Lawsuits On Credit
Keller, Amy
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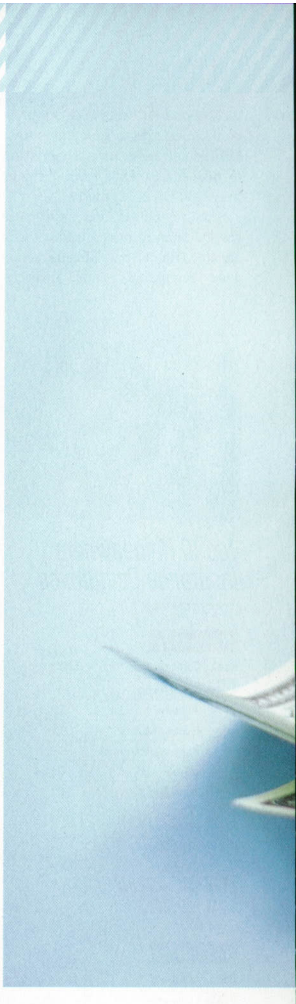


Companies and law firms that need money for long, expensive legal cases are turning to litigation lenders for cash.

By Amy Keller

For more than four years, Jacksonville wireless chip designer ParkerVision has waged a costly legal battle alleging that some of the biggest names in the mobile communications industry — including Qualcomm, Apple, LG Electronics and Samsung — have infringed its wireless networking patents.

The litigation has taken a toll on the publicly traded company's bottom line. Legal bills have eroded cash flow, and the company announced layoffs last year at two of its facilities in Florida.

In early 2016, the company announced that it had found a different way to fund its legal campaign. Instead of using cash on hand, ParkerVision will pay its lawyers with $11-million borrowed from a company called Brickell Key Investments.

The decision by companies to use third-party litigation funding is becoming increasingly commonplace.

Third-party funders enable firms such as ParkerVision to shift the financial burden of legal disputes off their balance sheets and minimize the risk of pursuing a claim. Investors like the Royal Bank of Scotland Pension Fund, which has a controlling interest in Brickell Key Investments, are drawn to the potential payoff: If the legal claim they're betting on succeeds, they get a slice of the judgment.

ParkerVision executives lauded the strategy in a March conference call with investors. "Legal advisors, this new funding party ... these people are all making (a) real investment in ParkerVision," said ParkerVision CFO Cindy Poehlman. "As you might imagine, that value in their eyes has to be many, many multiples of the investment that they're making for that be a smart decision for them."

Most commercial litigation-funding arrangements are structured as "non-recourse" loans. Plaintiffs repay lenders only if they win their cases. If there is no favorable ruling, the company is off the hook for any litigation expenses, and the lender takes the hit.

ParkerVision did not respond to a request for comment, but a company filing with the Securities and Exchange Commission indicates the firm, if successful in its claims, will repay the lender, Brickell, the loan amount plus an unspecified minimum return on the loan. The company also agreed to pay a prorated amount on additional proceeds from lawsuits and other patent enforcement actions. And it agreed to give Brickell the rights, for five years, to buy up to 2.5 million shares of its stock at 35 cents a share (the stock has traded at more than $2.50 a share since the beginning of the year).

Litigation financing is not new. The legal funding industry got its start in the U.S. two decades ago, when lenders began providing small cash advances to plaintiffs in personal injury lawsuits. Funding corporate litigation, however, is a more recent phenomenon.

John Trujillo, a Tampa attorney who left a law practice to run a litigation funding company called Bayshore Funding Solutions, says rising litigation costs are driving the trend. Even many large com-

panies simply "don't have the operating budget to finance multiyear, multimillion-dollar claims," he says. "Lawyers that do this, bill hourly, not on contingency."

Trujillo believes that litigation funding also helps "level the playing field." Without third-party funding, he says, most startups would never have the financial means to wage an intellectual property battle or breach-of-contract dispute against a deep-pocketed rival.

Bayshore provides "high five-figure to low six-figure" funding for commercial litigants. But it applies strict "underwriting" standards to every lawsuit it considers funding. To gauge the risk, the company examines everything from the merits of the claim, to potential damages, to the experience and track record of the lawyers involved in the case, says Trujillo. Additionally, Bayshore offers funding for estate litigation, post-judgment appeals and settled cases, as well as cash advances to plaintiffs in injury cases.

