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Alabama

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Alabama courts have not addressed the discoverability of documents relating to third-party litigation funding. However, the Alabama Court of Civil Appeals has recognized that third-party litigation funding agreements violate public policy because they are akin to gambling contracts, which are illegal in Alabama. *Wilson v. Harris*, 688 So. 2d 265, 270 (Ala. Civ. App. 1996) (holding such an agreement is "opposed to the public interest because it condones speculation in litigation, makes sport of the judicial process, and tempts the unscrupulous to prey upon the distress of the ignorant and unfortunate."). Likely as a result of the Court's holding in *Wilson*, third-party litigation funding is not prevalent in Alabama, though the Alabama legislature has yet to specifically address the practice.

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California

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

In California, if a plaintiff attorney secures third-party litigation funding on behalf of a client, any information and communication regarding third-party litigation funding is considered confidential and non-discoverable.

California has no law against champerty which would invalidate a third-party litigation loan (*Estate of Cohen* (1944) 66 Cal. App. 2d 450,458). In a recent opinion of the Standing Committee on Professional Responsibility and Competence (Formal Opinion No. 202-204), the State Bar of California advises that litigation-funding loans are permitted, so long as the attorney maintains client confidentiality. Communications between plaintiff's counsel and the third-party litigation loan originator fall under the protection of Evidence Code section 952. Section 952 renders confidential any communication necessary to advance the client's interests, even when third parties are part of the communication. (*De Los Santos v. Superior Ct*. (1980) 27 Cal. 3d 677,683.)

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Colorado

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

There is no clear directive from Colorado appellate courts or the Colorado legislature on the scope of discovery regarding third-party litigation funding other than medical lien finance arrangements (which are discussed separately). Though Colorado appellate courts have not directly addressed the issue, most Colorado trial courts will likely disallow discovery regarding third-party litigation funding on the grounds that finance contracts are irrelevant and the files of litigation funding companies are privileged work product. Finally, if a defendant could prove that a litigation funding arrangement is relevant, pursuant to Rule 403 of the Colorado Rules of Evidence, trial courts may nonetheless exclude the evidence if its probative value is substantially outweighed by the danger of misleading or confusing the jury or unfairly prejudicing the plaintiff.

However, it is possible that Colorado courts may permit some limited discovery regarding litigation funding under narrow circumstances where there is specific credible evidence that the litigating funding arrangement creates bias or is otherwise directly relevant to the underlying claims and defenses. For example, a Colorado federal trial court permitted discovery regarding a litigation finance arrangement where the defendant argued that the plaintiff brought improper ADA lawsuits “to generate settlements and corresponding attorneys' fees” to benefit a litigation funding company that was allegedly controlling the litigation.[i] These limited circumstances likely do not apply in most personal injury cases.

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Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Under Delaware law, documents regarding third party funding are analyzed under Delaware's work product doctrine. *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, 2015 WL 778846 at *9 (Del. Ch. 2015). Under this analysis, third party funding has generally been held to be covered by Delaware's work product doctrine because they were prepared in anticipation of litigation and serve a litigation purpose. *Id.*; *Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co.*, 2015 WL 1540520 at *5 (Del. Super. Mar. 31, 2015). At the federal level, one federal district court judge in Delaware has required that the existence of a third-party litigation funding agreement must be disclosed, and that additional discovery can be sought if the funder has authority to make material litigation or settlement decisions. *See* Standing Order Regarding Third-Party Litigation Funding Arrangements (2022).

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Indiana

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Yes. During the 2024 session, the Indiana General Assembly passed a new law regarding commercial litigation financing agreements [i.e. "a nonrecourse agreement that a commercial litigation financier enters into, or offers to enter into, to provide funding to support a plaintiff or the plaintiff's attorney in prosecuting the civil proceeding, if the repayment of the funded amount is: (A) required only if the plaintiff prevails in the civil proceeding; and (B) sourced entirely from the proceeds of the civil proceeding, whether the proceeds result from a judgment, a settlement, or some other resolution."]

Under that new law, which will be added to the Indiana Code as 24-12-11-5 [https://iga.in.gov/pdf-documents/123/2024/house/bills/HB1160/HB1160.05.ENRS.pdf], the contents of a commercial litigation agreement are subject to discovery under the Indiana Rules of Trial Procedure by any party or an insurer that has a duty to defend another party in the civil proceeding.

