



Third Party Litigation Funding

OVERVIEW

- Third party litigation funding (TPLF) is the practice where an outside party, with no direct interest in the claim, pays for the cost of a lawsuit in exchange for a portion or percentage of any award.
- Litigation funders gamble on the outcome of litigation, treating the misfortunes of others as an investment opportunity. They are unregulated, and do not even need to disclose their involvement in a case. They are free to try to direct litigation towards the outcome that favours them, rather than the interests of the parties to the case, or the interests of justice. Unregulated litigation funding leaves the justice system vulnerable to abuse, and prioritizes profit over justice.
- TPLF threatens to increase litigation in the UK, which will increase the cost of doing business, and will increase prices for consumers.
- It is imperative that the Government regulate this industry now, to protect consumers and the civil justice system from being exploited for profit, and to prevent TPLF from negatively impacting the economy.

WHAT IS TPLF?

- Litigation funders provide finance to claimants or directly to claimants' lawyers to pay the legal costs of a claim, in exchange for a share of any payout awarded by the court or by way of a settlement.
- Many of these litigation funders are investment vehicles operated by hedge funds or other financial services firms. They are solely motivated by the potential profit in a lawsuit.
- Litigation funders cherry-pick the cases most likely to provide a return on their investment. Providing access to justice to impecunious claimants is not a relevant factor in their calculation. Nor is the pursuit of justice. Whether a claim has any legal merit is merely a factor in calculating their risk and potential return.
- If the claim is successful, litigation funders take a substantial percentage of the proceeds awarded to the claimant, often up to 30 to 40 per cent.
- Litigation funders act in the shadows, as they are not obliged to disclose to their opponents or to the court their direct interests in—and influence over—the litigation. A court making an award to victims of a wrongdoing may not realise that only a fraction will actually reach them, with the rest being diverted to secret investors in the case.



Third Party Litigation Funding

THE IMPACT ON BRITISH JUSTICE: KEY CONCERNS

- Third party litigation funding is fostering a society where the civil justice system is secretly exploited for profit rather than for the administration of justice. The rise of “no-win, no fee” cases and cold-calling by claims management companies encouraging claims for compensation for personal injuries, and PPI mis-selling is only the start. Third party litigation funding converts people’s misfortunes and potential claims into a commodity for the funder’s own profits.
- If the growth of TPLF is allowed to continue unregulated, there will be an increase in litigation as funders compete with each other to find and promote claims which present them with opportunities. As the most “profitable” claims are cherry picked, the competition for business will lead to more spurious claims being brought.
- Without a regulatory framework to restrain them, litigation funders can push their own interests in a case over the interests of the claimants. The lawyers involved in taking claims are faced with potential conflicts between their duties to their clients and their need to satisfy the funders paying their bills, and those interests are not always aligned. The strategy and the decisions over how a claim is pursued would normally rest with the claimant, under the advice of their lawyer. When funders are involved the objective of ensuring a good “return on investment” for that funder must also be considered, clouding the pursuit of justice.
- Until TPLF is regulated, the overstretched civil justice system is vulnerable to unscrupulous litigation funders establishing themselves and secretly funding cases to game the system for their own ends. In other jurisdictions, there are ample examples of litigation funders taking over cases and steering the outcome towards the maximization of their returns, leaving the clients with little or nothing.
- TPLF will lead to an increase in the cost of doing business as companies of all sizes spend their resources on defending themselves, diverting their energies away from growing their businesses. Even if a company is not targeted in a lawsuit: its costs will increase through higher insurance premiums, driven by the risk of litigation; innovation will be curbed as companies take a zero-risk approach, sticking with what they know; and jobs will be lost as companies inevitably become less competitive. Such costs will ultimately be borne by all consumers.

