THIRD-PARTY LITIGATION FUNDING: A COMPARATIVE LEGAL ANALYSIS OF THIRD-PARTY LITIGATION FUNDING AND ITS POTENTIAL IN INDIA

Written by ***Ambika Jhawar* & Prarthana Chigateri****

** 5th Year BA LLB Student, Jindal Global Law School*

*** 5th Year BA LLB Student, Jindal Global Law School*

ABSTRACT

Third party litigation funding (TPLF) enables financial assistance to a claimant, for the purposes of litigation, by an unrelated third party to the suit. Commercial funding is the most popular form of TPLF. In cases of commercial funding, the litigation funder expects a certain percentage of profit or a success fee upon the conclusion of the litigation. There is no specific law governing TPLF in India. However, reading the judicial precedents along with certain legal provisions, it can be inferred that the practice of TPLF is not prohibited under Indian law. This paper studies the development of the concept of TPLF, and the potential for its practice in India, with a special focus on shareholder class action suits. Through a comparative analysis, the paper argues that TPLF can be especially promising in shareholder class action suits. Drawing on the experiences of other jurisdictions, the paper provides certain recommendations that could guide the policy regulating the practice of TPLF in India. The paper finally argues that maximum advantage of this practice can be derived if a relationship of trust is created between the third party funders and the claimants.

INTRODUCTION

Third party litigation funding ("TPLF") is the financial support for litigation, provided by a person or an entity that is not a party to the litigation and having no direct interest in the outcome.[i] In return, the third party funder expects a certain predetermined payment or a success fee, from any monetary relief that the plaintiff might be awarded by way of decree, from a Court or an out-of-Court settlement.[ii] Third party litigation funding is mainly offered to the

plaintiff, but a defendant with a substantial counterclaim may also try to avail it. Traditionally, the sources of such funding would include contingency fees by lawyers,[iii] non-recourse loans,[iv] recourse loans,[v] and liability insurance.[vi] However, the new TPLF paradigm involves an unrelated third party who invests in the litigation.[vii] This new paradigm is similar to liability insurance, in that, they both "transfer the risks associated with civil litigation", "encourage lawsuits, influence settlement terms, have payers intermeddling in litigation, etc.".[viii] In the United States, tort liability insurance has been borne by insurers since the late 1800s.[ix] TPLF on the other hand, is a relatively new endeavour.[x] Charles Silver succinctly describes the difference as "liability insurers serve potential and actual defendants in civil litigation—usually the former—by acquiring risks associated with losses imposed by law", while " third-party funders serve potential and actual plaintiffs—usually the latter—by acquiring risks attached to litigation-related gains".[xi]

There are two main types of TPLF i.e. "pure funding" and "commercial funding". In case of pure funding, the funders are motivated to financially support the claim of a party, if they identify the case of the party to be genuine in nature.[xii] The funders are not required to pay the costs of the successful unfunded party. On the other hand, in the case of commercial funding, the funders exercise substantial control over the litigation process.[xiii]The motivating factor in this form of funding is the potential to make profit or derive benefit from the investment. In the case of *Dymocks Franchise Systems (NSW) Pty. Ltd*[xiv], Lord Brown defined commercial funding as:

> [W]here, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation, a concept repeatedly invoked throughout the jurisprudence.[xv]

Therefore, the main difference between the two forms, is the motivating factor behind it. In case of pure funding, the funders do not have any ulterior commercial motive. They are only facilitating access to justice for the concerned party. However, in the case of commercial funding, the funders are facilitating their profits/business by exercising substantial control.

However, compared to pure funding, the past decade has seen a rapid growth in commercial funding by investment firms. Some of the well-established commercial funding markets include Australia, England, United States of America, and Canada. The potential of commercial funding is still in its nascent stages in India. Even so, the Supreme Court of India[xvi] has observed that:

> *"There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation."*

In light of this observation, this paper will analyze the development of TPLF in India, with a special focus on shareholder class action suits. The article will also bring forth the complications and debates triggered by TPLF and will conclude on the potential of TPLF in India. The first part of the paper will study the evolution of the concept of TPLF in Australia and England. The second part of the paper will focus on TPLF in India and the legal provisions on the subject in Indian law. The third part of the paper will present an analysis of the potential of TPLF in India, by studying its advantages and disadvantages. The fourth part will focus on shareholder class action suits and will argue that a combined framework of class action suits and TPLF can encourage shareholders under the Companies Act, 2013[xvii] to pursue claims related to oppression and mismanagement. The fifth and concluding part will argue that TPLF can be promising in the Indian scenario. Furthermore, it will argue that better policies must be introduced to regulate the practice, and at the same time it must be ensured that the purity of civil justice is not damaged.