If the agreement includes a "foreign person," the plaintiff or his attorney must provide each party [or insurer with a duty to defend a party] written notice that the Plaintiff has entered into such an agreement "within a reasonable time" after entering into the agreement.

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Indiana

Does your state permit discovery of 3rd party medical funding/ factoring company files and, if so, what are the rules and regulations governing medical funding/factoring?

There are no Indiana cases or statutes that directly discuss the discoverability of 3rd party medical funding files. Under Indiana Trial Rule 26(B), however, discovery is open to "any matter, not privileged, which is relevant to the subject-matter involved in the pending action." While there are no specific rules regarding the discovery of 3rd party medical funding/factoring company files, it is likely that, under the broad scope of discovery, that information would be discoverable. That 3rd party company could try to claim that the information in the file is some sort of trade secret [or otherwise privileged], but that would be a question of first impression in Indiana.

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Illinois

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Illinois state courts have not considered the discoverability of third-party litigation funding files, but there is a growing body of federal court decisions on the issue. As a general matter, courts across the country that have addressed the issue have held that litigation funding information is generally irrelevant to any party's claim or defense. *In re Valsartan N. Nitrosodimethylamine*, No. 19-2875, 2019 WL 4485702, at *3 (D.N.J. Sept. 18, 2019); *Benitez v. Lopez*, No. 17-cv-3827-SJ-SJB, 2019 WL 1578167, at *1 (E.D.N.Y. Mar. 14, 2019); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 742 (N.D. Ill. 2014); *Kaplan v. S.A.C. Capital Advisors, L.P.*, No. 12-cv-9350, 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015), *aff'd,* 141 F. Supp. 3d 246 (S.D.N.Y. 2015); *Space Data Corp. v. Google LLC*, No. 16-cv-3260, 2018 WL 3054797, at *1 (N.D. Cal. June 11, 2018); *MLC Intellectual Property LLC v. Micron Technology, Inc.*, No. 14-cv-3657, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019); *Yousefi v. Delta Electric Motors, Inc.*, No. 13-CV-1632 RSL, 2015 WL 11217257, at *2 (W.D. Wash. May 11, 2015).

One of the most significant issues with obtaining such correspondence is to determine the exchanges between counsel and the funding company regarding the merits of the case. Another way to put it is that it would be helpful for litigants to see how their opponents discuss the strengths and weaknesses of their cases. This seems to be where courts draw the line. Courts that have examined this issue have generally held that litigation funding documents are protected by the work product doctrine. *See e.g., Viamedia, Inc. v. Comcast Corp.*, No. 16-cv-5486, 2017 WL 2834535, at *1 (Jun. 30, 2017); *In re Int'l Oil Trading Co., LLC*, 548 B.R. 825, 835-39 (Bankr. S.D. Fla. 2016); *Doe v. Society of Missionaries,* No. 11-cv-02158, 2014 WL 1715376, at *4 (N.D. Ill. May 1, 2014); *United States v. Homeward Residential, Inc.*, No. 4:12-cv-461, 2016 WL 1031154, at *6 (E.D. Tex. Mar. 15, 2016); *United States v. Ocwen Loan Serv., LLC*, 4:12-cv-543, 2016 WL 1031157, at *6 (E.D. Tex. Mar. 15, 2016); *Mondis Tech., Ltd. v. LG Elecs., Inc.*, Nos. 2:07-cv-565, 2:08-cv-478, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011). This is true even when mental impressions are shared with a third party because the privilege is waived only when that disclosure substantially increases the opportunities for potential adversaries to obtain that information. *Doe,* 2014 WL 1715376, at *4. When counsel submits materials to secure funding for a litigation matter, that production does not substantially increase the chance that opposing counsel would obtain the information.

Another consideration courts have made is that if litigation funding companies are required turn over documents to an inquiring opposing counsel, it will impact the company's ability to do business and attract future customers. Litigation

funding communications are designed to be confidential. Otherwise, no counsel would ever memorialize on paper the relative merits and the chances of success of a piece of litigation and apply for litigation funding. *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 738 (N.D. Ill. 2014). Similarly, if litigation funding companies did not maintain confidentiality of documents provided by attorneys about their evaluation of the case, these companies would run out of clients fairly quickly. *Doe*, 2014 WL 1715376, at *4.

