

Third-Party Litigation Funding

State and Federal Disclosure Rules & Case Law



Mark Behrens
*Co-Chair, Public Policy
Practice* | Washington, D.C.
202.639.5621
mbehrens@shb.com



Katie Jackson
Associate | Washington, D.C.
202.783.8400
kjackson@shb.com



Cary Silverman
Partner | Washington, D.C.
202.662.4859
csilverman@shb.com

PREPARED FOR

**Baylor
Law.**

MAY 11, 2022

Third-Party Litigation Funding

State and Federal Disclosure Rules & Case Law

TABLE OF CONTENTS

State Third-Party Litigation Funding Disclosure Laws	1
Federal District Court Local Rules Requiring Third-Party Litigation Funding Disclosure	1
Federal District Court Orders With Limited Third-Party Litigation Funding Disclosure	2
Federal District Court Local Rules– General Disclosure	3
Federal Appellate Court Local Rules – General Disclosure	6
Cases Allowing Discovery of Third-Party Litigation Funding in Some Circumstances	7
Cases Denying Discovery of Third-Party Litigation Funding.....	10

SHOOK
HARDY & BACON

State Third-Party Litigation Funding Disclosure Laws¹

WEST VIRGINIA

[W. Va. Code Ann. § 46A-6N-6 \(2019\)](#) | (“Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any litigation financier, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.”).

WISCONSIN

[Wis. Code § 804.01\(2\)\(bg\) \(2018\)](#) | (“Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.”).

Federal District Court Local Rules Requiring Third-Party Litigation Funding Disclosure

DISTRICT OF DELAWARE

[Standing Order Regarding Third-Party Litigation Funding Arrangements](#) (D. Del. Apr. 18, 2022) | (“(1) Within...30 days of the filing of an initial pleading...the party receiving [third-party litigation] funding shall file a statement...containing the following information: (a) The identity, address, and, if a legal entity, place of formation of the Third-Party Funder(s); (b) Whether any Third-Party Funder’s approval is necessary for litigation or settlement decisions in the action, and if the answer is in the affirmative, the nature of the terms and conditions relating to that approval; and (c) A brief description of the nature of the financial interest of the Third-Party Funder(s). (2) Parties may seek additional discovery of the terms of a party’s arrangement with any Third-Party Funder upon a showing that the Third-Party Funder has authority to make material litigation decisions or settlement decisions, the interests of any funded parties or the class (if applicable) are not being promoted or protected by the arrangement, conflicts of interest exist as a result of the arrangement, or other such good cause exists.”).

DISTRICT OF NEW JERSEY

[Civ. L.R. 7.1.1](#) (D.N.J. June 21, 2021) | (“[A]ll parties... shall file a statement... containing the following information regarding any person or entity that is not a party and is providing funding for some or all of the attorneys’ fees and expenses for the litigation on a non-recourse basis in exchange for (1) a contingent

¹ Several states have passed laws regulating consumer lawsuit lending. See Me. Rev. Stat. Ann, tit, 9-A, §§ 12-101 et seq. (2021); Utah Code Ann. §§ 13-57-101 et seq. (2020) 14A Okla. Stat. §§ 3-801 et seq. (2014).

financial interest based upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal or bank loan...”).

NORTHERN DISTRICT OF CALIFORNIA (CLASS ACTIONS)

[Standing Order for All Judges of the North District of California Contents of Joint Case Management Statement](#) 19 (N.D. Cal. Nov. 1, 2018) (“Whether each party has filed the “Certification of Interested Entities or Persons” required by Civil Local Rule 3-15. In addition, each party must restate in the case management statement the contents of its certification by identifying any persons, firms, partnerships, corporations (including parent corporations) or other entities known by the party to have either: (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding. In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim.”).

Federal District Court Orders With Limited Third-Party Litigation Funding Disclosure

- [In re Nat’l Prescription Opiate Litig.](#), 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018) (ordering counsel in the MDL with third-party contingent litigation financing to submit to the court ex parte, for in camera review, a letter identifying and describing the litigation financing and sworn affidavits from counsel and any third-party litigation funders attesting that the financing does not create a conflict of interest for counsel, undermine counsel’s obligation of vigorous advocacy, affect counsel’s independent professional judgment, give the funder control over litigation strategy or settlement decisions, or affect party control of settlement; providing a continuing duty to update the disclosures if circumstances change during the pendency of the MDL proceedings; and stating that absent “extraordinary circumstances” the court would not allow discovery into third-party litigation financing, citing a case which held the information shielded from disclosure by the work-product doctrine.
- [In re Zantac \(Ranitidine\) Prods. Liab. Litig.](#), 2020 WL 1669444, at *5-6 (S.D. Fla. Apr. 3, 2020) (stating that selection of plaintiff leadership counsel in the MDL “warrants transparency, the highest regard for professional conduct, and confidence in the leadership and in the manner in which the case is handled by all parties,” so each applicant was directed to provide written responses to questions that included whether counsel or the person’s firm has financing that is contingent upon the litigation; if so, then counsel must answer: (1) whether the litigation funder has control (direct or indirect, actual or apparent or implied) over the decision to file or the content of any motions or briefs, or any input into the decision to accept a settlement offer? (2) whether the financing creates a conflict of interest for counsel, undermine counsels’ obligation of vigorous advocacy, affect counsel’s independent judgment, gives to the lender control over litigation strategy or settlement decisions, or affects party control of settlement? (3) briefly explain the nature of the financing, the amount of the financing, and submit a copy of the documentation to the Special Master; and (4) disclose any other relationship or fact that counsel believes, if known, would be material to the court with respect to either an actual conflict of interest or the appearance of a conflict of interest).

