

Don't fear foreign investment in lawsuits

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Remember the hysteria when Japanese investors bought Rockefeller Center and threatened the American car industry with obliteration? Recent commentary served as the latest example in a long line of xenophobic scare tactics by claiming that “foreign adversaries” are funding “frivolous litigation” to “weaken critical industries” or to obtain trade secrets or intellectual property.

Then, as now, the fearmongering should be seen for what it is.

Foreign money is an essential ingredient to American prosperity, as are the financial tools of risk sharing that are now in the mainstream of America’s justice system.

Historically, lawsuits were funded (on both sides) by litigants themselves or, in the case of certain claimants, by lawyers working on contingencies. The pay-as-you-go model is biased in favor of the corporate or the wealthy. The contingency fee model takes the sting out a bit, but at a steep price — lawyers, not victims, choose whether to bring cases, and they charge enormous fees to do so. The cartel of lawyers enforces price-fixing around 33 percent — even when the risk is low and not much law work is done.

Justice is expensive, and economic barriers can enable all kinds of anti-social conduct to flourish. And our contingency system incentivizes lawyers to bring the wrong kind of cases, focusing on quick wins against deep pockets.

Wealth shouldn't determine whether justice is available; it should be the merits of one's case that matters, not the size of one's wallet.

The rise of litigation finance has helped level the playing field, as well as reduced risks for all litigants. Financial tools for spreading risk are now being used in law. A litigation finance company can invest across a portfolio of dozens or hundreds of matters, just like a venture capitalist, thereby reducing risk and therefore costs.

If we allow investors to provide funding to support lawsuits, as is common practice in the U.S., it is irrelevant where the investment is coming from — whether from a local bank, a hedge fund, a wealthy individual, or even a family member. It is equally irrelevant if the money is foreign or domestic. Money is money.

Foreign money makes Americans better off generally. In 2021, the U.S. was the top global destination for inward foreign direct investment according to the IMF, investing some \$5 trillion. This increases U.S. productivity and standards of living. Foreigners also help bankroll government spending, buying hundreds of billions in government debt each year. Foreign investors also invest heavily in U.S. stocks and bonds. The same xenophobic arguments made against foreign investment in litigation could be made here as well, but the benefits in these areas of foreign investment are well understood. Should we close our financial borders for fear of foreign investors in government or business?

To be sure, lowering the costs of lawsuits puts pressure on getting substantive law “right,” an undeniable positive good for society. If there are bad legal rules from a social standpoint, making those rules easier to enforce or to defend might be a bad thing. But this is not so much an argument against financing legal claims but against bad laws. If litigation finance makes it easier to enforce a bad law, the solution is to repeal or reform the bad law, not to arbitrarily restrict claimants generally and in all cases, good and bad.

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Some argue that foreign investment in litigation threatens trade secrets or classified information, raising concerns about governments using litigation funding as a Trojan horse. But litigation funders do not generally have access to this information, as they are passive investors, and those who invest in litigation financing companies are even further removed from the claims. Courts also have ample tools to protect that information, such as through protective orders and in camera reviews.

Embracing litigation financing, while using those existing tools to reduce risks, will help vindicate American values, whether funded by foreigners or not. An 'America first' strategy does not mean financial isolationism, which has never existed in our nation, and would make Americans far worse off. Let foreigners invest in all U.S. assets, whether they are expecting returns from our entrepreneurs or from our lawyers.

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