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Iowa

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

There is no rule either explicitly permitting or prohibiting third-party litigation funding in Iowa. In 2022, the Iowa legislature proposed a bill that would have prohibited litigation funding contracts. *See* S.F. 2085, 89th Gen. Assemb., Reg. Sess. (Iowa 2022). However, the bill did not receive committee approval and, as a result, did not move to the floor for full debate. Iowa state courts are similarly silent as to discovery of third-party litigation funding files.

However, related federal caselaw sheds light on the parameters of discovery applicable to third-party litigation funding files. In *Nunes v. Lizza*, the Northern District of Iowa was faced with a motion to compel third-party litigation funding discovery requests. *See* No. 20-cv-4003-CJW, 2021 WL 7186264, at *1 (N.D. Iowa Oct. 26, 2021). It held that "'courts across the country . . . have held that litigation funding information is generally irrelevant to proving the claims and defenses in a case.'" *Id.* at *3 (quoting *Fulton v. Foley*, No. 17-CV-8696, 2019 WL 6609298, at *2 (N.D. Ill. Dec. 5, 2019)). Yet, "'[d]iscovery into litigation funding is appropriate when there is a sufficient factual showing of "something untoward" occurring in the case.'" *Nunes*, 2021 WL 7186264, at *4 (quoting *V5 Technologies v. Switch, Ltd.*, 334 F.R.D. 306, 311-12 (D. Nev. 2019)). Based on these holdings, the court in *Nunes* performed a case-specific analysis and ultimately permitted discovery (subject to in camera inspection) as the defendants "raise[d] legitimate subjects for inquiry not present in a more run-of-the-mill personal injury case or commercial dispute." *Nunes*, 2021 WL 7186264, at *4.

Under Iowa federal law, all parties are required to file Disclosure Statements at the outset of a case. *See* N.D. Iowa L.R. 7.1 (2024); S.D. Iowa L.R. 7.1 (2024). These Disclosure Statements require parties to disclose (1) "the names of all associations, firms, partnerships, corporations, and other artificial entities that either are related to the [party] as a parent, subsidiary, or otherwise, or have a direct or indirect pecuniary interest in the [party's] outcome in the case;" and (2) "with respect to each such entity, a description of its connection to or interest in the litigation." *Id.* This requirement would arguably include the disclosure of third-party entities who fund a party's litigation. Therefore, discovery of the "identity" of third parties who fund litigation, and their "connection" to the case, is arguably mandated in Iowa federal courts. At this time, it appears that *Nunes v. Lizza* is the sole guidance discussing the extent to which parties may discover *additional* information regarding third-party litigation funding. *See* 2021 WL 7186264.

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Kansas

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Kansas does not specifically permit discovery of third party litigation funding files. In 2021, Senate Bill 152 was introduced, which, if passed, would have required parties, without awaiting a discovery request, to provide the other parties with third party funding agreements. However, the bill did not become law and died in Committee in May 2022. Last year, another bill House Bill 251 was introduced which would have allowed a party to obtain discovery of the existence or content of any third-party agreement, noting that same was not necessarily admissible evidence at trial.

While this bill also died in committee in April 2024, it is an accurate summary of the current state of the law in Kansas. Third party litigation funding files may be discoverable in Kansas if relevant to any party's claim or defense. In *Freeman v. Gerber Prods. Co.*, a federal District of Kansas Court ruled that litigation funding agreements were discoverable because "information pertaining to plaintiffs' ability to pursue litigation [], by way of a contingency fee agreement or other arrangement, may lead to the discovery of admissible evidence". 2006 WL 8440588, at *1, *2 (D. Kan. May 4, 2006). While they may be discoverable, they are likely not admissible evidence at trial.

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Kentucky

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Kentucky courts have not directly addressed the issue of the discoverability of third-party litigation funding files. The discovery of third-party litigation funding files would likely be subject to Kentucky Rule of Civil Procedure 26.02(1). Pursuant to CR 26.02(1) discovery is limited to "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party."

In *Harper v. Everson*, the Western District of Kentucky while applying the federal counterpart of Kentucky CR 26.02(1) held that information regarding the third-party funding of the plaintiff's litigation was not relevant to the ERISA-related issues to be resolved at an upcoming preliminary injunction hearing. No. 3:15-CV-00575-JHM, 2016 U.S. Dist. LEXIS 197894, 2016 WL 8201785 (W.D. Ky. June 27, 2016).

