Discovering Third-Party Litigation Financing

By Luther Munford and Katelyn Ashton

Luther T. Munford is of counsel in the Ridgeland, Mississippi office of Butler Snow LLP where he conducts moot court exercises and writes for firm publications. He is a past president of the American Academy of Appellate Lawyers and is the author of Mississippi Appellate Practice (2010).

Katelyn R. Ashton is a member in the Memphis, Tennessee office of Butler Snow's litigation department and practices within the Pharmaceutical, Medical Device and Healthcare Group. She obtained her B.S., summa cum laude, from Freed-Hardeman University and J.D., magna cum laude, from Savannah Law School, where she was Editor-in-Chief of Savannah Law Review.

In litigation-funding arrangements, an investor advances money to a party—usually a plaintiff—to pay lawsuit expenses. In exchange, the borrower agrees to give the investor a portion of his proceeds from the litigation. Traditionally, these are nonrecourse investments, in which the funder is guaranteed a portion of any awarded damages, including fees, judgments, or settlements.

There is doubt as to whether litigation funding, which has traditionally been illegal,[1] has any benefit to our legal system.[2] Nevertheless, litigation funding continues to be big business and is growing rapidly. That is perhaps because even if the funding is illegal, it does not provide the opposing party with the right to have the lawsuit dismissed. In other words, the illegal funding does not "poison" the litigation tree. One recent estimate is that litigation funding worldwide is a $10 billion industry—$5 billion of which is here, in the United States.[3]

While litigation funding is available in single cases, it is common for an investor to fund an entire portfolio of claims held by a single law firm, especially in class actions and multi-district litigation.

Third-party litigation funding is a largely unregulated industry. It is laden with as-yet-unexplored potential for abuse, ethical violations, and conflicts of interest. Most notably, the interests of lawyers who are funded and their clients may differ, but clients seldom receive the independent legal advice they would need to waive a conflict.[4] Indisputably, third-party funding changes litigation. The question remains: How? And the only way to answer that question is through increased transparency during discovery.

This article, after a brief discussion of the interests at stake, will list arguments in favor of discovery, provide supporting citations, and suggest a strategy for gaining as much disclosure as possible of the terms on which opposing litigation is financed.

What the Parties Want

Intuitively, it would seem that a plaintiff would want the defendant to know that the plaintiff was supported by a litigation finance company. If so, the plaintiff has a stronger hand. Yet, that intuition is incorrect. Litigation-funding entities continue to zealously protect their identities and terms from exposure to the public and to the opposing party—all while insisting that they have no control over material aspects of litigation. We're not convinced.

As with every discovery dispute, the threshold issue is whether the sought information is "relevant to any party's claim or defense."[5] And so begins the fight. Plaintiffs and funders alike assert that the entity funding the litigation and the terms surrounding that arrangement are irrelevant. Defendants disagree.

---

[1] *See* Lisa Bench Nieuwveld & Victoria Shannon, Third-Party Funding in International Arbitration 144–59 (Wolters Kluwer 1st ed. 2012) (presenting that 19 states and the District of Columbia prohibited third-party litigation funding agreements); John Beisner and Jordan Schwartz, *How Litigation Funding is Bringing Champerty Back to Life*, Law360 (Jan. 20, 2017, 12:05 PM), https://www.law360.com/articles/882069/how-litigation-funding-is-bringing-champerty-back-to-life.

[2] *See* Kari L. Sutherland, *Funding Litigation and Treatment: Leveling the Playing Field or Exploiting the Little Guy*, Pro Te Solutio, Spring 2016, at 5–11; *see also Echeverria v. Est. of Lindner*, 7 Misc. 3d 1019(A), 801 N.Y.S.2d 233 (Sup. Ct.), *judgment entered sub nom. Echeverria v. Lindner* (N.Y. Sup. Ct. 2005) (finding that a funding arrangement was actually a loan with an impermissible usurious interest rate); *Fast Trak Inv. Co., LLC v. Sax*, 962 F. 3d 455, 459 (9th Cir.) (certifying to the New York Court of Appeals: (1) "Whether a litigation financing agreement may qualify as a 'loan' or a 'cover for usury' where the obligation of repayment arises not only upon and from the client's recovery of proceeds from such litigation but also upon and from the attorney's fees the client's lawyer may recover in unrelated litigation?" And, (2) if so, "What are the appropriate consequences, if any, for the obligor to the party who financed the litigation, under agreements that are so qualified?"), *certified question accepted sub nom. Fast Track Inv. Co., LLC v. Sax*, 35 N.Y. 3d 997, 149 N.E. 3d 432 (2020).

