

How Litigation Funding Helped Knock Down State Farm

Law360, New York (February 11, 2014, 2:15 PM ET) -- It should have been a boom time for Joseph Radcliff. After a hailstorm caused extensive damage in central Indiana in 2006, Radcliff and the employees of his roofing business helped homeowners repair the physical damage. But he didn't stop there. Radcliff also helped his clients make claims to the carriers that had issued them insurance policies.

While many carriers paid out claims to their policyholders, some didn't. Radcliff and many others noticed that insurance giant State Farm, in particular, was denying more claims than seemed logical. Hundreds of complaints about State Farm were made to the Indiana Insurance Commission. The commission investigated State Farm's compliance practices, resulting in the insurer reopening tens of thousands of claims. It was forced to pay a six-figure penalty.

Radcliff Put to the Test

State Farm was upset with Radcliff for helping stir up this commotion. The carrier submitted incomplete information to Indiana insurance investigators suggesting Radcliff had deliberately damaged certain roofs. This led to Radcliff's indictment on 14 counts of felony insurance fraud. Law enforcement officers arrested him at gunpoint. It took nine agonizing months, but all charges against Radcliff were eventually dropped when prosecutors discovered what State Farm had done.

State Farm wasn't done with Radcliff. It sued him on civil fraud and racketeering claims in state court. His reputation and business was in ruins. But Radcliff refused to roll over and die. He counterclaimed against the insurance giant for defamation and abuse of process.

After a six-week jury trial in 2011, and with the help of intrepid lawyers at Price Waicukauski & Riley, Radcliff and his company won \$14.5 million in compensatory damages, one of the largest defamation judgments in U.S. history. But winning a jury award and collecting it are two different things.

State Farm refused to accept its defeat and pay or settle. It had the resources to protract the legal process over years on appeal as it sought to overturn the jury's verdict. Over this time, Radcliff's business remained shattered.

Reinforcements Arrive

Enter commercial litigation funding. Litigation funding allows plaintiffs to finance their legal actions or to receive other financial help on a nonrecourse basis. It evens the playing field between large, well-financed litigants who are quite used to fighting in court, and individuals or small to mid-sized

companies, who are often inexperienced at fighting legal battles and may find themselves easily outgunned.

Litigation funding provides greater access to justice to these smaller players. Well-established in other parts of the world — particularly in Australia, Canada and the U.K. — litigation funding is only now becoming common in the U.S.

The U.S. Chamber of Commerce, one of the largest lobbying groups in the U.S., funded by the titans of corporate America, has become a virulent opponent of funding. In the past few years, the chamber is reported to have spent more than \$200 million on political lobbying, including more than \$50 million through its Institute for Legal Reform. The chamber claims that funded litigation inevitably leads to an increase in frivolous lawsuits.

In fact, what litigation funding inevitably leads to is more claims being decided on their true merits, rather than on the relative financial resources of the parties.

New York Supreme Court Justice Eileen Bransten makes the point nicely in her December 2013 decision in *Lawsuit Funding LLC et al. v. Lessoff et al.* “There is a proliferation of alternative litigation financing in the United States, partly due to the recognition that litigation funding allows lawsuits to be decided on their merits, and not based on which party has deeper pockets or stronger appetite for protracted litigation,” Bransten wrote, granting, in part, summary judgment on liability to funder enforcing investment agreement.

Interestingly, the chairman and CEO of State Farm, Edward B. Rust Jr., also served as chairman of the chamber’s board for a term that ended in June 2013.

For Radcliff, litigation finance was the answer, which helped in two key ways. First, with litigation funding, Radcliff was able to hire one of the best appellate lawyers in Indiana, Julia Blackwell Gelinias, a fellow of the elite American Academy of Appellate Lawyers. All the other fellows in Indiana were on State Farm’s payroll.

Second, litigation funding gave Radcliff startup capital to help him get a new business off the ground while he waited for State Farm’s appellate efforts to run their course.

In December 2013, the Indiana Supreme Court refused to hear any further arguments from State Farm, after the Indiana Court of Appeals had affirmed the trial court judgment in its entirety. State Farm paid more than \$17 million (with interest) to Radcliff. The litigation funding did what it is designed to do: provide the best counsel, and help the small business owner win a fight with a much bigger opponent. As Radcliff tells it, he couldn’t have done it without litigation funding.

Best Practices for U.S. Funding

Many other western democracies already embrace litigation finance. Ethics opinions and reports, including from the American Bar Association, now give guidance to lawyers on relevant issues of professional responsibility and funding. But there’s a lot more work to be done to fold commercial litigation funding seamlessly into our U.S. system of justice.

In January, as an outgrowth of an academic round table held in 2013 in New York, a “Code of Best Practices” for funding was published for the U.S. The code’s intent is to ignite a conversation on

increasing transparency in this market in line with longstanding practice in Australia, and taking a page from a code in place in England and Wales. If a code is broadly embraced, it can encourage greater acceptance of litigation finance as a whole in the U.S. The more light shines on litigation funding, the more it will thrive and grow.

The U.S. code outlines best practices in four distinct areas: funder interactions with the public, with attorneys, with claimants, and finally, guidelines for funders' financial strength. Basic notions of fairness, accountability, transparency and responsibility inform its provisions.

An industrywide discussion is warranted on self-governing standards like this, including at other academic round tables. Another was held recently at Stanford Law School's Center for the Legal Profession this past month.

As the State Farm case demonstrates, litigation funding isn't just handy or useful. It can be critical in helping U.S. litigants handle extended and expensive litigation, and restart their businesses. It helped Radcliff knock down his Goliath.

—By Ralph J. Sutton, Bentham IMF

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Bentham IMF provided Joseph Radcliff with litigation funding for his case against State Farm.

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