

The consultation closes on **Friday 31 January 2025 at 23:59**.

Consultees do not need to answer all questions if only some are of interest or relevance.

Answers should be submitted by PDF or word document to CJCLitigationFundingReview@judiciary.uk. If you have any questions about the consultation or submission process, please contact CJC@judiciary.uk.

Please name your submission as follows: 'name/organisation - CJC Review of Litigation Funding'

You must fill in the following and submit this sheet with your response:

Your response is (public/anonymous/confidential):	Public
First name:	Ryan
Last name:	Hollingsworth
Location:	UK
Role:	Lawyer
Job title:	Legal Director & Company Secretary
Organisation:	ABPI
Are you responding on behalf of your organisation?	Yes
Your email address:	

Information provided to the Civil Justice Council:

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Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Civil Justice Council.

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We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous, we will not include your name in the list unless you have given us permission to do so. Please let us know if you wish your response to be anonymous or confidential.

28 February 2025

ABPI Submission: Civil Justice Council Review of Third-Party Litigation Funding

About the Association of the British Pharmaceutical Industry

The ABPI exists to make the UK the best place in the world to research, develop and access medicines and vaccines to improve patient care.

We represent companies of all sizes which invest in making and discovering medicines and vaccines to enhance and save the lives of millions of people around the world.

In England, Scotland, Wales and Northern Ireland, we work in partnership with governments and the NHS so that patients can get new treatments faster and the NHS can plan how much it spends on medicines. Every day, our members partner with healthcare professionals, academics and patient organisations to find new solutions to unmet health needs.

According to Office for National Statistics data, in 2021, the pharmaceutical industry in the UK created 126,000 jobs and contributed £17.6 billion in direct Gross Value Added (GVA) to the UK economy. The industry is the largest investor into UK R&D (£9 billion in 2022¹) and industry clinical trials conducted in the UK benefit thousands of patients and generate significant cost savings to the NHS. A recent ABPI report² showed that, in 2022, industry clinical trials alone:

- generated £7.4 billion of GVA for the UK economy, creating a total of 65,000 jobs;
- raised £1.2 billion of direct revenue to the NHS, supporting 13,000 NHS jobs; and
- helped to prevent 3 million sick days, worth £0.9 billion to the UK economy, by supporting research-active hospitals to provide better quality care than research-inactive hospitals.

The ABPI and its members are available to discuss matters considered as part of this consultation, and the UK pharmaceutical industry's experiences with them, in more detail.

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The ABPI Endorses TPLF Regulation

The ABPI welcomes the opportunity to respond to this Civil Justice Council review focused on third-party litigation funding (TPLF).

This is an area of critical importance to our members and, more generally, to the pharmaceutical industry worldwide.

ABPI member companies generate revenue by bringing medicines to society and delivering lifesaving or lifechanging therapies to patients; TPLF entities earn by treating litigation as a profit-generating opportunity. And yet so little money actually finds its way into the hands of claimants: a Consumer Financial Protection Bureau Report to U.S. Congress in 2015 found that when claimants in the US received a payment from a class action, it was typically about \$32, while the claimants' lawyers earned an average of \$1 million per settled case.

¹ <https://www.ons.gov.uk/economy/governmentpublicsectorandtaxes/researchanddevelopmentexpenditure/bulletins/businessenterpriseanddevelopment/2022>
² <https://www.abpi.org.uk/publications/the-value-of-industry-clinical-trials-to-the-uk-extended-report/>

Our submission is based on the experience of our membership. We answer certain questions put forward by the Council (referenced in footnotes for each subtitle) while leaving it to the legal experts to answer the most technical questions in detail. Our submission underscores the ABPI's support for greater regulation of third-party litigation funding in the UK.

The ABPI supports greater regulation of third-party litigation funding in the UK, which currently operates without transparency, and free of any ethical or fiduciary obligations. TPLF-driven litigation is diverting pharmaceutical companies' resources away from R&D and other productive activities and undermining the UK investment environment.

