



Comments on the “Transparency in Third Party Litigation Financing Model Act”

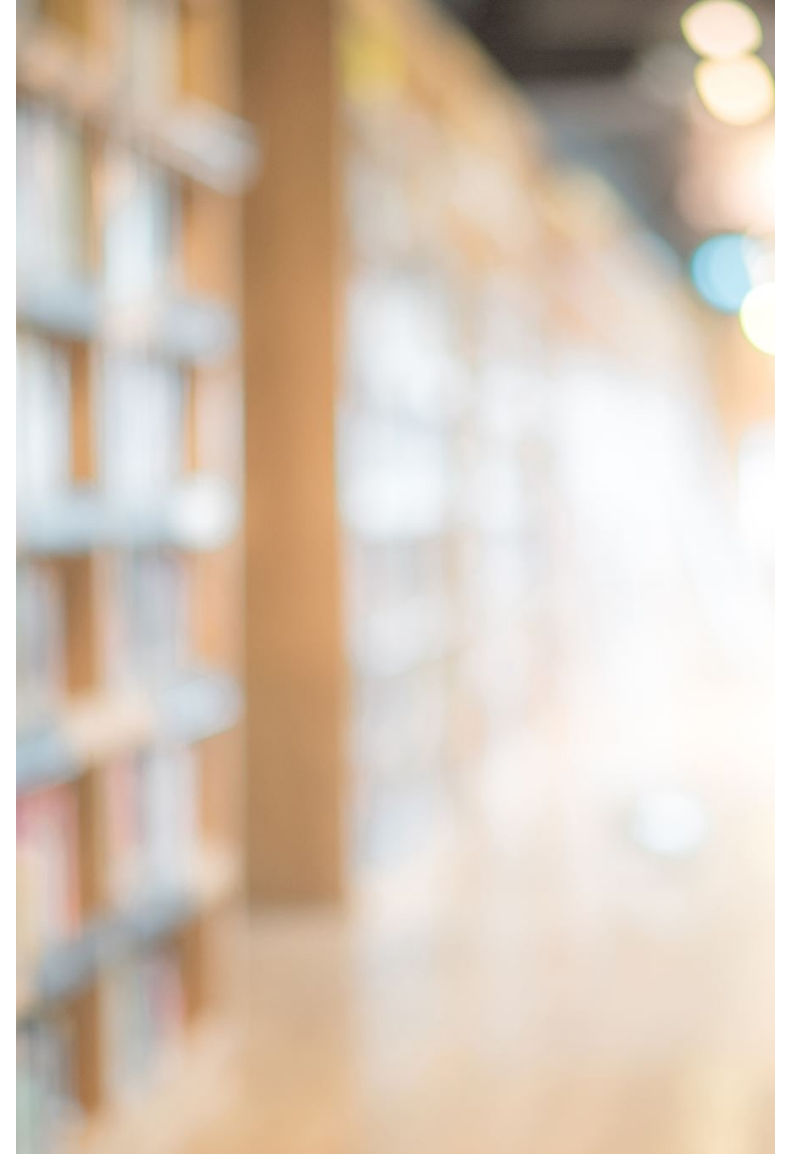
-Ken Klein

NCOIL Summer Meeting 2024

An abstract, colorful graphic on the right side of the slide. It features a gradient of colors including purple, blue, and green, with a white circular shape on the left edge that overlaps the text area. The colors are blended and wavy, creating a dynamic, artistic effect.

