

September 28, 2021

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: Proposed Fed. R. Civ. P. 26(a)(1)(A)(v)

Dear Secretary:

On behalf of the Advanced Medical Technology Association, the American Property Casualty Insurance Association, the American Tort Reform Association, the Association of Defense Trial Attorneys, *DRI—Lawyers Defending Business*, the Federation of Defense & Corporate Counsel, the Florida Justice Reform Institute, the International Association of Defense Counsel, Lawyers for Civil Justice, the Michigan Chamber of Commerce, the National Association of Mutual Insurance Companies, the National Association of Wholesaler-Distributors, the National Retail Federation, NFIB, the New Jersey Civil Justice Institute, the Ohio Chamber of Commerce, Pennsylvania Chamber of Business and Industry, the Pharmaceutical Research and Manufacturers of America, the Product Liability Advisory Council, the Small Business & Entrepreneurship Council, the South Carolina Chamber of Commerce, the State Chamber of Oklahoma, the Texas Civil Justice League, the U.S. Chamber of Commerce, the U.S. Chamber Institute for Legal Reform, the Vegas Chamber, the Virginia Chamber of Commerce, and Wisconsin Manufacturers & Commerce,¹ we write regarding the pending request that the Advisory Committee on Civil Rules consider amending Federal Rule of Civil Procedure 26(a)(1)(A) to require disclosure of third-party litigation funding (“TPLF”) arrangements in any civil action filed in federal court.²

During the Advisory Committee’s consideration of our proposal, several factual disputes about TPLF have arisen that are relevant to the amendment’s advisability. In our view, many of these disagreements could be resolved by implementing the proposed rule on a trial basis and observing what it reveals. The undersigned therefore suggest that the Advisory Committee initiate a one-year limited pilot project during which the proposed amendment to Fed. R. 26(a)(1)(A) would be applied to all civil cases in several federal districts. Specifically, in the courts subject to the pilot project, the existing Rule 26 initial disclosure rules would be augmented to further require litigants to “provide to the other parties . . . for inspection and copying as under Rule 34, any agreement under which any person other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that

¹ Descriptions of each of these organizations are included in the attached Appendix A.

² See Document No. 17-CV-O) (June 1, 2017), as supplemented by Document No. 19-CV-I) (March 17, 2019).

is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.”

We believe such a pilot project would provide the Committee with valuable insights on several key questions:

- Although acknowledging significant growth in the TPLF industry, Advisory Committee members have expressed uncertainty about the extent to which TPLF is being used in federal court cases and the contexts in which it is being employed.³ Since disclosure is not presently required, hard data on these points is (not surprisingly) lacking. The proposed pilot project would likely fill that information gap.
- The record reflects a dispute among commenters about whether TPLF companies influence or control the litigation matters in which they invest. Funders have repeatedly disclaimed any control or influence over the lawsuits they finance.⁴ But as discussed in our March 2019 letter, each and every funding agreement that has made its way into the record before the Advisory Committee contains provisions permitting substantial funder control or influence over the litigation.⁵ The only way to resolve this uncertainty is to examine more agreements to see what they actually say, which would be a major benefit of the pilot project.
- Some have questioned whether TPLF can be clearly defined, raising doubts about whether a workable disclosure rule is feasible. For example, funders have suggested that a disclosure rule might inadvertently encompass arrangements under which litigants receive financial support from their relatives or others not in the TPLF business. We believe such concerns are overblown because the definition in the proposed rule carefully limits the disclosure requirement to arrangements in which an investor buys an interest in the outcome of a lawsuit. A pilot project should yield clear insights regarding the kinds of agreements that would be disclosed in response to the proposed rule.
- Some commenters have questioned whether disclosure is needed in light of existing local rules of many federal trial and appellate courts that require certain disclosures to allow the evaluation of potential judicial conflicts of interest.⁶ Others have urged that those rules are generally ignored.⁷ The only way to know whether these existing local rules (which vary

³ See Advisory Committee on Civil Rules, Agenda Book, Oct. 29, 2019 at 191 (“For purposes of this Subcommittee, however, the most salient point is that it has not heard that TPLF plays a substantial role in MDL proceedings.”).

⁴ See Burford Capital, <https://www.burfordcapital.com/how-we-work/with-law-firms/> (“We act as passive investors and do not control strategy or settlement decision-making[.]”) (last visited on Feb. 3, 2020).

⁵ See Letter to Advisory Committee, Document No. 19-CV-I, at 6-7, Mar. 18, 2019.

⁶ *Survey of Federal and State Disclosure Rules Regarding Litigation Funding*, Feb. 7, 2018, at 1, <https://judicialstudies.duke.edu/wp-content/uploads/2018/04/Panel-5-Survey-of-Federal-and-State-Disclosure-Rules-Regarding-Litigation-Funding-Feb.-2018.pdf>.

