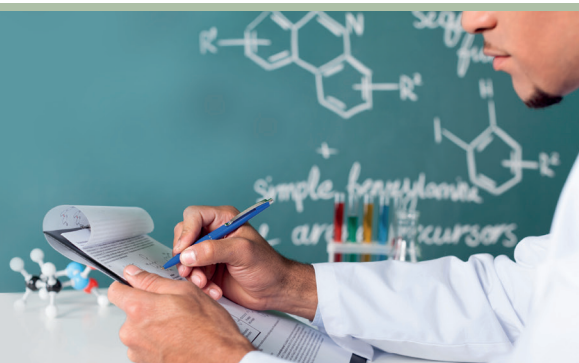


The funding factor

Will 2018 be the year litigation funding becomes part of the legal team's toolkit? **Cindy S Ahn** examines



The year 2017 closed with all eyes in biotech and pharmaceutical law trained intently on the *inter partes* review (IPR) process. Highlighted by a battle over a blockbuster eye treatment (Allergan's Restasis) and culminating with December arguments before the Supreme Court of the US, the IPR saga seemed certain to continue dominating headlines and conversation well into 2018.

But whether or not IPRs survive constitutional scrutiny, the broader current they represent is sure to keep flowing. General counsel in biotech legal departments are eagerly hunting for innovative ways to manage costs without foregoing opportunities to seize or protect market share. Whatever happens with IPRs, the drive for innovation in corporate legal departments will roll on, and likely accelerate, in 2018.

This innovation will occur on both sides of the industry. Generic drug makers will continue seeking new ways to pursue what IPRs represent – swift resolution of IP matters at a reduced cost. And big-pharma legal departments will be focused on finding new ways to create value for their companies and their shareholders.

From either perspective, the imperative is to curtail the growth and impact of legal costs, – without inhibiting the business's ability to pursue meritorious claims using the most capable attorneys.

Awash in legal costs

No industry in the US had a higher legal spend in 2017 than pharmaceutical, biotech and life sciences, according to a survey from the Corporate Legal Operations Consortium (CLOC).¹ On average, firms in these industries spent almost 2.5% of revenue on internal and external legal services. For large pharmaceutical companies that post \$20bn to \$50bn in annual revenues, this translates into a whopping \$500m to \$1bn in legal costs. In comparison, the industry with the next-highest legal spend, entertainment and media, legal costs accounted for just under 1.5% of revenue.

And there's no reason to believe those costs will be going down: the global biotech market, currently worth some \$370bn,² is

expected to nearly double in size by 2025. Regardless of how a company fits into the biotech ecosystem, the pressure on in-house counsel to pursue, protect or attack patents has never been greater.

The case for innovation

In this environment, every biotech company must have proactive patent strategies – be they offensive or defensive – and correspondingly robust legal resources to keep up with the caseload. Given the tremendous legal burden on pharma and biotech companies, there is a pressing need for non-traditional methods to wage aggressive campaigns in the legal arena without constantly expanding legal departments or budgets.

That's why I believe 2018 will see a rapid and widespread increase in the use of litigation finance in the pharma and biotech space. In many industries, litigation finance is already becoming a commonplace tool, especially among progressive general counsel seeking to convert their legal departments from cost centres to value-generation engines.

Litigation finance allows those general counsel to aggressively pursue claims they believe are meritorious, using the outside lawyers of their choice, without incurring the associated litigation costs.

A recent study³ by ALM Media found that 36% of law firms used litigation finance in 2017, compared with 28% at the previous year and only 7% in 2013. As that growth coincides with a steady increase in IPR filings, litigation finance around pharma patents will allow firms of all sizes to stay competitive on the IP front.

Crucially, litigation finance would provide general counsel with choices that may have previously been closed to them because of costs considerations – including the choice to pursue legal action and choice of counsel. Litigation finance would allow smaller companies to hire the lawyers with experience and skill equal to those deployed by their bigger competitors, so that cases are decided on merit rather than resources.

And it's not only the smaller players that would benefit. Litigation finance gives large-cap general counsel a tool to prosecute patent

violations based on merit rather than on cost-benefit analyses. During a time when big pharma is already facing patent cliffs and a decline in R&D productivity, a barrage of patent challenges can be a drain on legal budgets. If any industry should be availing itself of every potential method to drive efficiency in legal costs in 2018, it is pharmaceuticals.

Widespread adoption of litigation finance would also counteract market forces that are pushing companies of every size to hire law firms based on price, rather than on their capabilities and likelihood of winning in court. Not only is this a sub-optimal practice for the companies doing the hiring, it creates conditions for a destructive race to the bottom in the legal industry.

Ultimately, if companies are going to continue funding crucial research that will improve lives, or make life-saving medicine more affordable, they must be confident that they will have a fair chance to get a return on their investment.

Summary

Most importantly, litigation finance would restore an equilibrium that incentivises innovation and competition, bringing down costs for consumers today without sacrificing the great discoveries of tomorrow.

Footnotes

1. <https://cloc.org/wp-content/uploads/2017/11/2017-CLOC-State-of-the-Industry-Survey-FINAL-1.pdf>
2. <https://www.grandviewresearch.com/industry-analysis/biotechnology-market>
3. <https://www.law.com/sites/dailyreportonline/2017/10/09/the-growing-acceptance-of-litigation-finance/>

Author



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