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Should You Tap Litigation Finance for Lawsuits?

From the Experts

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NATA-LIA

With defensive litigation a reality for most every corporation, corporate counsel must manage the expense, risk, uncertainty and distraction that typically accompanies a lawsuit. But what about pursuing meritorious legal claims on behalf of your company?

There are serious questions to weigh before filing a lawsuit. Budget restrictions, attorney fees and expenses, pressure on quarterly earnings, risk and even the legal department's role all must be considered before adding to your company's litigation docket.

And there's one more factor companies are considering before pursuing a meritorious claim: litigation finance. More and more, corporate counsel are using it to address these issues and transfer the risk of pursuing meritorious legal claims.

What Is Litigation Finance?

Litigation finance is a rapidly growing form of specialty funding used by public and private companies of all sizes to pursue meritorious legal claims. Litigation finance firms provide nonrecourse capital to corporations to pay attorney fees and expenses incurred in meritorious litigation. It enables corporations to pursue valid legal claims under a variety of circumstances.

These include situations in which a corporation:

- desires to spread litigation risk and avoid expense;
- cannot make the required investment to pursue a claim;
- experiences liquidity problems;
- faces budgetary constraints;
- seeks an alternative to the traditional hourly billing model; and/or
- prefers to deploy capital toward core business operations.

Litigation finance enables corporations to avoid the high costs of litigation without forgoing meritorious legal claims and to treat legal claims as discrete assets able to be financed and monetized.

This model has made quick believers of leaders in both the legal and corporate communities. For example, Barry Ostrager, partner and former longtime chair of the litigation department of Simpson Thacher & Bartlett, has secured significant trial verdicts for clients utilizing litigation financing. Bill Strong, a prominent international investment banker, recently left his position as co-CEO of Morgan Stanley's Asia Pacific Region to become chairman of Longford Capital, a litigation finance shop based in Chicago (and where I am a managing director). This trend certainly will continue as the benefits of litigation financing become more widely known.

How Does It Work?

Typically, funds received under a litigation finance contract are used to pay attorney fees and other expenses incurred during business-to-business litigation. The funding is not a loan, but a form of nonrecourse financing. Funds need not be repaid if the claim is unsuccessful; the finance company assumes that risk. If the claim is resolved successfully, either through settlement or award at trial or arbitration, the litigation finance firm will recover its investment plus an agreed-upon return. Funding agreements are bespoke, and the terms vary widely depending on the facts and circumstances of the case.

There is little doubt that litigation finance is an industry whose time has come. It increases access to justice and enables corporations to mitigate and manage litigation risks efficiently. As the saying goes, watch this space.

William P. Farrell Jr, is a managing director of Longford Capital, a Chicago-based private investment company that provides capital for use by companies pursuing meritorious legal claims. He has more than 20 years of complex litigation experience, including extensive trial and appellate experience as both a government prosecutor and a partner in the commercial litigation departments of two prominent national law firms.