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Are Litigation Funding Documents Protected From Discovery?

By **Michele Slachetka, Christian Plummer and Justin Maleson** (April 22, 2020, 4:26 PM EDT)


Michele Slachetka


Christian Plummer


Justin Maleson

In recent weeks, COVID-19 has resulted in statewide shutdowns, court closures and delays, and widespread uncertainty across the business community and legal industry. Litigation funders, conversely, are experiencing a spike in inquiries from law firms (and their clients) interested in exploring the possibility of using funding to hedge risk and add balance sheet stability to help combat the unpredictability.

For attorneys new to litigation funding, many of the initial and most common questions relate to the discoverability and protection of materials shared with a funder. For example, are documents shared with a funder discoverable? Does disclosure waive privilege? Is work product protected?

In an effort to answer these and related questions, this article summarizes the trends that have emerged from courts across the country regarding the discoverability of litigation funding materials, and discusses best practices for sharing documents with a litigation funder.

Courts Almost Universally Apply the Work-Product Doctrine to Protect Litigation Funding Materials

The work-product doctrine, which applies to materials prepared in anticipation of litigation or for trial,[1] is meant to provide the attorney with a "privileged area within which he [or she] can analyze and prepare his [or her] client's case."[2] Work-product protection is frequently asserted over materials reflecting an attorney's legal analysis, theories and litigation strategies.

In deciding whether to finance a case, a litigation funder engages in a due diligence process to evaluate the risk profile, strengths and weakness, likelihood of success, potential recovery, and litigation strategies, among other considerations.

As part of that diligence process, the funder will want to speak with the attorney overseeing the case (and often the client), and review both public and nonpublic documents related to the case. Some of those documents (e.g., an analysis of potential damages) may reflect counsel's impressions of the strengths, weaknesses and value of various claims and defenses.

Understanding the importance of maintaining confidentiality in a process designed to enable attorneys and clients to secure funding to pursue their claims, the vast majority of courts addressing the issue agree that attorney work product provided to a litigation funder — particularly when done pursuant to a nondisclosure agreement or confidentiality agreement — is protected and off-limits from discovery.[3]

Commonly, the claim owner (or attorney) and litigation funder will execute a nondisclosure or confidentiality agreement covering any documents shared between them. Although not a per se requirement for work-product protection in all jurisdictions, these agreements formalize and memorialize the parties' understandings regarding disclosure, thereby minimizing "the opportunity for potential adversaries to obtain the information" — a principal concern when assessing potential waiver of work-product protection.[4]

Courts Rarely Apply the Attorney-Client Privilege to Protect Litigation Funding Materials

In contrast to work-product protection, courts have been less willing to shield from discovery materials shared with a litigation funder that are solely protected by the attorney-client privilege.

Much of the distinction results from the different purposes of the respective privileges. While the work-product doctrine protects materials prepared in anticipation of litigation, the attorney-client privilege protects communications made in confidence between an attorney and a client for the purpose of obtaining or providing legal advice.[5]

Litigation funders fall outside the attorney-client relationship, and, as such, the attorney-client privilege is typically waived for information shared with the funder unless an exception to the privilege is found to apply. One exception that some courts have applied in limited circumstances is the common interest exception, which allows attorneys representing clients with a common legal strategy to share privileged communications without waiving privilege.[6]

However, because the primary focus of the attorney-client privilege is the provision or receipt of legal advice, most courts addressing the issue have held that sharing attorney-client privileged materials with a litigation funder waives privilege because the parties' shared interest is financial — to secure funding — and not legal.[7]

That said, a minority of courts have applied the common interest exception to protect attorney-client privileged materials shared with a funder.[8]

Whether explicitly articulated or not, these courts seem to rely on a more expansive "common enterprise" approach to the common interest exception, which considers whether the original disclosures were necessary to obtain informed legal advice and would have been made absent the attorney-client privilege; whether disclosure to third parties was intended; and whether the parties share a common, litigation-related cause rather than an identical legal interest.[9]

Typically, in these cases, there also is evidence that the litigant and the funder took steps to prevent further disclosure, such as through a confidentiality, common interest or nondisclosure agreement.[10]

For practical purposes, attorneys should err on the side of caution and avoid sharing attorney-client-privileged materials with litigation funders (or any other third parties) — at least to the extent that the materials do not also qualify as attorney work product.

