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## Litigation Investors Gain Ground in U.S.

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Investors who back high-stakes lawsuits haven't always found the warmest reception in the U.S., where historic bans on such arrangements have at times proved harder to dislodge than in the U.K. or Australia.

But the lure of big-time payoffs in the world's largest litigation market continues to draw so-called litigation funders, who invest in business disputes in exchange for a cut of the proceeds if their side prevails.

In places like Texas, South Carolina, Massachusetts and Florida, restrictions on third-party financing of litigation have either been relaxed or abolished.

The climate also looks friendlier in Illinois. Last week, in a ruling on a dispute over pretrial discovery, a federal magistrate judge in Chicago held that a British company, Miller U.K. Ltd., didn't violate state law when it turned to third-party funders for money to pursue an existing lawsuit against heavy-equipment maker [Caterpillar](#) Inc. over alleged theft of trade secrets. The judge rejected Caterpillar's attempt to obtain documents containing details of Miller's litigation-finance arrangements in the lawsuit, which is continuing.

Caterpillar had argued that third-party funding documents weren't protected by attorney-client privilege, and that Miller's financing deal was illegal under an Illinois statute that criminalizes so-called "officious intermeddling" in lawsuits by outside parties. The judge disagreed with the latter claim, and said most of the information that Miller had refused to turn over wasn't relevant to the case.

"Caterpillar tried to use the fact that there was litigation investment as an attack on the party suing them for trade secrets. That failed," said Anthony Sebok, a professor at the Benjamin N. Cardozo School of Law at Yeshiva University in New York.

A Caterpillar spokeswoman declined to comment.

"The courts are acknowledging that it's a legitimate method of financing," said Reed Oslan, a partner with Kirkland & Ellis LLP who represents Miller in the suit and has worked with a number of litigation funders in other cases.

"I think the trend is moving toward a more universally liberal standard across the country," Mr. Sebok said, "but we are not there yet."

Critics of so-called litigation finance worry the practice could spur frivolous litigation or give outside funders undue influence over legal decisions.

Hoping to further ease the industry's way, Betham IMF, the U.S. arm of a big Australian litigation-funding firm, is adopting a code of best practices, aiming to allay concerns that such arrangements lack transparency and might lead to conflicts of interest.

Among the code's provisions: The funder shouldn't provide legal advice to clients or pay referral fees to lawyers to send potential clients their way. Financing arrangements should clearly state whether, and under what circumstances, the third-party funder can participate in settlement decisions, and the funder should "maintain sufficient financial resources to meet its obligations to fund all disputes that they have agreed to fund."

Ralph Sutton, chief investment officer at Bentham IMF, said the firm wants to engage other litigation funders operating in the U.S. in a broader discussion about the best way to self-regulate. In the U.K., a litigation-finance trade group has adopted a similar code of conduct for its members.

The industry's opponents say such measures don't go far enough. "There is no oversight, no regulation, nothing dealing with conflicts of interest or disclosure [of funding agreements], either

to the defendants or to the judge," said Lisa Rickard, president of the U.S. Chamber Institute for Legal Reform, an affiliate of the U.S. Chamber of Commerce that has lobbied for federal oversight of third-party litigation finance.

While plaintiffs' law firms have long taken cases on a contingency basis, third-party financing allows litigants to hire lawyers from big law firms that typically eschew such risks.

Litigation funders say they help level the playing field for cash-strapped litigants involved in commercial disputes with wealthier opponents. Their services don't stir up frivolous lawsuits, they argue, because investors are unlikely to profit from claims that have little or no legal merit.

Some funders also enter into deals with big companies that keep litigation costs off the corporate balance sheet, or provide financing to law firms at a time when many big clients are asking them to share more risk in cases, instead of simply billing by the hour.

"Amid a very challenging revenue environment for the legal industry, we are finding increasing demand for our capital to fund alternative fee arrangements," said Aaron Katz, managing principal of Parabellum Capital LLC, which has raised more than \$200 million in capital for such investments.

On Monday one of the newer third-party litigation funders, Gerchen Keller Capital LLC, plans to announce that it has raised another \$250 million in capital for litigation investments. The firm, launched last year, now has more than \$300 million in assets under management, said managing director Travis D. Lenkner.

The demand "has far exceeded our expectations," Mr. Lenkner said in an interview. "Even very large household brand-name companies that have cash positions that run into the billions—they may very well have that cash on hand, but they don't want to spend it on legal fees."