[3] Matthew Goldstein & Jessica Silver-Greenberg, *Hedge Funds Look to Profit from Personal-Injury Suits*, N.Y. Times (June 25, 2018), https://www.nytimes.com/2018/06/25/business/hedge-funds-mass-torts-litigation-finance.html; *see also* David H. Levitt, et al., DRI Ctr. For Law & Pub. Policy, Third Party Litigation Funding: Civil Justice and the Need for Transparency (Oct. 17, 2018) ["DRI 2018"] (noting that in 2017, "the litigation finance industry [was] a $5 billion market in the United States").

[4] Lucian Pera and Michael Perich, *It Can Be Risky for Litigators to Advise on Litigation Funding*, Law360 (Mar. 6, 2020), https://www.law360.com/articles/1249341/print?-section=aerospace.

[5] *See* Fed. R. Civ. P. 26.

Plaintiffs and litigation funders often insist that documents relating to third-party litigation funding are privileged or protected because they reveal information about the claimant's finances, the litigation budget, and insight into strategy.[6] Forced disclosure, they argue, would reveal a plaintiff's ability to afford litigation and would also allow a defendant to use that knowledge to force an otherwise unwilling plaintiff to settle. They further insist that mandatory disclosure requirements will be expensive, will result in lengthy discovery battles, and could reveal information relating to their assessment of a case's strengths, weaknesses, and value.

Defendants, on the other hand, find that they are simply unable to realistically assess a case and develop a litigation and settlement strategy without knowing the existence and terms of a funding agreement. Similar concern provides the basis for the mandatory disclosure of defendants' insurance agreements.[7]

Defendants also have an interest in knowing who controls the litigation, inside and outside of the pleadings. Illustrative of this interest is when funders were reported to have lured pelvic mesh plaintiffs into having unnecessary surgery solely for the purpose of increasing their claims' value.[8] And of utmost concern is whether third-party litigation funding arrangements create conflicts of interest for judges,[9] the attorneys, and the parties. Control over who participates in a dispute is a vital element of any dispute resolution process.[10] It is exceedingly odd that the care the law takes to control participation, through rules governing standing, severance, intervention, amicus participation, champerty, and maintenance, get thrown out the window when it comes to simply revealing the interest of a covert third party.

An additional consideration is funding's effect on the plaintiff's incentive to settle. If the funder truly has no control over the litigation, the plaintiff has no incentive to settle to avoid cost and expense. If the funder has a right to recover the first dollar collected, then the plaintiff has no reason to settle for less than that amount.[11] The funding relationship may also discourage settlement for something other than the immediate payment of money—e.g., injunctive relief, a new business relationship, or simply an end to the injuries litigation itself inflicts.[12]

The Discovery Debate

As might be expected, courts have taken different positions. Some courts have allowed disclosure,[13] while others have denied defendants' requests outright.[14] Accordingly, the American Bar Association cautions attorneys utilizing third-party funding to "assume that some level of disclosure may be required," and that the "litigation funding arrangement may well be examined by a court or the other party."[15]

Those courts ordering disclosure have varied approaches, including requiring disclosure of the identity of the litigation funder and nature of the funding relationship, limiting disclosure to *in camera* review,[16] and requiring an affirmation that funder has no control over the case and, accordingly, that

---

[6] *See* Michele Slachetka, Christian Plummer, and Justin Maleson, *Are Litigation Funding Documents Protected From Discovery?*, Law360 (Apr. 22, 2020), https://www.law360.com/ energy/ articles/1266149/are-litigation-funding-documents-protected-from-discovery- (stating that courts rarely apply the attorney-client privilege, but often apply the work-product doctrine to protect litigation funding materials).

