Proponent Testimony

ON: Hearing on Senate Bill 19

TO: Members of the Ohio Senate Judiciary Committee, Ohio Legislature

BY: Nathan Morris, Senior Vice President for Legal Reform Advocacy, U.S. Chamber of Commerce's Institute for Legal Reform

DATE: December 6, 2023

Chairman Manning and Members of the Committee:

Good morning and thank you for the opportunity to appear today to speak on Senate Bill 19.

My name is Nathan Morris, and I am the Senior Vice President for Legal Reform Advocacy at the U.S. Chamber of Commerce's Institute for Legal Reform ("ILR").

The U.S. Chamber is the world's largest business federation. It represents more than 300,000 direct members and indirectly represents the interests of more than three million businesses of all sizes, sectors, and industries from every region of the country and across Ohio. ILR champions a fair legal system that promotes economic growth and opportunity.

Let me begin by noting that, for many of the reasons shared by other proponents, the Chamber supports the reforms proposed in Senate Bill 19. I would like to use my time today to discuss these reforms in the context of an ongoing, nationwide debate on Third Party Litigation finance or "TPLF."

TPLF is an umbrella term that encompasses any transaction in which a profit-motivated outsider, an entity not directly involved in a dispute, provides funds with an expectation that they will be repaid, in whole or in part, from a later settlement, judgment, or award.

The Chamber believes TPLF has the potential to distort our justice system, foment non-meritorious litigation, needlessly prolong disputes, and harm both businesses and consumers.

Third party financiers and their transactions are not all alike. At the risk of oversimplifying, I would like to distinguish two types of TPLF.

First, large-scale litigation funding. These are transactions that involve substantial investments in single cases, small groups of cases, or entire litigation portfolios. Funds are used to support advertising campaigns, pay litigation expenses, hire experts, and so on. TPLF industry insiders estimate that over $13 billion is currently invested in U.S. lawsuits.[1]

[1] Westfleet Advisors, "The Westfleet Insider: 2022 Litigation Finance Market Report", at https://www.westfleetadvisors.com/wp-content/uploads/2023/02/WestfleetInsider-2022-Litigation-Finance-Market-Report.pdf.

Funders try very hard to prevent parties, courts, and the public from learning about these transactions.

What do I mean by "large scale?" Millions of dollars. The CEO of one prominent funder recently indicated that his firm's deals rarely involve under $5 million.[2] The same firm provided over $140 million to support a series of complex lawsuits over meat pricing.[3] Unsurprisingly, given the large amounts involved, it appears that large-scale funders at times exert influence over the litigation they support. The $140 million meat lawsuit investment only became publicly known when a dispute arose between the company that took the money and the investor that provided, which spilled into public view. In short, the company wanted to settle its suits. The litigation funder blocked the settlements and ultimately took control, via assignment, of the litigation.[4]

This sequence of events is one that should deeply concern the Committee. A funder, operating in secret, controlled *the* key decision in massive litigation over the price of something that most people in this room purchase. Large-scale funders may exert influence over or decide other key litigation decisions, including the selection of counsel and briefing strategies.

The Chamber has other serious concerns with large-scale investment funding, including that it may be hidden from and harm consumers.[5] It may also allow foreign actors to advance their interests by financially supporting U.S. lawsuits. We are hardly alone in our concern with the potential impact of foreign litigation finance. Bipartisan federal legislation introduced earlier this year would ban sovereign wealth funds from investing in U.S. lawsuits,[6] and Florida's two U.S. Senators urged federal courts in their state to require disclosure of foreign investments.[7] I would note that Sen. Marco Rubio currently serves as Vice Chair of the U.S. Senate Select Committee on Intelligence. Ohio Attorney General (AG) Dave Yost also expressed concern about secret foreign adversary funding in U.S. courts in a letter with 13 other AGs to the U.S. Department of Justice.[8]

