

Quick hit: Pulling the curtain back on third-party funding

Andrew Andrzejewski | October 23, 2024



October 2, 2024 letter with 100+ signatories

Our companies, actively engaged in the federal civil justice system as both plaintiffs and defendants, are concerned about the procedural inconsistencies and deficiencies related to disclosure of third-party litigation funding (TPLF)

October 2, 2024

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: Procedural Consistency for the Disclosure of Third-Party Litigation Funding

Dear Mr. Byron:

Our companies, actively engaged in the federal civil justice system as both plaintiffs and defendants, are concerned about the procedural inconsistencies and deficiencies related to disclosure of third-party litigation funding (“TPLF”). As federal judges have become increasingly aware of the reasons why courts and parties need to know about TPLF, they are employing varied and often insufficient means of inquiry. We respectfully ask the Advisory Committee on Civil Rules (“Advisory Committee”) to amend the Federal Rules of Civil Procedure (“FRCP”) to provide a uniform and efficient procedure for disclosure of TPLF agreements in civil cases.

I. IT IS UNFAIR TO DENY PARTIES INFORMATION ABOUT WHO CONTROLS THE LITIGATION

We need TPLF disclosure to understand who has control of the case. We know from experience that when TPLF is present in our cases, it fundamentally alters the dynamics and has a major impact on whether the dispute can be resolved through settlement. We cannot make informed decisions without knowing the stakeholders who control the litigation—and we cannot understand the control features of a TPLF agreement without reading the agreement. Without this information, 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. (This is the very reason why courts typically require us to appear with authority and our insurance representatives in settlement conferences and mediations.)

II. DISCLOSURE OF TPLF AGREEMENTS IS ESSENTIAL TO THE FUNCTION OF KEY FRCP AND WITNESS SAFEGUARDS

When defendants are kept in the dark about TPLF agreements, they are prevented from utilizing several key FRCP provisions as intended. For example:

- FRCP 26(b)(1) describes “the resources of the parties” as a factor relevant to whether a particular discovery request is proportional to the needs of the case. When courts do not allow us to know if the named parties are funded by TPLF investors, we cannot argue, and the court cannot weigh, how the resources of the parties should factor into decisions about the scope of discovery. This proportionality factor, which was added to the FRCP

What is TPLF?

Third-party litigation funding

- Funding arranged between a non-party and a plaintiff or plaintiff's counsel
 - A specific claim
 - **An inventory of personal injury claimants**
 - Even a firm's portfolio of matters
- Usually confidential
- Multibillion-dollar industry
- Expanding access to justice v. higher returns on investment



What You Need to Know About Third Party Litigation Funding, <https://instituteforlegalreform.com/what-you-need-to-know-about-third-party-litigation-funding/>
Pandemic Is Expected to Bring More Lawsuits, and More Backers, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/your-money/lawsuits-litigation-finance-coronavirus.html>
Five Common Misconceptions About Litigation Funding, ABA (Feb. 22, 2022), <https://www.americanbar.org/groups/litigation/resources/newsletters/commercial-business/five-common-misconceptions-about-litigation-funding/>
Considering paths to disclosure in third party litigation financing, Reuters (Feb. 22, 2023), <https://www.reuters.com/legal/legalindustry/considering-paths-disclosure-third-party-litigation-financing-2023-02-23/>

Why is TPLF a problem?

Our companies, actively engaged in the federal civil justice system as both plaintiffs and defendants, are *concerned* about the *procedural inconsistencies and deficiencies* related to disclosure of third-party litigation funding (TPLF)

Control of litigation

Plaintiff v. funder

- **De facto control**
 - Lien on recovery
 - Pay the funder before paying the plaintiff
 - Settlement offers weighed against debt to funder
- **Actual control**



What You Need to Know About Third Party Litigation Funding, <https://institutelegalreform.com/what-you-need-to-know-about-third-party-litigation-funding/>
Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding A Decade Later, <https://institutelegalreform.com/research/selling-more-lawsuits-buying-more-trouble-third-party-litigation-funding-a-decade-later/>
Letter to Secretary H. Thomas Byron III, Procedural Consistency for the Disclosure of Third-Party Litigation Funding (Oct. 2, 2024), <https://www.lfcj.com/s/124-company-letter-urging-uniform-TPLF-disclosure-rule-10-2-24.pdf>
Letter to Secretary H. Thomas Byron III, Proposed Fed. R. Civ. P. 26(a)(1)(A)(v) (May 8, 2023), [https://www.dri.org/docs/default-source/center-law-public-policy/coalition-comments_thirdpartylitigationfunding-\(002\).pdf](https://www.dri.org/docs/default-source/center-law-public-policy/coalition-comments_thirdpartylitigationfunding-(002).pdf)
Boling v. Prospect Funding Holdings, LLC, 771 F. App'x 562 (6th Cir. 2019)

