David's Goliath: Financing your Day in Court

Zeyad Aboudheir, B.A. (Economics), JD Candidate '23

Consider: You have **a strong legal claim**, but a **weak financial position.**

- **Problem**: **You are a "person of modest means**" who enters a contract with a large pharmaceutical corporation. **You then suffer a breach of contract** in the amount of $10 million, and the only way to recover your loss is to sue. **If you sue**, "[i]t is common ground that **the action is complex** and will involve extensive documentary production [and] [t]he trial will take approximately three weeks if the matter is not settled."[1]
- **What do you do?** Should you drop the claim, or perhaps settle at a great discount and refocus your attention and capital on your recovering business?
- Perhaps there is **another way**: You might not be familiar, but someone out there has built a successful business by understanding the merits of legal claims and, thereby, their value as financial assets. And if the fit is right**, a litigation financer could fund your claim by paying your legal costs and maintaining your suit**. The financier offers value by loaning you money to hire the most effective lawyers for your dispute. Importantly, their **loan is always non-recourse**; meaning if you lose in court, you do not have to repay the litigation financier for their loan. **Championing your legal claim is all done in exchange for a fair, reasonable cut of the winnings**.[2]

Thesis: **Litigation financing** is beneficial & laws should accommodate it.

- Litigation financing **promotes access to justice** and **rule of law**.

How can we **accommodate litigation financing**? Ask me about:

- A general legislative provision that mandates litigation financing, proper, as **non-recourse**.
- Amending most **secured transactions law** to provide for **first priority** to litigation financierS and **reduce the cost to litigants** of obtaining funding.
- **Same treatment** of litigation **financing for contract** claims and commercial **tort** claims with respect to financier's ability to collateralize the claim itself.
- Promotion of a **general awareness** to bolster beneficial the *pre-* and *post-claim effects* of litigation financing.

The l**aw** and h**istory** of litigation financing.

The legal doctrines of **maintenance** and **champerty** historically made funding litigation illegal, But the **SCC later endorsed litigation financing**.

Maintenance is where a party without an interest in a legal claim assists a party in bringing that claim. **Champerty** is a kind of maintenance where the maintainer shares in the proceeds of the legal action.[3]

The doctrines of champerty and maintenance **aimed to protect the administration of justice from abuse by a** prototypically powerful, **post-feudal figure** who "could constitute himself the champion of all who would accept his championship, maintain their causes."

Said figures would be increasingly **willing to take** on **litigation to increase their own estates creating a serious threat to the uniform enforcement of law** and becoming unduly influential in the course of the same.[4]

Maintenance and champerty became **antiquated doctrines**.

In *9354-9186 Québec Inc. v Callidus Capital Corp*, 2020 SCC 10, the S**upreme Court of Canada approved a litigation funding agreement** in the **interest of**, among other things, access **to justice**.

Litigation financing is was also approved to **finance class actions or** claims **where** the **claimant** is **significantly less powerful than the defendant**.[5]

The **ideal funder**, their **criterion** and what does **recovery look like**?

The **ideal litigation financier** provides a comparative advantage by specializing in **legal and financial knowledge** with adequate capital to fund claims and a demonstrated history in identifying meritorious legal claims

Under most agreements (which are non-recourse), the funder recovers if and only if the funded party is victorious, and **funders will only fund cases that they believe are meritorious**.

The value of a legal claim, as an asset, depends on whether the claimant can convert the claim into a final *and* enforceable money judgment as against a solvent defendant

What if "Goliath" simply doesn't comply with a final judgement? Omni Bridgeway and Burford Capital, industry leaders, have been **successful in enforcing as against *sovereign* nations** that refuse to honour international arbitral awards

General **awareness** of litigation financing will **strengthen rule of law**.

Important **positive *pre-claim* effects** arise as between two contracting parties **due to the simple fact** that parties are **aware of litigation financing** and may use it.[6]

Contractual reaches that rely on "David's" lack of funds to litigate won't work, because a counterparty to a breach who enjoys litigation financing will have the resources from the financier to pursue a legal claim for breach of contract

Parties with less economic bargaining power to be **more willing to contract** knowing that they can enforce their contractual rights.

