PRESIDENT
Lana A. Olson
Birmingham, AL
PRESIDENT-ELECT
Patrick J. Sweeney
Philadelphia, PA
FIRST VICE PRESIDENT
Anne M. Talcott
Portland, OR
SECOND VICE PRESIDENT
R. Jeffrey Lowe
New Albany, IN
IMMEDIATE PAST PRESIDENT
Douglas K. Burrell
Norcross, GA
SECRETARY-TREASURER
Kathleen J. Maus
Tallahassee, FL
DIRECTORS
Mark R. Beebe
New Orleans, LA
Michael D. Carter
Oklahoma City, OK
Marie E. Chafe
Boston, MA
James P. Craig
Cedar Rapids, IA
Michael L. Dailey
Baltimore, MD
Evelyn Fletcher Davis
Atlanta, GA
Dessi N. Day
San Diego, CA
Catherine C. Dugan
Brentwood, TN
Laura Emmett
London, ON
Allen M. Estes
Birmingham, AL
Matthew S. Hefflefinger
Peoria, IL
James W. Hehner
Indianapolis, IN
David L. Jones
Little Rock, AR
Catherine Ava Leatherwood
Columbia, SC
Renée Welze Livingston
Walnut Creek, CA
Thomas J. Maroney
New York, NY
Craig A. Marvinney
Cleveland, OH
Howard A. Merten
Providence, RI
Lori K. O'Tool
Seattle, WA
Stephen O. Plunkett
Minneapolis, MN
Christopher J. Pyles
Concord, NH
Jill Cranston Rice
Morgantown, WV
Anthony J. Sbarra, Jr.
Boston, MA
Michele Y. Smith
Houston, TX
Carmen R. Toledo
Atlanta, GA
Tracey L. Turnbull
Cleveland, OH
Sara M. Turner
Birmingham, AL
Tanner Walls
Denver, CO
Albert Barclay Wong
Carmel, IN
Ricardo A. Woods
Mobile, AL
CHIEF EXECUTIVE OFFICER
Dean Martinez

August 28, 2023

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: Proposed Fed.R.Civ.P. 26(a)(1)(A)(v) – DRI Supplemental Letter

Dear Mr. Byron:

The DRI Center for Law and Public Policy is a signatory on a May 8, 2023, joint letter in support of a proposed amendment to the Federal Rules of Civil Procedure that would mandate disclosure of third-party litigation funding (TPLF) agreements. DRI writes this supplement to emphasize its perspective, bolstered by the litigation experience of its 16,000 members, that such disclosure is necessary for the even-handed administration of justice, and to guarantee that defendants, no less than plaintiffs, are able to "secure the just, speedy, and inexpensive determination of every action and proceeding" required by Fed.R.Civ.P. 1.

One litigation funder urges women with vaginal mesh to have unneeded surgery to enhance the value of their claims.[1] In another mesh-related litigation, a law firm is alleged in a dispute with its former business development officer to have secured lawsuits.[2] Another funder placed ads on Craigslist seeking potential ADA plaintiffs (eventually the court dismissed ninety-nine "boilerplate lawsuits"), while still another advertised that it would provide $100,000 in "angel funding" along with a

[1] Alison Frankel and Jessica Dye, *Special Report: Investors profit by funding surgery for desperate women patients*, Reuters, August 18, 2015, available at http://www.abajournal.com/news/article/serial_ada_suits_operated_like_a_carnival_shell_game_depriving_plaintiff_of; Matthew Goldstein and Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, New York Times, April 14, 2018, *available at* https://www.nytimes.com/2018/04/14/business/vaginal-mesh-surgery-lawsuits-financing.html.

[2] David Yates, *Tentative settlement reached in highly publicized AkinMears lawsuit*, SE Texas Record, November 11, 2015, *available at* https://setexasrecord.com/stories/510647677-tentative-settlement-reached-in-highly-publicized-akinmears-lawsuit.