Federal District Court Local Rules— General Disclosure

According to the U.S. Chamber of Commerce Institute for Legal Reform, “Approximately 25% of federal district courts have local rules or forms written broadly enough to require disclosure of the identity of litigation funders in some circumstances. These districts expand on Federal Rule of Civil Procedure 7.1, which provides for corporate disclosure statements. These courts typically require a party to disclose the identity of any person or entity (other than the parties to the case) that has a financial interest in the outcome of the case. Some districts limit this disclosure obligation to corporate parties, while others extend the requirement to all private parties. The purpose of these local rules is to assist judges with assessing possible recusal or disqualification. These rules do not require disclosure of the litigation finance agreement itself.” U.S. Chamber of Commerce, Third Party Litigation Funding: Federal and State Disclosure Rule Requirements (2022).

DISTRICT OF ARIZONA

[D. Ariz. L.R. 7.1.1](#) | (“The disclosure statement required by Rule 7.1 of the Federal Rules of Civil Procedure... must be made on a [form](#) provided by the Clerk,” which requires disclosure of the identities of any publicly held corporation, not a party to the case, with a financial interest in the outcome of the litigation.).

CENTRAL DISTRICT OF CALIFORNIA

[C.D. Cal. L.R. 7.1-1](#) | (“[A]ll non-governmental parties shall file with their first appearance a Notice of Interested Parties, which shall list all persons, associations of persons, firms, partnerships, and corporations...that may have a pecuniary interest in the outcome of the case....”).

NORTHERN DISTRICT OF CALIFORNIA

N.D. Cal. L.R. 3-15 | (Upon making a first appearance, a party “must disclose any persons, associations of persons, firms, partnerships, corporations (including parent corporations), or other entities other than the parties themselves known by the party to have either: (i) a financial interest of any kind in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding” and must “supplement its certification if an entity becomes [financially] interested... during the pendency of the proceeding.”).

MIDDLE DISTRICT OF FLORIDA

[M.D. Fla. L.R. 3.03\(a\)](#) | (“With the first appearance, each party must file a disclosure statement identifying: (1) each person—including each lawyer, association, firm, partnership, corporation, limited liability company, subsidiary, conglomerate, affiliate, member, and other identifiable and related legal entity—that has or might have an interest in the outcome....”).

NORTHERN DISTRICT OF GEORGIA

[N.D. Ga. L.R. 3.3\(A\)\(2\)](#) | (a party “must at the time of first appearance file with the clerk a certificate containing... [a] complete list of other persons, associations, firms, partnerships, or corporations having either a financial interest in or other interest which could be substantially affected by the outcome of this particular case...”).

SOUTHERN DISTRICT OF GEORGIA

[S.D. Ga. L.R. 7.1.1](#) | (parties must file a disclosure statement with the complaint or answer certifying “a full and complete list of all parties, all officers, directors, or trustees of parties, and all other persons, associations of persons, firms, partnerships, subsidiary or parent corporations, or organizations which have a financial interest in, or another interest which could be substantially affected by, the outcome of the particular case....”)

NORTHERN DISTRICT OF IOWA

[N.D. Iowa L.R. 7.1](#) | (Within 21 days after a civil complaint is filed, a plaintiff must file “a disclosure form containing the following: (1) The names of all associations, firms, partnerships, corporations, or other artificial entities that...have a direct or indirect pecuniary interest in the plaintiff’s outcome of the case; and (2) With respect to each such entity, a description of its connection to or interest in the litigation.”).

SOUTHERN DISTRICT OF IOWA

[S.D. Iowa L.R. 7.1](#) | (Within 21 days after a civil complaint is filed, a plaintiff must file “a disclosure form containing the following: (1) The names of all associations, firms, partnerships, corporations, or other artificial entities that...have a direct or indirect pecuniary interest in the plaintiff’s outcome of the case; and (2) With respect to each such entity, a description of its connection to or interest in the litigation.”).

DISTRICT OF MARYLAND

[D. Md. L.R. 103.3\(b\)](#) | (“When filing an initial pleading... counsel shall file a statement (separate from any pleading) containing...[t]he identity of any corporation, unincorporated association, partnership, or other business entity, not a party to the case, which may have any financial interest whatsoever in the outcome of the litigation, and the nature of its financial interest.”).

EASTERN DISTRICT OF MICHIGAN

[E.D. Mich. L.R. 83.4\(b\)\(2\)](#) | (“Whenever, by reason of...profit sharing agreement.., a publicly owned corporation or its affiliate, not a party to the case, has a substantial financial interest in the outcome of the litigation, counsel for the party whose interest is aligned with that of the publicly owned corporation or its affiliate must file the statement of disclosure...identifying the publicly owned corporation and the nature of its or its affiliate’s substantial financial interest in the outcome of the litigation.”).

WESTERN DISTRICT OF MICHIGAN

[Local Form pursuant to Federal Rule of Civil Procedure 7.1](#) | (“Disclosure of Corporate Affiliations and Financial Interest” form requiring disclosure of the identities of any public corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation, and a description of the nature of the interest).

DISTRICT OF NEBRASKA

[Local Form pursuant to Federal Rule of Civil Procedure 7.1](#) | (“Disclosure of Corporate Affiliations, Financial Interest, and Business Entity Citizenship” form requiring disclosure of the identities of any individuals, publicly held corporations or other publicly held entities, or parent corporations with a “direct financial interest in the outcome of the litigation,” and a description of the nature of any financial interest).

DISTRICT OF NEVADA

[Nev. L.R. 7.1-1](#) | (With the first appearance, a party “must identify in the disclosure statement all persons, associations of persons, firms, partnerships or corporations (including parent corporations) that have a direct, pecuniary interest in the outcome of the case” and “must promptly file a supplemental certification upon any change in the information that this rule requires.”).

