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THIRD-PARTY LITIGATION FINANCING: UKRAINIAN AND AMERICAN PERSPECTIVE

ФІНАНСУВАННЯ СУДОВИХ ПРОЦЕСІВ ТРЕТІМИ ОСОБАМИ: УКРАЇНСЬКА ТА АМЕРИКАНСЬКА ПЕРСПЕКТИВИ

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The article examines the phenomenon of third-party litigation funding, which is Increasingly used in global legal practice as an effective tool to ensure access to justice for parties lacking their own resources to pursue complex and costly disputes. The author defines the concept of "third-party litigation financing," outlines its main types (consumer and commercial/investment funding), and describes the stages of the funding process – from initial case selection and legal due diligence to the conclusion of a funding agreement. Attention is given both to the advantages of this mechanism (expanding access to justice, risk-sharing, strengthening negotiating positions) and to its disadvantages (the risk of excessive control by investors, increased costs and prolonged proceedings, and reduced compensation shares for claimants).

A separate focus is placed on the American perspective, where legislative debates continue regarding the need for greater transparency and the introduction of taxation on funders' profits. In particular, recent U.S. congressional bills are analyzed, such as the Litigation Transparency Act of 2025 and the Tackling Predatory Litigation Funding Act, both of which aim to regulate the market through mandatory disclosure requirements and additional tax mechanisms. The author emphasizes that excessive regulation may lead to an outflow of investors and restrict access to funding for small companies, undermining the core purpose of third-party litigation financing as an institution.

The Ukrainian context is considered through the lens of numerous investment arbitrations brought against the russian federation in connection with the annexation of Crimea and military aggression. As of 2025, at least 13 such cases have been recorded, including the high-profile Naftogaz case, in which an international arbitral tribunal awarded Ukraine more than USD 5 billion in compensation. Against the backdrop of the state's enormous reconstruction needs (estimated by the World Bank at over USD 524 billion), third-party litigation funding has become a critically important instrument for attracting capital to pursue claims in international courts and arbitration proceedings.

Key words: litigation funding, third-party litigation funding, legal dispute, arbitration, litigation funding agreement, due diligence, BIT, Litigation Transparency Act of 2025, Tackling Predatory Litigation Funding Act.

У статті досліджується феномен фінансування судових процесів третіми особами, який дедалі частіше використовується у світовій правовій практиці як ефективний інструмент забезпечення доступу до правосуддя для сторін, що не мають власних ресурсів для ведення складних і дорогих спорів. Автор визначає поняття «third-party litigation financing», розкриває його основні типи (споживче та комерційне/інвестиційне фінансування), а також окреслює етапи процесу фінансування: від початкового відбору справи та проведення юридичного аудиту до укладення договору про фінансування. Увага приділяється як перевагам цього механізму (розширення доступу до правосуддя, розподіл ризиків, посилення переговорних позицій), так і його недолікам (ризик надмірного контролю з боку інвесторів, зростання витрат і затягування процесів, зменшення частки компенсації для позивачів).

Окремий акцент зроблено на американській перспективі, де на законодавчому рівні триває дискусія щодо необхідності підвищеної прозорості та запровадження оподаткування прибутків фондів. Зокрема, розглядаються останні законопроєкти Конгресу США, такі як: Litigation Transparency Act of 2025 та Tackling Predatory Litigation Funding Act, що спрямовані на врегулювання ринку через обов'язкове розкриття інформації та додаткові податкові механізми. Автор підкреслює, що надмірне регулювання може призвести до відтоку інвесторів і обмеження доступу до фінансування для малих компаній, що суперечить першочерговій меті інституту фінансування судових процесів третіми особами.

Український контекст розглянуто через призму численних інвестиційних арбітражів проти російської федерації у зв'язку з анексією Криму та військовою агресією. Станом на 2025 рік зафіксовано щонайменше 13 справ, серед яких резонансне рішення у справі «Нафтогазу», де міжнародний арбітраж присудив Україні понад 5 млрд доларів США компенсації. На тлі колосальних потреб у відновленні держави (оцінених Світовим банком у понад 524 млрд доларів) фінансування судових процесів третіми особами стає критично важливим інструментом залучення капіталу для переслідування вимог у міжнародних судах і арбітражах.

Ключові слова: фінансування судових процесів, фінансування судових процесів третіми особами, правовий спір, арбітраж, договір про фінансування судового процесу, юридичний аудит, Двосторонній інвестиційний договір, Закон про прозорість судового фінансування 2025 року, Закон про боротьбу з хижацьким фінансуванням судових процесів.

Litigation funding, also known as third-party funding ("TPLF") or litigation finance, is where a third party (with no prior connection to the litigation) agrees to finance all or part of the legal costs of the litigation, in return for a fee payable from the proceeds recovered by the funded litigant [1, p. 1].

Litigation funding is typically divided into two main groups: consumer and commercial or investment. Consumer litigation funding arrangements generally involve a plaintiff seeking financial support from a funder for living or other expenses, usually related to tort or personal injury claims. Alternatively, investment or commercial litigation funding arrangements often involve large – scale tort and commercial cases and alternative dispute resolution proceedings.