222 South Riverside Plaza | Suite 1870 | Chicago, IL 60606
P: 312.795.1101 | F: 312.795.0747 | E: dri@dri.org | dri.org

referral to attorneys for potential plaintiffs in "MeToo" sexual harassment claims.[3] In December 2022, a criminal conviction of a lawyer and a doctor disclosed that a litigation funding enabled a $31 million fraudulent scheme in which a litigation funder encouraged and paid for unneeded surgeries for personal injury plaintiffs, and resulting in more than 200 fraudulent lawsuits, according to the U.S. Department of Justice.[4] In personal injury litigation, medical finance companies and "lien doctors" encourage claimants to forgo submitting their medical expenses to their own health insurers or to workers' compensation in order to enhance the amounts of those bills and thereby the overall value of the claim—and some have a network of doctors who seek referrals of such patients, thereby putting their bias and credibility in issue.

These are just a few of the examples of the ways in which TPLF potentially impacts the actual evidence pending in a lawsuit and may well be relevant to the issues before the court and jury. More are discussed in DRI's comprehensive white paper on the subject.[5] Too often, these issues are given short shrift in the debate over the scope of transparency that should be applied to TPLF agreements. However, in considering whether to amend the Federal Rules of Civil Procedure, this Committee ought to include evaluation of these and other real-world examples of the impact of TPLF on claims—which defendants are required to defend, and on which courts are required to use scant judicial resources—that either should never have been brought or should be subject to earlier and more reasonable settlement.

The impetus for the joint May 8, 2023, letter was the revelations in a recent intra-industry dispute between Sysco Corporation and Burford Capital, disclosing that Sysco had received a staggering $140 million in funding from Burford, and that Sysco and Burford had added provisions that gave Burford veto power over settlements. The joint letter points out that this agreement—justified or not under the circumstances—belied the industry's repeated statements that it never interferes with either the funded party's ability to settle nor with the attorney–client relationship. This development is the kind of evidence that the Committee ought to consider in evaluating the real need for an amendment mandating disclosure of TPLF agreements.

While the joint May 8, 2023, letter discusses Sysco's complaints about its deal with Burford, one does not have to be sympathetic to Sysco—who, after all, signed the contract and took the funding as a sophisticated party—to understand that it is not only Sysco who is affected by

---

[3] Debra Cassens Weiss, *Serial ADA suits operated like 'a carnival shell game,' depriving plaintiff of proceeds*, judge says, ABA Journal, July 13, 2017*, available at* http://www.abajournal.com/news/article/serial_ada_suits_operated_like_a_carnival_shell_game_depriving_plaintiff_of.

[4] Southern District of New York | New York Attorney And Doctor Convicted Of Defrauding New York City-Area Businesses And Their Insurance Companies Of More Than $31 Million Through Massive Trip-And-Fall Fraud Scheme | United States Department of Justice.

[5] https://www.dri.org/docs/default-source/dri-white-papers-and-reports/third-party-litigation.pdf.

Burford's objections to the proposed settlements. The defendants are also affected, as are the courts who have to continue to manage lawsuits that otherwise might have been dismissed.

Litigation funding should be discoverable, regardless of whether it is relevant to the pending lawsuit.

Among the major arguments against the discoverability of funding agreements are that (1) the funding agreement is "irrelevant" to the case, and (2) litigation funders have no control over the litigation. As discussed above, neither of these is always true, and often are decidedly untrue. Without disclosure of the funding agreement, it is impossible to determine the potential relevance or the degree of control.

As to the "irrelevant" argument, for over 50 years the Federal Rules of Civil Procedure (and the law of most states) have mandated that the *defendant's* litigation funding be disclosed in discovery through production of copies of the defendant's insurance policies that might apply to the claim. The 1970 decision to require such discovery was itself "sharply" debated, especially because the existence of the defendant's insurance coverage is almost universally inadmissible in evidence of the underlying case in which the insurance policies are discoverable and are not probative on the issues in that case. The 1970 Advisory Committee Notes explaining the reasoning for allowing such discovery are remarkably on point as to the reasons why TPLF agreements should also be discoverable:

> Disclosure of insurance coverage 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. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect.

