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Full Speed Ahead for Litigation Funders

By Jenna Greene
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It's been four years since Australia-based litigation funder Bentham IMF set up shop in the U.S. Now, it's hitting its stride.

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On Monday, the company announced that it has struck more than $30 million in funding deals with seven small and midsize law firms here, with three more deals in the works.

The out-of-the-blue announcement follows a flurry of stories in late October about rival Burford Capital's $30 million joint venture with Hausfeld to open an office in Berlin focusing on cartel claims.

The takeaway: it's full speed ahead for the young but fast-growing industry, despite a recent inquiry into the inner workings of the companies by suspicious Senate Republicans.

Ralph Sutton, chief investment officer and legal counsel for Bentham, said that the company's U.S. arm has made 25 investments in legal matters here. Among them: deals covering portfolios of about 60 cases involving disputes in intellectual property, insurance coverage, entertainment, health care, contracts and other areas, including whistleblower and human rights cases.

"Clients want it, firms want it," Sutton said of the cash infusion Bentham provides in exchange for a payout down the road when the cases are resolved.

Increasingly, rather than investing in individual, one-off cases, Sutton said, Bentham has been putting its money into portfolios of cases with a select group of law firms. "We're making law firms into partners," he said, an arrangement that he sees as the future of litigation funding.

The potential for windfall profits may not be as great, but it also spreads the risk if some of the cases underperform.

Consider this unhappy press release on Monday from fellow litigation funder Juridica about one of its cases, a dispute over the theft of trade secrets brought by a smaller plaintiff against a much larger company.

The plaintiff scored a full win on liability, but the jury awarded damages "which will result in a return to the company of just $2 million. This compares with an original investment of $3.5 million and the case valuation of $9.4 million," Juridica stated. "The plaintiff and its advisers are considering whether there are grounds to appeal the low damages."

The beauty of buying into a firm's portfolio of cases is to insulate against results like this.

So who are these firms Bentham has teamed up with? Sutton will only name two: Washington, D.C.-based Weisbrod, Matteis & Copley, which Bentham is working with to fund a series of insurance coverage cases involving property damage claims, and The Law Offices of Jeffrey Ryan in Redwood City, California, in association with *qui tam* claims.

The other firms, which prefer not to be identified, are based in New York, New Jersey and Los Angeles.

In part, Sutton said, the other firms don't want to be named because they're skittish about being dragged into an inquiry by Sen. Charles Grassley, R-Iowa, who chairs the Judiciary Committee, and Sen. John Cornyn, R-Texas, the Senate majority whip. On Aug. 27, the pair sent a letter to Bentham, Burford and Juridica with a long list of questions about their businesses.

The senators asked the companies to provide a list of all the cases they've invested in between 2009 and 2014, how much they invested, who the lawyers are, what their profits have been and other details.

"Over the last several years, a growing number of reports have raised concerns about what impact the rapid expansion of third-party litigation financing is having on our civil justice system," they wrote. "Your burgeoning industry is largely unregulated and operates with no licensing or oversight. … And while commercial litigation lenders maintain that plaintiffs retain control over litigation and settlement decisions, the terms and fundamental structure of agreements that are publicly available call into question these assertions."

Foremost among those raising concerns is the U.S. Chamber of Commerce's Institute for Legal Reform, whose deep-pocketed members don't like the idea of outside investors footing the bill for lawsuits against them.

"Funding more litigation in what is already the world's most litigious country is not in the interests of the business community or the American economy," wrote Lisa Rickard, president of the Institute for Legal Reform.

That's definitely true if you're the one getting sued. Not so much if you're the one who was wronged.

Indeed, Burford in its lengthy response to the senators went after the Chamber of Commerce.

"It is well-known that the Chamber of Commerce is not simply critical of litigation funding—it is critical of litigation in all forms," wrote chairman Peter Middleton, CEO Christopher Bogart and CIO Jonathan Molot. "Moreover, the Chamber's position on this issue stands in stark contrast to the fact that its members are the users of litigation finance."

Litigation financing, they continued, "enables large businesses to make their own strategic and budgetary choices about where to spend their own cash, and when to seek outside finance—just as they do with any other kind of asset, from tractors to airplanes to office buildings."

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