A Market for Justice: A First Empirical Look at Third Party Litigation Funding

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ABSTRACT

The alienability of legal claims holds the promise of increasing access to justice and fostering development of the law. While much theoretical work points to this possibility, no empirical work has investigated the claims, largely due to the rarity of trading in legal claims in modern systems of law. In this paper we take the first step toward empirically testing some of these theoretical claims using data from Australia. We find some evidence that third party funding corresponds to an increase in litigation and court caseloads. Cases with third party funders are more prominent than comparable ones without such an arrangement. While third party funding appears to have effects on both the cases funded and the courts in jurisdictions where it is most heavily used, the overall welfare effects are still ambiguous.

I. Introduction

The primary argument for markets is that they increase overall welfare by allocating goods and services where they are most valued. Market forces can provide a powerful disciplining effect. Yet we don't see markets everywhere, and this paper deals with one particular missing market: that for litigation.

Suppose we allow individuals the right to trade litigation claims,[2] in effect creating a market for justice. This could be a market-based solution to the undersupply of some types of litigation. Would such a market spur innovation, increase settlement rates, and avoid taint?

Selling litigation rights to parties with the resources to pursue the claims may address the problem of litigation undersupply due to credit constraints, risk aversion, collective action problems, or simply unawareness, even when a plaintiff or defendant has a positive expected payoff. A market for litigation rights should lead to more litigation initially and thus earlier clarification of disputes. This could have large positive externalities as future actors have greater certainty about the law and thus can make better informed decisions. While government subsidies in the form of legal aid partially address these issues,[3] a market for justice has the potential to have a much larger impact.

This paper makes the first attempt to empirically quantify the effects of a third party litigation funding system. Using data from the leading Australian litigation funding firm and Australian courts, we examine the impact of litigation funding on the courts and on cases that

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[2] We will use the terms "litigation trading", "a market for litigation", and "third party funding" interchangeably. By each of these terms, we mean the ability of individuals or firms with no direct interest in a particular claim to buy at least a fraction of that claim.

[3] For a discussion of the present state and historical developments of public funding of legal services in the United States, see Earl Johnson, Jr*., Justice for America's Poor in the Year 2020: Some Possibilities Based on Experiences Here and Abroad*, 58 DEPAUL L. REV. 393 (2009).

receive funding. The empirical strategy compares the evolution of outcomes in states where litigation-funding firms are active to the evolution in areas where they are not active.

Undersupply of litigation may result from several sources. Credit constrained individuals or firms may have positive expected value litigation claims, but be unable to pursue them due to lack of funds.[4] Allowing third party funders to buy a claim or a fraction thereof could allow a case to proceed where it would not have previously. The additional claims would tend to be more costly and be brought by less-wealthy individuals or firms.

Risk averse individuals or firms will also not pursue positive expected value claims, but not because they can not afford the fees. The uncertainty inherent in legal proceedings will reduce the value relative to a risk-neutral entity. Thus, the transfer of a claim from a risk-averse to a risk-neutral party should yield an increase in total claims pursued. The additional claims would be riskier and be brought by more risk-averse entities. Both credit constraints and risk aversion are associated with low levels of wealth.[5] Therefore, the ability to trade claims is likely to be particularly valuable to the litigants because of their high marginal utility of wealth.

There are other contexts in which third party funding or litigation trading could affect the claims pursued. For example, multiple parties that share a claim in complex cases may face a

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[4] *See generally* J. P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973) (developing a framework for "analyzing trading among individuals in the face of uncertainty"); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971) (describing the economic theory for pre-trial settlement agreements); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973) (explaining the procedural rules and practices that inform the legal-dispute resolution regime); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation,* 13 J. LEGAL STUD. 1 (1983) (developing a model of the litigation process that identifies the characteristics of suits that settle and suits that are litigated).

[5] Because lower income claim holder cannot afford to absorb the costs of an adverse ruling, they are often characterized as being risk adverse. *See* Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 85 (2010).

collective action problem: while individually the case is not worth pursuing, it would be worth

pursuing if all the benefits accrued to one party.[6] Allowing the trading of claims makes it

possible for this transfer of benefits to proceed.

One further group that could benefit from litigation trading consists of individuals and firms

unaware that they possess a legal claim. If information about the legal system is imperfect,[7]

there will be entities that fall into this category. The ability of third parties to benefit in some

way from the prospective resolution of claims creates an incentive to locate and provide

information to otherwise unaware claim holders. The introduction of third party funders provides

this incentive.

Litigation trading is not the only way to potentially address the failure of some positive

expected value claims to be pursued. In the United States and other countries, contingency fees

partially serve this purpose by lowering or eliminating costs for clients, and also dispersing some

of the risk of litigation.[8] There are some important differences between contingency fees and

litigation trading. The most prominent of such differences is the fact that the potential funder in

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[6] *See* Vicki Waye, *Markets for Legal Claims* (August 2006) (unpublished Ph.D. dissertation, University of Sydney) (citing Peter Charles Choharis, *A Comprehensive Market Strategy for Tort Reform* 12 YALE J. on REG. 435, 481(1995)). Similar results apply in class actions lawsuits. Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 534–48 (1991); John C. Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 887–88 (1987) (examining potentially detrimental effects of entrepreneurial litigation on those represented by class counsel); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 12–27 (1991) (proposing auction in which attorneys bid opportunity to represent class, thereby restoring equilibrium between client and attorney interests).
[7] Certainly the system of law schools, bar certification, and ongoing professional education requirements seem to indicate that knowledge of the law is a specialized skill.
[8] 23 RICHARD A. LORD, WILLISTON ON CONTRACTS § 62:4 (4th ed. 2010) (stating that one purpose of contingent fee contracts is to allow plaintiffs access to legal services). *See also* Molot, *supra* note 6, at 90.

the contingency fee system must be an attorney. This can lead to some less than desirable outcomes relative to litigation trading. These will be discussed further in Section VI.[XX]

At the introduction of a rule allowing litigation trading, one would expect an increase in initial legal claims from the above sources. It is unclear, however, whether this would translate into an increase in litigation in equilibrium. The introduction of a third party funder would serve to balance the distribution of bargaining power between risk-averse plaintiffs and risk-neutral defendants. This would result in increased settlements rates as defendants adapted to the involvement of third party funders.[9]

The overall welfare effects are also ambiguous. While benefits to several groups have been mentioned above, they are not comprehensive. For example, an additional benefit of litigation trading may be the earlier clarification of the law. With more resources being expended in pursuit of claims, ambiguous legal questions should arise and be resolved more quickly. This should lead to more efficient behaviors as parties make better-informed decisions.

There are also potential costs of allowing litigation trading. The common law principles of champerty and maintenance have long prohibited third party involvement in litigation.[10] One rationale is that allowing such involvement could pervert the pursuit of justice.[11] Another concern is that a rule change could lead to a vast increase in litigation with low social value,

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[9] Molot, *supra* note 6, at 85.

[10] Following Shukaitis we use the following definitions for maintenance and champerty: "Maintenance" exists when a person "without interest" in a suit assists a party in litigation. "Champerty" is maintenance plus an agreement to share in the proceeds of the suit. Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329, 330 (1987).

[11] *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 219 (2003) (quoting *Key v. Vattier*, 1823 WL 8 (Ohio Dec. 99, 1823) in characterizing champerty and maintenance as "an offense against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression").

which would in turn congest the courts and divert their resources from more socially valuable litigation.

In this paper, we aim to provide the first empirical evidence relevant to these considerations. Effects on aggregate welfare are always extremely difficult to measure convincingly, and we cannot do so directly here. This would require a great deal of detailed information on all manner of claims brought, most of which end in settlement.[12] Settlement data is notoriously difficult to collect, as its reporting is not required except in very limited circumstances.[13] However, by empirically examining the first major implementation of a third party funding system, we are able to shed some light on the central questions.

Specifically, we are able to collect data from Australian courts, administrative agencies, and the largest third party litigation funding firm.[14] Using this data we take two approaches to understanding the impact of third party funding on various outcomes. First, we use IMF's entry into an Australian state as a proxy for the relaxing of rules against third party funders. Using court data, we can examine the effects of the rule change on the processing and expense of litigation in the courts. We are able to control for overall time trends and state-specific differences by using criminal data (where the changes are not relevant) as a control. We find that third party funding does appear to be associated with increased expense to the courts, an increased backlog, and a slowing in average time to completion.

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[12] While settlement rates vary by location and nature of claim, settlement in civil trials have been estimated to be as high as ninety-five percent. *See, e.g*., Marc Galanter & Mia Cahill, "*Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339–40 (1994).
[13] Settlement is typically unreported.
[14] The firm's name is IMF (www.imf.co.au), not to be confused with the International Monetary Fund.

Second, we use a case study methodology to examine a handful of published cases considered by IMF, some of which were funded and some of which were not. By examining only cases considered by IMF, we attempt to eliminate some of the selection bias inherent in the process of choosing cases for funding.[15] Here, we find a difference in the impact of cases that were chosen to be funded from those that were not. The funded cases cite substantially more cases than unfunded ones, and are themselves cited over twice as frequently. This evidence supports the notion that third party funding can spur the development of law.