Additionally, neither the Kentucky Court of Appeals nor the Supreme Court of Kentucky has addressed whether third-party litigation funding agreements violate Ky. Rev. Stat. § 372.060, Kentucky's champerty statue which voids any contract or agreement to provide funding for another party's case in exchange of the proceeds. In *Boling v. Prospect Funding Holdings, LLC*, the Sixth Circuit Court of Appeals predicted that the Kentucky Supreme Court would most likely hold that such agreements would violate Ky. Rev. Stat. § 372.060 and that such agreements would be inconsistent with Kentucky's public policy. *Boling v. Prospect Funding Holdings, LLC*, 771 Fed. Appx. 562, 581-82 (6th Cir. 2019).

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Louisiana

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Yes. In most state courts, the litigation/medical funding documents are discoverable. However, most often, securing the funding documents requires overcoming numerous objections from the funding companies, plaintiff's counsel, and the doctors who have contracted with the companies.

RULES AND REGULATIONS GOVERNING THIRD PARTY FUNDING

SB 355, Act 765 created La R.S. § 9:3580.10 *et. seq.,* which is known as the laws on "Transparency and Limitations on Foreign Third-Party Litigation Funding" and "Litigation Financing Disclosure Act". In instances where a litigation funding or financing agreement is in place, (1) the entity cannot dictate any decisions on the matter and (2) the agreement is discoverable in the litigation.

Under the "Transparency and Limitations on Foreign Third-Party Litigation Funding" laws, for any non-domestic entity whose contract is contingent on the outcome of the litigation, the laws have mandatory disclosure requirements to the state attorney general and prohibits certain terms in such agreement for contingent outcomes. Additionally, it bans funders from directing lawyers and parties on how to pursue suits, including whether to settle. The law takes effect on August 1, 2024.

Under this law, Third-Party Litigation Funding Companies must:

- Disclose in writing to the attorney general the name, the address, and citizenship or the country of incorporation or registration of any foreign entity that has a right to receive or obligation to make any payment that is contingent on the outcome of the civil action, or portfolio that includes the civil action and involves the same counsel of record or affiliated counsel, by settlement, judgment, or otherwise.
- Disclose in writing to the attorney general the name, address, the citizenship or the country of incorporation or registration of any foreign entity that has received or is entitled to receive proprietary information or information affecting national security interests obtained as a result of the funding agreement for such civil action. This disclosure does not pertain to information received by a party to the action, counsel of record, or law firm of record.

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Michigan

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Yes.

- The attorney must pay the monthly interest on the loan. Payment of the principal of the loan depends on the agreement between the funding company and the attorney.
- The client *may* be responsible for the interest paid at the end of the loan. This must be disclosed in the contingency fee agreement.
- If the client will be charged interest at the end of the matter, the attorney must provide the client a statement detailing the interest charged.
- Disclosure of the litigation funding to the client must be included in the contingency fee agreement. The client must consent to the funding, in writing.
- Cases governed by MCR 8.121 require approval of the Court.
- The client's funds cannot be used as collateral.

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Minnesota

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

The Minnesota Supreme Court approved 3rd party litigation funding in 2020 reversing the 120-year prohibition against champerty. *See Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235 (Minn. 2020). Because of the recency of the approval of 3rd party litigation funding, Minnesota courts have not directly addressed the discovery of party litigation funding.

Although the court in *Maslowski* abolished the prohibition against champerty, it did not take away all of the court's authority to review such agreements, stating that the "district courts may still scrutinize litigation financing agreements to determine whether equity allows their enforcement." *Id*. at 241; *see e.g.*, *Osprey, Inc. v. Cabana Ltd. P'ship*, 340 S.C. 367, 532 S.E.2d 269, 278 (2000) ("Our abolition of champerty as a defense does not mean that all such agreements are enforceable as written."). "Parties . . . retain the common law defense of unconscionability." *Id*.; *see Abernethy v. Halk*, 139 Minn. 252, 166 N.W. 218, 220 (Minn.1918) (observing that a court "may decline to enforce an unconscionable contract"). Courts should continue to carefully review uncounseled agreements, particularly between parties of unequal bargaining power or agreements involving an unsophisticated party. *Id*. "Courts and attorneys should likewise be careful to ensure that litigation financiers do not attempt to control the course of the underlying litigation, similar to the "intermeddling" that we described in our early champerty precedent." *Id.; see Huber v. Johnson*, 68 Minn. 74, 70 N.W. 806, 808 (Minn. 1897) (stating that "it is difficult to conceive of any stipulation more against public policy" than a contract term requiring the litigation financier's permission to settle the underlying litigation). This language seems to indicate that there may be circumstances where the courts may need to review 3rd party litigation funding agreements and opens the door to discovery on these issues.

