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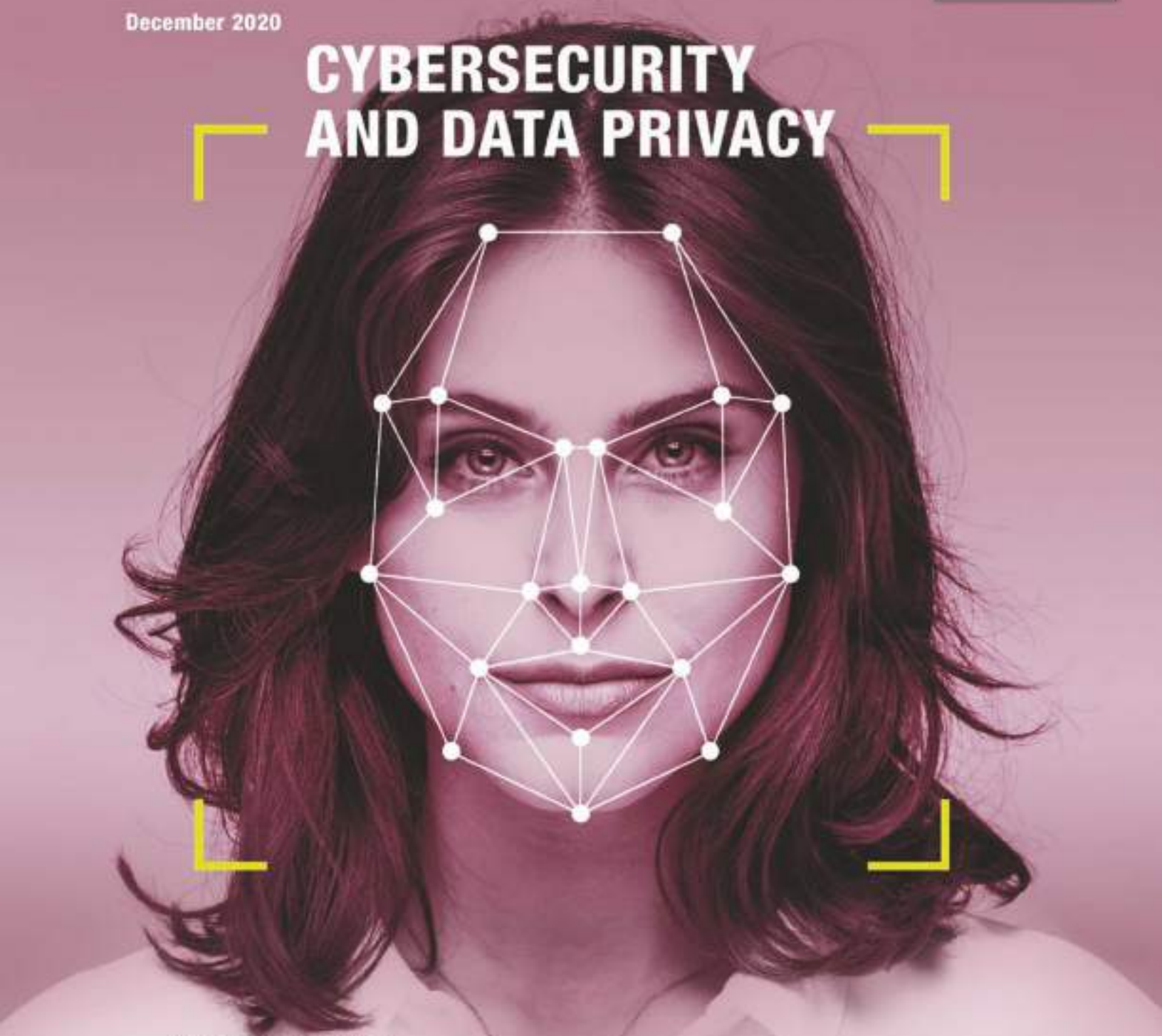
CYBERSECURITY AND DATA PRIVACY



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Medical Litigation Funding

By Whitney Lay Greene

Preventing nuclear verdicts in bodily injury cases begins with combatting excessive and unnecessary medical bills frequently paid for by third-party litigation funding companies.

