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October 28, 2014

VIA E-Mail
Mr. Jonathan C. Rose
Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Submission 14-CV-B

Dear Mr. Rose:

I am writing on behalf of the U.S. Chamber Institute for Legal Reform ("ILR"), the American Insurance Association, the American Tort Reform Association, Lawyers for Civil Justice, and the National Association of Manufacturers, regarding the memorandum included as Tab 6A of the agenda book for the October 30-31, 2014 meeting of the Advisory Committee on Civil Rules ("the Committee"). That memorandum concerns Submission 14-CV-B, the proposal of the aforementioned organizations to amend Fed. R. Civ. P. 26(a)(1)(A) to require initial disclosures about third-party litigation funding ("TPLF").

We believe that the memorandum provides a thoughtful analysis of a number of the issues and concerns presented by the growing influence of TPLF in U.S. litigation. We appreciate the Committee's evident interest in the TPLF-related issues and agree with many of the conclusions and suggestions for further thought the memorandum identifies. In that same spirit, we wished to offer some additional information and insights on some of the matters highlighted in the memorandum as worthy of further inquiry and analysis.

First, we agree with the memorandum's definition of the issue. As it observes, there are a variety of litigation-financing arrangements in the market today, and our proposal is not directed at all such arrangements. Rather, our proposed rule – and the concerns we offered in support of its adoption – is directed solely to undisclosed parties that have acquired a direct financial interest in the outcome of the litigation.

Second, the memorandum also correctly observes that there is uncertainty about the pervasiveness of TPLF in U.S. litigation. We wish to stress, however, that the lack of robust data in this area stems largely from the lack of disclosure requirements. Absent any duty to report TPLF arrangements, litigation funding lacks transparency; its presence in a case only occasionally comes to light as a result of discovery or disputes with the funder.[1] In our view, there is good reason to believe that, while its precise scope is unknown, litigation funding is a rapidly growing practice, as evidenced by the rapid expansion in recent years in the number of TPLF entities and by the aggressive marketing efforts of these businesses.[2]

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[1] For examples of instances where the existence of TPLF arrangements came to light only after a dispute over those arrangements, see, for example, Kevin LaCroix, *Litigation Funding in the Courts*, Jan. 16, 2014, *available at* http://www.dandodiary.com/2014/01/articles/securities-litigation/litigation-funding-in-the-courts/ (noting that in a lawsuit involving Miller U.K. Ltd. and Caterpillar, the "parties have had extensive discovery disputes, including a dispute about whether or not Caterpillar could discover Miller's third-party financing arrangements, as well as of the documents and information Miller had supplied prospective funding firms in order to try to obtain financing"); Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y. Times, Jan. 16, 2011, *available at* http://www.nytimes.com/2011/01/17/business/17lawsuit.html?_r=2&adxnnl=1&ref=todayspaper&adxnnlx=1414091659-Jw/R7cDxUKI52l1ExQsu1w&.

[2] For discussions of the rapid growth of the TPLF industry, especially in the last five years, see, for example, Vanessa O'Connell, *Litigation Funding Market Heats Up*, Wall St. J., Oct. 3, 2011, *available at* http://blogs.wsj.com/law/2011/10/03/litigation-funding-market-heats-up/; Maya Steinitz, *Whose Claim Is This Anyway: Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268 (2010-2011), *available at* http://www.minnesotalawreview.org/wpcontent/uploads/2012/03/Steinitz_PDF.pdf; Kevin Lacroix, *Litigation Funding: A U.S. Growth Industry?*, Apr. 10, 2012, *available at* http://www.dandodiary.com/2012/04/articles/securities-litigation/litigation-funding-a-u-s-growth-industry/; and Grace M. Giesel, *Alternative Litigation Finance and Attorney-Client Privilege*, at 3-4 (2014) (noting expansion of TPLF reach in last five years in particular), to be published in 92 Denver U. L. Rev. (2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441237. For discussions of the significant profits claimed and capital attracted by these businesses see, for example, Giesel, *supra* at 4 n.11 (noting reported profits of $15.9 million on $280 million in investments by Burford and announcement of a stock payout as a result of litigation financing success by Juridica Investments Ltd.); William Alden, *Litigation Finance Firm Raises $260 Million For New Fund*, N.Y. Times, Jan. 12, 2014, *available at* http://dealbook.nytimes.com/2014/01/12/litigation-finance-firm-raises-260-million-for-new-

Third, we agree with the memorandum's suggestion 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." We think this and other mechanisms for addressing TPLF issues suggested by the memorandum merit consideration. Ultimately, the goal should be to create transparency about who has a stake in litigation outcomes, and our belief is that the Committee should consider all options for doing so.

