

Discovery of Litigation Funding in NJ Mass Tort Litigation: Charting a Course

Litigation funding in the context of a multi-district litigation (MDL), “refers to any agreement under which any person, other than an attorney, permitted to charge a contingent fee representing a party, has the right to receive compensation that is contingent on and sourced from any proceeds of an MDL.” *In re National Prescription Opiate Litig.*, MDL No. 2804, 2018 U.S. Dist. LEXIS 84819, at *1 (N.D. Ohio May 7, 2018).

Information and documents that refer or relate to litigation funding or financing are often the subject of defense discovery requests, especially in an MDL, and are vigorously opposed by plaintiffs’ counsel. Judicial treatment of such discovery requests is far from consistent, with some courts allowing discovery, see *In re American Medical Systems, Inc. Pelvic Repair Systems Prod. Liab. Litig.*, MDL No. 2325, 2016 U.S. Dist. LEXIS 84838 (S.D.W. Va. May 31, 2016), while others deny the requests outright, see *Benitez v. Lopez*, No. 17-cv-3827, 2019 U.S. Dist. LEXIS 64532 (E.D.N.Y. Mar. 14, 2019), or limit disclosure to an in camera review, see *In re Opiate Litig.*, 2018 U.S. Dist. LEXIS 84819 at *1.

Until recently, there have been no decisions from the Third Circuit or the District of New Jersey addressing the discoverability of litigation funding. Recently, Magistrate Judge Joel Schneider, the magistrate judge managing discovery in the Valsartan MDL pending in the District of New Jersey (Camden), issued a written decision providing litigants with guidance regarding the circumstances under which discovery of litigation funding will be permitted. See *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prod. Liab. Litig.*, MDL No. 2875, 2019 U.S. Dist. LEXIS 160051 (D.N.J. Sep. 18, 2019). While the court denied defendants’ request for litigation funding discovery, it identified two scenarios under which the court would review, in camera, litigation funding documents: (1) where plaintiffs’ counsel made the request; or (2) “if good cause exists to believe a litigation financier has control or input into plaintiffs’ litigation decisions” *Id.* at *42. With the number of MDLs assigned to New Jersey on the rise, the increasing costs of mass tort litigation, and the expanding



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role of third-party litigation funders, familiarity with judicial decisions addressing the discoverability of litigation funding is particularly important.

Valsartan Opinion

The Valsartan MDL involves claims that a generic high blood pressure medication contained carcinogenic contaminants that caused plaintiffs to suffer personal injuries and economic losses. During the early stages of discovery, defendants sought litigation funding information and documents from plaintiffs as part of the Plaintiffs' Fact Sheet, a discovery device similar to interrogatories that are commonly used in mass tort MDLs. Specifically, defendants' proposed question asked each plaintiff for "all documents and communications related to funding or financing, if any, you or your counsel have obtained to pursue this litigation." Defendants argued that litigation funding discovery was relevant to various issues, including plaintiffs' standing (to assess whether plaintiffs were the real parties in interest), credibility and bias (to assess the necessity and reasonableness of plaintiffs' medical treatment), financial ability (for purposes of discovery cost-shifting and potential sanctions), and the scope of proportional discovery.

In addition, defendants argued that litigation funding discovery would promote transparency and help derail any potential abuses or conflicts of interest before they arise. Plaintiffs objected to the discovery sought by defendants, arguing that litigation funding had no relevance to the merits of the case, and that defendants would likely use such discovery to assert leverage in settlement negotiations. Plaintiffs did not oppose the production of litigation funding agreement to the court, in camera, "where the litigation funding company has control or input into litigation decisions, including settlement, which could interfere with a plaintiff's control of his or her lawsuit and the attorney-client relationship." *In re Valsartan*, 2019 U.S. Dist. LEXIS 160051 at *27.

In his Sept. 18, 2019, decision, Magistrate Judge Schneider explained that although there was no existing Third Circuit or District of New Jersey decisions on the discoverability of

litigation funding, numerous courts and commentators had written on the issue with mixed results. *Id.* at *28-29. Relying on Fed. R. Civ. P. 26(b)(1), the court analyzed whether the litigation funding information sought by defendants was relevant to any of the claims or defenses, and whether it was proportional to the needs of the case. *Id.* at *29-30. Agreeing with several decisions from other district courts, Magistrate Judge Schneider held that litigation funding information was not per se relevant to the claims and defenses asserted in the Valsartan MDL. On the other hand, the court held that litigation funding discovery is "not off-limits in all circumstances," and may be permitted upon a showing of good cause. *Id.* at *31. The court explained that good cause may exist where "something untoward occurred," "there is 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." *Id.* at *31-32. For example, the court explained that in the pelvic mesh MDL, litigation funding discovery was permitted after the defendants presented some evidence that inappropriate or fraudulent medical treatment had occurred. *Id.* at *36. Although defendants in the Valsartan MDL had raised these potential concerns, the court held that defendants had not demonstrated that any of these "parade of horrors" had occurred or were likely to occur in the future. *Id.* Because defendants had not provided a concrete basis for their litigation funding discovery requests, the court denied defendants' application without prejudice.

Magistrate Judge Schneider also accepted plaintiffs' counsel's offer to disclose their litigation funding agreements, in camera, at the appropriate time in the litigation. *Id.* at *39-40. The court acknowledged that situations could arise where the litigation funding entity exercises control or input into the litigation, including settlement, which could interfere with plaintiffs' interests and the orderly and efficient management of the litigation. The court, however, left it to plaintiffs' counsel to decide if and when such in camera disclosure should occur, but cautioned counsel to err on the side of transparency and disclosure. In deciding whether to submit litigation funding information in camera, the court directed plaintiffs' counsel to

consider several factors, including whether the litigation funder: had de facto control over litigation decisions; had the ability to withdraw funding; had settlement decision making authority; had control over the selection of counsel. *Id.* at *40. The court also invited defendants to request an in camera review if good cause existed, such as if the litigation was prolonged, settlement or ADR was being discouraged, plaintiff's counsel's control over the litigation was being undercut, their professional independence was being diminished, or their attorney-client relationship was being compromised.

Conclusion

Judge Schneider's decision provided both plaintiffs and defendants a roadmap to seek or oppose discovery of litigation funding. While plaintiffs received a favorable ruling that litigation funding discovery is not permissible in every product liability or mass tort MDL as a matter of course, the decision did provide defendants with a list of potential situations where such discovery may be permitted upon a showing of relevancy, need and good cause. Aside from case law, there have been legislative efforts to further promote transparency regarding litigation funding in MDLs and other litigations. In 2017, the Lawyers for Civil Justice and U.S. Chamber of Commerce Institute for Legal Reform proposed an amendment to Fed. R. Civ. P. 26, which would require the automatic disclosure of litigation funding at the outset of the litigation. See <https://www.lfcj.com/disclose-third-party-litigation-funders.html>. The proposal is being considered by an advisory subcommittee tasked with studying the issue further. In addition, in 2018 and 2019, several U.S. senators proposed a bill (Litigation Funding Transparency Act) that would require the disclosure of the existence of litigation funding in class actions and MDLs. See <https://www.congress.gov/bill/116th-congress/senate-bill/471/text>. Unless and until Congress passes such legislation, the discoverability of litigation funding discovery will likely continue to be litigated in courts throughout the country.