

**U.S. House of Representatives
Committee on Oversight and Accountability**

“Unsuitable Litigation: Oversight of Third-Party Litigation Funding”

September 13, 2023

Testimony of Aviva Wein

My name is Aviva Wein. I am an Assistant General Counsel at Johnson & Johnson and I lead our Litigation Policy and Risk Mitigation Group. The views I express today are informed by my work—first at a defense law firm for several years, and, for the past 11 years, handling product litigation for Johnson & Johnson.

I and others at J&J applaud this Committee’s efforts to shine a light on the growing threat to our judiciary and the U.S. economy posed by the mass tort plaintiffs’ bar abuse and exploitation of the civil justice system.

Let me be clear up front, this is not about limiting aggrieved consumers or removing accountability from companies. However, in the current system, plaintiffs—the allegedly injured persons who should be the focal point of the entire process—have become nothing more than pawns in the game structured by plaintiffs’ counsel and the litigation financiers to generate profits for themselves.

This corruption of the civil justice system is one of the most significant challenges facing U.S. manufacturers of widely used products—from lifesaving and life-enhancing medicines and medical devices, to other consumer goods. The mass tort litigation business model, which we are discussing today, targets successful products because these products have large consumer bases from which lawyers and others can recruit plaintiffs for their cases through false and misleading advertising. The plaintiffs’ model exploits permissive litigation rules to solicit, aggregate, bring and maintain thousands of meritless claims—and then points to the sheer volume of claims as purported justification of their actions. The baseless and excessive mass tort litigations cause harm to manufacturers they target who are forced to incur extraordinary fees to litigate, as well as the consumers they mislead as to the true cause of their harm.

The Big Business of Product Liability Litigation

Traditionally, in tort litigation, an individual who experienced harm would seek out a lawyer to vindicate his or her rights in an effort to recover from someone who wrongfully caused that harm. That is how civil justice is supposed to work. Today’s mass tort litigation works in reverse: lawyers develop a tort theory, recruit investors, use that money to advertise for plaintiffs, and haphazardly collect thousands of claims. Mass tort litigation has been transformed into a money play: driven, funded and distorted by legal and financial entrepreneurs.

What makes this litigation model possible is the involvement of private equity funds and other litigation funders in this process. These investors are pouring unprecedented sums of money into financing litigation. In December 2022, the U.S. Government Accountability Office highlighted the lack of transparency regarding the extent of litigation financing but, even with the limited

disclosures identified “47 active commercial litigation funders, and reported that they had a total of \$12.4 billion in assets under management and had committed \$2.8 billion to new litigation financing agreements in 2021.”¹ Others have estimated litigation financing in the U.S. as involving up to at \$2.3 to \$5 billion *per year*.² A group that advises these funders has stated that 70% of this capital is invested in what they call “portfolio” litigation – or what the rest of us refer to as “mass tort litigation.”³

These investors are piling into litigation financing because they view mass tort litigation as a reliably winning proposition,⁴ with extraordinary returns: if a \$10 billion settlement of a mass tort controversy occurs, plaintiffs’ counsel (and their investors) typically pocket upwards of \$4 billion (if not more) of that amount.⁵ The vast influx of litigation financing is reshaping every aspect of the litigation process—which cases get brought, how long they are pursued, when are they settled.⁶ Yet, litigation financing remains largely unregulated, and, worse, the investments are normally hidden from the courts and parties—including when investors—not the parties—control when to settle and for how much.

So, how does this outside money control and distort justice?

First, it funds sophisticated advertising campaigns urging people to call or click for a chance at a jackpot. All day, every day, we are bombarded on our TVs, tablets, and phones with ads to sue. The American Tort Reform Association estimated that, in 2021, nearly \$1 billion was spent on more than 15 million TV ads soliciting people to file lawsuits—a 30% increase from 2017.⁷ The U.S. Chamber of Commerce has issued similar reports.⁸

Sometimes, the law firms hire advertisers to urge individuals with potential claims to contact their intake personnel at the firms.⁹ Other times, independent claims aggregators known as “lead generators,” who are non-lawyers, engage in aggressive marketing activity to identify persons

¹ *Third-Party Litigation Financing: Market Characteristics, Data, and Trends*, U.S. Gov’t Accountability Office, GAO-23-105210 (Dec. 2022), at 11-12 (citing Westfleet Advisors, *The Westfleet Insider*).

