17-CV-GGGGGG

November 3, 2017

VIA E-Mail
Ms. Rebecca A. Womeldorf
Secretary of the Committee on Rules of Practice and
Procedure of the Administrative Office of the United
States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Submission 17-CV-O

Dear Ms. Womeldorf:

The undersigned organizations submit the following letter regarding the memorandum included as Tab 7B of the agenda book ("Agenda Book Memo") for the November 7, 2017 meeting of the Advisory Committee on Civil Rules ("the Committee"). That memorandum concerns Submission 17-CV-O, the proposal of the aforementioned organizations to amend Fed. R. Civ. P. 26(a)(1)(A) to require initial disclosures about third-party litigation funding ("TPLF").

We believe that the Agenda Book Memo provides a thoughtful analysis of a number of the issues and concerns presented by the growing influence of TPLF in U.S. litigation. We appreciate the Committee's continued interest in TPLF-related issues. However, we are concerned by the suggestion that "immediate action" might not be taken and that the Committee needs additional information on "whether there has been meaningful change" since the original proposal was considered in 2014.[1] We are also concerned by the suggestion that adoption of a disclosure rule would require resolution of the thorny legal and factual issues raised in the Agenda Memo – for example, (i) the undersigned's "motives for urging disclosure"[2]; (ii) the precise limits of champerty and maintenance[3]; (iii) whether disclosure of TPLF is actually analogous to the disclosure of insurance agreements[4]; (iv) the extent of funder

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1 Mem. at 345, 355.

2 *Id.* at 346.

3 *Id.* at 347-48.

4 *Id.* at 348.

control of litigation[5]; (v) the relationship between TPLF and litigation strategies[6]; and whether TPLF increases the filing of frivolous litigation.[7] Resolution of these complex issues is beyond the scope of the disclosure proposal set forth in Submission 17-CV-O and is unnecessary. Rather, as elaborated in Submission 17-CV-O, disclosure ***is*** necessary for judges to do their jobs: avoiding conflicts of interest; ensuring that litigation over which they are presiding is not being funded pursuant to illegal agreements; determining whether the plaintiff and/or class counsel in a putative class action will adequately represent the class; and evaluating the parties' resources as part of any proportionality analysis under Rule 26(b)(1). Accordingly, we offer the following additional information and insights in response to the initial suggestions and commentary in the Agenda Book Memo.

First, it appears that the Agenda Book Memo expresses a potential reluctance to take "immediate action" on the disclosure proposal on the ground that there is insufficient information to "understand the underlying phenomena."[8] Most notably, the Agenda Book Memo points to the vigorous disagreement between the proponents and opponents of the proposal "about the extent to which the ***amount*** and ***extent*** of third-party funding has expanded."[9] We respectfully submit that any claims by the TPLF industry members that funding is not expanding at a dramatic rate are belied by their own press releases and other public relations activities. Notably, Burford, the largest funder in the industry, recently announced a record ***$488 million*** in new investments for the first half of 2017.[10] That announcement came in late July, after the undersigned submitted Submission 17-CV-O. Similarly, Longford Capital Management LP announced in September that it had raised ***$500 million*** for a second fund that will "dwarf" the initial $56.5 million fund that it had raised three years ago.[11] And last month, Bentham announced that it is launching a new bankruptcy litigation funding platform to help debtors, creditors and other

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5 *Id.* at 349-50.

6 *Id.* at 351.

7 *Id.* at 354-55.

8 *Id.* at 345-46.

9 *Id. at* 355 (emphases added).

10 Roy Strom, *Litigation Funder Longford Raises $500M as Industry Stays Flush*, Law.com, Sept. 18, 2017.

11 *Id.*

stakeholders involved in commercial disputes.[12] Simply put, and as one recent article put it, "[t]he figures just get bigger and bigger."[13]

We wish to stress that the lack of any more concrete data measuring the pervasiveness of TPLF in U.S. litigation stems largely from the lack of disclosure requirements in the first place. Absent any duty to report TPLF arrangements, litigation funding lacks transparency; its presence in a case only occasionally comes to light as a result of discovery or disputes with the funder. In our view, the dramatic fundraising numbers announced by TPLF companies on an almost-monthly basis, coupled with new entrants into the U.S. market (like U.K.-based Woodsford Litigation Funding this past summer),[14] make it clear that litigation funding is an increasingly pervasive practice.

