

# Strategic Discovery of Third-Party Litigation Funding in Class and Collective Actions

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Third-party litigation funding is marketed as a means of broadening access to justice by providing plaintiffs with resources to litigate in exchange for a cut of any monetary recovery. Some commenters have rebuked third-party litigation funding as an ethical quagmire and illegal champerty—stirring up litigation merely for a share of the proceeds. But where the plaintiff, at least on paper, remains in control of the litigation, courts have generally permitted third-party litigation funding.

With presently few legal restrictions, third party litigation funding has the potential to fund almost any lawsuit, including employment class and collective actions. How can employers sued on the back of third-party litigation funding discover this fact and use it to their advantage in litigation?

One federal court—the Northern District of California—requires disclosure of third-party litigation funding in class and collective actions as part of the [Joint Case Management Statement](#). In the absence of such automatic disclosure rules, an employer may request that the Case Management Order require the plaintiff to disclose any third-party litigation funding. See Fed. R. Civ. P. 26(f)(3)(F).

Once disclosed, the existence of third-party litigation funding could be leveraged by an employer to reduce litigation costs and gain strategic advantages:

**Scope of Discovery:** The “parties’ resources” is one factor in defining the scope of discovery. See Fed. R. Civ. P. 26(b)(1). A plaintiff’s resources fairly include any available third-party litigation funding, which may reduce the scope of discovery shouldered by the employer.

**Discovery Cost Shifting:** Third-party litigation funding may erode a plaintiff’s claimed inability to pay for requested discovery. See Fed. R. Civ. P. 26(c)(1)(B).

**Adequacy of Representation of Putative Class:** Courts must examine the resources that putative class counsel will commit to the class and “any other matters pertinent to counsel’s ability to fairly and adequately represent the interests of the class.” Fed. R. Civ. P. 23(g)(1)(A)(iv), (B). Class certification should be denied where the plaintiff fails to carry the burden of proving that third-party litigation funding will not conflict with or adversely impact class members’ interests.

**Sanctions:** A third-party litigation funder playing a role in litigation misconduct may be subject to

sanctions. See Fed. R. Civ. P. 37(a)(5)(A).

**Settlement:** Settlement efforts may be complicated by a third-party litigation funder influencing a party's settlement posture. A mediator should be apprised of this fact.

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