Fourth, with respect to the parallels between the disclosure requirements regarding insurers and our proposal to require disclosure of TPLF arrangements, we agree with the memorandum's view that disclosures of insurance information "conduce toward settlement." We believe that the disclosure of TPLF information would achieve the same result. As the memorandum observes, disclosure could facilitate settlement in some contexts by providing a party with more information about the litigation resources available to the other side. We submit that TPLF disclosures would aid settlement in other contexts as well. In particular, our more fundamental objective is to ensure disclosures about TPLF so both the court and defendants will know whether the plaintiff's settlement assessment in a given case will reflect (a) the named claimant's evaluation of his own claim or (b) a TPLF entity's need to achieve an adequate rate of return to its investors. Moreover, we believe that requiring TPLF disclosures will result in more equitable rules by allowing both sides to understand the potential sources of funding standing behind the parties, an improvement over the current rules, which require defendants to disclose the involvement of significant players in settlement on their side (i.e., insurers).

Fifth, on a related note, we agree with the memorandum's observation that one reason it is prudent to require disclosure of insurer information is the possibility that a nonparty insurer is exercising some measure of control over the litigation. We think the same rationale applies to TPLF entities. Interestingly, the Bentham IMF

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fund/?_php=true&_type=blogs&_r=0; *Investing in Litigation: Second-Hand Suits*, The Economist, Apr. 6, 2013, *available at* http://www.economist.com/news/finance-and-economics/21575805-fat-returns-those-who-help-companies-take-legal-action-second-hand-suits; Steven R. Strahler, *Chicago Company Seeks to Profit From Lawsuits*, Apr. 8, 2013, *available at* http://www.chicagobusiness.com/article/20130408/NEWS01/130409842/chicago-company-seeks-to-profit-from-lawsuits; Jennifer Smith, *Investors Put Up Millions Of Dollars To Fund Lawsuits*, Wall St. J., Apr. 7, 2013, *available at* http://online.wsj.com/news/articles/SB10001424127887323820304578408794155816934?mod=ITP_marketplace_0&mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424127887323820304578408794155816934.html%3Fmod%3DITP_marketplace_0; PR Newsire, *Gerchen Keller Capital Launches $100 Million Litigation Finance Fund*, Apr. 8, 2013, *available at* http://www.bloomberg.com/article/2013-04-08/aBIdDDW71yMw.html.

Best Practices guide, which is cited in the memorandum on another point, clearly contemplates significant control by TPLF entities. Specifically, it notes the importance of setting forth specific terms in litigation funding agreements that address the extent to which the TPLF entity is permitted to: "manage the Claimant's litigation expenses"; "receive notice of and provide input on any settlement demand and/or offer, and any response"; participate in settlement decisions; invoke arbitration to resolve disputes between the claimant and the TPLF entity over whether to settle; and terminate a funding agreement if the claimant's counsel withdraws from the engagement. *See* Bentham IMF, *Code of Best Practices* (Jan. 2014). Indeed, the Bentham IMF Code of Best Practices states that a TPLF agreement "may provide" that termination of funding "is permissible when . . . the Funder reasonably determines that an event or circumstance has occurred that has a material effect on the merits of the litigation or ***its prospects of a commercial success***." *Id.* (emphasis added). Obviously, the ability of a funder to withdraw financial support would give it substantial leverage to control litigation. Of course, these guidelines do not govern all TPLF practices, and as the memorandum rightly observes, the extent of a TPLF entity's control will vary from one case to the next, and some may "abjure efforts to control" in a given case. Even in such a case, however, it seems likely that the TPLF entity retains at least the possibility of control in the sense that they need to protect their investors' interests and strong incentives will exist for plaintiffs' counsel to yield control to curry favor in obtaining funding for future cases. In any event, we would simply note that litigation control does not appear to be a sound basis for distinguishing insurance coverage from TPLF involvement. While TPLF control in litigation may vary, the actual control exerted by insurers likewise varies from one case to the next, and often insurers with potential litigation coverage obligations tend to simply reserve their rights, leaving for later determination the insuror's obligation to defend or settle the matter.

Finally, we also concur with the memorandum's observation that "avoiding conflicts of interest for judges, jurors, and attorneys is a desirable goal" and that one potential for conflict could arise where a plaintiff's counsel has a financial interest in the TPLF entity. We think it important to emphasize that, although the Bentham best practices guide speaks to that specific potential for conflict, it does not suggest any mechanism for preventing the other conflicts that may arise – such as where defense counsel or the judge or members of his or her staff have investments in publicly traded companies that in turn deposit money in TPLF funds. Disclosure of TPLF relationships at an early stage would assist these individuals in identifying and resolving any potential conflicts. We also agree with the memorandum's suggestion that it may be imprudent to ask "trial courts to take the lead" on ethics issues, but we do not contemplate such a role for the courts. The advantage of disclosure is that it provides all parties to the litigation – plaintiffs and defendants and their counsel, as

well as judicial officers – with the information they need to make their own ethics calls.

Again, we appreciate the careful attention the Committee has given to our proposal. We look forward to continuing discussion of this important issue, and we urge the Committee to take steps soon to achieve greater transparency about the growing use of TPLF in federal court litigation.

Sincerely,

John H. Beisner