⁷ *Common sense vs. false narratives about litigation finance disclosure*, Burford, July 12, 2018, <https://www.burfordcapital.com/insights/insights-container/common-sense-vs-false-narratives-about-litigation->

widely and do not exist in many fora) are actually resulting in necessary disclosures is to see what happens when funding arrangements are deemed automatically discoverable as a matter of course.

- There is a fundamental dispute over whether a TPLF disclosure rule would give rise to burdensome, collateral discovery disputes. While the funding industry has pressed this argument, we disagree. Defendants would have to justify any requests for additional TPLF-related disclosure, which courts would be well-positioned to adjudicate, similar to any other discovery-related dispute. Being able to monitor lawsuits in which a party is required to disclose any funding agreements would go a long way toward resolving this question.
- There is also a fundamental dispute over whether a TPLF disclosure rule will force federal courts to make policy about TPLF-related issues. We believe that federal courts are already having to deal with such issues, particularly with regard to ethics issues in a variety of litigation contexts. However, a real-world implementation of a TPLF disclosure requirement would either validate or debunk that view.

In sum, we strongly believe that the time is ripe for a uniform TPLF disclosure rule applicable to all civil cases. However, as an intermediate step – and to provide the Advisory Committee with information critical to consideration of a final rule – the Advisory Committee should seriously consider establishing a one-year pilot program implementing the proposed Rule 26 amendment in several federal judicial districts to gather needed information, a practice it has undertaken in other contexts.⁸ As always, the Advisory Committee’s examination of our proposal to amend Fed. R. Civ. P. 26(a)(1)(A) is greatly appreciated.

Sincerely,

Advanced Medical Technology
Association

Small Business & Entrepreneurship
Council

American Property Casualty Insurance
Association

South Carolina Chamber of Commerce

American Tort Reform Association

State Chamber of Oklahoma

Association of Defense Trial Attorneys

Texas Civil Justice League

DRI – *Lawyers Defending Business*

U.S. Chamber of Commerce

finance-disclosure/ (“[T]hese broad disclosure provisions in local rules do not appear to be much-followed or enforced.”).

⁸ See, e.g., Jason A. Cantone & Emery G. Lee, *Initial Discovery Protocols for Employment Cases Alleging Adverse Action: Report on a Pilot Project to the Judicial Conference Advisory Committee on Civil Rules of Civil Procedure* (Federal Judicial Center, Oct. 19, 2018).

Federation of Defense & Corporate
Counsel

Florida Justice Reform Institute

International Association of Defense
Counsel

Lawyers for Civil Justice

Michigan Chamber of Commerce

National Association of Mutual
Insurance Companies

National Association of Wholesaler-
Distributors

National Retail Federation

NFIB

New Jersey Civil Justice Institute

Ohio Chamber of Commerce

Pennsylvania Chamber of Business and
Industry

Pharmaceutical Research and
Manufacturers of America

Product Liability Advisory Council

U.S. Chamber Institute for Legal Reform

Vegas Chamber

Virginia Chamber of Commerce

Wisconsin Manufacturers & Commerce

APPENDIX A – SUMMARY OF SIGNATORY ORGANIZATIONS

- **Advanced Medical Technology Association.** The Advanced Medical Technology Association (“AdvaMed”) is the world’s largest trade association of medical device manufacturers. AdvaMed advocates on a global basis for the highest ethical standards, timely patient access to safe and effective products, and economic policies that reward value creation. AdvaMed seeks to advance medical technology to promote healthier lives and healthier economies around the world. AdvaMed’s members range from the largest to smallest medical technology companies doing business in the United States. These companies produce medical devices, diagnostic products and health information systems.
- **The American Property Casualty Insurance Association.** The American Property Casualty Insurance Association (“APCIA”) is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the U.S. and across the globe.
- **American Tort Reform Association.** The American Tort Reform Association (“ATRA”) is the only national organization exclusively dedicated to reforming the civil justice system. The organization is a nationwide network of state-based liability reform coalitions backed by 135,000 grassroots supporters. ATRA’s membership is diverse and includes nonprofits, small and large companies, as well as state and national trade, business and professional associations.
- **Association of Defense Trial Attorneys.** The Association of Defense Trial Attorneys (“ADTA”) is comprised of some of the finest trial attorneys in the various states of the United States, the District of Columbia, Puerto Rico, Canada and France and The United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland. Founded as the Association of Insurance Attorneys (AIA) in 1941, it has established itself as one of the major defense trial attorney organizations in the legal profession.
- **DRI – *Lawyers Defending Business*.** DRI is the leading organization of defense attorneys and in-house counsel. Membership in DRI provides access to resources and tools for attorneys who strive to provide high-quality, balanced and excellent service to their clients and corporations. DRI is host to 29 substantive committees whose focus is to develop ongoing and critical dialogue about areas of practice. DRI provides access to resources and tools to grow your practice – members can search a database of more than 65,000 experts, attend renowned CLE seminars, conferences and webcasts, network with 16,000+ like-minded defense practitioners and more. DRI has served the defense bar for more than 50 years.
- **Federation of Defense & Corporate Counsel.** The Federation of Defense & Corporate Counsel was founded 75 years ago as an international defense organization dedicated to the principles of knowledge, justice and fellowship. Members include: (1) practicing lawyers

