which oftentimes might have to be abandoned save for TPLF investment. But that in itself poses an ethical consideration when it comes to defining the class and obtaining approval for settlement from 'class' members. In Australia, for example, where there is no class certification procedure under which a judicial order would bind all class members to the funding agreement, TPLF funders insist that class members agree in writing to ensure the funders' percentages in the event of successful litigation. As a result, an 'opt in' class is created, which limits the number of class beneficiaries only to those who have signed the agreement.

A Call for Greater Oversight

To address the issues surrounding TPLF funding of Class Action lawsuits in Australia, legislation was passed that would limit the fees for class action lawyers and funders to a maximum of 30% of any total payout and, at the same time, give courts the authority to approve and modify funding agreements, besides requiring that funders be licensed.

In June 2022, the U.S. Chamber of Commerce's Institute for Legal Reform (ILR) and twelve EU business and trade associations issued a joint statement endorsing the European Parliament Legal Affairs Committee's report on Responsible Private Funding of Litigation. In the EU, TPLF has been growing at an exponential rate, and despite TPLF having various earmarks of a commercial financial practice, little regulation existed to put in place safeguards for effective oversight. The EU report and the ILR's endorsement of that report were considered the first steps in bringing some measure of sensible control over TPLF financing of litigation both overseas and in the U.S.

Risk-Benefit Analysis

TPLF litigation funding may not be the right path to take in every case. However, for the plaintiff who cannot afford to pursue any legal remedy without such financing assistance, the answer is clear. It is now up to the regulators to see to it that the plaintiff is not only recompensed for loss or injury but that their position as stakeholder is protected as well.

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- CHRISTOPHER BOGART, CEO, BURFORD CAPITAL

Action

1 Best Interests of the Client:

The attorney must consider whether the acquisition of TPLF funding is an absolute in order to proceed with litigation, given the client's financial situation, available resource options, and the merits of the case.

2 Selling to the Funders:

The attorney must be prepared to make the case to the TPLF hedge fund investors the same as he or she would be required to do in pursuit of any other investment funding for a client.

3 Disclosure to Client:

The downside of TPLF funding for the client in terms of a significant reduction in net recovery must be fully explained to the client in writing upfront.

4 Undergoing Changes:

TPLF funding practices are currently being closely scrutinized by legal reform advocates and similar parties and will likely come under stricter regulation, which the attorney must be aware of.

Further Reading

1. https://www.lexisnexis.co.uk/legal/guidance/dispute-resolution-funding-an-introduction-funders-perspective
2. https://www.law.com/2017/03/29/who-rules-the-world-of-litigation-funding/
3. https://news.bloomberglaw.com/us-law-week/demystifying-the-litigation-funding-process
4. https://instituteforlegalreform.com/blog/third-party-litigation-funding-buying-trouble-across-the-globe/
5. https://www.cbsnews.com/news/litigation-funding-60-minutes-2022-12-18/
6. https://associationoflitigationfunders.com/about-us/litigation-finance/

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After receiving his Juris Doctor degree from The John Marshall Law School in Chicago, Mr. Brochin served as an Administrative Law Judge with the Illinois Department of Labor for six years where he presided over cases dealing with job separation issues and matters pertaining to contested Unemployment Insurance claims. He also co-wrote the agency's administrative rules, and periodically served as a 'ghost writer' for Board of Review decisions.

Following that position, he was Director of Development for a Chicago-area non-profit college where he was responsible for High Net Worth donations to the institution. For the next eighteen years he practiced as a solo practitioner attorney with an emphasis in the fields of Real Estate law and Commercial Contracts transactions, and was an agent for several national title insurance agencies.

In 2003 he was recruited to head up a U.S. title insurance research office in Israel, a position he held for four years, and between 2007-2017 he participated in litigation support for several high-profile cases. He has taught Business Law as a faculty member of the Jerusalem College of Technology, and has authored a wide variety of legal White Papers and timely legal articles as a professional legal content writer for GPL clients. Separate from his legal writing, he has co-authored academic articles on Middle East security topics that have been published in peer-reviewed publications.

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William Anderson is Managing Director and Head of Law & Compliance. He leads the GreenPoint practice in providing regulatory, legal, and technology solutions to law firms, legal publishers, and in-house law departments around the world, overseeing our team of experienced US attorneys and data and technology experts. Will has over 25 years' experience working with corporations to improve the management of their legal and corporate compliance functions. Will began his legal career as a litigator with a predecessor firm to Drinker, Biddle LLP. He then served as in-house counsel to Andersen Consulting LLP, managing risk and working with outside counsel on active litigation involving the firm.

Will has leveraged his legal experience interpreting regulations and appearing before federal (DOJ, SEC, FTC) and state agencies (NYAG) to oversee research and other areas at Bear Stearns. In this capacity, he counseled analysts on regulatory risk and evolving compliance requirements. Will also consulted on the development of a proprietary tool to ensure effective documentation of compliance clearance of research reports. Will then went on to work in product development and content creation for a global online compliance development firm pioneering the dynamic updating of regulated firms' policies and procedures from online updates and resources. Will holds a Juris Doctorate with High Honors from the Washington University School of Law in Saint Louis and is admitted to state and federal bars. He lives in Pawling, NY, with his wife and daughter.

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