EVOLUTION OF TPLF IN ENGLAND AND AUSTRALIA

English Law on Maintenance and Champerty

The general law on TPLF can be traced back to the principles of maintenance and champerty. "Champerty" refers to agreements between "a stranger to a lawsuit and a litigant by which the stranger pursues the litigant's claim as consideration for receiving part of any judgment proceeds"[xviii]. The stranger or the third party maintains, supports, or promotes another person's lawsuit. Similarly, "maintenance", refers to the financial support given by one party to another, for the continuation of a lawsuit.[xix]

The prohibition on maintenance and champerty can be traced back to Ancient Greece, where maintainers were likely to find themselves liable for bringing malicious prosecutions (also called *calumnia*).[xx] Eventually, these principles found their way into English law.[xxi] The prohibitions on champerty and maintenance arose at a time when medieval society was undergoing wider evolutionary change, and was sought to combat the '*last flaring up of feudalism*'[xxii]. The prohibitions were justified as they protected the integrity of the legal process from misuse by the feudal barons.[xxiii]

The initial position of law was that "every person must bring upon his own bottom, and at his own expense".[xxiv] Non parties to the suit were disallowed to "aid the prosecution of suits of any kind".[xxv] The strict views on the subject of maintenance was attributed to the possible danger of oppression of "poor men by rich men, through the means of legal proceedings".[xxvi] However, by 1895 the very doctrine of maintenance was questioned in the case of *Alabaster v. Harness*[xxvii] where it was observed that there could not be anything wrong in assisting another man in his litigation, "it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful". The Rushcliffe Report of 1945,[xxviii] introduced the concept of legal aid, which emerged as a State funded exception to maintenance.[xxix] By 1995, the doctrine of maintenance had received wider acceptance, but with a few exceptions.[xxx] It was noted by the English Courts that "…it would seem that maintenance is still in law both a tort and a crime in all cases, except where it can be brought into one of the recognized exceptions to the rule which prohibits it".[xxxi] Furthermore, the Law Commission Report of 1967[xxxii] recommended the abolition of champerty and maintenance. The law of maintenance and champerty thus evolved from being illegal to legal, with the caveat that the practice was not against public policy.[xxxiii]

The Criminal Law Act 1967[xxxiv] abolished both the crimes and torts of maintenance and champerty in United Kingdom.[xxxv] Nonetheless, the Act states that this abolition "shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal".[xxxvi] Although English law no longer prohibits litigation funding per se, it recognizes certain circumstances, where it can be declared contrary to public interest and illegal.

Present Law on TPLF in England

In 2002, the Court of Appeals ultimately noted that only those funding arrangements that undermined the ends of justice, should fall foul of the prohibition on maintenance and champerty.[xxxvii] In the case of *Arkin v Borchard Lines Ltd*.,[xxxviii] the Court stated many instances when funding arrangements had been used and accepted over the prior years. It also restated and established principles regarding the liability of the funders. The principle stated that any third party, that funds litigation must accept that the risk extends beyond the risk of bearing the cost of the funded party, that is, it extends to the cost incurred by the other party also. However, the Court also added a cap (known as the Arkin cap) to the liability: "we consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided."[xxxix]

The English Court in its two recent judgments, has developed the concept of TPLF further. In 2016, the Commercial Court of England and Wales gave a landmark decision in relation to the recovery of litigation funding costs, by upholding the decision of an arbitrator, and allowed a party to recover its third-party litigation funding costs as "other costs" under section 59(1)(c) of the Arbitration Act 1996.[xl] The Court in the case of *Excalibur Ventures*,[xli] the Court provided clarity to the litigation funding market regarding the scope of the potential exposure that funders may face about adverse costs orders. The Court also made it clear that funders may themselves be joined to the proceedings and held liable to pay indemnity costs in circumstances, where indemnity costs are awarded against a party they have funded, and that party is unable to meet that costs order; and when calculating the Arkin Cap, no distinction should be made between sums advanced to the funded party for the purpose of funding the litigation (such as solicitor's fees) and funds provided for the purpose of meeting a security for costs order. A different approach was taken in the case of *Davey v. Money and others*, where the court observed that the Arkin cap principle must not be applied mechanically, instead that the Court should consider it as a part of its overall discretion to arrive at a just result.[xlii]

In England and Wales, the third-party funding of litigation is not currently subject to any statutory regulation, although a voluntary code does exist.[xliii] Lawyers as well as third parties can enter into contracts for funding litigations.[xliv] It has been argued that the Code and the Association of Litigation Funders, have positively facilitated the development of TPLF in the United Kingdom.[xlv]

Rise of TPLF in Australia

The principles of maintenance and champerty were applicable in Australia until 2006.[xlvi] Even after these principles were removed from the statute books, Courts had the power to interfere in cases where the agreement was found to be against public policy.[xlvii] In the landmark case of *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited*,[xlviii] the High Court held that TPLF was not an abuse of the Court procedures and was also not contrary to public policy. However, the law still prohibits third party funding by advocates and solicitors.[xlix] Lawyers cannot charge contingency fees, or enter into "no win no fee" agreements.[l] Now, Australia is considered to be the most sophisticated market for TPLF in the world,[li] and since the Fostif case,[lii] litigation funding has become an entrenched part of the Australian legal system.[liii] In 2013, the Australian Securities and Investments Commission released a regulatory guide describing the conflicts that may arise in litigation funding, and detailing how litigation funders may manage conflict of interests by drafting an appropriate conflict management strategy.[liv]