The past several years have seen a major downturn in the market for legal services.[16] New technologies are allowing the outsourcing of more legal matters, and firms are becoming increasingly global.[17] As such, many countries around the world are reconsidering restrictions on various legal practices including publicly traded firms, allowing non-attorney partners, and allowing for third party funding for litigation.[18] In this paper, we hope to add some empirical evidence to help inform this discussion.

The remainder of this paper is organized as follows. First, we discuss details of how litigation funding works in Australia. Second, we model the possible impact of litigation funding. Next, we present empirical specifications and data sources, followed by our main empirical results. This is followed by an exploration of the limitations of these findings, and then concluding remarks.

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[15] Of course, we can't eliminate the selection effect completely, because even within the group of considered cases, there may be some unobservable characteristics that affected the ones that were chosen to be funded. But using the considered cases as the universe should at least mitigate the effect.

[16] *See, e.g.*, Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051 (2010).

[17] *See* Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137, 2138 (2010),

[18] *See* Marco de Morpurgo. *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 Cardozo J. Int'l & Comp. L. (forthcoming 2011) (manuscript at 43–64, on file with authors).

II. Background

Prohibitions on third party involvement in litigation have a medieval origin.[19] During this time period in England, coercive litigation was frequently used by wealthy landowners as a means to obtain more land.[20] This often took the form of funding litigation by other parties with the express goal of acquiring more land at below-market prices.[21] This eventually led to a response by the legislature, which attempted to end this type of litigation through the passage of a number of statutes that included prohibitions on maintenance and champerty.[22]

These prohibitions remained in effect in almost all common law jurisdictions through the 20th century.[23] As legal systems have become more formalized and less prone to outside corruption, the rationale for these doctrines has waned. Many jurisdictions have abolished maintenance and champerty as torts and did so in 1967 with the Criminal Law Act.[24] In Australia a number of states have abolished these doctrines, including New South Wales, Australian Capital Territory, Victoria, and South Australia.[25] In the United States, although there

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[19] 3 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 19 (John Bowring ed., 1843); Max Radin, *Maintenance by Champtery*, 24 CAL. L. REV. 48, 57–62 (1935); Percy H. Winfield, *The History of Maintenance and Champerty*, 35 LAW Q. REV. 50 (1919).

[20] Vicki Waye, Markets for Legal Claims 22 (Aug. 11, 2006) (unpublished Ph.D. dissertation, University of Sydney) (on file with author).

[21] *Id.*

[22] *Id.* at 23.

[23] The United States still permits the theories of maintenance or champerty to be used to challenge the validity of contracts. *See* Jason Lyon, *Revolution on Progress; Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 584 (2010).

[24] *See, e.g.*, Criminal Law Act, 1967, c. 58, §13, 14 (Eng.).

[25] New South Wales did so in 1993 by the Maintenace, Champerty and Barratry Abolition Act. Maintenance, Champerty and Barratry Abolition Act, 1993 (NSW) Australia Capital Territory: Sec 68 of the Law reform (Miscellaneous Provisions) Act 1995 (ACT) and sec 221 of the Civil Law (Wrongs) Act 2002 (ACT); Victoria: Sec 322A of the Crimes Act 1958 (VIC) and sec 32 of the Wrongs Act 1958 (VIC); South Australia: Sub-ss 1(3) and 3(1) of Sch 11 Criminal Law Consolidation Act 1935.); s 32

have been few prosecutions in the last century[26] they are still widely considered to be valid.[27]

The country that has seen the greatest movement in recent years in the enforcement of these

doctrines is Australia, and it is no accident that it is the subject of this current research article.[28]

Third party litigation funding is the financial support for litigation by an entity that is not

a party to the litigation and with no direct interest in the outcome.[29] It is a direct violation of the

doctrine of maintenance. Historically, third party litigation funding has been tolerated in some

contexts, such as the disposition by liquidators[30] or trustees[31] in bankruptcy of an insolvent's

causes of action.[32] In Australia, the scope of litigation funding has recently expanded with the

emergence of funders who support general commercial litigation with no interest other than the

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Wrongs Act 1958 (Vic); s 229 *Civil Law (Wrongs) Act 2002* (ACT); Sch 11 *Criminal Law Consolidation Act 1935* (SA). Even though criminal sanctions were abolished for maintenance and champerty, the common law ability to reject such contracts for public policy reasons remains. Overall, however, and in all districts, such contracts are usually enforceable. 1 AUSTRALIA LAW DIGEST 36.01. Also, see Waye's thesis for an excellent account of the history and current status of litigation funding in Australia.

[26] Andrew Hananel & David Staubitz, *The Ethics of Law Loans in the Post-*Rancman *Era*, 17 GEO. J LEGAL ETHICS 795 (2004); Susan Lorde Martin, *Financing Litigation On-line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COM. L.J. 85 (2002); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004); George Steven Swan, *Economics and the Litigation Funding Industry: How Much Justice Can you Afford?*, 35 NEW ENG. L REV. 805 (2001); George Steven Swan, *The Economics of Usury and the Litigation Funding Industry:* Rancman v Interim Settlement Funding Corp, 28 OKLA. CITY U. L. REV. 753, 758–60 (2003).

[27] *See* Jason Lyon, *Revolution on Progress; Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 584 (2010); Paul Bond, Comment, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REC. 1297 (2002).

[28] England, like Australia, has also abolished maintenance and champerty as torts and offenses. Waye, *supra* note 21, at 26. Our attempts to obtain data in the UK have so far proven to be less successful.

[29] This is the authors' definition of third party litigation funding.

[30] Re Park Gate Wagon Works Co., (1881) 17 Ch D 234; Re Movitor Pty Ltd (1996) 64 FCR 380; UTSA Pty Ltd v. Ultra Tune Australia (1996) 14 ACLC 1262; Re Tosich Constr. Pty Ltd (1997) 73 FCR 220; Re William Felton & Co Pty Ltd (1998) 16 ACLC 1294. Note however that this statutory exception only applies to property of the company. Re Fresjac Pty Ltd (1995) 65 SASR 334.

[31] Seear v. Lawson (1880) 15 Ch D 729; Guy v. Churchill (1888) 40 Ch D 481; Re Nguyen; Ex parte Official Trustee in Bankruptcy (1992) 35 FCR 320; Re Cirillo; Ex parte Offficial Trustee in Bankruptcy (1996) 65 FCR 576.

[32] Interview with John Walker, Managing Director, IMF, (Australia) LTD (July 16, 2008). *See also*, HUGH MCLERNON, IN SUPPORT OF PROFESSIONAL LITIGATION FUNDING 33 (2005).

potential for a commercial return on investment.[33] Third parties usually agree to fund litigation in exchange for a fraction of any amount recovered in the litigation, plus any reimbursed costs ordered. Litigation funding is used in bankruptcy proceedings, breach of contract suits, and class action lawsuits.[34]

The change in Australia has been due partly to the gradual abolition of Maintenance and Champerty, which made it potentially legal for funders to begin operations. Third party funders in the 1980's and 1990's operated mostly in the area of bankruptcy, since this was historically an area in which the law was relatively clear about the legality of the practice.[35] Funders began operating to a limited extent in other areas in the late 1990's and 2000's, but did not expand rapidly because there was still substantial uncertainty about the legality. It was not until the landmark *Fostif* decision[36] in 2006 that the law regarding third party funding was truly clarified.

Fostif grew out of a previous decision (*Roxborough v. Rothmans of Pall Mall Ltd.)[37]* regarding payments due to tobacco retailers by tobacco wholesalers. The aspect of the case which eventually landed it in Australia's highest court is the fact that the proceedings were initiated, organized, and funded by an outside company, Firmstone Pty Ltd. Firmstone signed agreements with over 2,000 plaintiffs in connection with the damage recovery. The agreements included provisions that Firmstone would receive any litigation costs awarded to the plaintiffs

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[33] Waye, *supra* note 21, at 104, 110.
[34] *Id.* at 106, 108, 244.
[35] Interview with John Walker, *supra* note 33.
[36] Cambells Cash and Carry Pty Limited v. Fostif Pty Ltd (2006) 229 C.L.R. 386.
[37] (2001) 208 C.L.R. 516.

plus one-third of the payments recovered from the wholesalers. Firmstone would also pay all

litigation and other associated costs, and would arrange for counsel if litigation was necessary.[38]

The questions the high court addressed included whether the actions of Firmstone

constituted an abuse of process or whether allowing it was counter to public policy. The court

determined that the mere action of litigation funding by a third party was not an abuse of process.

They further ruled that in jurisdictions where maintenance and champerty were abolished third

party litigation could not be counter to public policy. The implication of the case was to

substantially solidify the footing of third party funding in Australia.[39]

The *Fostif* decision occurred in the backdrop of a growing demand for litigation funding.

In recent decades, the Australian population has increasingly looked to the legal system to

determine the social policy, as well as the rights and duties applicable to the individual.[40] In

correlation with the court's increased presence in daily interactions, there also arose a demand

for greater access to the judicial system. This general demand for access was met by allowing

third party funders to participate in more causes of action.