My professional focus is on two things: Civil Litigation and Insurance

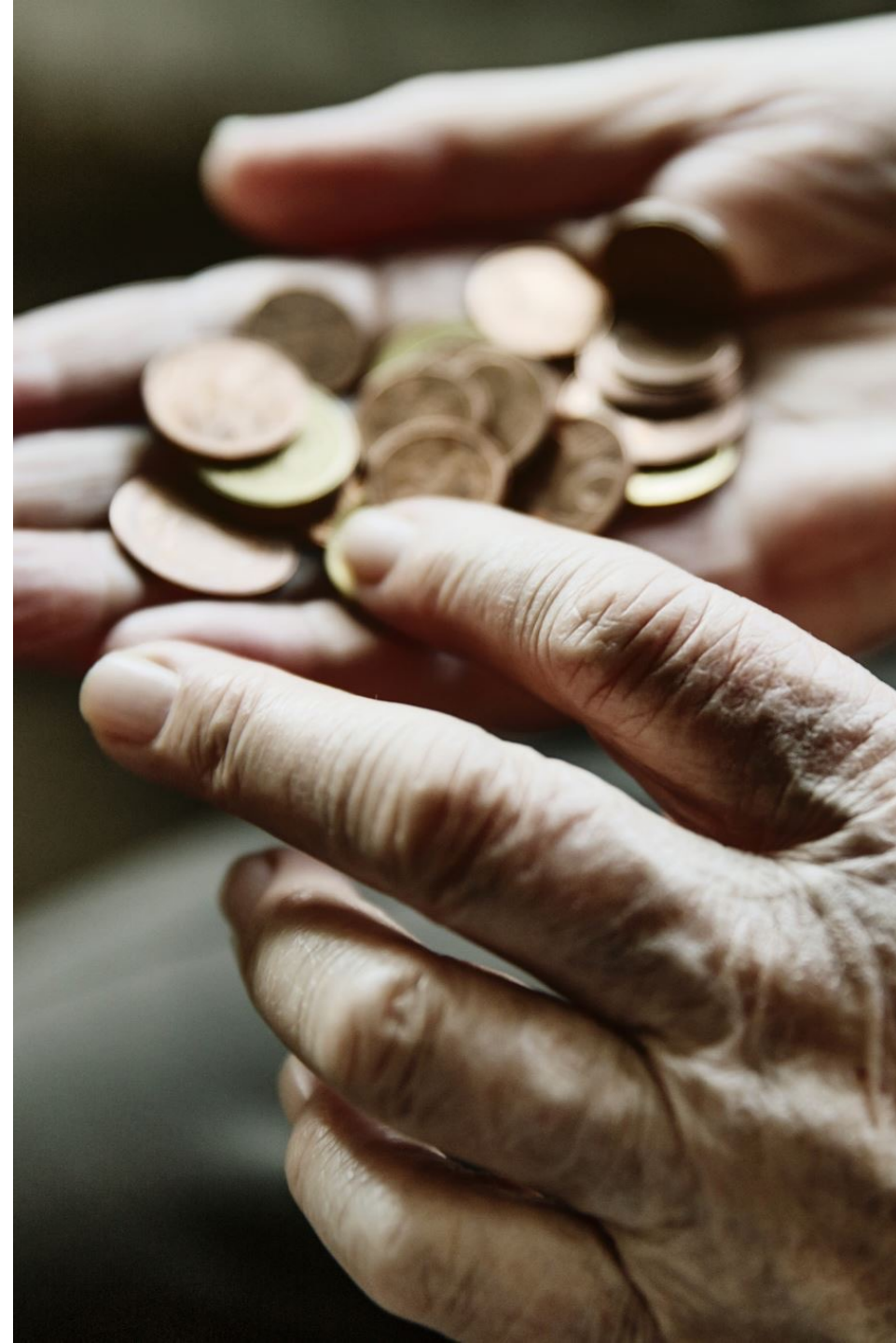
- Louis and Hermione Brown Professor of Law at California Western School of Law, where I teach Civil Procedure, Evidence, and a course focused on the intersection of insurance and natural disasters.
- Formerly a business litigation attorney – primarily defense – for over 20 years.
- NAIC Consumer Representative since 2018, focusing on affordability, availability, and adequacy of homeowner insurance.
- Published several scholarly papers both on insurance issues and on civil litigation issues.
- Panelist and presenter on Social Inflation and TPLFs



AN OPENING THOUGHT: TPLFs Do Not Unbalance the System; TPLFs Balance the System

As a defense lawyer, it was not lost on me that I had a structural advantage – my side had time and resources, and the plaintiff’s side often did not. For that reason, it was always noteworthy if the plaintiff was financially flush, or had a well-heeled financial backer, or had a highly successful and well-off plaintiff’s attorney. It meant I had to advise my client that their built-in advantage was gone.

The Implication: TPLFs do not create an improper advantage, but often erase one.



Today's Agenda: I will offer some brief thoughts on four things the proposed Model Act seeks to do:

