Interest Groups Call for Greater Transparency into Litigation Funding

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Earlier this month, **Lawyers for Civil Justice** (LCJ), a coalition of corporations, law firms, and defense bar organizations, submitted two proposals—one to the Advisory Committee on Appellate Rules, the other to the Advisory Committee on Civil Rules—for uniformly higher standards for disclosure of litigation funding in federal courts. One of those requests was submitted jointly with the **US Chamber of Commerce Institute for Legal Reform** (ILR), which as *Bloomberg Law* reports, has made previous (but unsuccessful) calls for mandatory disclosure of third-party litigation funding (TPLF).

In its September 1 rules suggestion to the Advisory Committee on Appellate Rules, LCJ claims that "undisclosed non-party financial stakes in appellate outcomes are pervasive in federal circuit courts", and yet circuit judges are "largely unaware" that those interests—"held by individuals, investment funds (including family offices), and institutions, both domestic and non-US"—are at play in the cases they decide.

According to LCJ, litigation funders are taking advantage of the fact that Rule 26.1 of the Federal Rule of Appellate Procedure does not currently require disclosure of such financial arrangements, concluding that Rule 26.1, along with local rules that do not specifically mention rights created by litigation funding contracts, do not apply to the financial stakes they hold in their clients' cases.

Pointing to *The Wall Street Journal*'s 2021 investigation[1] into federal judges' investments leading to apparent conflicts of interest, this persistent and widespread opacity, argues LCJ, does not aid judges in determining whether a conflict of interest exists—and it could create the appearance of impropriety.

Submitted jointly with the ILR, LCJ's September 8 rules suggestion to the Advisory Committee on Civil Rules makes similar arguments, claiming that while "judges are required to recuse themselves when they know that they or their families have a financial stake in a case, courts remain largely in the dark about the existence of third-party investments in their cases". They continue

> *This is so because the existence of TPLF in a given case need not be disclosed as a matter of course under the Federal Rules of Civil Procedure, and to the extent local rules require the disclosure of direct financial interests, they have largely been ignored.*

RPX frequently flags disclosures filed by NPEs in districts that have heighted disclosure requirements, including the Northern and Central Districts of California, that neglect to report financial relationships that have been substantiated by RPX's review of publicly available records. Still other plaintiffs opt to file a less stringent corporate disclosure statement (with respect to corporate parents and significant public company ownership stakes); this appears to be a popular route for NPE plaintiffs filing in the Northern District of Texas, which requires litigants to file certificates of interested parties.

In recent months, many plaintiffs litigating before Chief Judge Colm F. Connolly of the District of Delaware have taken a variety of approaches to circumvent his standing orders posted in April, which markedly raised the corporate and third-party funding disclosure requirements in cases assigned to his courtroom.

As reported extensively by RPX, Judge Connolly has ordered numerous parties to certify that they have complied with those disclosure requirements, causing some litigants to file new or amended statements. Some of those disclosures have raised concerns, with Judge Connolly, for example, granting early discovery into third-party funding arrangements (as requested by **Amazon** here); setting evidentiary hearings to determine the accuracy of filed disclosures (in several IP Edge LLC and **Dynamic IP Deals** suits); or even staying the matter altogether (as in *VLSI, LLC. v. Intel*).

The potential impact on settlement negotiations

In their proposals, LCJ/ILR also maintain that, in addition to mitigating conflicts of interest, increased transparency into TPLF could facilitate "more accurate and realistic settlement negotiations" between the litigants and also "allow courts to structure settlement protocols with greater potential to succeed".

> *Some judges may value a nudge for reasons beyond their ethical duties, including to learn who should participate in settlement conferences due to their authority or influence over resolution decisions. And some judges may appreciate the signal to learn facts relevant to their understanding of "the parties' resources" as required by Rule 26(b)(1), fashioning appropriate sanctions, and allocating costs. For example, if a litigation funder controls settlement decisions (in whole or in part), the court may wish to require that funder to attend any mediation. Absent disclosure, the funder's presence as a player in the settlement process likely will remain hidden.*

The proposed solution: LCJ is urging an amendment to Rule 26.1 "to require disclosure of non-party outcome-contingent rights settlement or judgment proceeds tied to the outcome of cases, specifically including such interests arising from litigation investment contracts".