Relevance Often Provides an Independent Basis for Courts to Reject (or Severely Limit) Discovery of Litigation Funding Materials

In addition to relying on work product (and sometimes privilege), courts frequently reject attempts to discover litigation funding materials on the independent ground that such materials are irrelevant to the claims and defenses at issue in the litigation. Stated another way, courts examining this issue regularly find that funding agreements and materials shared with a funder are not relevant, and, therefore, not discoverable.[11]

Despite a robust (and growing) body of case law protecting litigation funding information from discovery, attorneys continue to propose novel theories of relevance in an effort to obtain a perceived litigation advantage. But in rejecting such efforts, courts have explained that there is only a "narrow category"[12] of cases where litigation funding materials are relevant, and in those cases, the discovering party must provide objective evidence that its "theories of relevance are more than just theories."[13]

Mere speculation about potential bias or conflicts of interest by the party seeking discovery will not suffice to meet the burden for ordering discovery.[14] And, practically speaking, the argument that the funder is exercising control of litigation decisions — as opposed to the client — does not appear to pose a legitimate risk of discoverability when working with a reputable funder because such funders are passive investors, with clients and their attorneys retaining control of all litigation strategy and settlement decisions.

In the limited situations where courts have permitted litigation funding discovery based on the particular facts and circumstances of the case, they have consistently taken a protective view by placing strict limitations on the scope of allowable discovery.

For example, in the multidistrict opioid litigation, the court ordered in-camera submissions of information relating to the terms of financial arrangements and affidavits from counsel and the funders certifying no conflicts of interest or control by the funders, and stated that no further litigation funding discovery would be permitted "[a]bsent extraordinary circumstances."[15]

Similarly, when confronted with a broad request for litigation funding discovery, a bankruptcy court largely rejected such efforts, allowing only limited disclosure of a redacted version of the funding agreement (which redacted, among other things, payment terms and mental impressions relating to the litigation) to ensure that a putative creditor was a bona fide judgment creditor with the ability to force the involuntary bankruptcy of the debtor.[16]

And, in a class action where the plaintiffs' counsel were solo practitioners and wholly dependent on outside funding to pursue the case, a court limited discovery to the production of an unredacted version of the funding agreement on grounds that it was relevant to the determination of the adequacy of class counsel after the plaintiffs conceded its relevance.[17]

Simply put, relevance often provides a strong and independent basis for courts to reject or severely restrict litigation funding discovery.

Best Practices

In light of these trends, attorneys and their clients should take the following steps when working with a litigation funder:

- Enter into a nondisclosure agreement or confidentiality agreement before sharing any documents. Every funder has its own NDA that can be customized for the attorney or client in a matter of minutes. This is a quick, easy and important step for ensuring work-product protection.

- Do not share attorney-client-privileged materials with a funder. Courts are unlikely to protect attorney-client-privileged information disclosed to a funder, and, in any event, funders do not need or want that information. Disclosure of privileged information injects unnecessary risk that could negatively affect the outcome of the case (which is bad for everyone involved). Bottom line, if there is any question about whether a document is subject to the attorney-client privilege, err on the side of caution and do not risk waiver by sharing it with a funder.

- Share only (1) fact documents and (2) materials prepared in anticipation of litigation (i.e., documents subject to work-product protection). Relevant fact documents are discoverable irrespective of disclosure to a funder, and courts have taken a strong stance in protecting work product shared pursuant to an NDA. That said, one additional factor to consider before sharing these materials is whether there is a governing protective order, as discussed in the next bullet.

- Know your protective order. When exploring funding for a pending case, understand the scope of any case-specific protective order that could preclude or limit disclosure of certain nonpublic information to anyone other than counsel and the parties.

With these guidelines in mind, attorneys and their clients can turn their attention to the most important task — the litigation itself.

Michele Slachetka is a partner and Christian Plummer is an associate at Jenner & Block LLP.

Justin Maleson is a director at Longford Capital Management LP.

[1] David M. Greenwald and Michele L. Slachetka, Protecting Confidential Legal Information — A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work Product Doctrine (hereinafter "Protecting Confidential Legal Information") §III (Jenner & Block Practice Series 2019).

