U.S. Chamber of Commerce
Institute for Legal Reform

RULES SUGGESTION
to the
ADVISORY COMMITTEE ON CIVIL RULES

IT IS TIME TO ADDRESS THE PATCHWORK OF INADEQUATE PRACTICES: HOW THE LACK OF FRCP GUIDANCE IS FAILING COURTS AND PARTIES WHO NEED A UNIFORM AND CREDIBLE PROCEDURE FOR UNDERSTANDING THIRD-PARTY LITIGATION FUNDING AGREEMENTS

October 2, 2024

Lawyers for Civil Justice ("LCJ")[1] and the U.S. Chamber of Commerce Institute for Legal Reform ("ILR")[2] respectfully submit this Rules Suggestion to the Advisory Committee on Civil Rules ("Advisory Committee").

---

[1] LCJ is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. Since 1987, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] A program of the U.S. Chamber of Commerce (the "Chamber"), ILR's mission is to champion a fair legal system that promotes economic growth and opportunity. The Chamber is the world's largest business federation, representing the interests of millions of businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, so it is holistically dedicated to promoting, protecting, and defending America's free enterprise system.

Introduction

In the three years since the Advisory Committee last discussed third-party litigation funding ("TPLF") at its October 2021 meeting, federal judges have become increasingly aware of the need to understand TPLF agreements in their cases—particularly their control features—and have taken to employing a multiplicity of methods, often flawed, in an attempt to obtain the needed information. Now, as the Advisory Committee prepares for its October 10, 2024, discussion about "whether it has come time for the Committee to embark on what is likely to be a challenging TPLF project,"[3] this patchwork of court practices has materialized into an unpredictable procedural landscape, too often marked by reliance on mechanisms that are unsuited to the purpose, including *ex parte* conversations. Moreover, the lack of uniformity in TPLF disclosure is hampering the function of key provisions of the Federal Rules of Civil Procedure ("FRCP"), Federal Rules of Evidence ("FRE"), and other litigation principles such as real party in interest that presuppose courts and parties know who is controlling the litigation. Unfortunately, the FRCP are not neutral bystanders to these problems, but instead are (inadvertently) perpetuating them because some courts interpret Rule 26(b)(1)'s "relevance" standard to *bar* TPLF disclosure.

Courts and parties need a simple, effective, and predictable rule for TPLF disclosure. Basic judicial management requires courts to know who is in control of, and who will benefit directly from, the litigation. Parties need to know this information both so they can make a "realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation" (as the Advisory Committee said about disclosure of insurance agreements)[4] and so they can engage in settlement discussions without uncertainty over whether the named party has secretly contracted away its ability to resolve the case. Because the only way to understand TPLF agreements is to read them, the FRCP should also require disclosure of TPLF agreements.

I. DISPARATE PRACTICES ARE FILLING THE VACUUM CREATED BY THE LACK OF FRCP GUIDANCE

Now that more judges are aware of TPLF and its impact on individual cases, federal courts are casting around for the right way to inquire about TPLF agreements. Some judges ask in open court if parties are using outside funding.[5] Some have written their own standing orders;[6] some

---

[3] Advisory Committee on Civil Rules, Agenda Book, Oct. 10, 2024, 419, https://www.uscourts.gov/sites/default/files/2024-10_civil_rules_agenda_book_final_9-20_at_230_pm.pdf.

[4] Fed. R. Civ. P. 26 advisory committee notes to 1970 amendment.

[5] Hr'g Tr. 12:21-24, *In re Social Media Adolescent Addiction/Personal Injury Prods. Liab. Litig.*, MDL No. 3047, ECF No. 84 (N.D. Cal. Nov. 9, 2022) ("I want to know explicitly whether you use [TPLF] or intend to use it in this case.").

[6] *See Nimitz Techs. LLC v. CNET Media, Inc.*, No. CV 21-1247-CFC, 2022 WL 17338396, at *3 (D. Del. Nov. 30, 2022) (quoting terms of standing order that "applies to all civil cases assigned to me") (Connolly, C.J.), *mandamus denied* 2022 WL 1794845 (Fed. Cir. Dec. 8, 2022); Standing Order Regarding Third-Party Litigation Funding Arrangements, https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf. Report of the Parties, Standing Orders, Judge J. Philip Calabrese (N.D. Ohio), https://www.ohnd.uscourts.gov/sites/ohnd/files/Rule%2026%28f%29%20Report%20of%20the%20Parties%20%281.2.2024%29.pdf.