² Mark Popolizio, *Third-party Litigation Funding in 2022 -- Three Issues for Your Radar*, Verisk, Jan. 22, 2022.

³ *The Westfleet Insider: 2022 Litigation Finance Market Report*, Westfleet Advisors (2022), at 6.

⁴ Wall Street interests bet on mass tort cases because they generally “outperform returns on risky asset classes such as venture capital and private equity” and are “largely uncorrelated with macroeconomic risks.” Swiss Re Institute, *US Litigation Funding and Social Inflation* at 4, 8 (Dec. 2021); see also Roy Strom, *Camp Lejeune Ads Surge Amid “Wild West” of Legal Finance, Tech*, Bloomberg Law, Jan. 30, 2023 (investors “view mass torts as an increasingly lucrative asset class, and are likely to bet even more money on similar cases to diversify their holdings”).

⁵ Counsel’s contingency fee agreements with their clients are typically for 33-40%.

⁶ Leslie Stahl, *Litigation Funding: A Multibillion-dollar Industry for Investments in Lawsuits with Little Oversight*, CBS’s “60 Minutes,” Dec. 18, 2022 (interview with Professor Maya Steinitz).

⁷ *Legal Services Advertising in the United States: 2017-2021*, Am. Tort Reform Ass’n (Feb. 2022), at 5.

⁸ See, e.g. Cary Silverman, *Gaming the System: How Lawsuit Advertising Drives the Litigation Lifecycle*, U.S. Chamber Institute for Legal Reform (April 2020).

⁹ Roy Strom, *supra*.

who may be interested in pursuing a claim and then sell their names to law firms.¹⁰ Under either scenario, “[a]dvertising is the main method to find claimants, and it’s handled by an ecosystem of lawyer-specific ad agencies.”¹¹

Second, the advertisements generate massive numbers of claims. But the filing of a claim does not mean the claim has merit—or is even viable. There have been many reports of ethical violations with how claims are generated. In 2018, *The New York Times* in, “How Profiteers Lure Women Into Often Unneeded Surgery,”¹² specified tactics used to recruit claimants that raise questions about the veracity of the claims, including telling people to lie if they want money and convincing them to get unnecessary surgery to facilitate their lawsuits.

The ads may also mislead people into thinking they have a viable case. In 2019, the Federal Trade Commission sent letters to several law firms and lead generators flagging ads soliciting clients for suits against drug manufacturers as potentially “unlawful.”¹³ The ads misrepresented risks associated with drugs, were made to look like FDA alerts, and led consumers to believe their medications were recalled when they were not. Attorney ads also sometimes suggest that a mass tort has already been settled—that people only have to submit a form to get money—even when no such deal has been reached and liability is rightfully being contested.

When claims are collected by lead generators and sold to law firms who file them, they are rarely vetted; the lawyers typically have a paralegal prepare complaints without verifying any of the information. The result is a mass of claims, many of which are completely meritless.

The Federal Advisory Committee on Civil Rules issued a report estimating that in mass product cases, 20%-30% of all claims are “unsupportable . . . either because the claimant did not use the product involved, . . . the claimant had not suffered the adverse consequence in the suit,” or had some other deficiency.¹⁴ In some litigations, the report continued, unsupported claims “may be as high as 40% or 50%.”¹⁵ But plaintiffs generally face no penalties for filing meritless claims, and defendants are forced to spend time and money sifting through cases and seeking their dismissal.

Judge Clay D. Land of the U.S. District Court for the Middle District of Georgia discussed this phenomenon in a 2016 order, explaining that multidistrict litigations (MDL) create “incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit” because the lawyers “seem to think that their case will be swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of

¹⁰ *Id.*

¹¹ *Id.*

¹² Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often Unneeded Surgery*, N.Y. Times, Apr. 14, 2018.

