14. Third Party Litigation Funding and Cross-Border Discovery Subcommittees

This section of the agenda book provides brief status reports about ongoing work of other subcommittees. Because this work is at an early stage, this section is limited to providing a general status update. Each subcommittee welcomes reactions from members of the Advisory Committee and expects to continue its ongoing work.

TPLF SUBCOMMITTEE

This subcommittee was created at the Committee's October 2024 meeting, and has embarked on a program designed to educate subcommittee members about the issues involved. The topic has been on the Committee's agenda for a long time, so some background may be useful.

In mid-2014, the Chamber of Commerce proposed that Rule 26(a)(1)(A) be amended to require disclosure of third party funding of cases pending in federal court. At its Fall 2014 meeting, the Committee decided to take no action, in large part because of uncertainty about this relatively new phenomenon. In 2017, the topic was initially assigned to the MDL Subcommittee, but that subcommittee determined that TPLF did not seem to play a prominent role in MDL proceedings. The subject remained on the Committee's agenda, however.

In 2019 – partly in response to inquiries from members of Congress – the full Committee got an extensive report on the fruits of the ongoing monitoring of TPLF and decided to continue to monitor the topic but not otherwise to take action.

Meanwhile, there were developments in other arenas. In Congress, a number of bills calling for disclosure of TPLF were introduced. Most recently, in February 2025, Rep. Issa introduced H.R. 1109 (119th Cong. 1st Sess.), the Litigation Transparency Act of 2025. A copy of this bill is included in this agenda book.

Bills have been introduced in a number of states directing disclosure as well. Several years ago the State of Wisconsin adopted "tort reform" legislation that included disclosure requirements for TPLF arrangements. Other states that have entertained such legislative proposals include West Virginia and Louisiana.

Some district courts have adopted local rules or practices with regard to disclosure of funding. The District of New Jersey adopted a local rule requiring disclosure whether there was funding and, if so, of the identity of the funder. In the Northern District of California, there is a local rule or standing order calling for disclosure in class actions.

TPLF has also attracted substantial academic attention. There have been several academic conferences in the U.S. focusing on funding. In addition, an academic book published in Europe in late 2024 contained a full section on litigation funding. A symposium issue of the law journal of Tel Aviv University, to be published in 2025, contains papers from many scholars (mainly American, including this Reporter) on American experiences and concerns. There likely are other such symposia out there.

There is, in short, little question that TPLF has gained prominence. And the amount of such funding seems to be growing rather rapidly.

There seems to be sharp disagreement as to these developments. On one side, litigation funding is supported in some circles as "unlocking the courthouse door" by facilitating the assertion of valid claims.

On the other hand (as illustrated in connection with the work of the MDL Subcommittee), litigation funding is not supported as enabling the assertion of hundreds or even thousands of groundless claims "found" by claims aggregators and "sold" to lawyers who don't do their Rule 11 due diligence before filing in court. The arguments presented to the MDL Subcommittee in support of vigorous "vetting" of claims in MDL proceedings were partly based on this sort of concern.

From a rulemaking standpoint, beyond deciding whether to regard litigation funding as basically good or bad, there are a number of questions needing answers. Here are some of them:

(1) How does one describe in a rule the arrangements that trigger a disclosure obligation? In an era when lawyers and law firms often rely on bank lines of credit to pay the rent, pay salaries, hire expert witnesses, etc., all seem to agree that TPLF disclosure requirements should not apply to such commonplace arrangements.

(2) Is this problem limited to certain kinds of litigation? For example, some see MDL proceedings or "mass tort" litigation as a particular locus. Others regard patent litigation as a source of concern; in the District of Delaware there have been disputes about disclosure of funding in patent infringement litigation. Yet others (including a number of state attorneys general) fear that litigation funding may be a vehicle for malign foreign interests to harm this country, or at least hobble American companies when they compete for business abroad.

(3) Should the focus be on "big dollar" funding? One sort of funding is what is called "consumer" funding, often dealing with car crashes and involving relatively modest amounts of money. "Commercial" funding, on the other hand, is said in some instances to run to millions of dollars.

(4) Does funding prompt the filing of unsupported claims? Funders insist that they carefully scrutinize the grounds for the claims before deciding whether to grant funding, and that they reject most requests for funding. They also say that they offer expert assistance to lawyers that get the funding to help them win their cases. Since the usual non-recourse nature of funding means that the funder gets nothing unless there is a favorable outcome, it seems that funding groundless claims would not make sense.

(5) The above is largely keyed to funding of individual lawsuits. A new version, it seems, is "inventory funding," which permits the funder to acquire an interest in multiple lawsuits. One might say this verges on a line of credit; in a real sense if a firm's inventory of cases don't pay off the firm can't pay the bank. How such inventory funding actually works remains somewhat uncertain.

(6) If some disclosure is required, what should be disclosed, and to whom should it be disclosed? The original proposal called for disclosure of the underlying agreement and all underlying documentation. But if funders insist on candid and complete disclosure

regarding the strengths and weaknesses of the cases on which lawyers seek funding, core work product protections would often seem to be involved.

(7) Will requiring some disclosure lead to time-consuming discovery forays that distract from the merits of the underlying cases?

(8) What is the court to do with the information disclosed if disclosure is required? One concern is that lawyers seeking funding are handing over control of their cases in contravention of their professional responsibilities. Though judges surely have a proper role in ensuring that the lawyers appearing before them behave in an ethical manner, they would not usually undertake a deep dive into the lawyer-client relationship to make certain the lawyers are behaving in a proper manner.

(9) If judges don't normally have a responsibility to monitor the lawyers' compliance with their professional obligations, does that change when settlement is possible? Should judges then be concerned that settlement decisions are controlled by funders whose involvement is not known to the court?

There surely are other questions to be explored. Prof. Clopton has undertaken to review the growing literature on the subject of litigation funding. And presently it seems likely that the George Washington National Law Center will hold an all-day conference about the topic for the subcommittee, tentatively scheduled for October 23, 2025, the day before the Committee's Fall meeting.

CROSS-BORDER DISCOVERY SUBCOMMITTEE

This subcommittee also remains in the learning outreach mode. Its ongoing efforts include the following, among other things: In May 2024, representatives of the subcommittee met with the Lawyers for Civil Justice in Washington, D.C., to discuss cross-border issues. Then in July 2024, there was a meeting in Nashville with representatives of the American Association for Justice. In August 2024, the Sedona Conference arranged an online session with some of the members of its Working Group 6 (which focuses on cross-border discovery) and during the first week of March 2025, representatives of the subcommittee are attending the meeting of Working Group 6 in Los Angeles and will be on a panel to continue these discussions. In addition, Prof. Clopton has met with a panel of transnational discovery experts affiliated with the ABA. The information-gathering effort continues.

Significant questions remain, however. One is whether there is widespread enthusiasm for rule amendments keyed to cross-border discovery issues. To a significant extent, it seems that lawyers say "we can work that out." The basic tools for working it out seem to be in place in the rules already. There seems no doubt that any party could raise cross-border discovery issues in a Rule 26(f) discovery-planning meeting and present any disagreements to the court under Rule 16.

For at least some lawyers, the current rules appear to be sufficient. To consider one possible rule amendment – to add explicit reference to cross-border discovery to Rule 26(f) – there appear to be sectors of the bar that find that possibility extremely unnerving. For some of them, a rule change along these lines might signal to the judge that it is important to put the brakes on discovery and proceed in a gingerly manner. Some might consider that a recipe for delay tactics.