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THIRD PARTY LITIGATION FUNDING IN FALSE CLAIMS ACT CASES

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U.S. CHAMBER
Institute for Legal Reform

Third Party Litigation Funding in False Claims Act Cases†

Third party litigation funding (TPLF), where financiers invest in litigation in return for a share of an ultimate settlement or judgment, is a growing phenomenon in the United States. Despite the numerous documented concerns regarding TPLF, there is little transparency on the practice. In most cases, the existence of a TPLF agreement in a given case is never disclosed to the opposing party or the court, let alone the degree of strategic influence or control surrendered by the plaintiff to the funder.

This dynamic is especially problematic in the context of False Claims Act (FCA) litigation. In remarks given in early 2020, then-Deputy Associate Attorney General Stephen Cox acknowledged that even the U.S. Department of Justice (DOJ) has "little insight into the extent to which [TPLF entities] are backing the *qui tam* cases [DOJ is] investigating, litigating, or monitoring."[1] This is remarkable given that the relator in a *qui tam* case is standing in the shoes of the government, litigating on its behalf.

Fortunately, DOJ recently announced concrete, practical steps to begin remedying the critical information gap in False Claims Act cases and put some much-needed focus on the practice of TPLF. In a speech in late June, Principal Deputy Associate Attorney General Ethan Davis noted DOJ's continued questions about the role of TPLF in *qui tam* cases and described how the Department will begin to gather information for the purpose of studying these issues. Specifically, DOJ attorneys will begin to ask a series of questions at each relator interview, including: (1) whether there is an agreement with a third party funder; (2) the identity of the funder; (3) whether information has been shared with the funder; (4) whether there is a written agreement with the funder; and (5) whether the agreement entitles the funder to exercise any direct or indirect control over the relator's litigation or settlement decisions addressing it.[2] The Department also will ask relators to update this information.

> *"This welcome announcement will challenge the common mischaracterization of* qui tam *False Claims Act litigation as a lone whistleblower bringing a case against a large company to protect the public, at great personal risk and expense."*

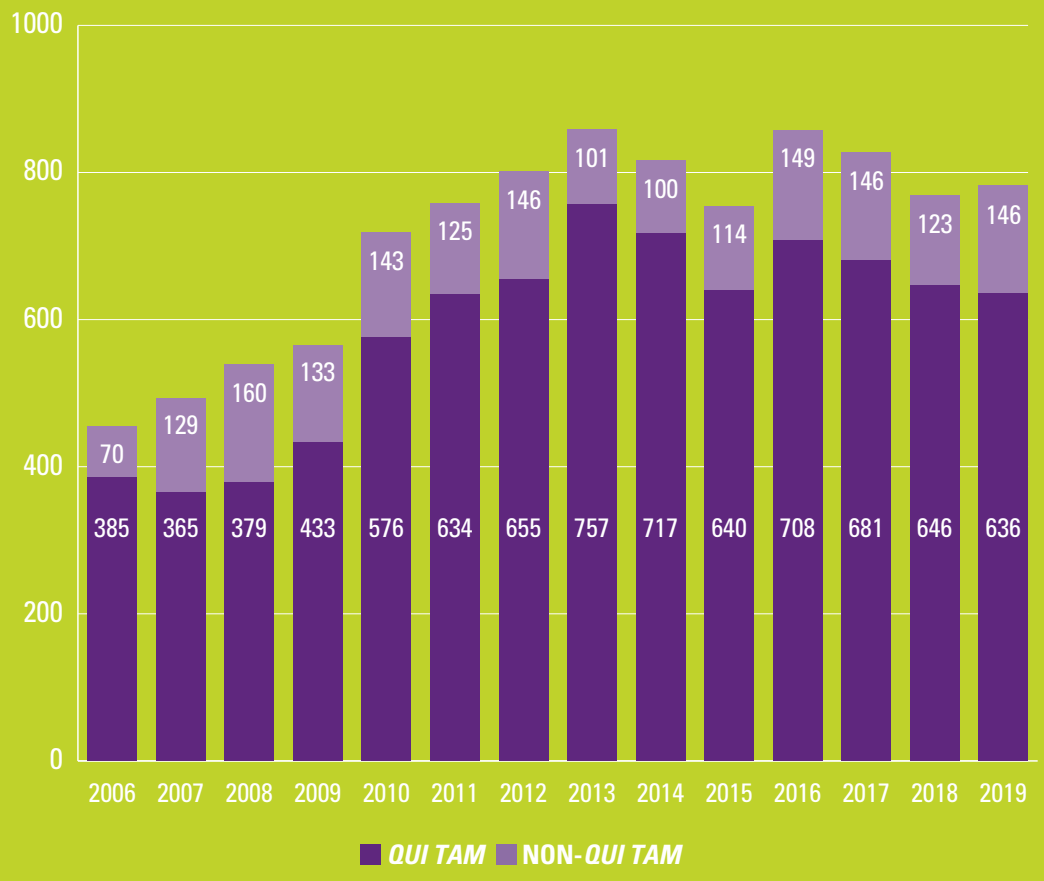
This welcome announcement will challenge the common mischaracterization of *qui tam* FCA litigation as a lone whistleblower bringing a case against a large company to protect the public, at great personal risk and expense. This account of FCA cases has the potential to influence the views of governments, judges, and juries on issues ranging from

case management to credibility. In some cases, the established narrative is rooted in reality, but in many others, it can be a misleading distortion of the truth. This is especially so when TPLF is involved.

