Litigation Finance and Theories of Private Law

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As the global economy has expanded and grown more complex, so too has it created a proliferation of law and litigation. Expanded opportunities to litigate have, in turn, given rise to demand for greater judicial efficiency and improved affordability. The emergence of third party litigation finance during the last two decades has been one of the private sector’s more controversial responses to the demand for affordable justice. While litigation funding is typically associated with common law jurisdictions exhibiting higher levels of entrepreneurial lawyering, it is by no means a purely common law phenomenon. Litigation funding is also offered in Austria, Germany and the Netherlands. In addition, third party financing is well established in international arbitration.

The embrace and significance of litigation funding vary considerably between regions within jurisdictions. In a number of US state jurisdictions, although attorney contingency fees are permitted, ancient common law doctrines of champerty and maintenance intended to limit abusive litigation still act as significant constraints upon litigation funding. In other jurisdictions, prohibitions against contingency fees and claim assignment designed to inhibit speculation in litigation constrain access to justice.

With a primary focus upon common law jurisdictions, this paper examines the pathways toward mainstream acceptance of third party litigation funding. It posits that the diverse responses in modern common law systems to litigation funding are rooted in a tension that has persisted since the days of Blackstone. That tension is between (i) the idea of the common law as a form of private economic ordering and (ii) the common law as an expression of specific liberal political and social values. This tension can be seen clearly in the diverging views of Bentham, who embraced litigation funding as a perfection of the market logic of the common law, and Blackstone, who opposed it on the grounds that it perverted a major purpose of law, which was to reduce conflict among (propertied) men.

Our contention is that both conceptions of law have adapted themselves to modern changes in society and both support what might be called an “agency-centered” view of the common law, where litigation, viewed either as an expression of individual economic interest or as the pursuit of corrective justice by individuals, leads to structures that tend to empower individual control of private law claims. We contrast the agency-centered view against its modern alternative, the “policy-centered” approach to private law, which views private law as an adjunct of the state, and private litigants as instruments of political choices made by the state.

The authors will argue that demand for litigation funding is correlated with advanced economic development and a pluralistic approach to private law that accepts the agency and policy centered approaches as each partially valid. By contrast litigation funding is less likely to gain a foothold in jurisdictions with comparatively unsophisticated investment cultures, and where litigation is seen as a rival, rather than a complement, to centralized forms of regulation and injury compensation.