The transfer of claims is now permitted in situations in which the funder has a legitimate

interest in the result of the lawsuit. This legitimate interest requirement has been met in cases in

which the parties are related by blood and in employer-employee relationships.[41] Likewise,

associations established to protect the legal interests of its membership are also considered to

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[38] *See* Waye, *supra* note 21, at 131.
[39] Id. at 133–37.
[40] *Id*. at 104 (citing Sir Anthony Mason, *Law and Morality*, 4 GRIFFITH L. REV. 147, 148–51 (1995) (commenting that the decline of religion, the extended family unit, the disintegration of old social and economic conventions and standards, have accentuated the importance of law in society and generated the expectation that the law will provide a resolution to pressing political and social problems)).
[41] British Cash and Parcel Conveyors Ltd v Lamson Store Serv. Co Ltd [1908] 1 KB 1006.

have a legitimate interest.[42] The funder must also demonstrate that they neither plan to "on-sell" the claim, nor "wager" on the outcome of the litigation.[43]

Funders that demonstrate legitimate *commercial* interests in the outcome of a dispute also fall within the exceptions against the assignment of a bare cause of action. A legitimate commercial interest has been found to exist in cases in which the funder has been given charge over the other party's assets or property.[44] A legitimate commercial interest may also exist in situations in which the funder claims a right to commissions under a disputed contract. Courts have characterized some interests as mere "hopes," and declined to permit a funder's intervention in situations in which the funder's commercial interest is contingent upon a favorable outcome in the litigation.[45] A "hope" of a commercial interest does not amount to a recognizable commercial interest. It is important to note the contradiction with the prohibition against "on-selling" the claim: publicly traded litigation funding firms currently "on-sell" bundles of claims to shareholders.

In situations involving a bankrupt claim holder, the courts have permitted a broader definition of legitimate interest.[46] The insolvency exception to the prohibition against transfer of claims is justified for two reasons. First, liquidators, receivers, and trustees in bankruptcy are obligated by a duty to both the public welfare, and to the entity's creditors. They act as officers

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[42] Martell v. Consett Iron Co Ltd [1955] Ch 363; Magic Menu Sys. Pty Ltd v. AFA Facilitation Pty Ltd (1996) 72 FCR 261; Moloney v. Housing Industry Association Ltd (Unreported Tas SC Dec. 4, 1992).
[43] South Australian Asset Mgmt. Corp. v. Sheahan (1995) 13 ACLC 328; JC Scott Constrs. Pty Ltd v. Mermaid Waters Tavern Pty Ltd (1984) 2 Qd R 413; Re Movitor Pty Ltd (1996) 64 FCR 380; Trendtex Trading Corp. v. Credit Suisse [1982] AC 679; [1981] 3 All ER 520; [1981] 3 WLR 766; Giles v. Thompson [1994] 1 AC 142, 146 per Lord Mustill.
[44] Vangale Pty Ltd v. Kumagai Gumi Co Ltd [2002] QSC 137.
[45]Project 28 Pty Ltd (formerly Narui Gold Coast Pty Ltd) v. Barr, [2005] NSWCA 240.
[46] Stevens v. Keogh (1946) 72 C.L.R 1 (holding that funding by the Police Association of New South Wales of an action brought by an impecunious member did not constitute maintenance).

of the court and are obligated to perform their role, within the boundaries of the respective statutory provisions, to satisfy the interests of the creditors. Second, the trustee has a duty to liquidate its holdings to satisfy the creditors in the most efficient manner. In many cases, these requirements will support claim sale rather than the involvement of the trustee in extended legal proceedings.

This ability to transfer claims does not absolve receivers, liquidators, or trustees from their duty to adhere to the public policy principles underlying the theories of champerty and maintenance. Assignments can be invalidated if it appears that the actions of the receiver, trustee, or liquidator are contradictory to this public welfare mandate. This might occur where conflicts of interest between the receiver/trustee/liquidator and the funder are not effectively safeguarded in a litigation funding arrangement. Likewise, agreements to assign claims to a specific creditor, may present a conflict of interest with relation to the other creditors. Alternately, an agreement to assign legal claims to certain parties, for example to a specific creditor, may be unfair to the creditors as a whole.

In general, courts appear to welcome litigation funding. According to *QPSX Ltd v Ericcson Australia Pty Ltd* ((2005) 219 ALR 1 at [54]), the exercise of due diligence and formulation of budgets by firms like IMF (Australia) Ltd injects "a welcome element of commercial objectivity into the way in which such (complex commercial litigation) budgets are framed and the efficiency with which the litigation is conducted."[47]

WHAT LITIGATION FUNDERS DO

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[47] *QPSX Ltd v Ericsson Australia Pty Ltd* (2005) 219 ALR 1 at [54].

Litigation funding firms provide references, expertise, and most importantly, capital, to third parties in the pursuit of legal claims.[48] In exchange, the funders receive a portion of the proceeds of any settlement or award at trial. While these firms could potentially purchase the entire payoff from a claim, this would create a principal-agent problem. In most cases, the cooperation of the original claimholder is essential to successfully prosecuting a claim[49] and the best way to ensure this cooperation is by leaving the original claim-holder holding a substantial portion of the claim. By leaving the original claim-holder a substantial part of the claim, their future cooperation is ensured. Thus, in practice, litigation funding firms tend to hold between 30 and 60% of the claim.[50]

At present, litigation funding firms tend not to be interested in funding personal injury claims involving physical or mental injury to individuals that rely heavily on oral testimony and witness credibility due to the greater risks associated with these claims.[51] Firms prefer commercial claims where the primary evidence is documentary. One firm does not fund cases below $750,000 in value, while another firm wants a stake of at least $1 – 2 million.[52]

Firms fund cases where the risk is small and where they estimate the probability of winning a successful judgment or settlement to be large. At one firm, the probability of succeeding by judgment or settlement must be greater than 95%, while at another, the required

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[48] Waye, *supra* note 21, at 417–32 (describing the interaction between litigation funding firms and claim holders).

[49] Shukaitis, *supra* note 11, at 340–41; Swan, *supra* note 27, at 819–20.

[50] Interview with John Walker, Managing Director, IMF, (Australia) LTD (July 16,2008). *See also* Michael Legg et al., *Litigation Funding in Australia* 5 (Mar. 13, 2010) (unpublished manuscript, on file with the author).

[51] Waye, *supra* note 21, at app. at 477–78.

[52] *Id.*

probability of success is 50%.[53] Firms prefer cases that are likely to settle quickly since the

longer and more complex a matter is, the greater their risk.[54] Litigation funding firms also

thoroughly investigate the claim holder, especially if they are to be a key witness in the case.

Where the case is reliant on the testimony of a key witness, firms may also insure the witness's

well-being to hedge against death or illness intervening in the case resolution.[55]

Claim owners must provide detailed information to the third-party funder prior to

concluding the funding contract. The funder then uses this information to conduct a risk

analysis. If the funder's exposure to risk is small, then an offer of funding may be made without

further inquiry. However, if the risks are high, the funder does due diligence on the claim.[56]

During this process, the funder will evaluate the claim amount, check the liquidity of the

defendant(s), obtain fee estimates for legal and other expert advice, and seek counsel's opinion

regarding the likely success of the claim. Throughout this process, the funder retains the right to

terminate the financing arrangement if new evidence emerges which negatively impacts upon the

chances of a successful outcome.[57]

Once funders become involved, their role within the litigation environment can vary.

Some firms essentially act as a banker. Although they monitor the prosecution of the claim by

the claim holder's lawyers and ensure that budget caps are being complied with, they do not

participate in the day-to-day management of the claim nor do they provide instructions to the

claim holder's lawyers.[58] . While funders do engage in informal communication with the claim

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[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* at 74–75.
[57] *Id.* at 75.
[58] *See id.* app. at 480–81.

holder's, they need not formally report to the client.[59] Although firms differ on this policy, some

firms do not exercise veto rights over whether a claim holder accepts or declines a settlement

offer.[60] One firm requires the lawyers to report regularly, but it is not active in the control of

strategy or in the management of litigation. The firm's main concern is that the claim is

progressing within an agreed-upon budget.[61] It sets a global budget for legal services and the

lawyers then determine how to prosecute the claim within that budget, however, it does not

control the budget on an line-item basis.[62] Other firms are even more active and monitor and

advise throughout the process.[63] The funder may cap lawyers' fees and establish clear timelines

to align budget and strategy.[64] Any settlement proposal must be a joint decision between the

funding firm and the claim holder. In no case do the firms have a fiduciary duty to the client—

they see their position as analogous to insurers and that they are therefore under a duty of good

faith to the client.[65]

III. Theory

Economic theory is ambiguous as to the effects of litigation funding. While there have

been several excellent theoretical discussions on the topic[66], there has been little formal work and

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[59] *See id.* app. at 485.
[60] *See id.* app. at 480–81.
[61] *Id*. app. at 484.
[62] *Id*.
[63] *Id*.
[64] *Id*. at 484.
[65] *Id*. at 483–84.
[66] *See, e.g.*, Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697 (2005); Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383 (1989); Molot, *supra* note 6; Shukaitis, *supra* note 11.

no empirical work conducted to date. Below, we outline a simple model of litigation trading, but we first summarize some of the predictions from the theoretical literature.