Protect

- Protect consumers

Deter

- Deter bad foreign actors

Curtail

- Curtail rising insurance premiums

Recalibrate

- Recalibrate the litigation system to impact lawsuit frequency and outcomes



1. Protecting Consumers



The Wrong-headedness of Cap on Rates or Amounts of Return

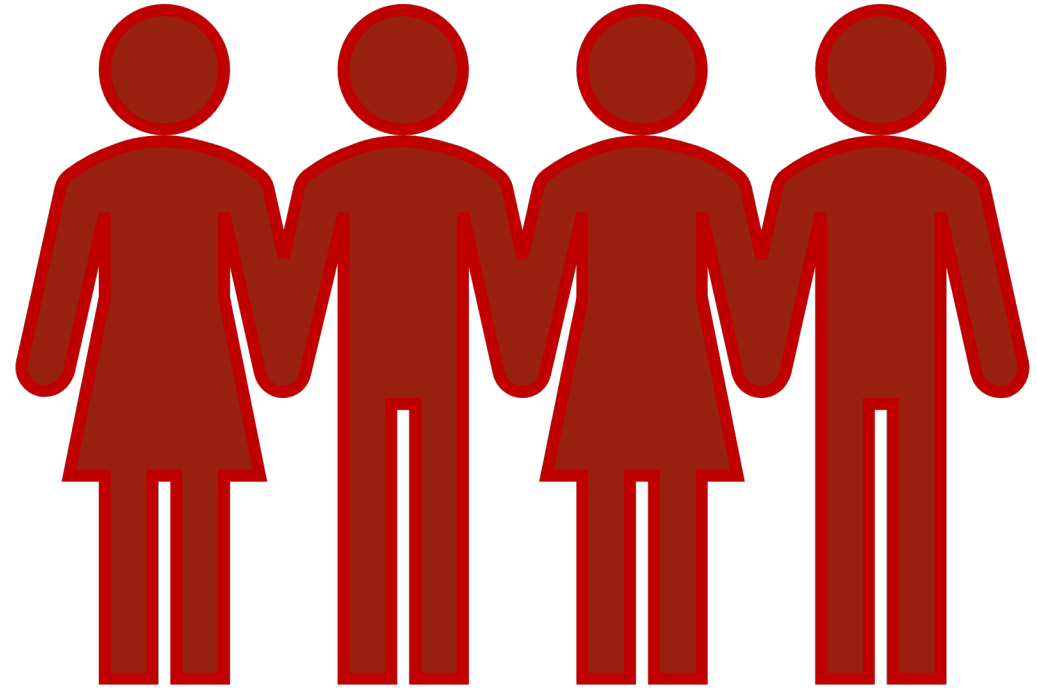
- Typically caps on rates or amounts of return – such as usury laws – are to protect unsophisticated consumers from possibly predatory lenders.
- But a plaintiff is not like someone taking out a payday loan or being solicited by glitzy credit card ads. A plaintiff has an attorney to advise them on how expensive litigation will be, it's likelihood of winning, the likely amount the client will get, the timing of the process, the available (if any) TPLF funding, and the conditions of those TPLF contracts.
- And the plaintiff owes nothing unless they win enough to cover the loan.
- So, treating TPLFs like payday lenders does not add protections to consumers but does add a layer of protection to the defendants who harmed consumers.

Problems With The Model Act's Definition of 'Consumer'

The Model Act's definition of "consumer" excludes from consumer protection:

- Any person who is in your State's courts but does not live in your State.
- Any small business – even a single person – if that business is organized as a company or other legally-recognized entity.

