New York Appellate Court Clears Path for Disclosure of Third-Party Litigation Funding in Personal Injury Lawsuits

For the first time, a NY appellate court allowed defendants in a personal injury case to discover third-party litigation funding, highlighting a shift toward greater transparency and fraud prevention in lawsuits.

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For the first time, a New York appellate court has held that the defendants in a personal injury lawsuit are entitled to third-party litigation funding discovery. In *Lituma v. Liberty Coca-Cola Beverages LLC*, 243 AD3d 504 (1st Dept. 2025), the Appellate Division, First Department, established critical legal precedent in allowing this discovery that the defense bar has been seeking for years.

Lituma involved personal injury claims stemming from a motor vehicle accident. The defendants, Liberty Coca-Cola Beverages, LLC, and its driver, asserted an affirmative defense and a counterclaim for fraud, alleging that the accident was staged. Specifically, the defendants alleged that the driver of the plaintiffs' car cut in front of the defendants' tractor trailer and then slammed on the brakes, deliberately causing a rear-end collision. As the litigation progressed, the defendants also uncovered evidence that linked the plaintiffs to other individuals involved in suspected fraudulent accidents.

Based on this new evidence, the defendants moved to vacate the note of issue and compel discovery related to their affirmative defense and counterclaim. They supported their motion with a detailed affidavit from a claims representative, whose thorough investigation had uncovered numerous connections between the plaintiffs and other claimants believed to have staged accidents, as well as medical providers flagged for possible fraudulent treatment. In several instances, the plaintiffs' testimony was contradicted by this new evidence, raising issues of credibility as well.

The Supreme Court, Bronx County, granted the defendants' motion. The First Department affirmed, finding that the defendants had met their burden of demonstrating "unusual or unanticipated circumstances" sufficient to vacate the note of issue because the suspected fraud began to surface only one month before plaintiffs filed the note of issue. With respect to the specific issue of the discovery of litigation funding material, the First Department held that the defendants established that the information sought is "material and necessary" as it could reveal a financial motive for fabricating the accident.

In support of its holding, the court cited to *Smartmatic USA Corp. v. Fox Corp.*, 2023 NY

Slip Op. 30886[U], *4–5, 2023 WL 2626882 [Sup. Ct., NY County 2023], comparing it with *Worldview Entertainment Holdings, Inc. v. Woodrow*, 204 AD3d 629, 629 [1st Dept. 2022]). In *Smartmatic*, the Supreme Court, New York County, permitted discovery of litigation funding agreements where the issue of plaintiffs' motivation to sue defendants was an element of defendants' anti-SLAPP counterclaim.

The Smartmatic court reasoned that information about the source, amount, and terms of any litigation funding could be relevant, or lead to evidence relevant, to plaintiffs' motive for the litigation. On the other hand, in *Worldview*, the First Department affirmed the denial of the defendants' motion to compel discovery into litigation financing, holding that the defendant had not explained how such discovery would support or undermine any particular claim or defense. Viewing *Lituma, Smartmatic*, and *Worldview* together, the discovery of litigation funding material should be permitted where the defendants have demonstrated how the discovery is material and necessary to a particular defense.

Prior to the Lituma decision, state and federal courts protected litigation funding from discovery for public policy reasons. Courts reasoned that litigation funding allowed lawsuits to be decided on their merits, rather than on factors such as on which party had deeper pockets or a stronger appetite for protracted litigation. The Eastern District of New York held that whether a person received litigation funding would not assist the factfinder in determining whether or not the witness was telling the truth. *Benitez v. Lopez*, 2019 WL 1578167, at 1 (EDNY Mar. 14, 2019).

In a break from this reasoning, the First Department in *Lituma* emphasized that full disclosure is required of all matter material and necessary to the defense of an action, with the terms "material and necessary" to be interpreted liberally to require disclosure of any facts bearing on the controversy.

Thus, once considered to be helpful in having disputes decided on their merits, the *Lituma* decision reveals a growing concern that litigation funding may be interfering with that very goal, possibly funding litigation based on deception and fraud. Even where the litigation has merit, it is widely believed that litigation funding can influence plaintiffs' willingness to settle their claims if a significant portion of the settlement will be paid to the litigation funder.

In response to rising concerns, Governor Kathy Hochul recently signed the Consumer Litigation Funding Act into law; the bill provides protections to consumers who enter into litigation funding agreements, including a 25% cap on the financing company's gross recovery from a lawsuit. Discovery into litigation funding agreements and practices may reveal other issues that need to be addressed through legislation.

In addition to setting a legal precedent for the discovery of third-party litigation funding, the *Lituma* decision affirmed the other fraud-related discovery the defendants sought in their motion to compel, including social media, phone records, and depositions of connected claimants; depositions of plaintiffs' prior employer to confirm connections between plaintiffs and other claimants; depositions of plaintiffs related to fraud connections; additional independent medical exams of plaintiffs; and depositions of plaintiff's medical providers.

Lituma also establishes a standard for maintaining a counterclaim for fraud, by citing to the insurance agent's detailed chronology and specific evidence of connections to other suspicious individuals. In contrast, the First Department's previous decision in *Linares v. City of New York*, 233 AD3d 479 (1st Dept. 2024), dismissed a counterclaim for fraud where defendants relied solely on "unproven allegations of fraud" in the RICO complaint.

The First Department in *Lituma* also rejected the plaintiffs' argument that fraud claims do not lie in a personal injury action and that, therefore, the defendants were not entitled to the discovery. The First Department noted that plaintiffs had not made this argument in opposition to the defendants' motion to vacate the note of issue, nor had they appealed from the order permitting the defendants to amend their answer to include the fraud affirmative defense and counterclaim.

Although the decision refrains from endorsing the fraud counterclaim, it nonetheless provides a roadmap for defending a litigation where there is evidence that the accident is staged: highlight any irregularities or discrepancies in the testimony, gather evidence of connections to individuals and providers who have been flagged for possible fraud, and move for production of litigation funding discovery to determine whether the plaintiffs have a possible financial motive for falsely claiming an accident.

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