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OPINION: Overreaction Over 3rd-Party Class Action Funding

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The legal blogosphere is abuzz with discussion of Gbarabe v. Chevron Corp., No. 14-cv-00173, 2016 (N.D. Cal. Aug. 5, 2016). In this discovery dispute, Judge Susan Illston compelled a class action plaintiff to produce his confidential litigation funding agreement to the defendant. The decision is being hailed as evidence that "judges in the future may feel compelled to require the disclosure of third-party funders," forcing funders "to change their playbooks." Others claim that the decision "has the potential to force" funders "out of the shadows" and is a "cautionary tale" that "will profoundly impact the practice of third-party funding of class actions." A closer look at the ruling, however, suggests that the reaction may be overblown.

As several commentators have already noted, the Gbarabe plaintiff conceded two of the strongest (and thus most common) arguments against production of third-party funding agreements: (1) relevance and (2) privilege. The relevance point in Gbarabe all but had to be conceded because of the unusual facts surrounding class counsel in that case, which put the "adequacy of class counsel" directly at-issue. According to pleadings filed there, class counsel are two individual lawyers without a formal office or support staff, they missed several deadlines due to lack of financial and personnel resources, and critically, they admitted they required outside funding to prosecute the case.

Thus, the Gbarabe plaintiff argued only that the documents' production would breach a rather weak confidentiality provision contained within the funding agreement that explicitly allowed for production pursuant to court order. In these circumstances, it is perhaps not surprising that the judge ruled as she did.

By contrast, in a recent case where a funded class action plaintiff did object to producing funding documents on the basis that they were irrelevant to the issues in the case (including adequacy of class action counsel), the Southern District of New York agreed and denied the defendant's motion to compel. Kaplan v. S.A.C. Capital Advisors LP, No. 12-cv-9350 VM KNF, 2015, at *1 (S.D.N.Y. Sept. 10, 2015).

As the court in Kaplan reminded the defendant, the "party seeking disclosure must make a showing of the requested information's relevance to its claims or defenses," and any basis for concerns about the fitness of class counsel due to a funding arrangement must be "nonspeculative." Id. at *5. While it is possible that the presence of multiple large law firms representing the Kaplan class (as opposed to the solo practitioners representing the Gbarabe plaintiffs) may have influenced the court's decision, the court explicitly ruled that the "plaintiffs' admission that they have entered into a litigation funding

agreement does not, of itself, constitute a basis for questioning counsel's ability to fund the litigation adequately." Id. This is especially true considering that a plaintiff or counsel may desire to secure funding for a variety of reasons (e.g., reducing the risk of loss, regulating cash flow, etc.) unrelated to the depth of their own pockets.

Class action defendants' ability to compel production of funding documents thus will turn, as it always has, on the circumstances of the case. Put differently, there is no reason to suspect that Gbarabe will lead to a flood of disclosure in class action cases. And, even if there were, there is no reason to suspect that the ruling will have a "profound" impact on the nascent litigation funding industry as a whole: at least some large commercial litigation funders, including Bentham IMF, do not invest in U.S. class actions.

And it is hard to envision a scenario outside of the class action context where the presence of third-party funding would be even arguably relevant to the merits of the claims made in a case. Indeed, even Judge Illston reserved decision on the question of whether other funding documents generally are "relevant and discoverable." 2016, at *2.

Why, then, the buzz? Certainly, as one expert noted in a recent article covering Gbarabe, the U.S. Chamber of Commerce and other opponents of litigation funding are quick to "ring the 'fire alarm'" whenever a decision ostensibly favorable to corporate defendants is issued. And disclosure of third-party funding is a "hot" topic in the Northern District of California: as Judge Illston noted in her opinion, the ruling follows on the heels of a proposed revision to Local Rule 3-15 that would require automatic disclosure of litigation funders.

In light of the cloud of controversy surrounding litigation funding in the Northern District of California, however, it should be remembered what exactly third-party funding is intended to do, and what it has so far appeared to accomplish in Gbarabe: namely, permit plaintiffs with limited resources to bring legitimate claims that otherwise might not be brought.

While the merits of the Gbarabe class' claims are yet to be determined, the allegations — that Chevron's negligence caused an oil rig explosion that led to environmental devastation, the almost total loss of a local Nigerian fishing industry, and significant health issues for fishermen — are serious ones. The consequences of requiring such plaintiffs to disclose the terms of their funding arrangements, and the potential chilling effects such disclosure could have on litigation funding, should be considered carefully.

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