2. Detering
Bad Foreign
Actors

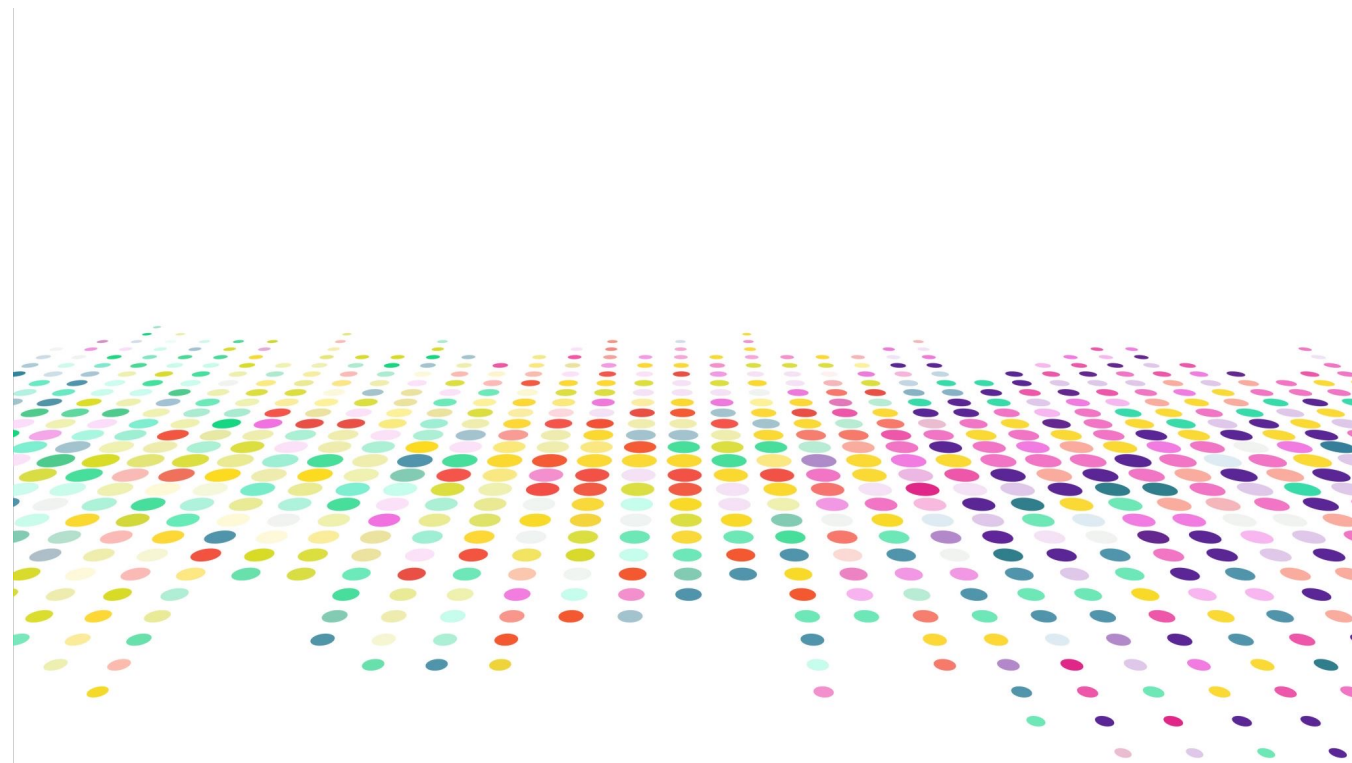


The Unjustified Burden of New Regulations on an Already Expensive Litigation System:

- The litigation system long has dealt with actors with bad motives, such as competitors using litigation to learn each others' trade secrets.
- The litigation system has long had foreign-owned entities, such as insurers or reinsurers owned by foreign entities.
- Plenty of procedures already exist to deal with these issues.
- There is nothing special about TPLFs justifying adding new procedures to existing ones. There is no gain.
- But adding new procedures will add burden and cost, and inevitably that will harm plaintiffs' ability to get justice.



3. Curtailing Rising Insurance Premiums



This Concern Appears to Be More Myth Than Reality

- The industry's own data suggests that neither the frequency of litigation nor the cost of litigation correlate to the cost of premiums.
- Most commercial TPLF agreements do not involve litigation that has insurance either as a first-party or a third-party.



4. Recalibrating Lawsuit Frequency and Outcomes



The Model Act Makes *All* Lawsuits Harder to File and Harder to Win (which is not a good result)

- The litigation system has cradle to grave architecture to weed out frivolous lawsuits.
- There is little to no evidence that this architecture is failing.
- So, if this Model Act is successful, then the most likely result will be that necessary litigation (litigation seeking just compensation) is harder to file and harder to win.

The data (as opposed to the rhetoric) is that TPLFs make litigation more just:

- Harvard Professor Sam Antill and Stanford Professor Steve Grenadier developed a “real-option model” that tested “the potential for litigation financing to encourage the filing of costly frivolous lawsuits.”
- They weighed the competing arguments that “litigation financing encourages frivolous lawsuits that waste the time and resources of the defendant,” on the one hand, and “litigation funding allows lawsuits to be decided on their merits, and not based on which party has deeper pockets,” on the other.
- They found “that litigation financing ...deters wasteful bullying: a strategy in which a defendant incurs large litigation costs simply to secure negotiating advantages over an underfinanced plaintiff.”

TPLF Disclosure Does Not Help Any Consumers But Does Harm Some

- A defendant knowing about or knowing more about a TPLF backing a plaintiff (or not) gives a defendant important competitive information in litigation.
- This does not help any plaintiff.
- This does not advance justice.
- But this does hurt a plaintiff who thus is exposed as *not* being backed by a TPLF.



SOME CLOSING THOUGHTS:

1. Whatever your thoughts are about TPLFs, it is unclear why it is an *insurance* issue (especially as to commercial TPLF, where insurance often is not involved).
2. Litigation is an unbalanced system favoring defendants. It is this opportunity that TPLFs invest in. Put another way, TPLF profits are a rough measure of cost the system otherwise puts on plaintiffs.
3. Money always finds a way. If behavior by a class of actors (such as insurers) is creating a profit opportunity by suing them, then money will be spent to chasing that return. No litigation reform ever has or ever will change that. If insurers don't want TPLFs to invest in challenging insurance claims behaviors, then don't be so investable.