Two-thirds of such arrangements is invested in lawsuit "portfolios" rather than individual cases [2].

TPLF shifts the financial burden of litigation or arbitration to the funder's balance sheet, which makes this financing most suitable in cases where a client cannot objectively assess the likelihood of success or does not have the resources to pursue a claim.

This article is an author's attempt to set out a brief overview the third-party litigation funding concept its types, stages, Ukrainian and US perspectives.

Parties involved. Litigation funders vary in type, size, and investor base. For example, many funders are private entities that specialize in TPLF. They may obtain investment capital from institutional investors, such as endowments and pensions. Other firms may be multistrategy funders, which are firms that invest in various markets and asset classes. A small number of funders are large, publicly traded companies. Other funders are smaller firms that may be backed by single inves-

tors, such as high-net-worth individuals, or may be family offices or hedge funds that only occasionally participate in litigation funding [3, p. 14].

Process stages. The funding process begins with an initial meeting between the party seeking funding and the litigation. During this meeting, the claimant presented an overview of the case and discussed their funding needs with a funder. The litigation funder evaluates whether the case meets its investment criteria, assesses its potential merits, and then ensures that the goals and desires of both parties are aligned. Before disclosing detailed information about a case, the claimant and the litigation funder typically conclude a Non-Disclosure Agreement ("NDA") to protect the confidentiality of the information shared during the funding process [4].

When considering whether to invest in a claim, funders consider (the respective importance of which will vary by claim and by funder): (1) demonstration of healthy claim (2) margin of recovery somewhere higher than budget for funding (3) the value of the claim (4) the amount required to be advanced (5) jurisdictional obstacles (6) available defenses (7) the nature, length and type of the proceeding (8) the possibility of settlement (9) the creditworthiness of the client (10) the creditworthiness of the opposing party (with a view to being able to collect on the award) (11) counsel that has been selected and how counsel will be compensated (12) any other obstacles to recovery of an award [5, p. 1].

The above stages take place during the process of "due diligence", the aim of which to confirm whether a case is suitable for investment.

Once the review is complete, the funder decides whether to proceed with or decline the investment, knowing that approval exposes it to the full spectrum of risks connected with the dispute. If the decision is favorable, the claimant and funder formalize their arrangement by entering into a Legal Funding Agreement (the "LFA"). The LFA is the cornerstone document in third-party funding, establishing the financial and contractual framework of the funder's involvement in the dispute. While its financial terms generally mirror those outlined in the term sheet, they may be revised if due diligence reveals issues requiring adjustment. Typically, such agreements are not subject to disclosure.

Advantages

– *Access to justice:* Enables claimants (especially individuals or small companies) who lack resources to pursue meritorious claims without bearing

– upfront legal costs;

– *Risk sharing:* Transfers the financial risk of litigation to the funder; the claimant pays only if the case succeeds;

– *Additional leverage:* increase of leverage of litigants in settlement negotiations with available financial resources to pursue their claims. Therefore, third-party litigation funding helps balance power disparities in disputes where one party has significantly greater financial resources.

Disadvantages.

– *Excessive control*: TPLF allows funders to exercise undue control or influence over the litigation to the detriment of courts, defendants and plaintiffs. For example, in some TPLF agreements, there are provisions that allow funders to make strategic decisions like whether and when to settle, even if the plaintiff would rather proceed to trial. Unlike attorneys, funders do not owe a fiduciary duty to the plaintiffs and may not be acting in their best interest;

– *Increase of litigation costs:* TPLF can lead to increased litigation costs. For instance, TPLF may encourage the filing of frivolous lawsuits leading to defense expenses that would not normally be encountered. Additionally, cases involving TPLF agreements may involve discovery fights and motions pertaining to accessing the TPLF agreement themselves, thereby driving up the costs of litigation. Finally, cases involving third-party litigation funding result in longer case timelines [6, p. 20];

– *Reducing recovery*: Third-party funders generally do not have to abide by any ethical or fiduciary rules. Their priority is their financial investment, not the best interests of the plaintiffs. In fact, in some funded class actions, the funding agreements are structured so that the fewer people who claim their award, the more money the funder gets. Funders usually receive a significant portion of the proceeds (often 20–40%+), reducing the claimant's recovery.

American perspective

Washington, D.C. – Congressman Darrell Issa, Chairman of the House Judiciary Subcommittee on Courts, Intellectual Property, Artificial Intelligence and the Internet, Congressman Scott Fitzgerald (WI-05), and Congressman Mike Collins (GA-10) introduced HR 1109 – The Litigation Transparency Act of 2025. This is breakthrough legislation that will require the disclosure of parties receiving payment in civil lawsuits.