Third Party Litigation Funding

TPLF AND CLASS ACTIONS

- The UK already has court procedures for class or group actions. The Government is in the process of expanding these considerably, including through the introduction of “opt-out” class actions for breaches of competition law.
- Collective actions allow a group of claimants to bring similar claims against one or more defendants in a single set of proceedings, sharing the legal costs and risks amongst them.
- The Government’s proposed “opt-out” litigation will allow a self-elected representative to bring a case to court on behalf of everyone in the UK who may potentially have been harmed by the same breach of competition law. For example, if you potentially suffered loss as a result of anti-competitive conduct by a company, someone could bring a claim to court on your behalf and on behalf of everyone else in a similar position without seeking your consent or even without your knowledge. In comparison, in “opt-in” proceedings, you would have to sign up to participate in the claim.
- The potential damages are therefore much higher in “opt-out” than “opt-in” actions as the class size is not usually known, and there are many more class members (claimants) than in an “opt-in” action. As the class size grows, each individual member has less influence and control over how the claim is conducted on their behalf.
- Because “opt-out” collective actions often involve huge monetary claims, collective actions increase the pressure on a business to settle in order to avoid the costs and risks of litigation, even when the business has meritorious defenses to the claims. These very features can also make “opt-out” class actions attractive to litigation funders.
- For these reasons, unless it is clarified that litigation funders cannot “invest” in “opt-out” class actions, there is a risk of these mechanisms being exploited for private reward entirely unrelated to the justice of the case.
- International experience has shown that class actions, and in particular, “opt-out” class actions, are prone to serious abuse because of the opportunities they create, including compelling businesses to settle to avoid the legal costs and reputational damage of litigation.



Third Party Litigation Funding

URGENT ACTION REQUIRED

Policymakers have largely ignored the emergence of TPLF, which has grown rapidly in the UK without proper scrutiny or regulation.

The industry has a voluntary code of conduct. The code of conduct was drafted by funders themselves, is extremely weak, and applies to only the small proportion of funders who have signed on to the funders' voluntary association.

In light of the failure of the industry to self-regulate in a meaningful way, the Government should introduce, as a matter of urgency, robust regulations which safeguard consumers against conflicts and abuse by funders, including:

- requiring all litigation funders in the UK to be licensed and to abide by the rules; and
- having an effective enforcement regime for funders who do not comply or breach the rules; and
- ensuring transparency in the funding agreement (such as the disclosure of any existing relationships between the funder, the claimant's lawyers and the claimant) and mandating that the agreement should be disclosed to the court and opposing parties. Additionally,
- funders should be liable for any adverse costs order, where the claimant does not have insurance cover, or inadequate cover; and
- there should be restrictions on the fee structure designed to prevent litigation abuse; and
- funders should be prevented from influencing, either directly or indirectly, the strategies and decisions over how a claim is pursued.



Third Party Litigation Funding

ABOUT THE JUSTICE NOT PROFIT CAMPAIGN

The campaign is backed by the U.S. Chamber Institute for Legal Reform, a not-for-profit public advocacy organisation affiliated with the U.S. Chamber of Commerce, the world's largest business federation, which represents the interests of more than three million businesses of all sizes, sectors and regions, in addition to state and local chambers and industry associations. Many of the U.S. Chamber's members are companies that conduct substantial business in the UK or are British-owned and operated. ILR is therefore deeply interested in the orderly administration of justice in the UK.

ILR's mission is to restore balance and ensure justice for both claimants and defendants, and maintain integrity within the civil legal system. We do this by creating broad awareness of the impact of litigation on society and by championing common sense legal reforms at the state, federal and global levels. Since its founding in 1998, ILR has worked diligently to limit the incidence of litigation abuse and has participated actively in legal reform efforts in the United States, the European Union, the UK and elsewhere.

ILR is sharing its experiences of the worst aspects of the U.S. litigation culture with UK policymakers and other stakeholders to protect the integrity of the UK's civil justice system.

For more information on the U.S. Chamber Institute for Legal Reform please visit www.instituteforlegalreform.com

CONTACT DETAILS

For more information, please contact info@jnp.co.uk