

**UNANIMOUS 11TH CIRCUIT PANEL DELIVERS BIG VICTORY TO
THE DEFENSE BAR BY PERMITTING LITIGATION FUNDING
EVIDENCE IN CIVIL CASES**

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I. INTRODUCTION

The Eleventh Circuit United States Court of Appeals has affirmed a decision that will allow Defendants to introduce evidence of a Plaintiff's use of medical funding companies in personal injury cases. The Eleventh Circuit held that the evidence could tend to show that a treating doctor might provide biased testimony in order to secure additional referrals from the medical funding company, which relies upon a Plaintiff's success at trial in order to make a profit. This is a groundbreaking victory for the defense to be able to tell juries about the relationship between the Plaintiff, his or her attorney, the doctor and the funding company. It will also expand the scope of discovery in cases where a medical funding company has been used to pay for surgeries or other treatment.

II. THE ML HEALTHCARE BUSINESS MODEL: HOW IT WORKS

The Eleventh Circuit explained the ML Healthcare business model as follows:

. . . ML Healthcare matches injured, uninsured plaintiffs who have viable tort claims with treating doctors. It then purchases at a discounted rate the medical bills these doctors generate. To recoup its investment and make a profit, its contract with the plaintiffs permits ML Healthcare to recover the full amount of these bills from any tort damages recovered by the plaintiffs. The contract also provides that the referred plaintiffs will personally repay ML Healthcare the full amount of the if they recover no damages or if there are insufficient damages to cover the bills. In short, the contract allows ML Healthcare to recover the difference between the discounted bills it pays treating doctors and what those doctors say is the full value of those medical services: either from the plaintiffs themselves or from any tort recovery the plaintiffs receive. Nonetheless, a plaintiff who recovers insufficient damages to pay back ML Healthcare may be unable or unwilling to repay her debt, meaning that, absent a recovery by the plaintiff in such cases, ML Healthcare will be out not only its investment, but also

any hoped-for profit. Thus, for its business model to flourish, ML Healthcare needs the plaintiffs whom it subsidizes to win their lawsuits.¹

III. THE POTENTIAL BIAS ARISING FROM THE ML HEALTHCARE BUSINESS MODEL

The Eleventh Circuit then set out defendant's theory of bias arising from ML Healthcare's business model.

According to Defendant, this arrangement creates the risk of bias on the part of doctors who receive referrals from ML Healthcare and who subsequently testify on behalf of the plaintiffs that they have treated pursuant to those referrals. This is so, Defendant contends, because if a doctor did not provide a favorable causation analysis – which is necessary to win a tort case – ML Healthcare likely would find other doctors who would. Thus, to continue to receive referrals from ML Healthcare – and the guaranteed income stream they generate – the treating doctors have an incentive to provide analyses that help these patients – and, by extension, ML Healthcare – win their cases.

IV. THE ELEVENTH CIRCUIT AGREES WITH THE DISTRICT COURT PERMITTING ADMISSIBILITY OF ML HEALTHCARE EVIDENCE

The District Court permitted evidence that ML Healthcare referred the plaintiff to her two doctors, Dr. Ugwonali and Dr. Hunter. The trial court also permitted evidence concerning payments made by ML Healthcare to plaintiff's treating physicians. For the purposes of the appeal, the Eleventh Circuit assumed that the ML Healthcare payments constituted a collateral source; however, the Eleventh Circuit went on to state,

In short, under Georgia law, evidence of collateral benefits is not typically admissible in a personal injury tort case unless that evidence serves a valid evidentiary purpose other than just revealing to the jury those benefits. When that occurs, and the evidence is admitted, the trial court should instruct the jury about the limited purpose of the evidence and, in particular, remind the jury not to consider the collateral payments to reduce its award of reasonable and necessary medical expenses.

Id. At pp. 6-7.

¹ Page 14, Order. See attached link <http://media.ca11.uscourts.gov/opinions/pub/files/201513851.pdf>.

The Eleventh Circuit affirmed the ruling of the District Court and concluded that payments made by ML Healthcare to plaintiff's treating doctors were admissible not for the purpose to reduce its award of reasonable and necessary expenses but for the limited purposes of (1) showing bias of the treating physicians and thereby attack the credibility of the causation opinions provided by such treating physicians, and (2) to challenge the reasonableness of plaintiff's claimed medical expenses. Id. at p. 7

With respect to the bias argument, the Eleventh Circuit explained

A jury might infer that Plaintiff's doctors were incentivized by ML Healthcare's referral and payment arrangement to provide testimony that was more favorable to Plaintiff than it otherwise would have been. If so, the jury would have found bias, which is clearly a relevant consideration in evaluating a witness's credibility.

Id. at page 16.

With respect to using ML Healthcare evidence to challenge the reasonableness of plaintiff's claimed medical expenses, the Eleventh Circuit did not expressly affirm the trial court's ruling but explained,

As it turns out, Defendant ultimately did not use ML Healthcare evidence to challenge the reasonableness of the medical bills. That being so, and because there was a valid ground for the admission of the ML Healthcare evidence – to show bias – we do not have to determine whether admissibility of the evidence to challenge the reasonability of the expenses was proper.

Id. at page 19.

V. CONCLUSION

The Eleventh Circuit decision confirms that there is a new day in Georgia which permits the discovery and use of litigation funding evidence to dispute physician causation testimony by virtue of bias and also to contest the reasonableness of the claimed medical expenses. The collateral source rule is no longer available to bar the discovery of such funding arrangements between litigation funding companies and the doctors they select for plaintiffs. In any case

where a litigation funding company is involved, they are open to full discovery with respect to their contractual relationship with the patient and with the treating physician as the courts have made it clear that such evidence is discoverable and admissible.