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PRIVATE DOLLARS FOR PUBLIC LITIGATION: AN INTRODUCTION

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INTRODUCTION

The fundamental economic logic of litigation investment is that capital should be able to flow freely to support meritorious lawsuits.[1] As Bentham noted two hundred years ago, there

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1. *See, e.g.*, Keith Hylton, *Toward a Regulatory Framework for Third-Party Funding of Litigation*, 63 DEPAUL L. REV. 527, 537–39 (2014) ("As long as the rights transfer does not affect the win probabilities, social welfare is unam-

is often a mismatch between parties with claims and the resources necessary to pursue those claims.[2] A victim of a legal wrong may not have the assets to establish that she has been wronged since there is no necessary connection between the occurrence of a legal wrong and the financial status of the person suffering a wrong. In fact, there is likely to be an inverse relationship—the occurrence of a legal wrong (the suffering of an injury) may be the reason that a person lacks financial assets.[3]

This economic logic of litigation investment has been one of the main arguments for the liberalization of the rules against champerty and maintenance.[4] The other main argument is the moral case that people have a right to do with their property as they see fit.[5] This second argument will not be addressed in this paper.

The economic case for litigation investment is a general one: there is no reason its validity should vary with the identity of the claimant or the claim.[6] It is, in theory, equally valid for claims in tort, contract, intellectual property, inheritance, and divorce. There may be reasons arising from the unique features of some area of law, such as family law or trusts and es-

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biguously greater when the victim sells her ex post right to the third party."); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 407–14 (2009).

2. *See* 1 Jeremy Bentham, Letter XII, Maintenance and Champerty, *in* 3 THE WORKS OF JEREMY BENTHAM 19, 19 (John Bowring ed.) (Edinburgh, William Tait 1843).

3. In fact, even traditional critics of litigation investment, such as Blackstone, would have to admit that the experience of financial loss as a setback by the victim of legal wronging would strengthen the private law argument for third-party investment. *See* Anthony J. Sebok, *What is Wrong About Wrongdoing?*, 39 FLA. ST. U. L. REV. 209, 214–16 (2011).

4. *See, e.g.*, Stephen Gillers, *Waiting for Good Dough: Litigation Funding Comes to Law*, 43 AKRON L. REV. 677 (2010).

5. Both W. Bradley Wendel and I have argued for this position, or, more precisely, that this position is consistent with the larger liberal values to which litigation investment's critics are already deeply invested. *See* Anthony J. Sebok, *Should the Law Preserve Party Control? Litigation Investment, Insurance Law, and Double Standards*, 56 WM. & MARY L. REV. 833 (2015) [hereinafter Sebok, *Should the Law Preserve Party Control?*]; W. Bradley Wendel, *Alternative Litigation Finance and Anti-Commodification Norms*, 63 DEPAUL L. REV. 655 (2014).

6. *See* Keith N. Hylton, *The Economics of Third-Party Financed Litigation*, 8 J.L. ECON. & POL'Y 701, 721 (2012).

tates law, that provide independent arguments for limiting or prohibiting litigation investment—e.g. investment in divorce—but these reasons must be established on a case-by-case basis sensitive to both context and the costs and the benefits to society of both permitting or prohibiting litigation investment.[7]

In this paper I will apply the economic case for litigation investment to public litigation and consider the arguments for limiting litigation investment in public litigation rooted in policy concerns unique to public litigation.

I.
Public Litigation

The working definition of public litigation adopted in this paper is litigation by the state, that is, litigation in which the state, and not a private person or entity, is the plaintiff in a non-criminal case. There is no a priori reason that litigation investment could not fund criminal prosecutions, but this paper will be limited to a discussion of litigation investment in civil litigation simply because, absent criminal prosecutions that result in large monetary fines, the economic case for litigation investment in criminal prosecutions does not exist.

The definition of "public litigation" adopted in this paper turns on the identity of the plaintiff and not the purpose of the litigation or the potential beneficiaries of the litigation.[8] It could be argued, as some have, that litigation initiated and controlled by private citizens is public litigation since it benefits the public or substitutes for public litigation.[9] Under this definition, litigation brought by "private Attorneys General"

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7. *See, e.g.*, Kingston White, *A Call for Regulating Third-Party Divorce Litigation Funding*, 13 J.L. & Fam. Stud. 395 (2011).

8. The definition of public litigation has been canvassed by different scholars for various purposes. *See generally* William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 Vand. L. Rev. 2129 (2004); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976).

9. *See, e.g.*, Martin H. Redish, *Class Action and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 90–91 (arguing that individual compensatory lawsuits may "be categorized as private Attorney General actions, because they may well have the incidental impact—perhaps even intended by the legislative creation of the private right—of exposing and punishing law violations").

and *qui tam* litigation are public litigation as much as litigation initiated and controlled by government lawyers.[10]

From a functional perspective, there may be overlap between public litigation initiated and controlled by government attorneys and litigation in the public interest initiated and controlled by private citizens employing their own attorneys. There is a conceptual difference, however, which matters a lot given the goals of this paper: government lawyers, especially when they are based in the office of the State's Attorney General, have duties of self-regulation that private citizens do not.[11] A State Attorney General has a client *unlike* any other lawyer—unlike an attorney representing a private citizen, who is not obliged by law to act in the public's interest, an Attorney General must exercise her own judgment at all times to promote the public's interest.[12] This difference may matter to the rules that permit and/or limit litigation investment in public interest litigation.

