

October 15, 2025

Via E-Mail: RulesCommittee_Secretary@ao.uscourts.gov

Judicial Conference of the United States
Committee on Rules of Practice and Procedure
Advisory Committee on Civil Rules
Attention: Third-Party Litigation Funding Subcommittee

Re: Third Party Litigation Funding

We are a group of attorneys and advisors who practice regularly in the commercial litigation funding field.¹ Our firms routinely represent litigation funders, funded parties, law firms, insurers and insurance brokers, institutional investors, creditors, and other interested parties with respect to commercial litigation funding transactions. Individually, we have served in legal and business capacities internally at litigation funders, as fund managers ourselves, as well as in other related roles. Collectively, we have been involved in structuring, underwriting, negotiating, documenting, and continuing to advise on hundreds of transactions, including investments made by every major commercial litigation funder active in the United States, in every major type of commercial dispute.

We accordingly have substantial and direct experience with all facets of commercial litigation funding.² We provide the following information to the Advisory Committee in connection with its Third-Party Litigation Funding Subcommittee's ongoing study of issues related to litigation funding disclosure.

The Passive Nature of Commercial Litigation Funding

Commercial litigation funding is a passive investment business. In its Rules Suggestion (the "*LCJ Suggestion*"), Lawyers for Civil Justice advocates for broad, automatic litigation funding disclosure rules on the basis that "TPLF agreements give non-party funders specific mechanisms of control or significant influence over litigation and settlement decisions."³ We disagree.

LCJ is wrong for several legal and factual reasons. These range from unequivocal and binding contractual terms, to ethical guardrails, to practical realities.

1. Contractual Terms. Passivity is a central pillar of for-profit third-party commercial litigation funding. Although funding arrangements are bespoke in nature, they originate from form agreements containing standard terms, conditions, and provisions. We regularly draft and negotiate such agreements. They typically contain multiple provisions cementing the funders' passivity, including broad disclaimers of control recognizing (a) the funded party's ability to settle unilaterally, including with the advice of their counsel, (b) non-interference with the attorney-client relationship, and (c) the controlling nature of counsel's ethical obligations in the event of any conflict. Notably, these provisions are rarely subject

¹ Please see the footnotes to our signature blocks for our relevant industry experience and recognitions.

² Our comments are limited to for-profit, non-recourse, third-party commercial litigation funding.

³ Lawyers for Civil Justice, [Rules Suggestion](#), 25-CV-L, at 2.

to any substantive negotiation, given the parties' mutual understanding from the outset—and affirmation throughout the investment process—that the funding will be passive in nature.

With respect to the balance of agreement terms, a commitment to fund litigation is not *carte blanche*.⁴ Rather, funding contracts reflect a negotiated allocation of economic risk between litigants, capital providers, and/or counsel. This allocation is principally embodied in terms such as fee and expense budgets,⁵ proceeds waterfalls, and mechanisms to monetize non-monetary outcomes.⁶ It is also reflected in a litigant's obligation to pursue meritorious claims in good faith, an essential term in light of funders' lack of control rights.⁷

We therefore dispute LCJ's assertions that litigation funders are "directing" or "have significant control over litigation decisions,"⁸ and that "boilerplate disavowals of funder control" are associated with "federal judges and litigants [being] deceived."⁹ Control disclaimers are material terms of litigation funding agreements. Moreover, a contractual requirement to act within the bounds of an economic agreement does not constitute "control."¹⁰ And even where a funder has the ability to terminate funding in the event of breach, the exercise of termination rights is rare. That is because the cessation of funding could result in the dismissal of or the inability to pursue the action, and the resulting loss of

⁴ All commercial litigation funders with meaningful assets under management are institutionally-backed and government-regulated managers that oversee diversified portfolios of legal assets. They must maintain strict policies to prudently commit their assets under management, pursuant to fiduciary and risk-management obligations.

⁵ It is common for budgets to be staged over case milestones. Budgets are negotiated with input from law firms and outside vendors and can be directly correlated with case strategy. For example, budgets are influenced by factors such as the contemplated types of expert witnesses and other costs associated with the legal theories to be pursued, the estimated number of depositions to be taken, and whether to pursue certain defendants and claims.

⁶ If the litigation results in non-monetary proceeds that benefit the funded party, it is reasonable for the funding party to be compensated for that result. Funders routinely underwrite the potential for a case to resolve for non-monetary consideration. They will typically decline to invest in a situation where such potential is high, unless the non-monetary consideration can be monetized in a straightforward way.

⁷ This is an important protection against moral hazard, particularly since commercial litigation funders increasingly provide working capital and other funds to litigants that are not used for the ongoing payment of legal fees and expenses. See [The Westfleet Insider, 2024 Litigation Finance Market Report](#) ("Notably, allocations to monetization deals increased substantially, and we have observed a steady trend in this regard for the last four years"). Absent a litigant's obligation to pursue meritorious claims in good faith, a funder would face unacceptable risk of bad faith discontinuance of the action.

