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4 Trends In Discoverability Of Litigation Funding Documents

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A year ago, we wrote a Law360 guest article surveying the case law and summarizing the trends that have emerged from courts across the country regarding the discoverability — or lack thereof — of litigation funding materials. Since then, courts have continued to weigh in on these issues and expand the existing body of case law.

In this article, we examine key decisions over the past year addressing discoverability of litigation funding materials, and describe how they fit in with the established trends. We also touch on a discoverability issue unique to the international arbitration space.

Before turning to the recent cases, here is a brief refresher on the key trends: (1) Courts rarely apply the attorney-client privilege to protect funding materials; (2) courts almost universally apply the work-product doctrine to protect funding materials; and (3) relevance often provides an independent basis for courts to reject, or severely limit, discovery of funding materials.

As discussed below, recent cases are consistent with the established trends, as courts have continued to take a strong stance in protecting funding materials, absent unique circumstances.

Courts continue to protect work product shared pursuant to an NDA.

We ended last year's article with a list of best practices to consider when working with a funder. At the top of the list was the need to enter into a nondisclosure or confidentiality agreement before sharing any documents.

The importance of that practice was on full display in Impact Engine Inc. v. Google LLC, where the U.S. District Court for the Southern District of California in October 2020 denied a motion to compel and upheld work-product protection for funding materials exchanged pursuant to an NDA.[1]

In refusing to allow discovery of the materials — which included funding agreements (final and draft versions), term sheets and a case discussion — the court explained that, as indicated by the terms of the NDA and the funding agreement, confidentiality was the "clear

expectation of both parties," and "work product protection is not waived because it [is] shared with another person or entity."[2]

This case is a good reminder that entering into an NDA at the beginning of the funding process is an important and necessary step for ensuring maximum protection under the law.

To qualify for work-product protection, materials must be prepared in anticipation of litigation.

Another best practice when working with a funder is sharing only materials prepared by a party or its representative in anticipation of litigation, i.e., documents subject to work-product protection.

This was a central issue in Midwest Athletics and Sports Alliances LLC v. Ricoh USA Inc. before the U.S. District Court for the Northern District of California in April 2020, where the defendant was seeking discovery of patent claim charts that had been prepared for the former patent owner by counsel, and subsequently shared by the plaintiff, which had purchased the patents, with a funder.[3]

Though the court recognized the charts "do indeed reflect the legal analysis of an attorney," it nevertheless ruled that work-product protection did not apply because "there is simply no evidence in the record that the claim charts at issue were prepared in anticipation of litigation."[4] To the contrary, the evidence showed that the charts were prepared at a time when the former owner "had no intention or plan to enforce [the patents] in litigation," and the "sole objective was to monetize the patents by selling them to someone else."[5]

Further supporting the court's conclusion, counsel acknowledged that he had never actually been retained to pursue litigation on the former owner's behalf.[6] As a result, the court allowed discovery of the claim charts.

To avoid a similar result, attorneys should remain vigilant and avoid sharing materials — other than fact documents, which are discoverable irrespective of disclosure to a funder — that do not qualify for work-product protection because they were not prepared in anticipation of litigation.

Relevance continues to provide a stand-alone basis for protecting funding materials.

The most notable case from the past year addressing the relevance of funding materials is United Access Technologies LLC v. AT&T Corp., where the U.S. District Court for the District of Delaware in June 2020 denied a motion to compel on relevance grounds, without even reaching the issue of work-product protection.[7]

The court explained that based on its in camera review of the funding materials — which included funder solicitations, litigation updates and other communications with funders — discovery would be improper because the defendant "failed to meet the threshold requirement to show that the litigation funding-related discovery it seeks ... is relevant" to the claims or defenses at issue in the case.[8]

As we noted last year, courts have been relying on relevance as an independent basis for rejecting or restricting litigation funding discovery, and United Access builds on that case law.

International arbitration panels may be more likely to allow funding discovery.

