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PERSPECTIVE

Attacks on litigation funding are attacks on litigation itself

By David M. Gallagher

Last month, Equifax and its allies lobbied Congress to limit credit bureaus' exposure to lawsuits, just before news broke of the massive data breach affecting 143 million Americans. It's no accident that the leading advocates of increasing barriers to litigation are representatives of industries whose business practices routinely lead to litigation. Nor is it an accident that these same advocates are the leading critics of third-party litigation funding.

While barriers to litigation might be good for Equifax and other litigation-prone interests, they're not good for the rest of us. Mandatory arbitration clauses and class-action waivers are huge barriers to litigation, but the biggest barrier of all to litigation is how much it costs. In all kinds of cases, aggrieved plaintiffs are increasingly looking to litigation funders to help them pay the enormous expenses of seeking justice against corporate giants. Opponents of litigation funding — which makes litigating meritorious cases affordable — would prefer that litigation remain prohibitively expensive to most plaintiffs.

Attacks on litigation funding should get no traction in California. The California Supreme Court has already recognized that litigation funding is a beneficial activity, and even a protected one. In *PG&E v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1136-37 (1990), the court roundly rejected an attempt by a defendant against whom litigation had been funded (PG&E) to hold the third-party funder (Bear Stearns) liable: "In fact we have no public policy against the funding of litigation by outsiders. If any person who induced another to bring a lawsuit involving a colorable claim could be liable in tort, free access to the courts could be choked off with an assiduous search for unnamed parties. It is important to remember what PG&E is trying to achieve through this lawsuit. It seeks to enjoin Bear Stearns from further participation in the lawsuit in order to avert what it considers to be the irreparable harm of an adverse judgment. It is essentially seeking to abort the lawsuit by starving the litigant of funds. … [I]t would defeat the purpose of assuring free access to the courts, and cause a flood of oppressive derivative litigation, to assess tort liability for their activities. … Our legal system is based on the idea that it is better for citizens to resolve their differences in court than to resort to self-help or force. It is repugnant to this basic philosophy to make it a tort to induce potentially meritorious litigation." (Citations omitted.)

In a later case, the Supreme Court acknowledged that the logic of this holding applies in the context of an anti-SLAPP motion. Interpreting Code of Civil Procedure Section 425.16's provision that a "cause of action against a person arising from *any act* of that person in furtherance of the person's right of petition or free speech ... shall be subject to a special motion to strike," the court noted that "'any act' includes … funding … of a civil action." *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056 (2006) (emphasis added).

The 9th U.S. Circuit Court of Appeals has reached consistent decisions, in the context of the *Noerr-Pennington* doctrine. That doctrine is an application of the First Amendment right to petition, immunizing parties from liability for bringing bona fide litigation claims. The 9th Circuit has held that the doctrine protects not only parties filing litigation, but also any third parties funding it. *Sosa v. DirecTV, Inc.*, 437 F.3d 923 (9th Cir. 2006). Indeed, it was *Noerr-Pennington* that animated the California Supreme Court's conclusion in *PG&E*, above. As an opinion of the Southern District of California later described, "the California Supreme Court has directly sanctioned third-party funding of litigation. In *PG&E*, the Court favorably reviewed cases that had applied Noerr to protect litigants from state tort counterclaims, and concluded that the same considerations should protect persons who induce or finance others' litigation." *Gen-Probe, Inc. v. Amoco Corp., Inc.*, 926 F.Supp. 948, 959 (S.D.Cal. 1996).

A casual observer might assume from the harping of its critics that the propriety of third-party litigation funding is still up for debate in California. In fact, the issue was settled over 25 years ago by the California Supreme Court itself, and seconded more recently by the 9th Circuit. As these courts have concluded, third-party litigation funding is "protected," and efforts to oppose it are "repugnant" to our public policy.

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