

## With America's poor record on civil justice, shouldn't we encourage litigation finance?

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BY RALPH SUTTON

The World Justice Project (WJP) recently released its annual assessment of the "rule of law" as practiced by 102 countries across the globe. To put it mildly, the report contains disturbing findings on the state of civil justice in America. This independent analysis placed the US in 65th place on the affordability and accessibility of our legal system, tied with those stalwarts of civil justice Botswana and Pakistan.

Stunning, you say? Juan Carlos Botero, executive director of the WJP, a group led by a stellar board chosen from the highest ranks of the American legal profession, doesn't think so. "We have done this study year after year," says Botero, "and have always found the same thing... (civil justice) is significantly more accessible and affordable in Western European countries than it is in the United States."

Botero is being kind. According to the WJP's report, not only do most advanced nations like Britain, Norway, Sweden and Germany outrank the US; so, too, do Third World countries like Moldova, Sri

Lanka, Honduras, Colombia, Venezuela, and even Iran, Bulgaria and Russia.

Why, in the United States, where we value equality and fairness, do we fail so miserably at providing access to justice for those who feel that they have been wronged?

One plausible explanation is the extreme economic imbalance that exists in America's judicial system, favoring parties with the deepest pockets. This is truer than ever in the civil context, where litigation has become an enormously expensive proposition for businesses and individuals without substantial financial resources. In addition to the cost of obtaining quality counsel there is the ever-expanding price tag associated with trial discovery, compounded by funds needed for a whole battery of trial necessities – from witness preparation to jury research, plus the small fortune needed in reserve in the likely event of an appeal.

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However, in the last several years, a new type of funding model has emerged in the US to help claimants in civil suits persevere in their cases. Litigation finance, as practiced by our firm and others, provides up-front capital to individuals, companies, institutions and law firms to help cover the substantial costs of disputes in exchange for a percentage of any financial recovery down the road – from a jury verdict, a settlement or a court order or judgment. Funders take considerable risk in that they receive nothing if the cases they back fail. However, that has created considerable discipline and focus among companies that practice lit finance, helping them choose the most meritorious matters and the most worthy venues for adjudication. And in fact, many of the cases funded by third-party investors are brought by entrepreneurs, small businesses, homeowners and private citizens whom the World Justice Project is thinking of when it ranks the US so low in its survey.

The promise of Legal Aid is almost non-existent for civil cases. And yet litigation finance con-

tinues to be frowned upon as a “gimmick” that encourages “frivolous” suits and “degrades” the legal profession. Those criticisms come from Robert Weber, general counsel for IBM. But Weber is hardly alone. The US Chamber of Commerce has declared litigation finance “a threat to the integrity of the US judicial system.”

The deep enmity that large corporations have towards litigation finance stems from the historical prohibition of “champerty” and “maintenance” -- legal terms used to describe the participation of a disinterested party in a lawsuit. Statutory prohibitions on maintenance date to 13th century England, when feudal lords turned to the courts to fight against each other.

Thankfully, third party funding is no longer illegal – prohibitions on champerty and maintenance have fallen away in most US states. As funding emerges as a reasonable alternative for under-capitalized litigants, the results can be striking.

Consider the case of a roofing contractor in Indiana whose reputation was destroyed by State Farm over false claims of insurance fraud. Using funding from our firm, he went on to win

a \$17 million judgment against the insurance giant in 2013. Likewise, investors put up the necessary money to challenge Iran for its role in the 1983 bombing of the Marine barracks in Beirut, resulting in a 2014 judgment for \$1.8 billion. More recently, when a trove of valuable art stolen by the Nazis was recently discovered in an apartment in Munich, third-party funding helped the heir of one murdered Holocaust victim recover a painting that rightfully belonged to his family.

Other countries established under English common law have begun to promote litigation finance, including Australia, Canada, New Zealand, South Africa and even the United Kingdom. In the UK, the high cost associated with civil litigation prompted the Ministry of Justice to initiate a 2009 study that endorsed third party funding. In many cases, the report found, it is “the only means of funding litigation.” Far from encouraging nuisance suits, litigation finance was hailed as a means to actually “filter out unmeritorious cases, because funders will not take on the risk” if they do not believe there will be a reward.

The president of the Supreme Court of the United Kingdom – the counterpart to our Chief Justice – went even further. In a 2013 speech, Lord Justice Neuberger recounted the history of maintenance and champerty before concluding that litigation funding needed to be actively encouraged, for “if all members of society cannot gain genuine access to the courts then the possibility exists for society to become exploitative, as some elements take advantage of the fact that they can ignore the law with relative impunity.” Closer to home, NY State Supreme Court Justice Eileen Bransten noted in a recent judicial opinion that litigation funding “allows lawsuits to be decided on their merits, and not based on which party has deeper pockets.” A very American idea.

The latest World Justice Project “rule of law” study reminds us just how far America lags behind the rest of the globe when it comes to ensuring civil justice. We would benefit from encouraging a practice that helps even the playing field for millions of hard working people.

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Before entering the field of litigation funding, Ralph was a trial attorney and partner in entertainment law firms for over 15 years. Ralph graduated from Columbia College with honors in English, and received his J.D. from the New York University School of Law. After graduating from NYU, Ralph served as a law clerk to U.S. District Court Judge G. Thomas Elsele for two years.

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