actively engaged in the private practice of law who devote a substantial amount of their professional time to the representation of insurance companies, associations or other corporations, or others, in the defense of civil litigation and have been a member of the bar for at least eight years; or (2) corporate counsel and other executives engaged in the administration or defense of claims for insurance companies, associations, or corporations who have national, regional or company-wide responsibility for a company of greater than local significance.

- **Florida Justice Reform Institute.** The Florida Justice Reform Institute (“FJRI”) seeks to improve Florida’s civil justice system by fighting wasteful civil litigation through legislation, promoting fair and equitable legal practices, and providing information about the state of civil justice in Florida. FJRI works on such issues as fair settlement, assignment of benefits, phantom damages, legal and medical fee schedules, workers’ compensation costs and the operation of state courts.
- **International Association of Defense Counsel.** The International Association of Defense Counsel (“IADC”) was established in 1920, the IADC advocates legal reform and professional development. IADC’s activities benefit its approximately 2,500 members and their clients, as well as the civil justice system and the legal profession. IADC’s membership consists of partners in large and small law firms, senior counsel in corporate law departments, and corporate and insurance executives. Members represent the largest corporations around the world, including the majority of companies listed in the FORTUNE 500.
- **Lawyers for Civil Justice.** Lawyers for Civil Justice (“LCJ”) is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For more than 30 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.
- **Michigan Chamber of Commerce.** The Michigan Chamber of Commerce (“Michigan Chamber”) encompasses approximately 6,600 member employers, trade associations and local chambers of commerce of every size and type in all 83 counties of the state. The Michigan Chamber’s mission is to promote conditions favorable to job creation and business success in Michigan. Michigan Chamber member businesses provide jobs to 1.5 million residents. One of every 2.6 employees in Michigan works for a Michigan Chamber member firm.
- **National Association of Mutual Insurance Companies.** The National Association of Mutual Insurance Companies (“NAMIC”) is the largest property/casualty insurance trade association with more than 1,400 member companies serving more than 170 million auto, home and business policyholders. NAMIC promotes public policy solutions that benefit insurance policyholders and the NAMIC member companies that it represents. NAMIC member companies write nearly \$230 billion in annual premiums, and have 54 percent of

homeowners, 43 percent of automobile and 32 percent of the business insurance markets. Membership in NAMIC is not restricted to mutual insurance companies and is open to stock insurance companies, reinsurance companies and industry vendor companies.

- **National Association of Wholesaler-Distributors.** The National Association of Wholesaler-Distributors (“NAW”) is a federation of wholesale distribution associations. NAW works with academia and the distribution consulting community to advance the state of knowledge in wholesale distribution. It also represents the wholesale distribution industry before Congress, the White House and the judiciary on issues that affect the industry’s various lines of trade. NAW members represent all lines of trade and include some of the largest wholesaler-distributors in the United States.
- **National Retail Federation.** The National Retail Federation (“NRF”) advances the interests of the retail industry through advocacy, communications and education. NRF is the world’s largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation’s largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans.
- **NFIB.** NFIB is the voice of small business, advocating on behalf of America's small and independent business owners, both in Washington, D.C., and in all 50 state capitals. NFIB is nonprofit, nonpartisan, and member-driven. Since its founding in 1943, NFIB has been exclusively dedicated to small and independent businesses, and remains so today.
- **New Jersey Civil Justice Institute.** The New Jersey Civil Justice Institute (“NJCJI”) is the State’s leading organization advocating for the business community on matters of law and legal policy. NJCJI promotes a fair and predictable civil justice system, and defends the value of the rule of law in protecting innovation and fostering economic growth.
- **Ohio Chamber of Commerce.** The Ohio Chamber of Commerce (“Ohio Chamber”) is the state’s leading business advocate and resource, the Ohio Chamber aggressively champions free enterprise, economic competitiveness and growth for the benefit of all Ohioans.
- **Pennsylvania Chamber of Business and Industry.** Founded in 1916, the Pennsylvania Chamber of Business and Industry (“Pennsylvania Chamber”) has served as “The Statewide Voice of Business™” by advocating public policies that expand private sector job creation and lead to a more prosperous Pennsylvania for all of its citizens. The Pennsylvania Chamber is the largest business association in Pennsylvania, and consists of more than 9,400 member businesses of all sizes and industry sectors throughout the state – from sole proprietors to Fortune 100 companies – representing nearly 50 percent of the private workforce in Pennsylvania.
- **Pharmaceutical Research and Manufacturers of America.** The Pharmaceutical Research and Manufacturers of America (“PhRMA”) represents the country’s leading biopharmaceutical research companies. PhRMA’s mission is to conduct effective advocacy for public policies that encourage the discovery of important new medications for patients by