A. *The Varieties of Public Litigation*

The state can be a party in civil litigation for one of three reasons. It can sue to enforce a public right, it can sue to enforce its own private law rights in contract, property, or tort, or it can sue to enforce the interests of its citizens. In the following paragraphs, I will briefly discuss the first two reasons for a state to be a civil litigant. Most of this section will be about the third reason.

The state may sue to enforce a public right by seeking to impose a civil fine or penalty on a private actor.[13] This is one of the core functions of the state, and both the federal and state governments have actively pursued civil penalties over

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10. *See* Rubenstein, *supra* note 8, at 2143–46.

11. *Id.* at 2138 ("By contrast, an attorney is a public attorney if her client is the government.").

12. As Rubenstein noted, this point is found in standard treatises on professional responsibility. *Id.* at 2138 n.44 (citing THE LAW AND ETHICS OF LAWYERING 820 (GEOFFREY C. HAZARD, JR. ET AL. EDS., 2d ed. 1994) and CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 8.9.2, at 44951 (Government Lawyer Models and Roles).

13. *See* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law,* 101 YALE L.J. 1795 (1992).

the course of American legal history.[14] From one perspective, the pursuit of civil penalties seems more like criminal prosecution than private litigation, since the former appears to share a punitive purpose with the latter.[15] This question has been thoroughly vetted by the United States Supreme Court, which has, except for a brief period, held fast the idea that civil penalties are not criminal and do not trigger the constitutional protections owed to criminal defendants.[16] Under current Supreme Court doctrine, a civil penalty becomes a criminal penalty only if it is "so punitive either in purpose or effect as to negate" its legislative or administrative designation as civil.[17]

The federal government imposes civil penalties in many different areas of public regulation and some can be quite large.[18] This paper will focus on states and municipalities as potential consumers of litigation investment, and states also have the power to impose civil fines, especially in environmen-

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14. *Id.* at 1844 (describing increasing "legislative adoption of punitive civil sanctions" over the Twentieth Century).

15. *See, e.g.*, Timothy Stoltzfus Jost & Sharon L. Davies, *The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement*, 51 ALA. L. REV. 239, 281, 318 n.236 (1999) (reporting on the "the fading difference between criminal and civil law" in the law of civil penalties).

16. "In the seminal but relatively short-lived opinion in *United States v. Halper* [490 U.S. 435, 448 (1989)] the Court placed deterrence with retribution as a form of punishment. When the Court retreated in *Hudson*, civil money penalties moved back across the civil/criminal line." Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 917 n.272 (2012) (citing Hudson v. United States, 522 U.S. 93, 105 (1997)).

17. Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (citing United States v. Ward, 448 U.S. 242, 248–49 (1980)).

18. *See, e.g.*, 29 U.S.C. § 666 (1970) (authorizing the Occupational Safety and Health Administration (OSHA) to impose civil penalties for workplace safety violations); 16 U.S.C. § 2407 (1978) (authorizing the Director of the National Science Foundation to impose penalties for introducing waste into Antarctica); 50 U.S.C. § 1705 (1977) (authorizing the Department of the Treasury to enforce export control restrictions with civil penalties). The federal penalties can be large. For instance, in April 2010, United States Government announced that the National Highway Transportation and Safety Administration would seek a record civil penalty against Toyota for its failure to notify the government of a defective pedal, and Toyota agreed to pay the statutory maximum civil penalty of $16.375 million. *See* Press Release, NHTSA, Toyota Motor Corp. Will Pay $32.45 million in Civil Penalties as Result of Two Department of Transportation Investigations (Dec. 20, 2010), http://www.nhtsa.gov/PR/DOT-216-10.

tal protection, consumer protection, and antitrust.[19] Although the enforcement of state public laws through the imposition of civil fines is a core governmental function, it cannot be assumed that every state has adequate resources to pursue every worthwhile case. To take just one example, a review of the enforcement of mining safety in Utah revealed that the state had reduced its capacity to enforce its own laws to almost zero, which was not the case in other states, such as West Virginia.[20] While politics may have played a role in this abandonment of enforcement, the author of the study observed the obvious, which was that the state wished to avoid the expense of enforcement.[21]

The second reason that a state can sue as a private party is to enforce its rights in private law just like a private citizen. States and municipalities own real property and chattel, make contracts, and suffer property and economic damages just like a private person. And they sue for private law remedies just like private citizens. So, for example, a state can sue for reimbursement for clean up costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[22] A state can sue under the federal antitrust laws for damages to itself as a consumer of a product whose price

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19. Examples of State Attorneys General seeking civil penalties under state law are numerous. A typical case involved the Attorney General of Connecticut settling a consumer protection case with two hotel companies in 2011 for $50,000. *See* Press Release, State of Connecticut Office of the Attorney General, Attorney General Reaches Settlement With Hotels Over Alleged Scheme to Fix Price of Hotel Rooms (Aug. 11, 2011), http://www.ct.gov/ag/lib/ag/press_releases/2011/081111callaround.pdf. They can be quite large. For example, the Missouri Attorney General announced in 2015 that Tyson Foods would pay a total of $540,000 in civil penalties, damages and environmental improvements stemming from a "fish kill" in that state. *See* Michael Skalicky, *Settlement Reached After MO Attorney General Sues Tyson*, KSMU (Jan. 20, 2015), http://ksmu.org/post/settlement-reached-after-mo-attorney-general-sues-tyson.

