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Third Party Funding

While Discoverability of Third-Party Litigation Funding Remains an Unsettled Area of Law, Several Jurisdictions now Require, or Permit, the Disclosure of Information Relating to Third-Party Litigation Funding Agreements

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A growing trend in complex and expensive litigation is for plaintiffs and their counsel to seek third-party medical financing and/or litigation funding. This trend has resulted in "third-parties—investors with no legal interests in cases— [] funding lawsuits, bearing most or all of the cost and risk of litigation. In exchange for financing a lawsuit, an investor will receive a large percentage of an award or settlement."[1] In recent years, "third-party litigation funding has become a burgeoning, multibillion-dollar, international industry."[2]

Recently, courts throughout the United States have generally upheld the use of third-party litigation funding, so the defense bar has focused its attention on requiring plaintiffs and non-party financiers to disclose third-party litigation funding in litigation. It should be noted that, at this time, there is a divergence of authority throughout state and federal courts on the disclosure requirements, if any, or discoverability of third-party litigation funding. As recently stated by the District Court for the Southern District of Indiana in a September 2023 decision, "whether information and documentation relating to medical financing or litigation funding is discoverable is a developing area of law and not yet settled."[3]

A small minority of states and federal district courts recently passed legislation or promulgated rules regulating third-party litigation funding, and some jurisdictions even require disclosure of litigation funding as a matter of course in ongoing litigation. For example, in 2017, the District Court for the Northern District of California entered a standing order mandating automatic disclosure of third-party litigation funding in class action lawsuits.[4] Similarly, in June of 2021, the District Court for the District of New Jersey amended its local rules to require that parties utilizing third-party litigation funding to disclose the existence of "any person or entity that is not a party and is providing funding for some or all of the attorneys' fees and expenses for the litigation on a non-recourse basis."[5]

In 2018, Wisconsin amended its discovery rules to require mandatory disclosure, without awaiting a discovery request, that "provide[s] to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise."[6] In 2019, West Virginia amended the West Virginia Consumer Credit and Protection Act to regulate the terms of litigation financing contracts and require that litigation financiers provide certain consumer disclosures in relation to the litigation funding contract.[7] Additionally, West Virginia Code § 46A-6N-6, requires that parties in ongoing litigation "without awaiting a discovery request, provide to the other parties any agreement under which any litigation financier, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise."[8]

Accordingly, the defense bar practicing in West Virginia possesses statutory authority to support its discovery requests seeking information and documents relating to third-party litigation funding. While West Virginia Code § 46A-6N-6 requires disclosure of litigation funding agreements without awaiting a discovery request seeking the same, the best practice is for defense counsel to direct written discovery, within the contours of West Virginia Code § 46A-6N-6, to seek information and documents relating to any litigation funding agreements related to the ongoing litigation. While it does not appear that any West Virginia courts have interpreted the statute, the West Virginia defense bar should be able to rely upon West Virginia Code § 46A-6N-6 for the appropriateness of discovering any litigation funding agreements should the other party resist providing such discovery.

For those members of the defense bar practicing in other jurisdictions, you will likely need to conduct research on the disclosure requirements, if any, and/or discoverability of litigation funding agreements, as the jurisdictions

1 Justin Boes, *Lawyers, Funds & Money: The Legality of Third-Party Litigation Funding in the United States*, 49 Rutgers L. Rec. 118 (2022).
2 *Id.*
3 *Hobbs v. American Commercial Barge Line LLC*, No. 4:22-cv-00063, 2023 WL 6276068 (S.D. Ind. Sept. 26, 2023).
4 Standing Order for All Judges of the Northern District of California, Contents of Joint Case Management Statement 19 (Nov. 1, 2018).
5 N.J.A.R. 7.1.1 *amended by In re: Amendment of Local Civil Rules* of June 21, 2021 (N.J. June 21, 2021), https://www.njd.uscourts.gov/sites/njd/files/Order7.1.1%28signed%29.pdf.
6 W.I. S.T. 804.01(2)(b)(bg).
7 *See* W. Va. Code § 46A-6N-1, *et seq.*
8 *See* W. Va. Code § 46A-6N-6.

are split, the inquiry is often case specific, and this emerging area of law remains in a state of constant development. To assist practitioners in their legal research in other jurisdictions, a brief survey of jurisdictions that have recently ruled that litigation financing is discoverable, at least in some instances, is included below.

Cases Permitting Discovery of Litigation Funding Agreements

Hobbs v. American Commercial Barge Line LLC, No. 4:22-cv-00063, 2023 WL 6276068, at *5 (S.D. Ind. Sept. 26, 2023) ("While the Court ultimately grants [defendant's] request to the extent that it will compel the requested discovery, it emphasizes that this ruling should not be read to support a blanket conclusion that discovery related to medical financing or litigation funding will always be relevant or discoverable. There may be meritorious objection that a party could make to similar requests in other cases, but [plaintiff] did not make them here."

Spears v. Wal-Mart Stores E., LP, No. 2:18-cv-152, 2020 WL 12676397 (S.D. Ga. Sept. 21, 2020) ("Court ordered Cherokee Funding, LLC, a non-party, to respond to the discovery subpoena, holding that the collateral source rule does not bar the discovery sought and that discovery relating to third-party litigation financing is relevant for purposes of discovery to explore plaintiff's treating physicians' bias, intent, or motive. In so holding, Court held "[s]everal courts have determined that information about the relationship between a plaintiff, a medical funding company, and treating physicians may be relevant to the treating physicians' bias, intent, or motive.")

Ortiviz v. Follin, No. 4:22-cv-00063, 2017 WL 3085515, at *5 (D. Colo. July 20, 2017) (holding that non-party, Marrick Medical Finance, LLC ("Marrick"), must respond to discovery subpoena requesting information relating to Marrick's agreement to pay plaintiff's medical bills at a discounted rate. The court ruled that the collateral source rule did not apply, an existing protective order in the case protected the disclosure of any purported trade secret information sought from Marrick, and the discovery sought on Marrick medical payment agreement with Plaintiff was relevant and proportional to the needs of the case for purposes of establishing any bias, reasonableness of treatment, and cost of treatment.

In re: American Medical Systems, Inc., MDL No. 2325, 2016 WL 307704 (S.D. W. Va. May 31, 2016) (requiring non-party that funded corrective pelvic mesh surgeries for putative plaintiffs to produce information and documents through a discovery subpoena relating to the corrective surgery financing agreement).