[7] *See* DRI 2018, *supra* note 3, at 6–8 (comparing the discoverability of third-party litigation funding agreements with mandatory insurance disclosures).

[8] *See* Michael Goldstein and Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*; N.Y. Times (Apr. 14, 2018), https://www.nytimes.com/2018/04/14/ business/vaginal-mesh-surgery-lawsuits-financing.html; Matthew Goldstein, *Two Men Charged in Pelvic Mesh Removal Scheme*, N.Y. Times (May 24, 2019), https://www.nytimes.com/2019/05/24/business/vaginal-mesh-surgery-arrests.html ["*Pelvic Mesh Removal Scheme*"]; Bexis, *Litigation Funder Indictment in Pelvic Mesh Litigation*, Drug and Device Law Blog (June 20, 2019), https://www.druganddevicelawblog.com/2019/06/ litigation-funder-indictment-in-pelvic-mesh-litigation.html#; *see also* Beisner, et al., U.S. Chamber Inst. for Legal Reform, Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding a Decade Later 14 (Jan. 2020) ["ILR 2020"].

[9] Patrick A. Tighe, *Memorandum: Survey of Federal and State Disclosure Rules Regarding Litigation Funding* 209 (Feb. 7, 2018), https://judicialstudies.duke.edu/wp-content/uploads/2018/04/Panel-5-Survey-of-Federal-and-State-Disclosure-Rules-Regarding-Litigation-Funding-Feb.-2018.pdf.

[10] *See* Luther T. Munford, *The Peacemaker Test: Designing Legal Rights to Reduce Legal Warfare*, 12 Harv. Neg. L. Rev. 377, 391 (2007).

[11] DRI 2018, *supra* note 3, at 22–29, 15; *see also Odell v. Legal Bucks, LLC*, 665 S.E. 2d 767, 774 (N.C. App. 2008) (discussing the plaintiff's argument that a "rational borrower is likely to reject any settlement offer that is less than the amount of the advance and accrued interest she owes to the lender, even if the settlement offer is perfectly reasonable").

[12] *See Boling v. Prospect Funding Holdings LLC*, 771 F. App'x 562, 580 (6th Cir. 2019) (discussing the trial court's observation that funding agreements "may interfere with or discourage settlement . . . 'because an injured party may be disinclined to accept a reasonable settlement offer where a large portion of the proceeds would go to the firm providing the loan'" (citing *Boling v. Prospect Funding Holdings, LLC*, No. 1:14-cv-00081, 2017 WL 1193064, at *4 (W.D. Ky. Mar. 30, 2017))); *see generally* Luther Munford, *Litigation as a Tort*, 21 Green Bag 2d 35 (2017) (discussing the inherent injurious nature of litigation).

[13] *See, e.g., In re: Am. Med. Sys. Inc.*, MDL No. 2325, 2016 WL 3077904, at *5 (S.D. W. Va. May 31, 2016) (funder's relationship with doctors is relevant to plaintiffs' motive for corrective surgery as well as its cost); *Cobra Int'l, Inc. v. BCNY Int'l, Inc.*, No. 05-61225-CIV, 2013 WL 11311345, at *3 (S.D. Fla. Nov. 4, 2013) (funding agreement is relevant to determining ownership of the patent and who has control over the case); *see also In re Int'l Oil Trading Co., LLC*, 548 B.R. 825, 838 (Bankr. S.D. Fla. 2016) (ordering that the funding agreement be produced but allowing redaction of terms that disclose counsel's mental impressions and opinions about the case).

[14] *See, e.g., Benitez v. Lopez*, No. 17-cv-3827-SJ-SJB, 2019 WL 1578167 (E.D.N.Y. Mar. 14, 2019) (denying defendants' motion to compel, finding that documents concerning litigation financing were irrelevant and that asserted potential related problems were speculative); *In re: Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig.*, 405 F. Supp. 3d 612, 615 (D.N.J. Sept. 18, 2019) (denying the discovery request and holding the litigation funding information was irrelevant but stating that discovery could be allowed if the defendant showed good cause, e.g., where "something untoward occurred," or a non-party was making litigation decisions, or the interests of the class were not being protected or a conflict of interest existed).

