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Courts Keep Rejecting Litigation Funding Discovery Campaign

By **Matthew Harrison and Stephanie Southwick** (October 15, 2019, 1:44 PM EDT)

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In January 2017, the Northern District of California modified its standing order to require the disclosure of litigation funding in class, collective or representative actions. Detractors of the industry trumpeted this as a watershed moment in the debate over litigation funding disclosure.

Those with deep understanding of the industry knew better: Both before and ever since, courts have consistently rejected forays into these arrangements as contrary to bedrock tenets of discovery law.

The debate about whether courts will entertain such discovery absent extraordinary circumstances is essentially a dead letter. Recent case law on this issue drives the point home.

The Push for Discovery of Litigation Funding Arrangements Continues to Fail

It is unsurprising that the largest and most litigious lobbyist in the world, the U.S. Chamber of Commerce, has spent millions advocating for automatic disclosure of funding arrangements. This campaign is designed to discourage claimants from adding a powerful tool to their litigation arsenals against some of the organization's largest constituents.[1] Another purpose is likely to chill the flow of information between funders and claimants — ironically, precisely the information needed by funders to back only meritorious cases.

For litigants, discovery about these arrangements also holds great allure, perhaps only to gain insight about why a sophisticated investor is confident enough in the claimant's case to support it with millions of dollars of nonrecourse capital. But more practically, they surely understand it will show exactly what it will take to outspend an opponent and provide a road map of the funded parties' litigation strategy.

The perplexity lies in why these discovery expeditions continue, given the regularity with which the courts rebuff them.

Funding Must Be Relevant to the Parties' Claims and Defenses (and Rarely Is)

The primary reason for courts' repeated denial of discovery into funding arrangements is

straightforward: They are rarely relevant to the subject matter of the litigation under Federal Rule of Civil Procedure 26(b)(1).

As reported by Law360,[2] the U.S. District Court for the District of New Jersey in Valsartan Products Liability Litigation recently issued the latest in a long line of decisions reaching the same conclusion.[3] The opinion is instructive because it addresses the panoply of arguments parties typically raise when seeking these materials, including relevance and proportionality, real party in interest questions, attorney work-product protection and a purported trend favoring disclosure.

In Valsartan, the court analyzed the discoverability of plaintiff's funding-related documents in litigation concerning recalls of contaminated medication. Defendants argued that plaintiffs' agreements and communications with litigation funders were relevant to assessing credibility and bias, determining the real party in interest, deciding the scope of discovery, and evaluating discovery cost-shifting and potential sanctions.

Unsurprisingly, the court found litigation funding irrelevant to the parties' claims and defenses, and therefore, that materials relating to it were not discoverable. The court soundly rejected each of defendants' relevance arguments. For example, with respect to funding's purported relevance to sanctions, cost shifting and the scope of discovery, the court stated that it "routinely decides these issues without inquiring as to how the parties finance their cases."

This conclusion echoes the observation made by the advisory committee to Federal Rules of Civil Procedure in response to the chamber's parallel arguments: "[J]udges currently have the power to obtain information about third-party funding when it is relevant in a particular case."[4] The court also concluded that defendants' "parade of horribles that might occur from litigation funding is pure speculation."

In reaching its ruling, the court performed a comprehensive analysis of recent jurisprudence. It cited eight cases from six jurisdictions and observed a "plethora of authority that holds that discovery directed to a plaintiff's litigation funding is irrelevant." Many of them are the subject of previous commentary.[5] But one recent case from the U.S. District Court for the Eastern District of New York is notable for the novelty of defendants' relevancy arguments.

In Benitez v. Lopez,[6] defendants claimed funding documents were germane to plaintiff's credibility and to his motives behind the lawsuit. The court disagreed. It held that the use of funding "does not assist the fact-finder in determining whether or not the witness is telling the truth" and that "litigation motivation" is not relevant to a claim or defense, or credibility.

The court rejected defendants' attempt to delve into the extent of a funder's control of strategy and settlement decisions, holding that a party is generally not entitled "to know why the adverse party chooses to make certain strategic decisions in a case or avoid settlement."

Naturally, a small handful of outliers to this parade of rejections have occurred in rare instances when the requesting party can demonstrate relevance. The Valsartan court addressed this rather obvious proposition.