On the surface, medical litigation funding and lien-based medical treatment provide a necessary service to individuals injured in an accident who would not otherwise be able to afford medical treatment. However, this noble veneer hides the potential ethical and legal turmoil of artificially inflated medical bills, questionable procedures, and a complex web of relationships between referral sources, medical providers, and third-party funding companies that may result from efforts to maximize an "investment" in the bodily injury claim or lawsuit. Skeptics of third-party funding believe these practices are at least partially to blame for the recent increase in so-called "nuclear verdicts" arising from seemingly ordinary cases.

With billions of dollars at stake, medical litigation funding is big business for funding companies and medical providers who finance treatment. These entities often have six, seven, or even eight-figure reasons to keep information and documents, which evidence funding practices and relationships, from disclosure. Likewise, plaintiffs and their attorneys seeking to capitalize on inflated medical bills as a conduit for higher settlements and verdicts may also be incentivized to fight the disclosure of this information. For those of us defending personal injury cases that involve these funding companies, this article highlights the basics of how medical litigation funding works, what evidence it leaves behind, and how it could dramatically affect the exposure in your cases. The reader will also learn about recent developments in the caselaw favoring disclosure of funding information, legislative efforts to make disclosure mandatory, and practical litigation tactics both to discover *and* use funding information at trial.

What Is Medical Litigation Funding?

Litigation finance is the broader umbrella for the funding of any lawsuit by a third party. The litigation finance industry began in Australia and the United Kingdom before making its way to the U.S. in the early 2000s. However, over the past ten years, the industry has boomed. In the commercial litigation context, financ-

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ing typically involves the paying of the costs and fees associated with bringing a lawsuit against another business. In personal injury cases, litigation finance is more likely to involve the funding of medical treatment and falls within the smaller scope of medical litigation funding. In these cases, the third-party finance company funds the medical treatment of the party to the litigation through one of several models (discussed further below). Thereafter, the finance company receives payment, generally at a significant profit, from the lawsuit proceeds.

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Litigation finance companies have billions of dollars at their disposal for litigation funding, with Burford Capital (which invests largely in commercial litigation) being one of the largest. At an industry conference in September 2019, Burford's founder boasted about its $2.5 billion in assets and $225 million dollars in post-tax profits in the first half of 2019 *alone*. There are a plethora of other players in the industry as more and more investors flock to promises of staggeringly high returns on their investments. A few of the more well-known medical litigation funders include Cherokee Funding, ML Healthcare, Oasis Financial, Key Health Medical Solutions, Pegasus Funding, Cash4Cases, and Greenlink Solutions.

Types of Medical Litigation Funding

Medical litigation finance is typically accomplished through one of two methods: the medical factoring model or the physician-funded treatment model. Both models typically involve inflated billing, unnecessary and/or excessive medical procedures, and questionable billing practices in order to recoup the cost of finance. The primary difference between the two models is whether the individual plaintiff or the provider receive the loan.

Medical Factoring Model

Under the medical factoring model, the patient/plaintiff borrows the money for the medical treatment. Specifically, the plaintiff's lawyer refers the plaintiff to litigation-company preferred physicians for treatment. The physicians then "bill" at self-pay or special (inflated) litigation funding rates, driving up the cost of the care and the potential damages awarded. The medical funding company then purchases the patient's account from the provider at a deeply reduced rate, often the actual reasonable and customary value of their charges. Next, the funding company stands in the shoes of the provider to collect the difference from the amount paid to the provider and the amount of the (inflated) billed charges.