[15] American Bar Association, Best Practices for Third Party Litigation Funding, 2, 11 (Aug. 2020) ("ABA Best Practices"), https://www.americanbar.org/content/dam/aba/ directories/policy/annual-2020/111a-annual-2020.pdf.

[16] *See, e.g., Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 739–42 (N.D. Ill. 2014) (discussing the court's *in camera* review of the withheld litigation-funding documents).

the funding arrangement will not interfere with the attorney's ethical obligations.[17]

The *In re: Zantac* MDL Court cautioned that MDLs warrant transparency.[18] Accordingly, from the outset of the litigation, the Court required applicants for plaintiffs' leadership to disclose to the Court whether their firms had contingent financing.[19] If so, the Court required the applicant to disclose whether the funder had direct or indirect control over substantive decisions and whether the financing created conflicts of interest, undermined counsel's obligation of vigorous advocacy, affected counsel's judgment, or affected party control of settlement.[20] Further, the applicant was required to explain the nature and amount of financing and submit a copy of the financing documentation to a Special Master for review. [21]

A memorandum prepared by the Advisory Committee on Civil Rules to the Judicial Conference of the United States says that the weight of authority supports disclosure—but the disclosure to which it refers involves only the identification of funders for disqualification purposes.[22] Six federal courts of appeal and 24 out of 94 of the federal district courts have adopted rules requiring such disclosure.[23] That begs the question as to the discoverability of the entire agreement.

Representatives have considered and answered this question through drafted legislation. The Litigation Funding Transparency Act was introduced and referred to the Senate Judiciary Committee in March of 2021.[24] If passed, the law would require the disclosure of any third-party, commercial litigation funder as well as the production of any litigation funding agreement in all federal class actions and MDLs.[25] The Advisory Committee has also considered changing the Federal Rules of Civil Procedure to mandate automatic disclosure of third-party funding agreements.[26] Until nationwide disclosure is required, however, the discoverability of litigation funding information in federal cases will be determined on a jurisdiction-by-jurisdiction basis.

We are also starting to see states pass legislation in the interest of transparency. In 2018, Wisconsin became the first state to mandate disclosure of third-party litigation funding arrangements. In *all* state court civil cases—not just in complex litigation or class actions—the Wisconsin statute requires a funded party to provide to all other parties any third-party litigation agreement.[27] West Virginia passed a nearly identical statute last year.[28] While we expect that other states will pass similar legislation, a federal disclosure requirement might influence states to act more swiftly.

Individual courts and districts are similarly undertaking efforts toward requiring disclosure of third-party financers.[29] The U.S. District Court for the Northern District of California, for example, updated its district-wide standing order to mandate disclosure of third-party financers in class actions.[30] And in April 2021, the U.S. District Court for the District of New Jersey proposed an amendment to its local rules that would require automatic disclosure of a third-party financer's identity, a statement regarding whether the financer's approval is necessary for litigation and settlement decisions, and a description of the nature of the financial interest[31]—a move the U.S. Chamber of Commerce lauded as essential to "fair"

---

[17] *See e.g.*, *In re: National Prescription Opiate Litig.*, MDL No. 2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018) (ordering the parties to submit, *inter alia*, sworn affirmations that the financing did not "(1) create any conflict of interest for counsel, (2) undermine counsel's obligation of vigorous advocacy, (3) affect counsel's independent professional judgment, (4) give to the lender any control over the litigation strategy or settlement decisions, or (5) affect party control of settlement"); *In re: Zantac (Ranitidine) Prods. Liab. Litig.*, MDL No. 2924, 2020 WL 1669444, at *5–*6 (S.D. Fla. Apr. 3, 2020) (requiring applicants to the Plaintiffs' Steering Committee to disclose to the Court whether the litigation was funded by a third party and, if so, answer questions pertaining to the funder's control, conflicts of interest, and nature of the agreement, to be reviewed by the Special Master).

[18] *In re: Zantac (Ranitidine) Prods. Liab. Litig.*, 2020 WL 1669444, at *5–6.

[19] *Id.* at *6.

[20] *Id.*

[21] *Id.*

[22] *See* Tighe, *supra* note 9, at 5.

