January 17, 2018

18-CV-B

Ms. Rebecca A. Womeldorf
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

RE: Third-Party Litigation Funding

Dear Ms. Womeldorf:

The American Association for Justice ("AAJ"), formerly known as the Association of Trial Lawyers of America ("ATLA"), hereby submits these comments in response to the numerous requests for rule-making on third-party litigation financing ("TPLF") and, in particular, the request for mandatory disclosure of third-party litigation agreements presented in the U.S. Chamber's Institute for Legal Reform ("ILR")'s most recent submission. See 17-CV-O and 17-CV- GGGGGG. This proposal is the most recent in a long chain of one-sided proposals directed towards the plaintiffs' bar regarding TPLF. AAJ, with members in the United States, Canada and abroad, works to preserve the constitutional right to trial by jury and access to justice when people are injured by the negligence or misconduct of others. AAJ advocates to ensure that all plaintiffs, including employees, consumers, patients, families, shareholders and businesses injured by corporations, receive proper access to the courts under fair, just, and reasonable rules of procedure.

I. Background.

AAJ generally opposes proposals to limit TPLF funding and access to capital for members of the plaintiffs' bar. Many plaintiffs' attorneys avail themselves of third-party litigation funding over the course of their professional lives. While AAJ is unable to quantify numbers or percentages of AAJ members that use funding, AAJ can say that some attorneys use TPLF frequently while others use it occasionally or not at all. Additionally, TPLF takes many different forms and one-size does not fit all. Indeed, the Committee previously noted the lack of universal definition of TPLF and recognized the need to ensure a narrowly crafted definition in any potential rulemaking to prevent an overbroad rule. AAJ agrees that this is a legitimate concern with these proposals.[1]

[1] Minutes of the Civil Rules Committee October 2014 Meeting, Agenda Book of the Advisory Committee on Civil Rules, page 49 (April 2015) ("It is not clear just what forms of financial assistance to a lawyer or to a party might be included under this label, nor is it clear whether the label itself should be adopted. Many ads offering financial

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While AAJ recognizes that the rise of TPLF is seen as a "phenomenon" in the last several years, its arrival and growth is not surprising to AAJ. The reason that TPLF exists is because traditional access to financing and capital, particularly post-recession, often was not available to members of the plaintiffs' bar, whose business model was considered too uncertain by traditional banks to extend lines of credits or other types of commercial loans.[2] However, other types of financial institutions, particularly those with in-depth knowledge of how litigation works, did find an interest in providing plaintiffs' firms with adequate financing. Access to adequate financing when litigating against a corporate defendant that has comparatively far more resources became instrumental in the success of many plaintiffs' lawsuits.[3] As success of this type of financing grew, other types of institutions have taken interest in financing plaintiffs' lawyers, and the types (individuals, banks, hedge funds, etc.) and models of litigation financing (be it individual cases, firms or portfolios of cases) continue to evolve.[4]

ILR's most recent submission should be familiar to the Advisory Committee. In April 2014, ILR and similarly-interested groups submitted a remarkably similar proposal to require mandatory disclosure of TPLF under Rule 26. Given the novelty of TPLF and contentious debate surrounding the alleged concerns over TPLF, the Advisory Committee decided in October 2014 that rulemaking on the proposal was "premature."[5]

ILR's most recent submission on this subject reiterates the same alleged concerns contained in its 2014 comments, and ILR has requested that the Committee reopen its consideration due to "several relevant noteworthy developments."[6] These new developments mainly appear to be data on financial success of a few TPLF entities, the alleged "expansion" of TPLF funding models, and the recent standing order of one district court to require TPLF funding in class/mass actions.[7]

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support to lawyers seem to involve general loans to the firm, or to be ambiguous on the relationship between possible financing terms and specific individual litigation.").

[2] Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1275-1285 (2010-2011), *available at* http://www.minnesotalawreview.org/wp-content/uploads/2012/03/Steinitz_PDF.pdf.

[3] *Id.* at 1305 ("One-shotters' (i.e., individual plaintiffs') bargaining positions will be most radically transformed by litigation funding as plaintiffs are transformed from one-shotters to modified repeat players. By allying themselves with repeat-player funders, these plaintiffs will now reap the benefits of economies of scale, accumulated expertise, and a limited ability to play for rules, in addition to gaining access to justice."); *see also* Jan Wolfe, *Got Your Back*, The American Lawyer, 13-14 (Feb. 2014), *available at* http://www.americanlawyer-digital.com/americanlawyer-ipauth/201402ip?pg=13#pg13.