20. *See* Scott M. Matheson, Jr., *The State of Utah's Role in Coal Mine Safety: Federalism Considerations*, 29 J. LAND RESOURCES & ENVTL. L. 143, 143, 149, 159 (2009).

21. *Id.* at 163.

22. *See* Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 944 F.2d 940, 942 (D.C. Cir. 1991) ("Missouri [along with others] . . . sued Independent Petrochemical to recover its cleanup costs. Independent Petrochemical's potential joint liability is estimated to be at least $96 million.").

had been elevated by illegal conduct.[23] A state can sue for damages resulting from purchasing a pharmaceutical product whose price was inflated due to fraud.[24] In all of these examples, the state sues just as a private citizen would.

The third reason a state can bring a civil lawsuit is on behalf of its citizens. This is known as a "*parens patriae*" claim.[25] This third category of lawsuit must be distinguished from the previous two just discussed. In this third category, the state is not pursuing a civil penalty under its role as enforcer of public law. Nor is it pursuing damages resulting from a breach of a legal duty owed to it by a private party. In a *parens patriae* suit the state is pursuing compensatory damages on behalf of its citizens.[26]

B. Parens Patriae *Litigation*

1. *A History of* Parens Patriae *Litigation*

The Latin translation of "parens patriae" is "parent of the country," and its meaning is loosely connected to the idea that the sovereign of the nation (literally, at one time, the king) could take legal action to protect the interests of the nation.[27]

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23. *See In re* Coordinated Pretrial Proceedings, MDL Docket No. 150 WPG, 1978 U.S. Dist. LEXIS 19940 (C.D. Cal. Jan. 25, 1978).

24. Mississippi sued Eli Lilly for overcharging the State's Medicaid program for damages estimated at between $14.9 million and $122.2 million (depending on the damages methodology accepted by the court). *See* Hood *ex rel.* Mississippi v. Eli Lilly & Co. (*In re* Zyprexa Prods. Liab. Litig.), 671 F. Supp. 2d 397, 428 (E.D.N.Y. 2009). In 2012, drug wholesaler McKesson Corp. settled a Medicaid fraudulent pricing suit with twenty-nine. states and the District of Columbia for $151 million. *See* Gavin Broady, *McKesson To Pay $151M To Settle States' Drug Pricing Claims*, LAW360 (Jul. 27, 2012), http://www.law360.com/articles/364534/mckesson-to-pay-151m-to-settle-states-drug-pricing-claims.

25. *See* Edward Brunet, *Improving Class Action Efficiency by Expanded Use of* Parens Patriae *Suits and Intervention*, 74 TUL. L. REV. 1919 (2000).

26. *See* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 495 (2012).

27. The concept of *parens patriae* authority derives from early English practice, in which the King exercised certain royal prerogatives as "father of the country." *See* Michael Malina & Michael D. Blechman, Parens Patriae *Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U. L. REV. 193, 197 (1970). *See also* George B. Curtis, *The Checkered Career of* Parens Patriae*: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 895 (1976); Lawrence B. Custer, *The Origins of the Doctrine of* Parens Patriae, 27 EMORY L.J. 195, 195–96 (1978).

The modern doctrine of *parens patriae* was developed in a series of cases starting with *Louisiana v. Texas*, which involved an attempt by Louisiana to enjoin an embargo placed by Texas on New Orleans.[28] Louisiana lost that case because it lacked standing, but in dicta the Supreme Court noted that had Louisiana been able to establish a "quasi-sovereign" interest in the injuries suffered by the residents of New Orleans, it could sue under the doctrine of *parens patriae*.[29] In the following century, "a number of decisions expanded the parens scope to include the environment, interstate commerce, and antitrust . . . [but] the outlines of 'quasi-sovereignty' remained blurry."[30]

In 1982, the Supreme Court offered a more rigorous definition of *parens patriae* in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*.[31] The Court noted that the state must have an interest separate from that of the citizens on whose behalf it sues,[32] even though it is suing only for damages or to protect a legal right enjoyed by those citizens. Further, a state has a quasi-sovereign interest only if it can allege an injury to a "sufficiently substantial" segment of its population.[33] According to Margaret Lemos, "*parens patriae* authority will lie if the state acts on behalf of 'its residents in general' rather than 'particular individuals,' and asserts a 'general interest' in the welfare of its citizens of the sort that a state might try 'to address through its sovereign lawmaking powers.'"[34] Lemos' interpretation of the Court in *Snapp* suggests that a state can step in and seek redress for it citizens where (a) a significant portion of the state's citizens have suffered a private law wrong and (b) the remedy sought by the state is of the sort that the state could have pursued on behalf of its citizens through an exercise its own police powers. Of course, this is a very open-ended definition, especially if the criteria for (a) is not a simple matter of numerosity, but could depend on the significance of the interests held by the citizens who have been wronged. After all,

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28. 176 U.S. 1 (1900).