Even where the TPLF agreement gives no rights to the TPLF company to control the litigation and is not otherwise inadmissible in evidence, disclosure permits counsel for both sides to make the same realistic appraisals of settlement and litigation strategy. There is no principled basis for mandating disclosure of insurance coverage but not the TPLF agreement. And note, the required disclosure of insurance are actual copies of the insurance policies themselves, not just descriptions of their existence. Thus, rules such as the one recently enacted in the District of New Jersey, while a step in the right direction, still do not go far enough.

Those who assert that TPLF does nothing more than "level the field" and ensure that the "fight is fair" miss the point: the field is *not* level where the plaintiff knows about the defendant's funding, but the defendant is left in the dark about the plaintiff's funding. For example, the rules of virtually every court and mediation company mandate that an insurance company representative with authority to settle attend, usually in person, all settlement conferences. In cases with exposure beyond the primary insurance limits of the defendant, such rules apply to require a representative of the excess or umbrella insurer to attend as well, even though the primary insurer, not the umbrella insurer, controls the defense.

Every experienced litigation counsel knows of cases where settlements that were otherwise reasonable were scuttled because of a lien that had to be repaid, whether a medical lien, a

workers' compensation lien, or others; courts and mediators often require lien holders to participate in settlement conferences as well. TPLF companies, in essence, hold a lien—especially where the attorneys also sign agreements mandating that they first pay the proceeds of any result to the TPLF company before paying it to the plaintiff, as is common (according to reported cases arising from intra-industry disputes). And where the TPLF funding agreement is with the attorney rather than the party, or where (as is the trend) the attorney is getting funding for a portfolio of cases rather than only the one currently at issue, the need for the defendant, the mediator, or the settlement judge to understand the dynamics of the relationships that affect settlement decisions and strategy is perhaps even more heightened.

Thus, just as insurer representatives must attend such settlement conferences, TPLF company representatives should be required to attend as well. But such compelled attendance cannot be made if neither the court nor the defendant are aware of the existence and terms of the funding agreement.

Further, the very notion that TPLF companies have no control over the litigation or its resolution is itself something that the TPLF industry insists be taken only on faith. The terms of the TPLF agreement are shrouded in mystery, except for the few glimpses one obtains from intra-industry disputes (like the Sysco/Burford dispute) that end up in reported decisions. Without transparency, both the court and the defendants have no way to confirm the scope of such control or involvement. How are defendants to ever make a showing of good cause for more discovery—such as set out in the District of New Jersey rule—if they have no idea what the terms of the funding agreement provide?

Additionally, in the settlement realm, it is undeniable that the presence of TPLF funding and the need to pay the funder at rates that are sometimes usurious (regardless of whether such agreements formally qualify as "loans" within the terms of a given state's usury statutes and decisions) affect a plaintiff's reasons for settling at what might otherwise be deemed a reasonable value. Given the need to pay the TPLF company out of any proceeds, and with the TPLF company's money already in his or her pocket (if the party rather than the attorney was funded), there can often be little incentive for a claimant to settle but instead to roll the dice on even a questionable claim in pursuit of a big score. Courts have noted this dynamic at work. In a case where the plaintiff and plaintiff's attorney, after signing the funding agreements, later tried to avoid their payment obligations, one court noted the arguments as follows:

> Plaintiff argues that agreements such as the one in this case give litigation lenders a champertous level of control over the borrowers' lawsuits because they have a deleterious effect on the borrowers' abilities to settle their underlying claims. According to Plaintiff, a rational borrower is likely to reject any settlement offer that is less than the amount of the advance and accrued interest she owes to the lender, even if the settlement offer is perfectly reasonable. This is because the borrower will be required to pay her entire recovery to the lender, and will in effect receive nothing from the settlement. Instead, Plaintiff argues, the borrower will bring her claim to trial. If borrower loses at trial or secures a small recovery, she is no worse off than she would have been had she accepted the settlement offer.

Odell v. Legal Bucks, LLC, 665 S.E.2d 767, 774 (N.C. App. 2008). Or as another court stated: "Such hidden funding can introduce a dynamic into a plaintiff's case—an agenda unrelated to the merits, a resistance to compromise—that otherwise might not be present and, unless known, cannot be managed or evaluated." *Conlon v. Rosa*, 2004 Mass.LCR LEXIS 56, *6–8 (Mass. Land Court 2004).

