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Federal Courts in New Jersey May Soon Require Disclosure of Third-Party Litigation Funding

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The funding of litigation by third parties has become an increasingly big business. Substantial capital has been invested in litigation finance vehicles. The expanded use of litigation funding has been accompanied by criticism that it may be opportunistic, secretive, and lead to increased litigation. Given the criticism, some have called for more scrutiny in the area.

On April 14, 2021, the United States District Court for the District of New Jersey ("the Court") proposed a new local rule, Local Civil Rule 7.1.1 ("the Proposed Rule"), requiring automatic disclosure of information regarding third-party litigation funding. As drafted, the Proposed Rule may have significant implications for parties seeking alternative sources of funding for disputes. The Court has requested comments by May 21, 2021.

The Proposed Rule and Likely Scope (as Currently Drafted)

In circumstances where a third party provides funding for attorneys' fees and expenses in exchange for a financial interest contingent on the results of the litigation, the Proposed Rule would require disclosure of the following information: the funder's identity, including the name, address, and, if applicable, its place of formation; whether the funder's approval is required for litigation and settlement decisions and, if so, the nature of the terms and conditions of that approval; and a brief description of the nature of the funder's financial interest.

Consistent with the leading District of New Jersey case on the issue, the Proposed Rule also provides that the parties may seek additional disclosures of the terms of the agreement upon showing that 1) the funder has the right to make material litigation or settlement decisions; 2) the interests of the parties or class are not being promoted or protected, or conflicts of interest exist; or 3) additional discovery is necessary to any issue in the case. *See In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prod. Liab. Litig.*, 405 F. Supp. 3d 612, 615 (D.N.J. 2019) (requiring "sufficient showing that a non-party is making ultimate litigation or settlement decisions, the interests of the plaintiffs or the class are sacrificed or are not being protected, or conflicts of interest exist.").

Ambiguities in the Proposed Rule's language—most importantly, its potential application to persons "providing funding for some or all attorneys' fees and expenses"—leave open the question of whether the disclosure requirement includes more conventional contingency fee arrangements between a client and attorney. This lack of clarity contrasts with the disclosure rule in other jurisdictions, such as Wisconsin, where contingency fee arrangements with attorneys are expressly exempt from similar disclosure. *See, e.g.*, 2017 Wisconsin Act 235 § 12.

Disclosure of Third-Party Litigation Funding in the Top Five Patent Districts

If adopted, the Proposed Rule would be the first of its kind. Indeed, of the top five district courts for patent litigation (by volume), none requires automatic disclosure of more than the identity of the funders. *See, e.g.*, N.D. Cal. Standing Order for All Judges No. 19 (requiring disclosure of any person or entity funding the litigation of any claims or counterclaims in class, representative, or collective actions). And those jurisdictions that require disclosure of an interested party's identity generally justify the disclosure for the traditional reason of enabling the Court to evaluate possible disqualification or recusal. *See, e.g.*, C.D. Cal. L.R. 7.1-1 (requiring disclosure of identity of parties with financial interest in the case to avoid implication of judicial bias); *see also* W.D. Tex. L.R. CV-33 (generally allowing interrogatories requesting information regarding publicly owned corporations with financial interest in the case to check potential conflicts of interest).

While the Proposed Rule is also unusual in expressly providing for potential discovery of the terms of a third-party litigation funding agreement upon showing of good cause, the approach of using a heightened standard for the production of such terms *(e.g.*, requiring a showing of good cause) is aligned with case law in other jurisdictions. For example, the Northern District of California has denied requests for discovery of litigation financing on the basis that it is not relevant. *See, e.g., MLC Intell. Prop., LLC v. Micron Tech., Inc.*, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019). However, whether or not the Proposed Rule would circumvent the work-product doctrine, upon which some courts relied to deny discovery of litigation funding information, remains unclear. *See, e.g., United States v. Ocwen Loan Servicing, LLC*, No. 4:12-CV-543, 2016 WL 1031157, at *4–5 (E.D. Tex. Mar. 15, 2016) (allowing discovery of the funder's identity, but not allowing discovery of documents relating to "litigation investing efforts" based on the work-product doctrine).

Implications

Comments on the Proposed Rule will no doubt be submitted in advance of the May 21 deadline. If adopted, the Proposed Rule would likely be issued in the first week of June and go into effect immediately.

The Proposed Rule, as currently drafted, has a potential to be one of the broadest rules on required disclosure of third-party litigation funding sources. Yet, especially given the ambiguities in the current draft and the comment period, the ultimate scope of any rule ultimately adopted by the Court remains to be seen. And whether the Proposed Rule would deter litigants from seeking third-party funding for their disputes—as well as whether other courts adopt similarly expansive disclosure requirements—also remain open questions. It, however, appears likely that more and more jurisdictions will at least consider similar disclosure requirements as litigation funding becomes an even bigger part of the litigation landscape.