With more enforceability, a counterparty likely becomes more interchangeable because the premium of reliance on trust is diminished. **Past relationships may not fetter who parties feel they are able to contract with** when considering their lack of ability to sue and enforce against more powerful or unknown entities.

Notes and Sources

[1] *Schenk v Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215 at para 5.

[2] See especially Christopher P. Bogart, "The Case for Litigation Financing" (2016) 42:3 Litigation 46 at 46 (commenting on the lack of awareness of American lawyers in respect of litigation financing and overview of the litigation financing process).

[3] See *Buday v Locator of Missing Heirs Inc.* (1993), 108 DLR (4th) 424 at para 18, 16 OR (3d) 257 (CA). See also *An Act Respecting Champerty*, RSO 1897 c 327 ("Champertors be they that move ... suits ... for to have part of the land in variance, or in part of the gains" s 1). See John Baker, *The Oxford History of English Law*, vol 4 (Oxford: Oxford University Press, 2003) at 69.

[4] Bishop Stubbs, *Constitutional History of England* (Oxford: Clarendon Press, 1880) vol 3 at 573. See e.g. EH Bodkin, *The Law of Maintenance and Champerty and the Lawful Financing of Actions by Solicitors, Legal Aid and Trade Protection Societies, and Others* (London: Sevens and Sons, 1953) at 1 (parties facing opposing maintainers' counterparties were routinely powerless in the face of intimidation, bribery and perjury); Bishop Stubbs, *Constitutional History of England* (Oxford: Clarendon Press, 1880) vol 3 at 69, 352 (maintainers grew powerful enough to extend improper influence to sheriffs, jurors and judges); AI Taft, *Apologye of Syr Thomas More* (Oxford: Oxford University Press, 1930) ("I never saw the day yet but that I durst as well trust the truth of one judge as of two juries" at 150).

[5]. See e.g. Smith v Sino-Forest Corp, 2012 ONSC 2937 at paras 9, 14-15 (Court approving LFA featuring similar terms to those found in LFA approved in *Dugal v Manulife Financial Corp*., 2011 ONSC 1785); Bayens v Kinross Gold Corporation, 2013 ONSC 4974 at paras 37-39 (cautiously approving an LFA while realizing that "courts have been left to develop the approval criteria for third party funding largely on their own initiative, relying on common sense, knowledge of the problems of access to justice and of the administration of justice, and academic commentary" at para 37) [Kinross]; Hoy v Expedia Group, 2021 ONSC 2840 at para 22 [Hoy]; Stanway v Wyeth Canada Inc., 2013 BCSC 1585 at paras 44-46 (approval of LFAs in British Columbia under broad power of Class Proceedings Act, RSBC 1996, c 50, s 12 [CPA BC], despite no specific provisions in CPA BC, at the time, pertaining to litigation funding); Schneider v Royal Crown Gold Reserve Inc., 2016 SKQB 278 at para 13 (approval of LFA in Saskatchewan with associated confidentiality order on contents of LFA); *David v Loblaw*, 2016 ONSC 4466, aff'd 2018 ONSC 6469 at para 24;]; *JB & M Walker Ltd./1523428 Ontario Inc. v TDL Group*, 2019 ONSC 999 at para 28; ; *Drynan v Bausch Health Companies Inc.*, 2020 ONSC 4379 at para 123; *Tidd v New Brunswick*, 2020 NBQB 140 at para 14; Heller v Uber Technologies Inc., 2021 ONSC 5434 at para 30; Lilleyman v Bumble Bee Foods LLC, 2021 ONSC 4968 at para 25; Flying E Ranche Ltd v Canada (Attorney General), 2020 ONSC 8076 at para 39; Kan v Kew Media Group Inc., 2020 ONSC 5591 at para 12; Hayes v Saint John (City), 2016 NBQB 125 at para 5.

[6] See especially Sundeal Bedi & William C Marram "The Shadows of Litigation Finance" (2021) 74:3 Vand L Rev 563.

Contact and Acknowledgement

www.linkedin.com/in/zeyad-aboudheir
e: zeyad.aboudheir@usask.ca
c: 1-306-502-0812

Please don't hesitate to reach out with any questions or comments. Thank you for reading and listening!

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