How Jones Day Unmasked a Litigation Funding Deal and Won

A gas rig explosion off the coast of Nigeria ignited a class action against Chevron—but as the energy company's lawyers probed into the plaintiff's financing, the suit went up in smoke.

By Ben Hancock | October 29, 2017

K.S. Endeavor jackup drilling rig burning off Nigeria's coast on January 16, 2012.

Robert Mittelstaedt was after something.

It was September 2015, and the Jones Day attorney, a longtime counsel to Chevron Corp., was deposing one of his opponent's expert witnesses by telephone.

On the line was Kevin Cleary, a geologist whose company had been retained to measure the impact of a 2012 explosion of a natural gas rig off the coast of Nigeria. Mittelstaedt wanted to know why his opposing counsel wanted more time to produce Cleary's report. He pressed Cleary on whether "funding or lack of funding is a reason for the

delay."

Cleary responded that the plaintiffs attorneys, Jacqueline Perry and Neil Fraser, were "putting the money in place for the work to proceed."

Mittelstaedt pursued: "And is it your understanding that the additional work has now been funded?"

"I don't know that," Cleary answered.

The exchange was one of the first indications in the three-year-long case that Chevron suspected Perry and Fraser were receiving outside funding. Even before the plaintiffs lawyers inked their first litigation finance contract with UK-based Therium Capital Management, Chevron sought discovery relating to the funding of the litigation.

The trove of documents ultimately disclosed in the case sheds a rare light on how litigation funding operates and how the burgeoning funding industry structures deals to reduce exposure even while providing nonrecourse cash in risky cases.

Lawyers who have third-party funding typically fight to keep their arrangements under wraps on the grounds that the funding agreement is irrelevant to the case, and they have largely been successful in U.S. courts. Perry and Fraser, two solo attorneys with no prior record of litigating large class actions in U.S. federal court, resisted disclosure as well. But an internal case assessment turned over to Chevron showed that, from the outset, Perry hoped to secure funding "as soon as possible." Chevron's lawyers were more than happy to exploit that information, wielding it to challenge Perry's and Fraser's adequacy as class counsel.

The case has become a part of a broader debate about transparency and litigation finance. The U.S. Chamber of Commerce, an opponent of third-party litigation funding, highlighted the terms of Therium's agreement with Perry and Fraser last summer in a renewed proposal to a federal judicial committee to require disclosure of funding deals in all federal civil litigation. Funding agreements that require putative class members to hand over part of their recovery to funders "blur the line separating lawyers from nonlawyers and undermine the sacrosanct attorney-client relationship that is at the core of our civil justice system," the chamber wrote in June.

Therium Chief Investment Officer Neil Purslow declined requests to comment on the funder's decision to back the case. Chevron, through Mittelstaedt, also declined to comment on the litigation.

Perry, an English barrister who is also admitted to the California bar, argues that litigation finance plays an important role in the legal system. "Funding is an integral part of helping to achieve possible justice for people otherwise unable to achieve it for themselves," Perry wrote in an email, "and it is to the absolute credit of outfits like Therium that they are prepared to help towards costs."

Yet the fine print of their agreement also reveals mechanisms designed to align the economic interests of two parties that don't always have the same incentives. While litigation funders bristle at the notion that they have control over the lawsuits in which they invest, an analysis of the contract from Perry and Fraser's case, *Gbarabe v. Chevron*, shows the nuanced ways that funders try to ensure the lawyers will pursue a maximal settlement without spending too much time seeking a pie-in-the-sky recovery.

[To read the contract, click here. (https://www.documentcloud.org/documents/3898552-Funding-Agreement.html)]

"I think if you are a financier, the question is, when is too soon [to settle] and when is too late?" says Radoslaw Goral, a Dentons attorney who earned a doctorate studying litigation finance at Stanford University (though funding is not a major part of his commercial litigation practice). "And there I think you're getting at the real crux of the matter and

something lawyers and financiers might not agree on, for all sorts of reasons."

It's difficult to say whether that tension manifested itself in the handling of the Gbarabe case. There were no external signs that the two sides even engaged in any settlement talks. But what is clear is that Therium's funding was crucial to Perry and Fraser's ability to continue litigating the case for years against the energy giant, without the involvement of a larger law firm.