It explained that the requesting party must offer more than speculative arguments or generalized evidence, and decreed that it would not order discovery "in the absence of a demonstratable showing that the discovery is relevant to a claim or defense in the case." The court found no such showing.

In short, litigants continue their descent down this "rabbit hole" (as the Valsartan court aptly put it) and almost always come up empty. Relevance matters in discovery.

Litigation Funders Are Not Real Parties in Interest

In the context of relevance, the Valsartan court rejected the common refrain that funders are real parties in interest. It found defendants' assertion that the funder owned the right of action to be "pure speculation."[7] It also noted that "defendants have not cited to a single instance where a litigation funder owned the right to recover rather than being a passive investor that shares in the benefit of a recovery from an attorney's contingent fee."

A recent decision from the District of New Jersey in WAG Acquisition LLC v. Multi Media LLC is illuminating.[8] There, defendants argued plaintiff lacked standing because it contracted away certain rights in the patents-in-suit to a funder, and parroted the Chamber's refrain that a funder is "effectively" a real-party-in interest.[9]

The court discarded defendants' arguments and concluded: "The rights transferred to [the funder] 'reflect an intention to allow [funder] to protect its investment' in the litigation, which 'is fundamentally different than an intention to confer on [the funder] substantial rights in the patents themselves.'"[10]

These cases put to bed the notion that, without more, a funder becomes a real in party in interest by virtue of its financing arrangements.

Information Shared in Litigation Funding Arrangements Is Almost Always Protected Attorney Work Product

The court's decision in Valsartan rested on relevance and not the protection afforded by the attorney work-product doctrine to materials shared between the claimant and the funder. Nevertheless, the court cited eight decisions applying such protection over funding-related records and observed that the weight of recent authority counsels in favor of doing so.[11]

This too is consistent with Miller, which held that materials provided to a litigation funder by a claimant and its counsel are prepared "because of" litigation and are entitled to work-product protection. Disclosure to a funder does not waive protection if the materials are not disclosed in a manner that substantially increases the opportunity for potential adversaries to obtain them (typically under a nondisclosure agreement).[12] Nearly every subsequent decision has reached the same conclusion.

The few decisions in which a court has declined protection in this context reflect unique circumstances.[13] For example, in a recent decision from the Eastern District of Texas in Cypress Lake Software Inc. v. Samsung Electronics America Inc., the court declined to extend work-product protection because the doctrine simply did not apply.[14] There, Mirai Ventures agreed to provide funding and patent prosecution services to Sitting Man in exchange for a portion of any proceeds from the enforcement, sale or licensing of the patents. Sitting Man assigned the patents-in-suit to Cypress Lake Software, who sued Samsung for infringement.

Samsung sought production of the agreements between Mirai and Sitting Man prior to the assignment. The court compelled production based on the unremarkable proposition that the doctrine provides no protection (1) when documents are created absent the anticipation of litigation, or (2) for patent

prosecution materials. This outcome is consistent with the courts' application of the doctrine in the litigation funding realm because there — unlike in Mirai's and Sitting Man's contractual relationship — litigation is always contemplated.

There Is No "Shifting Tide" In Favor of Litigation Funding Disclosure

The modest amendment to the Northern District of California's standing order almost three years ago caused considerable hubbub among the chamber and other proponents of forced disclosure. This excitement has no doubt been further fueled by the chamber's congressional lobbying campaign to introduce a languishing bill called the "Litigation Funding Transparency Act of 2019" (formerly 2018).[15]

The members of the judiciary — i.e., those who regularly confront these issues — certainly have not given this crowd any reason to celebrate. Far from it: The chamber's efforts fly in the face of the parade of decisions rejecting disclosure. At a minimum, this should raise serious questions about the chamber's true motives. Indeed, one might say this is the only discovery of which the chamber has ever been a proponent.[16] Yet unless one counts the "dark money" efforts by this "goliath-sized influence machine,"[17] there is no trend in favor of disclosure. In fact, it is precisely the opposite, as the Valsartan court drove home emphatically.