Though Trujillo declined to say either how much the firm invests or how much it profits, some players in the industry have made a killing. *Forbes* magazine reports that Burford Capital, a London-based litigation funding firm that invests in cases in the U.S. and other countries, has brought in $348 million on $205 million of invested capital — a 70% return — since it went public in 2009.

There's no such thing as a sure bet, however. Juridica Investments, another publicly listed litigation funder, took a $30-million write-down on an antitrust price-fixing case. In November, Juridica Investments, managed by the same firm that manages Brickell Key Investments, took another hit in a trade secrets case where it had $3.5 million invested. Juridica Investments had expected the suit to yield a $9.4 million recovery, but the plaintiff was awarded just $2 million in damages.

Following those losses — and what Juridica Chairman Lord Daniel Brennan described as a lack of "scale and diversity" — Juridica announced it would stop funding new claims and concentrate on existing suits.

Courtroom setbacks aren't the only uncertainty for litigation financiers. The largely unregulated industry is also facing increased scrutiny from critics like the Institute for Legal Reform, an organization founded by the U.S. Chamber of Commerce.

The institute believes that third-party investments will clog court dockets with "questionable" claims, deter plaintiffs from settling cases

John Trujillo recently joined Bayshore Funding Solutions. Litigation funding helps "level the playing field," Trujillo says.

Law Firms Tap Litigation Funding Sources, Too

Individual litigants aren't the only ones seeking money to finance lawsuits. Counsel Financial, a legal funding company in upstate New York, offers lump sum advances on settled cases to attorneys operating on contingency. The company will also extend law firms four-year lines of credit up to $5 million based on the total value of a firm's contingent fee portfolio of cases.

Coral Gables attorney Alex Alvarez is a customer. According to a testimonial on Counsel Financial's website, Alvarez used a line of credit to help him pursue tobacco cases in Florida and "overcome the financial challenges of aggressive defense tactics." Alvarez says he's "obtained more than $300 million in judgments against the tobacco industry" to date and that having access to capital "lets the defendants know I'm in this until I get my clients the money they deserve."

Tobacco cases in Florida have also attracted interest from the California-based Law Finance Group, which specializes in funding post-judgment appeals, settled cases and estate and trust disputes. The company began offering "appeal" money to plaintiffs and law firms pursuing claims against cigarette manufacturers in 2014 after the Florida Supreme Court denied a tobacco industry appeal.

Law Finance Group has also funded lawyers pursuing claims against BP, after the 2010 Gulf of Mexico oil spill, and funds law firms involved in Chinese drywall litigation.

RD Legal Funding, a New Jersey firm that concentrates on post-settlement funding, has been offering attorneys legal advances on "slow-paying Chinese drywall" legal fees and awards and settled BP oil spill claims, as well as numerous other types of cases. The company also offers "well-established" law firms lines of credit of up to $10 million and what it calls a "fee acceleration" product — purchasing a firm's unpaid legal fees from settled cases.

Barry Cohen

While litigation financiers are notoriously hush-hush about the terms of such arrangements, deals that have come to light suggest that lawyers pay a premium for cash advances.

Court records show that Barry Cohen, a Tampa Bay trial attorney, turned to RD Legal Funding on several occasions over the past decade for cash advances on legal fees he was owed. In one of several transactions, RD Legal Funding in 2007 "purchased" $3.3 million in receivables from Cohen for $2.5 million.

By 2012, with interest, the amount Cohen owed RD Legal Funding had ballooned to more than $7 million. The New Jersey company ended up suing Cohen in 2013 in U.S. District Court to recover the money and other funds it claimed Cohen owed. The suit was dismissed this February after Cohen and RD Legal Funding reached an

top photo: Mark Wemple

and undercut attorney-client control over litigation. "These folks are using our civil justice system for their own money-making purposes. This is a distortion of the system," says Bryan Quigley, spokesman for the Institute for Legal Reform.

In a 2012 proposal "Stopping The Sale On Lawsuits: A Proposal To Regulate Third-Party Investments in Litigation," the IRL suggested the Federal Trade Commission oversee the industry and proposed a $1-million licensing fee for funders and more transparency of litigation financing agreements. The proposal also touted a "loser pays" rule such as the one in England.