Shukaitis (1987) suggests that litigation trading could increase the value of compensation to claimants and increase deterrence for a host of activities.[67] It could also lead to more nuisance suits and a greater volume and duration of litigation.[68] Litigation funding promotes claims brought by indigent and risk-averse victims that would not otherwise be pursued. [69]

Litigation trading should lead to an increase in cases that are weak on the merits, but that plaintiffs manage to "puff up" by misrepresenting them to a litigation funding company. Potential claims sellers will have an incentive to overstate their claims to potential buyers thereby creating an adverse selection problem.[70] The third-party buyers have worse information about the claim than either the plaintiff or the defendant. Thus, only claims that do not settle are likely to be offered on the claims market.[71]

Abramowicz predicts litigation funding will cause an increase in cases being pursued in jurisdictions where damage awards are more unpredictable.[72] In such areas, risk averse plaintiffs would prefer a small, sure recovery to a large, uncertain recovery. As a larger entity with deeper-pockets, the litigation funder is able to act in a risk-neutral way. In one scenario, litigation funding companies will over-litigate (even at a loss) to create fearful reputations in the short-run, and thereby make settlements easier later on.[73] However, litigation funders will

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[67] Shukaitis, *supra* note 11, at 334–41.

[68] *Id*. at 342–46.

[69] *Id*. at 338–40.

[70] Abramowicz, *supra* note 66, at 743–45.

[71] *Id*. at 744–45; Shukaitis, *supra* note 11, at 344.

[72] Abramowicz, *supra* note 66, at 735–37, 740–41.

[73] *Id*. at 728.

usually settle in the long run, as this would be the least costly method of maximizing profits.[74] In

sum, the qualitative literature predicts that under a litigation funding regime, claimants will

recover the claim amount sooner and can smooth risk by selling to a risk-neutral third party. The

third party funders consolidate and accelerate cases because they can pool similar claims and act

as repeat players.

Thus far the literature discussed has considered ex-post trading in litigation claims, that is

claims where the harm has occurred. In a pair of fascinating papers, Robert Cooter considers a

closely related topic: a market in unmatured claims.[75] Here, individuals could make ex-ante

sales of litigation claims, even before any harm occurs. For example, individuals with health

insurance may want to sell the right to sue for a workplace injury, knowing that health expenses

would almost certainly be covered by insurance. While related to the current topic, this idea has

seen almost no examples of real-world implementation.

In *A Market in Litigation Claims* (Molot, 2008a) Jon Molot considers the shortcomings of

the predominance of settlement in the current disposal of most litigation.[76] The fact that parties

to a settlement may have very different time or risk preferences can yield settlements that are

substantially different from those that risk-neutral parties would agree to. A market for litigation

claims would allow risk-neutral parties to negotiate settlements (or litigate) with outcomes that

better reflect the strength of cases and the law. Molot considers a related topic in *A Market in*

Litigation Risk (Molot, 2008b),[77] a paper that is closer to Cooter (1988) and Cooter and

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[74] *See id.* at 729.
[75] Cooter, *supra* note 66; Robert Cooter & Stephen D. Sugarman, *A Regulated Market in Unmatured Tort Claims: Tort Reform by Contract*, *in* NEW DIRECTIONS IN LIABILITY LAW 174 (W. Olsen ed., 1988).
[76] Jonathan T. Molot, A Market in Litigation Claims: A Market Alternative to Judicial Settlement Efforts (2008) (unpublished manuscript, on file with author).
[77] Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367 (2009).

Sugarman (1989) in considering the effects of trading ex-ante litigation claims. In contrast, the focus of this paper is on trading or funding of ex-post claims.

In order to be more precise about the expected effects of litigation trading on a market for litigation claims, we formally model the litigation process of a risk-averse claimant. Suppose a lawsuit has two possible outcomes, *A* and *0*, with probabilities *p* and *(1-p)*, respectively. It is costly to bring a suit and that cost is *c*. A risk neutral individual pursues the suit if its expected value is greater than his cost, namely if *pA > c*. If he is risk-averse, we can describe the individual as one who only pursues cases with a positive certainty equivalent. To be concrete, assume the following utility function over gambles:

u = E(r) - 0.005Rσ², where *R* denotes the risk aversion parameter and the utility function is calibrated so that everything is measured in percent.[78]   In terms of return, the gamble is between a gain of (A-C/C) and a loss of 100%:

$$\left(\frac{A-C}{C}\right)100 = \left(\frac{A}{C}-1\right)100$$

$$\left(\frac{-C}{C}\right)100 = -100$$

p

1 - p

The expected return is straightforward to calculate:

$$E(r) = p\left(\frac{A}{C}-1\right)100 + (1-p)(-100)$$

$$= 100\left(\frac{pA}{C}-p+p-1\right) = 100\left(\frac{pA}{C}-1\right)$$

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[78] This type of utility function is sometimes used in finance for illustrative purposes. While it is clearly unrealistic for some values, it is chosen here because of its analytical tractability.

And the variance for a binary stochastic event is as follows:

$$\sigma^2(r) = p\left[100\left(\frac{A}{C}-1\right) - 100\left(\frac{pA}{C}-1\right)\right]^2 + (1-p)\left[-100 - 100\left(\frac{pA}{C}-1\right)\right]^2$$

$$\frac{\sigma^2}{10^4} = p\left(\frac{A - \cancel{C} - pA + \cancel{C}}{C}\right)^2 + (1-p)\left(\frac{-\cancel{C} - pA + \cancel{C}}{C}\right)^2$$

$$\frac{\sigma^2}{10^4} = p\left[\frac{A(1-p)}{C}\right]^2 + (1-p)\left(\frac{-pA}{C}\right)^2$$

$$\frac{\sigma^2 C^2}{10^4 A^2} = p(1-p)^2 + (1-p)p^2$$

$$\frac{\sigma^2 C^2}{10^4 A^2} = p(1-p)[(1-\cancel{p}) + \cancel{p}] = p(1-p)$$

Which simplifies to:

$$\sigma^2 = \frac{10^4 A^2}{C^2}p(1-p)$$

Now plug in for *E(r) and σ^2*

$$U = E(r) - .005R\sigma^2$$

and determine when this will have a positive value.

$$= 100\left(\frac{pA}{C}-1\right) - .005R\left[\frac{10^4 A^2}{C^2}p(1-p)\right] > 0$$

$$= 2pA - 2C - R\frac{A^2}{C}p(1-p) > 0$$

Now this function can be examined or plotted to help understand the comparative statics. We can hold all other parameters fixed and take the derivative of *p* with respect to *R* or *C*. A decrease in *R* (the risk aversion parameter) will lead to a decrease in *p*. This illustrates that risk-neutral entities (like third party funders) are willing to litigate cases with a lower probability of return. The results with respect to litigation costs *C* are a bit more complicated. For most reasonable values of *C*, higher litigation costs will lead to a requirement of a higher *p*: individuals litigate cases with a higher probability of conviction. This illustrates the theory that if litigation funding allows the smoothing of risk and the relaxing of credit constraints, individuals will litigate cases with a lower probability of conviction and the number of suits may rise.

One limitation of this model, however, is that the probability *p* of winning a lawsuit is exogenous to litigation funding. But litigation funding could increase the probability of winning a lawsuit. For example, litigation funding may help in the discovery process. Larger, more complex lawsuits could arise and lawsuit quality could be endogenous to litigation funding.[79]

IV. Data

The empirics we present here draw upon data from three main sources. First, we have personally been in contact with the largest litigation funding firm, IMF (Australia) Ltd, which has over 50% market share.[80] IMF has provided a list of lawsuits that they have funded as well as a list of lawsuits considered but not funded. From the lawsuits funded, the data includes

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[79] On the other hand, litigation funding could decrease the amount of damages awarded if the court knows that the damages awarded are going to a third party.
[80] JOHN WALKER, IMF (AUSTRALIA) LTD, LITIGATION FUNDING 4 (2006).

opening and closing dates, monthly profit and loss, expenditures, return on investment, case

classification, and case location.[81]

Between August 2001 to June 2010, IMF funded 113 cases, the average length of which

was 2.33 years.[82] Figure 2 presents the case duration distribution, which is right-skewed. A

handful of cases drag on for many years, but the bulk of the cases are resolved within the first

two years.

During this time period, IMF received an internal rate of return of 75%, before overhead

expenses.[83] Profits for most cases ranged between a loss and gain of less than a million

Australian dollars (see Figure 3). As would be expected, losses are limited, and there are some

notable cases with profits of several million Australian dollars[84]

Thirteen of the 113 cases actually went to court and had a judicial opinion. From

February 1999 to June 2007, IMF chose to fund 90 of the 763 cases considered.[85] The data

available on cases considered includes the date opened, cause of action, management

commentary, IMF investment manager, IMF state manager, estimated return, and the estimated

completion date.[86] From IMF's shareholder publications, we also obtained the jurisdictions of

the cases that were funded from 2001-2003,[87] the case categories for all cases funded from 2004-

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[81] David S. Abrams & Daniel L. Chen, IMF Lawsuit Financial Data (Sept. 8, 2010) (unpublished spreadsheets) (on file with the author). These documents are confidential and cannot be distributed publicly.
[82] *Id*.
[83] *Id*.
[84] Figure 3.
[85] Abrams & Chen, *supra* note 81.
[86] *Id.*
[87] ALDEN HALSE & HUGH MCLERNON, IMF, IMF COMPANY OVERVIEW 2003 at 21 (2003).

2007,[88] and the total litigation contracts in progress from 2002-2008.[89] Cases are classified

primarily into three categories: commercial (often contract disputes), group (class action), and

insolvency. The distribution across case type can be found in Table 1. Insolvency cases are the

largest category, but this is largely attributable to the historic origins of litigation funding.[90]

Since bankruptcy was the one domain where purchasing litigation has historically been allowed,

many of the earliest cases fall into this category. More recent cases represent a more diverse set

of legal fields.

