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Litigation finance makes stronger inroads in 2014

By Henry Meier
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Third party litigation funding appeared to gain momentum in the U.S. market this year, with more investments by established funds and more players entering the field, although detractors abound.

Allison Chock, head of Bentham IMF, a West Coast subsidiary of an Australian firm that pioneered litigation financing, said after three years in the market her firm doubled its number of U.S. investments — from 10 to 20.

“The popular acceptance of litigation finance for large complex cases is growing worldwide,” she said. “After three years in the U.S., the pipeline is looking nice and full. The number and quality of the deals we saw in 2014 are very good.”

Chock said the increase resulted from more acceptance among U.S. companies and law firms of litigation funding.

Christopher Bogart, CEO of Burford Capital, one of Bentham’s rivals, agreed.

“Three years ago, if I went to L.A., I would have spent most of my time educating and telling lawyers about what litigation finance is,” Bogart said. “Now, 75 percent of the AmLaw 100 has come to us to at least talk about what we can do.”

Burford also saw strong growth in 2014, Bogart said. In the first six months of 2014, it committed \$62 million to new cases.

Bogart said the most heartening development for the industry in 2014 was its acceptance into the everyday lexicon of the legal community. In its annual survey which polls more than 500 private practice lawyers, general counsels

and company chief financial officers, Burford said it found that 96 percent of respondents knew of litigation finance.

The industry still has its skeptics and detractors — the U.S. Chamber of Commerce remains vehemently opposed to litigation finance — many of whom claim the practice increases frivolous litigation.

The business group has published several working papers excoriating third party funding in recent years and sponsored legislation aimed at banning the practice, but so far the anti-litigation finance sentiment has yet to gain much traction. The past year has been especially quiet in terms of legislative attempts to restrict third party funding, according to Chock.

“We haven’t seen anything new from [the Chamber] lately,” she said. “There are some pending bills in state legislatures, but nothing serious and not in any place that we do a lot of business.”

Chock said Bentham had appointed a panel of attorneys to advise on ethical issues and best practices.

W. Bradley Wendel, a professor at Cornell Law School who advises litigation finance companies on ethics, said issues arise but are generally case specific.

“There are potential ethical issues that lawyers want to be aware [of], but that’s not unique to litigation finance,” Wendel said. “As a whole, though, there aren’t any problems inherent to the practice.”

Wendel was among several academics and practicing attorneys tapped by the American Bar Association to study litigation finance as part of the organization’s Ethics 20/20 reports. The working group issued a paper in 2011 advocating

against rule changes that might bar attorneys from involvement in litigation finance deals. While the mechanism has grown significantly since then in the U.S., Wendel said the principles espoused in the white paper hold true.

“We basically asked, ‘do we think that the rules need to be changed in some way to address third-party litigation finance?’” he said. “We found that it was more about informing lawyers on what the existing law says.”

Litigation finance firms also expanded their “portfolio” investments in 2014. While investing in single cases remains the dominant activity for such firms, more funds are striking deals with clients or law firms to invest in a bundle of cases.

Bogart said his firm looks at portfolio investments as “fundamentally a financial and economic play,” designed to protect investments against unpredictable results.

“Even the best lawyers lose claims and no matter how good our due diligence is, we’re going to lose some of the cases we invest in,” he said. “So doing a portfolio allows us to lower our pricing on capital for a client or firm because we lower the risk of the investment by spreading that risk over several matters.”

Chock said that Bentham was also looking to expand its portfolio investments, albeit cautiously.

“We will invest directly in a firm if they can put together a portfolio of cases that we deem worthy and that meet our investment standards,” she said. “It’s a good strategy for us, but the difficulty is finding firms that we think are excellent and that also have enough matters to make an investment worthwhile.”

Issue of scale continue to dog the industry to some extent, Chock said. While thousands of cases would likely benefit from some sort of outside financing, it doesn’t make economic sense for large firms like Bentham and Burford to get involved if the dollar figure is too low.

“Our average investment — what we’re putting into a case — is about \$8 million dollars,” Bogart said. “So by definition that eliminates most consumer and personal injury litigation.”

However, less conventional litigation finance options are springing up to fill the gaps at the lower end of the market. Companies like Legal Funding Central, which acts as more of a matchmaking tool than financier, are taking the model in a different direction with the promise of more readily available money for litigants of all stripes.

The issue, according to the more established firms, is that proper due diligence — the lifeblood of a successful litigation finance firm — can’t be replicated on the cheap.

“I think there’s a market for [smaller financing deals] but it’s tough,” Chock said. “You have to do the same amount of due diligence on a \$5 million case as you do on a \$500 million case, which makes it hard to sustain.”

“We see a lot of smaller litigation finance companies launch and then fade.”

The bottom line for those in the business, however, is that cases that might otherwise fall by the wayside can be brought regardless of a party’s financial position.

“That’s the beauty of litigation finance,” Chock said. “Cases get decided on the merits instead of by which side has more money.”