utilize local rules[7] and local standing orders;[8] and some are no doubt influenced by state rules.[9] Other judges require lawyers in MDL leadership positions to reveal their use of TPLF.[10] Some judges review TPLF agreements,[11] or portions of them, and at least one judge has required prior approval before lawyers can enter into TPLF agreements.[12] Still others have devised written orders requiring counsel to answer questions in writing, *ex parte*, about TPLF agreements while not requiring disclosure of the underlying agreements.[13] Problematically, some judges attempt to handle the need for TPLF information by engaging in *ex parte* discussions with plaintiffs' counsel in chambers, sometimes reviewing portions of TPLF agreements *in camera*.[14] And, incredibly at this juncture, there are still some judges who resist making any sort of inquiry whatsoever, either due to a lack of awareness or sometimes due to mis-reliance on the relevance test for discovery in Rule 26(b)(1).[15] All of these methods require judges to navigate resistance from funders, who appear to prioritize their own secrecy above all other interests.[16] This jumble of methods has produced an inconsistent and uncertain litigation environment in which parties do not know whether or how the important matter of TPLF disclosure will be handled from court to court or from case to case.

---

[7] *See* D.N.J. L. Civ. R. 7.1.1(a). As the Committee is aware, "roughly half of all federal circuit courts and a quarter of all federal district courts require disclosure of the identity of (some) litigation funders for judicial recusal and disqualification purposes, indicating that such information is relevant for the just determination of a civil action by a neutral decision-maker." Memo from Patrick A. Tighe, Rules Law Clerk, to Ed Cooper, Dan Coquillette, Rick Marcus, and Cathie Struve, *Survey of Federal and State Disclosure Rules Regarding Litigation Funding* (Feb. 7, 2018), Advisory Committee on Civil Rules, Agenda Book, April 10, 2018, 209, https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf.

[8] *See* Standing Order for All Judges of the Northern District of California, Contents of Joint Case Management Statement, § 17, https://www.cand.uscourts.gov/wp-content/uploads/2023/03/Standing_Order_All_Judges-11-30-2023.pdf.

[9] States that require TPLF disclosures in litigation include: Indiana (Ind. Code Ann. § 24-12-1-0.5, et. seq.); Louisiana (*see* https://legis.la.gov/legis/ViewDocument.aspx?d=1382655); Montana (*see* MT LEGIS 360 (2023), 2023 Montana Laws Ch. 360 (S.B. 269) (enacted 2023)); West Virginia (W. Va. Code Ann. § 46A-6N-6 (enacted 2019); S.B. 850, 2024 Reg. Sess. (W.V. Mar. 9, 2024) (signed Mar. 27, 2024)); and Wisconsin (2017 Wis. Act 235, https://docs.legis.wisconsin.gov/2017/related/acts/235).

[10] *See* Case Mgmt. Order Regarding Model Leadership Appls. for Consumer Track at 2–3, *In re Marriott Int'l Customer Data Sec. Breach Litig.*, No. 8:19-md-02879-JPB, ECF No. 171 (D. Md. filed Apr. 11, 2019).

[11] *See, e.g.*, Case Mgmt. Order No. 61 (Third-Party Litigation Funding) at 1, 3, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-02885-MCR-HTC, ECF No. 3815 (N.D. Fla. filed Aug. 29, 2023).

[12] *Id*. (prohibiting any plaintiff from "obtain[ing] third-party litigation funding, absent the filing of a motion with, and obtaining the prior approval of, th[e] [c]ourt").

[13] *See In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2018 U.S. Dist. LEXIS 84819 (N.D. Ohio May 7, 2018) (requiring counsel to answer whether funders have "any control over litigation strategy or settlement decisions"); *In re Zantac (Ranitidine) Prods. Liab. Litig.*, No. 2924, 2020 U.S. Dist. LEXIS 62805 (S.D. Fla. Apr. 3, 2020) (requiring counsel to answer whether "the litigation funder ha[s] any control . . . over the decision to file or the content of any motions or briefs, or any input into the decision to accept a settlement offer?").

[14] *See infra* section IV.

[15] *See infra* section III.

[16] Recently, after the plaintiff in *MSP Recovery Claims Series, LLC v. Sanofi-Aventis U.S., LLC*, No. 2:18-cv-02211 (BRM) (RLS), 2024 WL 4100379 (D.N.J. Sep. 6, 2024), was ordered to produce litigation funding agreements and other information, plaintiff dismissed the case entirely rather than comply.