29. *Id.* at 19, 22, 26 (Brown, J., concurring).

30. Jack Ratliff, Parens Patriae*: An Overview*, 74 TUL. L. REV. 1847, 1851–52 (2000).

31. 458 U.S. 592 (1982).

32. *Id.* at 607.

33. *Id.*

34. Lemos, *supra* note 26, at 495 (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982)).

nothing in the case law up to *Snapp*—and since—has suggested that a state has a quasi-sovereign interest only if a majority or even a significant plurality of its citizens suffer the same wrong.[35]

Modern *parens patriae* litigation reached a new level of significance with the third wave of tobacco litigation brought in the 1990s. The theories brought against the industry were diverse, but one approach in particular emerged as the most effective—the states (and later the federal government) suing the industry.[36] While some, including myself, have expressed skepticism of the legal theories that were brought, it is clear that the enormous success of the states' tobacco litigation made *parens patriae* more than a legal curiosity.[37] After all, the tobacco industry's individual state settlement and the Master Settlement Agreement totaled approximately $250 billion.[38] While not all the states used *parens patriae* as the frame for their actions, some of the most important in the litigation, such as Louisiana and Texas, did.[39]

2. Parens Patriae *Litigation Today*

Since the tobacco litigation, new opportunities and new reasons for adopting *parens patriae* have emerged.[40] *Parens pa-*

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35. Brunet, *supra* note 25, at 1922 (comparing *parens patriae* to class actions and noting that both need only cover a "large group of people").

36. *See* Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, *in* REGULATING TOBACCO 176–206 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

37. *See* Anthony J. Sebok, *Pretext, Transparency, and Motive in Mass Restitution Litigation*, 57 VAND. L. REV. 2177, 2195–2205 (2004); Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847 (1999).

38. *See* W. Kip Viscusi, *The Governmental Composition of the Insurance Costs of Smoking*, 42 J.L. & ECON. 575, 577 (1999) (stating that four states settled for approximately $36.8 billion and the remaining states forty-six states settled for approximately $206 billion through the MSA for a total of approximately $243 billion).

39. *See* Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 TUL. L. REV. 1859, 1862 (2000) ("Louisiana's trial team developed the theory of *parens patriae*, as applied to the tobacco litigation, to a degree beyond that of any other state."); Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 962 (E.D. Tex. 1997).

40. "Because of the perceived successful settlement of the state *parens patriae* tobacco cases, states have brought *parens patriae* suits against entire in-

triae has always been a popular tool for State Attorneys General in antitrust.[41] This is because in 1979 Congress amended federal antitrust law to authorize the attorney general of any state to bring a civil antitrust action in the name of the state "as *parens patriae* on behalf of natural persons residing in such State."[42] As Lemos has noted, while *parens patriae* has enjoyed an increase in visibility due to its creative use in the tobacco litigation, its true potential may lie in the fact that so many federal and state laws now explicitly authorize State Attorneys General to bring *parens patriae* actions on behalf of their citizens: In "the majority of cases . . . the state's litigation authority derives not from the common law doctrine of *parens patriae* but from state or federal statutes that explicitly authorize the Attorney General to sue on behalf of the state's citizens to redress particular wrongs."[43]

Finally, in addition to the convergence of attention on *parens patriae* drawn from the common law and statutory bases for these actions, *parens patriae* has become more attractive relative to other tools typically available to protect a state's citizens. Not only is *parens patriae* attractive relative to other tools available to state actors, but it is increasingly more attractive than the chief tool available to private lawyers, the class action.[44] As Gary Friedman and Myriam Gilles have observed, in a world where mass consumer litigation is becoming more difficult, the *parens patriae* action is still a viable option that can survive the doctrinal assault that has brought down class actions and class arbitration.[45] Friedman and Gilles argue that *parens patriae* actions could be used to protect consumers who have been hit by a double whammy. The current Supreme Court's doctrine on class certification cannot touch *parens patriae* actions, which are not class actions, and the Court's new

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dustries, including guns, lead paint, and more recently, health maintenance organizations." Brunet, *supra* note 25, at 1921.

41. *See* Susan Beth Farmer, *More Lessons from the Laboratories:* Cy Pres *Distributions in* Parens Patriae *Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361 (1999).

42. *Id.* at 380 (quoting 15 U.S.C. 15c(a)(1)).

43. Lemos, *supra* note 26, at 495.

44. On the advantages of *parens patriae* to other forms of public litigation available to Attorneys General, see Ieyoub & Eisenberg, *supra* note 39, at 1875–79.