[23] *Id.*

[24] *See* S. 840, 117th Cong. (2021-2022). Prior versions of the bill stalled in committee. *See* S. 471, 116th Cong. (2019-2020); S. 2815, 115th Cong. (2017-2018); John E. Hall, et al., *The Effect and Discoverability of Third-Party Litigation Funding (Part 2 of 2)*, For the Defense 28, 32 (Apr. 2021) (describing the Litigation Funding Transparency Act as a "narrow, disclosure-only scheme that follows an earlier attempt to include litigation funding disclosure requirements as part of a broader push to restrict class actions—the unsuccessful Fairness in Class Action Act of 2017).

[25] *See* S. 471, 116th Cong. (2019-2020).

[26] *See* Advisory Comm. on Civil Rules, Agenda Book, 345 (Nov. 2017), http://www.uscourts .gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf; Letter to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure in the Administrative Office of the United States Courts (Mar. 27, 2019), https://www.scchamber.net/sites/default/files/ pol_3rd_party_litigation_funding.pdf.

[27] *See* Wis. Stat. § 804.01(2)(bg).

[28] *Compare* W. Va. Code Ann. § 46A-6N-6 *with* Wis. Stat. § 804.01(2)(bg).

[29] *See Third-Party Litigation Financing: Local Rules and Forms*, Federal Judicial Center, https://www.fjc.gov/content/333092/third-party-litigation-financing-local-rules-and-forms.

[30] N.D. Cal., Standing Order for All Judges of the Northern District of California: Contents of Joint Case Management Statement (Nov. 1, 2018) ("N.D. Cal. Standing Order"), https://www.cand.uscourts.gov/wp-content/uploads/judges/Standing_Order_All_ Judges_11.1.2018.pdf.

[31] D.N.J., Notice to the Bar: Proposed Amendments to the Local Civil Rules (Apr. 14, 2021) ("D.N.J. Proposed Amendments"), https://www.njd.uscourts.gov/sites/njd/files/Notice BarNewRule2021.pdf.

and "ethical" civil litigation.[32]

There are several sources of information on litigation funding and disclosure generally. The subject of litigation funding is under review by the Advisory Committee on Civil Rules to the Judicial Conference of the United States, and a 2018 memorandum to that committee summarizes what federal and state law then said on that subject.[33] Also, in 2018, the Defense Resource Institute issued a white paper that discusses a variety of issues arising from third-party litigation funding and advocates for transparency.[34] A recent American Bar Association article argues in favor of the funding.[35] An even more recent and thorough analysis for the U.S. Chamber Institute for Legal Reform lists eight arguments against it.[36]

A Disclosure Strategy

Our review of those studies and recent court opinions suggests a list of arguments to be made in any case in which a party seeks to discover litigation funding agreements. These arguments demonstrate the need for, at a minimum, *in camera* judicial review coupled with the production of redacted agreements that enable defense counsel to identify problems for the court to consider.

- **Privilege log.** The agreements are relevant or are calculated to lead to the discovery of relevant evidence and so should, at least, be listed on a privilege log so that the court can consider redaction of any terms that disclose mental impressions of counsel.

- **Merits.** The agreements may be relevant to an issue on the merits, such as statute of limitations,[37] bad faith in bringing the suit,[38] or a post-trial motion for fees.[39]

- **Need for judicial review of conflicts to protect the public.** If the funder is paid by the lawyer, that is fee splitting which most ethical codes prohibit to ensure the independence of counsel.[40] If the funder is paid out of the plaintiff's recovery, and not by the lawyer, then that creates a conflict between the lawyer and the client. Either way, if the plaintiff does not have independent legal advice concerning the arrangement, it is especially important for the court to review the agreement to protect the interests of the public.