Our second data source is the Australian Report of the Government (ROGS).[91] From

here we have data on the supreme and federal courts for each Australian state (see Figure 1 for a

map of Australia) separated by civil and criminal matters for the years 1994 to 2009.[92] The

advantage of having criminal as well as civil data is that the criminal cases should not be affected

at all by litigation funding. Thus this data acts as the perfect control group. The data includes

lodgments, finalizations, several measures of expenditures and income, case backlog, case

duration, clearance rate, court fees, and attendances (appearances) per finalization. For a

definition of these variables, please see the Appendix. We also make use of population data for

each state obtained from the Australian Bureau of Statistics from which we create per capita

lodgments and finalizations.[93]

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[88] IMF, IMF (AUSTRALIA) LTD 2008 ANNUAL REPORT 5 (2008).

[89] *Id*. at 53.

[90] JOHN WALKER, IMF (AUSTRALIA) LTD, SUBMISSIONS ON STATE REGULATION OF LITIGATION FUNDING 4 (2005); Waye, *supra* note 21, at 6.

[91] Australian Government, Report on Government Services, http://www.pc.gov.au/gsp/reports/rogs (last visited Jan. 30, 2011). The data collected varies over time. Not all variables are available for all years.

[93] Australia Bureau of Statistics, Australian Demographic Statistics, http://www.abs.gov.au/AUSSTATS/abs@.nsf/second+level+view?ReadForm&prodno=3101.0&viewtitle

The third data source is LexisNexis Australia, from which we obtained data on all published opinions for cases considered by IMF between February 1999 and June 2007. Within the Lexis database, we searched for each of the 763 cases considered. A total of 16 unfunded and 7 funded cases were located.[94] For each of these cases we collected data regarding the date, attorneys, court, litigants, judge, citations to and from the case, positive and negative citations, and more detailed information about the case.[95] This data is used to examine the effect of litigation funding on the establishment of precedent.

V. Analysis

The ideal experiment to test the theories described above would consist of a law change randomly chosen to take place in some jurisdiction. One could then compare outcomes of interest such as settlement rates, settlement amounts, time to settlement, court caseload, court expenditures, and the development of precedent, between the treated and control jurisdictions. Because of the recent changes in the attitudes toward litigation funding in Australia, we have a situation that comes close to the ideal experiment.

However, reality differs from the ideal in several important ways. First, while some Australian states have officially discarded maintenance and champerty doctrines, others have not, but yet do still allow litigation funding.[96] Second, the timing of the introduction of litigation

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=Australian%20Demographic%20Statistics~Jun%202010~Latest~21/12/2010&&tabname=Past%20Futur e%20Issues&prodno=3101.0&issue=Jun%202010&num=&view=& (last visited Jan. 30, 2011).

[94] We searched based on the description that IMF recorded for each case considered.

[95] Data on file with the authors.

[96] Waye, *supra* note 21, at 204–10. Mere funding is not maintenance and mere funding for reward is not champerty. Impropriety has to be proved. Litigation funding firms can fund in the States and Territories

funding in a state is not always coincident with the law change. Third, data on many of the most

interesting outcome variables (particularly on settlements) are impossible to obtain.

With these limitations in mind, we proceed with an analysis that is as close to the ideal

experiment as possible. We proxy for the de facto law change with the amount of money IMF

spent in a particular jurisdiction at a particular time. This then becomes the key variable of

interest in our regressions. We begin with an analysis of the relationship between funding and

court outcomes:

$$(Outcome^{civil}_{it} - Outcome^{crim}_{it}) = \beta*(Funding_{jt}) + \delta_t + \gamma_j + \varepsilon_{it} \tag{1}$$

where t indexes year and j indexes jurisdiction. $Outcome_{jtc}$ is one of the variables from the

ROGS reports: lodgments, finalizations, several measures of expenditures and income, case

backlog, case duration, clearance rate, court fees, and attendances (appearances) per finalization.

γ_j and δ_t are fixed effects for jurisdiction,[97] year, and litigation type. Equation (1) is equivalent to

a fully interacted differences-in-differences specification.[98] We use robust standard errors.[99]

In order to have a causal interpretation in the above regression, the variation of litigation

funding across jurisdictions must be assumed to be exogenous. It is possible that there are

jurisdiction year characteristics that attract funding and are also related to the outcomes of

interest. To address this challenge to a causal interpretation, we make use of what is effectively

a placebo: criminal cases. Since litigation funding is only allowed in civil cases, one would not

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that have not abolished maintenance and champerty, and if challenged, litigation funding firms merely
need to prove that their funding is not improper maintenance. *See supra* Part II.

[97] Because we use state fixed effects, a jurisdiction that has no IMF expenditures during our timeframe
will drop out in our analysis.

[98] $Outcome_{itc} = \beta*\alpha_c*(Funding_{jt}) + \lambda*(Funding_{jt}) + \alpha_c*\delta_t + \delta_t + \alpha_c*\gamma_j + \gamma_j + \alpha_c + \varepsilon_{itc}$

[99] We do not cluster our standard errors at the state level since our dataset would only have 7 clusters, too
few by conventional standards.

expect any impact on criminal cases. These cases may thus be employed to control for any unobservable overall changes in a jurisdiction at a particular time. We should then be able to make a causal inference about the impact of more litigation funding on civil outcomes in a particular jurisdiction at a particular time. Thus, the dependent variable is the difference between the particular outcome measure for civil cases and for criminal cases.

Before proceeding to the main results, we first present in Figures 4-7 the variation in IMF funding over time in four Australian states. Although decreasing somewhat in 2008, New South Wales has seen relatively consistent funding levels of several million AUD per year between 2002 and 2007. The spending in Queensland is more volatile with around a million dollars spent in 2002, followed by a sharp drop off in funding through 2005, which then bounced back to some extent beginning in 2006. Victoria has seen higher levels of funding than Queensland, and its funding peaked in 2005 and have declined somewhat since then. Finally, Western Australia has seen a fairly steady growth in funding and was the only state examined to have an increase in funding in 2008. One of the important points to note from a comparison of the temporal funding patterns is that there is substantial amount of variation across the states. This adds confidence to the assumption that funding is not driven simply by overall national time trends.

The main results of the differences-in-differences analysis are presented in Panel A of Table 2. The table presents results from nine separate regressions, each using the specification described in Equation 1. There are several interesting findings. First, finalizations decrease with increased funding, although lodgments do not change in a statistically significant amount. The combination of these observations would tend to indicate that cases tend to take longer to conclude when a litigation funder enters the legal market. There are several other pieces of evidence that point in the same direction. The backlog of non-appealed civil cases increases

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substantially relative to the non-appealed criminal backlog as IMF spending increases. As one might expect, it appears that finalizations decrease and the backlog increases. The clearance rate also declines to a statistically significant degree as third party funding increases. Finally, even when normalizing finalizations by population size, one sees a significant (at the 10% level) decline with increased funding.

Together, these regression results tell a consistent story: an increase in activity of litigation funders leads to more sclerotic courthouses. One might expect this increased litigation to be reflected in greater spending by the courts, and indeed columns 3 and 4 bear this out. While the coefficient on recurrent expenditures (column 3) is insignificant, the measure of expenditures that is more responsive to caseload fluctuations is net expenditures, which does have a statistically significant relationship with IMF expenditures. Overall, we see a pattern of increased funding leading to slower case processing, larger backlogs, and increased spending by the courts. In the next section we discuss the robustness and significance of these findings and explore some possible channels for these results. For example, Panel B shows that IMF expenditures are not correlated with court processing outcomes in the year following the IMF expenditures.

First, we present the findings from the other main analysis undertaken – a comparison between funded and unfunded published cases (Table 3). From the universe of cases that IMF considered funding, we collect all with published opinions found in LexisNexis Australia. We compare the number of citations from and to other cases for the 7 funded and 16 unfunded published cases. There is a substantial difference in both measures of case significance. Funded cases cite almost 40 other cases on average, while cases IMF chose not to fund cite fewer than 20.

Even more indicative of case significance is the number of times funded cases have been cited. Here we find 11 citations on average for funded cases in comparison to fewer than 5 citations for the unfunded cases. The magnitude of the differences is extremely large. To the extent that citations are a good proxy for precedential importance, it appears that when litigation funders enter a market, they create more precedent earlier on. One potential concern may be that the funded cases are older, on average, than unfunded cases and have therefore had more time to gather cites. The funded cases are slightly older, less than 6 months on average, which is not enough to explain a disparity of this magnitude. We explore the robustness of the findings presented thus far in the next section.

VI. Robustness and Interpretation

Since our identification strategy relies on changes in IMF expenditures across states and across time, the biggest concern to a causal interpretation is that IMF expenditures may themselves be driven by other factors that correlate with court processing; moreover, the results presented so far do not rule out the possibility of reverse causality. Demand for third party litigation funding may be greatest when the courts are the most backlogged. We address this concern in several ways. First, we look one year before the IMF expenditures to see if court processing is driving demand for third party litigation funding. Second, we use financial data on cases that IMF considered, both funded and non-funded, as a proxy for demand for third party litigation funding.

