CHICAGOLAWBULLETIN.COM WEDNESDAY, JULY 18, 2018

Chicago Daily Law Bulletin®

Volume 164, No. 139 Serving Chicago's legal community for 163 years

Lawsuit investing: Time for a few rules?

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A recent article in The New York Times highlights a growing problem — funding of litigation by investment companies that are not otherwise involved in, or parties to, the litigation.

In its article, "How Profiteers Lure Women into Often-Unneeded Surgery," authors Matthew Goldstein and Jessica Silver-Greenberg detail how in some cases, marketers have inserted themselves into the litigation process. Indeed, in some instances, the third-party litigation funder incited litigation where none would have otherwise existed — potentially improper conduct called "barratry" in many states.

The context of the article by Goldstein and Silver-Greenberg is solicitation of potential plaintiffs for vaginal mesh claims, a burgeoning field of product-liability litigation. But without regard to the merits of any potential plaintiff's individual claim, the article raises a number of questions that the public, as well as participants on both sides of the litigation bar, ought to be concerned about.

Just how did a marketer learn that the persons mentioned in the article even had vaginal mesh implants? It is one thing if a third-party litigation funder is recommended by a person's attorney, but in these instances, the persons contacted reportedly did not have an attorney. So, how did the litigation funder get access to their medical records to enable the contacts cited in the article?

Debate over litigation funders in vaginal mesh claims is not new. Reuters published a special report on the subject in August 2015. But even beyond vaginal mesh cases, the subject of litigation funder is worthy of further investigation.

A recent Wall Street Journal article ("Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight," March 21, 2018) indicates that litigation funder firms "have raised hundreds of millions of dollars to finance hundreds of commercial lawsuits in the U.S." As noted by one such funder in that article: "We make it harder and more expensive to settle cases."

But when litigation funder companies go beyond merely funding the costs of the litigation and start soliciting customers who would not otherwise have filed a lawsuit or contacted an attorney, do they cross the line?

Litigation funder companies assert that they are simply leveling the playing field with deep-pocketed defendants and insurance companies — and perhaps they are in some instances. But when litigation funder companies go beyond merely funding the costs of the litigation and start soliciting customers who would not otherwise have filed a lawsuit or contacted an attorney, do they cross the line?

When rather than lending to the actual party, they instead finance portfolios or books of cases by lawyers without input or disclosure to the clients, is that simply putting the parties on an equal financial footing or is it something more and different that requires further scrutiny?

If (as some reports suggest) they make deals with the medical providers to pay a discounted amount for the medical treatment, and yet later assert the full value of the medical bills rather than the discounted amount actually paid, does not that change the dynamic of the lawsuit?

Is it appropriate for persons to be contacted out of the blue and referred to attorneys and doctors with whom the persons have never had any contact or relationship? Or, is that inserting themselves into the litigation process in a way that is potentially admissible in evidence and ought to at least be disclosed to all concerned?

And, if as suggested by Goldstein and Silver-Greenberg's recent article, they and their network encourage unneeded surgery in the cause of driving up the potential settlement value for the product-liability defendants, that is something worthy of further investigation indeed.

There are many players in the litigation funder marketplace and it may be difficult to separate the possibly legitimate from the venal. But it may well be that the time has come for establishing some solid ground rules.

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