THIRD PARTY LITIGATION FUNDING IN INDIA

The question of whether the principles of English law relating to maintenance and champerty should be applied to the Indian society, was considered by the earliest British Courts in India, but their decisions were not uniform. The Privy Council established that *"English laws of maintenance and champerty were not of force as special laws in India"*.[lv] Agreements were considered in their nature, and those that were against public policy or were unconscionable, or made for improper objects, would ought to be held invalid.[lvi] In the case of *Mr. G.,* the Supreme Court iterated that *"the rigid English rules of champerty and maintenance do not apply in India"*.[lvii] The Court further stated that, if the contract had not been between a lawyer and his client, but between the client or a litigant and a third party, the contract would be legally enforceable and good. Perusing various cases, the Madhya Pradesh High Court noted in 1957, that champertous bargains were neither void nor illegal, unless the agreements were unconscionable or extortionate, or were unrighteous.[lviii] In the case of *Rattan Chand Hira Chand v. Askar Nawaz Jung (Dead) LR.S. and Ors.*,[lix] the Court considered the validity of an agreement regarding the financing of a property litigation. The Court also found that one of the considerations in the agreement was that the funder will also use his political connections to ensure a favourable outcome. As the consideration was against public policy, the Court dismissed the appeal. Nevertheless, the Court noted that agreements concerning champerty and maintenance are valid in India, unless it is not against public policy. In *Bar Council of India v.*

A.K. Balaji and others,[lx] it was noted that advocates in India cannot fund litigation on behalf of their clients, but there is no such bar on third parties to fund and receive payment after the outcome of the litigation.

Legal Provisions on Third Party Litigation Funding in Indian Law

- **Civil Procedure Code, 1908**

Indian law does not have specific provisions on TPLF, but the wording of s.35 of Code of Civil Procedure (CPC)[lxi] can be read to infer that, in certain circumstances the cost may be awarded to a third party by the Court. Costs are in the discretion of the Court that is adjudicating the matter. Judicial discretion cannot be exercised by the Courts without keeping in mind the general legal principles. Moreover, some States have amended Order XXV to cover cases in which the plaintiff is financed by a third party. For example, Order XXV of CPC was amended for the State of Maharashtra[lxii], and it states that in cases where a third party is financing a plaintiff for some returns, "the Court may order such person to be made a plaintiff to the suit, if he consents, and may either of its own motion or on the application of any defendant order such person, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant".[lxiii]

In the case of *Maniankutty v. Venkiteswaran,*[lxiv] the Court observed that *"it cannot be said that [the] Court has no power to award costs against persons, who are not parties to the suit in exceptional cases"*.

- **The Indian Contract Act, 1872**

Section 23 of the Indian Contract Act[lxv] states that the consideration or object of an agreement is unlawful, if the Court regards it as immoral, or opposed to public policy, and such agreements are void. The definition of and scope of "public policy" can be determined through judicial precedents. In *Fender v. St. John Milday*,[lxvi] Lord Atkin observed that "the doctrine does not extend only to harmful effects, it has to be applied to harmful tendencies. Here the ground is less safe and treacherous". Relying on Lord Atkin's observation, Justice Subba Rao noted that "Public policy or the policy of the law is an illustrative concept. It has been described as an 'untrustworthy guide', 'variable quality', 'unruly horse', etc.…".[lxvii] Furthermore, in *ONGC Saw Pipes case*,[lxviii] the Supreme Court of India observed that "The concept of what is for the public

good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time". The term public policy has been held to include 'tending to the perversion of or interference with the administration of justice'. This head covers maintenance, champerty, and agreements to stifle prosecution. Ergo, agreements of maintenance and champerty, that tend to the perversion or interference with the administration of justice, have been held void. A similar observation has been made by Courts in cases like *Mr. G.*[lxix] and *A.K. Balaji*.[lxx]

Section 70 of the Indian Contract Act[lxxi] states that in situations where in a non-gratuitous act by a person (or a third party) benefits another person, the person receiving the benefits is bound to make good for, or compensate the person that has engaged in the non-gratuitous act. This provision may be relevant for cases of pure funding, wherein funders are motivated to financially support the claim of a party non-gratuitously. This section is not applicable in cases of commercial funding, where the funding is mainly done for monetary returns or profit. It has also been noted by the Supreme Court that Section 70 of the Indian Contract Act does not apply to cases where there is a subsisting contract.[lxxii] Therefore, if the pure funding is done vide a contract, Section 70 of the Indian Contract Act will not apply, and the act by the third party will become gratuitous.

- **Bar council of India Rules**

The Bar Council of India Rules[lxxiii] do not explicitly prohibit litigation funding by advocates. However, it has been noted in the *A.K. Balaji case*[lxxiv] that "a conjoint reading of Rule 18[lxxv] (fomenting litigation), Rule 20[lxxvi] (contingency fees), Rule 21[lxxvii] (share or interest in an actionable claim) and Rule 22[lxxviii] (participating in bids in execution, etc.)" indicates that advocates in India cannot fund the litigation on behalf of their clients.

POTENTIAL OF TPLF IN INDIA

One of the main reasons for TPLF entering the sphere of civil litigation can be attributed to the expensive nature of civil litigation.[lxxix] In many legal systems (such as Australia), the cost of the litigation is paid by the losing party, and this is referred to as the "loser pays" cost rule.[lxxx] Due to lack of resources, the aggrieved party cannot afford to hire lawyers or bear the cost or

burden of the litigation.[lxxxi] The main question that arises from the overwhelming use of TPLF in different jurisdictions is regarding the risks and benefits, and the viability of TPLF in the Indian adjudicatory system.

Advantages of TPLF

One key advantage of TPLF is that it facilitates "access to justice".[lxxxii] Persons who did not have access to the judicial system, due to financial distress or bankruptcy, can avail justice through this route.[lxxxiii] It promotes access to justice without imposing financial burden on the plaintiff, and also has the potential of filtering out unmeritorious cases, and can thereby increase the volume of meritorious litigation. [lxxxiv] With the rise of TPLF, there has also been an increase in the number of shareholder class action litigations in Australia, Canada,[lxxxv] and the United States of America[lxxxvi], which allows minority shareholders and other shareholders to initiate meritorious claims.

