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Follow the Funding
Tactics for obtaining the disclosure of third party litigation finance materials

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Within the legal community, third party litigation funding (TPLF) is either lauded for its potential to expand access to justice, or decried for how it has further inundated society with lawsuits. Most, though, agree that TPLF has had a seismic impact on the litigation landscape.

TPLF—an arrangement where outside parties pay for litigation costs in exchange for a share of any award recovered down the road—allows claimants to retain more expensive experts and litigation vendors, undergo costly (and, at times, questionable) medical treatments, and prolong litigation with costly discovery and motion practice. TPLF has had a particularly significant impact on settlement negotiations, as plaintiffs receiving TPLF are disincentivized from accepting otherwise reasonable offers to make up for the portion of the award that will be paid to the funder. Claimants are also undeterred by litigation costs—a concern that otherwise encourages plaintiffs to accept fair offers.

All is not lost, however, as some of these TPLF-driven changes can be countered through vigilant lawyering. If a plaintiff discloses a compelling expert report, for example, a rebuttal expert can often be identified to neutralize its impact. Other changes brought about by TPLF are more difficult to combat. For example, when plaintiffs reject fair settlement offers, it can be difficult to untangle whether this is because they overvalue their case, they are bluffing, or they are trying to offset funding costs. It is difficult for defense counsel to adjust its own strategy if it is unaware of TPLF's impact on the claimant's strategy.

In recent years, Congress has considered legislation that would create a uniform standard for handling the discoverability of TPLF information in federal court, at least for class actions and multidistrict legislation. The Litigation Funding Transparency Act of 2018 would require class plaintiffs to disclose the identity of the funder and provide a copy of the relevant agreement. However, this bill has not been passed and no uniform approach has been adopted for handling TPLF discovery.

Absent legislation, it can be exceedingly difficult to persuade judges that TPLF discovery must be turned over even when counsel has been given every reason to suspect that it is in play. Many jurisdictions simply have not evolved their discovery rules to address TPLF's unique impact on litigation. Nevertheless, there are notable exceptions where litigants have obtained disclosure of TPLF discovery and used the information to compelling effect. The approach to the discoverability of TPLF documents varies among state and federal jurisdictions. Only four jurisdictions currently mandate TPLF disclosure: the U.S. District Court of New Jersey, Wisconsin state courts, West Virginia state courts, and the U.S. District Court of Delaware. Meanwhile, courts in the Second, Eleventh, and Fifth Circuits have found that such documents may be discoverable when they are "relevant to credibility issues" or when they "show the bias of one party for or against another," as stated in *Eastern Profit Corp. Ltd. v. Strategic Vision US, LLC (2020). [See also ML Healthcare Services, LLC v. Publix Supermarkets, Inc. (11th Cir. 2018); Collins v. Benton (2021, E.D. La.)]. Courts in the Second Circuit have denied discovery*

when sought simply to "peer into [an] adversary's strategy…," even though TPLF documents are discoverable when relevant to issues of bias and credibility. (See Eastern Profit).

Yet another federal court, in the Eastern District of Texas, found that certain TPLF documents were protected by the attorney work product doctrine and, thus, undiscoverable. [See Mondis Technology, Ltd. v. LG Electronics, Inc. (2011)]. Given the spectrum of approaches for handling the discoverability of TPLF documents, it is imperative that litigants research how their particular jurisdiction handles such issues at the outset of the litigation. Armed with this knowledge, litigants can tailor their discovery demands to specifically target information that would fall within a court's finding of discoverability and relevance in that jurisdiction. In the few jurisdictions that mandate disclosure, tailoring discovery to the rules of a case's jurisdiction simply means demanding disclosure of documents covered by the relevant statute or local rule.