DOJ's recent policy change is thus a welcome and much-needed development. It should be emulated by state attorneys general as they review claims by relators under their own FCA laws that are supposed to be brought on behalf of the state.

As demonstrated by the examples below, traditional concerns regarding TPLF are exacerbated in the context of *qui tam* FCA litigation. Increased transparency regarding the use of TPLF is necessary to allow the government, the parties, and the court to better address these issues on a case-by-case basis. Just as importantly, removing the cloak of secrecy surrounding TPLF will allow a more informed evaluation of the impact of TPLF on FCA litigation as a general matter.

Fraud Statistics—Civil Division—New FCA Matters



Every year, the vast majority of new FCA matters are driven by *qui tam* relators. The government and the public have a significant interest in understanding the role that third party litigation funders, with their own agendas, may play in these actions.

Data Source: Civil Division, U.S. Department of Justice, Fraud Statistics-Overview (Jan. 9, 2020).

Divergent Incentives and Interests

The practice of TPLF is growing in the United States, where financiers invest in litigation based on a cost-benefit analysis for their overall portfolio, not any first-hand knowledge regarding the merits of the particular case.[3] One of the concerns commonly raised about TPLF is that the third party funder may affect litigation strategy, acting as an invisible force behind the plaintiff unknown to the court, jury, and defendants. Even if the TPLF agreement does not give any direct control to the TPLF entity—an argument that TPLF supporters often assert, but that is hard to evaluate without greater transparency into the arrangements—the existence of TPLF may have an impact on the case. For example, TPLF may create incentives against settlement by driving up the plaintiff's bottom line (to account for the TPLF entity's share) or reduce the likelihood of settlement due to the funder's interests. This issue has drawn particular attention in class actions, in which the funder's role may dilute any influence that named plaintiffs have on the litigation and raise concerns about conflicts with other proposed or actual class members' interests.

These concerns are even more acute in the context of FCA litigation. In *qui tam* FCA actions, there is already a degree of separation between the party who initiated and potentially litigates the action (the relator), and the allegedly injured real party-in-interest (the government). As reflected in "the Granston Memo" and recent government motions seeking dismissal of *qui tam* actions pursuant to 31 U.S.C. § 3730(c)(2)(A), the interests of the relator and the government are not completely aligned.

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Motivated by their own interests, including their share of any eventual recovery, relators may choose to litigate a case that the government concludes lacks merit or would result in an "unwarranted windfall" to the relator.[4] In addition, while the relator is solely focused on the outcome in his or her individual case, the government's interests extend more broadly, including to potential impacts of the case on agency policies and programs, other government litigation, and government resources.[5] For example, a relator may pursue arguments or theories that the government would not pursue or, even further, that directly undermine the government's interests.

TPLF drives a further wedge between the government and those litigating on its behalf. A third party funder that directly or indirectly affects litigation strategy introduces an additional layer of separation between the private litigant and the real party-in-interest—the government.

For example, the introduction of TPLF alters the relator's and his or her counsel's cost-benefit

analysis in deciding whether to voluntarily dismiss a case or pursue settlement. TPLF funders may have a greater willingness to "roll the dice" on pursuing cases or providing additional funding despite litigation weaknesses, because their risks are more diffuse. The government, however, does not get the benefit of this TPLF; its considerable costs of participating in the litigation remain the same while the litigation, skewed by the self-interest of those providing TPLF, slogs forward.

Impacts on the Dynamics of Discovery Disputes

An oft-cited argument in favor of requiring disclosure of TPLF arrangements is that it will lead to a more equitable resolution of discovery issues, such as proportionality and cost-shifting. Rule 26(b)(1) of the Federal Rules of Civil Procedure expressly incorporates consideration of "the parties' resources" into the evaluation of the appropriate scope of discovery. Courts similarly consider the parties' resources when deciding whether to shift the costs of responding to discovery requests to the discovering party. The court's evaluation of these issues may be distorted if it is not aware of external financing the plaintiff may employ to pay for the discovery it claims to need. This is particularly true in a non-intervened FCA case: the typical image of an individual whistleblower fighting against a large company may be misleading if the individual has the resources of a TPLF entity at his or her disposal. Indeed, the relator may have more litigation resources than the defendant.

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Arming courts and defendants with information about the true extent of relators' resources presents a realistic opportunity to shift the costs of relators' typically expansive discovery requests. This could, in turn, lead to less asymmetrical discovery outcomes. For instance, faced with a realistic threat of potential cost-shifting, relators may craft more reasonable discovery requests. And, if relators persist with a scorched-earth discovery approach, they and their financiers may have to pay for it.

