



Three Strategies to Fend off a Funding Attack

BY MIKE RAFI

More and more frequently, defendants seem to take a particular interest in plaintiffs' relationships with medical funding companies (and companies that provide litigation loans or cash advances). Defendants are focusing on these relationships because they hope to (1) reduce the value of plaintiffs' cases

and (2) discourage funding companies from contracting with plaintiffs who have cases against them. In fact, while on the defense side, I defended a road wreck case involving a commercial vehicle where my client focused as much, if not more time and effort, on the medical funding company than the plaintiffs.

The simple fact is that some clients will need money for medical treatment. Under Rule 1.8(e) of the Georgia Rules of Professional

Conduct, a lawyer may not provide financial assistance to a client in connection with pending or contemplated litigation, including funding medical expenses. This is where medical funding companies come in.

Medical funding companies pay for medical treatment that a plaintiff needs because of an injury that forms the basis of a lawsuit. Funding companies enable a client to receive treatment during the lawsuit, with the company getting repaid when the case is over.

Some companies only require repayment if clients successfully recover but others require repayment no matter what.

Funding companies, like insurance companies, contract with medical providers to pay only a certain percentage of billed-amounts or a fixed amount for certain treatments. Upon a recovery by your client, the funding company (per its contract with your client) will recover the entire billed amount—not only what it actually paid to the providers.

This article sets out three strategies for dealing with funding companies and combating defense arguments related to funding companies.

1

PUT THE FUNDING COMPANY ON A “NEED-TO-KNOW” BASIS

In one quotable scene from the 1996 movie *The Rock*, Nicholas Cage tells Sean Connery “You’re on a need-to-know basis ... and you don’t need to know.” This is precisely what you should tell the funding company, because it will limit the amount of information the defendant can use against your client.

The funding company needs to know a few things about your client and his case. The company legitimately needs basic information regarding the case—how the client was injured and the treatment the client needs. Additionally, the lawyer must usually provide periodic reports to the company concerning the status of the case. But the funding company does not need—and you should not disclose—the details of your case.

The less information you give, the less information defendants can claim they are entitled to. Defendants sometimes ask for all communications the plaintiff and his lawyers have had with a funding company. Defendants may also seek all internal communications the funding company has had regarding your case. One former defense client of mine went as far as to pay for the funding company to search and produce all electronic communications regarding the plaintiffs and their case.

So, only disclose necessary details to the funding company and also confirm with the funding company that it will limit its internal communications regarding your case. Although defendants are probably not really entitled

to this information, you can avoid this battle before it starts. By keeping the funding company on a need-to-know basis you will ensure the defendants will not become privy to things that they “don’t need to know.”

2

BLACKBOARD THE FULL VALUE OF YOUR CLIENT’S MEDICAL BILLS

You will want to blackboard all of your client’s bills. The defense will try to stop you.

To blackboard the bills, you must first know where to get them. The funding company determines how medical bills will be handled. Some companies allow lawyers to obtain bills directly from providers, just as you would do if no funding company was involved; others serve as a mandatory middleman—providers will submit bills to the company, who will then pass along

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the bills to you. In this second, and increasingly common scenario, even you and your client will not know how much the funding company actually paid the medical providers for your client’s treatment. Remember, in the end, your client will owe the full amount of his bills, not merely the amount paid by the funding company.

The defense may try to discover the exact amounts paid by the funding company to the medical providers by seeking contracts between the doctors and funding company and receipts of payments. This is a violation of the collateral source rule, but if the defense does this, it is likely because it intends to argue that the full amount of the medical bills should not be told to the jury. In this scenario, the defense will probably argue that the billed-amounts are actually the sum of two separate figures: 1) the actual medical costs paid to the providers, and 2) the additional amount that will be the profit for the funding company. According to the defendant, only the medical costs paid to the provider are “reasonable,” and thus recoverable under O.C.G.A. § 51-12-7. Because the funding company profit is not a reasonable medical expense, the defense may say, you should not be able to blackboard that amount to the jury.

Such a defense argument ignores the reality of your client’s situation and is contrary to the weight of Georgia law. The truth is your client was billed for treatment and owes the provider the billed-amount—contracting with a funding company does not change that truth. Preventing the client from recovering the full billed-amount would allow the defendant to benefit from your client’s need to use a funding company, and thus violate the collateral source rule. The Georgia Court of Appeals has specifically held that a plaintiff is entitled to claim and blackboard at trial the full amount of reasonable medical expenses billed, notwithstanding that portions of bills have been written off as a result of contractual rate reductions. *Olariu v. Marrero*, 248 Ga. App. 824, 826 (2001); *Candler Hosp., Inc. v. Dent*, 228 Ga. App. 421, 421-22 (1997).

You should have some help fighting this battle—the funding company should assist you. Especially if you have not confronted this issue before, speak with the funding company *before your client accepts funding* to confirm it is well-versed regarding discovery issues like this one. In the end, you should be able to thwart the defendant’s attempt to question your client’s medical bills and ensure that you may present the full amount of your client’s medical bills to the jury.

3

CHALLENGE CAUSATION ARGUMENTS

Another page from the defense playbook will be to discredit your client’s medical providers because they were paid by the funding company. The defense argument will go like this: the medical funding company will only pay for treatment that resulted from the incident giving rise to the lawsuit; thus, the doctors will only be paid if they attribute their treatment to the underlying incident; so, the doctors have a financial motive to attribute causation to the incident. Try these three ways to overcome

this defense argument:

First, try to disprove the defense's position through their own experts. The defense will often have at least one medical expert who will testify that the treatment provided to your client was, in fact, not caused by the underlying incident and/or the treatment was unnecessary and should not have been performed. Make sure you investigate whether the defense expert or any other doctors in his current or former practices have been paid by a funding company (bonus points if it is the same company your client is using). If you can link the defense expert and the funding company, then you should be able to get positive testimony from the expert regarding how he and doctors he is associated with—just like your client's doctors—do not change their diagnoses or courses of treatment simply because a funding company is involved.

Second, move *in limine* to exclude any argument by the defense that the funding company, doctors, and your client are in cahoots together. The Court should only allow the defendant to make such an argument if it is supported by substantial and credible information.

Third, if the defense is able to argue to the jury that some kind of fraudulent scheme exists, then separate your client from the fray. Ask your client to tell the jury about his treatment and why he received it. Chances are that your client wanted to get better and did not want to undergo any unnecessary treatment, especially if your client had invasive surgery. Juries have a very tough time believing that someone would willingly go under the knife when it was unnecessary.

By challenging the defendant's causation arguments at every step in the litigation process, you have a good chance to keep

baseless arguments out of the courtroom. Incorporate this causation strategy, keep funding companies on a "need-to-know" basis, and blackboard all of your clients medical bills, and you will put your client in position for a full recovery. ●

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