¹³ Press Release, *FTC Flags Potentially Unlawful TV Ads for Prescription Drug Lawsuits*, Fed. Trade Comm’n, Sept. 24, 2019.

¹⁴ *Agenda Book*, Advisory Committee on Civil Rules, Nov. 1, 2018, at 142.

¹⁵ *Id.*

their case being scrutinized.”¹⁶ This is why “many cases are filed . . . with so little pre-filing preparation that counsel apparently has no idea whether or how she will prove” the case.¹⁷

In other words, plaintiffs’ counsel in mass tort litigation too often prefer to litigate the mass—the large number of cases filed—and ignore the tort, which is the merits of the allegations.

Third, as judges are beginning to find out, the scientific basis for entire litigations—that the product can cause the harms alleged—may largely be a figment of this business model. The lawyers and funders often raise speculative associations between a commonly used product and a widely experienced disease for which the cause remains varied or unconfirmed. They then hire “experts” to craft a theory about how the product is the real culprit so that anyone who used the common product and experience common disease will respond to the advertisements.

Courts are starting to catch on to this litigation play. The *Wall Street Journal* reported earlier this year that a laboratory with ties to plaintiffs’ lawyers is behind studies alleging that the heartburn medication Zantac and other products—sunscreens, antiperspirants, shampoos, and hand sanitizers—contain dangerous levels of cancer-causing chemicals.¹⁸ In Zantac litigation, 50,000 claims were dismissed by a federal court after it was discovered that improper testing methods *generated* the cancer-causing chemical.¹⁹ Yet, the accusation and lawsuits led to Zantac being pulled from the market, swamped the courts’ dockets, and forced defendants to waste millions defending against meritless claims. Other cases generated by the lab remain pending.

Finally, the involvement of litigation funders also can delay the resolutions of cases. Funders control litigation outcomes, including when cases can settle and for how much. The largest litigation funder, Burford Capital, has claimed it acts as a passive investor and does not control strategy or settlement.²⁰ But, in a dispute with Sysco Corp., which accepted Burford funding, Burford prevented Sysco from settling claims. The Sysco situation is not unique. In a letter to the Federal Advisory Committee on Civil Rules, the U.S. Chamber and other groups said they are not aware of *any* litigation funding agreements that do not afford funders some control or influence over the litigation they fund.²¹

Consequences of this Mass Tort Generation Machine

As courts, attorneys and academics are seeing, this new and pervasive mass tort business model has significant adverse consequences for the courts and litigants. Courts are overwhelmed, and the MDL system, which Congress developed to deal with mass torts, is breaking down. The

¹⁶ *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, No. 4:08–MD–2004 (CDL), 2016 WL 4705827, at *1 (M.D. Ga. Sept. 7, 2016).

¹⁷ *Id.*

¹⁸ Editorial, *A Legal Shakedown Exposed*, Wall St. J., Feb. 16, 2023.

¹⁹ *See id.*

²⁰ [Control: Addressing a Common Question About Litigation Finance](#), Burford Capital, Oct. 4, 2017.

²¹ [Letter from 35 Organizations to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts regarding Proposed Fed. R. Civ. P. 26\(a\)\(1\)\(A\)\(v\)](#), May 8, 2023.

system had good intentions, but many MDL judges acknowledge they cannot properly ensure that the individual cases consolidated in their courts will get appropriate individual attention.

Where there is smoke, there is not necessarily fire. Mounting case numbers are meant to convey to courts and the media that there is a problem with a product. But large case pools more often result from the fact that claims are not properly vetted, by the law firms or the courts. If a claim were filed individually, the federal rules contain many procedural steps that would reveal if it was improperly filed. But, in mass torts, defendants are typically barred from using these tools, leaving the funders and lawyers to run up the mass of claims without scrutiny.