Transparency of interests

Judges' conflict of interest

- Recusal
- In the spirit of FRCP 7.1 disclosures

Parties' interests

- Plaintiffs seeking recovery
- Funders seeking profit



Letter to Secretary H. Thomas Byron III, Procedural Consistency for the Disclosure of Third-Party Litigation Funding (Oct. 2, 2024), <https://www.lfcj.com/s/124-company-letter-urging-uniform-TPLF-disclosure-rule-10-2-24.pdf>
Third Party Litigation Funding: Civil Justice and the Need for Transparency (2018), <https://www.dri.org/docs/default-source/dri-white-papers-and-reports/third-party-litigation.pdf>
LCJ Letter to the House Courts Subcommittee on TPLF Disclosure Rules, (July 2, 2024), <https://www.lfcj.com/s/LCJ-Letter-to-House-Courts-Subcommittee-on-TPLF-Disclosure-July-2-2024.pdf>
Rules Suggestion, https://www.uscourts.gov/sites/default/files/22-cv-m_suggestion_from_lcj_and_ilr_-_rule_16c2_0.pdf

Proportionality and fairness

David v. Goliath?

- Needs of the case
- Precision of discovery requests
- Allocation of costs of discovery and motion practice (and sanctions)
- Harassing and/or harming manufacturers



Illusion of merit

Funding plaintiff inventories and “facts”

- Plaintiff advertising
 - \$1 billion+ in ad spend/year
 - 15 million+ ads/year
- Large dockets
- Funding plaintiffs’ medical care
 - Unnecessary medical procedures
- Funding science supporting plaintiffs’ claims

Attack on safe and effective medication and medical devices

What You Need to Know About Third Party Litigation Funding, <https://instituteforlegalreform.com/what-you-need-to-know-about-third-party-litigation-funding/>
Dark Money: Undisclosed Third Party Litigation Funding and Its Impact on Medical Technology, <https://www.advamed.org/wp-content/uploads/2024/01/AdvaMed-TPLF-Paper-Final-12-7-2023.pdf>
How Profiteers Lure Women Into Often-Unneeded Surgery, *N.Y. Times* (Apr. 14, 2018), <https://www.nytimes.com/2018/04/14/business/vaginal-mesh-surgery-lawsuits-financing.html>
LCJ Letter to the House Courts Subcommittee on TPLF Disclosure Rules, (July 2, 2024), <https://www.lfcj.com/s/LCJ-Letter-to-House-Courts-Subcommittee-on-TPLF-Disclosure-July-2-2024.pdf>



What can we do about TPLF?