II. SPORADIC AND INADEQUATE TPLF DISCLOSURE PRACTICES PREVENT THE NORMAL FUNCTION OF KEY FRCP PROVISIONS, EVIDENCE RULES, AND LITIGATION PRINCIPLES

The function of certain key FRCP provisions, evidence rules, and ethical rules presuppose that judges and parties know who controls or benefits directly from the litigation. These provisions cannot function as intended in the absence of TPLF disclosure. For example:

- FRCP 26(b)(1) includes "the resources of the parties" as a factor judges are to consider when deciding whether the discovery being sought is "proportional to the needs of the case." Courts cannot determine, and parties cannot advocate or respond to, the applicability of this factor without knowing whether a hidden non-party investor is providing resources to one or more parties.
- Similarly, courts and parties often must be able to identify relevant decisionmakers and to assess the parties' relative resources when determining or advocating for the appropriate allocation of costs pursuant to FRCP 26(c)(1)(B), or the imposition of sanctions under FRCP 37.
- FRCP 23 requires judges to ensure the adequacy of representation, which can be affected by a TPLF agreement.[17] Class action settlements must be "fair, reasonable, and adequate" to class members, matters that cannot determined without knowing whether a non-party investor has a contractual right to a significant portion of the proceeds.[18]
- FRE 607 provides that any party can attack the credibility of a witness who is being paid and/or has a direct interest in the outcome of the case, such as a share in the judgment or settlement proceeds. Parties are deprived of this important protection, and judges cannot enforce or oversee it, without knowing whether a TPLF agreement exists and whether a non-party financier is paying the witness.[19]
- Judges are required by statute and ethics rules to recuse when they know they have a financial interest that can pose a conflict or an appearance of one. Although TPLF investors used to be rare and obscure, "[l]egal finance has gone mainstream"[20] and "82% of law firm lawyers say they use legal finance."[21] Today, TPLF is a $15.2 billion

[17] *See Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016) (the "funding agreement [was] relevant to the adequacy [of representation] determination [required for class certification] and should be produced to [the] defendant").

[18] Only in the Northern District of California, by virtue of a Standing Order, are judges informed of this important consideration ("In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim"). Standing Order for All Judges of the Northern District of California, Contents of Joint Case Management Statement, § 17, https://www.cand.uscourts.gov/wp-content/uploads/2023/03/Standing_Order_All_Judges-11-30-2023.pdf.

[19] *Nunes v. Lizza,* No. 20-cv-4003-CJW, 2021 WL 7186264, at *6 (N.D. Iowa Oct. 26, 2021) (allowing discovery into "concern[s] that one of the witnesses in this case may be involved in funding the litigation").

[20] Burford, *Legal Finance at 15: Global Law Firm Professionals on the State of the Industry*, 3 (Oct. 1, 2024), https://www.burfordcapital.com/insights-news-events/insights-research/2024-research-legal-finance-at-15/.

[21] *Id*. at 4.

industry[22] that invests in many types of cases in all federal districts and includes public companies, foreign governments, and private individuals including ordinary people with 401(k) accounts. Rule 7.1 does not provide judges with the means to obtain necessary recusal-related information.[23]

- Parties have a right to rebut, and judges a duty to manage, a plaintiff's characterization of a case as a "David versus Goliath" situation.[24] When either the court, or the parties, are unaware that a TPLF agreement provides significant resources to the party claiming to be the "David," neither the court nor the parties can give meaning to this right. TPLF secrecy should not be used as a sword by those who claim it as a shield.
- When courts and parties do not know who stands to benefit directly from the judgment or settlement in a case, courts cannot administer, and parties do not have the protection of, the FRCP 17(a)(1) requirement that "[a]n action must be prosecuted in the name of the real party in interest."[25]

Because each of these rules and principles requires that courts and parties know who controls and stands to benefit from the litigation, they cannot be applied fully or uniformly in the absence of a uniform procedure for disclosure of TPLF agreements.[26]

III. RULE 26(b)(1)'s "RELEVANCE" STANDARD IS CONFUSING COURTS ABOUT THEIR NEED AND ABILITY TO ORDER TPLF DISCLOSURE

Some courts see Rule 26(b)(1) as barring the disclosure of TPLF agreements as not "relevant to the claims and defenses."[27] Such courts have expressed skepticism that TPLF information is

---

[22] Westfleet Advisors, *The Westfleet Insider 2023 Litigation Finance Market Report*, https://www.westfleetadvisors.com/wp-content/uploads/2024/03/WestfleetInsider2023-Litigation-Finance-Market-Report.pdf.

