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Use Of 3rd-Party Litigation Financing By Cos. Likely To Grow

By **Michele Gorman**

Law360, New York (September 18, 2019, 2:56 PM EDT) -- There will be a coming "explosive growth" in the use of commercial litigation finance by companies, not just to fund litigation but also to monetize claims, a panel of experts predicted Wednesday.

At the opening session of the second annual Litigation Finance Dealmakers Forum in Manhattan, discussion was largely focused on the increasing role of financing and funding as a driver of growth in the market.

"We've seen over the last year in particular ... a growing interest among companies of all types, including the Fortune 50, to exploring how litigation finance might help their day-to-day practices," said panelist Michael Nicolas, co-founder and managing director of Longford Capital Management LP. "Companies have all different types of objectives when considering working with a funder."

The panel acknowledged that one of the challenges to the growth is clearing the hurdle of cultural acceptance.

"Part of it is changing the thinking within a company. It's thinking of legal claims as assets," Nicolas said. "I think that cultural shift takes time and that, as we've seen, it's a long conversation that has to work its way up through the [general counsel]'s office, to the [chief financial officer], to the CEO."

Law360 has recently reported that third-party litigation and arbitration funding has become increasingly attractive for lawyers who have grown weary of the billable hour, because it allows them to draw on their experience while challenging them to ensure a funded claim will be a good investment.

But it hasn't all been smooth sailing. In August, litigation finance firm Burford Capital Ltd. was accused in a putative class action of manipulating its metrics to paint a "misleading picture" for investors while neglecting to mention that the company is "already arguably insolvent."

At the conference Wednesday, the panelists said the process they're undertaking with companies is not unlike the experience they've had with law firms. On the firm side, there has been a significant increase in seeking funding on two levels: for individual cases and for portfolio funding, Nicolas said.

A portfolio arrangement uses cross-collateralization, meaning that instead of realizing returns from each individual case, the funder's return depends on the performance of the cases as a whole. It's a tool funders use with both companies and law firms.

Nicolas said his company has been involved in portfolio transactions with AmLaw 200 firms, as well as boutique trial litigation shops.

"[There's] an ever-growing acceptance within firms of all sizes that litigation funding is here, it's here to stay, and it can be an important part of a firm's practice," Nicolas said. "It also, frankly, is what clients are demanding more and more as time goes on."

Panelist David Gallagher, co-head of litigation investing at technology and investment firm D.E. Shaw Group, agreed, adding that firms are becoming more knowledgeable and sophisticated with litigation funding, increasingly explaining it from their own perspective rather than hearing about it for the first time.

Gallagher said he has also seen firms entertain offers from funders as a source of leverage in settlement negotiations.

"We've been involved in some processes that fit that description where ultimately the firms and the clients didn't take funding at all, the cases got resolved," he said.

The enhanced understanding of commercial litigation finance and its benefits at firms is largely driving the growth of its overall use, Nicolas said, adding that the conversations about litigation finance are much different than they were five years ago, when firms were asking questions such as how to use litigation funding. Now, he said, most of the firms he speaks with are familiar with it.

To firm leaders who ask Nicolas if they're behind their competitors in using commercial litigation finance, he said he often responds, "If you're asking me the question, you probably are."

A survey of in-house and private firm lawyers published in October by Burford showed a spike in the use of third-party litigation funding and plenty of organizations forgoing worthy claims in the face of big legal bills. In its annual survey, Burford said more than 1 in 3 interviewees indicated that their organizations had used litigation financing — a massive jump from 10% six years ago.

Speaking to the subject matter and the types of cases he sees, Nicolas mentioned that the company focuses on "the things that we know, and avoid[s] the things we don't," looking at commercial and intellectual property cases as well as antitrust and trade regulation claims and international arbitration.

Another panelist, Fred Fabricant, a partner at Brown Rudnick LLP, acknowledged that increasing competition has offered the ability for more proposals to test the market and that building a positive, solid relationship between the client and litigation funder is critical to success.

"It's a partnership, and I think the way people look at it after they've been through war — and it's war for 20 months going to battle — after that battle has concluded, they go back to that relationship," he said.

In the relationships, he added, it's key to have a funder who won't "run for the hills every time there's some kind of an adverse event" in litigation.

--Additional reporting by Caroline Simson, Hailey Konnath and Andrew Strickler. Editing by Alanna Weissman.