



Litigation Finance Discovery In The Courts

The following aims to be a comprehensive list of opinions that have examined the discoverability of litigation finance agreement and communications with potential or actual funders, with a focus on those that have examined the work product protection.

In a patent infringement case, the IP holding company that owned the patent at issue reached out to various “investment brokers and potential investors with slide presentations and other documents that contained disclosures of Inpro’s licensing and litigation strategies and also estimates of licensing and litigation revenues.” The court rejected the argument that these documents were not created for litigation purposes but rather for “business advice” and found the work product protection applicable because the documents were prepared “with the intention of coordinating potential investors to aid in future possible litigation.” Because the documents were shared pursuant to an NDA the protection was preserved.

Mondis Technology, Ltd. v. LG Electronics, Inc. (E.D. Texas May 4, 2011).

In a dispute concerning IT royalties, the court found that “litigation strategy, matters concerning merits of claims and defenses and damages would be revealed if the documents were produced. The matters directly involve the mental impressions of counsel and are protected from disclosure as work-product.”

Devon IT, Inc. v. IBM Corp. (E.D. Pa. Sept. 27, 2012).

In a trade secret misappropriation case, the court, in an expansive opinion discussing many issues relevant to litigation funding, including champerty, maintenance, and issues related to the “real party in interest,” determined that certain “damage estimates,

summaries or worksheets” created by plaintiff and its attorneys did need to be turned over – but only because they had lost work product protection by turning over the documents to prospective funders without an NDA in place. The court otherwise found the “deal documents” in the case irrelevant having “nothing to do with the claims or defenses in the case.”

Miller UK v. Caterpillar (N.D. Ill. Jan. 6, 2014).

In a case against a religious society alleging negligent supervision based on sexual abuse by a priest, the court examined the distinction between “fact” and “opinion” work product. While the former contains “raw factual information” and receives far lesser protection, the latter “includes counsel’s mental impressions, conclusions, opinions or legal theories.” The court found work product protection applied to materials that “incorporate opinions by Plaintiff’s counsel regarding the strength of Plaintiff’s claims, the existence and merit of certain of Defendants’ defenses, and other observations and impressions regarding issues that have arisen in this litigation.” While the court found that some “fact” work product might be relevant to a statute of limitations issue in the case, it ordered defendants to seek that information from plaintiff and not the litigation finance company.

Doe v. Society of Missionaries of Sacred Heart (N.D. Ill. May 1, 2014).



In a complex dispute related to the propriety of funding foreign litigation against plaintiffs by a company in liquidation in the foreign jurisdiction, the court concluded that although in a funded case “the overlap between business and litigation reasons for the creation of the disputed documents is more extensive than usual” the work product protection still applied. “No persuasive reason has been advanced in this case why litigants should lose work product protection simply because they lack the financial means to press their claims on their own dime. Allowing work product protection for documents and communications relating to third-party funding places those parties that require outside funding on the same footing as those who do not and maintains a level playing field among adversaries in litigation.”

Carlyle Investment Management v. Moonmouth Co. (Del. Ch. Feb. 24, 2015).

In a securities class action against a company for insider trading in a publicly traded stock held by class members, the court denied discovery into litigation finance arrangements because concerns about plaintiffs’ counsel’s ability to fund prosecution of the action were “purely speculative” and the funding documents were therefore irrelevant. The court said: “The plaintiffs’ admission that they have entered into a litigation funding agreement does not, of itself, constitute a basis for questioning counsel’s ability to fund the litigation adequately.” Though plaintiffs’ counsel in that case argued for application of the work product doctrine to the funding agreement, the court did not reach that argument because it found the agreement irrelevant.

Kaplan et al v. SAC Capital Advisors LP et al., No. 12-cv-09350 (S.D.N.Y. Sept. 10, 2015).

In a lawsuit brought by an individual who claimed to be one of the co-founders of the tech payment company Square, the defense sought communications with the ten potential funders the plaintiff had contacted. The court found that work product protection was preserved because of “written or oral confidentiality agreements with the third parties at issue here.” The court did order disclosure of the “underlying facts conveyed to the litigation funders” but gave plaintiffs the responsibility of redacting and producing the 21 documents at issue.