Ethical Conflicts of Interest and Privilege Issues

Commentators also often raise concerns about conflicts-of-interest and privilege issues that may arise unbeknownst to the court or the opposing party due to the lack of transparency regarding the TPLF arrangement. For example, on the side of the plaintiff, there may be ethical concerns due to potential conflicts of interest among the plaintiff, the attorney, and the funder, if the attorney has contractual duties to, or a repeat relationship with, the funder.

As another example, there may be ethical conflicts if third party funders receive non-public information that has the capacity to move markets, such as a settlement that has not yet been finalized and announced. If they trade on such information, markets could be distorted to the benefit of the third party funder and the detriment of the general public, whose interests DOJ is charged with protecting. With respect to privilege, communications between the plaintiff and the TPLF entity—especially during pre-agreement due diligence—may result in a waiver of attorney-client privilege. While the work product doctrine may still offer some protection, that doctrine has important exceptions.

These issues are magnified in the context of FCA litigation.

> *"[C]ommunications with the TPLF entity may potentially violate the FCA's requirement that* qui tam *complaints be filed under seal, opening up the door to potential penalties."*

Instead of three entities among which there may be potential conflicts on the plaintiff-side of the ledger, there are four: the government, the relator, the relator's counsel, and the funder. The privilege issues thus are even more complicated. For example, imagine that during the course of its investigation into a relator's allegations, the government, the relator, and relator's counsel communicate about the investigation—a frequent occurrence. Traditionally, the relator and the government would assert that these communications are protected by the work product doctrine or other investigative privileges, and that those protections are not waived because the common-interest doctrine applies. However, the plaintiff may unilaterally waive these protections by sharing the information with a third party funder. The government should be on notice that this is a possibility. In addition, communications with the TPLF entity may potentially violate the FCA's requirement that *qui tam* complaints be filed under seal, opening up the door to potential penalties. DOJ's recent announcement suggests that the Department is keenly aware of the potential issues that could arise if relators share information with third party funders.

Conclusion

As a general rule, the public benefits by more—not less—transparency. DOJ's recently announced policy is an important and welcome first step in helping the government, and ultimately the public, understand the role TPLF plays in *qui tam* suits that are purportedly brought on the government's behalf. In particular cases, what DOJ learns may inform its exercise of discretion to dismiss *qui tam* suits pursuant to 31 U.S.C. § 3730(c)(2)(A). Furthermore, DOJ may determine that a more probing inquiry into the role of TPLF in *qui tam* suits is warranted and that all stakeholders are entitled to know more about such TPLF arrangements. Armed with this information, Congress and state legislatures may find that legislative fixes are in order to address any distortion that may be caused by the misalignment of interests between the government, *qui tam* relators, TPLF entities, and the public interest.

> *"Furthermore, DOJ may determine that a more probing inquiry into the role of TPLF in* qui tam *suits is warranted and that all stakeholders are entitled to know more about such TPLF arrangements."*

DOJ'S FOCUS ON TPLF

As stated above, DOJ will begin shedding much-needed light on TPLF in FCA cases by asking a series of questions at each relator interview, to establish:

1. *whether there is an agreement with a third party funder;*
2. *the identity of the funder;*
3. *whether information has been shared with the funder;*
4. *whether there is a written agreement with the funder; and*
5. *whether the agreement entitles the funder to exercise any direct or indirect control over the relator's litigation or settlement decisions.*

Endnotes

† This edition of *ILR Briefly* was prepared by Matthew Dunn and Krysten Rosen Moller, Covington & Burling, LLP.

1 Deputy Associate Attorney General Stephen Cox Provides Keynote Remarks at the 2020 Advanced Forum on False Claims and *Qui Tam* Enforcement (Jan. 27, 2020), *available at* https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-provides-keynote-remarks-2020-advanced.

2 *See* Ethan Davis, Principal Deputy Associate Attorney General, Civil Division of DOJ, Remarks on the False Claims Act at the U.S. Chamber Institute for Legal Reform (June 26, 2020), *available at* https://www.justice.gov/civil/speech/principal-deputy-assistant-attorney-general-ethan-p-davis-delivers-remarks-false-claims.

3 According to a 2017 Litigation Finance Survey published by Buford Capital Limited, amongst US law firm respondents, use of litigation funding increased 414 percent between 2013 and 2017. "The dominant view among all survey respondents" was that litigation finance was growing and was increasingly important. *2017 Litigation Finance Survey*, Buford Capital Limited, *available at* https://www.burfordcapital.com/insights/insights-container/2017-litigation-finance-survey/.

4 *See* Mem. from Michael D. Granston, Dir., Fraud Section, Commercial Litigation Branch of DOJ, to All Attorneys in Fraud Section, Commercial Litigation Branch at 3-4 (Jan. 10, 2018).

5 *See id.* at 4-7.

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