Pharmaceutical innovators face an array of challenges in bringing new medicines to market. Regulators and patients want new medicines to become available to patients more quickly, with few side effects and the lowest possible prices. At the same time, the science of developing new treatments is becoming more complicated, IP systems are under attack in several jurisdictions, and health budgets are under pressure everywhere. Companies face rising competition from their counterparts in other nations, who benefit from unfair trade practices and government subsidies. Globally distributed supply chains are vulnerable to trade protectionism, wars, geopolitical tension, environmental pressures, and other risks. The rise in TPLF targeting the pharmaceutical industry further complicates what is already a very challenging environment for doing business.

Pharmaceutical companies support access to justice for patients and consumers, but how that is properly and transparently achieved is of great importance, including the role that TPLFs play in that equation.

TPLF and the Innovative Pharmaceutical Sector

Because litigation is extremely expensive, time consuming, and disruptive, it is generally viewed by companies in our sector as a last resort for resolving disputes. The opposite is true of third-party litigation funders, who profit from litigation without, in our view, increasing access to justice. ABPI member companies generate revenue by bringing medicines to society and delivering lifesaving or lifechanging therapies to patients; TPLF entities earn by treating litigation as a profit-generating opportunity. Through TPLF, investors finance lawsuits in exchange for a percentage of any settlement or judgment received. The terms of the financing are set out in the litigation financing agreement. Investors can fund one case, or they can invest in a portfolio of cases (including a series of cases managed by the same legal team, over time). TPLF is typically non-recourse, which means the funder is not repaid in cases where there is no recovery.

We observe that TPLF is gaining ground across regions. The ABPI welcomes the growing attention from policymakers, who are scrutinising and taking action to regulate this practice. As an initial matter, and at a minimum, transparency is urgently needed.

Disclosure of third-party funding is essential to enable participants in a case and the court to make informed decisions about the litigation because outside funding “fundamentally alters the dynamics and has a major impact on whether the dispute can be resolved through settlement”.¹

What is clear is TPLF is a profitable asset class, leveraging the court system and civil litigation as vehicles for securing profits, with certain sectors most affected. One is the innovative healthcare sector, developing pharmaceutical products and medical devices.

Across jurisdictions, health innovators are embroiled in more litigation characterised by higher costs and longer timelines, less willingness by claimants to reach negotiated settlements, and often, frivolous claims. Observers attribute this in part to the growing role, behind the scenes, of TPLF in Europe and the UK creating a more “US style” system for representative actions and opt-out style class actions (e.g. the Competition Appeals Tribunal in England & Wales) which are “big business” for TPLF. Even when faced by lawsuits that are unmeritorious, pharmaceutical companies must divert resources and time away from productive uses such as R&D to address the claims. They may even choose to settle claims without merit to avoid protracted litigation and to focus on their core mission: ensuring patients obtain the therapies they need as soon as possible.

Pharmaceutical and medical device companies have been aggressively targeted by TPLFs, across jurisdictions and especially in the United States. The United States has seen class action lawsuits proliferate in recent years, with tens of thousands of cases and many instances where claimants are found to have no real connection to the case. In the US, multi-million dollar advertising campaigns are relied upon by TPLF entities to advertise litigation and recruit participants, as they simultaneously acquire stakes in the outcome of the (thousands of) cases. Staggering growth in the number of lawyers and advertisers targeting pharmaceutical and medical device companies with class actions has been reported in the United States in recent years³. As of June 2024, there was an estimated \$15.2 billion in commercial litigation investments in the United States alone⁴.

Our sector is counting on UK lawmakers to impose regulation – at a minimum, transparency requirements – to avoid this same dynamic undermining the legal system, innovation ecosystem, and investment environment in the UK.

Innovative pharmaceutical companies must increasingly divert resources from research and development activities aiming to create new innovation and improve patients’ lives to respond to unmeritorious cases driven by TPLF.

TPLF has already taken root in the UK, where evidence points to rapid growth in the sector. Based on the limited information available, we observe a significant increase in the number of claimant law firms and third-party litigation funders setting up shop in the UK in recent years. TPLF assets in the UK have increased tenfold in the last decade, rising from £200 million in 2010/2011 to more than £2 billion by 2021. Data from the U.S. Chamber of Commerce Institute for Legal Reform suggests that there are now reportedly more of these organisations in the UK than any other European country. TPLFs finance only a small number of cases – those they expect to be most profitable (recent research by Professor Rachael Mulheron KC (Hon) of Queen Mary University of London, conducted on behalf of the Legal Services Board, identified that most litigation funders only support between 3% and 5% of all cases presented to them)⁵. This strategy is clearly highly profitable, and this explains why the industry continues to grow at pace.