Physician-Funded Treatment Model

Under the physician-funded treatment model, the funding company provides financing directly to the medical provider to cover overhead (including fees and expenses) associated with treating many plaintiffs. The provider then solicits and obtains referrals of patients with compensable injuries from other medical providers (frequently chiropractors) and plaintiffs' lawyers. Once the plaintiff begins treatment, some providers create inflated medical bills through over-treating, over-billing, and improper billing. This billing typically occurs under a letter of protection between the physician, the patient, and the lawyer. Upon the resolution of the lawsuit (either by jury award or by settlement), the plaintiff's lawyer negotiates the amount owed to the provider for the inflated bills. Frequently, the provider receives approximately half of the total "billed" charges; although there are certain instances where they receive as little as ten cents on the dollar. The physician then pays the funding company with the profits and continues the cycle.

How to Spot Medical Litigation Funding

Both third-party litigation funding companies and providers who provide treatment under a letter of protection want to ensure they are making good "bets" when choosing lawsuits in which to invest. This requires these entities essentially to perform claim evaluations to determine whether funding a plaintiff's treatment is a sound investment, likely to generate a positive return. The arrangement also incentivizes providers to perform (and bill) for as much treatment as possible *and* to connect all of their treatment of a patient to the accident at issue in the lawsuit. Providing favorable causation opinions is vital to the enterprise because determining the treatment was not causally related to the accident would result in a lower return on their investment. These efforts to mitigate the risk of loss and increase the likelihood of a positive return frequently require a significant amount of coordination between the "funding triangle" of plaintiffs' attorneys, providers, and funding companies.

This coordination is frequently documented in a variety of contracts and other documents, which are invaluable as evidence to show *potential* bias on the part of the treating physician and/or to challenge the reasonableness of the plaintiff's medical bills. Unsurprisingly, none of the parties to the funding triangle are eager to reveal the existence or nature of litigation

funding—or to provide defense attorneys with the documents that evidence them. Thus, defense attorneys must be savvy to identify cases where funding companies are involved. Examples of the types of documents frequently found in the funding triangle paper trail and the nature of information expected to be found in those documents are discussed below.

Electronic Medical Records and Practice Management Software

Now that the use of electronic medical records is virtually ubiquitous within the medical community, the same is true for the use of practice management software, which incorporates virtually all aspects of the management of a provider's medical practice into a single software platform. These platforms can prove to be a gold mine for identifying evidence of litigation funding and treatment coordination between providers, plaintiffs' attorneys, and third-party funding companies specifically. Three of the more common software programs are Care Cloud, E-clinical Works, and Centricity. Each of these programs allow providers to input electronic notes and other information in a patient's medical file, which (importantly) do not become a part of the patient's electronic medical record. Although the specific set-up varies by software, these extraneous notations are typically organized into various "tabs" within the software. The "tabs" most likely to contain notes specifically reflecting the involvement of litigation funding and/or direct communications with plaintiffs' attorneys include patient notes, patient alert notes, scheduling notes, or notes from billing. Other possible tabs that could contain key information are the guarantor, contracts, insurance, financial, payment plan, and historical data tabs.

For example, Care Cloud allows a provider to input what are referred to as "pencil notes" within a patient's medical chart. Centricity uses a similar option referred to as "Patient Alert Notes." These notes frequently contain references to direct communications with the patient's attorney. These communications include a variety of topics, including requests from the provider to be updated on the status of the litigation, questions about available policy limits, requests for supporting documents or conferences in anticipation of being deposed by defense counsel, communications from a plaintiff's attorney alerting the provider to possibly problematic information (i.e., a subsequent accident), and *even seeking approval from the attorney to proceed with a specific medical procedure*. These notes will also sometimes reflect copy and pasted version of e-mails between providers and the patient's attorney. Frequently, the e-mails will identify the key players within the physician's practice who are actively involved in coordinating with the plaintiff's attorney. This information is key to identifying potential deponents in the future. In sum, the notes contained in the practice management software not only provide direct evidence of possible bias on the part of the treating physician and of coordination between providers and plaintiffs' providers, they may also offer clues to other sources of information and documents that the providers and plaintiffs' attorney may deny exist.

