



IP Litigation Funding: Making Decisions Based on Efficiency

Russell J. Genet at IP Dealmakers Forum

WHEN AN INDIVIDUAL client or firm is seeking litigation funding, efficiency is top priority. Anyone pitching a funder should get right to the point: the merits of the exact patents to be litigated. Economic analyses of an “entire market,” inflated damage claims and poorly developed infringement analyses significantly hamper and slow the due diligence process.

This was one of many no-nonsense takeaways delivered by Russ Genet, Director at Longford Capital, in conversation at the eighth annual IP Dealmakers Forum. An exclusive gathering of dealmakers at the forefront of the global intellectual property market, the event hosts seminars from top investors, IP owners, industry experts and thought leaders.

Genet was one of four speakers on a panel titled “Investors Roundtable: Developments in the IP Finance Landscape” hosted on December 7, 2021. Here are other key ideas Genet presented to the audience gathered in-person at the Apella Event Space in New York City, and virtually.

When It Comes to Pitches, Merit Matters Most: Thoughtful claim infringement charts, reasonable damage analyses, and a good patent validity story—these are the main things, Genet asserted, that claim holders should present when requesting IP litigation funding. It is not necessary to provide an analysis of every patent that may be part of a litigation campaign. A thoughtful analysis of the best three or four patents are sufficient for Longford Capital’s due diligence requirements. Genet explained,

“We need to see detailed claim charts that provide a thoughtful infringement analysis of the best 1-3 claims in each of those patents.” “Furthermore, we will want to see that a prior art search has been completed, unless there is a good validity story, meaning the patents have already survived inter partes reviews (IPRs), ex parte reexaminations, or have been the subject of reissues.”

Regarding damages, Genet cautioned the audience against providing analyses based on the value of an entire market. “Unless you are planning to sue everyone in the market—and you have infringement claim charts to back you up—then a damages analysis based on an entire market value is not helpful to us.” Longford Capital focuses its damages evaluations on a reasonable royalty analysis, with apportionment applied according to Federal Circuit law. “You can tell me about a lost profits analysis, but that is always difficult to prove. We will always ask for an alternative reasonable royalty damages estimate,” explained Genet.

If prospective clients want to help Longford get to yes quickly, they should understand Longford’s focus on the merits of the specific patents against specific defendants.

The Upsides of a Multi-Patent, Multi-Defendant, and Multi-Jurisdictional Case:

Genet prioritizes large cases that may cross international borders, have four or more defendants, and will involve the assertion of multiple patents—an approach that differentiates Longford Capital from other litigation finance firms.

Though they may be more expensive, there are benefits. A case involving multiple patents helps insulate against patent invalidity challenges and adverse claim construction rulings—if one patent is found invalid or not infringed, the remaining patents can still go forward. Furthermore, multiple defendants provide multiple opportunities to license the patents and generate revenue. A multijurisdictional case puts additional pressure on the defendants, increasing the likelihood of settlement.

“Other firms have a different approach. They might want to win a single patent case and, using that as a precedent, start to go after other companies,” Genet said. “Our approach may be more expensive. But we’d rather put in more capital upfront to spend less time bringing a case to resolution.”

Patents Matter More than the History Behind Them: Patents don't need to be "battle tested" before being approved for funding; in fact, battle tested patents may come with downsides. For instance, the term of a previously litigated patent may be very near expiration if it has already been litigated for many years, resulting in a patent with minimal future value. Moreover, the value of the case may have significantly decreased if several large defendants have already taken a license to the patent. What's more, arguments and statements made in prior litigation could limit what can be argued in future litigation.

When it comes to Longford Capital, the vast majority of IP cases they fund haven't been litigated, nor do they have a whole lot of history.

"It's just not as important for us," Genet said. "If we can analyze internally and get comfortable with the patents in the due diligence process, then we can move forward with funding. Battle testing is definitely a factor we take into consideration, but it doesn't serve as the basis of our decision making."

Claim Owners Must Be Aligned with Funders: Longford Capital always budgets and plans for their cases to go to trial. However, they prefer to be among the **97 percent of patent cases** that settle before trial. Since Longford doesn't seek to influence the final settlement decision, understanding a client's goals for a case becomes crucial. "When we go to trial, our invested capital is at its zenith—we have been paying attorneys' fees and expenses for years at that point. Furthermore, our risk is also very high—juries are very unpredictable. So, we need to know whether a client is going to act rationally if they receive a reasonable settlement offer."

Thus, becoming acquainted with the client—whether in-person or through a virtual call—is a routine part of Genet's evaluation process. Genet and the other members of the Longford team work hard to get to know their clients and make sure, as best they can, that the clients will act reasonably and rationally during the litigation and resulting settlement discussions.

About Longford

Longford Capital is a leading private investment company that provides capital to leading law firms, public and private companies, universities, government agencies, and other entities involved in large-scale, commercial legal disputes. Longford was one of the first litigation funds in the United States, and is among the world's largest litigation finance companies with more than \$1.2 billion in assets under management, and having invested in the outcomes of more than 500 meritorious cases. Typically, Longford funds attorneys' fees and other costs necessary to pursue meritorious legal claims in return for a share of a favorable settlement or award. The firm manages a diversified portfolio, and considers investments in subject matter areas where it has developed considerable expertise, including, business-to-business contract claims, antitrust and trade regulation claims, intellectual property claims (including patent, trademark, copyright, and trade secret), fiduciary duty claims, fraud claims, claims in bankruptcy and liquidation, domestic and international arbitrations, claim monetizations, and a variety of others. For more information, please visit www.longfordcapital.com.