The ABPI and its members have seen a significant increase in the number of class actions claims against life sciences and other consumer goods businesses in the UK in the last five years. A report by the law firm CMS suggested that class members involved in UK competition class action lawsuits now total more than 500 million people: for a country with a population of 68 million people, this represents more than eight class actions for each person in the UK (“Class Actions Report 2024”). For pharmaceutical companies, ESG laws could become a further significant area of exposure to claims and TPLF.

³ See [On Litigation Funding: The Drug and Device Industry](#), published 2018 by Faegre Baker Daniels LLP

⁴ See What You Need to Know about Third Party Litigation Funding, published June 2024 by the U.S. Chamber of Commerce Institute for Legal Reform

⁵ <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>

Due to their cost and complexity, competition law class actions will always require litigation funding, and these claims are particularly popular with TPLFs. Competition class actions offer the prospect of huge returns for funders: hence the significant recent growth in the number of these claims. TPLFs are interested in profits and opt-out competition class actions deliver this for them, even though we can observe such claims doing little to deliver effective access to justice (a 2019 U.S. Federal Trade Commission study showed that the median take-up rate for consumer class actions was just 9%⁶).

For pharmaceutical companies, TPLF has opened the door to a rising number of costly, frivolous lawsuits. Our members are increasingly directing resources to address a growing number of dubious claims that were made possible only thanks to TPLF. Businesses (across sectors) often settle cases rather than engage in protracted and costly litigation, regardless of whether the claims are legitimate. These are resources that could have potentially gone towards R&D and other efforts to bring innovations such as medicines to society. The interests and actions of TPLFs should be viewed very negatively when compared to the genuine social, economic, and healthcare improvements sought and delivered to citizens by the pharmaceutical industry.

The ABPI wishes to underscore the point that TPLF are operating in the shadows. In the UK, there is no single, complete source of information about the growth of TPLF, its profitability as an industry, or the outcomes of funded cases. These funders currently face no accountability for engaging in unethical practices, and they do not bear the consequences of driving more litigation so they can profit from it.

The ABPI's view – and that of the many innovators, across sectors, that are now urging policymakers to focus on TPLF – is that transparency and regulation are urgently needed. Without them, third-party litigation funders (TPLFs), whether hedge funds, private institutions specialised in third-party litigation financing, foreign government entities, or others, will continue to compromise the integrity of the UK legal system while undermining the investment environment and threatening the future competitive position of innovative sectors such as pharmaceuticals in the UK.

TPLF does not necessarily act in the best interest of the claimant⁷

This is the essential starting point for the discussion as to why regulation is urgently needed for TPLF. The ABPI and its members are of the view that TPLF – without adequate guardrails – does little, if anything, to advance access to justice. We are convinced that greater transparency and regulation of TPLF in the UK could help to deliver better outcomes for individuals and therefore improve access to justice in the UK overall.

It is certainly possible, in theory, that third-party litigation funders may enable individuals (both those who have and have not been harmed) to take legal action. However, available evidence suggests that TPLFs do not necessarily act in the best interest of the individual generally. Rather, access to justice is, at best, a by-product of their activities, which are focused purely on generating profits by financing lawsuits. To expand:

First, the total lack of transparency in the third-party legal funding (TPLF) sector makes it difficult to establish any correlation between TPLF and access to justice. There is no obligation under English law to disclose when TPLF is being used to fund a case. Thus, there is no guarantee that either the relevant court or the defendant(s) to a dispute will be aware of its existence, the terms of the litigation finance agreement, which entities are sitting behind the funder, who is influencing the litigation process, and so on.