Another advantage is the role that TPLF can play in cases of insolvency. Traditionally, TPLF was used to support insolvency litigation in Australia.[lxxxvii] It has been observed that an 'Insolvency Professional' is an ideal client for third party funding.[lxxxviii] As the Insolvency Professional is an estate with no money in it, TPLF can be a viable option for a substantial claim against the entity that contributed to the insolvency. [lxxxix]

Disadvantages of TPLF

In 2012, the United States Chamber of Commerce's Institute for Legal Reform ("ILR") published a report[xc] highlighting the purported threats that TPLF industry creates and describe it as a "clear and present danger to the impartial and efficient administration of civil justice in the United States." [xci]

The American Bar Association Commission on Ethics 20/20 ("Commission") issued a draft white paper[xcii] addressing the ethical and professional responsibility issues raised by the emerging TPLF industry. The Commission suggested that lawyers involved in TPLF should be careful in maintaining their independent professional judgment and make decisions in their clients' best interests.

Another argument against TPLF is that it increases the number of frivolous claims. There exists a similar argument that while TPLF may or may not increase the number of frivolous claims

filed, but it will increase the overall volume of litigation.[xciii] Another argument against TPLF is its perceived exploitation of consumers. The vulnerability of consumers is certainly an issue in consumer legal funding, where individuals do not possess the leverage required to sufficiently negotiate protections into their contracts.[xciv]

Lastly, it involves lawyers' ethical obligations and potential conflicts of interest that may be raised by TPLF arrangements. There is also a concern that information exchanges between TPLF providers and litigants will waive attorney-client privileges.[xcv]

Settling the debate

The problem with the criticism that TPLF increases frivolous claims is premised on the assumption that TPLF will be available to every litigant, regardless of any scope of success. In reality, third party funders invest a lot of time and resources in analysing the cases they want to fund, and only invest in cases involving millions of dollars and with a high chance of success, to ensure profits.[xcvi] The other concern that TPLF poses is with respect to ethics and the corruption of public justice.[xcvii] The objective of an effective legal system is to provide access to civil justice.[xcviii] Even meritorious claims are not pursued by individuals because the exorbitant costs can dis-incentivise individuals to pursue their claims.[xcix] TPLF can provide an aid to such individuals by making the litigation costs economically feasible and thereby provide access to civil justice.[c] Therefore, the question is whether the issues stated above, and other regulatory issues posed by TPLF, can be managed without damaging the purity of civil justice in India i.e., whether the accessibility of ordinary people to the civil justice system is not hampered due to the proliferation of TPLF.

INTERPLAY BETWEEN SHAREHOLDER CLASS ACTION SUITS AND TPLF IN INDIA

It is a popular practice in Australia that shareholder class action suits are funded by a third party. The class action suit can be brought by number of shareholders, representing the interests of other affected shareholders.[ci] This kind of suit is generally against a group of individuals, who are in control of the management of the company. It is a cost- effective and efficient

manner to resolve disputes arising from similar legal claims. In many cases, the shareholders are not willing to pursue their claims because of the exorbitant cost involved in the whole process of resolving a dispute.

Even in cases where a class action suit is brought by shareholders, they will recover minimal amount of compensation, which will not be enough to pay the litigation costs.[cii] Therefore, litigation funding can motivate shareholders to approach the court for seeking remedies. It can also play an important role in improving access to justice and encouraging companies to improve their corporate governance practices. IMF Bentham ("IMF") is a leading litigation funding firm in Australia.[ciii] IMF is used to taking legal risks and is aware of ways to mitigate the same. However, a group of shareholders may not be aware of the potential risks associated with the whole process. In the case of *Kirby v. Centro Properties Limited*,[civ] the federal court approved the $200 class action settlement. The shareholders were funded by IMF. The company misclassified multi-billion-dollar short term debt as a long-term debt in its 2007 preliminary and final accounts. This misclassification was also approved by the board of directors and published. Due to this false information, when the true picture was revealed, the price of securities fell dramatically causing serious losses to investors.[cv] The investors were unaware of the risks, that the company might not be able to discharge its debt obligations.

Like Australia, the shareholder class actions in the United States are on the rise.[cvi] In the year 2018, a total of 403 federal securities class actions were filed, including cases of corporate misconduct.[cvii] However, unlike Australia, the United States does not have a robust system of TPLF for shareholder class actions.[cviii] The U.S. Chamber of Commerce's Institute for Legal Reform has stated that the Australian experience of TPLF funding of class actions, and the rise thereof, should present as a warning to the rise of such class action litigations.[cix] Fitzpatrick argues that whether the "risk balancing virtues of claim investing carry over into class action cases is a question that has not yet been addressed by scholars because many think that it is not possible for financiers to buy pieces of class action lawsuits in the United States".[cx] He argues that this can be attributed to the impracticality of finding each and every member of the class action suit, and entering into agreements with them in order to receive a share of the class recovery.[cxi] In Australia, the investors sign up shareholders one by one, when they want to fund such a class action, and the class action proceeds only with these shareholders, but it has not

been accepted by the financiers in America as it converts the opt-out class action into an opt-in class action.[cxii]

