

Entrepreneurial Litigation Financing

This month's article provides an overview of available resources for entrepreneurial litigation financing.

Once upon a time, there was a staid and largely predictable environment in which much of litigation was

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"local," and litigation was dominated by well-capitalized individuals or businesses usually able to outspend and

thereby outmuscle opponents lacking large pools of financial or intellectual capital. See generally, Stephen C. Yeazell, "Re-Financing Civil Litigation" (2001) 51 DePaul Rev. 183 (article surveys the rise of tort litigation since the early 1900s and describes the development of intellectual and financial capital in litigation). That staid and predictable environment, however, is now long gone.

Today, litigation has evolved into its own industry backed by large and growing pools of intellectual and financial capital. Indeed, litigation and law firm financial structures are in the midst of profound changes as nations around the world subject the practice of law to competitive economic forces and break down barriers to entry into the business of law. See generally, Terry, Laurel S., *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as 'Service Providers.'* Journal of Professional Lawyer, Vol. 2008, p. 189, 2008. Available at SSRN: <http://ssrn.com/abstract=1304172>.

Global Deployment of Intellectual Capital

One aspect of entrepreneurial litigation financing arises from creating intellectual capital through expertise in types of claims (e.g., medical malpractice, securities class actions) or through bringing repetitive claims against a company or an industry (e.g., drug cases, dust disease cases). The development of this type of capital is not new as it has been going on "locally" for many years. The new aspect today is that lawyers and others are

leveraging the intellectual capital by expanding globally. Thus, American plaintiff's firms now have global sets of offices and/or affiliates capable of litigating. For example, Southern Illinois plaintiff's law firm SimmonsCooper now has offices in both Nigeria and India.

Capital Market Funding for Litigation

The more significant story right now is the significant pool of entrepreneurial money available to fund litigation, thus fostering prosecution of claims that otherwise might not be brought for lack of money. Money to fund litigation is now available in many ways.

For one, there is capital market funding. Thus, an Australian law firm that represents bodily injury claimants, Slater & Gordon, undertook an IPO to raise cash and later used some of the funds to acquire other plaintiff law firms. The capital market also has been tapped through a public company listed on the UK's AIM exchange. Its sole business is funding litigation. <http://imlitigationfunding.co.uk>. Thus, the stock markets are now available to raise money to fund litigation.

Private Funders of Litigation

Litigation financing also is available from groups of private financial investors, including hedge funds. These funders in general consist of groups with ample cash who seek above market returns based on careful assessment of litigation risks and probabilities. According to conversations with some of these funders, the general rule is that a claim needs to involve at least \$1 million in order to justify a funder's involvement in any form of protracted proceedings. Smaller claims may be funded when the certainty of success is quite high (e.g., judgment already obtained and capital is sought to fund enforcement in the EU).

The litigation funding business does not yet seem to have developed a formal trade association. However, UK law firm Herbert Smith hosted a 15 November 2008

conference on UK litigation funding, including funding of the "costs" recoverable in UK litigation. See <http://www.legalsupportnetwork.co.uk/news/newsview.asp?n=1975>.

Example of Claim Funding

The website of one litigation funder, www.calunius.com, includes an interesting October 2008 press release that includes the following statements regarding a recent litigation funding investment. Its words probably illustrate the types of press releases that will become more and more frequent.

"Addleshaw Goddard has joined forces with a host of top names in the litigation funding market to launch a £50m action on behalf of a group of claimants against a London law firm.

Addleshaw and three funders have signed up around 500 individuals to bring the claim against the law firm and a foreign business national over advice they gave on technology investment schemes, which they claim were unsuccessful.

The group action, which is still to be filed, is being funded through a groundbreaking financial litigation package combining conditional fee agreements, after-the-event insurance (ATE) and third-party funding.

Brokers Calunius Capital and The Judge arranged the package which is provided by Allianz ProzessFinanz, QBE and Brit Insurance.

It is thought that the ATE package, which stands at around £10m, is one of the largest to date in the London insurance market.

The group allege that the foreign national and a former partner at the law firm are jointly liable for their role in the formation and administration of a number of technology investment schemes between 2002 and 2005.

Legal Week has not published the names of the prospective defendants as a claim form has not yet been issued.

Addleshaw' team is being led by disputes partner Michael Green with Four New Square's John Powell QC instructed as counsel. The law firm has instructed Beachcroft insurance partner Julian Miller.

Green said: '[This] is a significant milestone in securing redress for our clients, in that the funders' and ATE insurers' due diligence and decision to invest in the case represents an independent verification of the merits of the

investors' claims. This is a powerful message for any funded claimant to send to any defendant and its insurers.'

Mick Smith, one of Calunius' founders, commented: 'To close this deal in the last few weeks when most financial markets have seized up is another positive step for litigation funding.'

More Specifics on the Changes

Much more detailed information and analysis is available. Professor Laurel S. Terry of Penn State Dickinson School of Law has been following and describing the regulatory changes for several years. Her personal webpage identifies her background and many helpful articles. <http://www.personal.psu.edu/faculty/l/s/lst3>. A comprehensive new article by Professor Terry provides a good starting point for thinking about what the litigation industry will look like in the years ahead. See Terry, Laurel S., The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers." *Journal of Professional Lawyer*, Vol. 2008, p. 189, 2008. Available at SSRN: <http://ssrn.com/abstract=1304172>.

Conclusion

Litigation funding is here to stay, and no doubt will become more common, as well as evolving into new forms and larger pools.

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