

Third-Party Litigation Financing and Illinois' Attempt to Regulate Has Implications for the Transportation Industry

Article

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Third-party litigation financing is something defendants, and the transportation industry in particular, will likely increasingly see in lawsuits filed in Illinois. Generally, third-party litigation financing or funding is where an individual or private company that is not a party to a lawsuit agrees to help fund the suit. In exchange, the funder receives a return on their investment from any verdict or settlement recovered by the plaintiff. The payout is typically a return of the funded amount, plus interest, but in some jurisdictions can also be a set percentage of the settlement or verdict. If the lawsuit is not successful, a third-party funder does not recover anything.

The result is non-parties with a financial stake in the outcome of a case. Common sense, as well as a study conducted by the United States Accountability Office, suggests that plaintiffs backed by third-party funders will be less likely to settle with defendants given their obligations to pay back funders. That may mean larger settlement demands and a more difficult resolution process. We may also see an increase in litigation—both in the number of lawsuits filed and the length of the discovery process. Plaintiffs who may not have previously brought claims due to financial difficulty will no longer have that obstacle.

Commercial transportation is one of a few industries that is particularly susceptible to these arrangements. Trucking litigation often involves high upfront costs to conduct extensive discovery and retain regulatory, accident reconstruction and medical experts, making funding from a third-party to front those costs potentially appealing to litigants. Moreover, the trend of eye-popping verdicts nationwide will make trucking cases especially enticing to funders looking to make a good return on their investment.

Third-party litigation funding raises several practical and legal questions. What will funders' involvement be with the lawsuit beyond providing funding? To what extent will funders be able to direct legal strategy or recommend settlement? To

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what extent will funders' communications with attorneys be privileged? Without any federal statute, regulation of third-party litigation funding is left up to individual states. However, many states have not regulated third-party funding, leaving funders operating in a gray area without clear rules.

Illinois just recently enacted its first effort to regulate the practice: the Consumer Legal Funding Act ("CLFA"). 815 ILCS 121/1. The CLFA sets out application and licensing requirements for third-party funders, the interest that may be charged on the funded amounts, and the contractual requirements. Though the CLFA does not specify the total amount a company may finance, it does limit the fees that may be charged to not more than eighteen percent of the funded amount, assessed every six months. 815 ILCS 121/25(a). It also prohibits any charges from accruing after forty-two months from the date of funding. 815 ILCS 121/25(d).

Two important provisions of the CLFA speak to a funder's participation in the litigation process. The CLFA provides that funders shall not "receive any right to, nor make any decisions with respect to, the conduct of the underlying legal claim or any settlement or resolution of the legal claim." 815 ILCS 121/15(7). It further provides that "no communication between the consumer's attorney in the legal claim and the funding company *as it pertains to the consumer legal funding*" shall limit any statutory or common law privilege. 815 ILCS 121/50 (emphasis added).

Despite the effort to regulate third-party funding, the CLFA leaves several open questions. Do the above provisions bar discovery of substantive communications or updates regarding the case? Can funders still make recommendations regarding resolution? The plain language leaves room for interpretation and, despite becoming effective in 2022, the CLFA has not been analyzed by any court. With little to no guidance as to how the courts will interpret this statute, attorneys, funders, and consumers will still be left to decide on the scope of funder participation.

Open questions aside, the CLFA may ultimately lead to more third-party funding in Illinois by taking it out of a gray area without set rules and bringing it out into the open as a legitimate practice. Those involved in litigation should be aware of the potential of third-party litigation financing, investigate whether funders are involved in a particular case and the scope of that involvement, and be ready for its potential impact on potential settlement.

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