Leaving aside for the moment the questions of the hoary and largely abolished doctrine of champerty (*but see* the affidavit of Sysco's expert on the continuing viability of champerty) or the moral hazards of plaintiffs taking funding only to later seek to renege on their obligations under the contract, the presence of funding can result in cases going to trial that would otherwise settle, resulting in unnecessary expense and use of resources, to both the court system and defendants, that ought not have been incurred. That alone is reason for the existence and the terms of such funding to be transparent to all concerned in the litigation.

Litigation funding is relevant to discovery determinations.

Even where the TPLF agreement may not be admissible in evidence, it may nonetheless be relevant to other court determinations. Discovery is expensive and e-discovery is even more expensive. In product liability, toxic tort, and class action litigation, for example, the plaintiff has little exposure to that expense because it has limited information to be discovered. On the other hand, the discovery requests to the defendants are often massive in scope with little incentive for the plaintiff to narrow the scope unless required to do so by the court. Thus, defendants frequently bear the vast majority of the discovery response cost and risk.

Because litigation funders are not charitable institutions but rather profit-seeking businesses, they do not tend to invest in small matters where the return on investment is limited. Since the amounts at stake in funded cases tend to be larger, considerations of proportionality under Fed.R.Civ.Pro. 26 and state court equivalents are less likely to be significant factors in limiting scope, although Rule 26(b)(1) expressly provides that consideration of the "parties' resources" is one factor to be evaluated as part of the proportionality analysis.

In addition to proportionality, Fed.R.Civ.Pro 26(c)(1)(B) gives the court discretion to consider the "allocation of expenses" in determining the scope of permissible discovery requests. Like the insurance disclosure requirement, this dates back to at least the 1970 Amendments to the Federal Rules of Civil Procedure, with the 1970 Advisory Committee Notes stating: "[T]he courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or by requiring that the discovering party pay costs."

Standards for cost shifting have been developed by case law. Courts have held that it is entirely appropriate to shift the cost of responding to the requesting party for burdensome discovery requests. In making that determination, the ability of each party to incur that expense can be an important factor. Hiding the plaintiff's litigation funding inhibits that evaluation. Further, even an *in camera* inspection by the court puts the defendant at a significant and unfair disadvantage, since it is the party that is otherwise exposed to the expense of discovery compliance but would be deprived of the ability to argue the relative abilities of the parties to pay for those compliance costs.

Thus, even if it turns out that the TPLF agreement gives the funder no control over the litigation and the funding arrangement is (like insurance coverage) otherwise non-probative and inadmissible in evidence, discovery of the TPLF agreement is nonetheless relevant to other issues that need to be resolved by the court.

Sometimes litigation funding affects the evidence itself, and is therefore admissible.

The opening paragraph of this letter provides real examples of occasions when the litigation funding arrangement changed the evidence. The medical necessity for surgery can be a contested issue in a lawsuit, and the encouragement by a litigation funder that the plaintiff have unneeded surgery to enhance the value of the claim is something that the defendant should be entitled to argue to the jury. The range of possible arrangements itself cries out for transparency. In one situation involving product liability claims alleging traumatic brain injury, the TPLF company orchestrated assignment agreements between (1) the plaintiffs and the medical providers, and (2) the medical providers and the TPLF company. The TPLF company paid the medical providers between 50 and 65 percent of the invoiced amount, but the TPLF agreement prohibited the plaintiffs from submitting their invoices to their own health insurers or from challenging the reasonableness of the billed amounts; likewise, the medical providers were prohibited from disclosing to the plaintiffs, much less the defendants, the amount actually paid. In the lawsuit, the plaintiff then sought 100 percent of the medical bills from the defendant, seeking to profit on the difference.[6]

Courts in such situations have recognized that arrangements like this are not only discoverable but admissible in evidence as they affect the potential biases of the medical providers and other witnesses. Even if the medical providers never appear in court, the credibility of their reports—potentially relied upon by other witnesses—and of their invoices is something defendants should be allowed to argue to the jury.