⁶ Federal Trade Commission, "Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns" (2019) https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf

⁷ See consultation question 1

Second, providing access to justice is never the primary objective of a TPLF. These entities support claims because they are expected to be profitable. Based on what we know, they support a small number of potential claims that are chosen based on the prospect of a healthy financial return. To decide whether to provide funding, TPLFs assess elements like the substantive merits of a claim, whether there is sufficient quantum for the TPLF provider to make a return when measured against the costs of the litigation, whether enforcement is feasible, and the defendant's perceived propensity to settle. If a lawsuit meets their criteria, particularly the potential for high returns, they may support frivolous cases even with a low likelihood that claimants will benefit.

Third, TPLF may exercise control over strategic decisions like whether and when to settle, to the detriment of courts, defendants and claimants. Without any fiduciary duty to do so, unlike lawyers, they may not act in the best interest of the claimants. They may push to reject a settlement in the expectation that more can be recovered if the proceedings continue (particularly since they typically receive a high percentage of any award or settlement). A highly publicised example of this is the *Merricks v Mastercard* case in the Competition Appeal Tribunal, where although the parties had agreed to a settlement, the TPLF challenged this believing the proposed settlement of £200m was too low⁸. This delayed resolution and prolonged the litigation. TPLF is typically non-recourse, that is, there is no obligation for the borrower to repay the funding in the event nothing is recovered as a result of the proceedings.

Fourth, access to litigation is not the same thing as access to justice. Conflicts can be resolved using less adversarial approaches including voluntary redress schemes and ombudsmen processes. It is outcomes that matter, and claimants' subjective views of outcomes differ. Some claimants may be satisfied with a monetary award whereas others are more focused on expert testimony, getting an apology, and/or drawing public attention to their suffering.

Fifth, although complete information is not available about this, TPLFs appear to take the lion's share of any compensation received. By way of example, in the well-known case in the UK involving British postmasters, the settlement was allocated 80% to claimants' lawyers and third-party funders before the postmasters received anything. It is hard to see how these dynamics help individuals.

It is essential that we see TPLFs for what they are. They drum up business through aggressive advertising, turning individual cases into mass tort cases, and financing frivolous claims to earn outsized profits – not to help people to access justice. And they do this without any obligation to work transparently or adhere to ethical rules.

What are the Risks of Harm from TPLF?⁹

This is another foundational question as UK lawmakers consider regulatory action in the TPLF space. Based on experience and available information, the primary problems created include:

Lack of transparency means that judges and participants in a lawsuit may not realise that a third party has an interest in the case – and an expectation to profit from its outcome. Participants cannot make informed choices about how to manage litigation when they are not aware it's being financed by third parties. For example, they may inadvertently underestimate the willingness of claimants to settle and/or the conditions for reaching agreement on a settlement.

National security concerns can arise due to the lack of TPLF oversight, with foreign governments financing cases against companies in sensitive industries, to tie them up in litigation, make them spend money, or to access their trade secrets. Research from the United States indicates that adversarial foreign governments may be using litigation funding to advance cases against

⁸ <https://www.lawgazette.co.uk/news/200m-mastercard-settlement-cleared-by-competition-appeal-tribunal/5122448.article>

⁹ See consultation questions 4, 5, 27, 28, 34

American companies and interests, particularly in intellectual property disputes¹⁰. Through TPLF, an adversary can pursue national strategic goals by funding and influencing litigation with little risk of their involvement ever becoming known.

Funders may unduly influence or take control of a lawsuit to protect their financial stake in its outcome. This may include influencing strategic decisions of the funded party including fundamental issues such as when to accept or reject a settlement. Funders don't have to abide by ethical or fiduciary rules. Moreover, litigation funding introduces more complexity into the lawyer client relationship, because while the lawyer has a duty to the client to act in their best interests, the lawyer is (often) beholden to the funder as well. Lawyers may be incentivised to protect or promote their own interests and relationship with funders by advising or persuading the claimant to adopt the funder's preferred course of action.

The ABPI believes that funders should have no control over claims. Clients, not funders, should be making decisions and giving the instructions to counsel for their claims. Funders may have important expertise that is directly related to the case being funded, and this can legitimately be shared with claimants. However, no funding agreement should give funders control over how the claim proceeds. The ABPI notes with concern the number of UK cases in which funders appear to have had an inappropriate amount of control over litigation.

