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Transparency Watch: Federal District Court Mandates Automatic Disclosure of Third-Party Funding Arrangements for Class Actions

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In January, the U.S. District Court for the Northern District of California announced a change that makes litigants in putative class action suits subject to requirements mandating automatic disclosure of third-party funding arrangements. The rule was introduced by amendment to a provision in the Standing Order For All Judges of the Northern District of California (Standing Order) regarding the contents of joint case management statements and relevant to disclosures of non-parties with interests in a lawsuit. The Standing Order now provides: "in any proposed class, collective or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim." The rule as announced is a scaled back version of what the district court's Civil Rules Committee initially proposed: a revision of the court's Civil Local Rule 3-15 (Disclosure of Non-party Interested Entities or Persons), which, by incorporating specific reference to "litigation funders," would have mandated automatic disclosure in the certifications by parties of funding arrangements in any matter before the court, not just putative class suits. As we previously observed, while the practice of making loans to support litigation has existed in the United States since the 1990s, litigation finance has evolved substantially since then and, by all accounts, is on the rise. *See* "Litigation Finance on the Rise – But Questions Abound," *Expect Focus* Vol. II, Spring 2015. Indeed, whether focused on funding consumer or commercial litigants, investors of many stripes are taking chances on lawsuits, seeking shares of potentially lucrative recoveries, and making litigation finance a billion-dollar industry. In December 2016, a relatively young but prominent Chicago-based investment firm and player in the market was acquired by litigation finance powerhouse Burford Capital for a reported $160 million. Reports state

the combined entity has $1.2 billion invested in active commercial lawsuits. Disclosure, though, has been top of mind, both for advocates and critics of the practice. For example, during the comment period, Burford Capital told the district court the proposed revision of Local Rule 3-15 was "unnecessary and discriminatory." Burford argued, *inter alia*, that the court's rules "already have a much broader disclosure obligation than most U.S. federal courts," highlighting that Local Rule 3-15's requirements already mandated disclosure of "any persons .... known by the party to have ... a financial interest (of any kind)...." The objections of Bentham IMF, an Australian-based litigation funder, included that the proposed requirement would "give defendants in all cases the unprecedented and unintended advantage of knowing which claimants lack the resources to weather a lengthy litigation campaign." On the other hand, as we previously reported, one of litigation financing's most vocal critics, the U.S. Chamber of Commerce Institute for Legal Reform, together with its allies, has urged an amendment to Federal Rule of Civil Procedure 26(a)(1)(A) that would require information about third-party funders of litigation to be added to the list of required "initial disclosures," as many such investors are "publicly traded companies or companies supported by investment funds whose individual shareholders may include judges or jurors." Although more narrow in scope than the disclosure requirement initially proposed, the Northern District of California's third-party funding rule is the first of its kind by a federal district court. Litigation financing critics are sure to seek ways to build on this apparent advancement toward greater transparency in this area.

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