biopharmaceutical research companies. PhRMA members, which include some of the largest pharmaceutical companies in the United States, invest billions in the research and development of innovative medicines that enable patients to live longer, healthier and more productive lives.

- **Product Liability Advisory Council.** Formed in 1983, the Product Liability Advisory Council (“PLAC”) is a non-profit association that analyzes and shapes the common law of product liability and complex litigation. PLAC’s mission is to help members successfully manage every link in the liability chain – from product design to manufacture to distribution through sale to end-users, and on to post-sale responsibilities. PLAC is comprised of more than 100 leading product manufacturers and 350 of the most elite product liability defense attorneys operating in the United States and abroad.
- **Small Business & Entrepreneurship Council.** The Small Business and Entrepreneurship Council (“SBE Council”) is a 501c(4) advocacy, research and education organization dedicated to protecting small business and promoting entrepreneurship. SBE Council educates elected officials, policymakers, business leaders and the public about key policies that enable business start-up and growth. SBE Council’s members include entrepreneurs and small business owners.
- **South Carolina Chamber of Commerce.** The South Carolina Chamber of Commerce (“South Carolina Chamber”) is the leading statewide organization championing a favorable business climate for South Carolina companies and employees. Its mission is to strategically create and advance a thriving, free-market environment where South Carolina businesses can prosper. The South Carolina Chamber represents its members, which include both small and large companies, by assisting them with legislative advocacy and tracking, marketing, connecting and expanding their bottom line.
- **State Chamber of Oklahoma.** Representing more than 1,500 Oklahoma businesses and 350,000 employees, the State Chamber of Oklahoma has been the state’s leading advocate for business since 1926. The organization’s mission is to advance public policies that promote Oklahoma businesses and employees.
- **Texas Civil Justice League.** The Texas Civil Justice League (“The League”) is the nation’s oldest and largest state legal reform organization. It has pursued a broad civil justice reform agenda, including successful efforts to enact legislation restricting forum shopping, limiting punitive damages and joint and several liability and deterring frivolous lawsuits. The League’s members include hundreds of corporate businesses of all sizes, law firms, professional and trade associations, health care providers and individuals.
- **U.S. Chamber of Commerce.** The U.S Chamber of Commerce (“the Chamber”) is the world’s largest business federation, representing the interests of businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations. For more than 100 years, the Chamber has advocated for pro-business policies that help businesses create jobs and grow our economy.

- **U.S. Chamber Institute for Legal Reform.** A program of the U.S. Chamber of Commerce, the U.S Chamber Institute for Legal Reform’s (“ILR”) mission is to champion a fair legal system that promotes economic growth and opportunity. The Chamber is the world’s largest business federation, representing the interests of businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations. For more than 100 years, the Chamber has advocated for pro-business policies that help businesses create jobs and grow our economy.
- **Vegas Chamber.** The Vegas Chamber is the largest business organization in Nevada. Founded in the early days of Las Vegas, the Vegas Chamber has effectively protected and strengthened the Southern Nevada business community, helping its member businesses grow and thrive and providing a voice for those businesses in local, state and federal government.
- **Virginia Chamber of Commerce.** The Virginia Chamber of Commerce (“Virginia Chamber”) is the leading non-partisan business advocacy organization in the Commonwealth of Virginia. Working in the legislative, regulatory, civic and judicial arenas at the state and federal level, the Virginia Chamber seeks to promote long-term economic growth in the Commonwealth. The Virginia Chamber’s members include 25,000 Virginia companies, ranging from small businesses to Fortune 500 companies.
- **Wisconsin Manufacturers and Commerce.** Wisconsin Manufacturers and Commerce (“WMC”) is the state chamber of commerce, the state manufacturers’ association and the state safety council. Founded in 1911, WMC is Wisconsin’s leading business association dedicated to making Wisconsin the most competitive state in the nation. The association has nearly 3,800 members that include both large and small manufacturers, service companies, local chambers of commerce and specialized trade associations.

APPENDIX B – PROPOSED AMENDED RULE

The amended Fed. R. Civ. P. 26(a)(1)(A) would read as follows, with the new proposed language in underscore and deletions in ~~strikethrough~~:

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; ~~and~~

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment; and

(v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.