In India, Section 245 of the Companies Act, 2013[cxiii] was introduced by the Government after the Satyam scam[cxiv], where many shareholders from India were unable to claim damages due to the absence of a provision enabling the filing of class action suits by the shareholders.[cxv] Section 245 of the Act[cxvi] states that members, depositors or a class of them, can file an application in the Tribunal if they are of the belief that the affairs of the company are being conducted in a manner that is prejudicial to the interests of the company, its members or depositors. It introduces the concept of class action by shareholders and depositors of a company with substantive remedies. A class action suit will mainly serve two purposes: first, it will provide compensation for the losses suffered by the shareholders in case of non-compliance.[cxvii] Second, it creates a deterrence effect, which will help in avoiding/ reducing the future violations.[cxviii] Therefore, this concept has been evolved to provide better remedy mechanism to the shareholders and prevent corporate frauds. In cases where the cost of litigation and risk involved may be high, litigation funding can prove to be useful to such shareholders. Yet, there is no specific law that governs TPLF in India.

In May 2019, the National Company Law Tribunal (NCLT), amended Rule 84 of the National Company Law Tribunal Rules.[cxix] Prior to the amendment, this Rule only provided for the requirements of filing an application for class action suits by shareholders. The new amendment provides for the requisite number of member or members to file an application under Section 245 of the Companies Act, 2013.

One limitation of funding of shareholder class action suits is that the third-party investor will be willing to finance only high-stake claims, which involves huge amounts of money. In other words, shareholders who are in genuine need of funds to pursue their claims may be excluded. Litigation funding is a business, where the funder focuses on generating profit through the litigation funding agreement and not necessarily on promoting access to justice. The second limitation is that this option of choosing a third party to finance shareholder claims can be misused by shareholders, and pressurize the company to succumb to the unreasonable demands of the shareholders, and the company may find it difficult to focus on its core business and long-term goals.

On the other hand, TPLF funding of shareholder or member or depositor class actions reduces the cost of litigation, and the third party also absorbs the risks of litigation.[cxx] More importantly, it enables minority shareholders (or other shareholders) who may otherwise be unable to access the judicial system, to pursue their claims. Another impact of shareholders having access to such litigation is that it can increase compliance by companies, and may deter companies from indulging in unlawful practices, and thereby strengthening corporate governance.[cxxi] Section 245 of the Companies Act, 2013 [cxxii] empowers shareholders to come together and institute a collective suit dealing with similar claims against the company, directors, advisors, experts and auditors. This could create an environment of deterrence and greater accountability, could circumvent the situation faced by the Indian shareholders of Satyam Computers Services limited, post the scam.[cxxiii] TPLF can further strengthen this provision by reducing the risks and the costs to the shareholders.

CONCLUSION: THE WAY FORWARD

Just like the Indian law, the Australian law prohibits lawyers from entering into arrangements for payment of damage-based contingency fee[cxxiv], where lawyers determine the fee based on the damages received. On the other hand, the regulatory method governing TPLF in England and Wales is voluntary, and industry professionals develop and adopt voluntary standards and codes of conduct for the same.[cxxv]Furthermore, the Association of Litigation Funders (ALF) Code of Conduct,[cxxvi]provides protection to litigants that enter into TPLF agreements with ALF's funder members, and strikes a balance in the protection accorded to funders and litigants. It has been observed that majority of the TPLF in England and Wales is in the field of commercial litigation, and there have been no transactions with personal injury claimants.[cxxvii] Similarly, in the United States the types of claims are commercial claims such as breach of contract, intellectual property infringement etc., and consumer claims such as mass tort or personal injury.[cxxviii]Australia, on the other hand, has a more robust TPLF practise. Initially TPLF was used in cases of insolvency but is now being used in civil and commercial litigation, and a broad range of class action suits.[cxxix]

It has been reported that investors from England and Wales have taken an interest in litigation funding in India.[cxxx] With the development of the field, it is necessary to have policies to govern

the practice and to protect the investors and claimants alike. As we have already analysed the case for the potential of TPLF in India and growth of shareholder class action suits, TPLF can be promising in India, and may soon gain traction. However, there is a need for policies to regulate the practice for the following reasons:

- To prevent the misuse of the practice by the investor firms. For example, firms must not engage in unethical practices to enhance the value of the claim[cxxxi].
- To create a checking mechanism on investor firms to enhance transparency and accountability. Funders must maintain adequate financial resources[cxxxii] and ensure that they do not put the claimant in a worse off position; and
- To ensure that the purity of civil justice is not compromised.

Based on the experiences of the jurisdictions mentioned in this paper, the following are some *recommendations* that can be included in the policy regulating the practice of TPLF in India :

- **Increasing transparency**: The existence of any litigation funding agreement ought to be promptly disclosed, in the same way that insurance policies available to defendants must be disclosed. Additionally, the claimants must be obligated to disclose all material facts and events that may influence the third party's decision to fund the claim[cxxxiii].
- **Increasing compliance:** The disclosure requirements in relation to material events must increase compliance to prevent acts of oppression by the parties involved.
- **Minimizing procedural and administrative costs:** Lower costs will facilitate funding and promote access to justice.
- **Control:** The substantial amount of control must be exercised by the claimant, unless and until the claimant forfeits the control over the litigation to the funder.
- **Conflict management:** In case, there is a conflict of interest, the interest of the claimant must prevail. The funders must not be allowed to withdraw their funding at any point during the litigation, unless and until there is a breach of trust or fraud on the part of the claimants.
- **Opt- out clause in class actions:** The shareholders must have an exit right with respect to the class action suit. Those shareholders that are not interested in pursuing the claim and being a part of the class action suit must be allowed to opt-out of the litigation funding agreement and the class action suit[cxxxiv].

