Legal Opinion Letter

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Third-Party Litigation Funding Justifies Cost-Shifting in Mass Tort/Class Action Discovery

by Andrew J. Trask

In the American civil justice system, the party seeking discovery typically gets a free ride. Meanwhile, the responding party bears the expense of complying with an adversary's discovery requests. In equally-matched litigation, this framework is broadly fair, but it leads to costly asymmetries in litigation against businesses—especially mass torts or class actions—where individual plaintiffs possess few documents, but defendant companies can have millions of pages (or terabytes) of information responsive to broad discovery requests. As a result, plaintiffs' counsel in aggregate litigation often seek discovery that imposes extraordinary costs on defendants, confident in the knowledge that defendants cannot reciprocate.[1]

In 2015, the federal judiciary adopted a "proportional" approach to discovery to address costly inefficiencies in civil litigation. Federal Rule of Civil Procedure 26 was amended to limit the scope of discovery to nonprivileged information that is "relevant to any party's claim or defense and proportional to the needs of the case." It also expressly recognized that courts may enter protective orders allocating expenses for discovery. These changes held the promise of a more fair and efficient discovery process.

In practice, however, many courts still allow expansive discovery in mass torts and class actions. They also remain reluctant to charge mass-tort or class-action firms for the discovery they request. Adherence to the traditional producer-pays approach reflects a view that impecunious plaintiffs cannot pay for discovery against a corporate Goliath and would lose their ability to seek justice if required to do so. This philosophy, however, does not reflect the reality in mass tort or class action litigations today.

Mass tort or class actions are rarely brought by under-resourced plaintiffs' law firms. These cases are largely filed by specialized law firms that have the resources to investigate and litigate complex claims.[2] Leading plaintiff firms have recovered billions of dollars for claimants and maintain robust war chests that allow them to finance very large cases. Some firms have highlighted their hefty capital reserves as a selling point when seeking class counsel appointments.[3]

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[1] *See, e.g.*, *Chambers v. Whirlpool Corp.*, 980 F.3d 645, 666 (9th Cir. 2020) ("Class action plaintiffs thus have an incentive to seek aggressive discovery (and log a tremendous number of hours in the process) without fear of reciprocally burdensome discovery.").

[2] *See, e.g.*, *In re Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig.*, 967 F.3d 264, 273 (3d Cir. 2020) ("Indeed, we have observed that it is counsel for the class representative and not the named parties who direct and manage class actions. Every experienced federal judge knows that any statements to the contrary are sheer sophistry.") (cleaned up).

[3] *See, e.g.*, *Smith v. Zoll Med. Corp.*, 2024 WL 278264, at *4 (D. Mass. Jan. 25, 2024) (attorneys' motion seeking appointment stated each firm "will be required to make contributions to fund the litigation, and they will not accept any

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The spread of commercial third-party litigation funding has further narrowed—if not altogether ended—any resource imbalance that arguably existed between mass-tort or class-action plaintiff firms and corporate defendants. Financial firms are investing enormous sums into funding "portfolios" of mass tort or class actions. Third-party litigation funding is now an over $15 billion industry in the United States,[4] and is expected to reach $31 billion by 2028.[5] In the mass tort context, funders report that the "funding provided to individual law firms now regularly exceeds $50 million" and at least one law firm has received "$250 million in funding."[6]

In the modern era, large-scale litigations involve a fight between Goliaths on both sides—but with one side forced to subsidize the other's discovery. This is unfair and not justified by the current litigation environment, especially in cases where a third-party litigation funder places a bet on the outcome of a case. Since funders stand to make a lot of money if a case is successful, they should absorb the cost of civil discovery as a business expense.

Courts should be aware of—and open to—shifting discovery costs in cases where there are large cost asymmetries in responding to discovery, but the parties have access to substantial financial resources, either because of outside funding or the ability to self-fund. Indeed, at least one court has explicitly referred to a known firm's financial resources in ruling cost-shifting appropriate during a dispute over electronically stored information:

> In this case Plaintiffs are represented by the very successful and well-regarded Philadelphia firm of Berger & Montague, which has had outstanding successes for many years in prosecuting class actions, winning hundreds of millions of dollars for their clients, and undoubtedly and deservedly, substantial fees for themselves. If the Berger & Montague firm believes that this case is meritorious, it has the financial ability to make the investment in discovery, to the extent the Court finds that cost sharing is otherwise appropriate.[7]

In addition, courts and legislatures should require transparency with respect to third party litigation funding agreements to help courts and parties identify whether a case involves a third-party investor. Progress has been made in this regard. For example, federal district courts for the District of Delaware and the District of New Jersey require third-party litigation funding disclosure[8] as does the Northern District of California in class actions.[9] A growing number of states are enacting third party litigation funding disclosure laws as well.[10]

The "adversary pays" rule makes sense in a world where small individual plaintiffs took Goliath corporations to court. But as 21st-century litigation continues to evolve into a clash of titans, courts should ensure the field remains fair to both sides.

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third-party litigation funding to do so"); *In re Data Breach Sec. Litig. Against Brightline, Inc.,* 2023 WL 6131609, at * (N.D. Cal. Sep. 18, 2023) (in motion seeking appointment, counsel "further represents that [they] will not accept third-party litigation funding").

[4] Westfleet Advisors, *The Westfleet Insider: 2023 Litigation Finance Market Report*, at 6.

[5] Thomas Holzheu, et al., *U.S. Litigation Funding and Social Inflation: The Rising Costs of Legal Liability*, at 8 (Swiss Re Inst. Dec. 2021).

[6] Tom Baker, *Where's the Insurance in Mass Tort Litigation*, 101 Tex. L. Rev. 1569, 1586 (2023).

[7] *Boeynaems v. LA Fitness Int'l, LLC,* 285 F.R.D. 331, 335 (E.D. Pa. 2012).

[8] Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022); Civ. L.R. 7.1.1 (D.N.J. June 21, 2021).

[9] Standing Order for All Judges of the North District of California Contents of Joint Case Management Statement ¶ 19 (N.D. Cal. Nov. 1, 2018).

[10] Wis. Code § 804.01(2)(bg); Mont. Code § 31-4-008; Ind. Code § 24-12-11 (effective July 1, 2024); W. Va. Code § 46A-6N-6.