Contracts and Funding Agreements

Regardless of the funding model involved in a particular case, there is bound to be a contract or financing agreement of some sort memorializing the terms. In the case of the physician funded treatment model, there is typically a financing agreement that lays out the terms of the arrangement and contains a schedule of accounts that identifies all of the claims and/or cases covered by the agreement. At a minimum, the financing agreement will identify the third-party funding company involved and the start date for the agreement. These agreements also frequently contain clauses dictating that the medical provider is the sole contact with the plaintiffs' attorneys and requiring that the provider use his or her "best efforts" to settle each account for as high an amount as possible. In addition, frequently the schedule will show that the same attorney or law firm refers patients to the same provider(s) repeatedly. Obviously, this practice only increases the likelihood of bias on the part of the treating physician, since a plaintiff's attorney is less likely to continue referring clients if the physician does not provide favorable opinions.

Individual patients are also typically required to complete a letter of protection on behalf of the provider that establishes a lien on any litigation proceeds. These letters may also include other language indicating that the patient is expressly foregoing the use of personal health insurance in favor of lien-based treatment. Last, letters of protection and/or financing agreements may even require that the plaintiffs' attorney obtain approval before settling any case below the total amount of serv-

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ices rendered. Overall, these agreements make clear to a jury that the treating physicians in these types of cases are not simply impartial third parties with no interest in the outcome of the case. Their relationships with the plaintiffs' attorneys and the funding companies are complex business relationships, and any opinions they offer should be viewed through that lens.

The marketing materials used in furtherance of this effort can provide additional evidence of the high levels of coordination between providers and their referral sources in the medical litigation funding context.

Referral Forms, Periodic Case Updates, and E-mails

Traditional medical providers simply treat a patient's symptoms and complaints as they are presented. If the patient has been involved in an accident, they seek only the necessary details to perform an accurate assessment of the patient's possible injuries. Unlike this traditional physician-patient relationship, medical providers involved in medical litigation funding must also assess whether accepting and treating a particular patient is a good investment. Because they only receive payment out of the litigation proceeds, they must necessarily determine whether proceeds are likely to be received. Some of these providers even have personal injury departments equipped with legal assistants, paralegals, and employees whose sole job is to serve as personal injury case managers.

In order for providers and their staff to make an accurate assessment of whether a case is, in essence, a good bet, they frequently require a potential patient's attorney to complete an intake or referral form prior to scheduling an appointment. These forms seek not only basic details about the patient's accident, but also whether there were any witnesses, whether cameras were present or absent, the name of the insurance company involved, and any applicable insurance limits. The forms frequently request copies of documents, like incident or police reports.

Aside from requiring intake forms and a pre-appointment assessment of a potential patient's claim before beginning treatment, providers may also require that the plaintiff's attorney provide other documents and information as a condition of accepting the patient. Many of these providers even have standard form letters, which they send to potential patients' attorneys, laying out requirements like providing the executed letter of protection, status reports on the litigation every thirty to sixty days, applicable policy limits, and accident or incident forms. As with the information contained in the practice management software, these documents are not included in the patient's medical records and would never be produced in response to a traditional non-party request. These documents not only provide further evidence of the unique business relationship between these treating physicians and the plaintiff's attorney, they also point to other potential sources of evidence. For example, status reports are typically provided in the form of e-mails. Thus, if reports are required by a particular physician, there are almost certainly bound to be e-mails between the physician and lawyer (or, more likely, their respective staff members), as well. It is also not uncommon for physicians (or their staff members) and lawyers (or their staff members) to communicate directly with each other by text. These communications can reveal the unparalleled level of coordination between the physician and attorney in advancing a plaintiff's case. Accordingly, any averment in discovery that no e-mails, text messages, or other written communications between provider and lawyer exist, should be met with significant skepticism.