- **Entitlement to profits:** The funders are only entitled to the profits arising from the class of shareholders that have opted-in to the class action suit and, have been funded by these third parties.
- **Code of ethics:** As TPLF makes inroad with the justice system, a code of ethics must be introduced governing the duties and obligations of the funders to the claimants, advocates and the Courts.

The true benefit of this practice and the policy governing it can only be observed, when the claimant is in a better position as a result of the funding. However, considering that TPLF is a new entrant in the Indian market, it is also necessary for policy makers to make sure that an environment of trust and confidence is created with respect to the practice, for the claimants and the funders alike. This relationship based on trust and confidence between the claimants, funders and the legal system will help all the parties to gain maximum advantage of the potential of the practice.

REFERENCES

[i]David Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L.1075, 1083 (2013).

[ii] *Id*. at 1083.

[iii] Contingency fee is the cost of litigation that the lawyer shoulders, in exchange for a percentage of the settlement. *See* Sasha Nichols, *Access to Cash, Access to Court: Unlocking the Courtroom Doors with Third Party Litigation Finance*, 5 UC IRVINE L. REV. 197, 198 (2015).

[iv] In non-recourse loans, the lender can only attach the collateral, not the borrower's personal assets, if the loan is not repaid. *See*, Loan, Black's Law Dictionary 1020 (9 ed. 2009).

[v] Recourse loan is A loan that allows the lender, if the borrower defaults, not only to attach the collateral but also to seek judgment against the borrower's (or guarantor's) personal assets. *See*, Loan, Black's Law Dictionary 1021 (9 ed. 2009).

[vi] Brian T. Fitzpatrick *Can and Should the New Third Party Litigation Financing Come to Class Actions?* 19 THEORETICAL INQUIRIES L. 109, 111 (2018).

[vii] TPLF is a form of non-recourse loan as consumers are only obligated to re- pay an investment to the extent their suit is successful. *See,* David R. Glickman, *Embracing Third Party Litigation Finance*, 43 FLA. ST. U. L. REV. 1043 (2017).

[viii] Fitzpatrick, *supra* note 6, at 111.

[ix] Charles Silver, *Litigation Funding versus Liability Insurance: What's the difference?* 63 DePAUL L. REV. 617, 618 (2014).

[x] *Id*. at 652.

[xi] *Id*. at 621.

[xii] Hamilton v Al Fayed [2003] QB 1175.

[xiii] *Id*.

[xiv] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd & Ors* [2004] 1 WLR 2807.

[xv] *Id*. at 7.

[xvi] In Re: Mr. 'G', A Senior Advocate of the Supreme Court v. The Hon'ble Chief Justice and Judges of the High Court of Judicature at Bombay, 1955 1 SCR 490; Bar Council of India v. A.K. Balaji and Others, (2018) 5 S.C.C 379.

[xvii] Companies Act,2013, No.18 of 2013, Acts of Parliament,2013.

[xviii] Champerty, Black's Law Dictionary 252 (9 ed. 2009).

[xix] Maintenance, Black's Law Dictionary 1039 (9 ed. 2009).

[xx] David Neuberger, *From Barretry, Maintenance and Champerty to Litigation Funding*, HARBOUR LITIGATION FUNDING (May 8, 2013), https://www.harbourlitigationfunding.com/wp-content/uploads/2015/09/lord_neuberger_harbour_annual_lecture_8_may_2013.

[xxi] *Id.*

[xxii] *Id.*

[xxiii] *Id.*

[xxiv] Wallis v Duke of Portland 3 Ves. Jun. 494.

[xxv] Bradlaugh v Newdegate (1883) 11 QBD 1.

[xxvi] *Id.*

[xxvii] Alabaster v Harness [1895] 1 QB 339.

[xxviii] Report of the Committee on Legal Aid and Legal Advice in England and Wales (Cmd. 6641) (HMSO).

[xxix] Neuberger, *supra* note 20.

[xxx] *Id.*

[xxxi] Martell v Consett Iron Co. Ltd [1995] Ch 363.

[xxxii] *Law Commission Proposals for the reform of the Law Relating to Maintenance and Champerty (*1966).

[xxxiii] Neuberger, *supra* note 20.

[xxxiv] Criminal Law Act 1967, s. 14(2).

[xxxv] Neuberger, *supra* note 20.

[xxxvi] Criminal Law Act 1967, s. 14(2).

[xxxvii] R (Factortame) v Secretary of State for Transfort (No. 8) [2003] QB 381 at 400, cited in Neuberger, *Id*.

[xxxviii] Arkin v Borchard Lines Ltd [2005] EWCA, 2005 (EWCA).

[xxxix] *Id*.at 10.

[xl] Essar Oilfields Services Limited v Norscot Rig Management Pvt Ltd [2016] EWHC (EWHC).

[xli] Excalibur Ventures LLC v Texas Keystone Inc & Others [2016] EWCA Civ (EWCA Civ).

[xlii] Davey v. Money and others [2019] EWHC 997.
[xliii] LESLIE PERRIN, *England and Wales, in THE THIRD-PARTY LITIGATION FUNDING LAW REVIEW, 48-58 (*Leslie Perrin Ed., 2018).

