



WISCONSIN ADDRESSES THIRD-PARTY LITIGATION FUNDING WITH NEW DISCLOSURE REQUIREMENT

Perhaps you have heard, or read, about third-party litigation funding (or litigation finance) – a financial accommodation through which an outside company covers a litigant's legal fees in exchange for a piece of the proceeds. The industry is experiencing explosive growth and has received attention from, among others, the Wisconsin legislature.

In this month's column, we will take a look at the industry and how the State of Wisconsin has chosen to shine light on it.

The Rise of Third-Party Litigation Funding

While the nascent industry lacks transparency, and concrete numbers are therefore hard to come by, sources estimate the industry as a whole has surpassed \$100 billion. A 2017 survey reported that 36 percent of law firms had used litigation funding. The details of litigation funding arrangements can vary, but they usually share common characteristics. An outside company – usually one of a small handful of key players who dominate the industry – agrees to pay the litigation expenses for the party to a lawsuit (or a prospective one) on a non-recourse basis. In exchange, the funder is entitled to a portion of the ultimate judgment or settlement obtained in the case. Financing is often arranged directly with the litigant, but law firms are taking an increasingly active role in arranging the funding.

Certain types of claims and lawsuits are more amenable to litigation finance; it is more likely to be used in high-risk, high-value claims. According to a survey conducted by one of the largest litigation funders, Burford Capital, the average value of a financed claim was \$33.5 million, with the average amount of funding equaling about 10 percent of the assessed value of the claim.

Litigation funding has been provided both to large, sophisticated commercial entities in commercial litigation, and to individual (or putative class) plaintiffs in consumer litigation. Litigation funding to plaintiffs is more common, since their claims generally have defined outcomes in terms of dollars recovered, from which the funder can claim its share. However, third-party funding has also been provided to defendants, although it is less common and more complex because it is harder to define a favorable outcome for which the funder would be entitled to a pay-off.

There are several potential reasons for the increasing popularity of litigation finance. For companies and law firms, a lawsuit paid for through litigation funding is more conducive to an alternative fee arrangement with litigation counsel, and helps companies fund litigation for which they would otherwise be fronting significant fees on an hourly basis. For investors, litigation funding is often seen as a somewhat risky, but provides a more lucrative return opportunity in a low-yield environment. Critics of litigation funding, however, say that it increases both the frequency and cost of litigation, that there are agency or moral hazard risks, and that it is largely unnecessary because businesses are capable of evaluating and funding their own claims when they are meritorious.

The Wisconsin Disclosure Rule

On April 3, 2018, Wisconsin became the first state to require disclosure of third-party litigation arrangements when it passed Wisconsin Act 235, a law which included a number of reforms to Wisconsin civil procedure to make litigation more efficient and business-friendly.

The new law provides that “a party shall, without awaiting a discovery

request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.” Importantly, this provision – for which the U.S. Chamber of Commerce was a leading advocate – requires production of litigation funding agreements at the inception of litigation (and without any formal discovery), does not require judicial supervision or management, and does not address, or provide any protection for, the potentially privileged aspects of litigation finance agreements. The law does not apply to traditional contingency fee arrangements solely between lawyer and client. Further, unlike disclosure rules that have been devised or proposed in other jurisdictions, Wisconsin's law does not distinguish between litigation funding agreements involving commercial entities and those involving plaintiffs in putative class or representative actions.

More Disclosure on the Horizon?

While Wisconsin is the first state to require disclosure of litigation funding arrangements, courts around the country have already weighed in, and new requirements are in the works at the state and federal level. For example, while the federal rules of civil procedure do not currently require disclosure of litigation funding agreements, some federal district courts have promulgated local rules requiring disclosure. The North District of California, for instance, requires disclosure of litigation finance agreements but only for collective or representative actions. 24 of the 94 federal district courts have local rules requiring disclosure of outside parties with a financial interest in the litigation. While these rules do not single out litigation finance, they arguably apply to litigation funding arrangements. Other courts have reviewed funding agreements in camera (i.e., only the judge could review it), or required production of litigation finance agreements in discovery, but permitted redaction of content covered by the work product doctrine.

At the congressional level, in May 2018, the Litigation Funding Transparency Act was introduced in the U.S. Senate, which would require production of any litigation funding agreement within 10 days of execution of the agreement or upon filing of the lawsuit. The proposed bill has not yet advanced in the Senate, and, given the recent flip of control of the House of Representatives, may not have a bright future. However, at the state level, the Chamber of Commerce, which lobbied for Wisconsin's disclosure law, has promised to advance the cause in other jurisdictions.

Litigation funding's growth will no doubt be accompanied by additional calls for disclosure and other regulatory and judicial scrutiny. In passing Act 235, Wisconsin is at the leading edge of the curve, and parties' management of (and litigation over) the disclosure obligations in our state may very well drive legislation, regulation and judicial decisions around the country.

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