

Litigation funding giant explains how it's done

11:00PM NOVEMBER 20, 2019 •  6 COMMENTS

Chris Merritt: Why hasn't litigation funding in this country followed the American pattern and been embraced by business?

Christopher Bogart: What's happened perversely is that Australia got so far ahead of the rest of the world with respect to the use of litigation funding for class actions, that it never really went anywhere else. And so Australia today has a robust litigation funding market but it's largely in class action and representative action. What's happened in the rest of the world is that while it might have been a little slower to start up, corporate clients are the mainstay of the usage of litigation funding.

Merritt: How does that work?

Bogart: Well if you're a business and you've got a pending claim against somebody or some thing, usually a corporate-to-corporate claim, you've got what is effectively an invisible asset.

You've got this claim sitting on your balance sheet but not doing anything for you and litigation being slow, it may well not do anything for you for some years.

And so what you can do is treat that like any other asset that you have. Just like a piece of real estate or receivable and you can come to a firm like mine and you can take capital in advance against the outcome of that claim and that's something that's increasingly common from big companies in North America and Europe and in Asia.

Merritt: So I imagine if a company wanted to do that without the involvement of a funder, they would need to use their own internal capital, which could otherwise be directed to doing what they do best?

Bogart: Well that's exactly right. And the dynamic is that companies, even companies with lots of access to capital, nevertheless would like to be putting that capital to work at things that make

them money in the business that they're in. So, for example, I used to be the global general counsel of Time Warner, the media group, and even though Time Warner had lots of capital, the chief financial officer never wanted to give me any of it as the head lawyer.

That capital was supposed to go and make movies and television shows and when I showed up and said "I've got this terrific way of making some money by advancing a claim" the answer was, "well we're not in the business of advancing claims".

The fact remained that we have this valuable asset and now CFOs and general counsel are realising that they can take those valuable assets and not only get capital from us to pay the legal fees associated with them, but also to actually take those assets and turn them into cash.

Merritt: So corporate legal departments could cease to be a cost centre and become a revenue centre?

Bogart: Well indeed. You've seen some companies do just that and big American companies, DuPont, Pfizer, firms like that, try hard to use their affirmative claim value to offset the costs of running a defensive litigation process.

Merritt: Are we talking big dollars here? How big are some of these claims?

Bogart: Well Burford did well over \$US1bn (\$1.46bn) last year of this kind of business. So it is big business.

Merritt: So compared to your class action practice how does the corporate side compare?

Bogart: Oh vastly larger. Burford's class action practice is quite small compared to the business financing that we're doing.

Merritt: So it might be describing you incorrectly to say you are simply a litigation funder — you're a financier whether that's for class actions, whether that's for corporate legal departments. Would that be right?

Bogart: That's exactly right and we don't even call ourselves a litigation funder. In fact if you go on our website we would describe ourselves as a provider of finance and all we're doing is looking dispassionately at legal assets.

We specialise in legal assets and we do what any other capital provider does, we examine those assets, we value them and we construct capital solutions around them.

Merritt: Here however, litigation funding is viewed as integral to class actions and people haven't really come across this other aspect of the business.

Bogart: I think that's right and I think it's a historical anomaly. What happened is that Australia got so far out in advance of the rest of the world in its use of litigation funding — and that's in part because Australia is unique as a market in allowing class actions to give proper redress for wrongs but not having contingency fees.

The result was that really the only way you could produce those actions was with litigation funding. And so if you're an Australian business today it wouldn't surprise me if you think of litigation funding as being synonymous with class actions that are brought against you.

Part of what we're doing in Australia — and we've expanded our presence here — part of what we're doing is trying to change that conversation with businesses.

Merritt: Are you getting cut through?

Bogart: We're starting to but it's very early days. The difference is that in the United States there's a robust contingency-fee class action business. And so we don't very often have clients come to us seeking financing for class actions, we instead are fundamentally a business capital supplier.