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[2] Lesley Stahl, *Litigation Funding: A multibillion-dollar industry for investments in lawsuits with little oversight*, 60 Minutes, July 23, 2023, at https://www.cbsnews.com/news/litigation-funding-60-minutes-transcript-2023-07-23/.
[3] Editorial Board, *The Litigation Finance Snare*, Wall Street Journal, March 21, 2023, at https://www.wsj.com/articles/burford-capital-litigation-financing-sysco-lawsuit-boies-schiller-a4b593fb.
[4] Alison Frankel, *Sysco cedes antitrust claims to litigation funder Burford as two sides drop cases*, Reuters, June 29, 2023, at https://www.reuters.com/legal/litigation/column-sysco-cedes-antitrust-claims-litigation-funder-burford-two-sides-drop-2023-06-29/.
[5] In re Girardi Keese, No. 2:20-bk-21022-BR (Bankr. C.D. Cal. 2022) (Complaint), at https://images.law.com/contrib/content/uploads/documents/403/81072/Girardi-Keese-trustees-lawsuit-against-California-Attorney-Lending.pdf.
[6] S. 2805 – 118th Congress (2023-2024): Protecting Our Courts From Foreign Manipulation Act, at https://www.congress.gov/bill/118th-congress/senate-bill/2805.
[7] Press Release, *Rubio, Scott Push for Transparency For Foreign Third Party Litigation Funding in U.S. Courts*, November 3, 2023, at https://www.rubio.senate.gov/rubio-scott-push-for-transparency-for-foreign-third-party-litigation-funding-in-u-s-courts/.
[8] *See* December 22, 2022 letter by 14 state attorneys general, at https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2022/pr22-55-letter.pdf.

I would be pleased to share additional information on large-scale funding should that interest the Committee.

The second type of TPLF is one that is already partially regulated in Ohio, direct-to-consumer transactions defined in current law as "non-recourse civil litigation advance[s]."

This is a very different business than large-scale lending. Many direct-to-consumer transactions are in the $3,000 to $5,000 range, although larger amounts are sometimes at issue. $5,000 is, of course, orders of magnitude smaller than the $5 million minimum I mentioned earlier that one large-scale funder treats as a "floor." Smaller does not, though, mean inconsequential.

Earlier this year, a federal judge overseeing a massive multi-district litigation required disclosure of direct-to-consumer funding arrangements and barred any new consumer funding transactions without her approval.[9] The judge feared "predatory lending practices" and explained that "interest rates well above market rates . . . can interfere with [claimants'] ability to objectively evaluate the fairness of their settlement options."[10]

Put more plainly, predatory advances, even when fully non-recourse, may prompt plaintiffs to reject entirely reasonable settlement offers, prolonging litigation and increasing its expense. This can result in more charges from the lender and drive consumers to risk "all or nothing" trials.

Ohio's existing civil litigation advance law is laudable. Significantly, Ohio consumers are already protected against investor interference in the prosecution of their cases. Current law requires funders to clearly and unequivocally, in their contracts, disclaim any right or ability to make decisions about a consumer's claim. It also ensures that consumers can cancel litigation advance contracts for a reasonable period after receiving funds.

But it can and should be improved.

First, it should incorporate additional, stronger protections against predatory practices. Senate Bill 19, for example, bars commission and referral arrangements between litigation advance providers and attorneys, law firms, and medical providers. It also protects against "churn and burn" funding by limiting securitization and other assignments of interests in plaintiffs' cases.

Second, it should require disclosure of advances to all parties and to courts. This is an area where Ohio is at risk of falling behind both courts, as mentioned above, and neighboring states. Earlier this year, Indiana updated its consumer advance law to require lawyers and litigants to disclose the existence of litigation advances and, if a case proceeds to discovery,

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[9] Alison Frankel, *3M judge issues extraordinary order to shut down 'predatory' litigation funding*, Reuters, September 5, 2023, at https://www.reuters.com/legal/transactional/3m-judge-issues-extraordinary-order-shut-down-predatory-litigation-funding-2023-09-05/.

[10] Id.

provide relevant documents.[11] Large advance providers and a trade association have expressed openness to an Indiana-style tiered disclosure approach in other states.[12]

Senate Bill 19 is positive legislation. I urge you to move this bill forward and to consider ways it could be improved as it advances through the legislative process.

I also urge the Committee to consider separate legislation that would address the unique challenges and risks posed by large-scale litigation funding.

Thank you for your time and for your consideration of this bill. I'd be pleased to answer any questions from the Committee.

[11] H.B. 1124 – 123rd General Assembly (2023), at https://iga.in.gov/pdf-documents/123/2023/house/bills/HB1124/HB1124.05.ENRS.pdf.
[12] *See e.g.* Consumers in Crisis Protection Act, North Carolina SB 176, 156th Session. (2023), at https://www.ncleg.gov/BillLookUp/2023/S176.