Requiring disclosure of TPLF agreements does not give defendants an unfair "litigation advantage."

Among the arguments made by the TPLF industry against discoverability, and picked up most recently by the Governor of Louisiana in his veto message of a statute that would have required disclosure,[7] is that requiring disclosure would somehow give defendants a litigation advantage into such items as litigation budgets. Such arguments propose a possible limited form of

---

[6] Francis H. Brown III and Marshall T. Cox, *Defending Against Personal Injury Claims Supported by Litigation Funding*, The Voice, Vol. 16 Issue 36, September 13, 2017, *available at* http://portal.criticalimpact.com/newsletter/newslettershow5.cfm?contentonly=1&content=258741&id=15751.

[7] Litigation Finance Disclosure Legislation Vetoed in Louisiana (bloomberglaw.com).

discovery[8]—as in the District of New Jersey rule or in the opioid litigation—in which the plaintiff need only disclose the existence of funding and an affirmation of lack of control by the funder, but no other details, absent a showing of good cause by the defendant.

Such arguments are make-weight and not effective. As noted earlier, for over 50 years, the plaintiff has been able to obtain information about the *defendant's* litigation funding, including the full amount of the available funding (insurance policy limits), the terms under which the insurer defends, the existence of any deductibles or self-insured retentions, and umbrella or excess insurance—and to receive a copy of the insurance policies themselves, not just a self-description of the coverage by the defendant. There remains no principled reason why the defendants should not be entitled to the same level of discovery about the plaintiff's litigation funding, especially in a setting where TPLF companies have so zealously acted to keep the terms of their agreements so severely shrouded.

To be sure, appropriate safeguards about privilege, work product, and other concerns about litigation strategy can be handled just as they are when insurers defend cases. With few exceptions, the attorney's communications with the defendant's insurer, the litigation budget, the insurer's reserves, and similar information are outside of the scope of discovery, and the same may be true for TPLF disclosure. That, however, is entirely different from refusal to produce a copy of the TPLF agreement itself, just as production of an actual copy of the insurance policy does not itself open up discoverability of the insurer's claims file or the defense attorney's file. If anything, production of the TPLF agreement evens the playing field, just as the TPLF company's assert that they do nothing more than that.

And we have not even touched upon the ethical issues arising from litigation funding. The American Bar Association Commission on Ethics 20/20 Information Report in February 2012 (referred to as "ABA 20/20") itself stated that it was only scratching the surface of the concerns, stating that the report was "meant only as a beginning to the U.S. legal profession's conversation about [alternative litigation finance] through highlighting of associated ethics issues." Further, the discussions in ABA 20/20 assumed that it was the party, not the attorney, who entered into the funding agreement. Ethical issues multiply where the funded entity is the law firm, which can affect disclosure obligations to the client. As noted in ABA 20/20: "Even in the absence of an explicit agreement to refer clients, a lawyer with a long-term history of working with a particular ALF supplier may have an interest in keeping the supplier content, which would create a conflict under [Model] Rule 1.7(a)(2)."

While at first blush this appears not to involve defendants, that is not necessarily so. Where the attorney's fee receipts must be paid to the funder, at a multiple of the funded amount, does that affect the advice given to the client—or to a portfolio of clients? Does that affect whether a

[8] *See, e.g.,* Dai Wai Chin Feman and Will Weisman, November 23, 2022, Litigation Funders Seek Transparency In Disclosure Debate - Law360.

case will settle or be tried—and does that then affect both the defendants and resources of the court system? These considerations also support the need for transparency.

Even the most field-leveling, non-litigation-controlling, vanilla funding agreement can nonetheless have substantial and important effects on the litigation, court determinations of issues before it, and the overall court system itself. And where anecdotal evidence suggests that many funding agreements are not merely field-leveling or non-litigation-controlling, the need for transparency is magnified. Court rules should be adjusted to require that both parties are equally well-informed about the other party's litigation-specific funding. Defendants are already required to disclose theirs. The same principles should apply equally to the plaintiff's side.

Respectfully submitted,

Lana A. Olson
DRI President

David H. Levitt
DRI Center for Law and Public Policy TPLF Task Force Chair