Perhaps signaling a lack of faith in their relevance arguments, the Valsartan defendants closed with a plea tantamount to: "But everyone is doing it!" Spoiler alert; they aren't: "The court disagrees with defendants' statement that there is a 'shifting tide towards disclosure of third-party litigation funding information in courts ... coupled by a similar movement in the legislative realm.'"[18]

The court referred to the slew of recent decisions denying disclosure and shot down the notion that the rules are changing. It also explained that the Northern District of California rule change was "limited" and remarked that "this adoption was not followed by a groundswell of copycats, including New Jersey."[19]

So much for the supposedly shifting tide in favor of disclosure.

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[1] The Chamber purports to "represent[] the interests of more than 3 million businesses of all sizes, sectors, and regions," though many of those companies are consumers of litigation funding. U.S. Chamber of Commerce, About the U.S. Chamber of Commerce, Washington: U.S. Chamber of Commerce, 2019, located at https://www.uschamber.com/about/about-the-us-chamber-of-commerce (last visited Oct. 9, 2019).

[2] A. Strickler, Want Your Rival's Funder Info? Be Specific or Don't Bother, Law360, Sept. 24, 2019, located at https://www.law360.com/articles/1201654/want-your-rival-s-funder-info-be-specific-or-don-t-bother (last visited Oct. 9, 2019).

[3] In re: Valsartan, No. 1:19-md-02875, 2019 WL 4485702 (D.N.J. Sept. 18, 2019).

[4] D. Campbell, Report of Advisory Committee on Civil Rules at 4 (Dec. 2, 2014), located at http://www.uscourts.gov/file/17932/download (last visited Oct. 9, 2019).

[5] See, e.g., M. Harrison and S. Jacobson, Courts Are Getting It Right on Litigation Funding Discovery, Law360, Jan. 22, 2019, located at https://www.law360.com/articles/1120873/courts-are-getting-it-right-on-litigation-funding-discovery (last visited Oct. 9, 2019).

[6] Benitez v. Lopez, No. 17-CV-3827-SJ-SJB, 2019 WL 1578167 (E.D.N.Y. March 14, 2019).

[7] This is consistent with the rule articulated in Miller UK Ltd. v. Caterpillar Inc., 859 F.Supp.2d 941 (2012) — the seminal decision concerning discovery of funding — that the real party in interest "is the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery."

[8] WAG Acquisition LLC v. Multi Media LLC, No. 2:14-cv-02340, 2015 WL 3804135 (D.N.J. Aug. 13, 2019).

[9] January 31, 2019 Letter to the Advisory Committee submitted by Brackett Denniston III, (Chair of the Chamber's Institute for Legal Reform), et al. ("When litigation funders invest in a lawsuit, they buy a piece of the case; they effectively become real parties in interest.").

[10] WAG Acquisition, 2015 WL 3804135 at *5 (internal citations omitted).

[11] In re: Valsartan, 2019 WL 4485702, at *7 n.7.

[12] Miller, 859 F.Supp.2d at 735-36.

[13] See Courts Are Getting It Right On Litigation Funding Discovery at n.14.

[14] Cypress Lake Software Inc. v. Samsung Electronics America Inc., No. 6:18-cv-30-JDK (E.D. Tex. June 26, 2019).

[15] Litigation Funding Transparency Act of 2019, S. 471, 116th Congress (2019), located at https://www.congress.gov/bill/116th-congress/senate-bill/471/text?format=txt (last visited Oct. 9, 2019).

[16] See, e.g., the US Chamber Institute for Legal Reform's letter to the Advisory Committee on Civil Rules, supporting proposed rule changes limiting the scope of discovery and decrying discovery as a "morass, nightmare, quagmire, monstrosity, and fiasco." (November 7, 2013), located at https://www.instituteforlegalreform.com/uploads/sites/1/FRCP_Submission_Nov.7.2013.pdf.

[17] A. Kroll, Is Corporate America's Lobbying Machine Hiding Its Donors?, Rolling Stone (July 10, 2019), located at https://www.rollingstone.com/politics/politics-news/elizabeth-warren-chamber-of-commerce-dark-money-oil-857465 (last visited Oct. 9, 2019).

[18] In re: Valsartan, 2019 WL 4485702, at *5 (internal citations omitted).

[19] Id.