EASTERN DISTRICT OF NORTH CAROLINA

[E.D.N.C. L. Civ. R. 7.3\(b\)\(2\)](#) | (“All parties shall identify any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of this litigation by reason of a...profit sharing agreement....”).

MIDDLE DISTRICT OF NORTH CAROLINA

[Local Form](#) | (“Disclosure of Corporate, Affiliations and Other Entities With a Direct Financial Interest in Litigation” form requiring disclosure of the identities of any publicly held corporations, publicly held entities, or parent corporations with a “direct financial interest in the outcome of the litigation,” and a description of the nature of any financial interest).

WESTERN DISTRICT OF NORTH CAROLINA

[Local Form](#) | (“Disclosure by Non-Governmental Corporate Party of Corporate Affiliations and Other Entities With a Direct Financial Interest in Litigation” form requiring disclosure of the identities of any publicly held corporations, publicly held entities, or parent corporations with a “direct financial interest in the outcome of the litigation,” and a description of the nature of any financial interest).

EASTERN DISTRICT OF OKLAHOMA

[Local Form pursuant to Federal Rule of Civil Procedure 7.1](#) | (“Corporate Disclosure Statement” requiring non-governmental parties to “file a statement that identifies any parent corporation and any publicly held corporation” with a “direct financial interest in the outcome of the litigation” and to describe the nature of such interest).

NORTHERN DISTRICT OF OKLAHOMA

[Local Form pursuant to Federal Rule of Civil Procedure 7.1](#) | (“Corporate Disclosure Statement” requiring non-governmental parties to “file a statement that identifies any parent corporation and any publicly held corporation” with a “direct financial interest in the outcome of the litigation” and to describe the nature of such interest).

WESTERN DISTRICT OF OKLAHOMA

[Local Form pursuant to Federal Rule of Civil Procedure 7.1](#) | (“Corporate Disclosure Statement” requiring non-governmental parties to “file a statement that identifies any parent corporation and any publicly held corporation” with a “direct financial interest in the outcome of the litigation” and to describe the nature of such interest).

MIDDLE DISTRICT OF TENNESSEE

[M.D. Tenn. L.R. 7.02](#) | (“Any non-governmental business entity party must file a Business Entity Disclosure Statement, using the form located on the Court’s website. A party must file the Business Entity Disclosure Statement as a separate document with its initial pleading, or other initial court filing, and must supplement the Business Entity Disclosure Statement within a reasonable time of any change in the information.”).

NORTHERN DISTRICT OF TEXAS

[N.D. Tex. L.R. 3.1\(c\)](#) | (A plaintiff's electronically filed complaint must be accompanied by a "signed certificate of interested persons... that contains... a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities that are financially interest in the outcome of the case."); 3.2(e) (same for complaints filed on paper); 81.1(a)(1)(D) (Upon removal from state court, a party must file "a separately signed certificate of interested persons that complies with LR 3.1(c) or 3.2(e).").

WESTERN DISTRICT OF TEXAS

[W.D. Tex. L.R. CV-33\(b\)\(3\)](#) | (A party may use interrogatories to ascertain the identities of "a partner, a partnership, or a subsidiary or affiliate of a publicly owned corporation that has a financial interest in the outcome of this lawsuit... and the relationship between [those entities] and [the named party].").

WESTERN DISTRICT OF VIRGINIA

[Local Form](#) | ("Disclosure of Corporate Affiliations and Other Entities With a Direct Financial Interest in Litigation" form requiring disclosure of the identities of any public corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation).

WESTERN DISTRICT OF WISCONSIN

[Local Form](#) | ("Disclosure of Corporate Affiliations and Financial Interest" form requiring disclosure of the identities of any publicly owned corporation, not a party to the case, with a financial interest in the outcome of the litigation, and description of the nature of the financial interest).

Federal Appellate Court Local Rules – General Disclosure

Almost half of the U.S. Courts of Appeals have rules that require identification of litigation funders in some circumstances. "These rules expand Federal Rule of Appellate Procedure 26.1, which requires any nongovernmental corporation that is a party to file a Corporate Disclosure Statement. Judges use this disclosure statement for disqualification or recusal purposes. No federal appellate court requires the disclosure or production of the litigation finance agreement itself." *U.S. Chamber of Commerce, Third Party Litigation Funding: Federal and State Disclosure Rule Requirements* (2022).

THIRD CIRCUIT

[3rd Cir. L.R. 26.1.1\(b\)](#) | ("Every party to an appeal must identify on the disclosure statement required by [Federal Rule of Appellate Procedure] 26.1 every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest.").

FOURTH CIRCUIT

[4th Cir. L.R. 26.1\(a\)\(2\)\(B\)](#) | ("A party...must identify any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of the litigation by reason of a...profit sharing agreement...or state that there is no such corporation.").

FIFTH CIRCUIT

[5th Cir. L.R. 28.2.1](#) | ("Counsel...will furnish a certificate for all private (non-governmental) parties...on the first page of each brief...and which must certify a complete list of all persons, associations of persons,

firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation.”).

TENTH CIRCUIT

[10th Cir. L.R. 46.1\(D\)\(1\) & \(2\)](#) | (“Each entry of appearance must be accompanied by a certificate listing the names of all interested parties not in the caption... The certificate must list all persons, associations, firms, partnerships, corporations, guarantors, insurers, affiliates, and other legal entities that are financially interested in the outcome of the litigation.”).

ELEVENTH CIRCUIT

[11th Cir. L.R. 26.1-1\(a\)\(1\)](#) | (“Every party...must include a certificate of interested persons...with every motion, brief, answer, response, and reply filed.”).

[11th Cir. L.R. 26.1-2\(a\)](#) | (“A [certificate of interested persons] must contain a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party’s stock, and other identifiable legal entities related to a party.”).

