

Congress of the United States
House of Representatives
Washington, DC 20515-0550

August 19, 2024

VIA ELECTRONIC TRANSMISSION

The Honorable John G. Roberts, Jr.
Presiding Officer
Judicial Conference of the United States
One Columbus Circle, NE
Washington, D.C. 20544

Dear Chief Justice,

We write to you out of concern about the status of the Judicial Conference's rulemaking activity regarding disclosure of third-party litigation funding. In May 2021, Members of Congress wrote to the Judicial Conference regarding potential legislation to require the disclosure of investor-funded litigation.¹ These investor-funded litigation arrangements raise a number of concerns, including with respect to lawyers' fiduciary duties to their named clients, and concerns about the sometimes-fraudulent nature of the litigation fueled by such funding.

Since our May 2021 letter, the monetization of our justice system has continued at a breakneck pace. One industry observer estimates that litigation funders currently have at least \$13 billion in assets under management as investors pour funding into lawsuits seeking lucrative returns.² Several federal and state courts are taking action to understand what this flood of outside money means to individual cases and its impact on court proceedings (including but not limited to the non-parties who influence decisions concerning settlement versus continuing litigation) by requiring disclosure of outside funding. However, the Judicial Conference has remained silent on this problem, despite the tremendous importance of this issue.

The purpose of authorizing the Judicial Conference to establish its own rules was to allow the federal judiciary to regulate its judicial proceedings, including issues such as non-party investment in litigation. Congress is closely watching this issue and is aware of the Judicial Conference's inactivity despite four proposals for procedural rule changes that are currently pending before the Judicial Conference Committee on Rules of Practice and Procedure and its Advisory Committees.³

¹ https://www.uscourts.gov/sites/default/files/21-cv-1_suggestion_from_senator_grassley_and_representative_issa_-_third_party_litigation_funding_0.pdf.

² <https://www.jdsupra.com/legalnews/gosueme-the-broken-promises-of-third-4261485/>.

³ The proposals include amendments to FRCP 7.1, https://www.uscourts.gov/sites/default/files/24-cv-d_suggestion_from_lcj_and_ilr_-_rule_7.1.pdf; FRCP 16, <https://www.uscourts.gov/sites/default/files/22-cv->

In furtherance of reaching an appropriate resolution of these issues, please provide answers to the following questions:

- Has the Conference evaluated the success of the local rules requiring disclosure of third-party funding of civil litigation that have been adopted by the U.S. District Courts for the District of New Jersey, the Northern District of California, the Western District of Texas, and the standing order adopted by the Chief Judge of the District of Delaware?
- We are concerned that federal judges may be presiding over lawsuits in which, unbeknownst to them, a non-party investor has a direct, contingent financial interest in the proceeds of a judgment or settlement. Has the Conference considered how to ensure that the existence of such investments is disclosed to the presiding judges?
- Under FRCP 7.1, certain entities must disclose parent corporations and any publicly held corporation owning 10% or more of its stock. Has the Conference considered whether non-party financial investors with a right to receive any payment that is contingent on the outcome of specific litigation should also be disclosed?
- Would not a simple disclosure requirement permit the litigants and their counsel to advance any concerns third-party funding might present in a matter directly with a Court when appropriate? This would save valuable judicial resources now being utilized by federal judges who must engage in all manner of self-directed activity to determine the propriety of third-party funding. Why not make this the obligation of the litigants who will then brief any issues that need further action?
- It is clear from public reports that judges are uncertain about how to address disclosure of third-party funding even when they conclude that more information may be needed. Some judges have engaged in *ex parte* conversations with plaintiffs' counsel. Some review portions of funding agreements in camera and provide their opinions and conclusions on an *ex parte* basis. This is a departure from how other important issues are addressed in our adversary system—the norm is to seek the views of both sides and make a decision that is at least known to the parties, if not the public. Is the Conference concerned about the current ad hoc and often *ex parte* approach to addressing disclosure of third-party funding?
- Although a uniform disclosure rule for all civil cases would be the most efficient way to inform courts and the parties about third-party funding and the financial interests that it creates, an amendment to FRCP 16(c)(2) adding third-party funding as a matter for consideration during pretrial conferences would also assist the courts and the parties. Has the Conference considered an amendment addressing disclosure during pre-trial conferences?

- The dispute over third-party funding in the *Sysco v. Burford Capital* litigation has led to a number of legal proceedings requiring considerable attention from the courts.⁴ Has the Conference considered that rules requiring or facilitating early disclosure of third-party funding agreements may avoid unnecessary litigation and controversy, such as we saw in the *Sysco* case?
- Finally, we understand and appreciate that the Conference is generally cautious about making changes to the rules as it seeks to avoid unintended consequences. What concrete harms or interests, if any, have been articulated that have so far deterred the Conference from requiring disclosure of third-party funding of litigation before the federal courts?
- Has the Federal Judicial Center undertaken any training of judges regarding the growth of investor-funded litigation, the issues it raises in individual cases, and how to go about asking for information from the parties about its consequences?

Congress is closely watching the growing monetization of our judicial system, and it is imperative that procedural rules including the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure keep pace with the growth of third-party litigation funding. Thank you for your prompt attention to this matter.



Representative Darrell Issa, CA-48



Representative Ben Cline, VA-6



Representative Scott Fitzgerald, WI-5

⁴ <https://darroweverett.com/sysco-vs-burford-litigation-financing-case-analysis/>.