

# ALL SYSTEMS MUST BE GO

## THE CRUCIAL ROLE OF DUE DILIGENCE IN IP LITIGATION FINANCE

*A former IP litigator, Russ Genet is a Director responsible for sourcing, underwriting, and monitoring IP investments at the litigation finance firm Longford Capital. With a background that includes litigating up to and before the Court of Appeals for the Federal Circuit, patent prosecution, and representation of clients in USPTO proceedings, he brings broad perspective to the importance of due diligence in litigation finance.*

### WHY IS IP AN IMPORTANT COMPONENT OF A LITIGATION FINANCE PORTFOLIO?

IP cases have great potential for large returns. They're big cases with multiple defendants. Damages can be high. Juxtapose that with commercial cases, which typically have only a single defendant and oftentimes have damages that are too small to support the investment. IP cases also require a large amount of capital to support the litigation. That scale allows funders to put money to work, but because there's a large potential for returns, that money is protected.

IP cases also allow funders to protect their capital in a way often not possible in other types of commercial cases — they give us an opportunity to have multiple ways to monetize a case. A set of patents can be asserted against multiple defendants at the same time. This provides us with many opportunities to generate settlements, which helps to protect at least our invested capital. If we have a patent case with five defendants, then we have increased our chances of returning at least our invested capital through settlements, and will likely generate profits. Further, the defendants in patent cases tend to be very large corporations, so there's very little to no collection risk.

### YOUR ROLE FOCUSES HEAVILY ON DUE DILIGENCE, CORRECT?

The most important part of my job is due diligence, evaluating the cases. Do we think the case is a winner? I evaluate the infringement, the validity, and the damages issues, to decide whether we want to take the case on as an investment.

Due diligence of a patent infringement case requires significant experience in litigating them and in prosecuting patents in order to understand where the traps are. I'm an electrical engineer and lawyer. I practiced for 20 years both trying patent infringement cases in federal courts and prosecuting patents at the USPTO. I'm registered with the Patent and Trademark Office. I've met with examiners at the USPTO, handled ex parte reexaminations and inter partes reviews. I've argued in the Federal Circuit Court of Appeals and in courts throughout the country. All of that plays into the due diligence process.

### HOW SIMILAR IS THE DUE DILIGENCE PROCESS TO THAT OF EVALUATING A CASE WHEN YOU WERE A LITIGATOR?

The process is similar, but nuanced. As a litigator, your due diligence needs to satisfy

Rule 11 obligations to the court and your duties to competently advise your client. As a funder, I have a heightened review standard because I also need to protect our investors' money and select cases that will provide a return on their investments. This nuanced difference may result in a litigator and a client being willing to take on more risk than a funder. When you're evaluating from a funder's perspective, you take a much more critical eye to the case as a whole, including all potential defenses, than you might do as the trial lawyer.

### **WITH ALL THIS IN MIND, IS THERE A PIVOT POINT, A FULCRUM, WHERE YOU FEEL LIKE YOU HAVE ENOUGH? WHERE DO YOU SAY, OK, WE'RE GOING TO MAKE THIS BET?**

There isn't one thing that drives it, because there's so much that we have to consider — it is a complex decision. It could be a great infringement case, with a strong validity story, and significant damages involving well-heeled defendants. But if the claim owner is unreasonable in their settlement expectations and wants to get a billion-dollar judgment, I'm going to say no. On the other side, I can have a

claim owner who says, "Listen, I just want a reasonable number out of this. I don't need money that is life changing. I just want to be paid for my invention." OK, maybe. But if the patent infringement read is weak, I'm going to say no.

There's no one thing that pushes me one way or the other. There are so many issues that get baked into a decision to say yes. The first gate you have to clear, however, is infringement. There must be a strong infringement case — if you can't get past that, nothing else matters. Next, we will evaluate validity and damages. Then it becomes a discussion of the reasonableness of everybody involved, all the parties.

### **IT SOUNDS LIKE MISSION CONTROL FOR A SPACE LAUNCH — GOING AROUND THE ROOM DESK BY DESK TO MAKE SURE ALL SYSTEMS ARE GO.**

That's a good analogy — it highlights the difficulty in getting these cases approved for funding. I need all green lights for a go. Any one that's red would kill the deal. Just like an Apollo mission, if you don't get all green lights, the rocket doesn't get off the ground.

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RUSSELL GENET  
Director  
Longford Capital



**CRITICS OF LITIGATION FINANCE OFTEN FALL BACK ON A CHAMPERTY AND MAINTENANCE ARGUMENT — THAT SOMEBODY WHO HAS A FINANCIAL INTEREST IN THE CASE IS INHERENTLY GOING TO BE DIRECTING THINGS. HOW MUCH MERIT IS THERE TO THAT ARGUMENT AND DOES THAT IMPACT YOUR DUE DILIGENCE PROCESS?**

We've had to deal with champerty and maintenance and barratry concepts over the years. First of all, we don't come anywhere near violating these medieval legal concepts. Like any of the major funders in the market, our funding agreement makes it very clear that we have no control over the litigation, we will not influence the client's decision on litigation strategy, nor do we control or influence the client's settlement decisions. We also do not influence or control the advice or strategy provided by claim owners' attorneys regarding the case or settlement decisions.

People ask, "How is that possible? Who in their right mind would invest millions and millions

of dollars in a case that they have no control over? That's insane." It's not insane. The way we get comfortable with this arrangement is because of the severity and the strength of our due diligence process. If we're going to give over control — if we're going to invest millions of dollars and turn control over to other parties — I have to be confident in the merits of the case, the experience of the law firm, and the reasonableness of the claim owner. This is all part of our due diligence analysis. If we get a sense that the law firm or the claim owner has unreasonable expectations or wants to pursue an unreasonable strategy, then this might not be a case we want to fund.

**DESPITE THE COMPLEXITIES, DO YOU THINK THE BENEFITS OUTWEIGH THE RISKS IN FINANCING IP CASES?**

IP cases are risky and they can be tough to evaluate. But from my funders' point of view on what the returns can be and the ability to protect your investment, yes, the benefits outweigh the risks. ☺

**DUE DILIGENCE IN PATENT LITIGATION REQUIRES SIGNIFICANT EXPERIENCE TO SEE THE TRAPS.**