[2] See United States v. Noble, 422 U.S. 225, 238 (1975).

[3] E.g., Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc., Nos. 16-538, 16-541, 2018 WL 466045, at *5–6 (W.D. Pa. Jan. 18, 2018) (denying discovery of communications with potential litigation funders because they were made for the purpose of preparing for litigation); United States v.

Homeward Residential, Inc., No. 4:12-CV-461, 2016 WL 1031154, at *6 (E.D. Tex. Mar. 15, 2016) (upholding work-product protection in denying motion to compel discovery of litigation funding information); Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 735 (N.D. Ill. 2014) (holding that documents reflecting counsel's mental impressions and theory of case did not lose their work product protection because they may have also been prepared to help obtain financing); Devon IT, Inc. v. IBM Corp., No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012) (denying litigation funding discovery as protected work product where it was "quite evident that the ... documents [sought] were prepared by counsel ... in anticipation of and during litigation"); see also AGIS Software Dev. LLC v. Huawei Device USA Inc., et al., No. 2:17-cv-00513, at *2 (E.D. Tex. Oct. 24, 2018) (overruling counsel's deposition instructions not to answer questions regarding the date and nonmonetary details of a funding agreement, but sustaining counsel's instruction not to answer questions concerning monetary terms based on work-product protection); In re Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018) (ordering in-camera submissions relating to financing terms and affidavits from counsel and funders certifying no conflicts of interest or control by the funders, but referring to work-product doctrine in ruling that "[a]bsent extraordinary circumstances, the Court will not allow [litigation funding] discovery"); In re Int'l Oil Trading Co., 548 B.R. 825, 839 (Bankr. S.D. Fla. 2016) (holding that most materials and communications shared with a litigation funder were protected under the work-product doctrine, and ordering only production of a redacted version of the funding agreement — which redacted, among other things, payment terms and mental impressions — to ensure that a putative creditor was a bona fide judgment creditor with the ability to force the involuntary bankruptcy of the debtor).

[4] Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 736 (N.D. Ill. 2014) (internal citation and quotation omitted) (holding that disclosure of work product to prospective consultants pursuant to oral or written confidentiality agreements did not result in waiver); see supra note 1, Protecting Confidential Legal Information §III.E.2.

[5] See supra note 1, Protecting Confidential Legal Information §I.

[6] See, e.g., id. §II; In re Int'l Oil Trading Co., 548 B.R. 825, 832–35 (Bankr. S.D. Fla. 2016) (holding that attorney-client privilege is not waived when privileged communications are shared with a litigation funder under the common interest exception and because the funder qualifies as a privileged agent).

[7] See, e.g., Cohen v. Cohen, No. 09 Civ. 10230 (LAP), 2015 WL 745712, at *3–4 (S.D.N.Y. Jan. 30, 2015) (finding communications between plaintiff and litigation funder not privileged despite the existence of an executed "joint interest" agreement because the two shared a common financial interest in the outcome of the litigation, not a shared legal strategy); Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 733 (N.D. Ill. 2014) (holding that plaintiff waived attorney-client privilege over documents shared with prospective funders because plaintiff's purpose was to secure funding and not to obtain legal advice or litigation strategies).

[8] E.g., Walker Digital, LLC v. Google, Inc., No. 11-309-SLR, 2013 WL 9600775, at *1 (D. Del. Feb. 12, 2013); Devon IT, Inc. v. IBM Corp., No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012); In re Int'l Oil Trading Co., 548 B.R. 825, 833 (Bankr. S.D. Fla. 2016).

[9] In re Int'l Oil Trading Co., 548 B.R. at 833 (holding that documents shared with funders did not lose privileged status because the disclosures were necessary to obtain legal advice regarding the prosecution of a collection action and because the parties did not intend to share the materials with any other parties).

[10] Walker Digital, 2013 WL 9600775, at *1 (common interest agreement); Devon IT, 2012 WL 4748160, at *1 n.1 (common interest, confidentiality, and non-disclosure agreement); In re Int'l Oil Trading Co., 548 B.R. at 832 (confidentiality provision in funding agreement).