The Explosion and its Aftermath

Perry and Fraser filed suit against Chevron in San Francisco federal court in January 2014 alleging the explosion of an offshore natural gas rig two years prior had damaged the health and livelihoods of tens of thousands of Nigerians. At first, they struggled to get past the pleading stage, then scaled back their case dramatically. Most of the original lead plaintiffs were ejected along the way.

It's not clear how many funders Perry and Fraser talked to before landing Therium's investment near the end of 2015. In her first and only meeting with her original lead plaintiff, a man named Foster Ogola, Perry said she had turned down an unnamed funder. "I hope you're sitting comfortably, because this is what I was told would be their expectation if they funded it," Perry said, according to minutes of the meeting that were later disclosed. "Between 30 percent and 40 percent…. It would have been a lousy deal."

The lawyers titled their pitch for funding "The KS Endeavor Rig Explosion: A Plan for Justice." The bulk of the document focuses on the litigation timeline, relevant law in California regarding litigation funding, how attorney fees are awarded and the budget for pursuing the case. It was just one of a host of sensitive documents about the case that were handed over to Chevron.

The costs included everything from Perry and Fraser's travel to San Francisco for the initial case conference ($5,000), to Fraser's trips to Nigeria ($55,133), to the inspection and reports by Cleary's company ($300,000-$500,000). It said that, while Perry would essentially litigate on contingency, Fraser would have to "give up a great deal of work to concentrate" on the Chevron case. The document proposed that he be paid $15,000 per month "against final fees on judgement or settlement."

Perry and Fraser made no secret about the problems they encountered early on but described the litigation as having been righted. "It is the strong belief of counsel that, should this case be granted class action status, Chevron may well come to the table to negotiate a settlement and avoid the embarrassing evidence of what occurred on the rig in the week before the explosion," the pitch read.

That projection was probably optimistic, given Chevron's past litigation tactics. In some ways, the company's decision to drill into the financing of the case was a move out of a familiar playbook. In the now-infamous litigation surrounding a $19 billion Ecuadorian court judgment against Chevron over pollution of the rainforest, the energy giant went hard after its adversaries' source of capital. (In that case, Chevron was represented by Gibson, Dunn & Crutcher.)

This time, represented by Jones Day, Chevron attacked the plaintiffs attorneys' capacity to bring the case. "Plaintiff's lawyers do not claim to have the resources themselves to fund this lawsuit. Nor are they part of a larger firm that can financially back a lawsuit like this," Mittelstaedt wrote in a brief. "To the contrary, plaintiff does not dispute that his counsel are dependent on outside funding."

U.S. District Judge Susan Illston of the Northern District of California, a former plaintiffs attorney, seemed alarmed in an August 2016 hearing at all the documents Chevron had been able to obtain, which included attorney emails with one of the plaintiffs. Fraser explained that they had turned them over to be transparent with Chevron.

“There’s transparency. And then there’s attorney-client privilege,” Illston shot back. “And it seems to me that those two things have come together in this case in a way that isn’t positive.”

“And I do understand that, your honor,” Fraser said, “but we didn’t expect Chevron to use that particular assistance against us. We were trying to–”

The judge interrupted: “Well, then, you haven’t been paying attention.”

‘Counterparties’

The first copy of the funding agreement that Perry and Fraser produced to Chevron’s attorneys at Jones Day in February 2016 was awash in black ink. You couldn’t tell who the funders were, and almost all of the substantive obligations were blacked out–except for language, contained in Article 3.3, about not having to pay the funder back, if the case fell apart.

In Aug. 2016, Judge Illston ordered the full Therium contract to be disclosed, granting a motion by Mittelstaedt. “The Court concludes that, under the circumstances of this case, the litigation funding agreement is relevant to the adequacy determination and should be produced to defendant,” she wrote.

The language of the contract contains many elements that are common across litigation funding deals, according to industry insiders. For example, it pegs the disbursement of funds to an agreed-upon budget, and (if the case succeeds) promises a return to the funder based upon both a multiple of the money invested and a percentage of the recovery.

The multiple, in this case, was six times the $1.7 million committed by Therium–a multiple that is on the higher end by industry standards and possibly an indication that Therium thought the investment was high-risk, according to Dentons’ Goral. The contract also restricts the ability of the lawyers to involve another law firm in the case and gives Therium fairly wide discretion to determine whether the agreement has been breached by the lawyers.

In the lingo of litigation funding, the funder and the lawyer or client receiving the investment are not “partners” or “allies.” Instead, they are “counterparties.” It’s a word borrowed from the lexicon of the financial industry, simply meaning the other side in a deal or transaction. But it also goes a ways toward capturing the inherent tension between the two sides’ interests.