[23] Lawyers for Civil Justice and the U.S. Chamber of Commerce Institute for Legal Reform, *A Necessary Disclosure: Why Rule 7.1 Should Provide Judges Information About Non-Party Contingent Financial Interests that Could Require Recusal*, March 14, 2024, https://www.uscourts.gov/sites/default/files/24-cv-d_suggestion_from_lcj_and_ilr_-_rule_7.1.pdf.

[24] *Nunes, supra* n.19 (third-party funding likewise "relevant to respond to a 'David vs. Goliath' narrative").

[25] *MSP Recovery v. Sanofi*, 2024 WL 4100379 at *6 ("litigation funding [is] … relevant in determining the real party in interest for this litigation"); *Nimitz Techs.*, 2022 WL 17338396 at *3 ("The Disclosure Order [concerning third-parry funding] also promotes the identification of the real parties in interest in a case."); *Nunes*, 2021 WL 7186264 at *5 (plaintiff's "lack of knowledge about who is paying the attorneys prosecuting this action raises legitimate concern about not only who may be in charge of the lawsuit, but also whether Plaintiffs are the still the real parties in interest"); *FastShip, LLC v. United States*, 143 Fed. Cl. 700, 716-17 (Ct. Cl. 2019) (litigation funding bears on determining real party in interest), *vac. on other grounds*, 968 F.3d 1335 (Fed. Cir. 2020).

[26] Further, a party's motive for pursuing litigation is also a substantive element of certain causes of action, such as SLAPP litigation and abuse of process, and third-party litigation funding is thus relevant in such litigation. *E.g. Smartmatic USA Corp. v. Fox Corp.*, No. 151136/2021, 2023 WL 2626882, at *2 (N.Y. Sup. Mar. 24, 2023) (litigation finance discoverable in SLAPP litigation).

[27] *E.g.*, *GoTV Streaming, LLC v. Netflix, Inc.*, No. 2:22-cv-07556-RGK-SHK, 2023 WL 4237609, at *11 (C.D. Cal. May 24, 2023); *Art Akiane LLC v. Art & Soulworks LLC,* No. 19 C 2952, 2020 WL 5593242, at *6 (N.D. Ill. Sep. 18, 2020); *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prod. Liab. Litig.*, 405 F. Supp.3d 612, 615 (D.N.J. 2019); *Fulton v. Foley*, No. 17-CV-8696, 2019 WL 6609298, at *2 (N.D. Ill. Dec. 5, 2019); *Benitez v. Lopez*, 17-CV-3827-SJ-SJB, 2019 WL 1578167, at *1 (E.D.N.Y. Mar. 14, 2019); *MLC Intellectual Property LLC v. Micron Tech., Inc.*, No. 14-cv-3657-SI, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019); *Space Data Corp. v.*

relevant to the litigation[28] or affects the merits of individual claims and defenses.[29]

The Advisory Committee considered—and rejected—a similar analysis when it promulgated a rule requiring disclosure of insurance agreements in 1970. The Advisory Committee determined that Rule 26(b) "relevancy" analysis should not limit the disclosure of insurance agreements, instead concluding that policy considerations require the mandatory disclosure of insurance agreements.[30] The Advisory Committee observed that many courts were rejecting discovery requests for insurance agreements "reason[ing] from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence."[31] The Advisory Committee noted that those courts "avoid[ed] considerations of policy, regarding them as foreclosed."[32]

The Advisory Committee should act consistently today by acknowledging that disclosure of TPLF agreements is not governed by Rule 26(b)(1) and by promulgating a uniform rule defining the procedure for TPLF disclosure. As was the case with disclosure of insurance coverage, this "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."[33]

IV. COURTS NEED FRCP GUIDANCE TO AVOID THE INAPPROPRIATE DEFAULT USE OF *EX PARTE* CONVERSATIONS

In the absence of FRCP guidance, some federal courts are resorting to *ex parte* conversations with plaintiffs' counsel. In secret, these judges are informally asking lawyers if they are using