[xliv] *Id.*

[xlv] *Id.*

[xlvi]JASON GEISKER AND JENNY TALLIS, *Australia*, in *THE THIRD-PARTY LITIGATION FUNDING LAW REVIEW, 2-7 (*Leslie Perrin Ed., 2018).

[xlvii] Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited, [2006) HCA 41.

[xlviii] Geisker and Tallis, *supra* note 40.

[xlix] *Id.*

[l] *Id.*

[li] *Id.* at 5.

[lii] *Supra*, note 47.

[liii] Geisker and Tallis, *supra* note 46.

[liv] *Id.*

[lv] Passarilal Mannoolal v. Mst. Chhuttanbai And Ors., AIR 1958 MP 417.

[lvi] Ram Coomar Coondoo v. Chunder Canto Mookerjee, (1876) 4 I. A 23.

[lvii] In Re: Mr. 'G', A Senior Advocate of the Supreme Court v. The Hon'ble Chief Justice and Judges of the High Court of Judicature at Bombay, 1955 1 SCR 490.

[lviii] Passarilal Mannoolal v. Mst. Chhuttanbai And Ors., AIR 1958 MP 417.

[lix] Rattan Chand Hira Chand v. Askar Nawaz Jung (Dead) LR.S. and Ors., 1991 SCR (1) 327.

[lx] Bar Council of India v. A.K. Balaji and others, 2018 (5) SCC 379.

[lxi] Code of Civil Procedure, 1908, No. 05, Acts of Parliament,1908.

[lxii] Order XXV of CPC was amended for Maharashtra by Bombay High Court Notification P. 0102/77 dated 5-9-1983. This same amendment has been adopted by Gujarat and Madhya Pradesh. Allahabad has added only R. 2 of Or. 25, which states that costs may be secured from the third-party funding of litigation.

[lxiii] *Id.*

[lxiv] Maniankutty v. Venkiteswaran, (1978) KLT 841 at 842.

[lxv] The Indian Contract Act 1872, Act 9 of 1872.

[lxvi] Fender v. St. John Milday, 1983 AC 1 (HC).

[lxvii] Gherulal Parekh v. Mahadevdas Maiya, AIR 1959 SC 781.

[lxviii] ONGC Ltd. v. Saw Pipes Ltd., 2003 (2) RAJ 1 (SC).

[lxix] In Re: Mr. 'G', A Senior Advocate of the Supreme Court v. The Hon'ble Chief Justice and Judges of the High Court of Judicature at Bombay, 1955 1 SCR 490.

[lxx] Bar Council of India v. A.K. Balaji and others, 2018 (5) SCC 379.

[lxxi] The Indian Contract Act 1872, Act 9 of 1872.

[lxxii] Mulamchand v. State of Madhya Pradesh, 1968 SCR (3) 214.

[lxxiii] The Bar Council of India Rules, 1975.

[lxxiv] *Supra* note 60.

[lxxv] The Bar Council of India Rules, 1975, Rule 18.

[lxxvi] *Id.* Rule 20.

[lxxvii] *Id.* Rule 21.

[lxxviii] *Id.* Rule 22.

[lxxix] Deborah R. Hensler, Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?, 63 DePAUL L. REV. 499, 502 (2014). https://via.library.depaul.edu/law-review/vol63/iss2/10.

[lxxx] Jasminka Kalajdzic et al., *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 142, (2013).

[lxxxi] *Supra* note 79, at 505.

[lxxxii] *Id.* at 519.

[lxxxiii] *Id.*

[lxxxiv] Id.

[lxxxv] *Supra* note 80, at 96.

[lxxxvi] Brian T. Fitzpatrick, *Can and Should the New Third-Party Litigation Financing Come to Class Actions?* 19 THEORETICAL INQUIRIES L. 109, 111 (2018).

[lxxxvii] JASON GEISKER AND JENNY TALLIS, *Australia*, in *THE THIRD-PARTY LITIGATION FUNDING LAW REVIEW, 1 (*Leslie Perrin Ed., 2018).

[lxxxviii] Marius Nasta, *Third Party Litigation Funding in Insolvency,* FINANCIER WORLDWIDE (Sept. 2016), https://www.financierworldwide.com/third-party-litigation-funding-in-insolvency#.XVLbjKeB3-Y.

[lxxxix] Anshul, *Litigation Funding: The Current Status of Third Party Litigation Funding in India*, NDTV PROFIT (Apr. 7, 2018, 6:58 IST), https://www.ndtv.com/business/litigation-funding-what-is-the-current-status-of-third-party-funding-in-india-1833998.

[xc] JOHN H. BEISNER & GARY A. RUBIN, U.S. CHAMBER INST. FOR LEGAL REFORM, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION 1 (2012),https://www.instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf.

[xci] David R. Glickman, Embracing Third-Party Litigation Finance, 43 Fla. St. U. L. Rev. 1043 (2017), at 1057, https://ir.law.fsu.edu/lr/vol43/iss3/6.

[xcii] American Bar Association Commission on Ethics 20/20, White Paper on Alternative Litigation Finance 13 (draft), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111019_draft_alf_white_paper_posting.authcheckdam.pdf.

[xciii] Mariel Rodak It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement, 155 U. Pa. L. Rev. 503 (2006).

[xciv] *Id.*

[xcv] I*d.* at 517.

[xcvi] Deborah R. Hensler, Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?, 63 DePAUL L. REV. 499, 502 (2014). https://via.library.depaul.edu/law-review/vol63/iss2/10.