According to Darrell Issa, in hundreds of cases every year and in greater frequency, civil litigation is being funded by undisclosed third-party interests as an investment for return – including from hedge funds, commercial lenders, and sovereign wealth funds operating through shell companies. Third-party litigation funding also poses unique challenges in patent litigation cases, where too often investor-backed entities seek large settlements against American companies, distorting the free market and stifling innovation. This widespread anti-transparency environment requires a legislative remedy that provides disclosure of investors receiving payment based on the outcome of a case. The bill will also require disclosure of the financing agreement between investors and parties to these civil actions [7].

The latest development was related to the Tackling Predatory Litigation Funding Act was introduced in both House and Senate on 20 May 2025. It was to introduce a tax on profits earned by third-party funders is part of this bill. Specifics: funders could face a rate equal to the highest individual income tax rate (37%) plus the 3.8% net investment income tax [8].

The growing push in Congress to impose taxes on funders' recoveries and to require extensive disclosure of funding arrangements is likely to reshape the industry in the coming years. Measures such as the *Tackling Predatory Litigation Funding Act* could make funding significantly less attractive by subjecting funders' returns to the highest marginal tax rates, while disclosure obligations under the *Litigation Transparency Act* and restrictions on foreign investment under the *Protecting Our Courts from Foreign Manipulation Act* may deter certain investors altogether. Taken together, these developments suggest a regulatory environment that is increasingly skeptical of funders and more protective of transparency, but potentially less conducive to the free flow of capital into complex and expensive disputes.

If taxation and disclosure requirements become burdensome, many funders may withdraw from the U.S. market or raise their pricing, leaving smaller claimants without viable financing options. While these measures aim to safeguard courts from undue influence and protect litigants from predatory practices, the unintended consequence could be reduced access to justice, as companies and individuals without deep resources may find themselves unable to pursue legitimate claims. In conclusion, the industry stands at a crossroads: unless lawmakers strike a careful balance between oversight and accessibility, the tightening of regulations could slow the expansion of litigation funding in the United States and limit its role as a tool for leveling the playing field in high-stakes litigation.

Ukrainian perspective. Alternative investment managers are increasingly drawn to Ukraine's dispute funding market, particularly in the context of arbitrations arising from russia's unlawful actions. This interest reflects a broader global trend of financing high-value disputes in emerging markets, especially when proceedings are governed by respected common law juris-

dictions such as England and certain U.S. states. In such cases, careful structuring advice from local counsel remains essential to mitigate risks that claims could be challenged under doctrines of maintenance and champerty, which historically sought to prevent the commercialization of litigation.

As of late February 2025, the total cost of Ukraine's reconstruction and recovery is estimated at $524 billion over the next decade. This figure is based on the Fourth Rapid Damage and Needs Assessment (RDNA4), a joint study by the Government of Ukraine, the World Bank, the European Commission, and the United Nations. This total is up from the $486 billion estimated a year earlier, reflecting the continued destruction from ongoing russian attacks [9].

As of today, at least 13 investment arbitrations in total, twelve of which were filed under the russia-Ukraine Bilateral Investment Treaty, were filed against russia for expropriation and other breaches of the Ukraine – russia BIT. These cases include several claims brought by businesses with assets, including real estate, petrol stations, and airports [10] claims by Ukraine's state-owned bank Oschadbank, and a claim from state-owned oil and gas company Naftogaz.

Naftogaz' case is the largest one where it was commenced arbitration proceedings against russia in October 2016, seeking compensation for Moscow's seizure of its property in violation of a bilateral investment treaty between Ukraine and russia. Naftogaz had been the leading player in the natural gas industry in Crimea, and was active in gas exploration, production, transport, storage, processing, and distribution. On April 12, 2023, a tribunal ordered russia to pay Naftogaz more than USD 5 billion for russian's treaty violations. This award remains the largest to date among all investor-state claims brought by Ukrainian entities over russia's unlawful actions in Crimea. In August 2025, Naftogaz Group has obtained permission from the District Court of Vienna Inner City (Austria) to enforce an arbitral award against russia (the "Crimea Award") for more than USD 5 billion [11].

Conclusions. In shaping the future of third-party funding, legislators must carefully balance transparency and regulation with the imperative of preserving access to justice. Overly restrictive measures – whether through excessive taxation or rigid disclosure requirements – risk discouraging funders from entering the market or inflating the cost of financing, leaving resource-constrained claimants unable to pursue meritorious claims. This outcome would not only undermine the promise of TPLF as a tool for leveling the playing field in complex disputes but would also erode its role in enabling accountability where powerful actors seek to avoid liability.

At the same time, global trends demonstrate that TPLF remains on an upward trajectory, driven by both claimants' demand for capital and funders' profit incentives. While regulatory challenges will persist, particularly regarding the extent of funders' influence over litigation, these hurdles are not insurmountable. For Ukraine, where businesses and state-owned entities continue to seek redress for massive losses inflicted by russia's aggression, TPLF offers a unique and necessary avenue to pursue justice in international arbitration. In this context, the development of a legislative framework that is friendly to responsible funding practices is not only desirable but essential–ensuring that Ukrainian companies, despite their limited resources, have the financial backing to transform legal rights into enforceable remedies.

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