

# PUT CLAIMANTS FIRST BY REGULATING LITIGATION FUNDING

**WHAT IS TPLF?** Third party litigation funding (TPLF) allows hedge funds and other financiers to invest in lawsuits in exchange for a percentage of any settlement or judgment. TPLF is largely unregulated, allowing funders to operate in the shadows.

## HOW IT WORKS

Third parties: financiers, hedge funds

Invest in lawsuits in any field of law by paying for legal, court & other claimant costs

Select cases with the highest possible settlement or award (e.g. shareholder cases, collective actions, cartel cases)

Receive a share of the settlement or award

## LITIGATION FUNDING MARKET IN 2021:

- 50 funders in the UK
- 27 in the Netherlands
- 20 in Germany
- 10 in Austria
- and many in other EU countries
- **Between €40 billion and €80 billion market globally**



*Rate of return on investments can be as high as 500%*

## COMMON MISCONCEPTIONS:

- Funders provide access to justice
- TPLF is a loan
- TPLF replaces legal aid
- TPLF is already regulated
- Funders operating in secret benefits consumers
- It is the claimants who are asking for funding



## THE FACTS

- Litigation funders are largely unregulated, unlike other financial and legal commercial activities. There are no rules governing TPLF investments in litigation.
- Funders act under the radar. Judges, claimants, and defendants are often unaware of funding involved in their cases.
- Litigation funders gamble on litigation and make excessive returns on their bets.
- In view of the high stakes, funders want to control the cases and have a say on the settlements.
- Because funding agreements are kept secret, funders can include dubious provisions that put their interests above the claimants. In some collective actions, funders are paid before the claimants and even have an arrangement to receive more money the fewer claimants that come forward.
- Funders have no fiduciary duty to act in the best interest of the claimants.



# SUGGESTED SAFEGUARDS

To prevent litigation abuse and ensure adequate compensation for claimants if they incurred material damage, the following regulatory safeguards should be considered for all types of litigation funding:

## LICENSING

A funder must only be permitted to provide litigation funding if it is authorised by a supervisory authority.

## TRANSPARENCY

Funding agreements must be disclosed to inform the judge and the defendant about the appropriateness of the investment agreement.

## AVOID CONFLICTS OF INTEREST

A contract between funders and claimants must also clarify the relationship between lawyers and funders to prevent lawyers from being torn between protecting the claimants' interests and pleasing the investors.

## NO FUNDER CONTROL

The claimants and their lawyers—not the funders—must determine the course of litigation and agree on the settlement to best serve the interests of the claimants.

## PROPORTIONATE SHARE OF THE REWARD

Claimants should receive adequate compensation if they incurred material damage and they should receive it before the funders get paid. Funders should receive a proportionate reward and be paid last.

## ADEQUATE CAPITAL INCLUDING FOR ADVERSE COSTS

Funders must have sufficient capital to pay for the legal, court, and other costs for the full duration of the litigation process. In case the funded case is lost, the funder must be liable for these full adverse costs.

## FIDUCIARY DUTY

Just like lawyers, funders must act in the best interests of claimants and prioritize the claimants' legal interests over their own economic interests.



## SELF REGULATION *Tried and Failed*

- It failed in the UK: only 12 of the 50 funders are members of the Association of Litigation Funders (ALF) with its self-regulatory code.
- The code's sanctions have no teeth: a £500 fine or being expelled from the organisation for violations, after which the funder can continue the activities for which it was expelled.
- This global multi-billion-euro industry has outgrown self-regulation.



## IS FUNDED LITIGATION THE ONLY ROUTE TO OBTAIN ACCESS TO JUSTICE?

No. There are better, cheaper, fairer, and faster methods to provide claimants with redress. These alternative routes include mediation, Ombudsman systems, ADR/ODR, and grievance systems provided by consumer organisations and companies themselves.



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