

THE BURFORD

Quarterly

A REVIEW OF LEGAL FINANCE

LEGAL FINANCE & AFFIRMATIVE
RECOVERY INSURANCE

EXPERT ROUNDTABLE:
GENDER DIVERSITY IN IP

KEY LEGAL FINANCE
DEVELOPMENTS ACROSS APAC





Navigating unfamiliar territory: Legal finance as a guide to plaintiff-side commercial litigation

G. Andrew Lundberg

+1 212 235 6831
alundberg@burfordcapital.com

Andy Lundberg is a Managing Director and member of Burford's Commitment Committee. He practiced for 35 years at Latham & Watkins. As the Global Chair of the firm's Insurance Coverage Litigation practice and Chair of its Los Angeles Litigation Department, he counseled numerous Fortune 500 companies on insurance matters, and litigated dozens of plaintiff-side coverage lawsuits. He is one of Lawdragon's Global 100 Leaders in Litigation Finance. He has summited his home state's Mount Rainier four times.

If you're an experienced hiker and you've done some occasional snowshoeing, how would you prepare for your first for-real mountain climb?

Hopefully, rather than simply buying an ice axe, strapping on crampons and venturing out onto the glaciers alone, you'd hire the most knowledgeable and experienced guide you could find and afford to help you through the training, equipment selection and logistics and lead you up the hill.

Companies and law firms that typically operate on the defense-side of large commercial litigation can approach their initial forays into plaintiff-side cases the same way: By partnering with an experienced legal finance provider that evaluates, supports and funds major business litigation every day, they can improve their chances of a successful litigation outing as a first-time plaintiff.

Companies can confidently venture into plaintiff-side commercial litigation with a legal finance partner.

Legal finance providers are effective and efficient guides in preparing for and executing litigation aimed at realizing value from commercial legal assets. A legal finance provider can vet the claim before filing, suggest capable counsel, brainstorm on strategy, assist in preparing for argument and trial, monetize an eventual settlement or judgment, and enforce an unpaid judgment or award. Legal finance providers bring expert and impartial (neither attorney nor client) perspective to assessing and reducing litigation risks. And—unlike the typical mountain guide—a legal finance provider doesn't just prepare, equip and aid its client in exchange for a fee. It also assumes the downside risk of an unsuccessful outing by paying legal fees and covering other case expenses on a current basis,

recovering that investment (plus its profit) only if and when the litigation objective is reached. As with climbing into thin air, the risks of ultimate failure in litigating a claim can't be eliminated—but the risk of paying for a failed effort can.

Just as mountaineering is a form of hiking, plaintiff-side commercial litigation is still litigation, and many businesses are used to playing that game broadly described. So is being the plaintiff really a different discipline? Yes, and the differences multiply as the scale and complexity of the expedition grows.

Many companies and their litigation managers are used to playing entirely on the defense-side. They (rightly) focus on and develop facility with typical defense-side concerns: Controlling defense costs, limiting downside exposure in individual cases, avoiding the creation of bad precedents affecting the company's defense portfolio and its larger business going forward, protecting sensitive competitive information, and avoiding "extraordinary events," i.e., surprise adverse outcomes. Often (and again rightly), their charge is less to win than it is to avoid losing. Much of their familiarity, skill and comfort with the litigation process flows from the recurring nature of many defense-side cases: Companies often face the same sort of claims—employment, product liability, consumer class action—on a regular if not continuous basis. Familiarity with the defensive environment builds experience, competence and confidence when it comes to defending new litigation matters.

Even when highly developed, though, that familiarity and expertise does not translate fully into the frame of reference and skill set required to conduct plaintiff-side cases effectively. Companies, in-house counsel and some of their outside law firms with

little or no experience with plaintiff-side litigation aren't used to thinking about whether to file a case in the first instance and the issues that decision presents, including assessing legal and duration risk, exposure to legal fees and out-of-pocket expenses and the opportunity costs involved in making the go/no-go decision. They aren't used to setting milestones for re-assessment of the case once it is filed or allocating and prioritizing resources across the different elements a plaintiff must establish to satisfy its burden of proof. They also aren't used to budgeting cases in which they are the party seeking recovery. And they may not have the experience of making and justifying requests for legal spend that aren't necessitated by the uncontrollable acts of a hostile third-party or a court but seem to non-lawyers to be entirely elective in nature.

Obviously, such unfamiliarity with the plaintiff's legal mindset and toolbox doesn't reflect a failing on the part of companies or their lawyers. It is simply a function of the fact that conducting litigation in the courts or before arbitrators is not a single discipline, any more than "competing in sports" is. No one expects to find a gold-medal swimmer on the diving podium, or a sprinter with a marathon victory: Same forum, different sport.

Beyond capital, legal finance offers specialized expertise for plaintiff-side matters

Legal finance providers offer a partnership solution for companies that confront this terra incognita—whether out of necessity, when the core business suffers a loss or challenge that threatens its viability, or out of an appreciation that commercial legal claims can be leveraged, like any other asset, to generate returns for the company. By applying their expertise to the vetting of

**If you found this article interesting,
please download the full issue of
the Quarterly here.**

Burford is the leading global finance and asset management firm focused on law. Its businesses include litigation finance and risk management, asset recovery and a wide range of legal finance and advisory activities. Burford is publicly traded on the New York Stock Exchange (NYSE:BUR) and the London Stock Exchange (LSE:BUR), and it works with companies and law firms around the world from its principal offices in New York, London, Chicago, Washington, Singapore, Sydney and Hong Kong. For more information, please visit burfordcapital.com.

© 2021 Burford Capital. All rights reserved. Burford, Burford Capital and the Burford logo design are registered trademarks of Burford Capital.

www.burfordcapital.com

Burford