High Rollers in the Courtroom Casino – Champerty and the Rise of Litigation Finance

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US civil claims - contingent fees

"A country is considered the more civilised the more the wisdom and efficiency of its laws hinder a weak man from becoming too weak and a powerful one too powerful."

— Primo Levi, "If This Is a Man" (1958)

The US civil claims legal system has, over the years, been praised and lambasted in more or less equal measure, for many perceived virtues and faults, by those within the US and others outside it. One particular aspect that is a perennial target for negative observation, particularly by those outside the US, is that of plaintiffs' lawyer being paid contingent fees, and accused of abusively parleying those into millions of dollars in payments, even when the commensurate amount of legal work has not been done, or when such sums are gained in a judgement based not on a legal principle or a favourable set of facts, but instead seen by the critics as only pandering to the emotions of a sympathetic civil court jury.

One defence of this aspect of the American legal system is that the plaintiff's lawyer had to put at risk a considerable sum of money, both in the form of time and in direct cash expenditures for costly experts and trial exhibits, and the other large sums required to successfully bring a case forward to trial. Thus, the lawyer for the plaintiff had a tangible stake in the outcome and would be thus driven to vigorously pursue the case for the client but also be bound to the economics of a particular case and want to resolve cases when costs did not justify the claim. This sort of 'joint venture' approach to litigation is said to allow to be brought to the courts cases of Plaintiffs who are of modest financial means, for whom the costs of US litigation would otherwise act as a unassailable fiscal barrier to meaningful access to the legal remedy that might be due to them.

Champerty Direct investment by an outside third party in the funding of the prosecution of a court case was long time forbidden under common law, and in fact has its own special name – 'champerty' - the illegal funding of maintaining a law suit with agreement to split the proceeds of a favourable monetary judgment.

Champerty should be distinguished from the legitimate at common law practice of the purchase and assignment of legal claims by third parties, who pay the claimant a sum for their entire claim, and have it assigned to them. This is common in various jurisdictions, and in seen in maritime claims with frequency, with at least one company specializing in buying up and then prosecuting marine cargo cases and unpaid debts by ship owners, then seizing vessels to secure such claims.

But in recent years, the law of champerty has been narrowly defined by the courts in the US, to a point to where it is almost out of existence – it now only seemingly applies to a case which is maintained for the sole purpose of generating law fees only, not a settlement or judgment based on the claim itself, or only to personal injury cases. And many states in the USA never adopted the law against champerty at all, including California, Texas, and New Jersey, or if have abolished the law if it was on their books – as in Florida and Massachusetts.

Litigation finance: a growing industry Now, the investment by third parties in litigation cases can be accurately termed as a growing industry. Starting with a few banks and loan companies, the business of 'litigation finance', as the participants call it, it has now dominated by international corporations specialising in this finance. Some of these firms, such as Juridica and Burford, are publicly traded entities, while others are privately held, such as BlackRobe Capital Partners and Parabellum Capital. Not all of these companies are located or affiliated with the US – there is Bentham IMF Ltd., a large commercial litigation funding company in Australia.

All of them have made significant inroads in US legal proceedings, funding cases both large and small, and making a difference in outcomes. Such companies contend that their infusion of capital into litigation can enable a cash-strapped, deserving plaintiff their day in court with the best case being presented, resulting in more likely a favourable, 'just' verdict for the plaintiff (and, of course, a return on investment to the litigation financier). But there are some reported negative outcomes. In the 20 February 2014 edition of the Wall Street Journal, an article described how in 2007 an outside investor called Altitude Capital Partners invested in a patent infringement claim case, which went to trial, and ultimately a settlement of USD 25 million was paid. But after paying off the lawyers and the investors at Altitude Capital, the plaintiff reportedly ended up with less than USD 800,000 as a net recovery.

Not only are litigation finance companies placing their cash to support initial litigation and trials, but have diversified into the funding of complex appeals of cases. And now a further diversification is taking place, namely these companies are seeking to assist defendants in lawsuits in the commercial field, providing financing of company litigation expenses, like any other type of commercial loan or line of credit.