In the Second Circuit and Eleventh Circuit, this strategy requires targeting information relevant to the existence of credibility or bias, such as:

- *The identity of the financier.*
- *A copy of the finance agreement.*
- *Information about the affiliation of any third-party financier with any other party to the lawsuit.*
- *Information regarding the affiliation of any third-party financier with any witness, vendor, or law firm involved in the lawsuit (including whether they were retained in past lawsuits that the third-party financier was involved with).*
- *Information regarding the business model of any third-party financier.*
- *Information regarding the identity of any entity paying for litigation costs/invoices (including attorney's fees, medical bills, vendor costs, and experts).*
- *Information regarding any contracts between the third-party financier, vendor, witness, and/or expert.*
- *Information concerning the extent of control the third-party financier has over the litigation (including what claims to bring, what vendors or experts to retain, and whether they have settlement authority).*

Once some of the information above has been disclosed (the identity of the third-party financier, witness lists, etc.), further information can potentially be gleaned from publicly available sources, such as the financier's website or the docket of prior lawsuits. When seeking to compel such discovery, litigants should take advantage of liberal discovery standards. Fed. R. Civ. P. 26(b)(1), for example, provides that "[i] Information within the scope of discovery need not be admissible in evidence to be discoverable." Simply put, litigants are not required to make a full-fledged evidentiary showing of a fraudulent scheme in order to establish the discoverability of information concerning a third-party financier's relationship to a witness.

For example, the defendant in the 11th Circuit case, ML Healthcare, commenced its inquiry by conducting discovery into the relationship between plaintiff, her treating doctors, and ML Healthcare (a third party). In doing so, the defendant learned that ML Healthcare "is a 'litigation investment' company that contracts with doctors to provide medical care for injured people…who lack medical insurance." ML Healthcare would advance the costs of medical care to patients in exchange for the right to recover the costs from a subsequent tort settlement or judgment. As it turned out, one of plaintiff's treating doctors involved in this arrangement also planned to testify on plaintiff's behalf at trial. The defendant in ML Healthcare went on to use this information to compelling effect at trial. Under F.R.E. 401(a), evidence is relevant and should be admitted so long as "it has any tendency to make a fact more or less probable than it would be without the evidence…." At trial, the defendant argued that the TPLF arrangement was relevant and admissible because it incentivized plaintiff's treating doctor/witness to testify favorably for her so that he could continue to get referrals from ML Healthcare in the future.

Concluding that such information could potentially be relevant to the doctor's credibility and potential bias, the court in ML Healthcare allowed (and the Eleventh Circuit affirmed) the defendant to subpoena ML Healthcare for testimony regarding the financial arrangement between ML Healthcare, plaintiff, and her treating physicians. The jury ultimately returned a defense verdict. In jurisdictions where TPLF documents are protected by privilege, tailoring discovery demands to one's jurisdiction may mean limiting demands to only the most basic information (identity of the third-party financier, a copy of the financing agreement) in a manner analogous to how the jurisdiction handles the discoverability of defendants' insurance information. In matters likely to involve TPLF (class actions, multi-district litigation, patent infringement, and certain types of personal injury lawsuits), it is worth investigating the possible role of TPLF in the earliest stages of any lawsuit. As the ML Healthcare matter conveys, developing the full picture of the relationship between a third-party financier, the claimant, and others involved in a lawsuit will likely involve piecing together information from numerous sources and discovery tools, all of which are acquired incrementally and over time.

It can also be helpful to raise these issues with the presiding judge early in the litigation process, as conveyed by the parties' experience in Eastern Profit. There, the court initially permitted only limited questioning into whether the claimant was being funded by an individual or entity that was "affiliated with" an organization opposed to the counterclaim defendant. In a later decision issued by the court, however, the

court discussed how even just this limited questioning revealed that the claimant had started to receive funding from a rival of the counterclaim defendant and only asserted the fraud claim after it started receiving funding. As a result, the court questioned whether the claimant was even defrauded, or if it was simply doing the bidding of its new funder. Accordingly, introducing these issues to the court early on can help familiarize the court with the unique relevance of this still novel type of discovery.

As noted above, Congress has begun considering how to properly regulate TPLF with the drafting of the Litigation Funding Transparency Act of 2018 (S.2815). This bill was updated in 2021 and introduced for the stated purpose of "increas[ing] transparency and oversight of third-party litigation funding…." However, the bill remains in draft form. Of course, considerable time and resources now devoted to litigating the discoverability of TPLF materials would be preserved by the passage of a uniform rule regulating TPLF disclosure, even at the federal level. Until such legislation is passed, litigants should continue to pursue a mix of proactive investigation, traditional discovery tools, and creative argumentation to obtain TPLF discovery.