Second, the Agenda Book Memo recognizes the important ethical issues potentially implicated by TPLF. For example, the Agenda Book Memo states that "disclosure may discourage arrangements that veer toward prohibited [fee] splitting and enable enforcement where an arrangement crosses the lines of professional responsibility."[15] The Agenda Book Memo goes on to express concern, however, with "enlisting defendants to protect plaintiffs from improper arrangements by plaintiffs' attorneys."[16] But this is no different from a defendant taking discovery from a named plaintiff in a putative class action with regard to his or her adequacy as a class representative. Although it is the defendant that brings information about adequacy of representation to the attention of the court, it is the court that ultimately decides what the appropriate resolution is. In any event, the concern set forth in the Agenda Book Memo overlooks the fact that disclosure puts the defendant ***and the court*** on notice of the existence of a funding agreement, both of which have a role in safeguarding ethical rules. As explained in Submission 17-CV-O, a TPLF disclosure requirement would be consistent with federal courts' interest in safeguarding legitimate, ethical civil litigation practices in all cases. Similarly, the Supreme Court has noted that class action defendants have a strong interest in ensuring adequate

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12 Bentham IMF, Oct. 16, 2017, https://www.prnewswire.com/news-releases/bentham-imf-launches-bankruptcy-funding-platform-with-addition-of-investment-manager-hires-corporate-counsel-in-new-york-300537201.html.

13 Strom, *supra* note 4.

14 Woodsford Litigation Funding Opens First US Office in Philadelphia, PA, July 24, 2017, http://woodsfordlitigationfunding.com/woodsford-litigation-funding-opens-first-us-office-philadelphia-pa/.

15 Mem. at 352.

16 *Id.*

representation before class certification, lest any final judgment be jeopardized down the road upon a revelation that representation was inadequate.[17]

The Agenda Book Memo also recognizes the important role disclosure can play in avoiding judicial conflicts of interest. As noted in the memorandum, funders have largely argued that such conflicts are unlikely, assuming that judges will simply avoid investing in companies that offer TPLF. But the funders offer no evidence to support their barebones assumption. The funders also argue that judicial conflicts of interest are virtually impossible where the judge is ***unaware*** that a friend or family member is funding litigation over which he or she is presiding. But "[t]his response does not address the appearance of impropriety," as the Agenda Book Memo recognizes.[18] The Code of Conduct for United States Judges requires that federal judges avoid both actual impropriety and its appearance.[19] As Justice Frankfurter put it, "justice must satisfy the appearance of justice."[20] The specter of a district court judge unwittingly presiding over a case in which he or she has some financial, familial or other interest cuts against that doctrine.[21]

Third, with respect to the issue of control, the Agenda Book Memo emphasizes the dearth of "volumes of information that should inform an appraisal of the role third party funders play in individual actions."[22] According to the Agenda Book Memo, "[t]here are likely to be many roles, some benign and some perhaps questionable."[23] We concur that the extent of a TPLF entity's control will vary from one case to the next, often depending on the particular terms of the funding agreement. But absent disclosure, the terms of those agreements will never see the

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17 *Abelson v. Strong*, MDL No. 584, 1987 U.S. Dist. LEXIS 7515, at *6 n.3 (D. Mass. July 30, 1987) ("The adequacy and typicality requirements also serve to protect defendants' due process rights because a judgment adverse to plaintiffs will only bind unnamed class members if the named plaintiffs adequately represented the absent plaintiffs[.]") (citing *Hansberry v. Lee*, 311 U.S. 32 (1940)).

18 Mem. at 353.

19 Code of Conduct for United States Judges, Canon 2.

20 *Offutt v. United States*, 348 U.S. 11, 14 (1954).

21 The Agenda Book Memo goes on to reason that ascertaining potential judicial conflicts of interest probably only requires identification of the funder as opposed to disclosure of the terms of the funding agreement. While that is probably true, many of the other thorny legal issues – i.e., champerty and maintenance, control, improper fee splitting, etc. – cannot be addressed without the disclosure of the terms themselves.

22 *Id.* at 350.