In the Gbarabe case, if Perry and Fraser landed a recovery, they would have been required to pay back Therium six times the $1.7 million it committed, or $10.2 million. In addition, they would have to have paid back whatever Therium actually poured into the case. In other words, if the lawyers used all of the committed funds, they would essentially have to pay back seven times the original investment–or $11.9 million, just to deliver on the multiple.

For a case that Perry and Fraser billed as worth $1.5 billion in damages, that may seem like peanuts. But it’s a factor they would have had to consider when settling the case. That math naturally incentivizes lawyers to keep pushing for a higher recovery–especially if there’s no downside risk of having to pay the funder back if the case collapses.

Alternatively, lawyers may seek to wash their hands of the case if the litigation goes sideways. The equation is unlikely to be the same for every attorney. Those with a load of other possibly lucrative cases might be more choosy about where to invest energy. Others might keep spinning away on a case for years hoping it will be the big break.

Funders use their contracts to try to limit their exposure to this type of risk. Eric Blinderman, the head of Therium’s U.S. operations, says that’s why the company typically includes two elements in the “success fee” it charges: a multiple of the original investment, plus a percentage of the overall recovery. So, if a lawyer or claimant churns on a case for years but successfully pushes to a high-dollar value recovery, Therium shares in some of that upside.

In the unredacted version of the Therium contract in the Gbarabe case, that percentage is 2 percent of "all Proceeds." Blinderman would not comment directly on the Gbarabe case (he joined Therium after the deal was inked, leaving Proskauer Rose to help set up the funder's U.S. operations in 2016). But he said the funder generally wants to ensure the lawyer or client "is incentivized to settle early and rationally."

Not all funders use the same structure. Harbour Litigation Funding, another major financier based in the UK, will typically obligate the counterparty to pay either a multiple of the investment or a percentage of the recovery, whichever is higher, according to Susan Dunn, head of litigation funding at Harbour.

Another point of tension is what might be called information asymmetry. Attorney-client privilege means there are some things a funder simply won't know. Funders try to offset that knowledge gap through the contract. In the Gbarabe case, the contract required the lawyers to confirm they provided only accurate information and have not "failed to disclose any information, document and/or material which would be relevant to Therium's decision to enter into and remain bound" by the agreement.

Money out the Door

In May 2015, Therium announced it had raised 200 million pounds ($304 million) from a single investor to "invest in the costs of large-scale commercial litigation, group litigation and arbitration globally," according to a press release.

Depending on how a funder sets things up, there can be pressure to get money out the door. Sometimes with private equity arrangements, the investments are put together first and the money comes later. Other times, it works the other way around.

Because Therium is private, it's difficult to know how its investment vehicle was structured. But, according to industry insiders and other experts, the Gbarabe class action is not like most of the cases that large commercial litigation funders–such as Burford Capital, Bentham IMF or even Therium itself–typically back. It's possible the case was a one-off opportunity to place some extra cash, a way for Therium to diversify its portfolio. With over $300 million at its disposal, $1.7 million probably seemed miniscule.

There has, of course, been a lot of money pouring into the U.S. litigation funding industry lately. Therium earlier this year expanded its operations in the U.S. with new hires, and other UK-based litigation funders have widened their footprint or entered the market. Chicago-based litigation funder Longford Capital Management completed a $500 million fund raise in September and says it had already found a home for $100 million of it.

"I think the defining characteristic in the next couple of years is going to be deployment pressure," says Charles Agee, who previously ran a litigation finance outfit and now advises commercial claimants seeking funding at Westfleet Advisers.

The rise of the litigation finance industry in the U.S. has led some defense lawyers to expect by default that a funder is behind the scenes–especially in class actions and mass tort cases with huge sums at stake. "I think if you're in one of those types of cases, it's become sort of state-of-the-art and incumbent upon you to explore the possibility of funding," says Tripp Haston, a partner at Bradley Arant Boult Cummings, who defends large life sciences companies.

The fact that a funder is involved may ultimately have no bearing on his strategy in the case, Haston says, but it might become an important issue if the contract shows the funder has some level of control or raises questions about the ability of the other lawyers to carry on with the litigation. "A big part of this, I think, for parties who are facing a funded set of litigation is just raising awareness–the court's awareness–that there is another material party in the case that is not disclosed," Haston says.

