

Discovery into funding must be anchored to materiality, not curiosity

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Executive Summary

EA significant Superior Court of Justice (STJ) decision in Resp 2171569/SP reaffirms Brazil's framework for third-party litigation funding. This includes confirming its legality, preserving minority-shareholder standing, rejecting compelled disclosure absent evidence of abuse, and placing the burden of proof on defendants.

The legality and widespread availability of third-party litigation funding in Brazil are not in dispute, and it is now frequently used in complex commercial and corporate disputes. Yet the STJ issued an important decision that consolidates this *status quo* and aligns domestic practice with prevailing global standards. The Court confirmed that funding is lawful, does not undermine a minority shareholder's standing, and, absent concrete evidence of abuse, does not warrant compelled disclosure of funding agreements. It also reaffirmed that defendants, not funded plaintiffs, bear the burden of proving any alleged abuse tied to funder influence. Taken together, these holdings enhance predictability for Brazil's developing market and curb procedural tactics aimed at chilling meritorious claims.

Analysis and Implications

The REsp 2171569/SP decision is a clear step forward for Brazil's third-party litigation funding. The STJ recognized that funding is a legitimate tool within the legal system and that a

minority shareholder may seek outside capital to share both the high costs and the potential results of complex litigation. On the facts before it, the Court found it unnecessary to compel production of funding agreements precisely because financing is admitted in the Brazilian order and, standing alone, does not create a justiciable issue warranting intrusive discovery.

Crucially, the Court separated the questions of standing and funding. The plaintiff's standing derived from compliance with Article 246, §1(b) of the Corporations Law, including the posting of a statutory bond. Funding does not negate the minority-shareholder standing or undermine the bond posted under the specificities of that cause of action, whose purpose is to deter frivolous suits. By rooting standing in statutory prerequisites rather than a party's capital structure, the decision places financing where it belongs: as a neutral means of enabling meritorious claims, not as a suspicion-triggering fact.

The burden of proof is allocated in a way that discourages fishing expeditions. If defendants allege that a funder's involvement has produced an abuse of the right of action, it is for those defendants to prove it under Article 373, II, of the Code of Civil Procedure. Speculation about "hidden interests" does not shift that burden to the claimant or justify invasive discovery. On this record, the lower courts correctly placed the burden on the defendants and revisiting that allocation would be barred by the STJ's own precedent.

From these premises follows a strong confidentiality and proportionality message: the identity of funders is irrelevant to the merits unless there is concrete evidence that funding arrangements affect the conduct of the litigation.

The practical effects are significant for governance and access to justice. Derivative suits suffer from acute collective-

action and free-rider problems: the company reaps the recovery while the initiating shareholder bears concentrated costs and risk. By confirming that financing is lawful, neutral to standing, and insulated from disclosure absent a demonstrated need, the STJ makes viable corporate-governance claims more financeable and less vulnerable to procedural chill. Courts and parties can focus on the core questions, whether there was an abuse of control power and what damages flowed, rather than collateral skirmishes over who pays the lawyers.