



House Committee on Judiciary

Testimony in Support of House Bill 2510- Third party litigation financing disclosure Presented by Eric Stafford, Vice President of Government Affairs, Kansas Chamber

Wednesday, January 31, 2024

Madam Chair and members of the committee, my name is Eric Stafford, Vice President of Government Affairs for the Kansas Chamber. The Kansas Chamber represents small, medium and large businesses of all industry segments across the state. We appreciate the opportunity to testify in support of House Bill 2510, which requires disclosure of third parties with financial interest in litigation. HB 2510 reflects amendments based on feedback during the hearing last year on Senate Bill 74. I will provide more context on those changes later in my testimony.

The U.S. Chamber Institute for Legal Reform (ILR) first published information on third party litigation funding (TPLF) back in 2009, but this practice was pretty limited to the country of Australia. However, a new niche market of hedge funds has been created for the purpose of investing in litigation in the outcome of lawsuits betting on their success and a financial return on their investment.

According to a 2020 publication from ILR, some estimate “that litigation finance is at least a \$10 billion industry.” This new industry has been called “thriving” due to the expansive growth of the practice of litigation financing. This type of practice opens the door to opportunities for frivolous litigation. In short, these companies are acting as investors and base their decisions on their expected return on investment, turning our judicial system into the stock market.

There are ethical questions that arise from this practice. TPLF encourages fee-sharing between lawyers and non-lawyers, and they undermine a party’s control over their lawsuit. The great thing about America’s capitalistic structure is these entities have the right to try and make money off of their investments, barring the ethical questions of whether they should or not. However, what we’re asking in HB 2510 is that this information be properly disclosed to the defense that there is a third party with a financial interest in the outcome of the case.

During testimony last year, a representative from Burford Capital said “It is very clear that funders do not control litigation. We do not control the day-to-day decisions, and we don’t control settlement decisions” (43 minute mark of 2/17/23 hearing-

<https://www.youtube.com/watch?v=OBruiq3VQDA&list=WL&index=1&t=1128s>).

However, in a March 2023 Wall Street Journal article, the article starts “In a notable twist, it {Burford} is now locked in its own litigation as it tries to block a settlement that one of its business clients wants” (<https://www.wsj.com/articles/burford-capital-litigation-financing-sysco-lawsuit-boies-schiller-a4b593fb>, also attached with our testimony).

Sysco food supplier partially funded a lawsuit using Burford as an investor in the case against food producers for price fixing. When Burford didn’t approve of the settlement terms Sysco was negotiating, according to the article, Burford sought to rewrite their contract with Sysco, directly contradicting statements made by their representatives last year before the Kansas Senate Judiciary Committee.

According to ILR, "In 2018, Wisconsin enacted a comprehensive litigation funding disclosure requirement. The Wisconsin law provides that "a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person ... has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise."

The U.S. District Court of Northern California adopted TPLF disclosure requirements for class action lawsuits in 2018, similarly followed by the New Jersey Federal District Court in 2021. Montana also passed disclosure requirements with more teeth than what is included in HB 2510. Louisiana passed legislation last year to be vetoed by their Democratic Governor. With a Republican now in office, that legislation is expected to move forward again in 2024 according to our experts.

Just last week, the Florida Senate Judiciary Committee approved 10-0 a bill on this issue. Arizona and Mississippi also have pending legislation in 2024.

Wisconsin

(bg) Third party agreements. Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.

As I mentioned at the beginning of our testimony, HB 2510 reflects new language based on opposition testimony last year. First, instead of the word shall, we mirrored existing Kansas law for discovery requests on insurance agreements that a party "may obtain discovery." Second, opponents from last year included medical loan and personal loan entities who supply short-term loans to individuals needing to pay medical bills or expenses while awaiting payment through settlement or award. We worked out the language included in HB 2510 with those entities to ensure they would not be impacted.

We are truly seeking disclosure only for those third-party entities with a financial interest in the outcome of the case. We also included language regarding admissibility of evidence to the jury. Our intention was not to make the jury aware of a third-party financing arrangement and that language is now included in the bill.