Some federal lawmakers have begun asking questions about the industry. Last August, Senate Judiciary Committee Chairman Chuck Grassley (R-Iowa) and Senate Majority Whip John Cornyn (R-Texas) sent letters to three of the largest commercial litigation financing firms — Burford Capital, Bentham IMF and Juridica — asking for details about their litigation financing deals and business practices.

As the Senate inquiry plays out, a few states have begun cracking down on the segment of the legal lending industry that provides smaller cash sums to litigants in personal injury cases. These lawsuit lenders advance funds to plaintiffs, usually in increments of a few thousand dollars, to cover rent, medical expenses and other bills while cases are pending. Funders get their money back when the plaintiff wins or settles a case — and get nothing if the plaintiff loses. But the arrangements have come under fire for high associated interest rates that can range from 30% to 200%, depending on the company.

In 2014, Tennessee passed a law that treats litigation funders as lenders and caps interest at 36%. Companies operating there must also pay $100 to register with the state and post a $50,000 surety bond. Consumers have five days to cancel their litigation funding contracts if they desire. Authorities in Colorado have also begun treating presettlement funding companies as lenders and placing limits on interest rates they can charge.

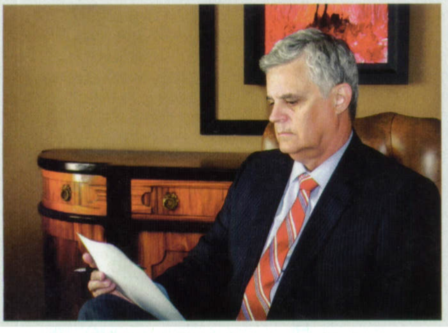
One funder, Elizabeth Pekin, co-founder and president of a presettlement funding company called Momentum Funding in Boca Raton ["A New Line of Business," page 64], says the transactions her company conducts are "technically not loans" and should be exempt from state consumer lending requirements.

If Momentum thinks an injured party has a good case, she says, the company will front the client approximately 10% of the expected "low-value" of a future settlement. As such, the company is purchasing an interest in potential proceeds of an undisclosed settlement.

Though expensive, third-party funding appears to be growing rapidly. According to a 2016 survey recently released by Burford Capital, 28% of lawyers reported their firms have used litigation finance — a four-fold increase since 2013 — and 75% of outside counsel predicted litigation funding would grow over the next five years.

"I don't think it's stirring up litigation that shouldn't be brought. I think it's a valuable additional resource in our legal marketplace."

— Michele DeStefano, law professor, University of Miami



Attorney Alex Alvarez tapped Counsel Financial to fund tobacco cases.

How Legal Funding Works

An example: A legal funding firm provides $2,000 to a plaintiff in advance on a case, which is later settled for $30,000.

This is how the money flows:

- **$3,000** — To legal funding firm (recoup initial $2,000 plus $1,000 in fees — 50% return)
- **$12,000** — Fee to plaintiffs attorney
- **$7,000** — Medical lien
- **$200** — Case expenses
- **$9,800** — To plaintiff

Source: Momentum Funding

photos: The Alvarez Law Firm left; University of Miami right

"These folks are using our civil justice system for their own money-making purposes. This is a distortion of the system."

— Bryan Quigley, spokesman, Institute for Legal Reform

ceeds of the case settlement, not lending money. The "fees" the company charges, Pekin says, are justified by the risk.

Michele DeStefano, a University of Miami law professor and visiting professor at Harvard Law School, has written and lectured on the topic. She thinks regulation may be appropriate in the consumer-lending segment of the market but sees less need with corporate legal cases. While the average Joe, she says, may not understand all the implications of litigation funding, commercial entities generally know what they're getting into.

Florida law limits how litigation lenders can operate, and lawyers must follow guidelines set out by the Florida Bar.

For one, lawyers are prohibited from being a party to any sort of agreement between a client and a legal funding company. Attorneys are also forbidden from speculating on what they believe a case might settle for — though they can provide facts about a case to a funding company with their client's informed consent.

While the Florida Bar generally "discourages the use of non-recourse advance funding companies," attorneys can provide clients with information about non-recourse advanced settlement funding if they feel it's in their client's best interest.

DeStefano predicts the industry will explode as technological advances make it easier to predict winners in court battles: "It's going to be a hotter and bigger market" that will allow the little guy to get a piece of the action.

