June 10, 2024

The Honorable Jim Jordan
Chairman, House Judiciary Committee
2055 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Jerrold Nadler
Ranking Member, House Judiciary Committee
2132 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Darrell Issa
Chairman, Courts, Intellectual Property, & the Internet
2108 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Henry Johnson
Ranking Member, Courts, Intellectual Property, & the Internet
2240 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Jordan, Ranking Member Nadler, Subcommittee Chairman Issa, and Ranking Member Johnson:

Thank you for opportunity to comment as the Committee as Congress considers disclosure and oversight of litigation funding, with a particular focus on litigation financed by third party investors and foreign entities. This important, often-overlooked topic merits study and action. Unfortunately, very little is known of the origins or intent of largely undisclosed funding arrangements, particularly as they pertain to U.S. patent litigation.

I write today as an author on, and researcher of, this largely undisclosed financial product. My background in patent litigation and my experience may, I hope, provide useful insight into this understudied but economically significant financial market, and its potential for abuse, particularly in U.S. patent litigation. I have written on this topic, including the co-authored ***Litigation Funding Disclosure and Patent Litigation***, published recently in the Federal Circuit Bar Journal.[1]

Limited Data Shows the Breadth of Litigation Funding

Third-party litigation financing, or TPLF, is one of the most significant developments in modern litigation. Since at least the 1990s, litigation financing steadily expanded in the United States and has grown into a multibillion-dollar industry, with reports (of limited scope) putting the amount at well over $10 billion

[1] A working draft is available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4527378 (June 2024).

invested. (It's unclear how accurate those or any private reports could be, given the lack of disclosure.) Litigation funding—providing third-party non-recourse funding contingent upon litigation recovery and outcomes—was once a crime, a tort, and an ethical violation in the United States, subject to the common-law bars of the doctrines of maintenance, champerty, and barratry, but a gradual lobbying to ease those restrictions over decades has led now to funding undergirding huge swaths of U.S. (and international) civil litigation today. And one of the biggest recent targets of litigation financing has been U.S. patent litigation.

Modern patent litigation is both a high-risk, high-reward prospect for litigation funding. Studies estimate that almost a third of all modern patent litigation is now funded, making it the highest growth area in litigation funding; the widespread beneficial use of litigation shell companies (non-practicing entities or "NPEs") and other procedural quirks of modern U.S. patent litigation present potential advantages and party asymmetries in employing funding. As it has grown into a major feature of the U.S. litigation landscape, numerous academics, advocacy groups, policymakers, and practitioners have raised concerns about the lack of transparency in litigation financing, given there are comprehensive rules or practices surrounding disclosure of the existence and terms of such arrangements.[2]

A Growing List of Examples Demonstrate Undisclosed Foreign Investment

Data shows that nearly 60% of all patent litigation stems from NPEs, and 30% of litigation is likely third-party financed, with at least some portion of being of foreign origin. Even with what little public disclosure exists of such funding, large foreign investments undergird at least some of these funds. For example, the largest publicly traded litigation funder, Burford Capital, has a close strategic and financial relationship with an undisclosed sovereign wealth fund ("SWF") worth at least hundreds of millions of dollars.[3] Similarly, Fortress Investment Group, which invests heavily in litigation finance and has been linked to hundreds of patent cases disclosed before it went private in 2017 hundreds of millions of dollars in direct investments from undisclosed sovereign wealth funds; Fortress is now majority owned by Mubadala Capital, Abu Dhabi's sovereign wealth fund,[4] though other investors remain undisclosed.[5] Thus, there is significant foreign investment fueling at least some U.S. litigation today.

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[2] The preceding two paragraphs are derived from the paper discussed *supra*.

[3] https://investors.burfordcapital.com/news/news-details/2023/BURFORD-CAPITAL-EXPANDS-AND-FURTHER-EXTENDS-SOVEREIGN-WEALTH-FUND-ARRANGEMENT/default.aspx

[4] https://www.pionline.com/alternatives/fortress-mubadala-complete-acquisition-fortress-investment-group

[5] https://www.reuters.com/legal/litigation/intel-vlsi-drop-delaware-dispute-blockbuster-patent-fight-2022-12-27/

Elsewhere, wrongdoing has been disclosed. Investigative journalists just recently discovered that sanctioned Russian billionaires have used the lack of disclosure of litigation funding vehicles to skirt sanctions and try to extract money from U.S. markets.[6] A patent-holding nonpracticing entity that was found to be "dishonest, unfair, deceitful and repugnant" by Chief Judge Rodney Gilstrap of the Eastern District of Texas—one funded by undisclosed Chinese investors under the moniker Purplevine IP, who, per Chief Judge Gilstrap, received access to the defendant company's "internal, privileged, and confidential" business information over the course of the case. And of course, one group, IP Edge, was found to be behind thousands of patent lawsuits filed over the past decade, using straw-man owners to shield ownership and liability in a scheme that ended up in referrals to the DOJ, the USPTO, and state bar associations.