---

Google LLC, No. 16-cv-03260 BLF, 2018 WL 3054797, at *1 (N.D. Cal. Jun. 11, 2018); *Ashghari-Kamrani v. United Serv. Auto. Ass'n*, No. 2:15-CV-478, 2016 WL 11642670, at *4 (E.D. Va. May 31, 2016); *Kaplan v. S.A.C. Capital Advisors, L.P.*, No. 12-CV-9350 (VM)(KNF), 2015 WL 5730101, at *5 (S.D.N.Y. Sep. 10, 2015), *adopted*, 141 F. Supp. 3d 246 (S.D.N.Y. 2015); *Yousefi v. Delta Electric Motors, Inc.*, No. 13-CV-1632 RSL, 2015 WL 11217257, at *2 (W.D. Wash. May 11, 2015); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 729 (N.D. Ill. 2014).
Of course, other courts have found that TPLF agreements are relevant to claims and defenses, including where it can lead to evidence of the value of a plaintiff's claims (most frequently in medical and patent cases). *See Hobbs v. Am. Comm. Barge Line LLC,* No. 4:22-cv-00063-TWP-KMB, 2023 WL 6276068, at *4 (S.D. Ind. Sep. 26, 2023) (compelling discovery of third-party funding because "[e]vidence related to the actual value of Mr. Hobbs' injuries is relevant not only as the parties prepare for trial but also to explore settlement possibilities"); *Taction Tech., Inc. v. Apple Inc.,* No.: 21-cv-00812-TWR-JLB, 2022 WL 18781396, at *5 (S.D. Cal. Mar. 16, 2022) ("This Court agrees with other courts in this district that have found litigation funding agreements and related documents can be directly relevant to the valuations placed on the patents prior to the present litigation."); *Preservation Techs. LLC v. MindGeek USA, Inc.*, No. 2:17-cv-08906-DOC-JPR, 2020 WL 10965161, at *6 (C.D. Cal. Dec. 18, 2020) ("litigation funding documents are relevant to assessing the value of the disputed patents in this suit").

[28] *Art Akiane*, 2020 WL 5593242 at *6 (information about litigation funding requires "some detailed, meaningful explanation to satisfy the requirement of relevancy"); *GoTV Streaming,* 2023 WL 4237609 at *11 ("Though the Court empathizes with Netflix's desire to obtain this information, allowing this to be the standard would require this Court to ignore the controlling limits under Rule 26."); *Fulton,* 2019 WL 6609298 at *3 ("settlement considerations are a wholly distinct concept and not a proper basis to obtain discovery under Rule 26(b)(1)").

[29] *Fulton*, 2019 WL 6609298 at *2 ("As a general matter, courts across the country that have addressed the issue have held that litigation funding information is generally irrelevant to proving the claims and defenses in a case.").

[30] Fed. R. Civ. P. 26 advisory committee notes to 1970 amendment.

[31] *Id*.

[32] *Id*.

[33] *Id*.

TPLF and, if so, if they have ceded day-to-day control over their case—and probably accepting the lawyers' assurances.[34] These courts are, in effect, reaching legal conclusions about the control features of a contract that could affect all parties to the litigation without the benefit of adversarial arguments from other parties about the meaning of the TPLF agreement.[35] Such an informal and one-sided method is not only highly unlikely to elicit candor and specificity about the key provisions in a TPLF agreement, but also compromises the credibility of the judicial process. The Code of Conduct for U.S. Judges generally prohibits *ex parte* communications and further states that judges who receive *ex parte* communications on a substantive matter "should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond."[36] The exceptions to the general prohibition "when circumstances require" are "scheduling, administrative, or emergency purposes."[37] A court's effort to understand the control features of a TPLF contract or to decide whether to allow discovery on this issue does not fall into any of these categories.[38] The Advisory Committee should not accept *ex parte* communications as the regular, routine procedure for federal court inquiries into TPLF agreements.

In camera review of limited portions of a TPLF agreement[39] does not remedy the problems. Rather, it enhances the risk that the judge has less than all of the relevant information needed to reach a conclusion about the operation of the contract.