Transparency is the top concern related to TPLF, as the lack of transparency can give rise to national security risks, result in the funder unduly influencing legal strategy, let conflicts of interest go unnoticed and unaddressed, undermine confidence in the legal system, and more.

Funder fees are an area of concern, with reports that amounts recovered are split unfairly between claimants, their counsel, and third-party funders. Based on information available, litigation financing agreements consistently allocate as much as 40-80% to funders and claimants' lawyers. Funders are reportedly paid before anyone else, taking as much as 20-40% or more of the proceeds. These arrangements can mean that claimants receive little or no money. Their action in court is primarily a vehicle for the funders and attorneys to profit. Further, we are seeing a growth in opt-in class action suits, which require claimants to elect to participate in the distribution stage to receive a share of the award or settlement; this is sometimes called delayed opt-in. Claimants will not bother to do so in cases where the counsel and funders take a large percentage, leaving a small residual amount to divide among the claimants.

Conflict of interest is another key concern. TPLFs will understandably prioritise their own financial investment. Litigation funders are commercial enterprises, and TPLF is recognised as a highly profitable asset class. Situations will invariably arise when the profits expected by funders may come at the expense of the interest of the funded claimants. Profiting from litigation is a vastly different aim from participating in litigation as a means of seeking justice, recognition, or compensation for alleged wrongs. Based on experience, there is substantial risk that the funder's interests diverge from that of the funded claimants over the course of the legal proceedings. We believe this inherent conflict is a significant problem with the litigation funding model.

Termination of funding is one example where there could be divergent interests between the funder, on the one hand, and the funded parties. It's possible depending on the litigation finance agreement, that a funder could terminate financing for reasons that are related purely to its commercial interests, regardless of the merits of the case and/or the interests of the funded party(ies). Various approaches to addressing this challenge have been proposed in the UK.

¹⁰ [1] See What You Need to Know about Third Party Litigation Funding, published June 2024 by the U.S. Chamber of Commerce Institute for Legal Reform

Profiting from litigation is a vastly different aim from participating in litigation as a means of seeking justice, recognition, or compensation for alleged wrongs.

What does the ABPI Recommend for TPLF Regulation?¹¹

For the ABPI, transparency is the first priority for lawmakers in any jurisdiction seeking to regulate TPLF. Additionally, in the UK, we support the enactment of a regulatory and licensing regime with consequences for any unlicensed party improperly participating in TPLF. Below we present select recommended actions that could help to address risks related to TPLF.

Transparency: There should be a mandatory requirement in all funded cases for the funded party to disclose to their opponent and the court, at a minimum: first, the fact that the case is funded by TPLF, second, the identity and address of the funder and, thirdly, basic information about the litigation finance conditions. Disclosure helps the court and parties to determine whether funders are exercising undue influence, violating any ethical rules, or whether conflicts of interest exist. It also helps participants in litigation to make informed choices about how to proceed, including regarding the option of potentially settling.

Moreover, transparency can help provide important data and information about activities, conditions and trends in the litigation finance space, so that lawmakers and other stakeholders can better understand and take action to regulate this space.

The ABPI understands that several other countries such as Singapore and Hong Kong have already imposed disclosure requirements related to the existence of third-party financing, and the identity/address of the funder. Disclosure of this information is also supported by the majority of academic commentators and the Irish Law Reform Commission's 2023 consultation on TPLF.

Funder fees: the ABPI endorses the imposition of controls on funders' fees in consumer cases. Consumers in the UK warrant protection given that often, for them, TPLF may often represent the only method of funding litigation to seek redress for injury. It is not unreasonable to expect an imbalance of power between consumers and funders, with the risk of consumers being under-compensated and funders being over-compensated.

It would seem sensible for legislation to mandate that a percentage floor will apply on the return to claimants/class/group members from any damages recovered in both opt-in and opt-out proceedings. Different percentage floors could apply for the pre-action and post-issue stages, with a higher floor on the return for the pre-action stage given funders will have invested less capital in a case at an early stage. While we support this type of regulation, the ABPI does not have a position on any suggested percentages.