As a result, MDL judges often start the proceedings by focusing on settling the mass of claims, not assuring that they rise or fall on the merits. The thousands of claims stockpiled in their courts create “incentives for judges to treat settlement as the ultimate goal.”²² For judges, driving the parties into a global resolution may seem like the best, and sometimes only, option.²³ But that’s not justice; it is gaming the system. It creates a Field of Dreams problem—if you create a system that rewards the mass filing of questionable claims, more will come.

Further, the continual bombardment of TV, internet and other ads that demean the value of important FDA-approved medications and medical devices, among other consumer products, can mislead people into making bad health care decisions, sometimes causing serious harm. Individuals relying on litigation-financed ad campaigns touting lawyer-contrived theories may forego the valid scientific testing required to ascertain the true cause of their malady or adopt less effective or more dangerous alternatives in lieu of appropriate treatments. In response to these concerns, the AMA and AARP have cautioned that “fearmongering” in lawsuit ads are “dangerous” (AMA)²⁴ and have “frightened” patients into stopping critical care (AARP).²⁵

And defendants cannot get justice. Even when defendants win, they lose. Here, I can share an experience I had earlier in my career. More than a decade ago, the FDA said it was looking into reports of bleeding risks related to the blood thinner Pradaxa. \$94 million was spent on litigation ads generating 4,000 claims. The litigation settled for \$650 million before a single trial was held, even as the FDA found Pradaxa had no heightened bleeding risk.²⁶

After that settlement, \$122M was spent on ads generating 30,000 claims over Xarelto, another blood-thinner—this one sold by J&J. Six trials were held. The defendants prevailed in all of the cases. The labeling has always adequately warned against the risk. Yet 30,000 cases were still

²² Andrew S. Polis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L. Rev. 1643, 1669 (2011).

²³ *In re NLO, Inc.*, 5 F.3d 154, 157 (6th Cir. 1993).

²⁴ Press Release, *AMA Adopts New Policies on Final Day of Annual Meeting*, Am. Med. Ass’n, June 15, 2016.

²⁵ *Don’t Let Lawsuit Ads Put You at Risk*, AARP, Mar. 18, 2018.

²⁶ <https://www.boehringer-ingelheim.com/us/press-release/fda-study-medicare-patients-reaffirms-safety-and-efficacy-profile-pradaxa-dabigatran>

stockpiled in the courts. The defendants agreed to pay \$775 million to resolve meritless cases in order to avoid the burdens of continued litigation.²⁷

Even more troubling than the waste of money and resources is the danger of litigation to human health. A 2019 study issued by the FDA found 66 reports of adverse events following patients discontinuing blood thinner medication (Pradaxa, Xarelto, Eliquis or Savaysa) after seeing one of these lawsuit advertisements.²⁸ Thirty-three patients experienced a stroke, 24 experienced another serious injury, and seven people died.

To be clear, the outside money and control fueling modern-day mass tort litigation have little to do with vindicating rights or compensating purportedly aggrieved consumers. Indeed, in the current system, plaintiffs—the allegedly injured persons who should be the focal point of the entire process—have become nothing more than pawns in the game structured by plaintiffs’ counsel and the litigation financiers to generate profits for themselves. As noted previously, those counsel (and their investors) get much of any money that is recovered. And not surprisingly, the consumer claimants feel very mistreated by the system.

According to a recently released survey of plaintiffs in mass tort MDL proceedings, “[l]ess than fifty percent could identify their attorney’s name, fifty-nine percent disagreed that their attorneys kept them updated on their case’s status, and only 16.6 percent ever even spoke with their lawyer on the phone.”²⁹ Thus, not surprisingly, the surveyed plaintiffs expressed strong objections to “overall . . . manner” in which their “lawyer handled their case: 47% were “extremely dissatisfied,” 18% were “somewhat dissatisfied,” but only 8% were “extremely satisfied.”³⁰ Only “a trifling 1.8 percent felt like their lawsuit accomplished what they hoped it would.”³¹

Today, the primary beneficiaries of our mass tort regime are the attorneys and their investors. The losers are the courts, American businesses, consumers and allegedly aggrieved claimants.