[4] *See* Burford Capital, 2017 Litigation Finance Survey (2017), *available at* http://www.burfordcapital.com/wp-content/uploads/2017/09/Burford-2017-Litigation-Finance-Research-Whitepaper.pdf.

[5] Minutes of the Civil Rules Committee October 2014 Meeting, Agenda Book of the Advisory Committee on Civil Rules, page 54 (April 2015)("But third-party financing practices are in a formative stage. They are being examined by others. They have ethical overtones. We should not act now. . . There has been a flurry of articles. 'The authors are all over the place.' Some, highly respected, have suggested that the concerns reflected by this proposal are premature. The Committee decided not to act on these issues now.").

[6] U.S. Chamber Institute for Legal Reform, Renewed Proposal to Amend Fed. R. Civ. P. 26(a)(1)(A) 17-CV-O (June 1, 2017).

[7] *Id.*

AAJ would contest of the novelty of some of these "developments." Also, data on whether certain TPLF entities are lucrative or not hardly justify a new discovery rule, and the Committee reporters have similarly questioned the relevance of this information.[8] Furthermore, one district court's experimentation with disclosure – one much more limited than that suggested by ILR – does not justify rulemaking either. On the other hand, it incentivizes a wait-and-see approach as courts (and state ethics commissions) experiment with different approaches.

Nevertheless, none of these "developments" justify reconsideration of the Committee's reasonable decision that rulemaking on this matter is premature. Most importantly, ILR's substantive reasons to justify the rulemaking have not changed.[9] ILR argues that disclosure is necessary so that the court and parties can identify the real party of interest in the litigation and disclose conflicts of interest. While AAJ disagrees with ILR's assessment of TPLF and the role it plays in litigation, AAJ mainly questions the true motivations of this proposal. If identification of potential conflicts of interest is the overarching concern of a rulemaking, then why not suggest an amendment to Rules 17(a) or 7.1, as the Committee reporter has suggested on this issue?[10] These repetitive proposals' insistence on an amendment to the discovery rules perhaps shows their true motivation, which may be to make the litigation so expensive and so impossible to bring for plaintiffs – even when adequately financed by a third party – that ultimately a meritorious case will not be brought.[11] It must be alarming to corporate defendants to face more well-financed plaintiffs when lack of funding denied so many of these injured plaintiffs a day in court before the advent of TPLF.[12]

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[8] Rule 26(a)(1)(A) Reporters Memorandum and Suggestion 14-CV-B, Agenda Book of the Advisory Committee on Civil Rules, page 121 (October 2014) ("Perhaps relatedly, the submission seems to suggest that TPLF arrangements are somehow improper. Not only does it describe TPLF companies as 'lucrative," . . . How this factor should affect a determination about the parties' resources under amended Rule 26(b)(1) (if it is amended effective Dec. 1, 2015) is uncertain . . .'[C]onsideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that '[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party whether financially weak or affluent'" (citing Committee Note).).

[9] *Compare* U.S. Chamber Institute for Legal Reform, Proposed Amendment to Fed. R. Civ. P. 26(a)(1)(A) 14-CV-B (April 9, 2014) *with* U.S. Chamber Institute for Legal Reform, Renewed Proposal to Amend Fed. R. Civ. P. 26(a)(1)(A) 17-CV-O (June 1, 2017).

[10] Rule 26(a)(1)(A) Reporters Memorandum and Suggestion 14-CV-B, Agenda Book of the Advisory Committee on Civil Rules, page 120 (October 2014) ("Finally, it might be noted that if the objective is to identify those with a real stake in the litigation, some revision of Rule 17(a) on real party in interest might be in order."); id. at page 118 ("Whether that would make information about this subject discoverable under Rule 26 is uncertain. It might be that the right focus would be on Rule 7.1 disclosure statements.').

[11] *See, e.g.*, Binyamin Appelbaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. TIMES (Nov. 14, 2010), *available at* http://www.nytimes.com/2010/11/15/business/15lawsuit.html?pagewanted=all ("The rise of lending to plaintiffs and their lawyers is a result of the high cost of litigation. Pursuing a civil action in federal court costs an average of$15,000, the Federal Judicial Center reported last year. Cases involving scientific evidence, like medical malpractice claims, often cost more than $100,000. Some people cannot afford to pursue claims; others are overwhelmed by corporate defendants with deeper pockets. A review by The New York Times and the Center for Public Integrity shows that the inflow of money is giving more people a day in court and arming them with well-paid experts and elaborate evidence. It is helping to ensure that cases are decided by merit rather than resources, echoing and expanding a shift a century ago when lawyers started fronting money for clients' lawsuits.").

