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LITIGATION

As litigation finance increases, skeptics fear business damage

By Henry Meier
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Despite reservations by some in the legal and business communities, litigation finance — the practice of non-legal entities funding cases — continues to flourish in the U.S., according to a recent spate of data released by companies in the industry. As its popularity surges, there's been a push to regulate the practice in light of the country's labyrinth of legal jurisdictions.

Burford Capital, which finances litigation in the United Kingdom and the U.S., released a study Wednesday in which it surveyed 430 private practice lawyers, in-house counsel and chief financial officers. The survey found that an overwhelming number expressed interest in third-party financing, especially in the business community.

Anthony Sebok, a professor at Cardozo School of Law in New York who tracks litigation finance, said increased exposure in the states was leading more companies to understand the benefits of the funding model.

"The non-legal business community is hearing more about it from the media and other sources and liking what they hear," Sebok said. "If they have the law on their side and only have the expense of litigation holding them back from filing a suit, why wouldn't they support it?"

Burford's study showed some variability in how attorneys saw it affecting cases, with general counsel being more skeptical of the benefits than private practice attorneys. Sixty-four percent of attorneys at law firms saw third party financing as leading to successful cases being brought that otherwise might not have, compared to only 38 percent of in-house counsel.

Still, Burford's chief operating officer, Andrew Langhoff, said those numbers showed an increase in the practice's acceptance.

"It's going to be interesting to track how the industry is responding to litigation finance," he said. "But there's a greater comfort in the legal community" compared to past years.

As the practice catches on, companies are raising big money to back it. Burford has raised more than $300 million to invest in cases, while Gerchen Keller Capital announced Monday it had raised an additional $260 million in funds to add to the $50 million it previously generated. A third company, Bentham IMF, said it's been involved in cases worth more than $2 billion globally.

The growth of third party funding for lawsuits hasn't been without speed bumps, however. The U.S. Chamber of Commerce's Institute for Legal Reform has targeted the industry for promoting an increase in litigation harmful to business interests. The advocacy group contends the practice also prolongs litigation while undercutting claimants' control of lawsuits.

But Sebok said those concerns were overblown to some extent given the lesser power third-party funders had over litigation decisions than, say, insurance companies, which have contractual powers to compel settlement in some cases.

"In the insurance context, companies can invoke their ability to have a say in settlements," Sebok said. "There's lots of law about those situations."

Things are much more undecided on the litigation finance front, however. To combat criticism, companies in the space are taking a proactive approach hoping to avoid formal regulatory oversight.

Bentham IMF, an Australian-based litigation finance company which has opened operations in the U.S., published a "code of best practices" Monday, outlining general principles third-party funders should adhere to. Those include greater transparency and ensuring that funder isn't causing the lawyers to breach their professional duties. The bottom line, according to Allison Chock, who oversees Bentham's operations in Los Angeles, is to provide greater understanding about how the practice works and what clients should expect.

"Litigation finance is pretty new in the U.S. and Bentham wants to make sure it's here to stay," she said. "So we aim to increase the transparency in transactions where we can."

In that spirit, Chock said her company advocates for arbitration when it comes to disputes over settlement offers in cases in which they have a stake, though she pointed out those disputes are exceedingly rare.

"We like to have the ability to take it to a third party who can decide on an expedited basis whether the offer is reasonable or not," she said.

Some supporters of litigation finance do think more formal regulation — especially in light of the country's mix of legal rules — is needed to deal with the growing practice. Sidley Austin LLP partner Peter Ostroff said that Bentham's principles are a good first step, but that for third party funding to be truly accepted the way it is in some other countries further action is needed.

"The reason that things like a code of conduct [are] important is that this area of commerce has to build a level of confidence," he said. "What we really need, however, is some type of regulation that is generally recognized."