45. *See* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623 (2012).

doctrine on class arbitration waivers cannot touch *parens patriae* actions either, since so far, the Court has not held that the Federal Arbitration Act preempts the power of a State Attorney General to pursue a quasi-sovereign interest.[46]

II.
Public Litigation and Litigation Investment

A. *Attorneys General and the Funding Gap*

Regardless of which type of public litigation an Attorney General pursues, she could, in theory, contract with a litigation investment provider. The economic logic is clear: all litigation consumes resources, and public law departments are resource constrained. While this has always been true, the significance of this fact became central to the political controversy that followed the success of the tobacco litigation. Professor David Wilkins has done as good a job as anyone in describing the unique challenge facing the states that took on the tobacco industry (especially the first states):

> [M]ost of the consumer, environmental, and regulatory actions brought by states in recent years involve large companies accused of causing widespread harm. As a result, the defendants in these cases have deep pockets and are capable of hiring the best legal talent money can buy to wear down their opponents, even when that opponent is the state. As [the Attorney General of Michigan] was quick to point out in the opening section of his brief in opposition to the Tobacco defendants' efforts to disqualify the private Attorneys he brought in to prosecute the case, "it is no secret that the Defendants have mustered an army of the nation's largest law firms, which include hundreds of attorneys, to fight a scorched-earth war."[47]

As Wilkins noted, the challenge faced by governments was not just getting lawyers as good or better than the private firms against whom they litigated (which explains why the United

46. *Id. at* 660 (asserting that State Attorneys General can and should "fill the void left by class actions" because "*parens patriae* suits are not subject to Rule 23 or contractual waiver provisions, and so avoid the majority of impediments to contemporary class actions").

47. David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General*, 2010 Mich. St. L. Rev. 423, 431.

States government hired David Boies to lead its antitrust suit against Microsoft) but, in addition to hiring excellent outside legal talent, these cases require extraordinary resources (regardless of whether they involve outside counsel, additional government lawyers, or some combination of the two).[48] For this reason, "financial considerations . . . pushed states to favor hiring these experienced lawyers on some form of a contingent fee."[49] And Wilkins only sees these pressures increasing: "Given both shrinking state budgets and the growing list of potential big-ticket claims involving alleged harms to consumers or the environment, the number of Attorneys General seeking to create [contingency fee] arrangements of this kind will, in all likelihood, only increase."[50]

Friedman and Gilles agree with Wilkins. They write that, "[Attorneys General] generally lack the resources to take the laboring oar on many of the large-scale cases that have traditionally been the province of the class action plaintiffs' bar. . . . it is unrealistic to expect state [Attorneys General] to step into the breach with their own resources."[51] The saga of the Attorney General of Louisiana, Buddy Caldwell, is a good illustration of how the public lawyers confront their financial challenges. In the wake of the BP Gulf oil spill, Caldwell asked the Louisiana legislature for $27 million to prepare for litigation on behalf of the State.[52] Caldwell lamented that his office was understaffed, and noted that his office had just one full-time environmental lawyer.[53] Caldwell warned that he was outgun-

48. *Id.* at 432.

49. *Id.*

50. *Id.* at 427.

51. Gilles & Friedman, *supra* note 45 at 668–69. This observation is confirmed by anecdotal evidence from the tobacco litigation. *See, e.g.*, Phil Brinkman, *Legal Bill Won't Affect State Much: Although the Contract Was with the State, the Issue Is Really Between the Lawyers and the Tobacco Industry*, WIS. ST. J., Mar. 21, 1999, at A1 (explaining Attorney General Doyle's defense of his use of contingency fee lawyers that "there was little enthusiasm among legislators to spend state money on a lawsuit that some felt shouldn't have been brought and others felt couldn't be won" and that the governor had refused a funding request for all additional government employees to prosecute the litigation).

52. Bill Barrow, *Attorney General Seeks Cash, Power to Hire Outside Lawyers in Fight Against Gulf Oil Spill*, TIMES-PICAYUNE (New Orleans), May 31, 2010, *http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/attorney_general_seeks_cash_po.html.*

53. *Id.*

ned: "You've got to hire experts now. . . . And BP is already out there trying to hire some of the same experts. (And) you've got to get the best lawyers. They're going to have lawyers that charge $1000 an hour. I want something close to a level playing field."[54]

B. *The Backlash Against Public Litigation by Contingent Fee*

For many, such as Friedman & Gilles as well as Wilkins, the obvious solution is that public litigation be done by outside counsel working on a contingent fee.[55] Ever since the tobacco litigation there has been a concerted political effort to limit Attorneys General ability to fund public litigation by contingent fees with outside counsel and this effort has resulted in significant legislative reforms. For example, in response to Caldwell's efforts to evade existing limitations on the use of private contingent fee attorneys in the Gulf oil spill litigation described above, Louisiana Governor Jindal spearheaded an effort to sharply limit the Attorney General's power to hire outside firms on a contingent basis.[56] Given that the Attorney General was reported to have used contingent fee attorneys in 432 cases during his tenure, the new law should have a significant effect on ability to bring public litigation in the future.[57]

The political backlash against the use of contingent fee attorneys is significant.[58] The United States Chamber of Commerce has urged the limitation or elimination of the use of contingency fee contracts by State Attorneys General.[59] The

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54. *Id.*

55. Gilles & Friedman, *supra* note 45, at 669 ("[T]here is little to stop state [Attorneys General] from engaging private law firms on a contingent fee basis to pursue claims in *parens patriae* on behalf of injured state residents.").