[12] *Id.*

II. ILR's One-Sided Proposal.

ILR's proposal can be found on page 33 of their 17-CV-O submission.[13]

The proposed amendment would add the following to Rule 26(a)(1)(A):

> "(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."[14]

As in the versions before, the disclosure requirement as drafted by the ILR is completely one-sided. It only applies to the plaintiffs' bar, even though the biggest funding companies provide funding for both plaintiffs and defendants. The disclosure requirement applies to all types of funding, including traditional sources of funding as well as third-party litigation funding. No definition of "agreement" is provided in the proposal. Finally, the draft requiring disclosure under Rule 34 does not solve the problems raised by ILR, mainly that TPLF may raise potential conflicts of interest. While AAJ disagrees with ILR's purported reasons for rulemaking, if indeed control of the litigation were actually a problem, the mere disclosure of a funding arrangement would not solve the problem.

III. The ILR Proposal is Not a True Federal Rules Amendment.

As seen with other amendment proposals, AAJ suspects that this latest proposal is a result of failed lobbying efforts in Congress. Congress has not passed the disclosure requirement, nor should the Advisory Committee. ILR may feel that the threat of Congressional overreach would incentivize Committee action. AAJ acknowledges that there may be times when Congress does step on the Advisory Committee's toes, particularly when circumventing the Rules Enabling Act, but TPLF disclosure is not one of those times.

In his comment (17-CV-FFFFFF), the Chairman of the House Judiciary Committee, Rep. Bob Goodlatte, states that the House included a disclosure requirement for class action cases in H.R. 985, the Fairness in Class Action Litigation Act, and urges the Committee to give careful consideration of 17-CV-O and ultimately support it.[15] H.R. 985 passed the House in March 2017 without any hearings or any support from the minority party. The bill has not gained traction in the Senate, and there is no guarantee that the bill would get considered by the next Congress. Moreover, rules of procedure and evidence should never be dictated by the political whims of Congress. That is why jurists universally approved of the Rules Enabling Act – to remove the creation of rules regarding the administrative of justice away from politicians.

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[13] U.S. Chamber Institute for Legal Reform, *supra* note 6, at 33.

[14] *Id.*

[15] Rep. Bob Goodlatte, Comment 17-CV-FFFFFF (Nov. 1, 2017).

Above all else, the most appropriate body to consider TPLF ethical concerns and potential disclosure requirements is state ethics commissions, not any federal body. While the ILR continues to lobby for third party litigation funding in Congress, ILR has once again asked the Advisory Committee to address a potential state-created ethical problem. AAJ questions whether true ethical concerns can even be addressed by a federal rule change when ethical and conflicts of interest issues are efficiently and effectively regulated by state rules of professional responsibility and licensing.[16]

As ILR's proposal concedes, this is a state issue. In explaining their reasoning for "the need for disclosure," ILR argues that "[t]he funding agreements may violate ***state*** champerty and maintenance laws, as well as ethical canons. . ." (emphasis added).[17] AAJ agrees that if TPLF agreements have any ethical implications at all, they are based on state ethics rules. State ethics commissions would be the appropriate body to consider the ethical implications of TPLF.

The regulation of litigation funding is fundamentally a state issue because it is so closely tied to the rules of professional conduct. The duties an attorney owes to his or her client are also defined by state law and state ethical rules, so issues like disclosure, conflicts of interests, and confidentiality are already regulated by the states.[18] There is simply no need for federal intervention into state rules involving ethics, contracts, and licensing. AAJ would ask the Committee to reject this proposal outright to allow states to continue their work in the evolving world of TPLF.

IV. Attorneys Make Their Own Litigation and Strategy Decisions.

While AAJ disagrees with many statements and notions in ILR's proposal, AAJ wishes to highlight and reiterate AAJ's prior assertions that litigation funders do not interfere with litigation decisions. There is no evidence that the financing company dictates the litigation strategy or decisions. Indeed, legal ethical rules prohibit such interference.[19] There is no reason that an attorney would listen to or take direction from a person or company that has no litigation or trial experience and risk a violation of state ethics rules in the process. Since the proposed amendment from ILR is simply a proposal, AAJ declines to respond to all the points raised in their comments. However, two points require a specific response.

