Testimony to the Senate Judiciary Committee on SB152

February 14, 2022

Chair Warren and Committee Members:

Burford Capital is the leading global finance and asset management firm focused on law. Burford is publicly traded on the New York Stock Exchange (NYSE:BUR) and the London Stock Exchange (LSE:BUR), and works with companies from startups to the Fortune 500 as well as law firms across the U.S. and around the world, including those traditionally viewed as "defense-side" firms.

Burford is engaged in the business of commercial legal finance, *i.e.*, the provision of capital to law firms and businesses represented by sophisticated counsel, typically in the form of multimillion-dollar non-recourse[1] investments. Because the provider's return is dependent on a successful outcome and because these agreements do not constrain or interfere with the client's ability to resolve the underlying matter at any time or for any amount, providers will by definition fund only the most meritorious matters; if they do not, they will quickly go out of business. Capital from these arrangements may be used for fees or expenses associated with litigation—on either side of a pending claim, or to recover millions in otherwise lost value through judgment enforcement, or to budget in the face of economic or legal uncertainty. In essence, commercial legal finance is unremarkable, akin to the financing that a business obtains to collateralize assets like real estate or equipment.

It is not surprising then that the vast majority of courts and legislatures have declined to impose additional unnecessary regulation on the industry, particularly given the fact that commercial legal finance does not present any novel ethical or evidentiary issues that cannot be addressed by the U.S. justice system's clear and robust discovery and professional conduct rules.

Commercial Legal Finance Arrangements are Privileged

Materials created for and provided to a potential finance provider as a consequence of litigation are protected under the work product doctrine in the U.S.[2] That is why the vast majority of courts

[1] It is important to note that commercial funders make investments, not loans, and these investments are nearly always non-recourse, *i.e,* the financier's investment return is dependent upon a successful outcome, otherwise there is no obligation on behalf of the client to repay the funder. In addition to avoiding the debt obligation that exists with a traditional loan regardless of outcome, clients who use legal finance also do not have ongoing principal and interest payments.

[2] Since finance providers do not control matters and provide capital on a non-recourse basis, they must carefully diligence a matter. Similarly, deal documents are protected because they were created due to the litigation, and the terms of such agreements reflect the information provided in work-product protected documents, such as lawyers'

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do not require disclosure of legal finance arrangements in commercial matters.[3] And, as the Advisory Committee on Civil Rules of the U.S. Judicial Conference has repeatedly observed in rejecting proposals to change the Federal Rules of Civil Procedure to force disclosure of these agreements, if a judge were to determine that such an agreement was relevant to a proceeding, he or she currently has the authority to obtain the information necessary.[4]

Commercial Funders Do Not Control Litigation

At Burford, we enter into carefully negotiated, multimillion-dollar transactions with law firms and businesses represented by sophisticated counsel. Burford's agreements state that we neither control nor will we seek to control strategy, settlement or other litigation-related decision-making, nor direct a counter-party to settle a matter at all, or for a particular amount. We will not withhold contractually required funding for strategic reasons. We are passive investors and we do not control the legal assets in which we invest. These decisions remain entirely with the client. In the U.S., the vast majority of commercial legal finance providers behave similarly.

Commercial Legal Finance Does Not Present a Conflict of Interest

Potential conflicts relating to legal finance agreements are no different than any other potential conflict. The assertion that legal finance may result in attorneys breaching their duties of loyalty and confidentiality to their clients is pure speculation, as no one has ever offered an example of this actually occurring. Nor has anyone offered any real-world examples of judicial conflicts of interest; they are acutely aware of their ethical responsibilities and would be well advised to avoid investing in legal finance entities. And even if a judge were to have a relationship that rose to the level of warranting disqualification, they can and do issue individual practice rules or standing orders requiring disclosure of any relationship with that company. While rules vary by jurisdiction, those that exist generally share the limited purpose of ensuring that adjudicators are not inadvertently deciding a matter in which they have a conflict. Any other concerns about conflicts or other ethical issues are more than adequately addressed by existing discovery and professional conduct rules.

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mental impressions, theories and strategies about the underlying litigation. For an overview of caselaw affirming work product protection for communications with legal finance providers, see "Work product protection for legal finance," available at: https://www.burfordcapital.com/media-room/media-room-container/work-product-protection-for-legal-finance/.

[3] *See Miller UK Ltd. v. Caterpillar, Inc.,* 17 F.Supp.3d 711, 734-35 (N.D. Ill. 2014) ("For purposes of a privilege analysis, there is nothing unique about cases involving third party litigation funding. . . . Materials that contain counsel's theories and mental impressions . . . do not necessarily cease to be protected because they may also have been prepared or used to help [a client] obtain financing."); *see also Colibri Heart Valve LLC v. Medtronic CoreValve LLC, et. al,* Case No. 8:20-cv-00847 (C.D. Cal. Mar. 26, 2021); *Impact Engine, Inc. v. Google LLC,* Case No. 3:19-cv-01301-CAB-DEB (S.D. Cal. Oct. 20, 2020); *Continental Circuits LLC v. Intel Corp.,* 435 F.Supp.3d 1014 (D. Ariz. 2020); *MLC Intellectual Prop. LLC v. Micron Tech., Inc.*, No. 14-cv-03657, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019); *Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc.,* No. CV 16-538, 2018 WL 466045 (W.D. Pa. Jan. 18, 2018); *VHT, Inc. v. Zillow Group, Inc.,* No. C15-1096JLR, 2016 WL 7077235 (W.D. Wash. Sept. 8, 2016).

[4] *See, e.g., In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018) (requiring disclosure to be made *ex parte* and *in camera* to the judge and stipulating that no discovery would be permitted).

Conclusion

If enacted, SB152 would lead to the exposure of legally privileged or sensitive information about how Kansas businesses do business. Litigation is not an excuse for one party to conduct a fishing expedition into another's finances, and overbroad disclosure requirements undermine the judicial goal of efficiency. Disclosure for disclosure's sake simply is not a legitimate basis for sound public policy. For the foregoing reasons, we strongly urge the Committee to oppose this legislation.

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