

## Critical Mass: MDL Litigation Funding Arrangements Placed Under Microscope. Plus: Did Jurors Sway Judge in RoundUp Trial?

With no federal statute or guideline, judges are taking the initiative to find out about third-party funding of mass-tort litigation

By **[Amanda Bronstad](#)** | May 08, 2019 at 05:20 PM

Welcome to **Critical Mass**, Law.com's weekly briefing for class action and mass tort attorneys. **Here's what's going on:** MDL judges are asking about **3rd party financing**, and one talked to me about why that's important. Find out **Monsanto's new argument** in its appeal of a **\$289 million Roundup verdict**. And how much did lawyers get for the **\$800M Fiat Chrysler settlement**?

### Got 3rd Party Financing? MDL Judges Want to Know

**Third party litigation financing** may be a hot topic in **class actions and multidistrict litigation** but, so far, no new federal law or rule exists to find out just how much it's happening.

That means **judges are on their own — for now**. And, [according to my story](#), at least **three federal judges** in large multidistrict cases in the past year have asked plaintiffs' lawyers to disclose whether they've got outside financiers in their cases. **U.S. District Judge Dan Polster** started the ball rolling a year ago with an **order in the opioid MDL**, but, last month, two other judges, **U.S. District Judge Paul Grimm** and **U.S. District Judge Casey Rodgers**, required disclosures from plaintiffs' lawyers seeking leadership appointments in the **Marriott data breach** and **3M ear plug cases**.

**Worth noting:** All three judges let the plaintiffs' lawyers submit the information **under seal**, a point of contention for the defense bar.

**Grimm talked to me about the topic**, which he said was important. In his case, none of the lawyers said they had third parties financing their cases against Marriott. **But what if they had?** I threw that question out at Grimm, who put it this way:

*"Oftentimes, it's the case that no one factor is paramount to all others and is a deal killer. But in that mythical unicorn of a hypothetical case, if there are two equally qualified applicants for lead counsel, both with the same substantive experience, the right personal experience, the right mix of qualities that on all other things are equal, and one is going to have third party funding, and one is not, that is something the court must ask itself: how important is this as to the decision as to what this lead counsel will be asked to do, and how heavily do I weigh that?"*

## **Monsanto: Roundup Jurors Swayed Judge**

**Monsanto** may have **lost two verdicts over its herbicide Roundup**, with another trial expected to wrap up this week, but the **fight on appeal has just begun**. Monsanto, now owned by **Bayer**, has [appealed last year's jury award of \\$289 million](#), which **San Francisco Superior Court Judge Suzanne Bolanos** reduced to \$78 million.

The appeal (see [here](#)) raises some of the same arguments Monsanto has brought up before, including the **judge's refusal to admit certain evidence at trial**. But **Monsanto also had a new appeal argument**: That Bolanos, even though she reduced the jury's award, was influenced by jurors and press coverage following the verdict to [uphold the punitive damages](#), rather than stick to her [tentative ruling to toss them altogether](#). Monsanto sought judicial notice of **letters that jurors wrote to Bolanos**, plus a San Francisco

Chronicle article about those letters, and an opinion piece by **actor Daryl Hannah and musician Neil Young**, urging Bolanos to retain the verdict.

I asked [Dan Gerber](#) (**Rumberger Kirk & Caldwell**) what he thought of Monsanto's new argument. He told me:

*"Monsanto's filing is innovative and brings up an important question about when a juror's role ends, and what influence the jury can have in post-trial motion practice."*

## **\$800M Fiat Chrysler Emissions Settlement Adds \$66M**

Lawyers who negotiated an **\$800 million settlement with Fiat Chrysler** over its **EcoDiesel vehicles** [asked a federal judge to approve an additional \\$66 million in attorney fees and costs](#).

The deal, which resolved claims that Fiat Chrysler installed software in 100,000 vehicles to cheat emissions tests, included a \$307 million class action settlement and \$400 million to federal and state regulators. Lead counsel [Elizabeth Cabraser](#) (**Lieff Cabraser**) came up with various calculations that placed the fee request below the **U.S. Court of Appeals for the Ninth Circuit's benchmark of 25%**, as did professors [Robert Klonoff](#) (**Lewis & Clark Law School**) and [Brian Fitzpatrick](#) (**Vanderbilt University Law School**), who filed separate declarations supporting the request.

On Friday, **U.S. District Judge Edward Chen** in San Francisco gave the deal final approval. My colleague **Ross Todd**, who was at the hearing, told me:

*"Since the attorneys fees weren't coming out of the settlement fund, Chen put FCA's lawyer **Robert Giuffra** from Sullivan & Cromwell in an interesting spot of fee-evaluator. Giuffra responded that the 'hardfought' negotiation over the fee came after the settlement had been reached and with the help of Special Master Kenneth Feinberg. Giuffra said that the final number ended up lower than the PSC's initial ask. 'Alright, well that says a lot,' said Chen, who later signed off on the settlement and the fees."*

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Here's what else you need to know:

**Zostavax Zinger: U.S. District Judge Harvey Bartle** had [some strong words for plaintiffs' lawyers suing Merck](#) over its **Zostavax shingles vaccine** after **tossing 173 of the 542 cases**. The complaints, he wrote in a 5-page order, were "full of boilerplate language unrelated to the individual case" and contained allegations "that are absurd on their face as to every plaintiff." The order specifically mentioned **Marc J. Bern & Partners** in New York. Co-lead plaintiffs' counsel [Mark Sadaka](#) (**Sadaka Associates**) and [Michael Goetz](#) (**Morgan & Morgan**) said the dismissals had nothing to do with the merits of the cases.

**Bauer Breach: Eddie Bauer** has [reached a \\$9.8 million settlement](#) over its **2016 data breach**. The clothing retailer plans to pay up to **\$2.8 million to Veridian Credit Union** and other financial institutions after hackers stole the personal information, including credit and debit card numbers, of customers at **350 of its locations**. It also plans to pay up to **\$2 million for settlement administration and attorneys' fees**, plus **\$5 million in injunctive relief**.

**All in the Family?** The family business isn't always friendly. In South Carolina, plaintiffs' attorney [George T. Sink sued his own son, George T. Sink Jr.](#), for trademark infringement. The elder George T. Sink claims his son's new

firm, **George Sink II Law Firm**, could be confused with his own, **George Sink P.A. Injury Lawyers**, one of the “most recognizable law firms in South Carolina.” The younger George T. Sink, who also uses the website [georgesinklawfirm.com](http://georgesinklawfirm.com), opened his firm days after being terminated from his father’s firm.

*That’s all for this week. Thanks for reading Critical Mass, and I’ll be back next week!*