Importantly, the *ex parte* approach to handling TPLF issues is preventing any potential development of case law concerning the increasingly common and complex legal questions about TPLF agreements, including what constitutes "control." Currently, critical issues relating to TPLF come to light only when conflicts between funders and their clients boil over.[40]

---

[34] Lawyers who receive non-party funding obviously have a strong interest in serving the interests of their funders.
[35] *See, e.g., GoTV Streaming,* 2023 WL 4237609 at *13; *Nunes,* 2021 WL 7186264 at *6; *United Access Techs., LLP v. AT&T Corp.*, C.A. No. 11-338-LPS, 2020 WL 3128269, at *1 (D. Del. Jun. 12, 2020) ("Generally, when confronted with this sort of dispute, close consideration of the subject matter in the disputed documents (e.g., through *in camera* review) is a prudent approach.").
[36] Code of Conduct for U.S. Judges, Canon 3(A)(4).
[37] *Id*.
[38] If the purpose of *ex parte* communications about TPLF agreements is to protect the privacy of the non-party, then the practice runs afoul of the judiciary's strong presumption that interested parties proceed in their own name, which can be overcome only by a showing of "a substantial privacy right which outweighs the 'customary and constitutionally-embedded presumption of openness in judicial proceedings.'" *Plaintiff B v. Francis*, 631 F.3d 1310, 1315–16 (11th Cir. 2011) (citations omitted).
[39] *E.g.*, *3rd Eye Surveillance, LLC v. United States*, 158 Fed. Cl. 216, 228 (Ct. Cl. 2022).
[40] *E.g.*, *In re Pork Antitrust Litig.*, No. CV 18-1776 (JRT/JFD), 2024 WL 2819438, at *4 (D. Minn. Jun. 3, 2024) ("Permitting a litigation funder to step into the shoes of its client via assignment and substitution would contravene the purpose of antitrust laws and standing requirements by condoning third parties with only investment interests to take over and litigate antitrust cases…. [C]ourts must still be careful to ensure that litigation financiers do not attempt to control the course of the underlying litigation. Sysco and Burford's conduct is precisely the kind of conduct of which courts are wary. The substitution motion directly resulted from their attempt to resolve the dispute over whether Sysco or Burford should control this litigation. The Court will not approve such conduct.").
In the *Gbarabe* litigation, a similar dispute revealed a litigation funding agreement that contained several key provisions by which the funder sought to influence the course of litigation, including prohibiting the lawyers from engaging co-counsel or experts without the funder's consent. *See Gbarabe v. Chevron Corp.*, No. 3:14-cv-00173-SI, ECF No. 186-4, at 69-91 (N.D. Cal. filed Sep. 16, 2016).

V. COURTS AND PARTIES NEED FRCP GUIDANCE THAT THE DETERMINATION OF CONTROL REQUIRES DISCLOSURE OF TPLF AGREEMENTS

It is widely understood that TPLF agreements can give control of litigation and settlement to non-parties.[41] Effective case management requires federal courts to know—and allow parties to know—if any TPLF agreement in their case takes control away from named parties and give it to unknown investors. Judges need to understand who is controlling litigation decisions so that they may require the actual decisionmakers to participate in, or be available during, settlement conferences and other pre-trial proceedings. Judges also need to know whether TPLF is harming named plaintiffs by siphoning off their recovery—especially in class action cases, where Rule 23 requires judges to ensure the adequacy of representation and that settlements are "fair, reasonable, and adequate" to class members. Judges (and the public) also should know whether TPLF is being employed by foreign adversaries to undermine the interests of the United States, gain access to sensitive information, or to evade sanctions.[42]

Parties need to know who is in control in order to make informed decisions about the litigation and engage in settlement discussions. When litigation funders hide in the shadows, "the settlement process often unravels when the nominal plaintiff or its counsel needs to obtain approval from undisclosed non-party funders or uses the non-party as an excuse to retract a commitment to settle."[43] Effective case management is thwarted when arbitration or separate litigation is needed to determine whether a named party has the right to settle its case, make certain litigation decisions, or even choose its own lawyer.[44]

A. Control Can Be Determined Only by Understanding the TPLF Agreement

Determining whether a TPLF agreement gives a non-party material influence or control over the litigation and potential resolution is more complicated than it might seem. TPLF agreements are typically lengthy and contain both significant control features and boilerplate recitations disavowing any delegation of control. Judges who ask lawyers yes/no questions about whether they have given funders control over litigation strategy or settlement decisions learn almost nothing about the actual nature of the TPLF agreement; they certainly do not learn whether a funding agreement vests a non-party funder with authority to influence or control the litigation.[45]

---

[41] *See, e.g., Pork Antitrust Litig.*, 2024 WL 2819438 at *3–4; *Boling v. Prospect Funding Holdings, LLC*, 771 F. App'x 562, 579–80 (6th Cir. 2019) (terms of the funding agreements "effectively g[a]ve [a TPLF entity] substantial control over the litigation," including terms that "may interfere with or discourage settlement" and otherwise "raise[d] quite reasonable concerns about whether a plaintiff can truly operate independently in litigation"). *See also* U.S. Chamber of Commerce Institute of Legal Reform, *Grim Realities: Debunking Myths in Third-Party Litigation Funding*, Aug. 2024, https://instituteforlegalreform.com/wp-content/uploads/2024/08/TPLF-Grim-Realities-8.29.24.pdf.