A. Myth: Litigation Funding Deters Settlement.

[16] *See, e.g.*, State Adoption of the ABA Model Rules of Professional Conduct, ABA Center for Professional Responsibility (2018), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html; *see generally* MODEL RULES OF PROF'L CONDUCT (2016).
[17] U.S. Chamber Institute for Legal Reform, *supra* note 6, at 9.
[18] *See* note 16, *supra*.
[19] Victoria Shannon, *Harmonizing Third-Party Litigation Funding*, 36 CARDOZO LAW REV. 861, 872 (2016) ("According to attorney ethical rules in most states within the United States, the funder must not exercise any control over the legal representation or the attorney. The lawyer representing the underlying client in the case must adhere to any rules of professional responsibility or ethics of the jurisdiction(s) in which she is licensed to practice and may be subject to specific ethical rules of the dispute resolution venue as well.").

ILR alleges that TPLF can delay and distort the settlement process because a party that must repay a TPLF entity a percentage of the proceeds may reject a fair settlement offer and hold out for securing a larger sum of money. The argument is nonsensical. First and foremost, the plaintiffs' attorneys sole concern considering a settlement is the best interest of the client.[20] Even if we were to accept ILR's notion that a plaintiff's attorney unethically considered his or her own interest in repayment over the interest of a client, then because the funding must be repaid, the attorney would arguably be more incentivized to settle at the earliest possible point in the litigation.

ILR's reasoning is not in line with the practical workings of plaintiffs' lawyers. Plaintiffs' lawyers must already weigh the cost and efficiency of trial under the contingency fee system under which most members of the plaintiffs' bar regularly operate. Under the contingency fee system, the plaintiff's attorney must efficiently manage his or her cases. Inefficiency and delay mean that it takes longer for the client to receive compensation, or it may drain the lawyer of their resources to properly bring their case to trial. In contrast, defense attorneys, who charge billable hours, get paid regardless of whether the case is quickly resolved or dragged out and thus do not weigh the cost of continuing litigation to the same extent that a plaintiff's attorney would.

In short, dragging out the settlement process is not financially advantageous to any plaintiffs' attorneys or their clients, and TPLF does not incentivize a plaintiff to reject an early settlement offer. On the other hand, TPLF does ensure that the plaintiff has enough resources to take on a well-heeled defendant. Further, TPLF ensures that a lawyer does not have to accept a low-ball settlement offer or take a complex case to court before it has been fully developed merely because they are running out of litigation resources.[21]

B. Myth: Litigation Funding Undermines Attorney-Client Privilege.

ILR alleges that TPLF raises confidentiality concerns because the attorney may be required to disclose privileged information to the funder. AAJ is amused that that ILR cares whether privilege is violated between injured parties and members of the plaintiffs' bar, when ILR does not represent these interests and offers no examples citing disclosure of privilege or harm to actual clients. A plaintiff's attorney, who is licensed by the state and must follow state ethics rules,[22] is not going to risk censure or the loss of a license by allowing a third party to interfere with the attorney-client relationship. Again, there is no evidence to suggest that current third-party financing practices have breached the obligation for an attorney to zealously represent the client's interests.

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[20] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2, R. 1.3 COMMENT (2016)

[21] *See, e.g.*, Appelbaum, *supra* note 11 (detailing the story of a plaintiff who, when facing an appeal after winning her sexual harassment lawsuit, "needed money for living expenses or she would be forced to take a smaller settlement."); s*ee generally* Jason Krause, *Third-party financing is growing, and lawyers are big players*, ABA Journal (July 2016).

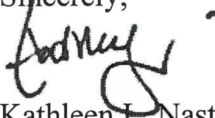
[22] Shannon, *supra* note 20.

V. Conclusion.

AAJ strongly believes that the case for regulation of third-party financing has not been established and that ILR's proposal is just an attempt to unbalance the playing field. There is simply resentment and oftentimes backlash when the plaintiffs' bar secures capital to bring complex cases that are expensive to develop. If any regulation is needed—and there is no evidence that there is—the highest state courts are perfectly capable of performing this function.

AAJ appreciates the opportunity to submit this comment on third-party litigation funding. If you have any questions or comments, please contact Sue Steinman, Senior Director of Policy and Senior Counsel, American Association for Justice, at susan.steinman@justice.org.

Sincerely,



Kathleen L. Nastri
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