Cases Allowing Discovery of Third-Party Litigation Funding in Some Circumstances

- ***Nunes v. Lizza***, 2021 WL 7186264, at *3-6 (N.D. Iowa Oct. 26, 2021) (in defamation case by close family members of prominent U.S. congressman with a history of litigation against media defendants, the magistrate judge noted, “courts across the country...have held that litigation funding information is generally irrelevant to proving the claims and defenses in a case,” but “[d]iscovery into litigation funding is appropriate when there is a sufficient factual showing of ‘something untoward’ occurring in the case,” and defendants raised “legitimate subjects for inquiry not present in a more run-of-the-mill personal injury case or commercial dispute,” so the court permitted discovery, subject to in camera inspection, to determine if the congressman was funding the lawsuit, finding the information relevant to (1) whether plaintiffs remained the real party in interest, (2) illuminate possible bias by the congressman—a witness in the case—and (3) refute a potential “David vs. Goliath” narrative at trial) (citations omitted).
- ***In re Sanctuary Belize Litig.***, 2021 WL 2875508, at *2 (D. Md. July 8, 2021) (after reviewing a litigation financing agreement between a commercial litigation finance firm and a party in camera, the district court ordered counsel to produce to the FTC and Receiver “any term sheet and any further litigation financing agreement.”).
- ***In re Outlaw Labs., LP Litig.***, 2021 WL 5768123, at *2 (S.D. Cal. June 29, 2021) (district court in a RICO class action denied an ex parte motion by dismissed defendants to prevent former counsel and main counter-defendant from producing email communications between the dismissed defendants and a litigation funder, stating the dismissed defendants “failed to establish how the communication shared with a third-party litigation funder retains the attorney-client privilege protection.”).
- ***Eastern Profit Corp. Ltd. v. Strategic Vision US, LLC***, 2020 WL 7490107, at *8 (S.D.N.Y. Dec. 18, 2020) (in breach of contract claim by company associated with a person who claimed to be a Chinese dissident against a research services firm that was hired to bolster the person’s “whistleblower campaign” against the Chinese Communist Party (CCP), but who may have been a double agent working for the CCP, plaintiff was permitted to

depose defendant to explore whether defendant's litigation was funded by someone associated with the CCP since the establishment of a relationship between defendant and the CCP would undermine defendant's claim that it relied upon plaintiff's statements opposing the CCP when it entered into the research agreement, the district court held: "The identity of a person providing litigation funding...is not protected by the attorney-client privilege or attorney work product doctrine.").

- **Impact Engine, Inc. v. Google LLC**, 2020 U.S. Dist. LEXIS 145636, at *4-5 n.2 (S.D. Cal. Aug. 12, 2020) (magistrate judge in patent infringement case held that litigation funding agreements and related documents were relevant, explaining: "courts have generally ruled that litigation funding agreements and related documents are relevant and discoverable in patent litigation" to "(1) establish the value of the patents at issue; (2) obtain statements made by [plaintiff] regarding the patents at issue; and (3) refute potential trial themes," while noting that any privilege or protection from disclosure was not before the court and that "potentially applicable privileges and protections from disclosure (such as the attorney-client privilege and the attorney work-product doctrine) may apply to litigation funding agreements and related documents.").
- **Finjan, Inc. v. SonicWall, Inc.**, 2020 WL 4192285, at *4 (N.D. Cal. July 21, 2020) (in patent infringement action, the magistrate judge said that the attorney-client privilege would not protect disclosure of information shared with a third party litigation funder).
- **Continental Circuits LLC v. Intel Corp.**, 435 F. Supp. 3d 1014, 1024 n.5 (D. Ariz. 2020) (patent infringement dispute where the district court allowed discovery of the identities of all persons or entities (other than counsel) with a fiscal interest in the outcome of the litigation, explaining "the fact of the funding agreements' existence does not disclose attorney mental impressions and therefore is not shielded from discovery by the work product protection for intangible information.").
- **Fulton v. Foley**, 2019 WL 6609298, at *4 (N.D. Ill. Dec. 5, 2019) (court in wrongful arrest case held that, while litigation funding documents and documents pertaining to information and communications between plaintiff, his counsel, and a litigation funder to secure and manage the funding agreement that related to counsel's mental impressions were not discoverable, plaintiff had to produce "all non-mental impressions, fact-based information and documents, including any statements provided by Plaintiff directly, if any, that was provided to [the funder].").
- **Acceleration Bay LLC v. Activision Blizzard, Inc.**, 2018 WL 798731, at *2 (D. Del. Feb. 9, 2018) (district court in patent infringement action held that plaintiff's communications with litigation funder at the time of the funder's due diligence were not protected work product because they were "prepared with a 'primary' purpose of obtaining a loan, as opposed to aiding in possible future litigation;" the common interest attorney-client privilege did not apply because plaintiff and the funder did not possess "identical legal interests in the patents-in suit or were otherwise 'allied in a common legal cause' at the time of the communications;" and the documents were relevant).
- **In re Gawker Media LLC**, 2017 WL 2804870, at *7 (Bankr. S.D.N.Y. June 28, 2017) (granting motion for discovery into litigation financing agreements and relationships under bankruptcy rules as relevant).
- **U.S. v. Homeward Residential, Inc.**, 2016 WL 1031154, at *5 (E.D. Tex. Mar. 15, 2016) (district court in qui tam action over alleged violations of federal and state real estate laws ordered Relators to file amended answers to interrogatories disclosing the identities of their prospective and actual litigation funders "as relevant to the claim under the Local Rules.").
- **United States v. Ocwen Loan Servicing, LLC**, 2016 WL 1031157, at *5 (E.D. Tex. Mar. 15, 2016) (magistrate judge in qui tam action over alleged violations of federal and state real estate laws ordered Relators to file amended answers to interrogatories disclosing the identities of their potential and actual litigation funders "as relevant to the claim under the Local Rules.").
- **Odyssey Wireless, Inc. v. Samsung Electronics, Co., Ltd.**, 2016 WL 7665989, at *6-7 (S.D. Cal. Sept. 20, 2016) (magistrate judge in patent infringement action stated that "[s]everal courts have found that the attorney work-product protection that attaches to litigation financing documents is not waived when these documents are

disclosed to third-party litigation funders,” and found no waiver of the attorney work-product privilege, but defendants showed a substantial need for documents regarding the valuations of plaintiff’s patents and were entitled to those documents with “portions of the documents that do not address these valuations...redacted before production.”).

