Chicago Daily Law Bulletin

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May 19, 2021

# Proposals take aim at third-party litigation funding

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Whether in state or federal court, production of primary and excess policies of insurance covering the defendant, or at least disclosure of the terms of such policies, is required as a matter of course.

The 1970 Advisory Committee Notes to the Federal Rules of Civil Procedure that added the requirement under Rule 26 for production of policies of insurance despite not being admissible as evidence state that:

"Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it will have the opposite effect."

This reasoning applies with equal force to third-party litigation funding agreements that are, as articulated in this space on Sept. 23, 2020, playing an increasing role in litigation, but are largely not subject to the same disclosure requirements as policies of insurance.

Recognizing the increasing role that third-party litigation funding has on litigation, a proposal was recently made before the Illinois General Assembly to create a licensing and regulation scheme for such funding. Though the amendment to Senate Bill 1088 so far has not progressed and would have required disclosure of such agreements in the course of litigation, a proposal in the U.S. District Court for the District of New Jersey would. Proposed Rule 7.1.1 would provide in relevant part:

"(a) Within 30 days of filing an initial pleading or transfer of the matter to this district, including the removal of a state action, or promptly after learning of the information to be disclosed, all parties, including intervening parties, shall file a statement (separate from any pleading) containing the following information regarding 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 in exchange for (1) a contingent financial interest based upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal or bank loan, or insurance:

"1. The identity of the funder(s), including the name, address, and if a legal entity, its place of formation;

"2. Whether the funder's approval is necessary for litigation decisions or settlement decisions in the action and if the answer is in the affirmative, the nature of the terms and conditions relating to that approval; and

"3. A brief description of the nature of the financial interest.

"(b) The parties may seek additional discovery of the terms of any such agreement upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case."

This proposal, while a step in the right direction, does not go far enough, as much litigation funding is to counsel, not the party directly and to obtain a complete picture of the arrangement and any interest in the litigation disclosure of such agreements is necessary. As held by the court in *Gbarabe v. Chevron Corp.*, 2016 U.S. Dist LEXIS 103594, *6 (N.D. Cal., Aug. 5, 2016), a class action in which it was contended that the adequacy of class counsel was affected by the litigation funding, the court stated:

"Plaintiff's proposal for in camera review of the agreement by the Court is inadequate because it would deprive Chevron of the ability to make is own assessment and arguments regarding the funding agreement and its impact, if any, on plaintiff's ability to adequately represent the class."

Such disclosure is not novel as litigation funding, including that directly to counsel, is already required to be disclosed in Wisconsin and West Virginia. Wis. Stat. Sec. 804.01(2)(bg) and W. Va. Code Ann. Sec. 46A-6N-6. If there is any contention that the defense makes no such disclosure of funding of the litigation, that is exactly what a policy of insurance is: funding of the defense of a lawsuit.

Attempts to obtain information about such agreements in federal and state courts across the country are often thwarted under claims of work product, but such claims, while successful under the broad conception of work product in other jurisdiction, they should not be successful in Illinois state court where work product is limited to material that is "opinion work product" prepared by counsel in preparation for trial. Rule 201(b)(2); see also *Monier v. Chamberlain*, 35 Ill.2d 351, 359-60 (1966), and *Milynarski v. Rush-Presbyterian St. Luke's Med. Ctr.*, 213 Ill.App.3d 427, 432 (1st Dist. 1991). Communications with a third-party funder, who is not the client and is not protected from disclosure under Illinois law, and the agreement itself is almost certainly not protected.

No matter the form of the litigation funding, whether via a loan to the plaintiff, funding to counsel, a lien or other arrangement with treating physicians, or other arrangement, the existence and terms of any agreement with those with an interest in the outcome of the litigation and communications with them, especially since they came into the situation after the incident giving rise to the suit arose (unlike a policy of liability insurance), should be required to be disclosed in the same fashion as policies of insurance are required to be disclosed.

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