# Third-Party Financing of Litigation: Good or Bad?

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Anthony Sebok & W. Bradley Wendel, Duty in the Litigation Investment Agreement: The Choice Between Tort and Contract Norms When the Deal Breaks Down, 66 **Vand. L. Rev.** 1831 (2013).

*Duty in the Litigation Investment Agreement: The Choice Between Tort and Contract Norms When the Deal Breaks Down*, by Anthony Sebok and W. Bradley Wendel, addresses a topic of growing importance: third-party funding of litigation. In a third-party funding contract, a firm finances a lawsuit, and receives in return some portion of the judgment. Several finance firms have appeared recently, with Juridica and Burford perhaps the best known, that specialize in investing in large-claim lawsuits.

Third-party litigation funding is also known as champerty, and has been prohibited for a long time under the common law. The common law prohibition has been relaxed in recent years in some states, making the legal status of third-party funding agreements unclear as a general matter. The litigation investment firms have a large stake in the law changing in their favor, or at least remaining unclear.

The ancient prohibition on champerty seems to have been based on a desire to minimize external influence on judges. In the late Middle Ages, a wealthy landowner who funded a legal claim might pressure the judge to decide the dispute in a way that favored his investment. Although judges are not afraid of wealthy landowners today, the champerty prohibition emerged in a time when judges were not infrequently threatened and bullied by the wealthy and powerful.

There are several desirable and undesirable consequences that might result from expanded third-party funding of litigation today. Sebok and Wendel examine some of the risks facing the contracting parties and look at ways in which the law can minimize them. They conclude that the risks should largely be left to the parties to manage in their contracts.

In general, the types of claims that can be financed are, to borrow language from Robert Cooter, "matured" and "unmatured." A legal claim is matured if the victim has already suffered (or is suffering) the injury and can sue for damages or an injunction based on what has happened to him. A legal claim is unmatured if the victim has suffered no harm at all; the claim is simply the right to sue for some wrong that may occur in the future.

Sebok and Wendel discuss matured claims, as do most of the most analyses of third-party funding. This is entirely reasonable because these are the only types of claim that are currently the subject of third-party financing.

The question that follows from their paper is whether their conclusions might also be applicable to markets in unmatured claims, should they ever arise. In comparison to matured claims, the risks associated with unmatured claims are a bit more difficult for the parties to manage. The informational asymmetry problems are an order of magnitude greater for unmatured claims. Markets in unmatured claims are not observed for the most part, but there are examples of such transfers. Patent trolls, for example, essentially purchase unmatured infringement legal claims.

Since many controversial legal relationships are designed primarily to solve the litigation funding problem – from class actions to patent trolls – the proper legal framework for third-party litigation funding is a topic with implications for several areas of the law. Sebok and Wendel are to be congratulated for calling attention to the topic.

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