- **Gbarabe v. Chevron Corp.**, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016) (court in putative class action arising out Nigerian oil spill granted defendant’s motion to compel production of plaintiff’s litigation funding agreement and related documents as relevant to assessing plaintiff’s ability to adequately represent the class).
- **In re Int’l Oil Trading Co., LLC**, 548 B.R. 825, 839 (S.D. Fla. Bankr. 2016) (in action by judgment creditor who filed involuntary petition against alleged debtor with support of a litigation funder, the bankruptcy court held that, because a key fact at issue in the case was whether the judgment creditor transferred some or all of its claim to the funder in exchange for financing, the debtor demonstrated a “substantial need” to obtain the funding agreement but the judgment creditor could redact “core opinion work product” such as the terms of payment and attorney mental impressions and opinion about the case).
- **Haghayeghi v. Guess?, Inc.**, 2016 WL 9526465, at *1 (S.D. Cal. Mar. 21, 2016) (magistrate judge in putative Telephone Consumer Protection Act class action held that litigation funding documents were “relevant to whether Plaintiff would adequately protect the interests of the class.”).
- **Morley v. Square, Inc.**, 2015 WL 7273318, at *3 (E.D. Mo. Nov. 18, 2015) (patent infringement case where the district court ordered disclosure of communications between plaintiffs and third-party litigation funders “with redactions of the [work product] protected information while revealing the underlying facts conveyed to the litigation funders.”).
- **Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co.**, 2015 WL 1540520, at *5 (Del. Super. Ct. Mar. 31, 2015) (patent infringement case where the court ordered plaintiff to disclose a redacted version of the litigation funding agreement that maintained the confidentiality of the payment terms (i.e., the contingency fee charged by plaintiff’s counsel, the percentage of the recovery the funder was entitled to, and the interest rate the funder received on its investment in certain circumstances), finding the redacted information to be protected work product).
- **Cohen v. Cohen**, 2015 WL 745712, at *4 (S.D.N.Y. Jan. 30, 2015) (after in camera review, the court ordered disclosure of email communications between plaintiff and a litigation funder in a common law fraud and breach of fiduciary duty action alleging defendant and his brother hid marital assets during defendant’s divorce from plaintiff over two decades ago, stating the funder had “no privileged relationship to Plaintiff.”); but see *Cohen v. Cohen*, 2015 WL 4469704, at *5 (S.D.N.Y. June 29, 2015) (after the court ordered plaintiff to produce certain email communications that the court found unprivileged, plaintiff withheld the documents on relevancy grounds, leading the court to review the documents for a second time in camera and order production of factual information or statements by plaintiff about the case or her former husband, “which [were] relevant either for their revelation of pertinent facts or as bearing on Plaintiff’s credibility.”).
- **Doe v. Soc’y of Missionaries of Sacred Heart**, 2014 WL 1715376, at *4 (N.D. Ill. May 1, 2014) (personal injury case involving alleged childhood sexual abuse where the district court ordered plaintiff to produce redacted “fact work product” litigation financing materials that “could potentially shed light on the statute of limitations defense asserted by [defendant].”), reconsideration denied, 2014 WL 1715376, at *4 (N.D. Ill. May 1, 2014)).
- **Cobra Int’l, Inc. v. BCNY Int’l, Inc.**, 2013 WL 11311345, at *3 (S.D. Fla. Nov. 4, 2013) (magistrate judge ordered production of a litigation funding agreement as relevant to establishing plaintiff’s ownership of the subject patent and standing to bring a patent infringement case).
- **Leader Techs., Inc. v. Facebook, Inc.**, 719 F. Supp. 2d 373, 377 (D. Del. 2010) (district court held that magistrate judge in patent infringement action did not commit clear error in finding the common interest privilege inapplicable to communications between plaintiff and potential litigation funders).

