

## Venture Capital Meets Patent Litigation

**By: Michael J. Garvin, Esq.**

A few years ago, I wrote an article for this publication entitled “Paying for Patent Litigation.” The focus of the article was various alternative fee arrangements law firms have entered into with their clients to pursue patent infringement litigation. These fee arrangements are limited only by the firm’s and the client’s imagination and include, among others, straight contingent fees, mixed hourly-contingent fees, flat fees, and not-to-exceed fees with a success component. Possible arrangements are essentially limitless and depend on many variables, including the nature and magnitude of the case, the client’s goals (e.g., injunction, damages, business deal), and the client’s and firm’s respective tolerance for risk.

At the time, third-party funding of patent litigation was less well-known than it is today. The patent enforcement companies such as General Patent Corporation and Rembrandt IP have certainly been around for some time, but they are known for acquiring or otherwise taking interest in individual inventors’ and insolvent companies’ patents, and engaging in industry-wide enforcement campaigns. Moreover, the targets of these campaigns are usually widely sold consumer products such as computers and other consumer electronics.

Until recently, institutional financing alternatives for patent disputes between competitors have been largely unknown. For several years, there has been a very limited market for patent infringement insurance, both defensive and offensive. Our own clients’ experience suggests that patent infringement insurance is practicable in only the rarest of circumstances. Unsurprisingly, the underwriting requirements are incredibly strict with very limited coverage, accompanied by high premiums and self-insured retentions. Evidence that this type of insurance is not a real solution in the vast majority of circumstances is that one rarely even hears anything about it anymore.

A new set of players has emerged, however, that may have a significant impact on how patent litigation is paid for, as well as on high-stakes commercial litigation generally. Within the last few years, a number of companies that can be described as “litigation venture capital firms” have been launched with the express purpose of making direct investments in commercial litigation. These firms include: Burford Capital, Juridica Capital Management, Arca Capital Partners, Juris Funding and even a unit of Credit Suisse. The reported profile of these firms is that they work with sophisticated corporate clients in return for a percentage of any award. As examples of the companies’ investment criteria, press reports state that Burford focuses on cases in which the litigation expense ranges between \$5 and \$15 million, and that Juridica ordinarily invests between \$3 million and \$10 million in cases with claims between \$25 million and \$100 million.

The litigation venture capital business is a nascent industry, to say the least, and the players’ criteria for funding disputes is bound to change rapidly. That said, in this emerging market, companies may find creative ways to defray the cost of patent disputes with competitors. For example, a smaller company might be able to hedge against a large competitor’s patent infringement suit against a new product by giving a funding company a share of the profits from the new product in return for funding the defense of the litigation. For companies confronting the cost of major litigation, under the right circumstances litigation venture capital firms may offer a viable solution.

© 2011 Hahn Loeser & Parks LLP

*Michael J. Garvin is a partner in the Cleveland office of Hahn Loeser & Parks LLP. He focuses his practice in litigation involving intellectual property and technology, particularly patent infringement litigation. Mike also serves as co-chair of the Technology Committee of the American Bar Association’s Section of Litigation.*