

Third-Party Litigation Financing Under the Spotlight: Judicial Conference Subcommittee Formed to Explore Disclosure Rules

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Third-party litigation financing is a significant issue in the U.S. legal system, with its use playing an increasingly important role in litigation. Whether a party should be, or is, required to disclose litigation funding from a third party, and the terms of that funding, has been the subject of heated debate for some time. On October 10, 2024, the Judicial Conference's Advisory Committee on Civil Rules agreed to create a subcommittee to evaluate whether new federal rules governing the disclosure of third-party financing should be promulgated. As we discussed in a [previous blog post](#), over the past decade the Advisory Committee has been considering changes to the Federal Rules to include mandatory disclosures related to litigation funding. The Advisory Committee's creation of a dedicated subcommittee to explore the transparency of third-party financing marks a pivotal moment, signaling that this issue is gaining attention after years of debate. The action by the Advisory Committee comes in response to rising concerns about the influence on litigation of third-party funders and increasing demands for greater transparency into who is funding lawsuits.

Concerns regarding the lack of a disclosure requirement for third-party funding were first brought to the Advisory Committee's attention in 2014.^[1] Since then, there has been a substantial increase in the amount of third-party funding of litigation. As of 2023, analysts report that the U.S. commercial litigation finance industry managed an estimated \$15.2 billion in assets, with over \$2.7 billion committed in just 2023.^[2] Despite this incredible growth and its impact on civil litigation, there is a lack of uniform rules governing the disclosure of these funding arrangements. While a few federal district courts and some states have taken steps to require parties to disclose third-party funding in certain circumstances,^[3] most courts and states do not have such disclosure requirements, highlighting the need for uniform rules to create consistency regarding disclosure of third-party litigation financing arrangements.

At its October 10, 2024 meeting, the Advisory Committee took an important first step in assessing the need for requirements surrounding the disclosure of third-party litigation funding in federal civil cases by forming a subcommittee, chaired by Chief U.S. District Judge R. David Proctor of the Northern District of Alabama, to evaluate this issue. This decision was driven by a widespread consensus within the legal community that third-party litigation funding creates real issues that require greater transparency. For example, an October 2, 2024, letter to the Advisory Committee from in-house counsel of more than 100 major corporations stated that third-party litigation funding fundamentally alters the dynamics of lawsuits by introducing undisclosed interests that can influence case strategy and settlement decisions, and obscure the true motives behind a litigation.^[4] Other organizations, such as

Lawyers for Civil Justice and the U.S. Chamber of Commerce’s Institute for Legal Reform, similarly advocated for significant reform in the federal rules with respect to third-party litigation financing transparency.^[5] As Chief U.S. District Court Judge Proctor noted at the Advisory Committee’s October 10, 2024 meeting, the landscape is “drastically changing” as third-party litigation funding becomes increasingly prevalent.^[6] The Chair of the Advisory Committee, U.S. District Court Judge Robin Rosenberg of the Southern District of Florida, similarly noted that transparency of litigation financing is “an important issue” that requires further analysis.^[7]

The recent push for transparency has not only come from the judiciary but also from Congress, highlighting the increased focus from different constituents on this issue. On October 7, 2024, Representatives Darrell Issa and Scott Fitzgerald introduced the Litigation Transparency Act, which would require mandatory disclosure of third-party litigation funding agreements in civil lawsuits.^[8] Reps. Issa and Fitzgerald noted that the proposed legislation aims to shine a light on the financial backers of litigation, addressing concerns that undisclosed investors may hold significant sway over the direction and outcome of cases.^[9] While this proposed legislation is not directly tied to the rule-making process of the Advisory Committee, both efforts reflect a broader push for increased transparency of litigation financing.

The question remains, of course, whether the Advisory Committee’s subcommittee will ultimately recommend the adoption of a federal rule requiring the disclosure of third-party litigation financing. However, the formal creation of a subcommittee to consider the issue, along with parallel congressional legislative efforts such as the Litigation Transparency Act, suggests a growing consensus that significant changes to how third-party litigation funding is disclosed and regulated in the U.S. are necessary.

Winston will continue to monitor these developments and provide updates on these issues.

[1] Advisory Committee on Civil Rules Agenda Book (Oct. 10, 2024), at 417.

[2] Westfleet Advisors Press Release, *\$2.7 Billion of Capital Committed in U.S. Commercial Litigation Finance Industry in 2023* (Mar. 27, 2024), <https://www.prnewswire.com/news-releases/2-7-billion-of-capital-committed-in-us-commercial-litigation-finance-industry-in-2023--302100047.html>.

[3] U.S. Government Accountability Office, Report on Third-Party Litigation Financing (Dec. 2022), at 27–29.

[4] Letter to H. Thomas Byron, Secretary of Committee on Rules of Practice and Procedure re: “Procedural Consistency for the Disclosure of Third-Party Litigation Funding” (Oct. 2, 2024).

[5] Letter to Advisory Committee on Civil Rules re: “It is Time to Address the Patchwork of Inadequate Practices: How the Lack of FRCP Guidance is Failing Courts and Parties Who Need a Uniform and Credible Procedure for Understanding Third-Party Litigation Funding Agreements” (Oct. 2, 2024).

[6] The American Lawyer, *Court Advisory Committee Inches Forward on Transparency in Litigation Financing* (Oct. 10, 2024), <https://www.law.com/americanlawyer/2024/10/10/court-advisory-committee-inches-forward-on-transparency-in-litigation-financing/>.

[7] *Id.*

[8] Darrell Issa Press Release, *Issa Introduces Legislation Reforming Third-Party Financed Civil Litigation* (Oct. 7, 2024), <https://issa.house.gov/media/press-releases/issa-introduces-legislation-reforming-third-party-financed-civil-litigation>.

[9] *Id.*

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