Disclosure Tide Is Turning for Third-Party Litigation Funding

Bloomberg Law

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April 1, 2026

https://news.bloomberglaw.com/legal-exchange-insights-and-commentary/disclosure-tide-is-turning-for-third-party-litigation-funding

Third-party litigation financing, or TPLF, has grown into a multibillion-dollar industry, with hedge funds, private equity firms, sovereign wealth funds, and others quietly staking claims in civil lawsuits in exchange for a portion of any recovery. It's now used by litigants and firms representing both plaintiffs and defendants. But the practice is especially pervasive in plaintiffs' side mass tort litigation, where the sheer volume and cost of prosecuting large inventories of claims makes outside capital particularly attractive to plaintiffs' counsel.

Despite the high stakes, litigants have faced hurdles in obtaining discovery into the nature of TPLF agreements. Courts have treated the agreements governing TPLF arrangements (and the communications surrounding them) as presumptively shielded from discovery, extending work-product protection or common interest privilege to ward off discovery requests.

But the disclosure tide may be turning as states and courts write new rules. Litigants must now consider incorporating TPLF discovery into their standard litigation strategy in jurisdictions that have enacted disclosure statutes. They also should monitor the ongoing federal rulemaking process that could extend mandatory disclosure to all civil actions in federal court.

Traditional Discovery Approach

The traditional judicial approach to TPLF discovery rested on two distinct but related doctrines.

First, under the work product doctrine, courts reasoned that documents prepared in anticipation of litigation retained their protected status even when shared with a third-party financier. This rested on the theory that disclosure to a funder doesn't constitute a waiver because the funder's interests are sufficiently aligned with those of the funded party.

Second, courts applied the common interest doctrine to uphold privilege where the funder and the litigant shared a sufficiently congruent legal or financial stake in the outcome. The result was a body of case law that, while far from uniform, generally denied defense discovery into the existence and terms of funding arrangements.

New Legislation

That default posture of confidentiality is now subject to renewed scrutiny in several state and federal jurisdictions across the country. A wave of recent state tort reform legislation and even some local federal rules mandates disclosure or registration of litigation financing activities. This gives litigants (in most cases, defendants) a powerful new statutory argument that these agreements are no longer beyond the reach of civil discovery.

For example, Georgia passed a set of statutes in 2025 codified as the Georgia Courts Access and Consumer Protection Act, which subjects the existence, terms, and conditions of any litigation financing agreement involving $25,000 or more to discovery in civil actions filed after enactment.

Litigation financiers funding in Georgia must register with the Georgia Department of Banking and Finance, disclose ownership information and any criminal history, and certify the absence of any affiliation with foreign adversaries. Failure to register may constitute a felony punishable by up to five years in prison and a $10,000 fine. Additionally, funders who provide $25,000 or more risk becoming jointly and severally liable for any award of sanctions or costs entered against the funded party.

Other states have pursued complementary approaches. West Virginia and Wisconsin enacted automatic disclosure requirements; Montana imposed recovery caps and enumerated prohibitions on funder influence; and Indiana and Louisiana made funding agreements expressly subject to discovery while banning funder control over litigation and settlement decisions. In at least 21 other states, bills requiring disclosure or registration requirements for litigation financiers have been proposed.

This growing coalition of states have specifically targeted litigation funding and imposed additional disclosure requirements. For discovery purposes, they have removed statutory bases for treating these funding agreements—and potentially communications between law firms and funders—as categorically exempt from disclosure. Some federal courts have followed suit, including the District of New Jersey.

Cracks in the former judicial consensus that such agreements are protected from disclosure have begun to grow more visible. Courts applying the common interest doctrine have reached divergent results.

In Miller UK Ltd. v. Caterpillar, Inc., the Northern District of Illinois held that a plaintiff and its litigation funders didn’t share a sufficiently common legal interest where the plaintiff

was merely seeking capital and not exchanging legal strategy, stripping away the privilege shield even as the court preserved protection for core work product materials.

The District of Delaware pushed further, issuing standing orders in patent cases requiring TPLF disclosure and refusing to credit privilege claims that were used as a device to conceal the party who ultimately controls litigation decisions. The Federal Circuit declined to vacate by mandamus, signaling that mandatory disclosure requirements can survive appellate scrutiny.

The US Judicial Conference's Advisory Committee on Civil Rules created a subcommittee in October 2024 to study whether uniform federal disclosure rules should be adopted—reflecting institutional recognition that the current patchwork is untenable.

New Strategies

Don't overlook the practical litigation significance of this statutory trend for disclosure in litigation, particularly those facing mass tort actions. The historic judicial reluctance to order disclosure of funding agreements rested partially on an absence of any affirmative legal obligation to disclose.

New state legislation changes that calculus directly. Where new laws, such as in Georgia, expressly render funding agreements discoverable and subject funders in Georgia to registration and civil and criminal penalty regimes, litigants now have a stronger argument that the legislature has made a policy judgment overriding any common law privilege inference.

This is how the statutory framework itself becomes the basis for a discovery motion. If the legislature has determined that the public interest requires disclosure of certain litigation funding information, courts appear to increasingly reluctant to construe privilege doctrines in a manner that nullifies that legislative command. Litigants in Georgia state-court mass tort cases, for example, can now point to this new law as affirmative authority that funding agreements are discoverable, rather than relying solely on case-by-case work product arguments that have often failed.

Litigants and their funders should audit their arrangements for compliance with registration and disclosure obligations that carry the risk of serious criminal and civil penalties. Beyond the immediate tactical question of discoverability, the new statutory landscape raises deeper questions about the role of outside capital in mass litigation. This includes whether funder-driven decisions about settlement, strategy, and claim aggregation are consistent with litigants' interests. These questions, once confined to academic debate, are now embedded in statute—and are quickly coming to courtrooms across the country.

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