

Are Litigant-Litigation Funder Communications Protected?

Law360, New York (June 10, 2016, 1:15 PM ET) --

Addressing a novel issue in *In re: International Oil Trading Company LLC*, 548 B.R. 825 (Bankr. S.D. Fla. 2016), the U.S. Bankruptcy Court for the Southern District of Florida recently denied in part an involuntary debtor's motion to compel production of communications between the judgment creditor who had filed the involuntary bankruptcy petition and the petitioner's litigation funder. The court found that the attorney-client privilege and work product protection were applicable to certain disclosures made to the litigation funder, a nonlawyer third party. In reaching its conclusion, the court relied on both federal common law and Florida law.



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Background

The dispute arose out of a judgment awarded to Mohammed Al-Saleh, who entered into contracts with debtor International Oil Trading Company LLC (IOTC) to transport fuel across Jordan to Iraq on behalf of the U.S. military. After IOTC failed to satisfy the judgment, Al-Saleh obtained litigation funding from Burford Capital LLC to further its collection efforts and then filed an involuntary bankruptcy petition against IOTC. IOTC subsequently propounded discovery demands seeking, among other things, all communications exchanged between Al-Saleh and Burford. Al-Saleh objected, asserting attorney-client privilege, common interest/joint defense privilege, and work product protection. The court held that all three protections were applicable.



Shmuel Vasser

Common Interest Exception

The court first considered whether disclosure to the litigation funder constituted a waiver of any privilege. The court declined to apply a "common legal interest" theory and instead relied on the broader "common enterprise" approach^[1] to the common interest exception. The "common enterprise" exception protects communications outside the immediate attorney-client relationship where the communications are between those sharing a common enterprise and the legal advice related to the goal of that enterprise. The court applied the exception relying on three factors: Al-Saleh's disclosures to Burford were necessary to obtain funding and thus informed legal advice, the disclosures were not intended to be further divulged, and the information was for "the limited purpose of assisting" in the common cause and securing Burford's investment.^[2]



Anne Gruner

Agency Exception

The court also found applicable the agency exception to waiver. The agency exception protects from discovery communications between clients and nonattorneys whose services are provided to further that client's litigation aims. The court rejected the narrower so-called "translator" theory. The narrower approach will apply the privilege only when the disclosure is made to "translators," i.e. paralegals, secretaries, linguistic translators, etc. Instead, the court adopted the more permissive approach under which the privilege extends beyond traditional nonattorney law office support so long as disclosure is made to further the rendering of legal services to the client.

The court held that litigation funders such as Burford are within this category. The court reasoned that Burford was retained in order to fund collection of the debt owed and was therefore compelled to evaluate the merits of the litigation and provide strategic advice. The court reasoned that without such funding, judgment creditors and others with meritorious claims could be forced to abandon their rights to recovery. The court found that "[c]ommunications with a litigation funder fall within the agency exception for the very reason that litigation funders exist — because without litigation funders, parties owed money, or otherwise stymied by deep-pocketed judgment debtors, might have reduced or no ability to pursue their claims."

Work Product Exception

The court additionally held that work product protection applies to the work of litigation funders. The court described the material at issue as "communications between a client, the client's attorney, and a litigation funder whose participation depends on assessments of the merits of litigation." The court found that IOTC failed to establish that it had a substantial need for documents classified as work product. To the contrary, the court found that IOTC could acquire the information elsewhere — it could do its own analysis — and thus production was not warranted. Al-Saleh retained Burford for the "primary purpose" of obtaining legal services, and the requested documents contained protected legal opinions. The sole document that the court required be produced was the funding agreement between Al-Saleh and Burford because that item constituted "fact work product" subject to a lesser protection than "opinion work product." The court nonetheless allowed the redaction of the agreement for all payment terms and any opinions concerning the litigation against IOTC.

Conclusion

Litigation funding is gaining wider acceptance in the marketplace, and with the increased cost of legal services it is reasonable to assume that such growth will continue. As is evidenced by the IOTC case, challenging and novel privilege and work product issues arise as a result of requisite due diligence conducted by litigation funders concerning the legal and factual strengths and weaknesses of the claims that will secure any investment. Typically, litigation funders have prepared "white papers" or other analysis concerning, among other things, the privilege and work product issues. This case is of particular note because it deals with direct communications between the litigant and the litigation funder. While the IOTC decision provides useful guidance, parties considering a third-party funding solution should expect that this area of the law will continue to develop.

Specifically, it remains to be seen whether other jurisdictions will follow a similar approach. For example, it does not appear that any New York case squarely addresses this issue; however, New York courts have found that the identity of those paying legal costs is generally not protected.[3] There is

additional precedent supporting an argument that the underlying funding agreement will be discoverable, as the IOTC case held.[4]

While the remaining rulings in the IOTC decision are more novel, there are some precedents generally in accord from other jurisdictions. See, e.g., *Walker Digital Google*, Docket No. 11-cv-00309-SLR (D. Del. Feb. 12, 2013) (applying common interest exception to protect as privileged documents shared between litigation funder and client); *Devon IT Inc. v. IBM Corp.*, 805 F. Supp. 2d 110 (E.D. Pa. 2011) (holding that attorney-client privilege applies to litigation funders when, among other things, common interest is identified and defined in agreement between litigant and funder). As such cases continue to emerge, the privilege and work product issues arising from the relationship between litigants and their funders will remain a topic to closely monitor.

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[1] Some federal courts have required a common legal interest, rather than merely a common commercial interest.

[2] Citing *Developers Surety & Indemnity Co. v. Harding Village*, 2007 WL 2021939 (S.D. Fla. 2007).

[3] *In re Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003*, 4 N.Y.3d 665, 678, 830 N.E.2d 1118, 1126 (2005) (quoting *Priest v. Hennessy*, 51 N.Y.2d 62, 69, 409 N.E.2d 983, 986 (1980)).

[4] See *Cobra International Inc. v. BCNY International Inc.*, No. 05-61225-CIV, 2013 WL 11311345 (S.D. Fla. Nov. 4, 2013).
