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So, Your Company Wants to Start Some Litigation

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Far more often than not, general counsel find themselves charged with defending their companies rather than initiating lawsuits against others. However, particularly in certain areas such as patent litigation, companies may have good reason to go on the legal offensive.

A panel during the first day of Corporate Counsel's 27th annual General Counsel Conference in New York dug deep into the topic of affirmative litigation, along with the option of tapping litigation finance to fund such actions.

One of the notable takeaways from the session was simple: convincing your company to voluntarily initiate litigation won't be an easy sell. One panelist, Pamela Tracey, vice president and general counsel of lighting manufacturing company Osram Sylvania Inc., told the audience that in her experience, legal departments are always trying to justify their litigation budgets.

"You fight so hard in-house when you're putting together your budget for next year," she said. "You're fighting tooth and nail to get the money you need to defend your lawsuits, so the thought of going and asking for an unknown amount for this great idea we have—it's just not reality."

Then, she added, there's the possibility that the initial claim could lead to multiplying legal work and expense. "The question is: why would you enter into litigation when there could be a counterclaim and you can't get out?" asked Tracey.

But while there is no such thing as a risk-free lawsuit, members of the panel explained that there are plenty of reasons why a company might find affirmative litigation to be a great business opportunity—not least of which is when the company has suffered real harm and wants compensation. Michael Kenny, a partner at Alston & Bird who has represented companies on both sides of the



lawsuit equation, pointed out that since 2010, every Fortune 100 company has engaged in affirmative litigation. In fact, he told the panel, it's becoming a more popular option in certain industries such as pharmaceuticals and in such legal areas as IP and antitrust.

Kenny explained that as in any major business decision, companies have to keep return on investment in mind when starting a legal action. Weighing risks and benefits goes a long way in determining whether affirmative litigation is a smart business move.

"We're getting really good at being able to put an expected outcome on the case," he said. If the plaintiff company has a promising case, the eventual payout—whether it's through a settlement or a verdict—could have a positive impact on the bottom line. Notably, becoming the plaintiff also gives companies a better opportunity to use counsel on contingency or other alternative fee arrangements that will likely save the company money.

Those companies that want to initiate a lawsuit, but might be hesitant about funding it out of their own coffers, do have another

option: obtaining outside financing. If they determine the case at hand to be worthwhile, litigation financing firms can take on much of the financial risk of litigation in exchange for a cut of the reward if it's successful.

William Strong, chairman of litigation finance firm Longford Capital, said he has seen this type of investment "rapidly growing" in recent years. Besides simply shifting the risk, he noted, it also gives clients with small or nonexistent budgets for affirmative litigation the leverage to engage attorneys from elite law firms with which the funders may have long-standing relationships. If you want to work with a leading national firm, "third-party funding provides you a way to do that," Strong said.

So what did the panel's resident GC think of letting investors take some of the heat off of companies by funding a suit? The verdict was affirmative: "I think it's critical to have this tool," Tracey said.

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