

LITIGATION FINANCE THE FACTS - NOT THE FICTION

The US Chamber of Commerce's Institute for Legal Reform has mounted a high-pitched attack on third party litigation funding. Its latest proposal is for heavy federal regulation, which would severely inhibit development of the industry. However the ILF's antagonistic approach to litigation funding is based on little or no worthy evidence. ILF's arguments about the merits of third party litigation funding have been sterile, focusing on hypothetical (and perhaps hysterical) problems rather than empirical evidence. These arguments result in extreme views and sweeping, unverified statements.

Over a Decade of Litigation Funding Experience in Australia

Unlike the ILF, Bentham Capital and its parent, IMF (Australia) Ltd, can point to over a decade of empirical evidence that undermines ILF's arguments. IMF is a public company that has been listed on the Australian Stock Exchange for 11 years, and is remarkably transparent in its funding activities. IMF publishes substantial information about each of its case investments, and provides Ernst & Young audited financials at least every six months, rich in financial detail. With 142 completed cases (more than any other commercial funder has even begun), the evidence points to one clear conclusion: there have been none of the problems the ILF claims are a "clear and present danger" to the American legal system.

Here is some of the proof: IMF has recovered over \$1.24B, of which more than \$800M has been returned to its many thousands of clients, small and medium businesses, charities and municipalities. There has been no funding of meritless litigation, no explosion in the volume of litigation in Australia, no cases of excessive and unwanted funder control, no problems with conflicts of interest and no compromising of the attorney client relationship. IMF has never been sued by a client, and no serious complaint has ever been lodged against it since inception.

The Australian Government Speaks

In fact, IMF and litigation funding has been praised by major Australian government regulators for helping those who have been wronged, often by the mega-corporations who finance the US Chamber, a registered lobbying organization. After years of intense academic and regulatory study, the current view of the Australian government is that there is absolutely no need to excessively regulate the litigation funding industry. It plays an important role in the justice system. Moreover, the industry's development may be inhibited if excessive regulation is imposed.

As the government announced just last year:

“The Government supports class actions and litigation funders as they can provide access to justice for a large number of consumers who may otherwise have difficulties in resolving disputes. The Government’s main objective is therefore to ensure that consumers do not lose this important means of obtaining access to the justice system.”

Years of experience, and scores of cases – not idle, even hysterical calls for regulation, are the necessary corrective to ILF’s bombast.

The Need for Funding in the US

There is no reason to consider that the US experience will be any different from that of Australia’s over the last 11 years. Despite some differences in our legal systems, the fundamentals remain the same. First, small and medium businesses and individuals cannot afford to vindicate their own rights. Second, there are very few law firms in the US that will even consider commercial disputes on a contingency fee basis. And many that will do so still require clients to pay millions for expert witnesses and e-discovery.

The playing field in commercial disputes needs leveling. Many enormous defendants won’t like that. But the system has benefited them for decades, so adding litigation funding to the legal system is hardly unfair. Any increase in litigation, unproven in Australia, is simply a function of increased access to justice.

As the Australian experience proves, litigation funding poses no more risk to the integrity of the judicial system. More importantly, it provides significant benefits for small and medium business plaintiffs.

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