On Professional Practice *By Ava J. Borrasso*

Third-Party Funding: Relationships, Relevance, and Recent US Court Analysis

"On Professional Practice" examines how professional responsibility principles apply to our work. Sharon Press, a member of the Dispute Resolution Magazine *editorial board, serves as the "On Professional Practice" editor. We encourage readers to submit ideas for future columns to her at sharon.press@mitchellhamline.edu.*

Third-party funding has increased in both arbitration and litigation, and with that has come increased concern about possible conflicts of interest. The presence of funding agreements in arbitration often raises concerns of potential conflict, ones that generally center on whether there is a relationship between the funder and the arbitrator. Guidelines regarding disclosures generally provide for disclosure of the funder's identity — but do not require disclosure of the underlying funding agreement or communications, subject to the need for additional disclosures.[1]

In litigation, issues involving third-party funding generally arise in the context of discovery. Evidentiary issues commonly involve whether funding agreements and corresponding communications are relevant to the underlying litigation and, if so, whether they are otherwise protected by privilege.

This article provides a brief examination of recent US court treatment of evidentiary issues that arise with respect to third-party funding and guidance as to when additional disclosure beyond identity of the funder might be warranted.

Relevance

In *Fulton v. Foley*,[2] the court addressed both relevance and privilege in the context of a motion to quash a subpoena served on a litigation funder. In that case, the plaintiff filed suit for the wrongful arrest and conviction for a sexual assault and murder he did not commit. The plaintiff moved to quash the subpoena served by the defendant, the city of Chicago, on the plaintiff's litigation funder. First the court rejected the city's arguments that the litigation funding documents were relevant to the claim for lost wages, determination of a reasonable settlement value, or to expose the plaintiff's bias. The court also rejected the city's request for communications and information provided to obtain funding, largely on the basis of the attorney work product doctrine's protection of mental impressions and opinions. Nonetheless, the court recognized that materials might have been exchanged that were fact-based and not privileged. As a result, the court quashed the subpoena but required the plaintiff to produce any relevant, non-privileged material that fell outside the protected parameters.

Litigation funding in the context of a multi-district mass tort case was addressed in *In re Valsartan N-Nitrosodimenthylamine (NDMA) Contamination Products Liability Litigation*.[3] The court held that the information sought was not relevant to any of the claims or defenses asserted in the case and explained:

> "In cases where there is a showing that something untoward occurred, the discovery could be relevant. In other words, rather than directing carte-blanche discovery of plaintiffs' litigation funding, the Court will Order the discovery only if good cause exists to show the discovery is relevant to claims and defenses in the case. For example, discovery will be Ordered where there is a sufficient showing that a non-party is making ultimate litigation or settlement decisions, the interests of plaintiffs or the class

are sacrificed or are not being protected, or conflicts of interest exist."

Because the request was not supported by anything beyond the defendants' speculation, the court determined the litigation funding information was not relevant. Nonetheless, the court agreed to review *in camera* the litigation funding agreement, which the plaintiffs offered to supply subject to possible additional production upon a showing of good cause. (Also interesting is *Williams v. IQS Insurance Risk Retention*,[4] which found that a third-party funding agreement was not relevant where collateral source rule precluded the plaintiffs from recovering damages beyond the amount the providers were actually paid.)

Bias

Several courts have considered whether funding agreements are relevant to determine bias. For example, in *Pipkin v. Acumen*,[5] the court granted a plaintiff's motion for a protective order as to the defendant's inquiry regarding litigation funding during the plaintiff's deposition. The defendant contended the information was relevant to the bias and credibility of a third-party witness, but the court noted that the issue was "entirely speculative" and fell short of the "specific, articulated" bases required to support a finding of conflict of interest or bias.[6] Because the defendant could inquire as to witness credibility and bias at trial, the court precluded inquiry of the funding arrangement. (Another case is *MLC Intellectual Property, LLC v. Micron Technology, Inc.*,[7] in which litigation funding agreements were found to be not relevant in patent litigation where the defendant's contention of potential conflict of interest and bias were speculative.)

By contrast, in *Collins v. Benton*,[8] a Louisiana district court affirmed an order of the magistrate judge that held that a funding agreement and payments received by a medical care provider were relevant and subject to discovery. There the plaintiffs sued a driver and his insurance company with respect to personal injuries sustained in an automobile accident. The defendants served a subpoena on a surgery treatment center to obtain information regarding bills incurred and payments received by the injured plaintiffs.

The magistrate judge reviewed *in camera* the master purchase agreement between the medical care provider and the entity that paid the plaintiffs' medical bills. Upon review, the magistrate judge concluded that the agreement was relevant to the amount owed, as the plaintiffs arguably remained liable for the difference between the amounts billed and paid. Further, the magistrate judge ordered disclosure of the amounts billed and paid with respect to the account receivable under the agreement. The court adopted the opinion, determining that the information was relevant to show potential bias of the medical providers, who may have an incentive under the terms of funding agreement for the plaintiffs to win their case.