These disparate examples demonstrate that this unique financial product attracts at least some foreign investment, the extent and identity of which is largely unknown, even to our nation's national security agencies and financial regulators. Those agencies and Congress have noticed such blind spots, with the SEC adopting rules requiring private equity firms to disclose their investments in litigation funding, with Congress requiring disclosure of beneficial ownership of corporate entities in the Corporate Transparency Act, and the Consumer Financial Protection Bureau (CFPB) issuing regulations a bringing a suit related to deceptive practices in litigation funding.

Many of the states have likewise adopted rules on TPLF, including most recently Louisiana, Nevada, Montana, and as recently proposed in Florida. Indeed, U.S. Attorney General Merrick Garland and fourteen state attorneys-general wrote a letter in 2022 calling for action on the threats posed by TPLF.

IP Litigation is Uniquely Prone to Obfuscating Ownership

Patent-holding NPE shell companies—generally state-registered limited liability corporations, or LLCs—are a widely used strategy among patent claimants and have heavily influenced modern patent litigation. These shell vehicles have tax, liability, and discovery-asymmetry advantages over suing as an individual or corporation that ensure the majority of U.S. patent litigation is brought using them. For instance, they need to hold no long-term working capital, and can use insolvency to avoid sanctions or fee-shifting awards; they handle discovery requests far more easily than

[6] https://news.bloomberglaw.com/litigation-finance/putins-billionaires-sidestep-sanctions-by-financing-lawsuits

defendants; and they need not worry generally about counterclaim risk. They also provide extra protection against veil-piercing inquiries that threaten their limited liability protection. And as patent litigation is Federal in nature, there are few limitations on where cases can be filed, allowing such entities to forum- and judge-shop nationwide. Licensors, aggregators, or litigation funders usually set up NPEs that then acquire patent portfolios, sometimes from bankrupt or insolvent companies, and then seek to enforce patents in litigation campaigns. This practice results in an additional layer of anonymity to funders and beneficial owners.

Arguments Against Disclosure Are Premised on Imperfect Knowledge

Many funders and lawyers argue vociferously against litigation funding disclosure of any kind. Arguments are often premised on statements that are impossible to verify, however, without disclosure, and they have over the course of time been contradicted by actual cases.

Arguments include that there are no (or few) bad actors using litigation finance to hide unethical or criminal schemes; that the national security implications are a fictious narrative; that very little if any funding is foreign in origin; that confidential information would never be turned over to funders because of adequate protections at the trial level, and that it is simply irrelevant. The cases contradict them. Disclosure requirements from just one sitting judge swiftly revealed an unethical and likely illegal scheme of thousands of patent lawsuits filed by the groups Mavexar and IP Edge over the years; foreign funding sources continue to be identified, from even sanctioned entities; and a defendant's highly confidential business information was recently shared with Chinese investors of unknown identity, as noted above. What's more, as disclosure is so currently curtailed, there is no telling—nor refuting—whether there is more of the same out there.

It is Time to Amend the Federal Rules of Civil Procedure

At a minimum, the judiciary has a right to have the presence and identify of funding disclosed to them in a uniform way—if nothing else, to determine for themselves the relevancy and saliency of these points. They have long done exactly this for insurance agreements contingent upon the outcome of the litigation; it is time to adopt a similar requirement for litigation funding arrangements. Either Congress should legislate it to do so, or the Judicial Council should itself amend the Federal Rules of Civil Procedure 7.1 and 26, amending to Rule 7.1 by adding a subsection (C) and moving current subsection (B) to (C), and require a statement filed at the onset of litigation that:

(B) identifies any person or entity that is not a party offering funding for some or all of the party's attorney fees and/or expenses to litigate this action on a nonrecourse basis in exchange for

(1) a financial interest that is contingent upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal loan, bank loan, or insurance, or

(C) states that there is no such corporation.

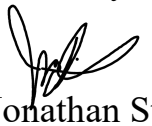
Likewise, Rule 26 should be amended (as it was in the 1970s related to insurance products tied to the outcome of litigation) to include the following subsection (v):

(A) In general. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: …

(v) for inspection and copying as under Rule 34, any agreement under which a third-party business may offer a non-recourse loan with recovery based in any part on a possible judgment in the action.

Until we adopt these or similar uniform disclosure rules, no one can police these products, much less speak authoritatively about them. Despite protestations to the contrary, we cannot know what we do not know, and financial products that are entirely undisclosed remain at least capable of being abused. It is past time to require judicial disclosure. Thank you very much for giving me the opportunity to comment.

Sincerely,



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