GoSueMe: The Broken Promises of Third-Party Litigation Funding

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Forget cryptocurrency—there is another kind of investment making the news in recent years and creating major headaches for corporate defendants: litigation funding.

Third-party litigation funding (TPLF) sees investment firms providing money, generally to plaintiffs, to cover their litigation costs. In return, investors get a portion of damages in the event of a plaintiff verdict. How big has it become exactly? As of 2022, litigation funders had more than $13 billion under management in the United States (*What You Need to Know About Litigation Funding*; U.S. Chamber Institute for Legal Reform, 2023). It has objectively influenced the number of lawsuits filed and the number of settlements and verdicts reached. But does that mean it is advancing justice?

Some have touted funding as a way to provide potential plaintiffs the opportunity to pursue their claims against wealthier company defendants. Its supporters, including funding firm heads like Burford CEO Christopher Bogart, argue that it is a way to "make the playing field level" by reducing financial barriers to justice (Stahl; *Litigation Funding: More Investors Fund Lawsuits, as Rules and Transparency Lag Behind*; 60 Minutes, 2022). Others, however, argue that it injects outside, under-regulated interests into the lawsuits' outcomes, increases the number of frivolous claims, can drag out litigation, and can even take advantage of the plaintiffs themselves.

While studies are limited, the published research on litigation funding does point to some troubling effects, both on the judicial system itself and its ability to deliver a just outcome.

Effects on the Judicial System

More Lawsuits

One study found that litigation funding increases the number of lawsuits and causes greater backlogs in courts (Abrams & Chen; *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*; University of Pennsylvania Journal of Business Law, 2013). The obvious reason for this effect is that litigation funding is designed to help people bring lawsuits; it is not surprising that a greater volume of cases can inundate courts, especially as the system continues to work through its pandemic surfeit. But, as explained below, litigation funding can also prolong the litigation process by disincentivizing settlements—leaving even more cases clogging the system as new ones flood in.

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Slower Resolutions and More Trials

Because the funder's interest is strictly financial—it wants to maximize return on investment—one main risk-reduction strategy is for it to diversify, investing in a "portfolio of cases" in the hopes that a few of them will return a large payout (Beisner et al.; *Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding a Decade Later*; U.S. Chamber Institute for Legal Reform, 2020). For this investment model, it is not about the result of one case in particular; it is about getting a few big wins across that portfolio. To encourage larger returns, plaintiff attorneys make larger demands and agree to settlements less often, resulting in a longer process and more cases going to trial.

An empirical study offers evidence to that effect. By examining statistics on medical malpractice litigation duration and awards and comparing data on where litigation funding is and is not allowed, the study demonstrated that funding had a considerable influence. It was associated with a 60.5% increase in claim payment, a 140% increase in resolution duration, and a 35.7% decrease in the probability of settlement (Xiao; *Consumer Litigation Funding and Medical Malpractice Litigation*; Journal of Empirical Legal Studies, 2017). These numbers are strong evidence that adding a third-party interest to case outcomes disrupts the litigation process and inflates damages requests; after all, an additional party is seeking payment.

Is Justice Being Served?

Who Gets Litigation Funding?

Litigation funding purports to help the everyman gain access to justice by overcoming the financial barriers to entry. But has this happened? One research paper found that it does not, in fact, remove the cost barrier for everyone. Rather, it tends only to help those who have claims

with a high "profitability rate"—a decent shot at a high-damages verdict (Deffains & Desrieux; *To Litigate or Not to Litigate? The Impacts of Third-Party Financing on Litigation*; International Review of Law and Economics, 2015).

Granted, this preference is not unique to litigation funding firms; many law firms prioritize such cases as well. Yet this noble "marketing point" of litigation funding falls short if people with meritorious claims, but little chance for a large award, do not receive funding due to funders' profit-based concerns.

Frivolous Lawsuits

The same paper reported another problem: litigation funding provides unharmed plaintiffs with larger incentives to make a claim, which can increase the number of frivolous lawsuits (ibid.). From the perspective of the funding company, the more claims that are made, the more profitability a litigation investment can have. Some settlements here and a large verdict there are enough to justify the endeavor. Defendants in the crosshairs, meanwhile, find themselves scraping their defense reserves to counter fresh waves of lawsuits.

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Effects on Jurors

More frequent and well-financed lawsuits can also have indirect effects on jurors. Litigation that assembles a plethora of individual suits (for example, hundreds of suits across the nation over the same product) is sure to attract media attention. Potential jurors are then more likely to see news about it and its prior verdicts. And since one of the first things jurors often wonder is whether anyone else has been harmed by the same product/company, pretrial publicity outlining serious, widespread plaintiff claims against a corporation—but offering little in the way of defense responses—can bias them against the defendant and suggest those claims have merit (Steblay et al.; *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*; Law and Human Behavior, 1999).

Reports of adjacent cases with loosely similar defendants can also lead jurors toward biased viewpoints. These reports create the impression that multiple companies in an industry have been bad actors and are now facing justice. In voir dires and mock jury deliberations, we often hear jurors reference Agent Orange, Johnson's baby powder, or Roundup in cases that involve completely different corporations. Clearly, these news stories help cement the belief that large corporations are apt to put profits over safety.

Going beyond the free publicity that standard media outlets offer to substantial, eye-catching claims, litigation funding can boost the signal by supporting paid plaintiff advertisements. In fact, money spent on plaintiff advertising has tripled in the last decade (Fogarty; *Exposing the Litigation Financing, Advertising, and Gaming Techniques That Are Threatening American Health Care*; AdvaMed Responsible Advertising for Patient Safety, 2021).