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Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

If the third-party litigation funding does not involve plaintiff's healthcare provider(s), then it would be difficult to argue the agreement is relevant and discoverable to show potential bias or credibility of a witness. In order for a third-party litigation funding agreement to be discoverable, the party seeking discovery would have to show relevance of the third-party funding. The court would consider the possible probative value of a third-party funding agreement and weigh it against the possibility of undue prejudice. No cases were found addressing a third-party litigation funding agreement that did not involve a health care provider.

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Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

No Missouri appellate court has addressed the discovery of 3rd party litigation funding. However, a Missouri federal district court addressed the issue in *Morley v. Square, Inc.,* 2015 U.S.Dist. Lexis 155569 (W.D.Mo. November 18, 2015). The context of *Morley* is different than a traditional 3rd party litigation funding case in that it involved a patent dispute. Thus, the funding arrangement was not the same as one would see in a personal injury action.

The *Morely* Court refused discovery of communications with third-party investors in the litigation *that represented either work product or attorney client privileged communication*. The Court held such communications were protected, even if there was no confidentiality agreement with the investors. *Morley,* 2015 U.S.Dist. Lexis 155569, at p. 10. Nevertheless, the Court held that documents subpoenaed from the third-party investors were to be provided to the plaintiffs, and produced, subject to appropriate redactions of attorney-client and attorney work product. *Id.* This holding appears to leave open the discovery of the funding agreement itself, but protects communications regarding the mental impressions of counsel, and work product of counsel that was provided to the funders of the litigation.

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Nebraska

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Nebraska courts have not yet specifically addressed whether third party litigation funding files are discoverable, thus discovery of third-party funding is likely subject to the general rules of discovery under Neb. Rev. Stat. § 6-326. Nebraska's Legislature has also not passed any laws mandating or prohibiting disclosure of those files. We would therefore expect our courts to look to federal decisions for guidance on this issue. *See, e.g., Nunes v. Lizza*, No. 20-CV-4003-CJW, 2021 WL 7186264, at *3 –*6 (N.D. Iowa Oct. 26, 2021) (noting that "[a]s a general matter, courts across the country that have addressed the issue have held that litigation funding information is generally irrelevant to proving the claims and defenses in a case[]" but stating that "there is no bright-line prohibition on such discovery"); *Morley v. Square, Inc*., No. 4:10CV2243 SNLJ, 2015 WL 7273318, at *3 (E.D. Mo. Nov. 18, 2015). Furthermore, there has been indication that Nebraska's congressional delegation would support the implementation of the Litigation Funding Transparency Act, which would require third party litigation funding arrangements to be disclosed in federal litigation.

Finally, the Nonrecourse Civil Litigation Act regulates third party litigation funding. *See* NEB. REV. STAT. § 25-3301, *et seq*. Section 25-3303 provides that "[a]ll contracts for nonrecourse civil litigation funding" must comply with numerous "requirements," such as disclosure and acknowledgement provisions as well as actual terms themselves. *See* NEB. REV. STAT. § § 25-3303(1)(a)–(v), (b); NEB. REV. STAT. § 25-3304 (setting forth several "prohibited acts" for civil litigation funding companies).

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Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

There are no specific rules on obtaining discovery of third-party funding sources in New Hampshire. However, such discovery could theoretically be obtained by deposition and notice procedure if relevant to any issue in the underlying litigation.

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New Jersey

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

In 2024, the Supreme Court of New Jersey's Civil Practice Committee rejected a proposed rule that would require parties to disclose third-party litigation funding as a part of routine discovery in civil actions filed in the Superior Court of New Jersey.

However, the U.S. District Court for the District of New Jersey recently adopted Local Civil Rule 7.1.1, which requires disclosure of information regarding the use of third-party litigation funding within thirty (30) days of the opening of a new matter in federal court. Under the Rule, parties must file a statement with information relating to any non-party who provides funding for some or all of the attorneys' fees and expenses for the litigation on a non-recourse basis in exchange for either a contingent financial interest based upon the results of the litigation, or a non-monetary result that is not in the nature of a personal or bank loan, or insurance. Specifically, parties must reveal the funder's name and address, whether the funder's approval is "necessary for litigation decisions or settlement decisions," and a "brief description of the nature of the financial interest." This has not been specifically addressed in New Jersey state court, which would handle discovery of such under traditional discovery and evidence rules.