- **Miller UK Ltd. v. Caterpillar, Inc.**, 17 F. Supp. 3d 711, 738, 740 (N.D. Ill. 2014) (in matter involving misappropriation of trade secrets and breach of contract, the court held that where plaintiff had no written or oral confidentiality agreements with funders as to non-deal documents (i.e., documents not evidencing the structure and terms of the funding transaction), the attorney work product privilege was waived and plaintiff was ordered to produce “all damage summaries, damage estimates, and spread sheets” shared with the funders; the court, however, noted that “[w]ith or without a confidentiality agreement, it could be argued that a prospective funder would hardly advance his business interests by gratuitously informing an applicant’s adversary in litigation about funding inquiries from that company. To do so would announce to future litigants looking for funding this was a company not to be trusted. Depending on all the surrounding circumstances, that perhaps could give rise to a reasonable expectation of confidentiality on which [plaintiff] could have relied,” but since plaintiff did not make the argument the court did not pursue it further).
- **Cf. 3rd Eye Surveillance, LLC v. United States**, 158 Fed. Cl. 216, 228-229 (Fed. Cl. 2022) (plaintiff in patent infringement action required to produce litigation funding agreement in camera to enable the necessary determinations as to whether the agreement was discoverable and, as to other communications between the plaintiff and the funder, plaintiffs were ordered to “identify what documents, if any, have been produced to a litigation funder that have also already been produced and what pertinent documents it is withholding and on what grounds” to allow the court to assess their discoverability).
- **Cf. Securitypoint Holdings, Inc. v. United States**, 2019 WL 1751194, at *5 (Fed. Cl. Apr. 16, 2019) (litigation funding agreement was ordered to be produced for in camera review to determine whether the government had demonstrated a need for information as to assignment or joinder so as to overcome the court’s prior finding that the agreement was protected as work product, explaining: “Litigation funding agreements are often considered by the federal courts to be protected by the work product doctrine or as otherwise irrelevant to the issues at hand.”).
- **Cf. Fastship, LLC v. United States**, 143 Fed. Cl. 700, 716-17 (Fed. Cl. 2019) (“The subject of litigation financing is a controversial one. Several circuits around the country have amended their local rules to require disclosure of litigation financing agreements with third parties that have a financial interest in the outcome.... [L]itigation financing agreements can occasionally be susceptible to abuse.... But the possibility of abuse does not mean the entire system should be discarded. Instead, courts have focused on the disclosure of such agreements to encourage transparency and ensure a shadow broker is not using litigation as a form of harassment or for multiple bites at the same apple. Disclosure also enables judges to appropriately evaluate potential recusal due to conflicts of interest.”), vacated and remanded on other grounds, 968 F.3d 1335 (Fed. Cir. 2020).

Cases Denying Discovery of Third-Party Litigation Funding

- **Earl v. Boeing Co.**, 2021 WL 3343232, at *3 (E.D. Tex. Aug. 2, 2021) (in putative class action over alleged aircraft safety defects, where plaintiffs’ counsel “disclosed the absence of ‘any litigation funding arrangements,’” the district court held that it would be “disproportionate and overly burdensome” to require the firms to respond to a request for production as to another plaintiffs’ law firm that was no longer counsel of record in the case).
- **Preservation Techs. LLC v. MindGeek USA, Inc.**, 2020 WL 10965161, at *6-7 (C.D. Cal. Dec. 18, 2020) (in this patent infringement case, the special master explained, “Despite the trend denying discovery into litigation funding, courts have been more receptive to allowing such discovery in patent infringement cases, given patent cases’ unique standing requirements and the potential for funding agreements to shed light on patents’ value,” then found the litigation funding documents “relevant to assessing the value of the disputed patents in this suit;” nonetheless, the special master said the work product doctrine “shields those documents from discovery” and ruled

that the defendant did not show a substantial need to access the documents or demonstrate that it could not access substantially equivalent information about the disputed patents' value elsewhere).

- **Art Akiane LLC v. Art & Soulworks LLC**, 2020 WL 5593242, at *5-6 (N.D. Ill. Sept. 18, 2020) (magistrate judge denied discovery of overly-broad request for third-party litigation funding materials in dispute over commercial rights to about a dozen paintings, explaining: "courts that have examined the issue have generally held that litigation funding documents are protected by the work-product doctrine.... In most instances, the real (not theoretical) significance and purpose of the inquiry is to learn whether litigation funding is involved in the case. That knowledge would allow the inquiring party to learn whether its opponent has financial difficulties requiring an outside infusion of capital, necessary to allow a party to sue in the first place or to defend itself in litigation. But those facts are 'irrelevant'— and potentially harmful to the party obtaining litigation funding—without legitimately advancing the purposes of litigation or of defense one whit. In short, broadly asking in discovery for 'documents relating to third-party funding for this litigation' is insufficient without some detailed, meaningful explanation to satisfy the requirement of relevancy.").
- **United Access Techs., LLC v. AT&T Corp.**, 2020 WL 3128269, at *1 (D. Del. June 12, 2020) (district court in patent infringement action noted that "[d]iscoverability of litigation funding materials is a contested issue" and held that defendant "failed to meet the threshold requirement to show that the litigation funding-related discovery it seeks here is relevant.").
- **Continental Circuits LLC v. Intel Corp.**, 435 F. Supp. 3d 1014, 1021-1023 (D. Ariz. 2020) (patent infringement dispute where the district court found that agreements between plaintiff and third-party funders were relevant to refute any David vs. Goliath narrative at trial, likely to contain information as to the value of the litigation and, therefore, to the value of the allegedly infringed patents, useful to explore the credibility of any witness receiving substantial compensation through the litigation, and helpful to identify any jurors with a relationship with the funders, but held the litigation funding agreements were not discoverable because they constituted work product, the protection was not waived by being shared with funders since the agreements included confidentiality provisions, and the defendant could not show a substantial need for the information).
- **V5 Techs. v. Switch, Ltd.**, 334 F.R.D. 306, 311-12 (D. Nev. 2019) (in antitrust action denying discovery of third-party litigation funding documents, the magistrate judge explained: "Discovery into litigation funding is appropriate when there is a sufficient factual showing of 'something untoward' occurring in the case; '[f]or example, discovery will be [o]rdered where there is a sufficient showing that a non-party is making ultimate litigation or settlement decisions, the interests of plaintiffs or the class are sacrificed or not being protected, or conflicts of interest exist.'" But defendant made "no factual showing" to support its theories that plaintiff's litigation funding was relevant; instead, defendant "essentially recycled the same speculation that other courts have rejected as insufficient bases on which to permit discovery into the source of litigation funding." (citations omitted), *aff'd*, 2020 WL 1042515 (D. Nev. Mar. 3, 2020) (affirming denial of defendant's motion to compel discovery and finding magistrate judge's ruling was not clearly erroneous or contrary to law).
- **Fulton v. Foley**, 2019 WL 6609298, at *2-3 (N.D. Ill. Dec. 5, 2019) (magistrate judge in wrongful arrest case held that litigation funding documents, including the terms of the deal and the funding agreements, were not relevant and documents pertaining to information and communications between plaintiff, his counsel, and a litigation funder to secure and manage the funding agreement that related to counsel's mental impressions, including counsel's description of the case and assessment of the strengths and weaknesses of the case, were irrelevant, protected work product, stating: "Courts that have examined this issue have generally held that litigation funding documents are protected by the work product doctrine.").
- **In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig.**, 405 F. Supp. 3d 612, 615 (D.N.J. 2019) (magistrate judge in MDL relating to allegedly contaminated prescription drug denied defendants' request for *carte blanche* discovery of plaintiffs' litigation funding, agreeing "with the plethora of authority that holds that discovery directed to a plaintiff's litigation funding is irrelevant," while

