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insurance law intensive

insurance in the eye of the storm

Session 2 + Chair
Thursday 25/5/2006, 2.30pm

The pros & cons of Litigation Funding - An insurers nightmare?

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LITIGATION LENDING INSURANCE LAW INTENSIVE 2006

IMF Investment Portfolio as at 31 December 2004		
Matter		Maximum Claim Value
AM Corporation, Smith, Rich & Lifetrack		\$20,000,000
Aristocrat Leisure Ltd		\$130,000,000
Barron Entertainment v Directors		\$2,000,000
Bensons		\$3,000,000
Concept Sports		\$4,000,000
Coplex Resources NL		\$10,000,000
Doran Construction v Directors		\$3,000,000
Edessa		\$3,000,000
Finance Brokers Case		\$90,000,000
Geneva Finance v Horwath & Horwath		\$20,000,000
Global Finance		\$10,000,000
Global Market Link Pty Ltd v Ord Minnett		\$10,000,000
Kingsheath Club of the Clubs v Stamoulis		\$10,000,000
Meadow Springs v Colliers		\$10,000,000
Mercury Rising		\$35,000,000
NEIB v Minara Resources		\$20,000,000
Nomad Telecommunications		\$15,000,000
Pan Pharmaceuticals		\$30,000,000
Performance Finance		\$9,000,000
Reynolds Wines (in liquidation)		\$10,000,000
Sentinel		\$80,000,000
Sit Simplex v Carter Newell		\$2,000,000
Sons of Gwalia		\$15,000,000
Spatial		\$50,000,000
Truckies v Pilbara Manganese Pty Ltd		\$6,000,000
TOTAL		\$597,000,000



“KIRBY J: Access to justice is one of the biggest problems in the common law system because of its adversarial character. If you have an inquisitorial system then it can be done much more cheaply, but in our system it is expensive and that is why the move in the United States, by the way, began for representative proceedings.

MR MYERS: Again, your Honour, justice, say in the Napoleonic countries that have the Napoleonic system, it is drawing a very long bow to say that justice there is cheap. Inquisitorial proceedings go on forever at enormous cost to - - -



KIRBY J: *That is true but most inquisitorial lawyers I have spoken to think ours is a Rolls Royce system. They may have a slow Volkswagen but it at least gets there, but - - -*

MR MYERS: *Rolls Royces are very good cars.*

KIRBY J: *Yes, I know, but only for the very rich, the very few, or the publicity supported and we all know that....public funds for civil litigation are very small.”*



“It is a very good system, the envy of many countries in the world. Every conceivable process is available to ensure that no stone is left unturned in the search for a just resolution. It is the Rolls Royce of justice systems in the sense that it is the best that money, a lot of money, can buy, but there isn’t much point in owning a Rolls Royce if you can’t afford the fuel to drive it where you want to go. You can polish it, admire it and take pride of ownership from it but it doesn’t perform its basic function sitting in the garage.” Martin CJ, May 2006



“The community owns the justice system of this state but very few of its citizens can afford to engage in its processes. It might be time to consider trading our Rolls Royce for a lighter, more contemporary and more fuel efficient vehicle which we can actually afford to drive and which will get us where we need to go just as effectively and perhaps more quickly.”



“Innovative methods of litigation funding must be developed. A code governing the terms upon which commercial third party funders can take an interest in the proceeds of litigation and uplift fees can be charged to encourage the legal profession to undertake appropriate cases on a no-win no-fee basis would assist worthy cases to go forward.”



“Litigation funders are not the cause for concern. The cause for concern is the cost and delay involved in the justice system”

John Walker, IMF, Sydney Morning Herald, 26 July 2005.



Charging a percentage uplift over and above normal fees is acceptable, but taking a cut of the action is not.



- Litigation funders are subject to
- no professional standards; and
 - no real controls



The golden rule

The person who owns the gold makes the rules.



*Whilst you (**the funder**) are acting for your client (**the claimant**) you have engaged me (**the solicitor**) as principal and not as agent for your clients.*

Responsibilities

My responsibilities in respect of the matter include (but may not be limited to):

- (1) overall supervision of each matter.*
- (2) attendance to preparation of documents required by courts including affidavits and orders. Filing of those documents:*



(3) liaison with counsel

(4) appearance (except where appearance by counsel) at directions hearings.

Assistance

I understand that you and your staff will provide assistance to me in respect of the matters.



In particular -

- *you (**the funder**) will be responsible for the day to day carriage of the matters. However you make copies of all documents (in respect of the matters) between yourself and your clients available to me. You will inform me (**the solicitor**) of all material oral communications between yourself and your clients.*
- *you will liaise with your clients (**the claimants**). I (**the solicitor**) will not directly liaise with your clients.*



- *you will provide sufficient staff to support any court hearings including attendance at court to assist counsel and to liaise with witnesses.*

Notification to clients

I understand that you have notified your clients as to my involvement in the matter and they have agreed to me representing them.



Gore v Justice Corp Pty Ltd

[2002] FCA 354



Roxborough v Rockmans (2001) CLR 516

7 Retailers

Average recovery: \$22,000.00



Fostif

10,000 retailers (est)

Average claim: \$4,000

Total recovery: \$40 million (est)



Total unremitted fees: \$230-250 million
(est)

Funder's share: One-third