The ABPI endorses regulations that would impose transparency and licensing requirements on TPLF, limit TPLFs' influence over legal strategies, help to identify and address conflicts of interest, ensure fair division of amounts recovered in litigation or settlements, adapt discovery and other procedural rules in funded cases, and maintain liability for funders regardless of the outcome of funded cases.

¹¹ See consultation questions 12, 17, 22, 28, 30, 34

Procedural rules designed to limit TPLF influence: Court approval should continue to be required for opt-out proceedings to protect the interests of the opt-out class. For funded opt-in claims court approval seems less necessary, but it is important that our other proposals are followed (including minimum return to the funded class). Also, it's essential that disaffected persons have recourse to regulators, and that regulators are empowered to take swift enforcement action when warranted.

In addition, third-party funders should remain exposed to full liability for adverse costs of proceedings that they have funded. The extent of the funder's liability should remain a matter for the discretion of the judge in the case.

Identify and manage conflicts of interest: On this topic, the ABPI would expect other consultation responses (notably from defendant and claimant law firms) to be better placed to respond to this question in detail. New guidance for lawyers acting in funded proceedings might help to clarify their duties (relating to potential conflicts of interest) vis-a-vis clients. As an initial matter, we endorse transparency requirements and licensing of entities engaged in TPLF.

Summary and Concluding Remarks

For the reasons outlined above, and based on our members' experiences, the ABPI endorses regulation and licensing regimes for third-party litigation funding. TPLFs finance cases against companies across sectors, and many companies have spoken out about the dangers of unregulated TPLF. The pharmaceutical industry has been, and remains, a favoured target for these entities, with growing TPLF threatening innovation, healthcare delivery, and the competitive position of our industry in the UK and globally.

Pharmaceutical innovators and manufacturers in the UK face dubious claims made possible thanks to TPLF; this follows the pattern in other jurisdictions, notably the United States, where the growing cost of TPLF-driven, often unfounded litigation is well-documented. In the US, innovative pharmaceutical companies have faced protracted litigation with higher costs, driven by TPLF entities that are not required to disclose their financing, have no fiduciary duty to the funded claimants, and are not subject to any ethical rules. We observe this dynamic now also in the UK, with rapid growth in the TPLF sector in recent years.

Often, companies targeted choose to settle unmeritorious claims rather than divert the substantial resources required to defend themselves in court away from productive investments like R&D to bring new medicines and vaccines to society. When resources are dedicated to litigation – particularly cases without merit and/or featuring thousands of claimants (some with no real connection to the case) – this means less money for innovation.

While some individuals require third-party financing to participate in litigation, the goal of TPLF is not to increase access to justice. TPLF is a profitable asset class. TPLFs' primary goal is to maximise return – regardless of the impact on the credibility of our legal system, investment environment, innovation and healthcare delivery, and whether the funded claimants benefit from the litigation.

Among the public, there is growing awareness of the need for TPLF regulation. A survey commissioned by the U.S. Chamber of Commerce Institute for Legal Reform in 2021¹² revealed that European consumers do not want lawsuit finance companies involved in civil litigation without government oversight. Respondents strongly supported safeguards for third party litigation funding. 83% of those surveyed backed regulation to ensure that TPLF align with consumers' best interests.

¹² See Consumer Attitudes to Third Party Litigation Funding and its Potential Regulation in the EU, published September 2021 and commissioned by the U.S. Chamber of Commerce Institute for Legal Reform. Respondents to the survey were located in the Netherlands, Spain, France, Germany, Poland, and Italy

For example, respondents indicated support for mandatory independent reviews of litigation finance agreements, to ensure they are not designed in a way that unfairly benefit funders.

Lawmakers must, at a minimum, impose basic obligations of transparency on TPLFs. Currently, these entities are operating in the shadows. In the UK, there are no reliable, complete sources of information about their activities, the terms of litigation finance agreements, or the scale of third-party litigation financing. Based on available information, the sector is expanding in the UK and elsewhere, with regulators scrambling to understand and address the many risks associated with TPLF.

The ABPI thanks the Civil Justice Council for the opportunity to share these perspectives. We are available, with our member companies, to discuss the issues in this submission in more detail at your convenience.