Marketing Materials

In order for the medical litigation funding system to work financially for the medical providers, it requires a steady stream of personal injury patients. With this requirement comes the need for providers to market their services to other medical providers (frequently chiropractors) and plaintiffs' attorneys. The marketing materials used in furtherance of this effort can provide additional evidence of the high levels of coordination between providers and their referral sources in the medical litigation funding context. Examples of marketing materials include everything from brochures sent to plaintiffs' attorneys advertising the provider's personal injury team and relationships with friendly chiropractors, to invitations to provider-hosted networking dinners for plaintiffs' attorneys and chiropractors.

Caselaw Developments Favoring Disclosure

In a significant case for the 11th Circuit, *ML Healthcare Services v. Publix Supermarkets, Inc.* established for the first time that documents evidencing medical litigation funding were not only discoverable, but admissible at trial. 881 F.3d 1293 (11th Cir. 2018). The underlying lawsuit arose from a slip and fall in the dairy aisle of a grocery store. Through discovery, defense counsel learned that a medical litigation finance company, ML Healthcare, had entered into an agreement with the plaintiff and the physicians involved to purchase the patient's accounts receivable at a discounted rate with the proviso that the full cost of treatment could be recovered from any settlement or judgement. The Georgia-based district court ordered the production of medical litigation funding evidence during discovery *and* allowed evidence of the agreement to be admitted at trial for the purposes of establishing bias on the part of the treating physician and as evidence of the reasonableness of the plaintiff's medical bills. Both the plaintiff and ML Healthcare appealed the rulings (regarding discovery and the admission of the evidence at trial), arguing both were barred by the collateral source rule.

In upholding the lower court's decision, the 11th Circuit held that evidence of a funding company's payment arrangement with the plaintiff's doctors was admissible to show bias on the part of treating physicians. The court did not rule on whether the evidence could also be introduced to challenge the reasonableness of the plain-

tiff's medical bills as it determined the defense counsel did not actually introduce it for that purpose at trial. This decision, which held that evidence of medical litigation funding arrangements was not only *discoverable*, but *admissible*, created a watershed moment for defense attorneys who had long struggled both to obtain litigation funding documents and to introduce them as evidence at trial.

Since the *MI. Healthcare* decision, the Georgia Court of Appeals and other Georgia federal district courts have followed suit, similarly allowing the discovery and admission of evidence of litigation funding to varying degrees. In *Stephens v. Castano-Castano*, 814 S.E.2d 434 (Ga. App. 2018), the trial court initially excluded evidence of the treating physician's financial interest. The Georgia Court of Appeals reversed the trial court's decision, holding that the treating physician's interest was "highly relevant" and even going as far as to call the physician an "investor of sorts" in the lawsuit. Echoing the language of the *ML Health Care* and *Stephens* courts, a different Georgia-based district court also allowed evidence of the financial incentive of the physician to testify favorably and determined doing so did not violate the collateral source rule. *Rangel v. Anderson*, 202 F.Supp.3d. 1361 (S.D. Ga. 2016). Going further, the *Rangel* court also permitted the payment evidence to be used to challenge the reasonableness of the medical treatments performed and the value of the services provided.

In addition to caselaw developments favoring disclosure of medical litigation funding information, some courts, including the Northern District of California, have implemented standing orders that require the disclosure of third-party funding information (although the California order only applies to class-action suits). The trend has continued at the federal level with a 2019 proposed amendment to Federal Rule of Civil Procedure 26(a)(1)(A), which would require initial disclosures to include the disclosure of any third-party litigation funding agreements in *all* civil actions filed in federal court.