Until now, we have focused exclusively on how U.S. courts have addressed the discoverability of

litigation funding materials. And while our focus remains the same, one point of note for attorneys practicing in the international arbitration space is that tribunals are often more willing than courts to require disclosure of at least some funding information — e.g., whether a party is receiving funding and the funder's name — to address potential conflicts of interest.

For example, a recent Law360 article examined a tribunal's February order in Bacilio Amorrortu v. Republic of Peru, which rejected an overbroad request for funding information and instead required the claimant to disclose only the funder's name — which the claimant had already volunteered to provide — for purposes of identifying potential conflicts of interest with the arbitrators.[9]

In addition to the funder's name, the respondent had also sought copies of the funding agreements and confirmation that the funder was obligated to pay any adverse cost award.[10] In denying that request, the tribunal highlighted a "potentially important 'access to justice' issue," because there is no requirement that the claimant prove its financial capacity to satisfy a potential adverse costs award.[11]

According to the tribunal, "disclosure [of the funder's name] is sufficient to deal with potential conflicts of interests," and in the absence of bad faith or other special circumstances, no further disclosure is warranted.[12]

A similar focus on potential conflicts is reflected in the amended rules of the International Centre for Dispute Resolution, or ICDR, which were updated in March to address this issue in the context of third-party funding.[13]

In Article 14, which governs "Impartiality and Independence of Arbitrator," the ICDR added a provision empowering tribunals to require that each party identify any funder with an economic interest in the outcome, or that is paying a portion of the party's costs, and to describe the nature of any such interest, recovery rights or contributions.[14]

Thus, attorneys and clients involved in international arbitration should be aware that an arbitration panel may be more likely than a U.S. court to allow at least some funding discovery.

Conclusion

Litigation funding materials remain a key topic of discovery in both U.S. litigation and international arbitration. As courts and arbitrators continue to address these discovery requests with increasing frequency, it is more important than ever to be aware of any rules regarding funding discovery in your jurisdiction or forum so that you can appropriately tailor communications with your funder.

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[1] Impact Engine Inc. v. Google LLC, 3:19-cv-01301-CAB-DEB, Dkt. 129 (S.D. Cal. Oct. 20, 2020).

[2] Id. at 3.

[3] Midwest Athletics and Sports Alliances LLC v. Ricoh USA Inc. (In re: Subpoena of Paul), 2020 U.S. Dist. LEXIS 73786 (Apr. 24, 2020).

[4] Id. at *7–8.

[5] Id.

[6] Id. at *8.

[7] United Access Technologies LLC v. AT&T Corp, 2020 WL 3128269 (D. Del. June 12, 2020).

[8] Id. at *1–2, *2 n.4. But see E. Profit Corp. Ltd. v. Strategic Vision US, LLC, 2020 WL 7490107, at *7, *8 (S.D.N.Y. Dec. 18, 2020) (denying motion in limine and allowing plaintiff to elicit testimony about the sources of defendant's litigation funding upon a showing of plaintiff's good-faith belief that an affiliate of the Chinese Communist Party (CCP) paid for defendant's legal costs, which, if true, would tend to negate defendant's counterclaim).

[9] No. 2020-11, Order on Request for Disclosure of Funding Agreement (Perm. Ct. Arb. Oct. 19, 2020), available at https://www.law360.com/articles/1354113/attachments/0.

[10] Id. ¶ 1.

[11] Id. ¶11; see also id. ¶9 ("The fact of third party funding does not imply that [claimant] is impecunious. There are numerous other reasons why a claimant may seek third party funding, including risk management and validation by a more objective third party of the merits of the claim.").

[12] Id. ¶¶8, 11.

[13] See ICDR, International Dispute Resolution Procedures, Art. 14(7) (Mar. 1, 2021), available at https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_0.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl-update-1mar); see also Ann Ryan Robertson, "The 2021 ICDR® International Dispute Resolution Procedures," American Arbitration Association, AAA343 (2021), available at https://go.adr.org/rs/294-SFS-516/images/AAA343_International_Dispute_Resolution_Procedures.pdf.

[14] Id.