Privilege

In re International Oil Trading Company, LLC[9] provides an excellent overview of application of various privileges to communications exchanged with litigation funders. In that case, a judgment creditor filed an involuntary bankruptcy petition against the judgment debtor in an effort to collect his outstanding commercial judgment. In the course of discovery, the debtor sought information regarding the litigation finance agreement and communication exchanged among the judgment creditor, his counsel, and the funder.

The court applied federal precedent and Florida law in reaching the conclusions that the communications were protected from disclosure pursuant to the common interest and agency exceptions to waiver of the attorney-client privilege as well as the work product doctrine. The common-interest exception to waiver of the attorney-client privilege requires that "a reasonable expectation of confidentiality" be maintained regarding the communications involving a common enterprise. The court held the common-interest exception was met by inclusion of the confidentiality provision in the funding agreement.

The agency exception applies to communication involving professionals necessary to render legal advice. Here, too, the court determined that the communications were protected:

> "Communications with a litigation funder fall within the agency exception for the very reason

> that litigation funders exist — because without litigation funders, parties owed money, or otherwise stymied by deep-pocketed judgment debtors, might have reduced or no ability to pursue their claims. Litigation funders may be essential to the provision of legal advice in such cases. Absent the ability to communicate with funders without waiving privilege, potential plaintiffs … might be "handcuffed" …"

The court decided that all the communications also fell within the agency exception.

Finally, with respect to the work-product privilege, the court again easily determined that the nature of communications exchanged "between a client, the client's attorney, and a litigation funder whose participation depends on assessments of the merits of litigation" consists primarily of work product. To the extent additional matters may have been addressed, the court held that they were not relevant and did not warrant review of tens of thousands of pieces of correspondence and that the debtor failed to establish exceptional circumstances to warrant production of the protected communications. By contrast, the court held that the funding agreement, though work product, was subject to production based on the debtor's demonstration of substantial need for the agreement and subject to redactions for mental impressions, opinions, and payment terms contained within the agreement.

Guidance

As these cases demonstrate, litigation funding is involved in a wide variety of claims, including personal injury, wrongful arrest, mass tort litigation, patent, and commercial judgment collection. But as the court's rulings show, relevance turns on the unique facts and circumstances of each case. Practitioners would do well to realize that if information or communications between attorney, client, and funders about third-party finding are relevant to the underlying matter, whether the funding agreement and corresponding communications are privileged is a question that courts say must be addressed. This overview of recent cases should serve as a warning that getting information about third-party funding is possible — although by no means guaranteed.

As shown, relevance, bias, and privilege are key to obtaining discovery of funding agreements in the context of litigation. By contrast, the relationship or conflict between an arbitrator and the funder is the main issue in arbitration proceedings. On this playing field, not much has changed since the respective guidelines were first introduced. While some guidance seemingly puts the burden of disclosure on the arbitrator (International Bar Association, American Arbitration Association), others consider the parties and funders in the best position to disclose conflicts (the ICCA/Queen Mary Report). Given the variety of circumstances in which such conflicts may occur, a more consistent approach appears to be in order. ■

Endnotes

1 *See e.g., Code of Ethics for Arbitrators in Commercial Disputes,* Canon II; *International Bar Association Guidelines on Conflict of Interest in International Arbitration,* 6(b) (2014); *International Council for Commercial Arbitration-Queen Mary Report on Third Party Funding in International Arbitration* (April 2018) Chapter 4.

2 *Fulton v. Foley,* No. 17-CV-8696, 2019 WL 6609298 (N.D. Ill. Dec. 5, 2019).

3 *In re Valsartan N-Nitrosodimenthylamine (NDMA) Contamination Products Liability Litigation,* 405 F. Supp. 3d 612 (D.N.J. 2019).

4 *Williams v. IQS Insurance Risk Retention,* No. 18-2472 C/W 18-6113, 2019 WL 937848 (E.D. La. Feb. 26, 2019).

5 *Pipkin v. Acumen,* No. 1:180cf-00113-HCN-PMW, 2019 WL 6324633 (D. Utah, Nov. 26, 2019).

6 *Id.* at *2.

7 *MLC Intellectual Property, LLC v. Micron Technology, Inc.,* No. 14-cv-03657-SI, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019).

8 *Collins v. Benton,* No. 18007465, 2019 WL 6769636 (E.D. La. Dec. 12, 2019).

9 *In re International Oil Trading Company, LLC,* 548 B.R. 825 (Bankr. S.D. Fla., 2016).

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