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LITIGATION

Discovery Trends in Litigation Finance Arrangements



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The last few years have seen a sharp rise in the use of third party litigation funding for plaintiffs and their counsel. That trend has given rise to questions as to these arrangements, including their legality, practicality, terms, and – importantly for investors wishing to remain behind the scenes – the extent to which the arrangements must be disclosed.

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As more lawsuits are funded by third parties, courts have been faced with novel discovery questions. Those include whether and to what degree discovery is appropriate with respect to the parties involved in the litigation funding, the specific funding arrangements, and the information provided to funders to aid in their assessment of the potential investment. Currently there are few rules that specifically address disclosure of litigation funding arrangements, leaving courts to deal with disclosure questions on a case-by-case basis. The results sometimes have been conflicting.

For example, in 2015 the United States District Court for the Southern District of New York considered a motion to compel the production of litigation funding documents in the wake of a plaintiff's acknowledgment that it was using third-party funding. *Kaplan v. S.A.C. Capital Advisors, L.P.*, No. 12-CV-9350 VM KNF, 2015 BL 324773, at *4 (S.D.N.Y. Sept. 10, 2015). The court denied the motion to compel, ruling that the defendants did not demonstrate the documents were relevant to any party's claims or defenses. *Id*. at *7. However, other courts ruling on similar requests have found litigation finance documents to be relevant. *See e.g.*, *Acceleration Bay LLC v. Activision Blizzard, Inc.*, No. CV 16-453-RGA, 2018 BL 45102, at *4 (D. Del. Feb. 9, 2018).

Even if potentially relevant, documents provided to or created by litigation funders have been found by some courts to be protected by the work product doctrine, which protects documents prepared in aid of liti-

gation. *See Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 738 (N.D. Ill. 2014); *see also Morley v. Square, Inc.*, No. 4:10CV2243 SNLJ, 2015 BL 379408, at *4 (E.D. Mo. Nov. 18, 2015). But other courts have rejected such defenses. In a recent case out of the District Court for the District of Delaware, a judge ordered the production of documents that were provided to a litigation funder for the purpose of assessing whether to fund a claim. The court found that the documents were not work product because their ''primary purpose'' was to obtain funding rather than to aid in the litigation, and because the documents were not prepared for a party to the litigation, as is required for work product protection. *Acceleration Bay*, 2018 BL 45102, at *3 . The *Acceleration* court also concluded there was no common interest privilege defense, primarily because there was no litigation funding or common interest agreement at the time the documents were created. *Id*., at *3-4 (holding also that the purported common interest must be identical and cannot be solely commercial).

Increasingly, jurisdictions are considering not only whether to compel disclosure when documents surrounding litigation finance arrangements are specifically requested, but also whether to impose jurisdiction-wide requirements mandating the disclosure of litigation finance agreements from the outset of the litigation. To the extent rules are adopted on a jurisdiction-wide basis, decisions like the ones discussed above will be superseded. Already the Northern District of California has imposed a standing order for all judges mandating the disclosure of people or entities who ''fund[ ] the prosecution of any claim or counterclaim'' in proposed class, collective, or representative actions. N.D. Cal., Standing Order for all Judges of the Northern District of California, ¶ 19 (Jan. 17, 2017). Additionally, in 2017, the federal Advisory Committee on the Rules of Civil Procedure announced that the Committee will be considering whether to amend Federal Rule of Civil Procedure 26 to impose a new requirement mandating the disclosure of litigation funding arrangements in all federal cases. Advisory Committee on Civil Rules, Civil Rules Agenda Book § 7B (Nov. 7, 2017).

Courts are not the only dispute resolution vehicles grappling with discovery issues in response to the increasing use of litigation financing arrangements. For example, the International Bar Association's (IBA) 2014 Guidelines on Conflicts of Interest in International Arbitration now provide that any party that is a legal entity must disclose third-party funders having ''a direct economic interest'' in the potential arbitration award. IBA Guidelines on Conflicts of Interest in International Arbitration, § 6 (b), Oct. 23, 2014; *see also* ICCA-Queen Mary Task Force, Third-Party Funding in International Arbitration 40 (Sept. 1, 2017) (draft) (examining third-party funding in the international arbitration context).

Proponents of mandatory disclosure requirements have sought varying levels of disclosure. Some advocate minimal requirements, calling only for the existence and identity of the funders. This level of disclosure would avoid more complex discovery questions, but would allow judges and arbitrators to assess and remedy potential conflicts of interest. As reflected in the foregoing IBA and ICCA pronouncements, that could include the possible disqualification of arbitrators as a result of their nexus to a funder.

Disclosure of the existence and identity of funders is already required in the Northern District of California and in arbitrations conducted under the auspices of the IBA. As part of their diligence process, potential funders need to consider the possibility that their funding arrangement will be disclosed, and that conflicts of interest may come to light as a result.

More aggressive proponents of disclosure propose that, in addition to disclosing a funder's identity, parties should be required to produce the underlying funding agreement. Advocates argue that this is necessary in order to determine the level of influence and control the funder has over the litigation. If a finance agreement provides the funder with control over aspects of the litigation, such as strategy and settlement decisions, the agreement may be vulnerable to challenges based on the doctrines of champerty and maintenance. Those doctrines prohibit the purchase or prosecution of another's claim. While somewhat archaic, champerty and maintenance remain viable doctrines to different degrees depending on the jurisdiction. As a result, defense counsel in an underlying dispute may be able to use funder control as ammunition to challenge the funded litigation on the basis of those doctrines. Potential funders must be mindful of the champerty and maintenance jurisprudence in the jurisdiction(s) that are relevant to the funding and litigation.

Given the increasing attention being paid to litigation funding arrangements, prospective funders need to be aware of any applicable jurisdiction-wide rules regarding disclosure with respect to such arrangements. To the extent such rules do not exist, funders need to understand the caselaw jurisprudence in the relevant jurisdiction, as well as caselaw in other jurisdictions that could be found probative. As such caselaw evolves, parties seeking disclosure will become increasingly sophisticated in crafting and justifying their discovery requests. Funders hoping for success in resisting disclosure must become equally sophisticated, staying apprised of developments in the law and engaging counsel as appropriate to advise them. And they must be prepared for the potential time and expense of protracted discovery battles – or be comfortable making the disclosures that may be sought.

Well-advised prospective funders also can use an understanding of the relevant law to anticipate issues beforehand. Funders should consider, for example, drafting appropriate common-interest agreements and minimizing the extent to which documents are created disclosing potentially sensitive views as to the likelihood of success in the litigation.