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September 27, 2024

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Re: Procedural Consistency for the Disclosure of Third-Party Litigation Funding

Dear Mr. Byron:

Our companies, actively engaged in the federal civil justice system as both plaintiffs and defendants, are concerned about the procedural inconsistencies and deficiencies related to disclosure of third-party litigation funding ("TPLF"). As federal judges have become increasingly aware of the reasons why courts and parties need to know about TPLF, they are employing varied and often insufficient means of inquiry. We respectfully ask the Advisory Committee on Civil Rules ("Advisory Committee") to amend the Federal Rules of Civil Procedure ("FRCP") to provide a uniform and efficient procedure for disclosure of TPLF agreements in civil cases.

I. IT IS UNFAIR TO DENY PARTIES INFORMATION ABOUT WHO CONTROLS THE LITIGATION

We need TPLF disclosure to understand who has control of the case. We know from experience that when TPLF is present in our cases, it fundamentally alters the dynamics and has a major impact on whether the dispute can be resolved through settlement. We cannot make informed decisions without knowing the stakeholders who control the litigation—and we cannot understand the control features of a TPLF agreement without reading the agreement. Without this information, the settlement process often unravels when the nominal plaintiff or its counsel needs to obtain approval from undisclosed non-party funders or uses the non-party as an excuse to retract a commitment to settle. (This is the very reason why courts typically require insurance representatives to appear with authority at settlement conferences and mediations.)

II. DISCLOSURE OF TPLF AGREEMENTS IS ESSENTIAL TO THE FUNCTION OF KEY FRCP AND WITNESS SAFEGUARDS

When defendants are kept in the dark about TPLF agreements, they are prevented from utilizing several key FRCP provisions as intended. For example:

- FRCP 26(b)(1) describes "the resources of the parties" as a factor relevant to whether a particular discovery request is proportional to the needs of the case. When courts do not allow

us to know if the named parties are funded by TPLF investors, we cannot argue, and the court cannot weigh, how the resources of the parties should factor into decisions about the scope of discovery. This proportionality factor, which was added to the FRCP in 2015, is meaningless when TPLF agreements providing resources to a party are kept secret.

- Similarly, if we are not allowed to understand the control features and resource provisions of TPLF funding agreements, we are significantly constrained in making meaningful arguments about allocating costs pursuant to FRCP 26(c)(1)(B) and sanctions under FRCP 37.
- Without TPLF disclosure, we have no ability to expose to the court and jury when witnesses have conflicts of interest caused by their financial relationship with non-party funders, including direct payments as well as the potential that they will financially benefit from the outcome of the case.
- When we do not know who stands to benefit directly from the judgment or settlement in a case, we do not have the protection of FRCP 17(a)(1), which requires that "[a]n action must be prosecuted in the name of the real party in interest."

III. INADEQUATE PRACTICES SUCH AS *EX PARTE* CONVERSATIONS SHOULD NOT BE THE STANDARD MEANS OF INQUIRY ABOUT TPLF

Some judges ask whether parties are using TPLF during initial scheduling conferences. Other judges engage in *ex parte* discussions with plaintiffs' counsel in chambers, sometimes reviewing portions of a TPLF agreement *in camera*. Still others have issued written orders requiring counsel to answer questions in writing, *ex parte*, about TPLF agreements but not reviewing the underlying TPLF agreements. Problematically, few judges follow up during the course of litigation to ask whether new TPLF deals have been struck since their initial questions or give any indication that disclosure is an ongoing obligation. And, of course, some judges continue to resist making any sort of inquiry whatsoever. This variety of approaches and inconsistent practices is creating a fragmented and incoherent procedural landscape in the federal courts.

The FRCP should establish a uniform and straightforward procedure for TPLF disclosure so courts do not have to devise their own schemes and parties do not have to guess what will be required or allowed from court to court and case to case. A rule is particularly needed to supersede the misplaced reliance on *ex parte* conversations; *ex parte* communications are strongly disfavored by the Code of Conduct for U.S. Judges (Cannon 3(A)(4)) because they are both ineffective in educating courts and highly unfair to the parties who are excluded. FRCP guidance is necessary to supplant practices by which courts are entertaining potential factual and legal disagreements – and in effect ruling on them – without the benefit of the other parties' views and without informing the parties that the court is reaching conclusions on legal questions.

IV. DEFENDANTS NEED TPLF DISCLOSURE FOR THE SAME REASONS THE FRCP PROVIDE PLAINTIFFS WITH OUR INSURANCE AGREEMENTS

Our companies need to know about TPLF when we are sued for the same reasons that the Advisory Committee promulgated FRCP 26(a)(1)(A)(iv) to require defendants to disclose our insurance agreements. The Advisory Committee explained in 1970 that disclosure of insurance contracts "will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and

litigation strategy are based on knowledge and not speculation." The Advisory Committee's reasoning applies equally to TPLF agreements because we need to be aware of key factors to make realistic and knowing assessments of the case and to develop appropriate litigation strategies. Without this information, we are at a major disadvantage in determining whether there are non-parties with a direct interest in the outcome of the case and in understanding whether the case can be resolved through settlement.

CONCLUSION

We urge the Advisory Committee to propose a straightforward, uniform rule for TPLF disclosure to remedy the current imbalanced and inconsistent litigation dynamic that is prejudicial and frustrates civil justice. The FRCP should require disclosure of TPLF agreements that provide non-parties a direct interest in the outcome of the case. Absent such a rule, the continued uncertainty and court-endorsed secrecy of non-party funding in our cases will further unfairly skew federal civil litigation.

Thank you for your consideration.

Sincerely,

Nicholas A. Kriegel
General Counsel
Safety National Casualty Corporation