Far from an accident, blanketing the airwaves is another way that third-party funders can invest money to make their portfolios more profitable. In touting the largest plaintiff wins, often in the tens or hundreds of millions of dollars, advertisements can anchor jurors to higher numbers at trial by providing a point of reference. As jury consultants, we commonly hear jurors in mock trials or post-verdict interviews make mention of other verdicts as a factor in their deliberations—e.g., "What's the going rate of lawsuits these days? $50 million for cancer?" or "That one woman got $80 million from Johnson & Johnson, so this is probably worth somewhere around that."

Jury selection hopes to identify and exclude those who may have been influenced by media reports and plaintiff advertising, but with the prevalence of both, a few fortunate cause challenges and a handful of peremptory strikes often fall short. Consequently, litigation funding has been cited as one reason for the rise in massive "nuclear verdicts" (*Annual Results 2019: Swiss Re Investor and Analyst Presentation*; Swiss Re, 2020).

Effects on Plaintiffs

Ironically, funding terms can prey on plaintiffs themselves, a concern that has been expressed by some scholars and lawmakers alike. There is good cause to question whether the injured party ends up with a fair share of their own settlement or verdict. As New York Assemblyman, William Magnarelli observed, "Some of the fees being charged by the [funding] companies were so high that whatever the verdict was, the victims ended up getting very little or close to nothing" (Sams; *Litigation Funding Bills Crop Up in State Houses Across the Country*; Claims Journal, 2020).

Data instead suggests that litigation funding serves on a broad scale to redistribute money from those seeking justice into the pockets of wealthy funders. Models created by Swiss Re analysts, for example, indicate that cases involving third-party funding see a notable decrease in plaintiffs' ultimate compensation. The analysts estimated that "plaintiff compensation decreases by 21% relative to the same award in a case without TPLF" (*U.S. Litigation Funding and Social Inflation: The Rising Costs of Legal Liability*; Swiss Re, 2021).

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Some have also argued that, while lawyers have ethical responsibilities to their clients, funding firms share no such requirements. Plaintiffs thus may be influenced by the pressures of those paying for their suit (Stahl, 2022). With funders incentivized to hold out for a few large verdicts across a portfolio of cases, it stands to reason that some plaintiffs may be encouraged to pass up terms of resolution that would have been more favorable than the actual outcome.

Acknowledging such concerns, a handful of states have already enacted laws prohibiting or regulating the industry, specifying whether its usage must be disclosed, and more. Other states and the federal government are in the process of drafting relevant legislation as well.

Corporate Defendants Must Act

With corporate defendants facing yet another litigation hurdle, corporations and the defense bar must coordinate both a long- and short-term response strategy:

Push for Regulation

The cryptocurrency collapse presents merely our most recent example that legislative response to new markets tends to lag—often to ruinous effect. In this case, lawmakers have only sporadically sought to regulate litigation funders and their practices; the gates remain wide open to profiteering at the expense of our civil justice system. Rather than trying to battle the problem in the courtroom, when it is mostly too late, defendants' best strategy will be to preempt the unhindered growth of litigation funding altogether. American businesses must urge legislatures nationwide to impose rules and transparency on litigation funding firms. Among other things, regulations should establish:

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- Settlement decision-making control remains vested with plaintiff(s)
- Funding agreements are conspicuous, in writing, and signed by plaintiff(s)
- Financing amounts are capped
- Fees, charges, and interest rates are capped
- An exchange of funding documents in discovery
- The relevance of funding to the litigation and its potential admissibility into evidence

Counter the "David v. Goliath" PR Narrative

If there were ever a public relations battle to be waged, this is it. Juries have been reaching nuclear verdicts with increasing size and frequency, hoping to send a message to the wealthy. But if jurors know that awarding millions or even billions of dollars will serve to increase the

return on investment for those with enough money to invest in (i.e., bet on) lawsuits, they may seek only to make the plaintiff whole rather than to enact change within a corporation or even an entire industry.

While the plaintiff bar continues to create ads with the semblance of news articles and pay for billboards and TV spots to anchor jurors to sky-high dollar figures, the defense bar could work to lift the veil on the influence of litigation funding. A documentary on a streaming service, an episode on a docuseries such as "Dirty Money," or a TikTok series via legal or journalism influencers could help inform future jurors about the vast potential resources behind plaintiffs going to trial—and those who stand to benefit most from a big verdict. By countering the perception of "David v. Goliath" in civil lawsuits, jurors may enter the courtroom with a healthier skepticism toward plaintiffs and their well-paid experts.

Precondition Jurors in Voir Dire

We often hear jurors lament the deep pockets of corporate defendants and the battle between "unequal" parties. In the short term, to get jurors thinking realistically, defense lawyers can ask the venire, "Does anyone have any idea how many resources the plaintiff's law firm has?" And, as long as there is no motion in limine on the issue, follow up with, "Has anyone here heard of third-party litigation funding?" Even if there is an objection, these questions hint to jurors that there may be plaintiff resources they were unaware of.

Final Thoughts

Third-party funding has already had a significant impact on U.S. litigation. Although it is all too true that high litigation costs are a detriment to one of the founding principles of our civil justice system—that plaintiffs should receive their day in court—the introduction of third-party interests appears, thus far, to be more curse than cure. Litigation funding may help some plaintiffs pursue the justice they are seeking, but it comes at a cost. What may be a lucrative pursuit for the investors and funding firms stands to be a nuisance to the system, to defendants, and even to the very plaintiffs it purports to help.

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