noting that litigation funding discovery is not off-limits in all instances, such as in “cases where something untoward occurred....”).

- **Benítez v. Lopez**, 2019 WL 1578167, at *1 (E.D.N.Y. Mar. 14, 2019) (magistrate judge in civil rights case against the City of New York and some of its employees denied discovery of litigation funding materials as irrelevant to any party’s claims or defense.).
- **MLC Intellectual Prop. LLC v. Micron Tech., Inc.**, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019) (in patent infringement action where plaintiff complied with local rule requiring disclosure of anyone with a financial interest in the case, the district court denied discovery seeking disclosure of litigation funding agreements as irrelevant where there was no specific articulated reason to suspect bias or conflicts of interest).
- **Space Data Corp. v. Google LLC**, 2018 WL 3054797, at *1 (N.D. Cal. June 11, 2018) (in patent infringement action where plaintiff “proffer[ed] an importance piece of information: it does not have any third-party litigation financing,” the magistrate judge denied discovery as to litigation funding considered by plaintiff as irrelevant and stated that, “[e]ven if litigation funding were relevant (which is contestable), potential litigation funding is a side issue at best.”) (emphasis in original).
- **Lambeth Magnetic Structures LLC v. Seagate Tech.** (US) Holdings Inc., 2018 WL 466045, at *6 (W.D. Pa. Jan. 18, 2018) (district court denied discovery of communications between plaintiff and litigation funders and funding agreements in patent infringement actions as “shielded under work product protection.”).
- **Viamedia, Inc. v. Comcast Corp.**, 2017 WL 2834535, at *1 (N.D. Ill. June 30, 2017) (district court in patent infringement action denied defendant’s request for documents plaintiff disclosed to prospective litigation financing firms as “protected by the work-product doctrine.”).
- **Eidos Display, LLC v. Chi Mei Innolux Corp.**, 2017 WL 2773944, at *1 (E.D. Tex. May 26, 2017) (magistrate judge granted plaintiffs’ motion in limine to prohibit references to litigation funding documents in patent infringement trial).
- **AVM Techs., LLC v. Intel Corp.**, 2017 WL 1787562, at *3 (D. Del. May 1, 2017) (district court excluded testimony as to plaintiff’s litigation funding agreements in patent infringement action as irrelevant and unduly prejudicial, stating, “The best that can be said about litigation funding agreements is that they are informed gambling on the outcome of litigation.”).
- **Mackenzie Architects, P.C. v. VLG Real Estates Developers, LLC**, 2017 WL 4898743, at *2-3 (N.D.N.Y. Mar. 3, 2017) (magistrate judge denied disclosure of litigation finance documents sought by defendant in copyright action to assess plaintiff’s claim for reasonable attorney fees as “not proportionally relevant to the needs of the case at this time,” since there had been no determination of the merits of the plaintiff’s case, and taking “no position as to whether Defendants would be entitled to such information in the event plaintiff prevails.”).
- **VHT, Inc. v. Zillow Grp., Inc.**, 2016 WL 7077235, at *1 (W.D. Wash. Sept. 8, 2016) (district court declined to compel disclosure of third-party funding information allegedly related to question of standing in a copyright suit as “disproportional to the needs of the case.”).
- **Ioengine, LLC v. Interactive Media Corp.**, 1:14-cv-01571-GMS, slip op. at 2 (D. Del. Aug. 3, 2016) (district court denied to compel production of documents plaintiff disclosed to prospective litigation funders as protected work product).
- **Harper v. Everson**, 2016 WL 8201785, at *5 (W.D. Ky. June 27, 2016) (magistrate judge rejected discovery requests related to third party litigation funding in an ERISA case as irrelevant).
- **Ashghari-Kamrani v. United Servs. Automobile Ass’n**, 2016 WL 11642670, at *4 (E.D.V.A. May 31, 2016) (magistrate judge denied motion to compel response to interrogatory seeking litigation funding information in a patent infringement case, stating: “Litigation funding is merely a relevancy issue: Information about a party’s

litigation funding is only relevant (and ultimately discoverable) if the requesting party has an actual basis for the relevancy of the information other than mere speculation or fishing.”).

