

# Is Increased Transparency into Litigation Financing on the Horizon?

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The market for litigation finance shows no signs of slowing down, but pressure from rulemaking bodies and the judiciary may reshape whether and to what extent funding arrangements must be publicly disclosed. The use of litigation finance to fund claims that may not otherwise have been pursued or as a risk management strategy has continued to expand in recent years. For much of its history, parties were not required to disclose whether they were receiving litigation financing or the source of such funding, however the recent trend is toward increased transparency into funding arrangements.

The first big moves toward increased disclosure came in the class action and multidistrict litigation (MDL) contexts. In those cases, judges and defendants alike are often wary of the change in incentives (settlement or otherwise) that results from shifting the financial interest in the outcome of a case from the party who was wronged to a third-party litigation funder. That concern led various courts throughout the country to order parties and their attorneys to disclose whether litigation finance was being used to fund a case. Court-ordered disclosures can include anything from the identity of the litigation funder and nature of the funding relationship, to an affirmation that the use of litigation finance will not interfere with the attorney's ethical obligations to their client. In many cases, those submissions are made to the court *in camera*, and discovery on third-party litigation financing is often not permitted in the absence of extraordinary circumstances.

While courts that permit discovery into litigation funding remain in the minority, legislatures and other rulemaking authorities have taken an interest in exploring requirements for expanded disclosure. Several state legislatures have passed laws mandating disclosure of third-party litigation funding arrangements to other parties in the case, with [Wisconsin being an early adopter in 2018](#). In 2019, [West Virginia passed a law](#) that required disclosure during discovery (without discovery requests) and also subjected litigation financiers to certain regulatory requirements and oversight.

Federal rule makers are also paying close attention to these developments. In Congress, Senator Chuck Grassley (R-IA) and three Republican cosponsors introduced the [Litigation Funding Transparency Act of 2019 \(S.471\)](#) in February 2019, which sought to amend Title 28 to require increased “transparency and oversight of third-party litigation funding in certain actions,” including MDLs and class actions. A prior version of the bill [stalled in committee](#) last year. In [October 2019, the MDL Subcommittee of the Federal Rules Advisory Committee noted](#) a recognition that third-party litigation funding affects cases of all types, and advocated for further consideration of the topic at the full Advisory Committee level. A [January 2020 update](#) from the Committee on Rules of Practice and Procedure noted that “[t]he question whether a rule change is appropriate to deal with these developments [in third-party litigation funding] therefore would remain under consideration.”

All of this comes as litigation financiers [raise capital at an unprecedented pace](#) and innovate to provide new forms of funding including [defense-side hybrid funding and success fee arrangements](#). And, as highlighted in Proskauer’s Private Equity and Hedge Fund [2019 Annual Review](#), litigation funding may fuel potential disputes by permitting fund sponsors to pursue potentially meritorious claims while reducing the effect of litigation expenses on the balance sheet, as well as affording sponsors a strategy to mitigate downside risk. Litigation funding is also among the market conditions contributing to an increased incidence of portfolio company litigation.

Thus, while courts continue to restrain discovery in the area, rule makers appear poised to continue expanding visibility into whether litigation finance is being used and if so, the entities that are involved. Those seeking to take advantage of litigation funding, whether that be using it to pay for the costs of litigation or as an investment opportunity, should be aware of the potential for increased transparency requirements advanced at the judicial or rulemaking level.

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