Northern District of Illinois Analyzes Privilege and Work Product Issues Involving Litigation Funding

Thomas E. Spahn (tspahn@mcguirewoods.com) is a partner with McGuireWoods LLP in Tysons Corner, Virginia. Tom practices as a commercial litigator and regularly advises clients on ethics issues including conflict of interest, confidentiality, and dealing with corporate wrongdoing. He is a frequent lecturer on legal ethics and privilege issues, and among numerous other publications is the author of The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide published by the Virginia Law Foundation. Tom has spoken at more than 1,000 CLE programs throughout the United States and in several foreign countries, and has served on the ABA Standing Committee on Ethics & Professional Responsibility.

In his March 12, 2014 “Privilege Points” release, Tom Spahn discusses litigation funding and the privilege:

Large companies increasingly turn to litigation funding as a means of financing commercial litigation. Only a few decisions have dealt with the privilege and work product waiver impact of companies disclosing protected documents to potential funders and the ultimately chosen funder.

In Miller UK Ltd. v. Caterpillar, Inc., Case No. 10 C 3770, 2014 U.S. Dist. LEXIS 779 (N.D. Ill. Jan. 6, 2014), the Northern District of Illinois issued an extensive opinion on these issues. After finding that litigation funding does not violate Illinois champerty or maintenance doctrines, the court held as follows: (1) the "deal documents" between the company and the ultimately chosen funder were irrelevant and therefore not discoverable; (2) the company waived attorney-client privilege protection for any materials shared with "any actual or prospective funders" – rejecting the company's common interest doctrine argument after concluding that "[a] shared rooting interest in the 'successful outcome of a case' . . . is not a common legal interest"; and (3) the company also waived its separate work product protection for any work product that it shared with prospective funders – "except those with which it had a confidentiality agreement." Id. at *33, *46-48, *72. The court noted "it appears that [the company] took protective measure with some but perhaps not all prospective funders." Id. at *71-72.

Companies communicating with prospective litigation funders must remember the fragility of the attorney-client privilege and the importance of confidentiality agreements when disclosing work product to any third party.