One possible explanation for the results discussed thus far is that more congested courts attract more third-party funding. We test this by running the same regressions as presented in panel A of Table 2, but using IMF expenditure data from the year after the court processing data.

We find (Panel C of Table 2) that no court processing measure is related to IMF expenditures in the year before the IMF expenditures occurred, except for attendances per finalization. This provides some support for IMF expenditures being exogenous to court processing.

We next turn to the interpretation of the economic significance of our results. Using Appendix Table A, which shows summary statistics for all variables, we consider the effect of mean level of IMF expenditures on finalizations. Multiplying 1083 by -0.434 indicates a fall of 470 finalizations out of an average of 4803 difference in finalizations between civil and criminal cases, roughly a 10% effect. Turning to Table 4, we find a comparable estimate in Column 1. In order to estimate a log-log specification, we run the Equation (1) equivalent: the fully interacted differences-in-differences specification, which allows us to not worry about taking logs of negative values.[100] A 100% change in IMF expenditures would lead to a 10% decrease in finalizations. We see similar magnitudes for clearance rate and finalizations per population. The log-log estimates for net expenditures and backlog of non-appealed cases is smaller and not statistically significant.

Even though we use criminal cases as a control group to address possible omitted variables, there are some omitted variables that may be specific to civil cases and litigation funding that could be correlated with court processing. For example, if IMF funding is representative of overall litigation funding and the other 50% of unmeasured litigation funding happens precisely where IMF funding occurs, then our estimates would be overestimated by a factor of 2. On the other hand, if IMF is actively precisely where the other 50% of litigation funders are not active, then our estimates would be underestimated, though in the extreme case,

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[100] $Outcome_{itc} = \beta * \alpha_c * (Funding_{jt}) + \lambda * (Funding_{jt}) + \alpha_c * \delta_t + \delta_t + \alpha_c * \gamma_j + \gamma_j + \alpha_c + \varepsilon_{itc}$

we would not be able to estimate any effects at all. This is likely not the case given the fact that some states still have champerty and maintenance facing criminal penalties on the books, even though it is not strictly enforced. Alternative litigation funding is not the only source of omitted variables bias, however. Arbitration and contingency fee arrangements are also unmeasured. The same logic applies as in the case of alternative litigation funding. Here, it may very well be the case that these alternative funding arrangements compete against each other, in which case our estimates are overestimates. Alternatively, if arbitration and contingency fees are used by the clients who were rejected by IMF or other litigation funders, then our tests using the measure for demand for litigation funding would alleviate this omitted variables concern.

Finally, we return to the issue of the development of law and establishment of precedent. The estimates in the preceding section did not control for court fixed effects and a linear time trend to address the possibility that different courts may have different citation patterns and that later cases may receive fewer citations. When we control for this in Table 5, we find that funded cases are still receiving more total citations and this is statistically significant at the 10% level. If we included cases that did not go to court (or otherwise were not able to be found in Lexis Australia) as receiving 0 citations, then the estimate effects of funding are vastly more significant since about 8% of funded cases had an opinion but roughly 2% of non-funded cases had an opinion.

In addition, we have data on the reversal rate of these cases. The funded cases are reversed 25% of the time. At first glance this suggests that litigation funding still has taint as the courts do not appear to consider the law to have as precedential value for funded cases. In the respective jurisdictions and years, only 5% of cases are reversed. However, non-funded but considered cases are reversed 31% of the time. This suggests that the high reversal rate may

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actually be due to selection, and conditional on seeking IMF funding, funding actually decreases reversal rate.[101]

VII. Conclusion

Ambitious statements have been made about the potential impact of allowing a market in litigation claims. Predictions include effects on settlement rates, settlement amounts, time to settlement, litigation quantity, and development of precedent. In this paper we have sought to make the first empirical test of some of these claims using several newly obtained datasets from Australia.

We find that litigation funders appear to have an impact on the functioning of courts. States that have a greater litigation funding presence experience a greater backlog in courts, fewer finalizations, and a lower clearance rate. This is also reflected in court expenditures, which increase with greater litigation funding.

While congesting the courts is certainly a cost to third party funding, the overall welfare effects may indeed be positive. If the value of the adjudication of cases is greater than the expense of adjudicating them, then third party funding should be encouraged. Further, court congestion may be a transitory effect of the entry of litigation funders, and not one that persists. The expectation would be that once defendants recognize the increased likelihood of litigation and the greater resources held by plaintiffs, they will be more likely to settle in equilibrium.

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[101] This analysis does not address the conventional view of taint, which is when a jury finds out that the damages being awarded to a party are actually going to a litigation funder. None of the cases where we found opinions in Lexis Australia had juries.

While transitioning to that new equilibrium, there is another potential benefit from litigation funding: earlier resolution of the law.

Litigation funding does appear to have precedential value. By two different measures, cases funded by IMF have greater importance than those they did not fund, but which proceeded to trial in any case. Funded cases both cite and receive over twice as many references as unfunded cases. If citations are a good proxy for legal precedent, then third party funding appears to promote its more rapid development. While a full welfare analysis is well beyond the scope of this paper, the closest real world attempt at a market in litigation claims has had a meaningful impact on the judicial system in Australia.

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Data Definition Appendix

Backlog Indicator – A measure of case processing timeliness. It is the number of pending cases older than the applicable reporting standards, divided by the total pending caseload (multiplied by 100 to convert to a percentage).

Lodgments – The initiation or commencement of a matter before the court. The date of commencement is counted as the date of registration of a court matter.

Finalisation – The completion of a matter so it ceases to be an item of work to be dealt with by the court. Finalisations are derived from timeliness data that may not reflect the total matters disposed by the courts in the reporting period.

Clearance Rate – A measure of whether a court is keeping up with its workload. It is the number of finalisations in the reporting period, divided by the number of lodgments in the same period (multiplied by 100 to convert to a percentage).
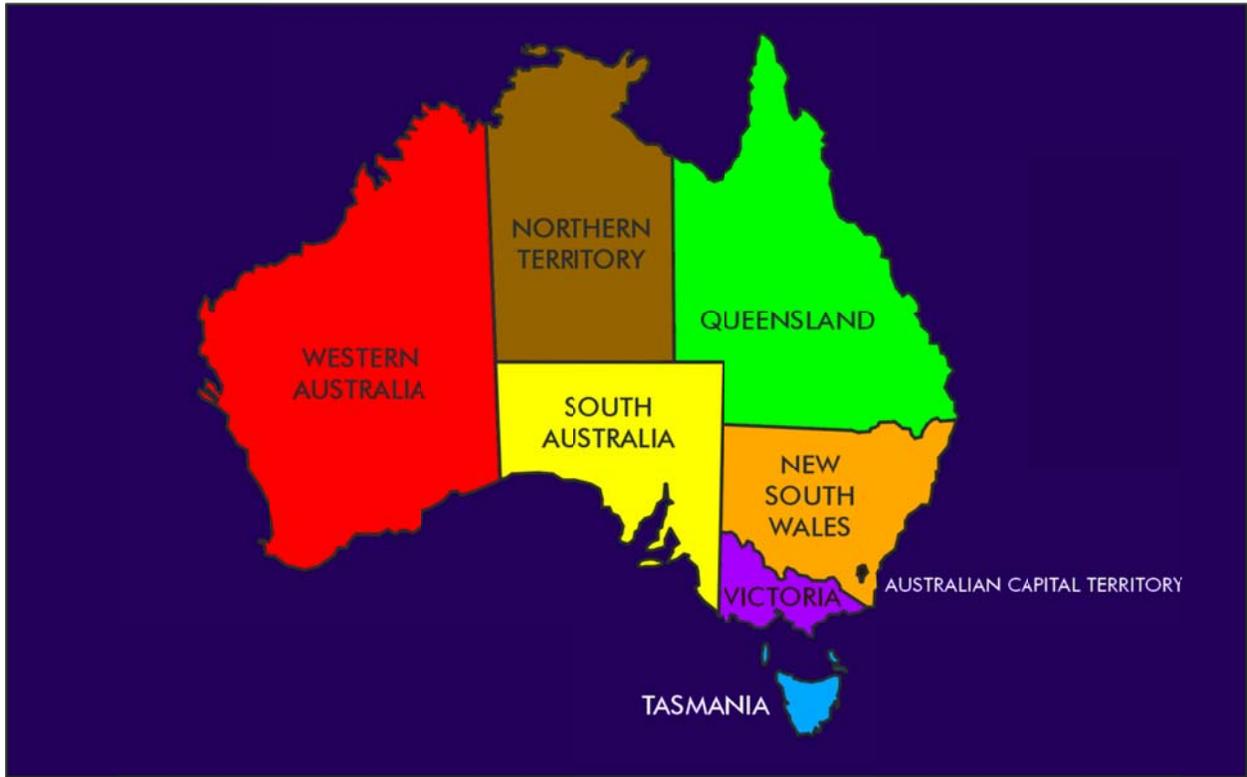
Attendance Indicator – The average number of attendances for each finalisation in the reporting period. An attendance is defined as the number of times that parties or their representatives are required to be present in court (including any appointment which is adjourned or rescheduled) for all finalized matters during the year. The actual attendance is one that is heard by a judicial officer or mediator/arbitrator.