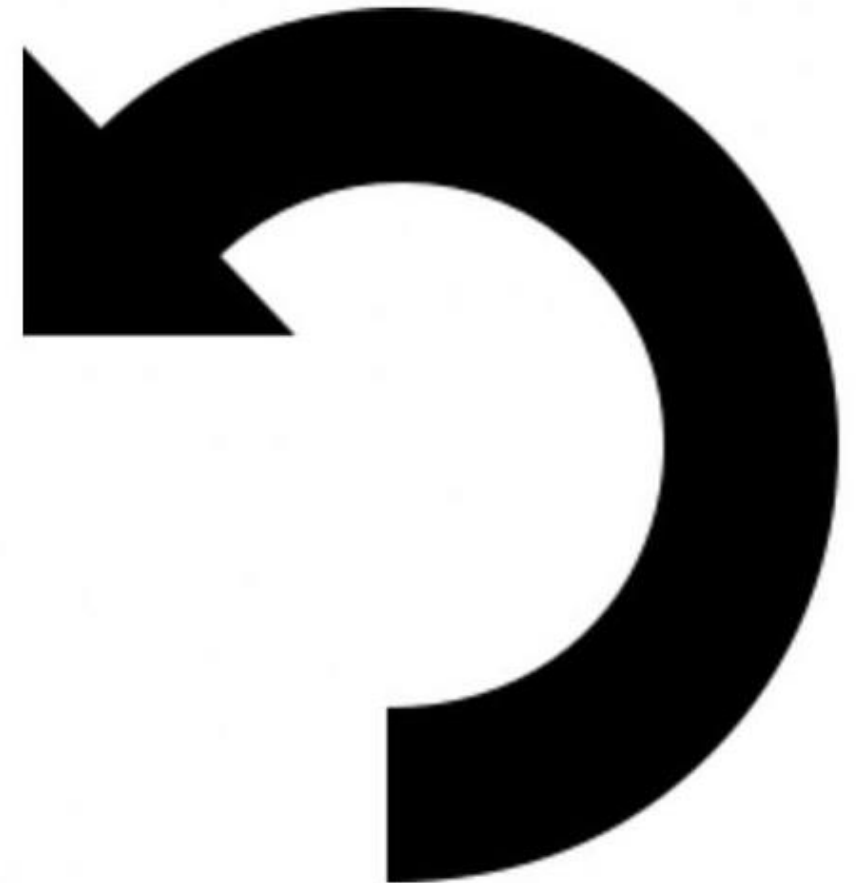
DNJ's course correction

In re Valsartan (2019)

- TPLF discovery denied but not off limits

D.N.J. Local Rule 7.1.1(a) (2021)

- Identity of the funder
- Controlling interest in litigation and settlement decisions
- Nature of financial interest



Litigation tools for tackling TPLF

Disclosure rules

- State laws
- Local rules and standing orders
 - Subject to enforcement
- MDL orders

Discovery and motion practice

- Targeted discovery requests
- Discoverability unsettled
 - In camera review/discoverable?
 - Not discoverable?

Grim Realities: Debunking Myths in Third-Party Litigation Funding, <https://institutelegalreform.com/wp-content/uploads/2024/08/TPLF-Research-Grim-Realities-Aug.-2024.pdf>

What You Need to Know About Third Party Litigation Funding, <https://institutelegalreform.com/what-you-need-to-know-about-third-party-litigation-funding/>

Dark Money: Undisclosed Third Party Litigation Funding and Its Impact on Medical Technology, <https://www.advamed.org/wp-content/uploads/2024/01/AdvaMed-TPLF-Paper-Final-12-7-23.pdf>

Advisory Committee on Civil Rules

Streamline disclosure requirements

- Amend FRCP 26 → disclose TPLF in initial disclosures
- Amend FRCP 16 → consider TPLF at pretrial conferences

Recent developments

- October 2, 2024: LCJ letter with 100+ signatories
 - Requesting “a uniform and efficient procedure for disclosure of TPLF agreements in civil cases”
- October 10, 2024: TPLF Subcommittee planned

What You Need to Know About Third Party Litigation Funding, <https://institutelegalreform.com/what-you-need-to-know-about-third-party-litigation-funding/>
Letter to Secretary H. Thomas Byron III, Procedural Consistency for the Disclosure of Third-Party Litigation Funding (Oct. 2, 2024), <https://www.lfcj.com/s/124-company-letter-urging-uniform-TPLF-disclosure-rule-10-2-24.pdf>
Court Advisory Committee Inches Forward on Transparency in Litigation Financing, *Law.com* (Oct. 10, 2024), <https://www.law.com/americanlawyer/2024/10/10/court-advisory-committee-inches-forward-on-transparency-in-litigation-financing>
Rules Suggestion, https://www.uscourts.gov/sites/default/files/22-cv-m_suggestion_from_lcj_and_ilr_-_rule_16c2_0.pdf



Resources for litigators

US Chamber of Commerce/Institute for Legal Reform

[Grim Realities: Debunking Myths in Third-Party Litigation Funding](#)

[What You Need to Know About Third Party Litigation Funding](#)

[Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding A Decade Later](#)

Lawyers for Civil Justice

[Ask About TPLF](#) (TPLF toolkit in development)

[Letter to Secretary H. Thomas Byron III, Procedural Consistency for the Disclosure of Third-Party Litigation Funding \(Oct. 2, 2024\)](#)

[LCJ Letter to the House Courts Subcommittee on TPLF Disclosure Rules, \(July 2, 2024\)](#)

DRI/Center for Law and Public Policy

[CLPP](#) (TPLF toolkit in development)

[Third Party Litigation Funding: Civil Justice and the Need for Transparency \(2018\)](#)

[Letter to Secretary H. Thomas Byron III, Proposed Fed. R. Civ. P. 26\(a\)\(1\)\(A\)\(v\) \(May 8, 2023\)](#)

[DRI Supplemental Letter to Secretary H. Thomas Byron III, Proposed Fed. R. Civ. P. 26\(a\)\(1\)\(A\)\(v\) \(Aug. 28, 2023\)](#)

ATRA

[Third-Party Litigation Financing](#)

AdvaMed

[Dark Money: Undisclosed Third Party Litigation Funding and Its Impact on Medical Technology](#)

Thank you