One day, she says, it will probably be as easy for the armchair investor to buy a "piece of a lawsuit" as it is to buy shares in a publicly traded company.

A New Line of Business

Two attorneys and a COO start a legal funding firm in Boca Raton.

During the three years she worked as a workers' compensation and personal injury attorney in Chicago, Elizabeth Pekin remembers frantic calls from injured clients "begging" her to help them find a way to make their rent or car payment. Pekin would sometimes phone landlords and bill collectors, asking them to be patient just a little longer.

It didn't always help. "A lot of people settled their cases short because they couldn't wait it out," says Pekin, a Clearwater native and University of Florida law school grad who stepped away from law in 1995 after the birth of her first son.

Six years later, her husband, Michael, also a personal injury attorney, came home from work and told her he'd been approached with a business idea to start a legal funding company that would provide pre-settlement funding to personal injury plaintiffs. Under the business model, plaintiffs owe nothing if they lose their case. If they win a judgment or settle, the funding company makes its money back — plus a return.

Michael Pekin

Elisa Moss

Elizabeth Pekin was sold. "I said 'You have to leave your law firm. This is the best business I've ever heard of.' "

Michael Pekin left his law practice and in 2002 co-founded Oasis Legal Finance, where as executive vice president of operations, he oversaw the company's underwriting, operations and sales team. Elizabeth joined the company as executive director of legal funding, concentrating on marketing and building a network of brokers across the country.

The company targeted consumers, promising access to cash in as little as 24 hours. The Chicago-based company quickly grew to be one of the biggest players in the $100-million-plus legal finance industry.

But as it grew, so did scrutiny of the company's practices. Stories emerged of customers like Larry Long, who according to the *New York Times*, received $9,150 from Oasis Legal Finance while waging a suit against the makers of the anti-inflammatory drug Vioxx. Long, who suffered a stroke while using Vioxx, was unable to work and "facing eviction" from his Georgia home when he sought the money from Oasis — but by the time his case was settled, he owed Oasis nearly $24,000. After paying his legal fees, case expenses and Oasis, Long walked away with just $4,000.

In 2014, the Pekins left Oasis and returned to Elizabeth's home state of Florida. Sidelined by a 15-month non-compete, the couple settled in Boca Raton and began pitching their ideas for a new and improved legal funding model to private equity and family funds.

They raised $30 million in funding from Victory Park Capital, a

left photo: Institute for Legal Reform; right photos: Momentum Funding

Elizabeth Perkin, husband Michael, and Elisa Moss started Momentum Funding in 2015, creating "very transparent agreement" with consumers.

Chicago-based private equity firm, and in 2015 launched Momentum Funding, which targets attorneys in auto injury cases. "We left two years ago with the idea if we could do it differently, then it would be a much better product for the clients because we wanted the pricing to go down," Pekin says. "It's an expensive product for the plaintiff, and we had a large overhead with the other company."

Their first tweak: Rather than market directly to consumers with expensive late-night advertising like many legal funding companies, Momentum markets directly to personal injury attorneys. Without paying for TV ads, Momentum has been able to lower its pricing and "be more competitive," Pekin says. "We used to put millions into advertising, pay-for-click SEO, but that drives the business in a very different way."

Another key change: Creating a "very transparent agreement" so consumers understand exactly how much they'll owe at a given time. Pekin says Momentum can generally offer about 10% of an expected settlement to plaintiffs with meritorious claims. The average funding amount Momentum provides is $2,700. The money the plaintiffs pay back, she says, is "based on a multiplier" on how long the money is out. "So if we gave them $1,000 and the case is settled in six months, they'd pay us back approximately $1,400 — a 1.4 multiplier," she says.

While that multiplier increases with the length of time a case takes to settle, Pekin says the company strives to be fair. "I want the client to walk with a nice check and be happy at the end of the case, and that's (what happens) when it's done correctly."

Educating attorneys about how the funding works has helped change attitudes toward the industry, Pekin says. "At the beginning of the industry, I was told to leave offices. I would go into firms that I knew from when I was practicing law and tell them all about legal funding, and they just looked at me like I was from another planet."

"Firms that even five years ago wouldn't have picked up phone, now they're all giving out our name to their clients." FT

photo: Momentum Funding