September 20, 2019

Ms. Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice and Procedure
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 Ms. Womeldorf:

On behalf of the Independent Women's Forum, we write to voice support for the proposal to amend Fed. R. Civ. P. 26(a)(1)(A) to require in civil actions the disclosure of agreements giving a non-party or non-counsel the contingent right to receive compensation from proceeds of the litigation. *See* July 1, 2017 letter to Advisory Committee (Document No. 17-CV-O) (proposing language for a new Fed. R. Civ. P. 26(a)(1)(A)(v)) as supplemented by November 3, 2017 letter to Advisory Committee (Document No. 17-CV-GGGGGG).

We appreciate that the Advisory Committee on Civil Rules (the "Committee") has been actively and carefully considering this proposal. As the Committee continues that important process, we wish to address a troubling assertion the third-party litigation funding ("TPLF") industry has offered in opposition to the proposal.

Advocates for the industry suggest that litigation funding is akin to pro bono practice because TPLF evens up resources between plaintiffs and defendants. As industry advocate Richard Levick puts it, "[t]he pursuit of social justice remains a sub-theme here, an important part of how the financiers see their role in the world."[1] According to Levick, "It's not much of a stretch to see litigation finance, like the plaintiffs' bar itself, filling something of a regulatory function; of forcing businesses to greater accountability where the government has so far failed or declined to do so."[2]

The problem of course is that it *is* a stretch to consider for-profit litigation funders as pro bono enforcement partners. Indeed, the funders take the opposite tact of pro bono attorneys: instead of donating their services, they are highly lucrative for-profit companies with jaw-dropping returns on

1 Richard Levick, *Litigation Financing: A Controversial Industry Does Well By Doing Good*, July 1, 2019, https://www.forbes.com/sites/richardlevick/2019/07/01/litigation-financing-a-controversial-industry-does-well-by-doing-good/#73381d106af2.
2 *Id.*

investment. In 2017, for example, Burford Capital reported a return on equity of 37%.[3] The litigation-financing industry is currently estimated to be worth between $50 and 100 billion.[4]

Nor is litigation financing a narrow scalpel used to go after bad actors. To the contrary, TPLF is an increasingly pervasive practice. According to Burford Capital's 2018 litigation finance survey, 32% of the lawyers they interviewed and an even larger percentage of survey respondents said their firms or companies had used litigation finance—a 237% increase since 2012.[5] And seven in ten U.S. lawyers who have not yet used litigation finance expect to do so within two years.[6]

The industry's private enforcement argument is altogether meritless when, as is increasingly the case, litigation funders purchase cases by the batch. More and more, funders are treating lawsuits like mortgages, investing in a portfolio based on a law firm's "existing track record."[7] In fact, about half of Burford's capital was in case portfolios in 2015.[8] And according to a 2017 Burford survey, more lawyers had experience with portfolio funding in 2016 (9%) than with single case financing in 2013 (7%).[9] The increasing prevalence of portfolio funding by third-party litigation funders makes sense as a diversified investment strategy, but undermines entirely the notion that funders are pro bono advocates for the common good.

To see litigation funders as private enforcers, moreover, gives rise to a whole host of concerns over the use and abuse of the legal process. The argument that for-profit financiers are serving the public interest by funding lawsuits is at odds with centuries of prohibitions on the purchasing of litigation. Under early common law, the courts held that a legal claim could not be transferred to a non-party because of corruption and a fear of multiplying lawsuits and disputes. Indeed, in Medieval England, the justice system was frequently abused when nobles and other parties who had influence with a particular judge would lend their name to a lawsuit. To ensure judicial independence, the doctrine of maintenance thus prohibited non-parties from supporting a lawsuit. Champerty is a specific type of maintenance whereby a third-party supports a lawsuit in return for a share of the profits. TPLF is by definition common law champerty.

The erosion of State law prohibitions against maintenance and champerty has coincided with the rise of judicial independence and the ethical canons that govern attorneys. But the cannons of legal ethics don't apply to third-party financiers and judges often have no knowledge of the funding agreement. As even industry advocates acknowledge, the "only obligations" of third party funders "are the ones stipulated in the contract with their clients."[10] They need not report conflicts or act in the best interest of their clients.

---

3 Brian Baker, *In low-yield environment, litigation finance booms*, Aug. 21, 2018, https://www.marketwatch.com/story/in-low-yield-environment-litigation-finance-booms-2018-08-17.

4 *Id.*

5 Burford, *2018 Litigation Finance Survey*, https://www.burfordcapital.com/2018-litigation-finance-survey/.

6 *Id.*

7 Sara Randazzo, *Litigation Funding Pioneer Hits a Roadblock*, Wall Street Journal, Nov. 23, 2015, http://blogs.wsj.com/law/2015/11/23/litigation-funding-pioneer-hits-a-roadblock/.

8 Julie Triedman, *Arms Race: Law Firms and the Litigation Funding Boom*, The American Lawyer, Dec. 30, 2015, http://www.americanlawyer.com/id=1202745121381/Arms-Race-Law-Firmsand-the-Litigation-Funding-Boom.

9 Burford's Latest Research Shows Explosive Growth and Ongoing Evolution of Litigation Finance, Burford Blog, May 3, 2016.

10 Richard Levick, *Litigation Financing: A Controversial Industry Does Well By Doing Good*, July 1, 2019, https://www.forbes.com/sites/richardlevick/2019/07/01/litigation-financing-a-controversial-industry-does-well-by-doing-good/#73381d106af2

Third party financiers have one primary objective: to maximize the returns for their investors. This profit motive can put them at odds with their clients and create conflicts of interest. A client may want to settle or not settle. A client may wish for an alternative remedy, like an injunction, or just an apology. These sorts of conflicts also can arise in contingency fee arrangements, which is precisely why judges rigorously police the ethical duty of a lawyer to represent the best interests of his or her client. With respect to TPLF agreements, however, funders are under no similar obligations, and in most cases, the judge is not even made aware of the agreement.

In all events, the TPLF industry never explains why *disclosure* itself is bad policy. Advocates vaguely suggest that disclosure will somehow complicate the industry's "pro bono" mission[11]—but it is hard to see why disclosure of self-styled private enforcers would be a negative thing. If for-profit funders do in fact function like private attorneys general, that is all the more reason to require disclosure. There are numerous safeguards that protect individuals and businesses from the long-arm of federal and state regulators. Similarly, the plaintiffs' bar is subject to canons of judicial ethics that protect the rights of clients and defendants alike.

Moreover, disclosure is important not only to help judges avoid conflicts of interests, make sure common law constraints on champerty and maintenance are not violated, and police the ethical obligations of attorneys, but also to give plaintiffs and defendants access to the same set of settlement tools. Requiring disclosure of TPLF agreements under Rule 26 would provide much needed parity between plaintiffs and defendants. Rule 26 already requires defendants to disclose insurance coverage.[12] As explained in the Advisory Committee Notes, "[d]isclosure of insurance coverage . . . 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."[13] Similarly, the disclosure of the TPLF agreement would "enable counsel" for the defendant "to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation."[14]

For all of the foregoing reasons, we urge the Committee to recommend adoption of the attached proposed amendment to Fed. R. Civ. P. 26(a)(1)(A). The Advisory Committee's examination of this proposal is greatly appreciated.

Sincerely,

Erin Morrow Hawley
Senior Legal Fellow
Independent Women's Forum

---

11 *See id.*
12 *See* Fed. R. Civ. P. 26(a)(1)(A)(iv).
13 Fed. R. Civ. P. 26, Advisory Comm. Notes, 1970 amendment.
14 *See id.*