56. Kyle Barnett, *Jindal Signs Bill Limiting Attorney General's Use of Contingency Fee Attorneys*, LA. RECORD, June 24, 2014, *http://louisianarecord.com/stories/510584811-jindal-signs-bill-limiting-attorney-general-rsquo-s-use-of-contingency-fee-attorneys*.

57. *Id.*

58. For early criticism in the media, *see* Editorial, *The Pay-to-Sue Business,* WALL ST. J., Apr. 16, 2009, at A14; Andrew Spiropoulos, Op-ed, *Today's Issue: Oklahoma Judicial System; New Attorney General Model Harms State,* OKLAHOMAN, July 8, 2007, at 17A; Editorial, *Prosecution for Profit*, WALL ST. J., JULY 5, 2007 at A12.

59. For a review of its position, *see* U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, PRIVATIZING PUBLIC ENFORCEMENT: THE LEGAL, ETHICAL

main tool (other than direct political pressure)[60] has been the passage of one of two legislative reforms, either the Private Attorney Retention Sunshine Act (PARSA) or a law called the Transparency in Private Attorney Contracting (TiPAC).[61] These laws generally mandate competitive bidding, reporting of attorney hours and expenses incurred, and a breakdown of the corresponding hourly rate. PARSA generally requires legislative oversight or approval for contracts over $1 million (or with a value that reasonably is expected to exceed that amount) and prohibits the state from paying fees of more than $1000 per hour when the total fee recovery is divided by the number of hours actually worked. TiPAC laws generally require the Attorney General to issue a finding that a contingency-fee agreement is in the best interest of the state, and that contracts and fee payments be publicly posted on the Attorney General's website. TiPAC laws also generally place caps on the total fees outside counsel can receive, whether as a percentage of the recovery or a cumulative cap.[62] According to the New York Times, as of 2014, fourteen states had adopted one or another version of these model laws.[63]

The political backlash has been assisted by both eye-opening press reports of high fees and cozy relations between the contingency fee firms hired by the Attorneys General and serious academic criticism of the practice. Many of the most inflammatory news reports came out of the tobacco litigation, such as the case of the Texas attorney who received $260 million in contingent fees for what appeared to be almost no

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AND DUE-PROCESS IMPLICATIONS OF CONTINGENCY-FEE ARRANGEMENTS IN THE PUBLIC SECTOR (2013), *http://www.instituteforlegalreform.com/uploads/sites/1/PublicInterestPrivateProfit_FINAL.pdf*.

60. Perhaps the best example of political shaming against contingency-fee arrangements occurred in 2007, when President Bush issued an executive order banning the federal government from paying lawyers a contingency fee. *See* Protecting American Taxpayers From Payment of Contingency Fees, Exec. Order No. 13,433, 72 Fed. Reg. 28441 (May 16, 2007). This prohibition stated that the "policy of the United States" is that the fees of lawyers representing the [federal] government should never be "contingent upon the outcome of litigation." *Id.*

61. *Id.* at 7.

62. *Id.*

63. Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. TIMES, Dec. 14, 2014, *http://www.nytimes.com/2014/12/19/ us/politics/lawyers-create-big-paydays-by-coaxing-attorneys-general-to-sue-.html.*

work.[64] But there have also been some serious questions raised by legal academics about whether the use of contingent fee attorneys in public litigation reproduces some of the same agency problems found in the use of contingent fee attorneys in class actions.[65]

C. *How Litigation Investment in Public Litigation Could Work*

There are two sides to litigation investment in public litigation. The first is the "demand" side: Can public lawyers, such as Attorneys General, use the funding? The second is the "supply" side: Would litigation investment firms want to invest in public litigation?

1. *Can the State Sell a Piece of Litigation?*

Under at least one conception of litigation investment, the transaction involves the sale of a portion of a contingent recovery by a layperson to another layperson.[66] The fact that the sale is between a state or municipality and a layperson should make no difference, as long as the agent of the state (the Attorney General) has authority to make the transaction. States and municipalities sell assets and borrow all the time; nothing turns on whether the sale or borrowing is in order to support litigation, unless there is a specific limitation imposed by state law on doing just that.

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64. *See* Barry Meier & Richard A. Oppel, Jr., *States' Big Suits against Industry Bring Battle on Contingency Fees*, N.Y.TIMES, OCT. 15, 1999, at A1.

> The staggering fees prompted public uproar, particularly in Texas, where one lawyer, Marc D. Murr of Houston, who appeared to play little role in the litigation, sought $260 million in fees. Faced by a state investigation, Mr. Murr, whose request was supported by the former Texas Attorney General who hired him, backed down.

65. *See, e.g.,* David A. Dana, *Public Interest and Private Lawyers: Toward Normative Evaluation of* Parens Patriae *Litigation By Contingent Fee*, 51 DEPAUL L. REV. 315, (2001); John C. Coffee, Jr., *"When Smoke Gets in Your Eyes": Myth and Reality About the Synthesis of Private Counsel and Public Client,* 51 DEPAUL L. REV. 241 (2001).