⁸ LCJ Suggestion at 5.

⁹ LCJ Suggestion at 16.

¹⁰ The most common sources of tension in funding arrangements relate to budget overage or working capital demands. Funders frequently receive requests to make accommodations or amend agreements in response to changing circumstances, such as unanticipatedly high legal fees and expenses. They are not always able to accommodate such requests for various reasons.

the funder's investment.¹¹ The unwarranted exercise of termination rights would also be damaging to a funder's reputation in the marketplace.

LCJ's allegations are also belied by our experience. We have been involved in hundreds of commercial litigation finance transactions¹² and are not aware of funders having an "indirect—but still powerful—influence"¹³ on cases. Tellingly, as opposed to presenting case studies that are actually representative of the U.S. commercial litigation funding market, the LCJ Suggestion is supported by an odd assortment of stale, foreign, and/or plainly idiosyncratic agreements.¹⁴ These agreements do not reflect prevailing norms in the U.S. commercial litigation funding market. Nor do their actual terms support LCJ's arguments.¹⁵

2. Ethical Guardrails. Litigation funding agreements must coexist with legal retention agreements. Ethical rules prevent funders from interfering with the attorney-client relationship. In third-party payor scenarios, Rule of Professional Conduct 1.8(f) explicitly prohibits "interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." Attorneys must also comply with the terms of protective orders as set forth below.

3. Practical Realities. With limited exceptions (such as post-judgment scenarios and outright claim assignments), funded parties steadfastly insist on maintaining full control of their claims.¹⁶ Furthermore, funders, litigants, and counsel are acutely aware of the scrutiny on the litigation funding industry, due to efforts by LCJ and similar interest groups. This operates as an additional check. Funders must be extremely mindful of designing their arrangements to fit properly within the sacrosanct framework of the attorney-client

¹¹ Litigation investing is generally regarded as a high-risk asset class. Passivity compounds that risk, particularly in situations involving the prototypical financed litigant, which lacks the financial wherewithal to self-fund its claims. Therefore, the litigant is also unlikely to have resources available to recompense the funder for damages in the event of breach (particularly if the breach leads to an unsuccessful case outcome).

¹² Our experience also includes counterparty disputes regarding the terms of funding agreements. Such disputes are uncommon, and typically involve issues such as budget increases and the division of litigation proceeds.

¹³ LCJ Suggestion at 2.

¹⁴ Of the nine litigation funding contracts attached to the LCJ Suggestion, three have a non-U.S. orientation (ILP: Australia; Chevron: England; Dominion: England); a fourth is a non-profit funder of ADA claims (LMFS); and a fifth is a well-known anomaly in the industry in which Burford Capital established, via a contractual amendment, a consent right over settlement decisions by Sysco only in the wake of Sysco's material breach of its original contract with Burford. In that case, it is undisputed that the original capital provision agreement did *not* contain the consent right.

¹⁵ See, e.g., LCJ Suggestion at Ex. I, § 4.1 ("[Plaintiff] shall have the sole and exclusive right to Settle . . . all or any portion of the Litigations"), § 5.1 ("[Plaintiff] has the sole and exclusive right to control, act or refrain from acting in respect of any act, request or decision in connection with the Litigations"), and § 5.4 (stating that, as an overarching exception to the plaintiff's covenants regarding the conduct of the litigation, "none of the foregoing shall require [plaintiff] to continue a Litigation to the extent [plaintiff] reasonably determines that a Litigation no longer has merit").

¹⁶ Parties wishing to sell their claims or intellectual property can do exactly that (provided the claims are assignable) and will command a premium for forgoing control and upside. But that is different from—and less common than—"third-party litigation funding."

relationship and applicable laws (such as champerty), and to avoid becoming a real party in interest under Fed. R. Civ. P. 17.

Finally, confidentiality designations foreclose funders' ability to direct litigation strategy. Most funded commercial litigation is complex in nature and involves matters related to confidential information (such as trade secrets and other internal corporate materials). Courts routinely enter protective orders in such cases, and parties liberally designate productions and testimony as confidential, highly confidential, or attorneys' eyes only. The parties' attorneys are the first-line enforcers of these protective orders, at the risk of sanctions including loss of their professional credentials if they share information and documents with anyone who should not have access. As a result, in our experience, violations of protective orders are exceedingly rare (and already impermissible). This leads to funders' inability to review materials produced in discovery as well as information redacted on dockets. Thus, even if funders could control litigation (which they cannot), it would be impractical and imprudent to do so without access to critical evidence and rulings shielded by protective orders.