Net Expenditure – Net expenditure refers to expenditure minus income (where income is derived from court fees and other revenue but excludes fines).
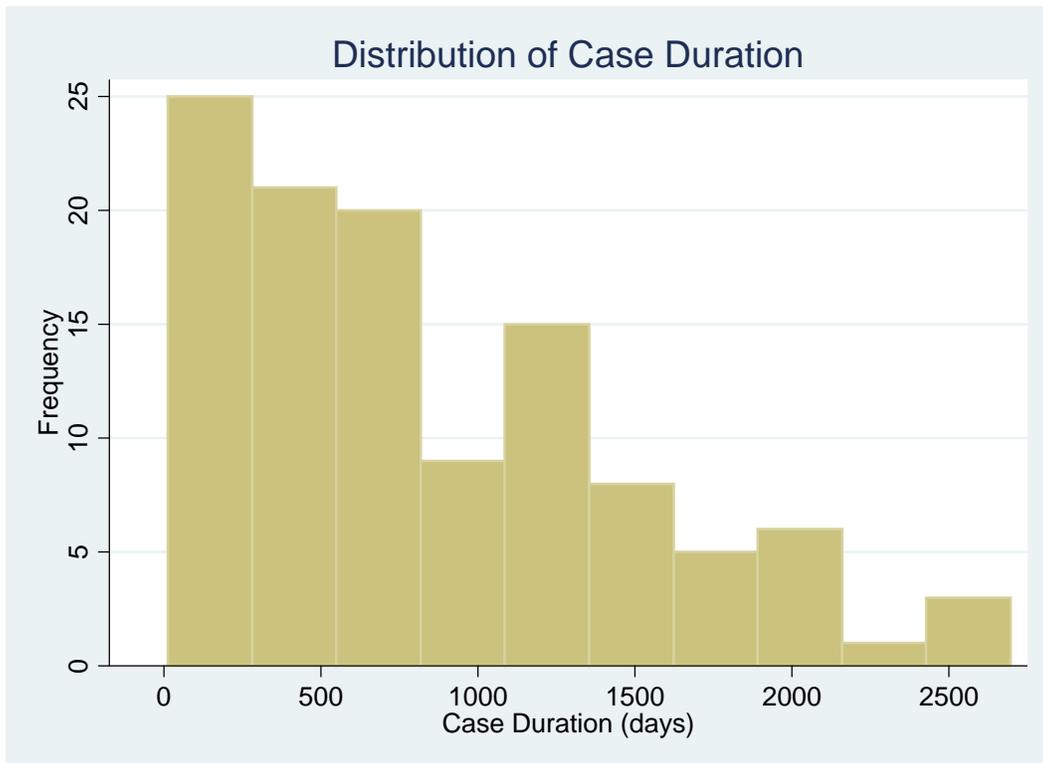
Recurrent Expenditure – Recurrent expenditure provides an estimate of annual service costs. Recurrent expenditure on courts administration includes judiciary and in-court expenditure, court and probate registries, sheriff and bailiff's offices, court accommodation and other overheads. The components of the expenditure include salary and non-salary expenditure, court administration agency and umbrella department expenditure, and contract expenditure. Total recurrent expenditure by Australian, State and Territory court authorities (excluding the High Court and specialist courts) was $1.2 billion in 2004-05.

Population – A lodgment that is yet to be finalised but is part of the case management of court administrators.
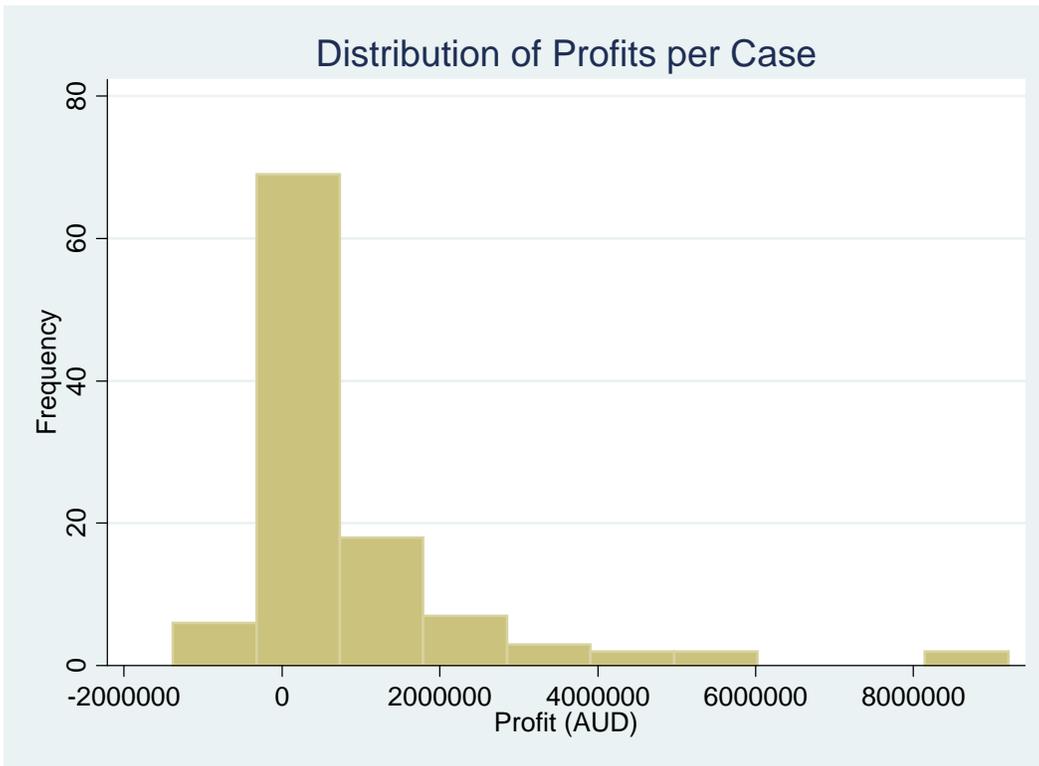
Figure 1