66. *See* Anthony J. Sebok, *Betting On Tort Suits After The Event: From Champerty To Insurance*, 60 DEPAUL L. REV. 453, 453 (2011) ("Technically speaking, the bargain struck between two parties in champerty is not an assignment. It is the partial assignment of the proceeds of litigation in which the property interest of the funder is by definition contingent on an uncertain event happening in the future—that is, the positive resolution of a lawsuit by either judgment or settlement.").

It is important to recall why a state actor would want to use litigation investment. Litigation investment has to be compared against the alternatives available to the state. The alternatives are: foregoing promising litigation, asking for a special appropriation from the state legislature, borrowing (assuming that the legal officer had the power to do so) and using a contingent fee attorney. The advantages of litigation investment over each of these is obvious, but special mention should be made of the advantages of litigation investment over a contingent fee arrangement with private attorneys.

There are four advantages. First, through litigation investment a public lawyer can separate personnel costs from expenses. While it may be the case that an Attorney General can staff a case with career public servants, it may be the case that she lacks the budget for unusual expenses, such as scientific experts and forensic economists. These expenses often drive up the cost of class action litigation, and it may be the case that the Attorney General wants access to capital only for these, and not also for the cost of legal personnel.[67] Second, it may be the case that litigation investment will cost less than a contingent fee arrangement with a private attorney. There is no a priori way to know in advance whether the plaintiff lawyer's contingent fee, which is based on a percentage of the total recovery, will be more than the rate charged by a commercial litigation funder, but there is some reason to believe that the funder would charge less.[68] Third, litigation funding allows the state to get exactly the lawyer it wants, and not the lawyer who can provide it with funding its lawsuit. It is well known that an important and valid function of certain mass tort firms is that they act as capital providers, or "banks."[69] There is no

67. It may be useful to take *American Express, Co. v. Italian Colors Restaurant* as an example of the prohibitive effects of expert costs in the sort of antitrust suit a state might wish to bring. 133 S. Ct. 2304 (2011). The suit was initiated by a number of small business merchants alleging antitrust violations regarding charge and credit card fees. The costs of an expert economic analysis for any individual plaintiff—which was necessary to prevail in arbitration—would have cost at least several hundred thousand dollars, and might have exceeded $1 million. *Id.* at 2316 (Kagan, J., dissenting).

68. The pricing of litigation funding is complicated and depends on many variables. *See* Maya Steinitz, *How Much is That Lawsuit in the Window? Pricing Legal Claims,* 66 VAND. L. REV. 1889 (2013).

69. *See, e.g.,* Paula Batt Wilson, Note, *Attorney Investment in Class Action Litigation: The Agent Orange Example,* 45 CASE W. RES. L. REV. 291 (1994).

reason why the mass tort firms that are in the best position to bankroll a large case are the best firms to litigate that case (although sometimes the two virtues can be found in the same firm). A claimholder like a state might prefer to get its capital from a non-lawyer capital provider and hire a specialist law firm on an hourly rate basis (or a retainer). The specialist law firm—especially in areas like environment law or consumer law—may not have the same capital structure as a large mass tort firm, but it may be the firm best suited to the case. Fourth, and finally, by taking litigation investment, the public lawyer separates the capital provider from the conduct of the litigation, and thereby eliminates some of the agency problems that have been made of the practice of allowing contingent fee firms contracting with Attorneys General.[70] The point here is separate from either the separation of powers or corruption critiques of contingent fee lawyers contracting with Attorneys General, which, if valid, concern the political legitimacy of third-party funding of public litigation in general.[71] The point here is that contingent fee attorneys simply bring a different "mind-set" to the litigation they handle than public lawyers.[72] This is not to say that the former are professionally or morally compromised compared to the latter, but only that "investment-based litigation decisions do not always correspond to the decisions that government officials would make as a matter of policy or politics."[73] The advantage to litigation investment is that, even if the public lawyer were to hire an outside lawyer (like David Boies in the Justice Department's Microsoft case), the chain of authority would be kept very clear: the client re-

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70. *See* Dana, *supra* note 65, *at* 324–25 ("Retention of outside contingency counsel by [Attorneys General] creates the possibility for a second-order agency problem. Even when the Attorney General is a faithful agent of the public interest, the contingency fee lawyers may not be faithful agents of the public-regarding Attorney General.").

71. *See* Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77, 80 (2010); Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. Rev. 913 (2008).

72. Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs' Attorneys in Municipal Gun Litigation*, *in* Suing The Gun Industry: A Battle At The Crossroads Of Gun Control And Mass Torts 129, 147 (Timothy D. Lytton, ed., 2005).

73. *Id.*

mains in charge, especially if the investment is used only for expenses.[74]

2. *Would a Litigation Funder Buy a Piece of Public Litigation?*

There is no a priori reason why a lawsuit that would have been attractive to a funder had the plaintiff been a private party should be less attractive just because the plaintiff is a state or a municipality. That is, all things being equal, the economics of a *parens patriae* suit for antitrust injuries will be just as attractive as an antitrust suit brought on behalf of a commercial plaintiff.

