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Third-party litigation funding arrangements should be disclosed

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Treating similar cases similarly is a central concept with its origin in Book 5 of Aristotle's Nicomachean Ethics and is the ultimate basis for the common law system of justice. As a result, lawyers spend a great deal of time trying to find a case on "all fours" and distinguishing other cases cited by the opposing side.

Under this system, the task of figuring out what is sufficiently similar and what facts were previously dispositive is necessary so that the law is applied consistently and fairly and achieves just results. There is little more destructive to the common law system than the perception that courts have not treated similar cases similarly, as it invites claims corrosive to the system as to motive for the decision.

As previously discussed in this space, the goal of the civil justice is to award to a party what they deserve (or not), nothing more (or less). The collateral source rule is alive and well in Illinois, but it is an affront to justice, and should be abolished. An adjunct to the collateral source rule that is gaining national attention is the struggle over the disclosure of third-party funding arrangements in civil litigation. Often employed to fund commercial litigation in which backers will bet on litigation they believe will be successful and in exchange for a percentage of the proceeds should they be correct, third-party funding is also increasingly financing personal injury litigation.

These arrangements create significant distortions in the civil justice system and pervert incentives to settle, especially because, unlike defendant's policies of insurance, they are often not required to be disclosed. In addition, treating physicians can be involved in the arrangements through either (1) direct payments from the funder to satisfy far higher billed amounts that are then collected by the funder or (2) through providing services in exchange for a lien on any recovery that are also billed at a higher than market rate.

Unlike a plaintiff's policy of health insurance, third-party litigation funding of medical bills, whether by direct payments or through medical liens, is not a collateral source and should not be treated similarly because it is an arrangement made after the alleged incident and is an investment in the litigation which is not a benefit to the plaintiff (contrary to the core aspects of collateral source).

In a recent case from Georgia, a state trial court ordered the production of documents subpoenaed from a third-party litigation funder who paid the plaintiff's medical bills and took a lien interest. The requested documents related to the funding of the plaintiff's medical bills, and while expressly not pre-judging the admissibility of the documents at trial, the court held that the arrangement and the amounts paid could be relevant to determining the reasonableness of the charges for the medical care administered to the plaintiff. *Cardona v. McGowan*, 19A-1907-6, Cobb County, Ga., Aug. 7, 2020.

This decision builds on a number of decisions from around the country, but particularly from Georgia, that have questioned whether third-party litigation funding is a collateral source. In *Ortiviz v. Follin*, 2017 U.S. Dist. LEXIS 113143 (D. Colo. 2017) citing *Rangel v. Anderson*, 202 F.Supp.3d 1361 (S.D. Ga. 2016), the court held that the agreement with the third-party funder was discoverable, and potentially admissible, because the arrangement may not render the third-party funder a collateral source.

Going further, in Houston v. Public Supermarkets, Inc., 2015 U.S. Dist. LEXIS 102093, *4 (N.D. Ga. 2015), the court found "ML Healthcare is not in the nature of a traditional collateral source. Unlike an insurance company to which the Plaintiff would pay premiums, ML Healthcare serves as an investor in the lawsuit and receives no payment from the Plaintiff until after the lawsuit. Furthermore, this Defendant does not seek to offer evidence of the relationships between ML Healthcare and the Plaintiff and ML Healthcare and the Plaintiff's doctors in order to reduce its liability, but rather to attack the credibility of the Plaintiff's experts and the reasonable value of the medical services."

Bias almost always is a basis to introduce evidence, and the Illinois Supreme Court has held that the reasonableness of the bills may be attacked by any means except through evidence of what was paid by the collateral source. *Wills v. Foster*, 229 Ill.2d 393, 418 (2008). If a third-party funder is not a collateral source, which defendants should assert they are not, then the information should be discoverable and then admissible for the purposes articulated by the *Houston* court.

The standard interrogatories promulgated under Supreme Court Rule 213(j), provide a basis for a defendant to seek the identity of the entity that paid the plaintiff's bills:

"State any and all other expenses and/or losses you claim as a result of the occurrence. As to each expense and/or loss, state the date or dates it was incurred, the name of the person, firm and/or company to whom such amounts are owed, whether the expense and/or loss in question has been paid and, *if so, by whom it was so paid*, and describe the reason and/or purpose for each expense and/or loss." (Emphasis added.)

While the collateral source rule will likely not be eliminated any time soon, defendants should seek disclosure of agreements with third-party funders, and the information gathered should be used to assail the reasonableness of the medical bills incurred and the bias of any doctors involved in the arrangement.

Similar cases should be treated similarly, but third-party funding of medical bills is not similar to a collateral source and should not be treated similarly.