I will close with comments from a 60 Minutes episode which aired just before the start of the 2023 session.

Transcript from 60 Minutes episode December 18, 2022:

But Maya Steinitz, a law professor at the University of Iowa, says there are ethics rules for lawyers, but not for these investors.

Maya Steinitz: The funders are not regulated. There's nothing precluding them legally from pressuring a client to settle. The rules of ethics are very clear that the lawyer has to abide by the wishes of the client. But human nature is human nature. There may be an inclination to be pulled towards the person who is paying.

Lesley Stahl: Why is this important? Why should someone out there who's not involved in a lawsuit care?

Maya Steinitz: For multiple reasons. First of all, there is this new industry and a new type of player, "litigation funders," who are reshaping every aspect of the litigation process - which cases get brought,

how long are they pursued, when are they settled. But all of this is happening without transparency. So we have one of the three branches of government, the judiciary, that's really being quietly transformed. And there's -

Lesley Stahl: Very little oversight.

Maya Steinitz: Very little oversight.

We believe House Bill 2510 offers a simple disclosure solution to protect against abuses in our state's legal system. Thank you for allowing us to testify in support of HB 2510, and I am happy to answer questions at the appropriate time.

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The Litigation Finance Snare

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PHOTO: JOHN MARSHALL MANTEL/ZUMA PRESS

Litigation financing has become a big business, and the largest firm in the U.S. is Burford Capital. In a notable twist, it is now locked in its own litigation as it tries to block a settlement that one of its business clients wants.

In a typical litigation financing deal, a firm like Burford fronts money to a company to pursue a lawsuit in exchange for a sizable piece of a settlement or verdict. The litigation funders work closely with trial lawyers to extract big payouts, and everyone gets private jets.

That's not what happened with Sysco, a food distributor whose antitrust litigation against meat suppliers was partly funded by Burford. Sysco hired New York-based law firm Boies Schiller Flexner to file antitrust claims against meat suppliers it accused of raising prices. Preparing for litigation, Boies Schiller pitched Sysco to bring in Burford, which it did.

The financing firm put up about \$140 million for the lawsuits and began to seek control over key elements of the litigation. When Sysco agreed to give its customers (restaurants and grocery stores) a piece of the antitrust claims in 2022, Burford objected and the two rewrote their contract to give Burford the right to review settlement offers, provided their consent is not “unreasonably withheld.”

You can see where this is going. In September Sysco decided to settle some claims with the meat suppliers. But Burford balked, claiming the proposed settlement was too low and that Sysco should continue litigating. In a September 2022 email to colleagues, Burford chief investment officer Jonathan Molot called the situation “an emergency” and added that “[w]e are going to have to sue them it seems. They are about to breach our contract.”

Burford has the right to look after its interests, but that's not how it sells its services. The company says publicly that its clients retain control of their lawsuits and that its role is only to provide extra cash to let litigation proceed when it might not otherwise. Burford CEO Christopher Bogart told CBS's “60 Minutes” in 2022 that clients are “free to run their litigations as they see fit,”

and work with their lawyers accordingly. While the firm might give advice, “the client is free to disregard that advice and take its own path.”

The facts look different here. Last fall Burford asked for a preliminary injunction to stop Sysco from settling, and in December it sought a temporary restraining order. Legal exhibits include an email from Burford’s Mr. Molot to others at Burford, confirming that he had spoken privately to Boies Schiller about whether the law firm would agree that the settlement was “unreasonably low.”

Both lawyers and funders claim the contingency-fee model helps businesses that otherwise couldn’t afford to litigate. But the arrangement also puts businesses at a negotiating disadvantage with their lawyers and funders whose priority is big paydays that may not be the best outcomes for clients.

Sysco filed suit March 8 in federal court in Illinois to allow its settlement agreement to proceed. We’d imagine the company regrets the entire exercise at this point. Let it be a cautionary tale.