A litigation investment firm may not want to invest in public litigation if the investment decision entails a degree of unwelcome publicity not found in private litigation investment. The risk of publicity might arise from the PARSA and TiPAC laws passed by tort reformers in response to the rise of contingent fee firms contracting with Attorneys General, but it is not clear first, whether these laws even apply to third-party funding. Mississippi's TiPAC law specifically applies only to contracts between the State and "outside counsel."[75] Litigation investors are not lawyers; they are not counsel. Even if these laws did apply, or were amended to apply, to litigation investors, the only risk to them would come from their "sunshine" provisions, since these laws mandate open and public bidding and disclosure of all contracts.[76] While this may create an extra

74. This assumes that the litigation investor does not retain control over critical aspects of the litigation. For a variety of reasons, given that settlement control is difficult to secure even in private litigation funding, loss of control in public litigation is very unlikely to occur. *See* Sebok, *Should the Law Perserve Party Control?*, *supra* note 5.

75. Miss. Code Ann. § 7-5-8 ("Contingent fee contracts with outside counsel").

76. Disclosure of the identity of the investors may be inevitable, since state procurement law may also apply to the retention of outside counsel. These laws typically mandate a bidding process for public contracts with outside vendors and set forth minimum criteria for working with the state. These laws often impose a minimum number of bids that must be submitted, and require contractors to be bonded and/or be free from any conflicts of interest with the state. Further, many state laws require a specific appropriation or approval from the legislature for contracts over a certain value (e.g., if the expected recovery is more than $100,000). While some of these laws may exempt contracts for professional services, such as legal work, others may apply to contracts with attorneys or otherwise may be silent on the issue. *See, e.g.*, Ariz. Rev. Stat. § 41-2538; S.C. Code Ann. § 11-35-1260.

burden on litigation investors that does not exist in private litigation investment, it is not clear that it creates a serious disincentive to investment.

One major difference between contingent fee firms and litigation investment firms investing in public litigation is the question of privilege. Contingent fee firms, by definition are covered by the attorney–client privilege, whereas litigation investment firms are not.[77] The question, then, is whether a public lawyer, such as an Attorney General, waives the privilege if she shows privileged material to a litigation investor in order to obtain funding (or to keep the funder apprised of progress in the case after funding). This is an important question, and the analysis of this risk is the same for litigation investment in private as well as public litigation.[78] Investment in public litigation by contingent fee lawyers has an advantage over litigation investment by third parties in this one way: there is no risk of waiver of privilege.

CONCLUSION

Litigation investment in private litigation is growing at an unprecedented rate, and, despite threats of regulation at both the state and federal level, it has the potential to significantly alter the calculation that private actors—especially business plaintiffs—make when deciding if and how to litigate.[79] This article has argued that the same economic logic that is driving the growth of litigation investment by private actors can and may operate on public actors as well. Further, compared to the prevalent model of introducing private capital into public litigation—outsourcing public litigation to private sector contingent fee attorneys—public litigation investment has certain ad-

77. *See generally* Grace M. Giesel, *Alternative Litigation Finance and the Attorney-Client Privilege*, 92 DENV. U. L. REV. 95 (2014).

78. The leading decision analyzing the waiver of privilege in the context of private litigation investment is *Miller UK Ltd. v. Caterpillar, Inc.,* 17 F. Supp. 3d 711 (N.D. Ill. 2014).

79. *See* Julie Triedman, *Arms Race: Law Firms and the Litigation Funding Boom*, AM. LAWYER (Dec. 30, 2015), http://www.americanlawyer.com/id=1202745121381/Arms-Race-Law-Firms-and-the-Litigation-Funding-Boom#ixzz3yM0D7u2v ("[T]he nascent commercial litigation finance industry [is] flexing its financial muscle in unprecedented ways. Investor money is pouring into funders' coffers, drawn by better-than-private-equity returns unlinked to the economy.").

vantages that make it more attractive than the alternatives (which include, of course, foregoing specific promising public litigation for lack of funds). It will be interesting to see whether the promise of public litigation investment will be realized in the marketplace and, if it is, whether it will generate political response on the part of those who are programmatically opposed to all forms of litigation investment.[80]

80. *See, e.g.*, U.S. Chamber Inst. for Legal Reform, Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States 8 (2009), http://perma.cc/3S5J-59JR; *Public Policy Implications of Lawsuit Lending and Its Effects on the Civil Justice System: Hearing Before the H. Comm. on Judiciary & Civil Jurisprudence*, 2012 Leg., 82d Sess. (Tex. 2012) (testimony of John H. Beisner, Skadden, Arps, Slate, Meagher & Flom LLP on behalf of the U.S. Chamber Institute for Legal Reform). *See also* Thurbert Baker, *Paying to Play: Inside The Ethics and Implications of Third-Party Litigation Funding*, 23 WIDENER L.J. 229, 232 (2013) (State Attorneys General need to recognize "the anti-consumer nature of these financial products").