



May 21, 2021

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William T. Walsh, Clerk of Court
United States District Court
Martin Luther King Jr. Federal Bldg. & U.S. Courthouse
50 Walnut St.
Newark, NJ 07101

Re: Proposed Local Civil Rule 7.1.1.

Dear Mr. Walsh:

I write on behalf of Lawyers for Civil Justice (“LCJ”) to urge the U. S. District Court for the District of New Jersey to adopt proposed Local Civil Rule 7.1.1., which would require disclosure of third-party litigation funding (“TPLF”). TPLF is now a pervasive feature of civil litigation¹ in the District of New Jersey and around the country, but many judges and parties remain unaware of its presence in, and importance to, their cases.

LCJ has specific expertise on the policy issues surrounding TPLF disclosure. LCJ is a national coalition of corporations, defense trial lawyer organizations, and law firms that promotes excellence and fairness in the civil justice system. LCJ members are frequent litigants in the District of New Jersey. For over 30 years, LCJ has advocated for procedural rule reforms that (1) promote balance in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. LCJ has submitted extensive comments to the Judicial Conference Advisory Committee on Rules of Civil Procedure (“Advisory Committee”), which is currently considering amending Rule 26 to require TPLF disclosure.

LCJ’s analysis reveals that courts rarely inquire about the existence of TPLF in the cases before them. In the rare instance when a party raises the issue, courts often fall back on a “relevance” analysis and conclude that TPLF is unrelated to the merits of the dispute. But there are strong reasons to require disclosure by rule (as with insurance agreements) regardless of relevancy to the merits. Awareness of TPLF enables judges and parties to ask questions that have great potential significance to the fair administration of justice. Approving proposed Rule 7.1.1. would be a significant step² towards much-needed transparency.

¹ Litigation funding was estimated to be a \$10 billion industry as of three years ago. See Matthew Goldstein & Jessica Silver-Greenberg, *Hedge Funds Look to Profit from Personal-Injury Suits*, N.Y. Times (June 25, 2018), available at <https://www.nytimes.com/2018/06/25/business/hedge-funds-mass-torts-litigation-finance.html>

² Requiring disclosure of TPLF agreements would be even more effective.

Judges and parties need to know who is “in the courtroom,” and TPLF agreements inherently raise the question of control over litigation. TPLF agreements are known to permit non-party funders to exercise substantial control or influence over the litigation. For example, in *Boling v. Prospect Funding Holdings, LLC*, the U.S. Court of Appeals for the Sixth Circuit concluded that the funding agreements in that case “effectively give [the TPLF provider] substantial control over the litigation,” including powers that “may interfere with or discourage settlement” and “raise quite reasonable concerns about whether a plaintiff can truly operate independently in litigation.”³ In a separate lawsuit filed in 2018, a TPLF provider revealed that it had contractual rights to exercise control over the litigation in which it had invested.⁴ Proposed Rule 7.1.1. would allow courts, when appropriate, to understand whether or not the lawyers and parties before them are actually the decisionmakers.

Proposed Rule 7.1.1. would also allow courts and counsel to ensure compliance with ethical obligations. The pervasiveness and growth of the TPLF industry—including its spread to mainstream investment companies and financial institutions—makes it increasingly likely that judges, counsel, and potential jurors could have financial interests contingent on the outcome of cases. In addition, proposed Rule 7.1.1. would provide information necessary to understand compliance with state laws concerning champerty and maintenance. Last but certainly not least, proposed Rule 7.1.1. would reveal information that courts are required to consider when making proportionality evaluations under Federal Rule of Civil Procedure 26(b)(1), which mandates consideration of “the parties’ resources” when courts determine the scope of discovery in individual cases.

The District of New Jersey’s proposed Rule 7.1.1. is part of a nationwide discussion about TPLF transparency. For example, the U.S. District Court for the Northern District of California has adopted a TPLF disclosure requirement, albeit limited to class action cases. The court’s “Standing Order For All Judges” requires that “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.”⁵ On a national scale, the Advisory Committee is considering amending Rule 26 to require TPLF disclosure. The Advisory Committee initially referred the issue to its MDL Subcommittee, but after extensive consideration, that Subcommittee recommended the full Advisory Committee should lead the examination because “TPLF is a phenomenon of growing importance” and “seems at least equally important in a broad range of types of litigation.”⁶ The full Advisory Committee approved that recommendation and announced that “[t]he question whether a rule change is appropriate to deal with” TPLF in all manner of civil cases “remain[s] under consideration.”⁷ Meanwhile, Congress is considering legislation, the Litigation Funding Transparency Act, which would require TPLF disclosure in

³ 771 F. App’x 562, 579-80 (6th Cir. 2019)

⁴ See Compl. ¶ 35, *White Lilly, LLC v. Balestriere PLLC*, No. 1:18-cv-12404 (S.D.N.Y. filed Dec. 31, 2018).

⁵ Standing Order for all Judges of the Northern District of California, Contents of Joint Case Management Statement, § 19 (Jan. 2017).

⁶ Committee on Rules of Practice and Procedure, Agenda Book, Jan. 28, 2020 at 313 (Report to the Standing Committee from the Advisory Committee on Civil Rules).

⁷ *Id.*

all federal civil cases. Adopting proposed Rule 7.1.1. would put the District of New Jersey in good company in recognizing the need for TPLF transparency.

No doubt, you are hearing from entities that provide TPLF. Their opposition to proposed Rule 7.1.1. is part of an aggressive strategy to keep their business model hidden from the judiciary and from the parties whose interests they oppose in court. Irrespective of the vehemence with which they advocate for their own interests, one fact is clear: there is no empirical evidence that a TPLF disclosure rule would somehow kill the now-mature multi-billion-dollar TPLF industry. Transparency will not cause the sky to fall. And if a measure as modest as proposed Rule 7.1.1. would change practices the industry is unwilling to disclose to the judiciary, courts should have an opportunity to understand what those practices are.

LCJ urges the District of New Jersey to adopt proposed Rule 7.1.1. Thank you for considering this important matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "H. Mills Gallivan". The signature is fluid and cursive, with a long horizontal stroke at the end.

H. Mills Gallivan
President