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Litigation Finance, Sure. Litigation Insurance? UK Broker Seeks US Sales

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By Roy Strom

The U.S. legal services market has within the past five years warmed up to the idea of litigation finance, a practice first adopted in Australia and then the U.K.

A well-known British-based broker of litigation funding, TheJudge Group Holdings Ltd., will announce Wednesday it is launching in the U.S. with hopes to grow domestic awareness of another across-the-pond legal financial product: Litigation insurance for plaintiffs.

While insurance products have long existed in areas such as antitrust or intellectual property to cover the cost of defending a lawsuit, the plaintiff-side litigation insurance product that TheJudge brokers is less widespread. It can defray the cost of attorney fees and expenses for companies filing suits or law firms taking cases on contingency.

The insurance can cover costs and between 40 to 70 percent of attorney fees, with the largest contract TheJudge has brokered in the U.K. covering up to \$40 million in fees and costs. As is the case with litigation funding deals, an insured plaintiff only pays a premium if its suit is a winner. The insurance is sometimes referred to in England as “after the event” insurance.

James Blick, a longtime director at TheJudge who will head the company’s U.S. operations based in New York, said insurance is in many instances a less-expensive alternative to traditional third-party litigation funding because the cost of the insurance policy is not tied to a percentage of a possible damages

award. Litigation funders can sometimes earn up to 200 to 500 percent of their investment in a single case, Blick said.

“The insurer is taking a similar bet to the bet the litigation funder is taking,” Blick said. “If the insured case is unsuccessful, the insurer pays out a substantial sum of money and collects no premium. If the insured litigation is successful, the insurer will pay out zero and will be entitled to a premium.”

The cost of the premium is determined by an insurer’s underwriting process, and it is based on the cost of the underlying litigation and the policy limit. TheJudge, for its part, only receives a commission from the insurance company if the plaintiff’s case is successful.

Another difference between litigation insurance and funding is that insured plaintiffs pay the cost of their litigation as it progresses, with any potential payment from the insurer coming only after the case is over. Litigation funders typically provide money upfront to fund certain suits.

Blick said litigation insurance is a more popular product in the U.K. than litigation funding. That is primarily because it is economically viable for a broader range of cases. While litigation funders require cases with potentially huge damages awards in order to fund the entirety of a suit, litigation insurers can tailor policies for smaller cases. The insurance coverage is often as low as \$200,000, Blick said.

For policies that size, TheJudge will be competing with an innovative litigation insurance provider that launched last year in the U.S.

Level Insurance, launched by a pair of Miami lawyers, provides what it calls cost protection for federal and some state litigation with policy limits of up to \$250,000.

Somewhat different from TheJudge’s offering, Level Insurance’s product, win or lose, costs 7 percent of the amount of coverage a firm or plaintiff purchases. It can also be purchased through the company’s website with no underwriting process.

“It’s a one-time premium payment and the policy follows the case through appeals and retrials,” said Larry Bassuk, president and co-founder of Level. “There’s no expiration date for the coverage.”

When asked why litigation insurance is not more prevalent in the U.S., considering it is more popular in the U.K., TheJudge’s Blick said it was because of the expertise built up by U.K. insurance companies in offering the product and the unconventional payment model compared to most insurance policies. In most types of insurance, premiums are paid regardless of whether a claim is filed. The U.K.’s “loser pays” system may also increase demand for the product.

“There are some basic features of this type of insurance which would make most insurance companies run for the hills,” Blick said. “If you were to turn up to any of the major, well-known American insurance carriers and say we want you to run the risk of losing a live piece of litigation and we may never pay you a premium, most insurance carriers just cannot wrap their head around that.”