[42] *Grim Realities*, https://instituteforlegalreform.com/wp-content/uploads/2024/08/TPLF-Grim-Realities-8.29.24.pdf.

[43] Letter from 124 companies to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure (Oct. 2, 2024) ("124 company letter").

[44] *See*, *e.g.*, *Pork Antitrust Litigation*, *supra* n. 40.

[45] *See Nimitz Techs.*, 2022 WL 17338396 at *18 (litigation funders discovered to be involved to such an extent that the "plaintiffs" made none of their own decisions). The judge suspected that the funders had "perpetrated a fraud on

Control features are unlikely to be express provisions; instead, they often are a function of how the contract operates. For example, language providing that the funder will "not unreasonably withhold consent" to settlement or certain other decisions in the litigation may not jump off the page as ceding control to a non-party. But such language can amount to a disguised veto power over the named party's decisions. Critical examination is key.

It is also important to understand how the continuation of funding works; a provision describing funding in steps or tranches can be a powerful mechanism of control because it can exert strong pressure on the named parties and their counsel to make certain decisions (*e.g.*, not to pursue a settlement on terms that do not satisfy the funder's desire for investment returns) or face the termination of funding. A court cannot understand the operative details via a cursory discussion or partial reading; it must have the benefit of a full vetting that can only come through the adversarial process.

B. Understanding is Achieved Only by Disclosing TPLF Agreements to Parties

Parties—who have their own right to know who controls the litigation—should be able to provide information, argument, and perspectives to the court about the meaning of TPLF agreements that may affect them. As 124 companies have told the Advisory Committee, "we cannot understand the control features of a TPLF agreement without reading the agreement."[46] As one court has observed, "disclosure of [litigation funding] agreements ... encourage[s] transparency and ensure[s] a shadow broker is not using litigation as a form of harassment or for multiple bites at the same apple."[47]

C. Supplementation is Critical to TPLF Disclosure

Any inquiry into TPLF agreements or disclosure order that takes place only once during litigation—usually at a very preliminary stage—is very likely to fail in its purpose. TPLF agreements can arise at any time during a case, and can change dramatically over the course of litigation, even after a settlement in principle, so supplementation of any representations or disclosures is essential.[48]

Conclusion

The answer to whether it is "time for the Committee to embark" on rulemaking concerning TPLF disclosure[49] is a resounding "yes." Any reservations that this will prove too challenging, or require a great deal more education, are unfounded. The Advisory Committee has done extensive work since 2014 and now it is clear that judges and parties recognize the need to know who controls and stands to benefit directly from their cases. The observation that judges have

the court" "designed to shield" themselves "from the potential liability they would otherwise face ... in litigation." *Id.* at *26.

[46] 124 company letter.

[47] *FastShip*, 143 Fed. Cl. at 717.

[48] *See WFIC, LLC v. LaBarre*, 148 A.3d 812, 814–15 (Pa. Super. 2016) (detailing evolution of litigation funding agreements during the course of litigation).

[49] Advisory Committee on Civil Rules, Agenda Book, Oct. 10, 2024, 419, https://www.uscourts.gov/sites/default/files/2024-10_civil_rules_agenda_book_final_9-20_at_230_pm.pdf.

authority to require disclosure of TPLF when warranted does not suffice. A uniform rule is necessary to remedy the hodgepodge of practices and default reliance on unsuitable methods including *ex parte* conversations.

Without such guidance, key provisions of the FRCP, FRE, and other judicial principles will be increasingly ineffective and dysfunctional, and FRCP 26(b)(1) will continue to exacerbate the problem. The only way to achieve the necessary familiarity with how litigation funding impacts particular litigation is through review of the actual TPLF agreements. The Advisory Committee should undertake to draft and adopt a straightforward, uniform rule for TPLF disclosure—one that allows courts and parties to understand TPLF agreements—so courts, parties, and non-parties know what the procedure will be in all federal courts.