Congress Should Address These Problems

To address the foregoing problems, Congress should take several steps:

First, Congress should support a proposed amendment to the Federal Rules that would require disclosure of third-party litigation funding (or enact legislation to the same effect). A draft rule mandating such disclosure on a nationwide basis has been under consideration before the Federal Advisory Committee on Civil Rules since 2017, but no action has been taken. In the meantime,

²⁷ Katie Thomas, *Bayer and Johnson & Johnson Settle Lawsuits Over Xarelto, a Blood Thinner, for \$775 Million*, N.Y. Times, Mar. 25, 2019.

²⁸ *Discontinuation of Direct Oral Anticoagulants in Response to Attorney Advertisements: Data From the FDA Adverse Event Reporting System*, in *Annals of Pharmacotherapy* (May 2019).

²⁹ Elizabeth Chamblee Burch, *MDL for the People*, 108 Iowa L. Rev. 1016 (2023).

³⁰ *Id.* at 1048.

³¹ *Id.* at 1016.

several federal courts, including those in the Districts of New Jersey, Delaware and Northern California, have adopted local rules or issued standing orders mandating such disclosures.

As Chief Judge Colm Connolly of the U.S. District Court for the District of Delaware explained in issuing a standing order requiring such disclosures, third party litigation funding raises concerns as to “whether the real parties of interest are before the Court.”³² Withholding the identity of the funders and the funding agreements creates a “lack of transparency as to who . . . is making decisions.”³³ The Delaware court modeled its order after the local rule adopted by the District of New Jersey and said its “confidence [in adopting the order] is reinforced by the fact that as of 2018, six federal courts of appeals and 24 district courts had third-party funding disclosures of some kind.”³⁴

More recently, the federal judge overseeing the 3M Combat Arms litigation required such disclosures, too. As that court noted: “For at least the past decade, settlements of this size and nature have often attracted the attention of third-party litigation funding entities intending to prey on litigants, including settlement participants seeking litigation funding pending the receipt of potential settlement funds.”³⁵ These rules should be universal across the federal judiciary.

Second, Congress should enact legislation that regulates third party litigation funding. The identify of anyone who provides funding for litigation in exchange for a stake in the outcome of a case should be disclosed to the plaintiffs in the lawsuits, along with the agreement and any conflicts of interest between the funders and parties. The funders should also have a fiduciary duty to the parties they are funding so they cannot make decisions, including refusing to settle, that are against that litigant’s interests.

In addition, Congress should safeguard the American people from misleading lawsuit advertising. Lawsuit ads should be clear about what they are and what they are not. Law and marketing firms should not be allowed to use federal government logos, suggest that an advertisement is a medical alert, or use the term recall when referring to a product that has not been recalled under the law.

Finally, Congress should pursue reforms of the MDL process that would achieve several key objectives: (1) dismissing at the outset claims that do not identify scientific evidence supporting allegations that the product in question *caused* the purported harm; (2) vetting claims early to weed out the 20%-50% that would never survive on their own merits; (3) ensuring rigorous medical science drives the outcomes of the litigation; and (4) not allowing settlement to result from the mere slapdash assembly of thousands of claims. The Federal Advisory Committee on

³² Memorandum, *Nimitz Tech., Inc. v. CNET Media, Inc.*, Nos. 21-1247-CFC, 21-1362-CFC, 21-1855-CFC, 22-413-CFC, *1 (D. Del. Nov. 30, 2022).

³³ *Id.* at *2.

³⁴ *Id.* (citing Meeting of the Advisory Committee on Civil Rules Agenda Book 209, 210 Philadelphia, P.A. (Apr. 10, 2018)).

³⁵ Case Management Order No. 61 (Third-Party Litigation Funding), *In re: 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-02885, *1 (N.D. Fla. Aug. 29, 2023).

Civil Rules has spent considerable time considering options in this regard, but the proposed rule it recently issued for public comment would not achieve these goals.

By embracing these simple, common-sense measures, Congress can help return the federal judiciary to a place where both plaintiffs and defendants can find justice. Again, I very much appreciate the opportunity to provide my experiences and perspectives.