Litigation Funding Disclosure Debate: Strategy Considerations

By **Andrew Stulce and Marc Cavan** (January 31, 2025)

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With new legislative proposals, an important court order solidifying a body of case law and the U.S. Judicial Conference's Advisory Committee on Civil Rules all entering the discussion, 2024 was a busy year for the litigation finance disclosure debate.

But ongoing arguments over whether parties should be required to disclose funding often overlook a different consideration: Should funded parties consider voluntary disclosure?

Regardless of whether future rule changes eventually add disclosure requirements, funded parties should consider whether certain voluntary disclosures could be to their advantage.

Policy Considerations in the Mandatory Disclosure Debate

For years, opponents of litigation funding have advocated for mandates requiring funded parties to disclose information about their funding arrangements. The argument typically asserts that litigation funding is purportedly tying up courts and harming defendants with meritless claims. Opponents also often raise the specter that funded parties might cede control over litigation decisions to litigation finance firms.

On the other hand, proponents of litigation funding, and funded parties themselves, frequently counter that disclosure should not be required because information about funding is irrelevant to the merits of the case. From a policy standpoint, they also argue that funders focus their investments on meritorious claims, as funders would not gain from supporting the pursuit of meritless claims.

Recently, some pro-disclosure reforms have been enacted through the legislative process. At the state level, numerous proposals requiring various forms of disclosure have been introduced in recent years. Some appear to have fizzled, such as those in Florida and Kansas, while West Virginia, Louisiana and Indiana **enacted** various litigation-funding disclosure reform bills.[1]

Similar congressional proposals stalled in committee, though lawmakers are still trying — including via a **refreshed proposal** that Rep. Darrell Issa, R-Calif., introduced in October.[2]

October also saw another significant development: The U.S. Judicial Conference's Advisory Committee on Civil Rules decided to formally study the disclosure issue in the context of whether a new rule should be implemented.[3]

Committee members — individuals familiar with the federal courts and focused on the efficient

administration of the civil justice system writ large — should approach the issue objectively, and take into account **arguments** on both sides of the debate in determining how to address disclosure, if at all.

Courts Weighing in on the Scope of Disclosure

Within the disclosure debate, one key question is how much disclosure should be required. Opponents and proponents hold a range of positions, from "parties should have to disclose every aspect of funding, including the amount of funding and detailed due diligence findings, plus all communications with the funder," to "no one should disclose even the presence of funding because it's completely irrelevant."

Notable case law from 2024 analyzes the scope issue. For the first time, a U.S. federal appeals court judge, sitting by designation in the U.S. District Court for the District of Delaware, weighed in on the matter in Design with Friends Inc. v. Target Corp.

In his September opinion,[4] U.S. District Judge Stephanos Bibas **rejected** a discovery motion into third-party litigation funding, finding that litigation funding documents — including presuit due diligence documents — are protected by the attorney work-product doctrine.

The order explained that opening such documents to discovery would significantly undermine the doctrine, potentially jeopardizing free and open collaboration between counsel and their clients.

Judge Bibas' order also found the burden imposed by requests for funding documents disproportionate to the value of the proposed discovery. This finding lines up with case law over the last decade, beginning with the U.S. District Court for the Northern District of Illinois' 2014 decision in Miller UK Ltd. v. Caterpillar Inc.,[5] which has generally found that litigation funding documents fail to meet the relevance standard embedded into the discovery rules.

Limited Funding Disclosure as a Legal Strategy

Although most courts considering discovery disputes have coalesced around nondisclosure as the general rule in recent years, the practical and strategic reasons for why each side in those disputes might want disclosure have received less attention to date.

On the one hand, it is not difficult to conceive of one reason why defendants desire more disclosure: Knowing the size and structure of a plaintiff's finances can affect litigation strategy. For example, a plaintiff that lacks resources might struggle to pursue litigation through trial if the defendant were to employ extensive discovery and motion practice, as financial pressure can lead a plaintiff to compromise, or even abandon, meritorious claims.

On the other hand, funded plaintiffs might decide that disclosing certain information about funding may inure to their benefit. For example, disclosing that the party has funding may send two messages.

First, choosing to voluntarily disclose that a case is funded could signal to the opponent that an "outspend and outlast" strategy will not be effective.

Second, voluntary disclosure could indirectly telegraph to the opponent, and potentially to the judge or arbitrator overseeing the case, that the case has merit.

After all, an independent, professional third-party funder has typically performed extensive diligence, and not infrequently hired outside attorneys with subject matter expertise to perform additional evaluation. At the end of that diligence process, the funder has elected to commit significant sums, recoverable only if the case resolves successfully.

And in the paradigmatic modern funding arrangement, the funder commits funds without having control over litigation strategy or settlement decisions.

Of course, plaintiffs considering whether to make voluntary disclosures should be aware of the potential drawbacks. For example, although disclosing that the case is funded should not change the legal analysis regarding whether funding documents — e.g., the funding agreement and communications with the funder — are discoverable, defendants may take the disclosure as an opportunity to issue additional discovery related to funding.

One tactic to limit the risks and costs associated with additional discovery would be to disclose only the name of the funder and, if the defendant raises the control issue, excerpts from the funding agreement confirming that the funder does not control the litigation.

Conclusion

Although parties should always be cognizant of court rules or local legislation to the contrary, current requirements in many jurisdictions generally do not obligate funded parties to make affirmative disclosures about funding.

Regardless, as the debate over required disclosure continues, funded parties should weigh the pros and cons of limited disclosure with their attorneys and decide what is best for their specific case.

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[1] https://news.bloomberglaw.com/business-and-practice/fortress-billions-quietly-power-americas-biggest-legal-fights.

[2] https://www.congress.gov/bill/118th-congress/house-bill/9922?s=1&r=1.

[3] https://www.reuters.com/legal/government/us-judicial-panel-examine-litigation-finance-disclosure-2024-10-10/.

[4] https://www.ded.uscourts.gov/sites/ded/files/opinions/21-1376_0.pdf.

[5] Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711 (N.D. Ill. 2014).