Third-Party Funding Transparency Is Key In Patent Suits

By **Bijal Vakil and Steven Reichel** (May 2, 2025)

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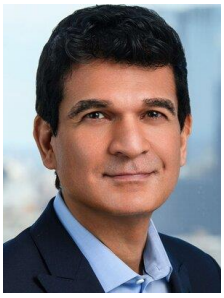

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In March, the Georgia State Senate unanimously advanced third-party litigation funding regulations that would require funders to register and give defendants tools to discover funding agreements.

Third-party litigation funding, or TPLF, the practice of investment firms providing capital to fund the costs of litigation in exchange for a portion of the recovery, has ballooned to a $15 billion-per-year industry.

A movement for increased TPLF discovery, the process of disclosing third-party funders, has grown alongside the industry. Discovery into TPLF may also have the added benefit of legitimizing alternative funding sources for litigation.

There is no automatic or unified disclosure process in any jurisdiction, and while some successes have made headlines, most motions to discover TPLF are denied on attorney work product or relevance grounds.

Proponents of TPLF believe that it helps encourage a strong and robust patent system by allowing smaller entities to assert their rights against larger companies.

Delaware Standing Order

In April 2022, Chief U.S. District Judge Colm Connolly of the U.S. District Court for the District of Delaware issued a standing order regarding third-party litigation funding, forcing parties to disclose third-party funders, the nature of their interest and whether their approval is necessary for litigation decisions.

Judge Connolly was concerned about "abuse of our courts and the lack of transparency as to who the real parties before the Court are, and about who is making decisions in these types of litigation."

In Nimitz Technologies LLC v. Cnet Media Inc. in 2023, for example, Judge Connolly found that, on multiple occasions, counsel acted in litigation — by filing and settling lawsuits — without ever having any direct communication at any point with the client.[1]

They instead acted solely on orders from TPLF entities. Judge Connolly referred attorneys to their respective bar disciplinary counsel.

Limited TPLF Discovery in Other Districts

Unfortunately for defendants, Judge Connolly's thinking has not made its way to Texas

district courts and the U.S. District Court for the Northern District of California, which limit or prohibit TPLF discovery.

Texas District Courts

The U.S. District Court for the Eastern District of Texas denies motions to compel litigation funding as fishing expeditions, while the U.S. District Court for the Western District of Texas noted recently that such motions are consistently denied.[2]

The Eastern and Western Districts of Texas should adopt broader initial disclosure requirements, perhaps mirroring Judge Connolly's approach in Delaware, so that parties can consider whether or not to seek appropriate discovery.

Legislation

A recent legislative reform also shows promise. Rep. Darrell Issa, R-Calif., chairman of the U.S. House of Representatives' Subcommittee on Courts, Intellectual Property and the Internet, cosponsored a bill, H.R. 9922, titled the Litigation Transparency Act of 2024.

It requires the disclosure of parties receiving payment in civil lawsuits. The bill is supported by the U.S. Chamber of Commerce. Interested parties should consider commenting on various proposals such as this to advocate for their positions.

Northern District of California

In 2019, the Northern District of California ruled in MLC Intellectual Property LLC v. Micron Technology Inc. that Civil Local Rule 3-15, even as expanded by Section 17 of the standing order adopted in 2017, requires parties to identify interested third parties, but does not require the disclosure of litigation funding agreements, except in the class action context or when there "was a specific, articulated reason to suspect bias or conflicts of interest."[3]

Litigants should consider whether the disclosures are sufficient and whether or not to compel production of information, i.e. documents, analysis, etc., if required in a case.

On the one hand, transparency is useful in damages calculations and settlement. On the other hand, an unexpected surprise in TPLF may adversely affect a defendant's attack on the damages case. Proceed with caution.

Without the above suggestions, defendants in California and Texas lack protection against nonpracticing entities that: (1) use third-party financing to obfuscate who is seeking discovery; (2) allow TPLF entities to potentially fund both sides of a litigation; (3) enable the targets of U.S. sanctions to evade restrictions; and (4) continue TPLF funders' capacity to degrade the attorney-client relationship.

Conclusion

TPLF is a growing industry that could benefit from enhanced disclosure standards to ensure transparency. As it stands, defendants sued in Texas district courts and the Northern District of California face challenges in obtaining TPLF discovery, which can complicate litigation involving nonpracticing entities.

The TPLF landscape will continue to evolve as litigants seek clarity on the issue. It is crucial for business and legal professionals on both sides to stay informed about further litigation

regarding disclosure requirements and their implications. Ultimately, achieving a balanced approach to TPLF disclosure will benefit all parties involved by fostering a more predictable legal environment.

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[1] Swirlate IP LLC v. Quantela, Inc., 2024 U.S. Dist. LEXIS 154423 (D. Del. Aug. 28, 2024) (describing Nimitz).

[2] Fleet Connect Sols. LLC v. Waste Connections US, Inc., 2022 U.S. Dist. LEXIS 129216 (E.D. Tex. June 29, 2022).

[3] MLC Intellectual Prop., LLC v. Micron Tech., Inc., 2019 U.S. Dist. LEXIS 2745 (N.D. Cal. Jan. 7, 2019).