[11] E.g., V5 Techs. v. Switch, No. 2:17-cv-2349-KJD-NJK, 2020 WL 1042515, at *1–2 (D. Nev. Mar. 3, 2020) (affirming magistrate judge's opinion denying defendant's motion to compel deposition testimony on how litigation was financed); V5 Techs. v. Switch, No. 2:17-cv-02349-KJD-NJK, 2019 WL 7489108, at *3–6 (D. Nev. Dec. 20, 2019) (denying motion to compel production of litigation funding information because it was irrelevant to any claim or defense); Benitez v. Lopez, No. 17-CV-3827-SJ-SJB, 2019 WL 1578167, at *1–3 (E.D.N.Y. Mar. 14, 2019) (denying motion to compel production of litigation funding documents, and rejecting argument that such information was relevant to plaintiff's credibility or impeachment, or that plaintiff's motives for financing suit — to the extent revealed in such documents — were relevant); Kaplan v. S.A.C. Capital Advisors, L.P., No. 12-CV-9350(VM)(KNF), 2015 WL 5730101, at *3–5 (S.D.N.Y. Sept. 10, 2015) (denying motion to compel production of litigation funding documents in class action as irrelevant where there was no indicia that plaintiffs' counsel lacked sufficient resources to litigate the case or otherwise satisfy Rule 23 requirements); Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 721–30 (N.D. Ill. 2014) (holding that litigation funding documents were not discoverable as relevant to defendant's unpled maintenance and champerty defense or on the theory that the funder was the real party in interest, and noting the "discovery rules ... were never intended to be an excursion ticket to an unlimited exploration of every conceivable matter that captures an attorney's interest"); see also Space Data Corp. v. Google LLC, No. 16-cv-03260, 2018 WL 3054797, at *1 (N.D. Cal. June 11, 2018) (declining to compel production of board minutes or further testimony on unanswered deposition questions regarding litigation funding given the irrelevance of that information).

[12] V5 Techs. v. Switch, No. 2:17-cv-2349-KJD-NJK, 2020 WL 1042515, at *1 (D. Nev. Mar. 3, 2020); see also V5 Techs. v. Switch, No. 2:17-cv-02349-KJD-NJK, 2019 WL 7489108, at *4 (D. Nev. Dec. 20, 2019) (rejecting defendant's "attempts to poke holes in [plaintiff's] showing of irrelevance [of litigation funding materials] by grabbing its baton, trumpets, and costumes to put on its own parade of horribles here").

[13] VHT, Inc. v. Zillow Grp., Inc., No. C15-1096JLR, 2016 WL 7077235, at *1–2 (W.D. Wash. Sept. 8, 2016) (denying litigation funding discovery "[w]ithout some objective evidence that any of [defendant's] theories of relevance apply to [the] case"); see also MLC Intellectual Prop., LLC v. Micron Tech., Inc., No. 14-cv-03657-SI, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019) (denying litigation funding discovery on relevance grounds in the absence of a "specific, articulated reason to suspect bias or conflicts of interest").

[14] In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig., 405 F. Supp. 3d 612, 615–16 (D.N.J. 2019) (denying defendants' request for litigation funding discovery in multidistrict mass tort litigation due to absence of good cause such as "a sufficient showing that a non-party is making ultimate litigation or settlement decisions, the interests of plaintiffs or the class are sacrificed or are not being protected, or conflicts of interest exist"); see also V5 Techs. v. Switch, No. 2:17-cv-02349-KJD-NJK, 2019 WL 7489108, at *4 (D. Nev. Dec. 20, 2019) ("Discovery into litigation funding is appropriate when there is a sufficient factual showing of 'something untoward' occurring in the case .... Mere speculation by the party seeking this discovery will not suffice."); Kaplan v. S.A.C. Capital Advisors, L.P., No. 12-CV-9350(VM)(KNF), 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015) (rejecting as speculative defendants' arguments that third-party financing could affect strategic decisions made on behalf of the class, cause counsel's interest to diverge from class members, or result in intraclass conflicts).

[15] In re Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018).

[16] In re Int'l Oil Trading Co., 548 B.R. 825, 838–39 (Bankr. S.D. Fla. 2016).

[17] Gbarabe v. Chevron Corp., No. 14-cv-00173-SI, 2016 WL 4154849, at *1–2 (N.D. Cal. Aug. 5, 2016).