Legislative Developments Favoring Disclosure

Elsewhere, other states have opted to enact legislation expressly to require the disclosure of litigation funding in discovery, with Wisconsin being the first state to do so in 2018. West Virginia passed a more comprehensive bill in 2019, which imposes extensive requirements on litigation funders, requires registration with the state's attorney general, and mandates disclosure of the terms of their agreements—*regardless of whether they are requested in discovery*. Lawmakers in at least four other states (Florida, Utah, New York, and Georgia) have considered or are considering similar bills to address litigation funding and its effect on driving up medical bills (and verdicts) around the country.

In addition, in 2019, four members of the Senate Judiciary Committee, led by Senator Chuck Grassley, proposed the *Litigation Funding Transparency Act*. Among other things, the act sought to require the disclosure of litigation funding agreements at the outset of any class action filed in federal court, or in any claim that is aggregated into a federal multi-district litigation proceeding. Although the fate of this particular piece of legislation is unclear, a prior version of the bill stalled in committee last year.

New Frontier: Treating Physician vs. Expert Witness

Attorney-provider-funding company relationships may transform a *treating physician* into an *expert witness*. Typically, treating physicians are not subject to the same Federal Rule of Civil Procedure 26(a)(2)(B) requirements as retained expert witnesses. However, recent caselaw developments open the door for defense attorneys to argue that the nature of the relationship between attorneys and medical providers in cases where medical litigation funding is involved can lead to the physician's classification as an "expert witness" and trigger the more stringent Rule 26 disclosure requirements. In a pair of Georgia district court holdings, the Northern District of Georgia concluded that the "…label of 'treating physician' was irrelevant and the determination of whether Rule 26(a)(2)(B) must be met turned on whether the physician offered opinions beyond those directly arising from the patient's treatment." *Kondragunta v. Ace Doran Hauling & Rigging Co. (N.D. Ga., CAFN: 1:11cv01094 and Barber v. Barnaby* (N.D. Ga., CAFN: 1:2018cv04925).

In making that assessment, those courts looked at two factors: (1) whether the physician's causation opinion relied on information or documents gathered outside the course of treatment (for example, from a plaintiff's attorney); and (2) whether the physician was "retained or specially employed" in the ordinary sense of payment being issued for their opinions. After evaluating each factor, the court in both cases determined that the providers testimony regarding their treatment of the plaintiff "cohabitated" with expert testimony outside of the treatment, which triggered expert testimony disclosure requirements under Rule 26(a)(2)(B). District courts in Alabama and Florida have also reached similar decisions. Importantly, this gave defense counsel grounds to seek exclusion of the physician for having been improperly disclosed. *See Brown v. Best Foods, A Div. of CPC Int'l, Inc.*, 169 F.R.D. 385, 389 (N.D. Ala. 1996); *Maluff v. Sam's E., Inc.*, No. 17-602640CIV, 2017 WL 5290879 (S.D. Fla. Nov. 9, 2017).

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Viewed through the lens of the documents identified in the paper trail section above, the plaintiff's attorney's provision of prior medical records, accident reports, video, etc. would all constitute "information or documents gathered outside the course of treatment" as to the first factor. With regard to the second factor, payments are most often seen in the form of the plaintiff's attorney's payment for medical narratives, permanent disability ratings, or for meetings with the physician. Last, evidence that the physician was "specially employed" by the attorney can be shown through the on-going and unusual

relationship that providers have with the plaintiff's attorney in litigation funding cases—which is demonstrated through the "status reports" and communications often contained within the practice management software.

Best Discovery and Litigation Practices for Obtaining Litigation Funding Information

Not to put too fine a point on it, but the best advice for defense lawyers in need of litigation funding information is to stop sending boilerplate discovery requests and follow through on what you ask for. Now that we know a wealth of information and evidence regarding litigation funding relationships exists and how it will help in the defense of our case, the question becomes: how do we get it? The first step in developing a comprehensive discovery strategy is to stop using boilerplate non-party requests. As shown above, most of the documents and information vital to fighting the inflated medical bills and unnecessary medical treatment associated with litigation funding are *intentionally* left out of a patient's chart and billing records. The truth is, physicians, funding companies, and (sometimes) plaintiffs' attorneys involved in medical litigation funding do not want defense attorneys to see what is on the other side of the funding curtain, and they are certainly unlikely to turn over the most pertinent documents happily or unilaterally.