Figure 2

Figure 3

Distribution of Profits per Case

Figure 4

IMF Annual Expenditures in New South Wales

Figure 5

IMF Annual Expenditures in Queensland

Figure 6

IMF Annual Expenditures in Victoria
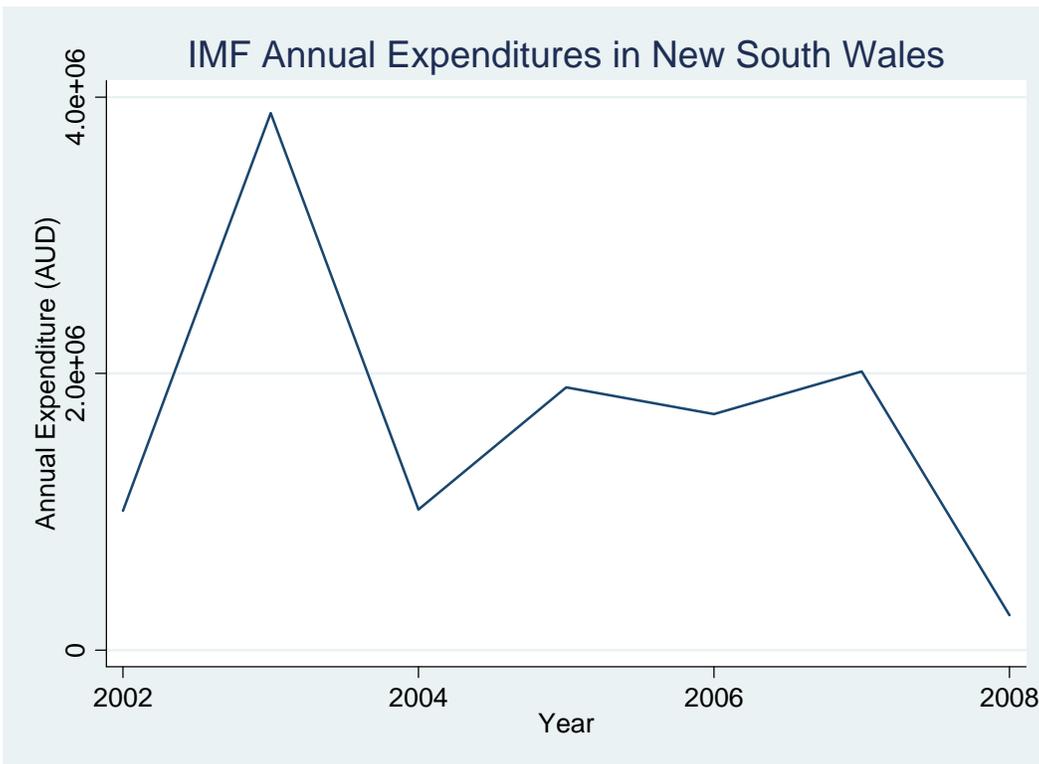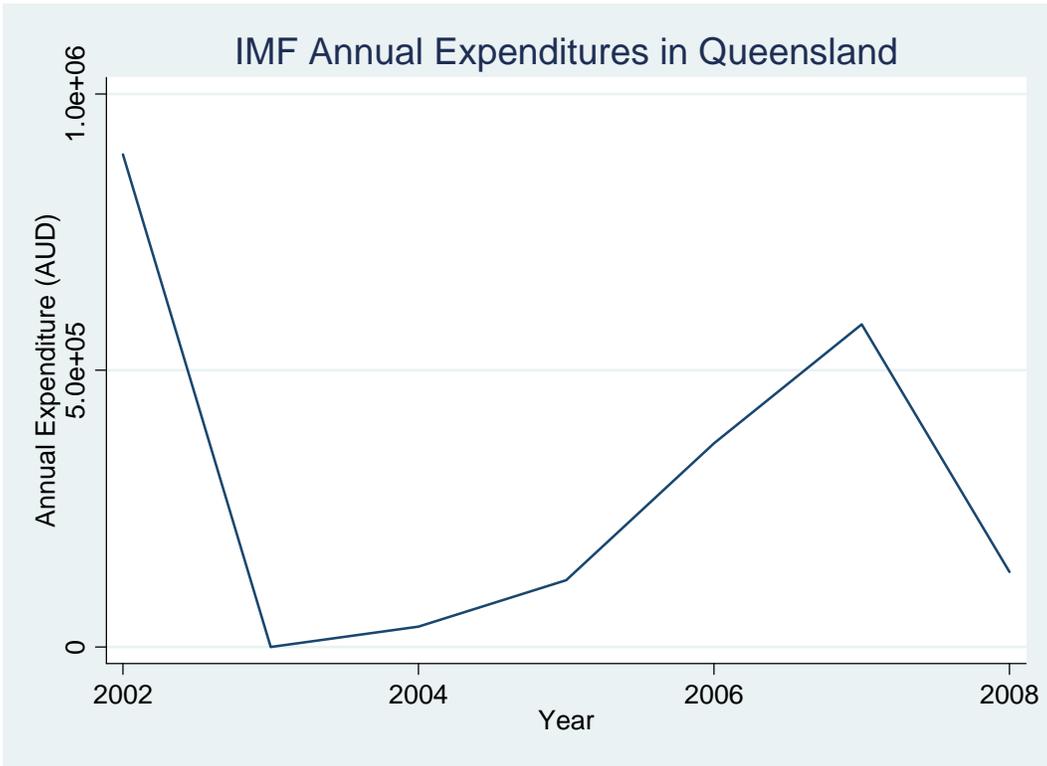
Figure 7
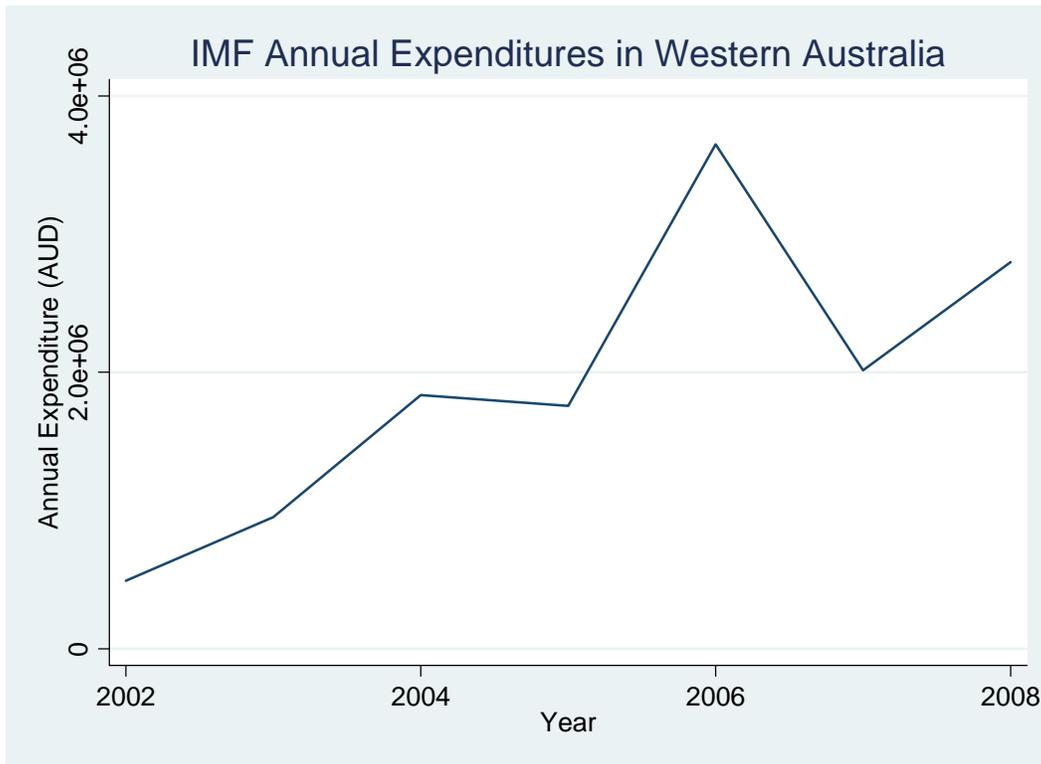
Table 1

Distribution of Funded Case Types

	Frequency	Percent
Commercial	21	23
Group	28	31
Insolvency	42	46
Total	91	100

Data provided by IMF on all cases between
February 1999 and June 2007.

	Lodgments	Finalizations	Recurrent Expenditures	Net Expenditures	Backlog, Appeals	Backlog, Nonappeals	Clearance Rate	Finalizations / Population	Attendances / Finalization
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Panel A									
IMF Expenditures$_t$	-0.240	-0.434	846.2	1118.2	-0.00514	0.00704	-0.0135	-0.00824	0.000223
	(0.204)	(0.210)*	(522.2)	(391.2)***	(0.00562)	(0.00200)***	(0.00408)***	(0.00466)*	(0.000232)
N	35	35	35	35	30	30	30	35	23
R^2	0.960	0.956	0.984	0.943	0.283	0.684	0.611	0.828	0.680
Panel B									
IMF Expenditures$_t$	-0.182	-0.0853	-1502.7	-1377.1	0.00249	0.00252	0.00278	-0.00213	-0.000193
	(0.198)	(0.353)	(1044.5)	(790.3)*	(0.00385)	(0.00261)	(0.00580)	(0.00724)	(0.000235)
N	30	30	30	30	30	30	30	30	23
R^2	0.981	0.949	0.986	0.958	0.239	0.589	0.475	0.801	0.678
Panel C									
IMF Expenditures$_t$	-0.349	-0.270	-268.3	-693.8	0.00129	0.000832	-0.00940	-0.00266	0.000581
	(0.234)	(0.197)	(745.1)	(817.9)	(0.00495)	(0.00527)	(0.00563)	(0.00457)	(0.000275)*
N	30	30	30	30	25	25	25	30	19
R^2	0.960	0.956	0.981	0.935	0.284	0.591	0.578	0.833	0.686

Table 2: Impact of Third-Party Funding on Court Processing

Regressions run using state-year observations obtained from the Australia ROGS reports for the years 2002-2008. States included are New South Wales, Queensland, South Australia, Victoria, and Western Australia. These are the states where IMF was actively investing. All regressions include state and year fixed effects. Robust standard errors in parenthesis. *** p<0.01, ** p<0.05, * p<0.10

Table 3

Citation Rates by Funded Status

	Funded	Not Funded	Ratio
Citations to other cases	38.7	19	2.0
	(32.1)	(22.7)	
Citations to the case	11	4.6	2.4
	(8.9)	(7.8)	
Observations	16	7	

Data collected from Lexis-Nexis Australia on all published cases considered for funding by IMF between 2002 and 2008. Standard deviation in parentheses.

Table 4: Impact of Third-Party Funding on Court Processing					
	Log Finalizations	Log Net Expenditures	Log Backlog, Nonappeals	Log Clearance Rate	Log Finalizations / Population
	(1)	(2)	(3)	(4)	(5)
IMF Log Expenditures$_t$	0.0526	0.0246	-0.0798	0.0465	0.0453
	(0.0353)	(0.0236)	(0.0534)	(0.0250)*	(0.0306)
Civil	3.426	0.668			3.303
	(0.314)***	(0.236)***			(0.278)***
Civil * IMF Log Expenditures$_t$	-0.114	0.0320	0.0492	-0.0915	-0.109
	(0.0391)***	(0.0291)	(0.0659)	(0.0376)**	(0.0346)***
N	70	70	60	60	70
R^2	0.984	0.936	0.559	0.490	0.982

Regressions run using state-year observations obtained from the Australia ROGS reports for the years 2002-2008. States included are New South Wales, Queensland, South Australia, Victoria, and Western Australia. These are the states where IMF was actively investing. All logs are of 1 plus the original value to avoid dropping zeros. All regressions include state and year fixed effects and are fully interacted with a dummy indicator for Civil. Columns 3 and 4 do not estimate the Civil coefficient becomes of multicollinearity. Robust standard errors in parenthesis. *** p<0.01, ** p<0.05, * p<0.10

Table 5: Impact of Funding on Development of Law -- Robustness Check

	Log Total Cites	Log Positive Cites	Log Cases This Cited
	(1)	(2)	(3)
Funded	0.869	0.346	0.578
	(0.445)*	(0.284)	(0.493)
N	23	23	23
R^2	0.243	0.202	0.139

Regressions run using case-level observations obtained from the Australia Lexis-Nexis reports for cases that IMF considered and had a published opinion. All logs are of 1 plus the original value to avoid dropping zeros. These regressions include court fixed effects and a linear time trend. Robust standard errors in parenthesis. *** $p<0.01$, ** $p<0.05$, * $p<0.10$