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

Dear Ms. Womeldorf:

I write on behalf of the Chubb Group of Insurance and Reinsurance Companies. We understand that the Committee is currently examining proposals to require disclosure of third party litigation funding arrangements in litigations brought in American federal courts. As the world's largest publicly traded property and casualty insurer, Chubb has been a witness to the growth of the litigation funding industry in America, Australia and elsewhere, as well as to the increase in lawsuit volume and litigation expense that has accompanied this growth. However, we also wish to share with the Committee Chubb's own experience with funded litigation over a disputed insurance claim, as we believe it illuminates an important and sometimes overlooked aspect of litigation funding, namely how the transnational and unregulated nature of these arrangements encourages speculative investments in lawsuits by parties unconstrained by the powers of American courts to discipline improper behavior.

More than 20 years ago, the United States District Court for the Eastern District of Pennsylvania issued a judgment denying a property damage insurance claim brought against CIGNA Worldwide Insurance Company by claimants from the Republic of Liberia.[1] The Court found that the damages for which the claimants sought recovery from their insurer were the result of the war that consumed much of Liberia in the 1980s and 1990s, and were thus excluded from insurance coverage by their policies' "War Damage Exclusion" clause. The Court's decision was upheld by the Third Circuit. Several years later, the District Court issued an Anti-Suit Injunction in response to efforts by the claimants to pursue legal proceedings in Liberia on the very same insurance claims. The injunction barred the claimants from "taking any action to enforce in any jurisdiction the Liberian Judgment" or otherwise taking any actions that "conflict with, constitute an attack upon, or seek to nullify" the District Court's judgment.[2]

Although the final judgement and the Anti-Suit Injunction should have been the end of the matter, the claimants were undeterred, largely because of the presence of unregulated transnational litigation funding. Backed by entrepreneurial lawyers and investors from several jurisdictions including Ireland, the British Virgin Islands, Switzerland and the United Kingdom, the claimants secured a large judgment from the Liberian courts on the very same insurance claims, notwithstanding the preclusive prior US judgment. They then sought to execute on that judgment in overseas jurisdictions in which our company maintained a presence.

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[1] *Younis Bros. & Co. v. CIGNA Worldwide Ins. Co.*, 899 F. Supp. 1385 (E.D. Pa. 1995), *aff'd*, 91 F.3d 13 (3d Cir. 1996,) *cert denied*, 519 U.S. 1077 (1997). CIGNA Worldwide's assets and liabilities were later purchased by ACE Limited, which subsequently changed its name to Chubb following a 2016 merger. Had the claimants and their funders been successful in pursuing CIGNA Worldwide, Chubb would have been contractually responsible for the liability.

[2] *Younis Bros. & Co. v. CIGNA Worldwide Ins. Co.*, 167 F. Supp. 2d 743, 747 (E.D. Pa. 2001).

Because these actions so clearly violated the District Court's Anti-Suit Injunction, CIGNA asked the Court to have the claimants, their lawyers and their (as yet unidentified) litigation funders held in civil contempt. So that CIGNA could properly serve its contempt petition on the proper parties, it sought discovery into the identity of the litigation funders. The District Court granted the discovery motion and ordered that the identity of the funders be disclosed. However, because the alleged contemnors (including the funders) were situated overseas, they felt empowered to repeatedly defy the District Court's discovery orders -- even those orders intended to test their own contention that the Court lacked jurisdiction over their violations of the Anti-Suit Injunction.

It took more than six years of litigation before CIGNA was finally able to identify the complete chain of litigation funding and to identify and serve papers on the original funder, an Irish real estate developer who had channeled his investment through private companies in Malta and the British Virgin Islands. The District Court's decision finally holding both the funders and their lawyers in contempt described the difficulties confronting the Court in seeking to vindicate its earlier judgment:

> "Now invoking this Court's jurisdiction, now denying it; now proceeding under American law, now alleging that they cannot comply with it; now claiming immunity, now refusing to provide any supporting discovery, Respondents' outrageous behavior is an affront to the Courts of the United States."[3]

Chubb believes that this extraordinarily lengthy and costly litigation illustrates that the litigation funding enterprise is not merely a matter of large domestic funders who can be held accountable in American courts. Because capital respects no boundaries, speculative investments in American litigations can be made from any country and by any individual or entity. Cases in U.S. courtrooms before U.S. judges and juries can be guided (or misguided) by parties who believe, rightly or wrongly, that they are not subject to U.S. jurisdiction and who may be able to cloak their identity behind corporate Special Purpose Vehicles and other masked offshore entities. In the litigation described above, the third party funders channeled their investments through a variety of Special Purpose Vehicles incorporated in Malta and in the British Virgin Islands (a jurisdiction known for its strict corporate privacy laws.)

In short, the absence of effective disclosure rules at the commencement of a litigation makes it difficult to control the actions of foreign speculators whose interest in using the federal court system as an investment vehicle may not be in the best interests of individual parties and who may not be constrained by either the civil rules or the inherent powers of the court. In the CIGNA litigation even the threat of a contempt order posed less of a deterrent than it would to domestic parties, as civil contempt orders are rarely enforceable in foreign jurisdictions.

We hope that the Committee will keep Chubb's experience with cross-border litigation funding in mind when considering specific proposals dealing with judicial supervision of such arrangements.

Very truly yours,

Howard S. Schrader

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[3] *Younis Bros. & Co. v. CIGNA Worldwide Ins. Co.*, Civ. No. 91-6785, 2016 U.S. Dist. Lexis 95707 at *64, 2016 WL 3959078 (E.D. Pa. Jul. 22, 2016)