[xcvii] Jasminka Kalajdzic et al., *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 94, (2013).

[xcviii] *Id.* at 93.

[xcix] Kalajdzic, *supra* note 80, at 94.

[c] *Id.* at 101.

[ci] Class Actions | IMF Bentham Ltd, Imf.com.au (2019), https://www.imf.com.au/practice-areas/class-actions (last visited Aug 15, 2019).

[cii] David H Webber, shareholder Litigation without Class Actions and The "Semi-circularity Problem", *Review and Predictions: 2019 Federal Securities Litigation and Regulation*, HLS FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Dec 23, 2014), https://corpgov.law.harvard.edu/2014/12/23/shareholder-litigation-without-class-actions-and-the-semi-circularity-problem/.

[ciii] IMF Bentham | Commercial Litigation Funding Australia, Imf.com.au (2019), https://www.imf.com.au/ (last visited Aug 15, 2019).

[civ] Kirby v Centro Properties Limited (No 6) [2012] FCA 650.

[cv] *Id.*

[cvi] Brian T. Fitzpatrick, *Can and Should the New Third-Party Litigation Financing Come to Class Actions?* 19 THEORETICAL INQUIRIES L. 109, 111 (2018).

[cvii] Jason Halper *et. al*., *Review and Predictions: 2019 Federal Securities Litigation and Regulation*, HLS FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (May 27, 2019), https://corpgov.law.harvard.edu/2019/05/27/review-and-predictions-2019-federal-securities-litigation-and-regulation/.

[cviii] Fitzpatrick, *supra* note 86, at 115-116.

[cix] Deborah R. Hensler, Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?, 63 DePAUL L. REV. 499, 502 (2014). https://via.library.depaul.edu/law-review/vol63/iss2/10.

[cx] Fitzpatrick, *supra* note 86, at 115.

[cxi] *Id.* at 116.

[cxii] *See,* Fitzpatrick, *supra* note 86, at 116.

[cxiii] Companies Act, 2013, No. 18, Acts of Parliament, 2013.

[cxiv] *See,* Madan Lal Bhasin, *Creative Accounting Scam at Satyam Computer Limited: How the Fraud Story Unfolded*, 5 OPPEN JOURNAL OF ACCOUNTING 57, 77-79.

[cxv] Lalit Kumar, *Class Action now in force; shareholders, depositors stand empowered; learn how,* FINANCIAL EXPRESS (July 14, 2016), https://www.financialexpress.com/opinion/get-ready-class-action/316092/.

[cxvi] Companies Act, 2013, No. 18, Acts of Parliament, 2013.

[cxvii] Kritika Krishnamurthy, *Class Action under the Companies Act 2013*, LAKSHMIKUMARAN & SRIDHARAN, https://www.lakshmisri.com/News-and-Publications/Publications/articles/Corporate/Class-actions-under-the-Companies-Act-2013.

[cxviii] *Id.*

[cxix] The National Company Law Tribunal Rules, 2016, Rule 84.

[cxx] Brian T. Fitzpatrick, *Can and Should the New Third-Party Litigation Financing Come to Class Actions?* 19 THEORETICAL INQUIRIES L. 109, 111 (2018).

[cxxi] Krishnamurthy, *supra* note 117.

[cxxii] Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 245.

[cxxiii] Varun Munjal, *Class Action Suits: notified yet ambiguous*, PSA LEGAL (Nov., 2016), http://psalegal.com/wp-content/uploads/2017/01/ENewslineNovember2016.pdf.

[cxxiv] JASON GEISKER AND JENNY TALLIS, *Australia*, in *THE THIRD-PARTY LITIGATION FUNDING LAW REVIEW, 1 (*Leslie Perrin Ed., 2018).

[cxxv] LESLIE PERRIN, *England and Wales, in THE THIRD-PARTY LITIGATION FUNDING LAW REVIEW, 48-58 (*Leslie Perrin Ed., 2018).

[cxxvi]Code of Conduct for Litigation Funders, ASSOCIATION OF LITIGATION FUNDERS,(Jan.,2018),http://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf.

[cxxvii] Perrin*, supra* note 125.

[cxxviii] Jonathan T. Molot, *Litigation Finance: A market Solution to a Procedural Problem*, 99 GEO. L.J. 65 (2010).

[cxxix] Geisker and Tallis, *supra* note 124.

[cxxx] Sugata Ghosh, *Litigation Funds Ready to Help India Inc Fight it Out*, The Economics Times,(2013), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Litigation_Funds_Ready_to_Help_India_Inc_Fight_it_Out.pdf.

[cxxxi] Alison Frankel & Jessica Dye, *Investors profit by funding surgery for desperate women patients,* Thomas Reuters,(Aug.,2015),https://www.reuters.com/article/usa-litigation-mesh/special-report-investors-profit-by-funding-surgery-for-desperate-women-patients-idUSL3N10S54U2015081.

[cxxxii] *See*, Code of Conduct for Litigation Funders, ASSOCIATION OF LITIGATION FUNDERS,(Jan.,2018),http://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf.

[cxxxiii] David H. Levitt & Francis H. Brown III, Third Party Litigation Funding: Civil Justice and the Need for Transparency Dri.org (2018), http://www.dri.org/docs/default-source/dri-white-papers-and-reports/third_party_litigation_10-17-18-(1).pdf?sfvrsn=2 (last visited Aug 15, 2019).

[cxxxiv] *See,* Jasminka Kalajdzic et al., *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 102, (2013).