Is third party finance good for civil case litigation? But is the concept of 'litigation finance' good for civil case litigation at all? Or does it still contain the flaws of 'champerty', seen in centuries past as anathema to a healthy and fair legal system?

Finally, has this concept effected litigation involving the shipping or offshore energy industries?

As for the first two questions, those are rightfully couched in terms of debate and subjective commentary. On the one hand, in theory no party should be denied the opportunity to properly present their legitimate legal grievance to a court simply because they lack the funds to do so, and litigation finance companies maintain that they are simply addressing that potential 'imbalance in the scales of justice'. They point out that the Plaintiff is in full control of the fate of the litigation, and that the Plaintiff's legal counsel must ethically pursue their client's interests and not those of the third party litigation financier.

On paper, the litigation investor is a purely passive party, simply there to infuse funds into the case, in return for a healthy return on that investment in case of success. To such an investor, the legal case is simply a 'commodity', like buying futures in ores or grains, and the risk of failure is factored into the rate of return expected, making for a hyper-rational decision model, not imbued with the emotional component that is felt by the Plaintiff and sometimes Plaintiff's counsel.

On the other hand, it can be argued that the presence of a sophisticated investor company, pouring in large sums of money towards the prosecution of a legal claim, with a view to recovery of that money and much more gain from interest on the loan and/or a piece of the judgment, will artificially alter the plaintiff's, as well as the defendant's, relative stance to each other and, more importantly, inject an untoward element of financial greed foreign to the case itself, distorting the decisions of counsel and the Plaintiff.

Likely the area of most potential for untoward influence by the litigation financier are those cases of middling prospects, where a Defendant is willing to pay a modest sum in settlement, the result of which would only produce a miserly rate of return on the amount of funds supplied to the Plaintiff by the outside investor. In such cases, the outside investor might attempt to sway Plaintiff and his legal counsel to strive for a higher result, even if that could backfire and end up squelching settlement discussions with the Defendant who might have assumed a more 'hardened' posture if what is viewed as by it as a reasonable offer was rebuffed by Plaintiff.

As to the third question, this is easier to answer.

The "Deepwater Horizon" experience In the huge amount of claims and ongoing litigation stemming from the fire/explosion/pollution from the 2010 'Deepwater Horizon' incident, there were dozens of litigation finance companies that came on the scene, funding thousands of the claims made in the aftermath of the accident. And their activity reportedly had a significant impact on the claims handling of that matter.

One particular example was reported in Bloomberg Business Week in December 2013. The LawFinance Group, a 20 year old litigation funding company, announced the availability of a

USD 50 million 'funding facility' for Deepwater Horizon claimants and their law firms. During the Thanksgiving holiday week in November 2013, normally a period of curtailed business and legal activities, LawFinance's CEO Alan Zimmerman announced a brisk USD 9 million of financing in the Deepwater Horizon case that week alone. "There's so much demand in the Gulf region, I think we'll be going back and raising more money—probably up to USD 100 million," Zimmerman added.

With funds at that level being injected into the case, no wonder that thereafter the level of interim legal fights and appeals would appear to have escalated, and defendant BP seeking relief from the US District Court in New Orleans to temporarily suspend settlement payments of certain commercial business loss claims until the Court can take a closer look at how these are being handled.

LawFunding takes a contrary view of the situation, seeing it as a positive development. "While we cannot stop BP from running full-page ads disparaging the legal profession, our capital will go a long way to level the playing field," Zimmerman stated. "Lawyers should also view delays as an opportunity to reach more claimants."

Final remarks Whether one views litigation financing as the bane of the US justice system or a boon to cash-poor plaintiffs who are simply seeking appropriate legal redress, one thing is certain – it is here to stay, and it is a growing industry, and is simply another factor that must be reckoned with when one is involved in litigation in the US.

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