Disclosure of Litigation Financing
Not Required by Court Rules

We are often asked about whether financing arrangements with Burford Capital need to be disclosed to opposing parties or to the court. The simple answer is “no” – and that is the answer regardless of whether litigation is pending in US courts, English courts, or arbitral tribunals.

The question of the disclosure of litigation financing – whether from Burford, from a hedge fund, from a bank, or from a shareholder or private investor – is something governed by the applicable court rules in the relevant jurisdiction. Different jurisdictions have very different rules about what kind of disclosure is required of non-party entities with an economic interest in the outcome of a litigation matter. (Arbitral tribunals sometimes have their own “rules” from their administering institution, and sometimes look to the IBA Guidelines for guidance.)

This is a rules-based area. Disclosure can have real economic implications for parties and it cannot be approached on a sui generis basis. And it is important to bear in mind that disclosure is about permitting judges and arbitrators to evaluate potential conflicts, not about enabling opponents to peer into their adversaries’ financial condition and arrangements.

Disclosure rules are not static and each jurisdiction is free to alter its rules to reflect its own calibration of the desirability of disclosure against the incremental burdens of managing conflicts. The rules also reflect other dynamics – for example, cost shifting jurisdictions may well cast a wider disclosure net to endeavour to look to viable cost parties, whereas largely “own costs” jurisdictions like the US may be quite narrow in the disclosure they seek from non-parties.

Burford, naturally, complies with the applicable rules in every jurisdiction in which it provides litigation financing. Moreover, if a client wants to disclose the presence of litigation financing – perhaps to signal to its adversary that it is being supported by a deep-pocketed, dispassionate financial investor – that is its choice. But that is the client’s choice, not something mandated by rule.

There are two important policy issues enmeshed in the question of non-party disclosure:

- First, disclosure rules need to be fair and to focus on the economic substance of what is happening, not on the identity of who is doing it. The question is not whether a “litigation funder” is involved in a matter, but the extent to which any non-party entity’s economic interest in the outcome of the matter should be disclosed. There is no principled basis for differentiating among such interested non-parties if the disclosure of any of them is to be required. This is generally how disclosure rules work today, with quantitative thresholds and specific relationships needing disclosure.
Second, disclosure needs to be accompanied by clear rules about the use of the information that is disclosed. Just as insurance policies and contingency fees (when disclosed) aren’t fair game for argument and courtroom rhetoric, so too must non-party capital (if disclosed) be off limits. Disclosure also can’t set off a discovery sideshow with the adverse party trying improperly for “gotcha” access to work product and internal documents from a litigation financier. These rules are lacking today, which is why many providers of litigation finance do not voluntarily disclose their involvement in the matters they finance.

Third party involvement in litigation matters is neither new nor uncommon. Shareholders, debtholders, insurers, lenders and others are all commonly involved in a company’s significant litigation, whether by providing capital to enable it to proceed or being involved in litigation decisions. It is a rare piece of significant litigation that has a single stakeholder in complete command of the matter – a real world point often not appreciated by the academic writing in this area.

Moreover, there is a vast number of structures in use by businesses to meet their litigation financing needs, including: recourse financing of a claim (from banks or specialty providers); non-recourse financing of a claim; derivatives; senior, subordinated, mezzanine or equity financing of a business that owns a claim; the use of special purpose vehicles into which a claim is assigned or indeed that become the parent of the claim owner; and many others.

Indeed, litigation finance is really just specialty corporate finance that focuses on litigation claims as assets. Virtually every corporate activity, from buying photocopiers to constructing skyscrapers, has access to specialty corporate finance, and businesses elect to make use of such finance in a variety of ways and for a variety of reasons. In some instances of litigation finance, financing is necessary for a claim to proceed at all and for justice to be obtained, as in the case of an impecunious claimant, one facing liquidity or budgetary challenges or one whose assets have been expropriated. In others, the use of external capital is a choice motivated by accounting issues, risk intolerances or financial analysis.

So what are the rules?

In US Federal courts, the decision has been made to limit disclosure to equity shareholdings in the party above a certain level and not to seek further disclosures despite it being clear to the drafters that other significant economic interests could exist. (See, e.g., Fed. R. Civ. P. 7.1, Fed. R. App. P. 26.1, Sup. Ct. R. 29(6).)

This reflects a clear policy choice. For example, the comments to the Federal Rules of Civil Procedure on this issue note:

Although the disclosures required by Rule 7.1(a) may seem limited, they are calculated to reach a majority of the (relevant) circumstances … Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts.

It is perfectly clear under the US Federal rules at every level of proceedings that providers of financing to a party or a case—whether litigation funders, banks, equity investors or insurers—are not required to be disclosed.

While practice varies in US state courts, the general principle enunciated above applies.

In the English courts, the situation is perfectly clear. The UK government has stated the policy thus: “in privately funded litigation there is no obligation on either party to disclose how a case is being funded.”

The courts have enforced that policy.

In arbitral tribunals, absent specific institutional or party-driven rules, the International Bar Association’s guidelines tend to be the principal source for guidance. Those rules are similarly clear. Only a “significant financial interest” in the outcome of an arbitration is the basis for an arbitrator to have a financial conflict, making it clear that arbitration funding to a party would not create such an interest unless the arbitrator were also the funder. Moreover, non-financial conflicts are explicitly limited to parties and their affiliates. “Affiliates” is a defined term in the IBA guidelines and would clearly exclude providers of arbitration financing.

There is also a narrow but important issue in arbitration that deserves mention: the question of law firms that take on funded work and whose partners also sit as arbitrators in other matters. A litigation funder is clearly neither the client of the law firm nor the party in the arbitration. There is simply no conflict when a law firm represents a funded client in one matter and a partner in the firm sits as an arbitrator in a separate matter funded by the same funder. In both cases, the funder is a significant step removed from the entity being tested for conflict.

In short, the federal rules in the US, the position in the UK and the IBA guidelines are all perfectly clear and reach the same conclusion: there is no obligation to disclose litigation financing arrangements.

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1 Del Webb Communities, Inc. v. Partington, 652 F.3rd 1145, 1156 (9th Cir. 2011).