



TEXAS CIVIL JUSTICE LEAGUE

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November 8, 2022

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The Honorable Nathan Hecht
Chief Justice
The Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Chief Justice Hecht:

In the last 20 years, the growing prevalence of third-party litigation funding (TPLF) has sparked a national debate over the extent to which TPLF agreements should be disclosed, discoverable, or otherwise regulated by the state. In view of the rapid growth of the TPLF industry, it seems likely that the debate will only intensify. On one hand, proponents seek legislative or judicial action either legitimizing their business or keeping other people's noses out of it. On the other, opponents seek with equal conviction to heavily regulate the industry or at minimum mandate disclosure of TPLF agreements to all parties in the litigation.

To date, two states, Wisconsin and West Virginia, have enacted mandatory disclosure statutes. Some federal district courts have adopted rules requiring disclosure of TPLF agreements to the court, including the Districts of Delaware and New Jersey, and the Northern District of California. More limited disclosure requirements have been adopted in at least two federal MDL cases, while more generally a number of other federal district and appellate courts have local rules that require disclosure of entities with a financial interest in the outcome of the litigation. Case law in the federal system is somewhat split, with some courts requiring disclosure when specific conditions are met and others denying discovery of TPLF agreements as either irrelevant or protected by attorney work product privilege.¹ Numerous state legal ethics opinions have weighed in on the relation between TPLF and various ethical rules, and the American Bar Association House of Delegates has recently issued "best practices" guidelines to assist attorneys and third-party funders in navigating the potential legal and ethical pitfalls of TPLF agreements.² No uniform standards exist to guide federal and state courts in determining if, when, to whom, and to what extent TPLF agreements should be disclosed.

This debate has come to the Texas Legislature as well, most recently in the form of H.B. 2096 and S.B. 1567, which were filed during the 2019 legislative session.

¹ See Mark Behrens, Katie Jackson, and Cary Silverman, "Third-Party Litigation Funding: State and Federal Disclosure Rules and Case Law," May 11, 2022. <https://shb.com>, last visited July 31, 2022.

² See "ABA Outlines Best Practices for Third-Party Litigation Funding." https://www.americanbar.org/groups/business_law/publications/committee_newsletters/consumer/2020/202011/thid-party, last visited August 31, 2022.

This proposal directed the Supreme Court to adopt a rule mandating disclosure of TPLF agreements to all parties in a civil action. Although the legislation did not progress beyond the committee stage, we anticipate that something like it may again be introduced in the future as more states take or consider similar action.

That is why, on behalf of the members of the Texas Civil Justice League, we are asking you to refer the issue to the Supreme Court Advisory Committee for promulgation of an amendment to the Texas Rules of Civil Procedure establishing a framework for disclosure and discovery of TPLF agreements under appropriate circumstances. We understand and appreciate that sharp disagreement exists among members of the civil trial bar, the business community, the TPLF industry, and other stakeholders regarding both the threshold question of whether the existence of such agreements should be disclosed at all and, if so, just how much information should be provided. The SCAC, with its broad representation of the civil trial plaintiff's and defense bar, the judiciary, and in-house counsel, is the ideal forum for making policy in this area.

As for TCJL, we support mandatory disclosure of the existence of third-party funding agreements for both consumer and commercial litigation to all parties in the litigation. In our view, a disclosure statement should include: (1) the name, address, and place of formation of the third-party funder; (2) whether any third-party funder's approval is necessary for litigation or settlement decisions in the action, and, if the answer is yes, the nature of the terms and conditions of such approval; and (3) a brief description of the type of funding provided and whether any attorney's fees that may be awarded in the matter will be subject to assignment to the third-party funder.³ A disclosure statement of this nature would put the court and parties on notice a funding company's interest in the outcome of the case without intruding into the realm of attorney work product, litigation strategy, or the specific amount of funding involved. It would also help illuminate whether certain third-party funding arrangements violate Rule 5.04 of the Texas Disciplinary Rules or Professional Conduct.

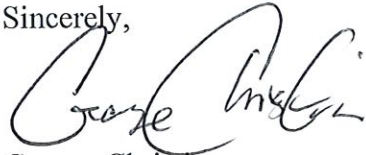
If it is the case that a TPLF agreement confers authority on the provider to make or participate in litigation or settlement decisions or to receive an assigned share of attorney's fees, a party could make a discovery request for more information, including the agreement itself, provided that such request meets the relevancy and other requirements of the existing rules. This may well be a rare case, given that to our knowledge most TPLF providers disclaim any involvement in managing or influencing litigation or settlement strategy (although we are not sure of the extent to which fee-splitting between lawyers and non-lawyers may be occurring).

³ This proposal closely tracks the Standing Order Regarding Third-Party Litigation Funding Arrangements issued by the Chief Judge of the United States District Court for Delaware. <https://ded.uscourts.gov/sites/ded/files/Standing%20Regarding%20RegardingThird-Party%20Litigation%20Funding.pdf>, last visited July 31, 2022.

But if such influence does exist, the court and other parties should have the tools to assess whether further disclosure should be compelled if it is relevant to identifying potential conflicts-of-interest and protecting the court's and attorneys' respective duties to the judicial system and the litigants they serve.

Thank you for your continued commitment to maintaining a fair, efficient, and transparent civil justice system. We deeply appreciate all you have done on behalf of the citizens of our state.

Sincerely,

A handwritten signature in black ink, appearing to read "George Christian". The signature is fluid and cursive, with the first name "George" written in a larger, more prominent script than the last name "Christian".

George Christian
Senior Counsel