Blinderman says that Therium is moving more toward financing entire portfolios of a law firm's litigation, like many large funders. "Interestingly, one-off cases are becoming increasingly less a part of the work we do here," he says.

In one-off cases, funders typically contract directly with the claimant. But in class actions that's usually not feasible, and the lawyers become the counterparties to the deal. In the Therium contract, the "Lawyers" are defined as Perry and Fraser "in their personal capacity and trading as Rufus-Isaacs Acland & Grantham."

In fact, that firm–a small, "quasi-virtual" firm with an office in Los Angeles–was not included in the deal at all. "We were absolutely unaware that this agreement had been entered into until approximately six months later," founding partner Alexander Rufus-Isaacs said in an interview. The Therium deal was inked in November 2015, according to communications logs filed in the case; Rufus-Isaacs said Perry and Fraser told him about the deal the following May. Rufus-Isaacs said the firm terminated Perry and Fraser in June 2016 as a result of their not informing him earlier. "Why was the agreement not made with the firm?" he asked.

Perry says that the reasons for the termination were "far more complex" but declined to elaborate. Fraser did not respond to requests for comment for this story.

Even as Jones Day was fighting to get the funding agreement, the U.S. District Court for the Northern District of California made a broader move to inject transparency into litigation finance deals. In June 2016, it proposed amending a local court rule to require disclosure of litigation funding agreements in all civil matters. Major funders, including Burford Capital and Bentham IMF, pushed back strongly against the proposal. In January 2017, the Northern District court adopted a narrower rule that was still the first of its kind in the nation: Litigation funding contracts would have to be disclosed in any class action.

Perry said then she welcomed the development. "Essentially, I think third-party funding is a [growing] factor in litigation in this country," she said. "And I think, if it's going to be noncontroversial, if it's going to establish itself as a way by which plaintiffs can fight on a level playing field against large corporations, it's important that it is transparent."

Up In Smoke

With funding in place, Perry and Fraser obtained more than a half-dozen expert reports. But the reports didn't do much good. According to a ruling by Illston in March denying class certification, the author of one study–which Perry and Fraser later withdrew–backed away from assertions that the gas blowout polluted the marine environment, and appeared to have altered some data to support his original conclusions.

Illston seemed flabbergasted the problems were not caught sooner. She noted the report contained a number of typos, including the wrong date of the rig explosion. The testimony of the lead plaintiff, Natto Iyela Gbarabe, did not serve his lawyers much better. According to Illston's ruling, Gbarabe in a deposition denied claims made in court papers that he vomited after the rig explosion and that other members of his community also suffered health issues.

In their motion to certify the class, Perry and Fraser argued they had shown they were able to represent the Nigerian plaintiffs because of their "zealous advocacy" and experience. "It is hoped the pleadings to date in the case at bar will also be found supportive of counsel's competency, commitment, knowledge of relevant law, experience and respect for legal ethics of the highest order," they wrote.

But in denying their motion, Illston found Gbarabe to be unfit to represent the class, and criticized Perry and Fraser's handling of the case. Chevron's strategy of attacking their ability to run the litigation seemed to have succeeded. "The Court also concludes that plaintiff's counsel have not demonstrated that they can adequately represent the proposed class in this complex case," Illston wrote. "Throughout the history of this matter, and specifically the

litigation of the class certification motion, plaintiff's counsel have demonstrated a complete disregard for scheduling orders, evidenced a lack of familiarity with or understanding of the Federal Rules of Civil Procedure and the Civil Local Rules, and failed to diligently prosecute this case."

Perry and Fraser did not appeal. As Chevron prepared to seek summary judgment, the plaintiffs attorneys sought to dismiss Gbarabe's case without prejudice–holding open the possibility of a second try. After Chevron said it would oppose that, Gbarabe, Perry and Fraser agreed to put a definitive end to Gbarabe's claims. In exchange, Chevron agreed that the dismissal "will not constitute an adjudication on the merits as to any other individuals in the putative class," according to their stipulation. Illston granted the motion on Aug. 2.

Months beforehand, in an interview at the end of May, Perry had seemed hopeful the suit–or some formulation of it–might still yield something. "We are as anxious as the funders have been to ensure that they haven't just chucked money into a big black hole," Perry said.

Therium Litigation Funding Contract – Gbarabe v. Chevron (Text)
(https://assets.documentcloud.org/documents/3898552/Funding-Agreement.txt)