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Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

New Mexico allows for third party litigation funding, and there are currently no established rules, regulations, or case law in New Mexico addressing same. The issue has not yet been challenged in New Mexico. There is no case law addressing the admissibility of 3rd party litigation funding agreements.

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Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Currently, medical funding is not widespread in North Carolina. However, there are no specific rules or regulations governing the discovery of medical funding/factoring in North Carolina. For instance, it seems likely that if defense counsel is aware the Plaintiff is receiving medical funding, defense counsel should send specifically tailored discovery responses to elicit information and documents specific to the medical funding/factoring company files. However, there are no appellate cases in North Carolina addressing the relevancy and permissiveness of this discovery.

North Carolina maintains the common law prohibition on champerty and maintenance. *See Wright v. Commercial Union Ins. Co.*, 63 N.C. App., 465, 469, 305 S.E.2d 190, 192, *disc. review denied*, 309 N.C. 634, 308 S.E.2d 719 (1983). In turn, many litigation funding agreements are seen to be void and against public policy in North Carolina. *See e.g., Charlotte-Mecklenburg Hospital Auth. V. First of Ga. Ins. Co.* 340 N.C. 88, 91, 455 S.E.2d 655, 657, *reh'g denied*, 340 N.C. 364m 458 S.E.2d 186 (1995). In 2008, the North Carolina Court of Appeals in *Odell v. Legal Bucks, LLC*, found a third-party funding agreement to be unenforceable because the terms violated the North Carolina Consumer Finance Act. 192 N.C. App. 298, 301, 665 S.E.2d 767, 770 (2008), *disc. rev. denied*, 363 N.C. 258, 676 S.E.2d 905 (2009). However, the Court did not find the agreement to be champertous or maintenance. *Id.* 192 N.C. App. at 308-309, 665 S.E.2d at 774-75 (relying on the contract language stating that the outside party had "no control input, influence, right or involvement of any kind regarding any claim, right, or interest of Plaintiff in the litigation."). The Court noted that North Carolina courts will not find an outsider's involvement in a lawsuit constitutes champerty or maintenance merely because that outsider provides financial assistance to a litigation and shares in the recovery; instead, "a contract or agreement will not be held within the condemnation of the principles unless the interference is clearly officious and for the purpose of stirring up strife and continuing litigation." *Id.* 192 N.C. App. at 309, 665 S.E.2d at 775 (internal quotations and citation omitted) (the court noted that the key inquiry is whether the interfering party exercises control over the claim).

A North Carolina Federal Bankruptcy court examined the *Odell* decision and also refused to enforce a similar agreement after finding that it violated public policy. *In re DesignLine Corp.*, 565 B.R. 341, 348 (Bankr. W.D.N.C. 2017). Yet, neither of these Courts found that third-party funding agreements were

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North Carolina

unenforceable as a whole, but rather engaged in a fact-specific inquiry of the lender's involvement in the litigation.

Further complicating a third-party lender's willingness to become involved in North Carolina cases is this state's continued adherence to the doctrine of contributory negligence. This doctrine increases the risk involved for a potential lender. Accordingly, third-party funding arrangements in North Carolina are somewhat rare. We are not aware of any specific rules related to discovery of these agreements in this state.

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North Dakota

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

North Dakota courts have yet to address whether third-party litigation funding files are discoverable. N.D. R. Civ. P. 26 outlines the scope of discoverable information. Under Rule 26, "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense, including the existence, description, nature, custody, condition, and location of any documents, electronically stored information, or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order the discovery of any matter relevant to the subject matter involved in the action."

Although North Dakota courts, nor the legislature, have addressed rules related to third-party litigation funding, the attorney receiving compensation from a third-party on behalf of their client must comply with all applicable rules of North Dakota Professional Conduct, as outlined below.

Under N.D. R. Prof. Conduct 1.8(f), a lawyer can accept compensation for representing a client from someone other than the client when: (1) the lawyer's representation of the client is free of any and all interference with the lawyer's independence and professional judgment[i] or with the client-lawyer relationship; (2) all information related to the representation of the client remains protected under Rule 1.6[ii]; and (3) after consultation with the client, the client consents.