Barring a uniform TPLF disclosure rule applicable to all civil cases, says LCJ/ILR, adding an effective, "simple" prompt to Rule 16(c)(2) could suffice.

> *Consider whether any person (other than named parties or counsel of record) has a right to compensation that is contingent on obtaining proceeds from the civil action, by settlement, judgment or otherwise. Unlike the mandatory disclosure rule that the Committee has been considering, a Rule 16(c)(2) prompt does not require the Committee to wrestle with: the types of cases to which it applies; the types of litigation funding entities or arrangements governed by such a rule; whether a mandatory rule would negatively affect the litigation finance industry; the sources of funding covered; what must be disclosed; to whom disclosure is made; or whether follow-on discovery is appropriate. A case-by-case approach, governed by individual judges' discretion, will allow for appropriate handling of these issues tailored to the circumstances of each case.*

Bloomberg described this new proposal, which would give judges discretion to inquire about litigation funding on a case-by-case basis, as a "watered-down version" of previous, unsuccessful Chamber efforts to require mandatory disclosure of third-party funding.

How widespread is TPLF in the patent space?

Both of the rules suggestions submitted by LCJ/ILR this month cite reporting by **Westfleet Advisors**, which earlier this year released its 2021 Litigation Finance Market Report. According to Westfleet (a "full-service litigation finance advisory firm"), a pool of 47 litigation funders active in the US have combined assets under management of $12.4B[2].

That number could in fact be higher. On the publication date of this article, the league table compiled by *The Litigation Finance Insider* reflected total assets under management (AUM) of over $14.5B for just eight litigation funders. At least six of those funders have been tied by public records to patent litigation filed here in the US.

Of course, not all those funders' capital is funding patent litigation; however, according to Westfleet's study, "patent litigation attracted a significantly higher percentage of new commitments in 2021, comprising 29% of all capital commitments". In an earlier version of its annual report, published in January of this year, the firm proclaimed that in the context of commercial litigation finance, "patent litigation is king".

In its coverage of the LCJ/ILR rules suggestions, *Bloomberg Law* reported that the Government Accountability Office (GOA)—"which provides nonpartisan research to Congress" scheduled a conference this week with participants from the litigation finance industry to discuss a study requested by lawmakers.

Senator Chuck Grassley (R-Iowa) and Representative Darrell Issa (R-Calif.) (who *Bloomberg* says "have in the past proposed legislation requiring greater disclosure in litigation finance"), and Rep. Andy Barr (R-Ky.), were among the lawmakers who commissioned the study, which

is meant to provide "detailed information on how many requests for funding have been received; how many cases funders have backed; how many have concluded; and what types of returns they generated".

There is currently no indication of when the GAO report is expected to be published.

Even amid continued scrutiny by lawmakers and various industry groups, and developments including Judge Connolly's headline-grabbing standing orders, RPX has observed steady involvement of third-party funders in the patent space this year. For a look at the third quarter of 2022, stay tuned for next month's Q3 in Review, which will cover TPLF-related developments as well as new funded NPE campaigns.

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[1] In late 2021, Judge Rodney Gilstrap of the Eastern District of Texas recused himself from numerous other lawsuits as a result of that investigation—which revealed that he was the judge with the most such conflicts, as a result of investments held by trusts in which either he or his wife, Sherry Sullivan Gilstrap, hold an interest. The *Journal*'s underlying data revealed that since 2011, Judge Gilstrap was assigned to 138 cases with such conflicts. A subsequent RPX analysis showed that 117 of those lawsuits were patent cases, and that all but six of those were filed by NPEs, including IP Edge LLC; Acacia Research Corporation; Brian Yates; Dominion Harbor Enterprises, LLC; Empire IP LLC; Endpoint IP LLC; IPValuation Partners, LLC; Leigh M. Rothschild; and Uniloc Corporation Pty. Limited, among others. For additional RPX reporting on this matter, see here.

[2] While characterizing the cited Westfleet survey as reflecting this year's market, LCJ/ILR's rules suggestions submitted this month actually cite a 2021 *Bloomberg* article, which itself pointed to Westfleet's 2020 publication, which reported a combined AUM of $11.3B for 46 litigation funders active in the US.