Morley v. Square, Inc. (E.D. Mo. Nov. 18, 2015).

In a qui tam case against a mortgage servicer, the court found no waiver of work product protection based on disclosure to possible or actual litigation funders. The court noted that “[l]itigation funders have an inherent interest in maintaining the confidentiality of potential clients’ information.” The court did order disclosure of the names of prospective and actual litigation funders, but did not provide reasoning underlying that order.

U.S. ex rel. Fisher v. Ho (E.D. Texas March 15, 2016).

In an involuntary bankruptcy case brought by an individual who had a business dispute with the bankrupt entity, the court carefully analyzed potential protection for the communications between the client and the funder (which, it noted, had “played a near-daily role in [the] litigation efforts, providing funding and assisting with legal and strategic decisions”). The court found work product protection applicable and shot down the argument that the claimant’s communications with the funder were for financial rather than legal purposes: “it does not matter that Burford’s obvious purpose is to obtain a return on its investment, just as it does not matter that counsel’s purpose is typically to earn a fee.” The court acknowledged that some of the thousands of communications with the funder likely were not protected work product, but concluded those were likely irrelevant and would not “force” the claimant to “sort through for years of correspondence . . . in order to provide . . . non-relevant information.” Because “the [funding] agreement is central to one theory presented” in the case, the court did order its production but allowed redaction of the payment terms and other terms that would reveal the “mental impressions and opinion” of the litigation.

In re Intern. Oil Trading Co. (Bankr. S.D. Fla. April 28, 2016).

In a patent infringement case, the court found work product protection applied to communications with potential funders because “[a]lthough litigation had not yet commenced, the documents were created because litigation was expected.” But the court concluded there was a “substantial need” specifically for valuations communicated to the funders because “Defendants have not yet been able to obtain this information from third parties” and “have not been given any other documents regarding valuations of Plaintiff.” Therefore, “they have demonstrated their inability to obtain this information without



undue hardship.” The court ordered production of the valuations but allowed redaction of all other information.

Odyssey Wireless v. Samsung Electronics (S.D. Cal. Sept. 20, 2016).

In a patent infringement case, the court found that documents prepared by the inventor and counsel and shared with prospective litigation funders were protected work product.

Ioengine v. Interactive Media Corp. (D. Del. Aug. 3, 2016).

In an antitrust case alleging monopolization of the local cable advertising market, the court noted that the work product doctrine serves “to protect an attorney’s thought processes and mental impressions against disclosure.” Communications between a party, its attorneys and actual or prospective litigation funders necessarily contain and reflect “opinions by . . . counsel regarding the strength of . . . claims, the existence and merit of . . . defenses, and other observations and impressions regarding issues that have arisen in this litigation,” and fall squarely within this protection.

Viamedia, Inc. v. Comcast Corp. (N.D. Ill. June 30, 2017).

In a patent infringement case, the court found that communications with a litigation funder that took place during the years prior to the filing of the lawsuit were protected by the work product privilege because “the evidence clearly establishes that these communications were primarily, perhaps exclusively, for the purpose of preparing for litigation.” The court rejected the argument that the “non-legal” nature of the claimant-funder relationship had some bearing on workproduct protection; “[e]ven if the court were to fully credit the relationships to be commercial, the materials nonetheless . . . were communications with Plaintiff’s agents and in anticipation of litigation.” The court also refused to compel production of an unredacted copy of the funding agreement on privilege grounds.

Lambeth Magnetic Structures LLC v. Seagate Technology Holdings, Inc. (W.D. Pa. Jan. 18, 2018).

In a patent dispute, the court rejected discovery into litigation funding based on the argument that such discovery was necessary “to uncover possible bias issues” or conflicts of interest among jury members or witnesses. The court concluded that such discovery was not mandated by local or federal court rules and that the defendant’s “arguments about potential bias or conflicts of interest are unpersuasive.” Ultimately, the court found the discovery sought “not relevant” and that the concerns raised by the defendant were alleviated because the plaintiff confirmed that none of the witnesses had an interest in funding the litigation and “the Court can question potential jurors in camera regarding relationships to third party funders and potential conflicts of interest.”

MLC Intellectual Property v. Micron Technology (N.D. Cal. Jan. 7, 2019).