- **Control.** An agreement may not expressly give the funder "control" or may even deny the funder "control" but still may indirectly give the funder the ability to influence the case outcome:

  - If the funder plays a role in the selection or compensation of treating doctors, or in the selection or payment of experts, then that information is relevant to the expert's bias.[41]

  - If the doctor or expert referred the plaintiff to the funder in exchange for a referral fee, that may similarly be a basis for impeachment.[42]

  - If the funder controls the selection of counsel, has a right to manage litigation expenses, has a right to receive pleadings or notice of settlement offers, or has a right to participate in settlement discussions, that may be "control" as a practical matter.[43]

  - If the funder has engaged in cold calls or other such tactics to solicit clients, that is relevant to

---

[32] Letter from Harold Kim, President of the U.S. Chamber Institute for Legal Reform, and Anthony Anastasio, President of the New Jersey Civil Justice Institute, to William T. Walsh, Clerk of Court for the United States District Court for the District of New Jersey (May 21, 2021), at 3, https://instituteforlegalreform.com/us-chamber-njcji-comments/.

[33] *See* Tighe, *supra* note 9; *see also* LAWYERS FOR CIVIL JUSTICE, MDL PRACTICES AND THE NEED FOR FRCP AMENDMENTS: PROPOSALS FOR DISCUSSION WITH THE MDL/TPLF SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON CIVIL RULES 8–9 (Sept. 14, 2018).

[34] DRI 2018, *supra* note 3.

[35] *See* William J. Harrington, *Champerty, Usury, and Third-Party Litigation Funding*, THE BRIEF, Winter 2020, at 56–57 (arguing the favorability and enforceability of litigation-funding agreements).

[36] ILR 2020, *supra* note 8, at 26–28.

[37] DRI 2018, *supra* note 3, at 27 (citing *Doe v. Soc'y of the Missionaries of the Sacred Heart*, No. 11-cv-02518, 2014 WL 1715376, at *4 (N.D. Ill. May 1, 2014) (reviewing funding documents *in camera*, finding that many protected documents were otherwise relevant to the statute of limitations issue)).

[38] *Nelson v. Millineum Labs*, No. 2:12-cv-01301-SLG, 2013 WL 11687684, at *5–6 (D. Ariz. May 17, 2013) (ordering plaintiff to produce both redacted and unredacted litigation funding documents to the court for *in camera* review and redacted litigation funding documents to defendant where defendant suspected marketplace competitor was funding plaintiff's litigation).

[39] *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691 (Fla. Dist. Ct. App. 2009) (finding that the lender exercised control over the case and was therefore liable for fees).

[40] *See* MODEL RULES OF PROF'L CONDUCT r. 5.4(a); ILR 2020, *supra* note 8, at 21, 31 n.159 (listing states that prohibit splitting fees); *see generally* ABA BEST PRACTICES, *supra* note 14.

[41] *See In re: Am. Med. Sys. Inc.*, MDL No. 2325, 2016 WL 3077904 (S.D. W. Va. May 31, 2016); DRI 2018, *supra* note 3, at 10 (citing *ML Healthcare Serv., LLC v. Publix Supermarkets, Inc.*, 881 F. 3d 1293 (11th Cir. 2018) (affirming the lower court's decision requiring the production and allowing the admission of payments made by a third party on the plaintiff's behalf where the experts had interest in future referrals)); *see also Yousefi v. Delta Elec. Motors, Inc.*, No. C13-1632RSL, 2015 WL 11217257, at *2 (W.D. Wash. May 11, 2015) (stating that evidence of union funding with expectation of repayment may be relevant to the credibility and potential bias of witnesses).

[42] *See* Bexis, *supra* note 8; *Pelvic Mesh Removal Scheme, supra* note 8.

[43] *See* ILR 2020, *supra* note 8, at 19.

whether subsequent surgery was medically necessary.[44]

- If the plaintiff or counsel owes the litigation funder a first dollar amount, that, in effect, "controls" the plaintiff's willingness to settle.
- If the plaintiff's counsel has an ongoing relationship with the litigation funder, then de facto control may exist, or a conflict of interest may arise out of the funder's role as a source of referrals or the payment of a referral fee.[45]

