Litigation Finance Doesn't Pose a Security Risk: Legal Insight

By Adam Mortara | May 3, 2023 4:01AM ET

Trial attorney Adam Mortara says third-party litigation doesn't threaten national security or prompt frivolous lawsuits as some opponents claim. Protective orders prevent access to confidential corporate data, and sham cases wouldn't be successful anyway, he says.

Litigation finance firms provide non-recourse loans to commercial parties with lawsuits, ensuring corporate defendants can't use their wealth and access to top-flight attorneys to intimidate and crush smaller competitors. In this context, large corporations and the US Chamber of Commerce have launched a multi-pronged attack on litigation financing.

The most common complaint is that litigation financing supports frivolous lawsuits. But funders couldn't remain in business if this were generally the case. An investment in litigation funding only creates a return if there is a judgment or settlement big enough to recoup the principal of the loan and provide a return. A funder that invested in sham cases wouldn't return anything to its investors and would be unsuccessful.

Risk Exaggerated

The charge of funding frivolous litigation doesn't make much economic sense. Nor does the Chamber's charge that litigation finance creates national security risk due to potential foreign access to corporate confidential information. The story goes that, by allowing overseas investors to potentially control litigation funds, those investors will gain access to corporate defendants' intellectual property. The Chamber's worries don't address how confidential information is

protected in discovery. And it's November report lacks any actual examples of litigation funders (foreign or domestic) gaining access to sensitive corporate secrets of an opponent through litigation.

Under the Federal Rules, corporate defendants can protect highly confidential discovery material from unwarranted disclosure through the issuance of a protective order, as provided for in Rule 26(c). This rule allows parties to request the court to issue an order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by specifying terms and conditions for the discovery process.

For highly confidential materials, the protective order may even include a provision for "attorneys' eyes only" designation, which limits access to the sensitive information exclusively to outside counsel and prevents it from being even being shared with the parties, their in-house counsel, or other individuals involved in the litigation. Where there is a protective order—and there is in every case where sensitive materials are produced—counsel must obey these orders as officers of the court. Others with access to the materials can be asked to sign acknowledgment of the terms, placing them within the court's power to sanction with contempt penalties.

I've never seen a protective order that allowed a litigation funder to have access to such material, or of a litigation funder even inadvertently getting access to such material.

In intellectual property litigation, the most high-profile example of improper access to confidential material that I can recall occurred in the long running *Apple v. Samsung* patent litigation related to the iPhone. There, Samsung obtained access to some confidential Apple material through an apparently inadvertent violation of the protective order by Samsung's counsel.

The trial court took swift action when the violation was discovered and the system worked as intended. And litigation funders had nothing to do with it. If protective orders continue to be drafted in the way that I have seen them done in hundreds of cases over 20 years, litigation funding poses no greater threat of improper disclosure than Samsung paying its own way in that case did.

Corporations might not like litigation funding because they generally don't need it and get sued by the people who use it. Fine. But litigation funding isn't a national security risk.

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