Accordingly, the first step is to develop comprehensive, targeted subpoenas or non-party requests that specifically lay out the categories of documents you are seeking. Since most defense lawyers practicing in the personal injury sphere become accustomed to seeing the same plaintiff-oriented physicians repeatedly, a best practice is to develop provider-specific requests for those physicians. Below are a few of the non-traditional documents that should be requested from a medical provider in the medical litigation funding context:

- **Information from the applicable practice management software.** The request should identify the specific software used by the provider (if known) and list example types of software (i.e., CareCloud, Centricity) if unknown. The specific "tabs" sought should also be listed.
- **Communications with the plaintiff and/or plaintiff's attorney.** The request should include the plaintiff's attorney, medical provider, and their respective staff members. Common job titles for physician staff members involved in case management and/or litigation funding issues are: physician liaison, personal injury clerk, personal injury client relations, funding liaison, and legal assistant.
- **Internal communications.** This request should cover internal emails, chat room logs, text messages, or other communications in any way related to the plaintiff, his or her lawsuit, and/or his or her bills.
- **Marketing materials.** This request should also include *communications* regarding marketing sent to or from the practice's employees. Common job titles for provider employees typically involved in marketing for personal injury cases are: marketing team coordinator, chiropractic network liaison, public relations consultant.
- **Referral documents.** This request should include any and all documents or communications related to how a specific patient was referred to the provider.
- **Contracts, agreements, and/or assignments of rights.** This request should include any and all contracts, liens, assignments of rights, agreements to pay, or other legal instruments potentially giving the provider and/or his or her practice group a financial interest in the outcome of the litigation.

Obviously, these categories are not intended to be all-inclusive. However, the more tailored and detailed the request, the more difficult it becomes for the provider to fail to produce documents under the guise of not being aware specific documents were intended to be covered under the request. A non-party request should also be sent directly to the litigation funding company, once identified. Those requests should include:

- Contracts or other written agreements entered into between the funding company, plaintiff, and/or his or her attorney; as well as agreements between the funding company and any medical provider who treated the plaintiff;
- All documentation related to the funding company's purchase of an account receivable from any medical provider who treated the plaintiff;
- Any intake forms, questionnaires, or other documentation created by, or provided to, the funding company that describes the accident at issue in the lawsuit or the plaintiff's injuries;
- Any progress notes, treatment notes or status reports regarding the plaintiff's medical treatment exchanged by the funding company with any medical provider;
- Documentation evidencing payments made between the funding company and the plaintiff's medical providers;
- All correspondence between the funding company and the plaintiff's medical providers;
- Documents related to any fee arrangement or negotiated rate between the funding company and the plaintiff's medical providers;
- All documents exchanged between the funding company and the plaintiff's attorney; and
- A listing of all cases in which any member, employee, or agent of the funding company has worked for the plaintiff's counsel in the past ten years.

While developing strong discovery requests is first step to discovering key medical litigation funding information, follow-through on those requests is even more important. Medical litigation funding has been allowed to operate un-checked in the shadows for years. The result is an immensely lucrative business model for funding companies, medical providers, and, frequently, plaintiff's attorneys. Given the damage this type of evidence can do to a plaintiff's damages claim and the enormously profitable nature of the litigation funding model, none of the players in the process are likely to open their files to discovery eagerly. Funding companies also have lawyers on deck (often our defense brethren!), ready to respond to the subpoena or non-party request and assert a litany of objections. Rarely are any requested documents initially produced. As a result, any response or objection to the non-party request should be carefully reviewed and promptly responded to with an appropriate good faith letter pursuant to Rule 37.