23 *Id.*

light of day, precluding the very "appraisal" that the Agenda Book Memo implies is necessary. And in addition to Bentham's own best practices guide (which, as discussed in Submission 17-CV-O, expressly contemplates some level of control), "some litigation funders have expressly stated their desire to direct the course of litigation once they invest."[24]

Fourth, disclosure is necessary for judges to determine whether litigation is being prosecuted pursuant to agreements that violate applicable champerty and maintenance laws.[25] The gist of the Agenda Book Memo's discussion seems to downplay the importance of these doctrines, simply noting that "some vestiges survive in at least some states."[26] If the past two years are any indication, however, champerty and maintenance are alive and well. Indeed, over that period, there have been ***five*** reported decisions of federal courts and state appellate court striking down third-party litigation funding agreements as violating state champerty/maintenance laws, each in different jurisdictions. In the latest, *Boling v. Prospect Funding Holdings, LLC*, a federal court held that a funding agreement underlying a product liability lawsuit violated Kentucky's law against champerty.[27] *Boling* and other recent judicial rulings discussed in Submission 17-CV-O indicate that champerty is not a moribund concept. As the Agenda Book Memo recognizes, no one is presently asking for the Committee to adopt rules "that revive or further diminish the doctrine."[28] Rather, we are simply requesting that TPLF arrangements be disclosed so that the parties and the court can determine whether they run afoul of any ***existing*** champerty and maintenance laws. After all, if a party is being sued pursuant to an illegal (champertous) funding arrangement, it should be able to challenge such an agreement under the applicable state law – and certainly should have the right to obtain such information at the outset of case.

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[24] Aaseeshh P. Polavarapu, Comment, *Discovering Third-Party Funding in Class Actions: A Proposal for In Camera Review*, 165 U. Pa. L. Rev. Online 215, 225 (2017) (citing Selvyn Seidel, *Time to pass the Baton?*, Fulbrook Cap. Mgmt. LLC (Nov./Dec. 2012), http://www.fulbrookmanagement.com/time-to-pass-the-baton (arguing against the "control doctrine" by taking the position that once a case is funded, the third-party funder should be able to control the litigation).

[25] Mem. at 348.

[26] *Id.* at 347.

[27] *Boling v. Prospect Funding Holdings, LLC*, No. 1:14-CV-00081-GNS-HBB, 2017 U.S. Dist. LEXIS 48098 (W.D. Ky. Mar. 30, 2017).

[28] Mem. at 348.

Fifth, the Agenda Book Memo states that "[a]n inevitable related concern is that mandatory disclosure will generate satellite litigation about the adequacy of the disclosure[.]"[29] However, a clear rule requiring disclosure at the outset will prevent – not spur – satellite litigation regarding TPLF. Indeed, the proposed disclosure rule is straightforward, mirroring that governing insurance agreements, which has easily been employed for decades without substantial controversy. In short, any concern about attendant satellite litigation concerning the adequacy of disclosure is unfounded.

In sum, we urge the Committee not to defer action on the pending proposal simply because it is not supported by "volumes of information" regarding the exact number of funding agreements that exist or the actual terms of those arrangements.[30] As previously discussed, the fact that TPLF has expanded by leaps and bounds over the past few years is well documented not only by TPLF companies' own public announcements, but also by numerous prominent articles on the subject. It is only because TPLF companies have successfully lobbied against disclosure that the agreements themselves – and their precise terms – have largely remained hidden. In fact, virtually every instance in which the terms of a funding agreement have come to light has revealed one or more of the legal issues detailed in the original submission, be it champerty and maintenance, undue control by the funder, or adequacy-of-representation problems in class actions. The Committee need not resolve the extent to which these issues are being implicated by TPLF arrangements. Indeed, such an exercise would be wholly outside the scope of Submission 17-CV-O. Suffice it to say that absent disclosure, courts will lack the ***information*** necessary to carry out their core judicial function in ensuring that the cases over which they are presiding are being litigated ethically and legally. Accordingly, we urge the Committee to give careful and serious attention to our proposal and take steps soon to achieve greater transparency about the growing use of TPLF in federal court litigation.

Sincerely,

U.S. Chamber Institute for Legal Reform

Advanced Medical Technology Association

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[29] *Id.* at 354.

[30] *Id.* at 350.

American Insurance Association

American Tort Reform Association

Association of Defense Trial Attorneys

DRI – *The Voice of the Defense Bar*

Federation of Defense & Corporate Counsel

Financial Services Roundtable

Insurance Information Institute

International Association of Defense Counsel

Lawyers for Civil Justice

National Association of Mutual Insurance Companies

Pharmaceutical Research and Manufacturers of America

Property Casualty Insurers Association of America

Pennsylvania Chamber of Business and Industry

South Carolina Chamber of Commerce

Virginia Chamber of Commerce

Wisconsin Manufacturers & Commerce

Florida Justice Reform Institute

Louisiana Lawsuit Abuse Watch

South Carolina Civil Justice Coalition

Texas Civil Justice League