- ***In re Int'l Oil Trading Co., LLC***, 548 B.R. 825, 832, 836 (S.D. Fla. Bankr. 2016) (in action by judgment creditor who filed involuntary petition against alleged debtor with support of a litigation funder, the bankruptcy court held that all communications between the judgment creditor and funder were “protected by both the common interest exception and the agency exception” to waiver of the attorney-client privilege and work product protection, and there was no showing of “substantial need” and “undue hardship” if the alleged debtor had to obtain the information in another manner).
- ***U.S. v. Homeward Residential, Inc.***, 2016 WL 1031154, at *6 (E.D. Tex. Mar. 15, 2016) (district court denied disclosure of funding agreements and plaintiff’s communications with funders as “protected by the work product doctrine” in qui tam action over alleged violations of federal and state real estate laws and defendants did not demonstrate a “substantial need” for the information).
- ***United States v. Ocwen Loan Servicing, LLC***, 2016 WL 1031157, at *6-7 (E.D. Tex. Mar. 15, 2016) (magistrate judge denied disclosure of funding agreements and communications with funders as “protected by the work product doctrine” in qui tam action over alleged violations of federal and state real estate laws and defendants did not demonstrate a “substantial need” for the information).
- ***Kaplan v. S.A.C. Capital Advisors, L.P.***, 2015 WL 5730101, at *3 (S.D.N.Y. Sept. 10, 2015) (putative shareholder class action where magistrate judge declined to compel production of litigation funding documents that defendant sought to assess the fitness of plaintiff counsel to represent the class where the defendants “provided no nonspeculative basis for raising such concerns,” and counsel’s past work on the litigation, partnership with other firms and assurances about the firm’s resources gave the court no basis to conclude that counsel’s financial resources were inadequate, thus the requested documents were not relevant to any party’s claim or defense).
- ***Sanchez Ritchie v. Sempra Energy***, 2015 WL 12912316, at *4 n.2 (S.D. Cal. Apr. 6, 2015) (in property ownership dispute, magistrate judge refused to quash subpoena on nonparty with a substantial financial interest in the case, stating that “the facts as presented suggest [deponent’s] role in this action is mostly that of a financier of plaintiff’s attorneys fees and costs. Some Federal Courts have concluded that the common interest doctrine does not apply when a party to litigation shares privileged materials with a third party who has no other interest in the case but to provide funding in exchange for a percentage of proceeds if the party prevails.”).
- ***Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.***, 2015 WL 778846, at *9 (Del. Ch. Feb. 24, 2015) (court in litigation over collapse of private equity fund during financial crisis denied disclosure of litigation funding documents under work product privilege, explaining: “the work product doctrine exists to preserve and promote the adversarial system of litigation and prevent a party from free-riding on his opponent’s efforts.... No persuasive reason has been advanced...why litigants should lose work product protection simply because they lack the financial means to press their claims on their own dime. Allowing work product protection for documents and communications relating to third-party funding places those parties that require outside funding on the same footing as those who do not and maintains a level playing field among adversaries in litigation.”).
- ***Doe v. Soc’y of Missionaries of Sacred Heart***, 2014 WL 1715376, at *4 (N.D. Ill. May 1, 2014) (personal injury case involving alleged childhood sexual abuse where the district court protected opinion work product materials shared with litigation funding companies, stating it was “significant that these litigation financing companies entered into written nondisclosure agreements that agreed not to divulge any of the information supplied to them by Plaintiff’s counsel.”), reconsideration denied, 2014 WL 1715376, at *4 (N.D. Ill. May 1, 2014) (plaintiff did not waive attorney work product protection by sharing opinion work product materials with litigation funders where the “litigation financing companies entered into written nondisclosure agreements that agreed not to divulge any of the information supplied to them by Plaintiff’s counsel” and “had self-interested reasons to protect

the work product from disclosure: breaching a written confidentiality agreement ‘would surely result in the inability to attract clients in the future,’) (citation omitted)

- **Miller UK Ltd. v. Caterpillar, Inc.**, 17 F. Supp. 3d 711, 733, 740 (N.D. Ill. 2014) (in matter involving misappropriation of trade secrets and breach of contract, the magistrate judge held that litigation funding “deal documents”—documents evidencing the structure and terms of the funding transaction—were not relevant because they had “nothing to do with the claims or defenses in the case” and showed “quite clearly” that plaintiff was the real party in interest, not an assignee or subrogee; thus, defendant was “not entitled to discover the amount of money sought or received by [plaintiff], the details of the agreement it ha[d] with its funder, or how much the funder w[ould] receive if [plaintiff] w[on] the case”; the judge also held that as to non-deal documents shared with actual or potential funders, “the funders and [plaintiff] did not share a common legal interest” so those materials “lost whatever attorney-client privilege they might otherwise have enjoyed;” finally, the judge held that where plaintiff had written or oral confidentiality agreements with funders, the non-deal documents were “protected and [were] not discoverable” attorney work-product).
- **Devon IT, Inc. v. IBM Corp.**, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012) (in action alleging a RICO violation, breach of agreements and a fiduciary duty, the district court quashed a third-party subpoena directed at a litigation funder connected to the plaintiff, stating the documents were provided to the funder under a confidentiality agreement, “protected from disclosure as work-product,” and production “would intrude upon attorney-client privilege under the ‘common-interest’ doctrine.”).

Thank you for reading.

Contact us with any questions.

Mark Behrens

Co-Chair, Public Policy Practice Group | Washington, D.C.

<mailto:mbehrens@shb.com>



Cary Silverman

Partner | Washington, D.C.

<mailto:csilverman@shb.com>



Katie Jackson

Associate | Washington, D.C.

<mailto:krjackson@shb.com>



2022

SHOOK
HARDY & BACON

ATLANTA

BOSTON

CHICAGO

DENVER

HARTFORD

HOUSTON

KANSAS CITY

LONDON

LOS ANGELES

MIAMI

NEW YORK

ORANGE COUNTY

PHILADELPHIA

SAN FRANCISCO

SEATTLE

ST. LOUIS

TAMPA

WASHINGTON, D.C.

SCIENCE | TECHNOLOGY
HEALTH | SHB.COM |
**Critical
in a crisis,
creative
in court.®**

THE CHOICE OF A LAWYER IS AN IMPORTANT DECISION AND SHOULD NOT BE BASED SOLELY UPON ADVERTISEMENTS.