More often than not, providers and funding companies will prolong the pro-

cess to obtain the requested documents even after the issuance of a Rule 37 letter. Frequently, it seems the hope is that the requesting party will either give up, move on to another more pressing matter, or that the case will settle before a court ever hears the discovery dispute. Knowing this, defense attorneys cannot wait for months of back and forth with these entities. Instead, make the good-faith effort to resolve the discovery dispute and promptly take the appropriate next steps, whether that be a motion to compel or a more informal discovery conference with the presiding judge.

Depositions of Providers, Billing Managers, and Corporate Representatives

Aside from re-thinking the traditional approach to non-party requests, defense lawyers must also re-think our approach to treating physician depositions. Providers should be questioned about which practice management software the practice uses, including the name of the software, the various tabs or input sections within the software employed by the practice, the kinds of information recorded within those tabs, and the employees (or employee job titles) responsible for entering the various pieces of information. If the information from the software has not been produced before the deposition, ask the provider to show you the software and the more important information contained therein (i.e., the pencil notes or patient alert notes). Providers frequently bring a laptop to the deposition in order to refer to their medical records and usually have the information readily available.

It is also important to find out about the practice's billing procedures and protocols and the provider's knowledge of the various billing practices. Most often, providers will contend they have no knowledge of billing practices. Accordingly, it is vital to find out which employees within practice do have the necessary information (i.e., a billing or office manager). Last, ask the necessary questions to evaluate whether you have grounds to seek the exclusion of the treating physician on the basis that he or she was not properly disclosed as an expert witness under Rule 26. In particular, determine whether the provider received any payment from the plaintiff's attorney for medical narratives, meetings, or the review of outside documents. Then, make sure each and every document reviewed and relied upon by the physician in reaching his or her opinions is identified (to investigate whether the physician relied on documents outside their treatment of the plaintiff).

As noted above, physicians frequently testify that they have no knowledge of billing practices or how their patients pay for medical treatment. Similarly, they also typically claim to have no knowledge of how a particular patient comes to treat with their practice (including whether they were referred by an attorney or funding company). In those instances, it is vital to proceed with the deposition of the corporate representative, pursuant to Rule 30(b)(6). The corporate representative can then be questioned on billing practices and referral methods of the practice. Assuming these topics are properly identified in the Rule 30(b)(6) notice, the corporate representatives cannot simply claim they have no knowledge of the issues in the same way a provider can. These depositions also provide the opportunity to have a representative with binding authority admit that certain billing practices (frequently used in cases where medical litigation funding is involved) are improper.

A Look Toward the Future

As defense attorneys and their clients are all too aware, the use of medical litigation funding continues to appear in a growing number of cases. Likewise, the claimed medical bills in seemingly run-of-the-mill personal injury cases continue to multiply exponentially due to funding involvement. Both factors undeniably contribute to the prevalence of so-called "nuclear" verdicts across the country in recent years.

Fortunately, courts and legislative bodies have begun to see that medical litigation funding is nothing like traditional medical bill payment sources available to personal injury plaintiffs, which formed the basis for the collateral source rule. Instead, these funding relationships are lucrative business arrangements that are more akin to an investment in the lawsuit. While these developments may open door for discovering and using litigating funding evidence, the onus is on defense counsel to continue to fight for further disclosure. The process of sending requests, following up with Rule 37 letters, filing motions to compel, and taking the necessary depositions is onerous, tiring, and time-consuming. It can also be expensive for clients, so counsel must be able to demonstrate why the discovery battle is both necessary and important to the defense of the case. These efforts are only made more difficult if defense attorneys hoard the valuable evidence obtained through discovery battles in the hope of gaining a competitive advantage. The members of the "funding triangle" will almost certainly continue working together to resist the disclosure of this type of funding information, and the defense bar must do the same. So, take the information provided in this article, use it to build on the strategies and techniques identified herein, then share what you learn! FD