- **Realistic appraisal of the case**. The agreement should be discoverable just like an insurance agreement is discoverable,[46] so that, as the comment to that rule says, "disclosure . . . will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation."[47]
- **Like a lien**. The agreements should be discoverable just as a worker's compensation lien or a medical lien would be discoverable because of its potential to become part of settlement negotiations. A full settlement may be impossible if the defendant cannot be sure that all liens have been satisfied.
- **Allocation of discovery expense**. Litigation funding is relevant to the "parties' resources" that must be taken into consideration in discovery disputes.[48]
- **Class action**. In a class action, plaintiffs other than the named plaintiff have an interest in knowing about their counsel's resources and relationship with a litigation funder.
- **Exception to collateral source rule**. Discovery may be necessary to determine whether an exception to the collateral source rule should apply.[49]
- **Wisconsin and West Virginia**. If either of these state's law applies, that state has a statute requiring disclosure of litigation funding agreements.[50]
- **Local rules and case management orders**. A growing number of courts are requiring litigation funding disclosures.[51] These rules should be taken into account when considering jurisdiction and venue in all cases.

These arguments favor disclosure of the entire agreement and related documents, at least subject to a protective order. Litigation funding agreements should be treated like all other discoverable documents in litigation and, if privilege is claimed, should be listed on a privilege log and submitted to the court for *in camera* review. But financial details that show how counsel has valued the case will almost certainly be protected, just as insurance reserves are protected.[52]

If an *in camera* review is conducted, then the defense should be given redacted copies so that the defendant will have the "ability to make its own assessment and arguments regarding the funding agreement, and its impact."[53] And, short of that, the list of "control" opportunities outlined above could be given to the judge conducting the *in camera* review to alert the court of all the ways potential control problems could occur.

One thing that seems certain is that a mere statement by plaintiffs that a funder does not "control" the litigation is entirely inadequate to resolve all of the issues that litigation funding raises.

Also, nothing in these cases stands in the way of asking questions in depositions of parties, treating doctors, or experts as to the funding they have received. After all, many of the decisions that reject disclosure do so because defendants' concerns are "speculative." Deposition questions may show that the concerns are real in a particular case.

Conclusion

Parties have a right to know who is controlling their litigation and who has a financial stake in their opposition's success. This can only be accomplished through reasonable transparency standards, a trend toward which is discernable. Discovering funders' identities and funding agreements can allow the courts to move on to the next step: determining whether litigation funding should be allowed at all. ■

---

[44] DRI 2018, *supra* note 3, at 27.

[45] *See* DRI 2018, *supra* note 3, at 24 (citing MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2)).

[46] FED. R. CIV. P. 26(a)(1)(A)(iv).

[47] FED. R. CIV. P. 26(a)(1)(A)(iv) advisory committee's note to 1970 amendment; *see also* DRI 2018, *supra* note 3, at 7–8.

[48] *See* FED. R. CIV. P. 26(b)(1), 26(c)(1)(B).

[49] *See* DRI 2018, *supra* note 3, at 19–20 (citing *ML Healthcare Serv., LLC v. Publix Supermarkets, Inc.*, 881 F. 3d 1293 (11th Cir. 2018); *Ortiviz v. Follin*, No. 16-cv-02559-MSK-MEH, 2017 WL 3085515 (D. Colo. July 20, 2017) (holding that the collateral source rule did not apply where funder paid medical bills at discounted rate in exchange for lien on full undiscounted recovery; plaintiff was still liable for full amount).

[50] *See* WIS. STAT. § 804.01(2)(bg); W. VA. CODE ANN. § 46A-6N-6.

[51] *See, e.g.*, D.N.J. PROPOSED AMENDMENTS, *supra* note 30; N.D. Cal. STANDING ORDER, *supra* note 29.

[52] *See Charge Injection Tech., Inc. v. E.I. du Pont de Nemours & Co.*, No. 07C-12-134-JRJ, 2015 WL 1540520 (Del. Super. Ct. Mar. 31, 2015).

[53] DRI 2018, *supra* note 3, at 28–29 (quoting *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016)).

Defending the Future of Mississippi
ESTABLISHED IN 1965

THE Quarterly

A PUBLICATION OF THE MISSISSIPPI DEFENSE LAWYERS ASSOCIATION

VOLUME 45 • NUMBER 2 SUMMER 2021

MDLA Announces 2021 Scholarship Award Recipients

Kelsi Baldwin
Mississippi College

Amber Cain
Mississippi College

Professor Donald Campbell
Mississippi College

Anna Claire Mercer
University of Mississippi

Lynette Potter
University of Mississippi

In This Issue: