Superior Court: Champerty, Maintenance 'Alive and Well in Delaware'

Barry M. Klayman and Mark E. Felger, Delaware Business Court Insider

April 23, 2014

Barry M. Klayman and Mark E. Felger

The doctrines of champerty and maintenance live on in Delaware, at least for the time being. In *Charge Injection Technologies v. E.I. du Pont de Nemours & Co.*, C.A. No. N07C-12-134-JRJ (Del. Super., Feb. 27, 2014), interlocutory appeal refused, No. 160, 2014 (Del. Apr. 7, 2014), the Superior Court considered whether the doctrines of champerty and maintenance are dead in Delaware and held that, absent a ruling to that effect from the Delaware Supreme Court, it would continue to recognize the doctrines.

Champerty is an agreement between the owner of a claim and a volunteer that the latter may take the claim and collect it, dividing the proceeds with the owner, if they prevail; the champertor carries on the suit at its own expense. Champerty cannot be charged against one with an interest in the matter; an agreement is not champertous where the assignee has some legal or equitable interest in the subject matter of the litigation independent from the terms of the assignment. Maintenance is an "officious intermeddling" in a suit that in no way belongs to the intermeddler by maintaining or assisting a party to the action, with money or otherwise, to prosecute or defend it.

The Superior Court acknowledged that the motion before it stemmed from "circumstances rarely seen in Delaware courts." Charge Injection Technologies Inc. (CIT) commenced suit against DuPont in 2007, but the case limped along with little activity because CIT failed to pay its attorneys, who in 2011 successfully moved to withdraw. CIT then obtained substitute counsel,

who entered their appearance for CIT a short time later. Sometime in 2012, CIT secured litigation financing from a third party, Aloe Investments. In 2013, DuPont discovered facts, including CIT's relationship with Aloe, that led it to believe that CIT had engaged in champerty and maintenance in violation of Delaware law. DuPont filed an emergency motion requesting a stay of the litigation until the champerty and maintenance issues could be resolved. The court characterized the issues relating to champerty and maintenance as raising "serious allegations" and potentially involving a "game-ending motion," and granted the stay.

DuPont served CIT with discovery requests on the champerty and maintenance issues. CIT's interrogatory responses identified Aloe as an investor, but CIT refused to produce any documents in response to DuPont's document requests, including the litigation-financing agreement between CIT and Aloe, claiming the documents were privileged. CIT also refused to produce a privilege log as required by Delaware law. During the meet-and-confer process, CIT claimed that it had not assigned any part of its claims to Aloe and that it retained complete control over both litigation strategy and settlement. DuPont filed a motion to compel CIT to produce documents responsive to its document requests, and CIT filed a motion for a protective order and dissolution of the stay.

CIT alleged that champerty and maintenance were "dying doctrines" throughout the United States and had been dead in Delaware for 40 years. CIT argued that the doctrines were never incorporated into the common law of Delaware as freestanding defenses, but existed solely by virtue of a criminal statute enacted in 1742 and repealed in 1972 that rendered champertous arrangements unlawful. CIT claimed that the repeal of the champerty statute "reflects the nationwide trend toward discarding champerty as an outmoded relic of feudal England."

DuPont argued that despite the repeal of the criminal statute, there had been several Delaware cases discussing the champerty and maintenance doctrines since 1972, including a Supreme Court decision in 1993, *Compaq Computer v. Horton*, 631 A.2d 1 (Del. 1993).

The Superior Court found that decisions of the Delaware Supreme Court, the Court of Chancery and the Superior Court since 1972 showed that, contrary to CIT's argument, champerty and maintenance "are alive and well in Delaware," even though none of those cases found an arrangement to constitute champerty and maintenance. The court said it would continue to recognize the doctrines absent a ruling from the Delaware Supreme Court holding that the doctrines were dead. The Supreme Court subsequently denied an interlocutory appeal by CIT, thereby keeping the doctrines on life support for the time being.

CIT also argued in the Superior Court that the litigation-financing agreement did not constitute champerty and maintenance. CIT contended that Aloe was not an "officious intermeddler" since CIT sought out Aloe, not the other way around, and CIT entered into the litigation-financing agreement well after it began the lawsuit. The court rejected both arguments, stating that a third party can still be an "officious intermeddler" even if the plaintiff initiated the contact, and champerty and maintenance are not inapplicable just because the third party invests after the suit is filed. CIT also contended that it did not assign any of its claims to Aloe, and it maintained control over the litigation. DuPont countered that Aloe could still have effective control over the litigation even without an express provision in the litigation-financing agreement giving it

control, and the absence of an express provision granting it control did not prove that Aloe was not exercising control over the litigation. DuPont also argued that whether the litigation-financing agreement constituted champerty did not depend on whether there was an assignment, but instead on whether Aloe was impermissibly assisting a party in prosecuting the litigation. The court, which had reviewed the litigation-financing agreement in camera, deferred ruling on the issue until after DuPont had the opportunity to complete discovery, including the chance to review a redacted copy of the litigation-financing agreement and CIT's privilege log.

The DuPont case means that the doctrines of champerty and maintenance live on in Delaware, at least until the Supreme Court again considers them. The Supreme Court's refusal to allow an interlocutory appeal from the Superior Court's decision shows that it is in no hurry to consider them, at least not on a less-than-complete record. Anyone who is looking for litigation financing from a third party, or any third party who is in the business of financing litigation, would do well to study the decision and any subsequent history to follow.

Barry M. Klayman *is a member in the commercial litigation group and the bankruptcy, insolvency and restructuring practice group at Cozen O'Connor. He regularly appears in Chancery Court.*

Mark E. Felger *is co-chair of the bankruptcy, insolvency and restructuring practice group at the firm.*