If receiving payment from a third-party payee creates a conflict of interest, the lawyer may not either represent the client or may no longer accept payment from the third-party payee. Under Rule 1.7, N.D. R. Prof. Conduct, a conflict of interest arises if the lawyer's "ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibility to another … third person, or by the lawyer's own interests."

Ultimately, it is acceptable for a third-party to pay for the litigation costs of another, but only if: (1) the third-party payee does not interfere with the lawyer's representation of the client, (2) the lawyer abides by the rules of confidentiality—meaning they are not disclosing confidential information to the third-party payee without consent of their client, (3) the client is consulted and consents, (4) accepting payment from the third-party payee does not create a conflict of interest for the lawyer, and (5) the third-party payee does not direct the lawyer's actions.

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Ohio

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

This issue has not been litigated in Ohio state court. However, at least one Ohio trial court has suggested that parties engaged in third-party litigation funding may need to disclose this engagement in pretrial discovery. *See Zwegat v. Bd. of Trustees*, C.P. No. 18CV-10593, 2019 Ohio Misc. LEXIS 228, at *11 (July 25, 2019) ("Any third-party funding needs careful study by counsel invited to participate in it; and may deserve full disclosure to a court in camera, or to other parties in pretrial discovery."). Generally, to be discoverable, documents sought must not be privileged and must be relevant and proportional to the needs of the case. Civ.R. 26(B)(1).

In Ohio federal courts, the Northern District of Ohio has held that "[a]bsent extraordinary circumstances, the Court will not allow discovery into 3PCL financing." *In re Natl. Prescription Opiate Litigation,* No. 1:17-MD-2804, 2018 U.S. Dist. LEXIS 84819, at *46 (N.D. Ohio May 7, 2018). It is not clear what "extraordinary circumstances" would permit the discoverability of such files. However, the Court ordered in-camera submissions relating to financing terms and affidavits from counsel and the funders to certify that there were no conflicts of interest or control by the funders.

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Oklahoma

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

The Oklahoma appeals courts have not been asked to address the question of whether litigation funding files are discoverable. The courts have not signaled what position they might take when asked to rule on this issue.

Oklahoma has enacted legislation to regulate third-party litigation funding, 14 O.S. § 3-807, but the discoverability of the third-party litigation funding file is not addressed in the statute.

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Oregon

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Oregon law does not prohibit discovery of 3rd party litigation funding files, nor does it have any statutes that regulate 3rd party litigation funding. There are several considerations that parties and practitioners should consider when 3rd party litigation funding is involved, including whether those materials could be considered discoverable and potential waiver of attorney-client privilege regarding disclosure to third parties.

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Pennsylvania

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

No. While discovery related to third-party litigation funding is permitted in Pennsylvania in some cases, such as claims arising out of champertous assignment of claims, a third-party litigation funder's files are typically protected by the attorney-client privilege. Further, communications with a litigation funder are protected as work product. *Lambeth Magnetic Structures, LLC v Seagate Technology (US) Holding, Inc.*, 16–CV–0538, 2018 WL 466045, at *5 (W.D. Pa. Jan. 18, 2018), *Devon IT, Inc. v. IBM Corp*., 2012 U.S. Dist. LEXIS 166749 (E.D. Pa. Sep. 27, 2012).

Any time a plaintiff takes out a law loan, the funding company must file a UCC lien with the Department of State. While this filing does not provide the amount of the lien, it typically provides the date the lien was filed, which can be useful in comparing the timing of the funding with a plaintiff's medical treatment in a particular action. One can also view the filing statement, which provides the debtor's name and address, and the secured party's name and address. These filings are accessed through the Department of State's website / database, which requires log-in information.

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Rhode Island

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Although the issue has not been addressed by any court in Rhode Island, it is unlikely that Rhode Island's discovery rules would permit discovery of 3rd Party Litigation Funding files. Rule 26(b)(1) of the Rhode Island Superior Court Rules of Civil Procedure states:

> *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any documents, electronically stored information or tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(b)(2) permits the disclosure of insurance agreements, even though it is not relevant or admissible at trial. With respect to the discoverability of a 3rd Party Litigation Funding file, a Rhode Island court would likely decide that such information is not discoverable on the grounds that the information is not relevant to any claim or defense of a party and/or that the request is not reasonably calculated to lead to the discovery of admissible evidence. Such agreements are not analogous to insurance agreements that are discoverable (to facilitate settlement negotiations), but not admissible because discovery of a Funding file would not be likely to assist the parties in resolving the case through settlement.