Disclosure

The for-profit, third-party commercial litigation funding industry serves a growing need in today's capital-intensive litigation environment. Market participants are economically rational and support the efficient settlement of meritorious claims, many of which could not be pursued without outside funding. While we support balanced transparency in principle, we caution against a disclosure regime that treats litigation funding contracts as inherently suspect and that, in turn, could counteract the very leveling of the playing field that litigation finance enables on behalf of financially disadvantaged litigants.¹⁷

In closing, we note that a disclosure rule would not solve the purported "problems" identified by LCJ unless broadly expanded beyond "third-party litigation funding" to all potential influences on litigant behavior. Under LCJ's view, virtually any contractual term, whether material or not, could be construed as potentially exerting direct or indirect control over a litigant.¹⁸ If anything can arguably be construed as "control," disclosure would necessarily encapsulate all other "direct or indirect" considerations for both plaintiffs *and* defendants and their counsel—whether contractual or not. This could logically include everything from recourse lenders and other creditors,¹⁹ to private equity or venture capital backers, to law firm partners, to shareholders, to

¹⁷ It is important to note that neither litigants nor their litigation funders have any visibility into their adversaries' budget or litigation strategies.

¹⁸ While investments have terms and conditions, they have no more influence than any other economic, business, or practical forces that could impact a litigant's decision-making.

¹⁹ Non-recourse litigation investors have significantly less rights than recourse lenders. It is not uncommon for litigants to carry debt, particularly those involved in "David vs. Goliath" bet-the-company disputes. Lenders can exert pressure on litigants and even foreclose on legal claims. This pressure also applies equally to defendants, which often have creditors secured by assets at dispute in the litigation, as well as key decisionmakers that may have personal liability and their own indebtedness considerations.

Committee on Rules of Practice and Procedure

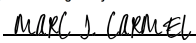
October 15, 2025

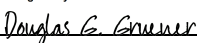
Page 5

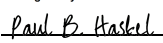
customers, to family and friends, to personal reputational considerations.²⁰ Such an approach would obviously be imprudent, with no purpose other than serving as a point from which to launch costly fishing expeditions for strategic advantage.

We thank the Advisory Committee for its thoughtful consideration of this topic.

Respectfully submitted,

DocuSigned by:

 9D3812EBB62044E...
 Marc J. Carmel²¹

Signed by:

 F0B97EDC7E9E44F...
 Douglas G. Gruener²²

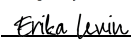
Signed by:

 DA9962E4F574438...
 Paul B. Haskel²³

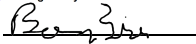
DocuSigned by:

 94C5E862EC7F46F...
 Michael P. Kelley²⁴

Signed by:

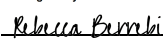
 9F4DA0355E694E1...
 Christopher Leonardo²⁵

Signed by:

 BC7EE45905A3490...
 Erika Levin²⁶

Signed by:

 D701CB3713184EF...
 Boris Ziser²⁷

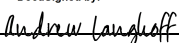
Signed by:

 0FD0A7B9AE5443...
 Charles Agee²⁸

Signed by:

 E6F37D0861B04B1...
 Rebecca Berrebi²⁹

Signed by:

 B46CF1483FAD462...
 Ted Farrell³⁰

DocuSigned by:

 E2521E58984C4C1...
 Andrew Langhoff³¹

²⁰ Under LCJ's reasoning, there is no need to limit influences to those that are monetary in nature.

²¹ Submitting in individual capacity. Member of McDonald Hopkins LLC. Former Director of Longford Capital. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²² Partner of Levenfeld Pearlstein, LLC. Former General Counsel of Gerchen Keller Capital and Director & Senior Counsel of Burford Capital. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²³ Partner of Crowell & Moring LLP. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²⁴ Partner of Parker Poe Adams & Bernstein LLP. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²⁵ Partner of Gilbert LLP. Former Director of Parabellum Capital, Managing Member of 1875 Capital, and Outside General Counsel of Juridica Investments. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²⁶ Submitting in individual capacity. Partner of Fox Rothschild LLP. Former Senior Vice President and General Counsel of The Judge (a litigation finance and insurance company). Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²⁷ Partner of McDermott Will & Schulte LLP. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²⁸ CEO of Westfleet Advisors. Former Executive Vice President & Chief Operating Officer of Augusta Capital. Ranked by Chambers and Partners for *Litigation Funding: Brokers*.

²⁹ Co-CEO of Litigation Finance Advisors. Former Head of Corporate Affairs of Tenor Capital Management. Ranked by Chambers and Partners for *Litigation Funding: Brokers*.

³⁰ Co-CEO of Litigation Finance Advisors. Former Managing Director of Vannin Capital. Ranked by Chambers and Partners for *Litigation Funding: Brokers*.

³¹ Founder of Red Bridges Advisors. Former Principal of Gerchen Keller Capital and Chief Operating Officer of Burford Capital. Ranked by Chambers and Partners for *Litigation Funding: Brokers*.