The regulation of 3rd Party Litigation Funding is not well-defined outside of the normal requirements imposed on lenders. Although there was an attempt in the Rhode Island legislature to regulate this area in 2011, there have been no further attempts to do so. *See* H. 5533, 2011 Gen. Assemb., Jan. Sess. (R.I. 2011); S. 0366, 2011 Gen. Assemb., Jan. Sess. (R.I. 2011).

A complicating factor is that Rhode Island still recognizes the common law doctrines of maintenance and champerty. *Toste Farm Corp. v. Hadbury, Inc.*, 798 A.2d 901, 906 (R.I. 2002). As the court explained, "maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome[.]" *Id.* at 905 (quoting *Osprey, Inc. v. Cabana Limited*

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Partnership, 532 S.E.2d 269, 273 (S.C. 2000)). "A champertor is one who purchases an interest in the outcome of a case in which he has no interest otherwise. A champertous agreement is unlawful and void where the rule of champerty is recognized, and the tainted agreement is unenforceable." *Osprey, Inc.*, 532 S.E.2d at 273. "In other words, champerty was described by the Supreme Court as a subset of maintenance in which assistance is provided specifically in return for a financial interest in the outcome." *Progressive Gaming Intern., Inc. v. Venturi*, 563 F. Supp.2d 321, 324 (D.R.I. 2008). Although the court noted that the modern trend among many courts is to abolish these causes of action, the court refused to do so. *Toste Farm*, 798 A.2d at 905-06. The court left it to the legislature to modify or repeal these doctrines. *Id.* at 906.

What constitutes assistance is not clearly defined. There have been very few modern cases dealing with these issues especially since the creation of the 3rd Party Litigation Funding industry. The cases that do involve either maintenance or champerty usually involve a person actively involved in the litigation and not merely providing financial assistance, however, there are no bright line rules in this area.

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Tennessee

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Tennessee has no specific statutory or regulatory rules regarding discovery of 3rd party litigation funding. Discovery is permitted in conjunction with Tennessee's version of the collateral source rule, which allows plaintiffs to claim the entire amount of billed medical expenses at trial as opposed to the amounts actually paid by a health insurer or other source.

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Vermont

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Vermont has enacted a comprehensive statutory scheme to regulate third party litigation funding, which is codified in Title 8 of the Vermont Statutes as Chapter 74, "Consumer Litigation Funding Companies." In 8 Vt. Stat. Ann. § 2255, the legislature addressed privileges: "A communication between a consumer's attorney and the company shall not be discoverable or limit, waive, or abrogate the scope or nature of any statutory or common-law privilege, including the work-product doctrine and the attorney-client privilege." While there are no cases directly on point, the Vermont Supreme Court's close guarding of the collateral source rule makes it is unlikely that 3rd party litigation funding-related materials would generally be discoverable in litigation.

The rules governing third party litigation funding to consumers are laid out in Title 7, Ch. 74 of the Vermont Statutes and are comprehensive. Litigation funding companies must register with the Commissioner of Banking and Insurance. Among other things, the litigation funding companies are prohibited from referring the consumer to a specific law firm or healthcare provider; nor may they accept or pay commissions or referral fees from/to a law firm or healthcare provider. The companies are prohibited from paying court costs or attorney's fees. Violations or unfair or deceptive acts are considered violations of the Consumer Protection Act, in addition to any other appliable common law or statutory rules and may be enforced by the Vermont Attorney General as well as the Commissioner of Banking and Insurance, and the consumer.

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Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

There are no Washington appellate cases on this issue. It is not likely that the court would grant a motion requiring production of these files.

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Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

West Virginia is one of the few states that permits the discovery of third-party litigation funding files. Under West Virginia Code § 46A-6N-6, a party or their counsel shall provide to the other parties any agreement under which any litigation financier, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent in any respect on the outcome of the legal claim. W. Va. Code § 46A-6N-6(a). This requirement indicates that such agreements are subject to discovery without awaiting a discovery request. *Id*. Unlike the other sections under this article, the terms "litigation financing" and "litigation financier" also include financing provided to an attorney or law firm where the right to receive repayment is contingent in any respect on the outcome of the consumer's legal claim. Id. § 46A-6N-6(b).

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Wyoming

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

There is currently no precedent in Wyoming for discovery of 3rd party medical funding files, and approaches may vary from venue to venue.