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FROM THE BLOG

Settlement Loans in Canada 10 Years On: Cautions and Considerations

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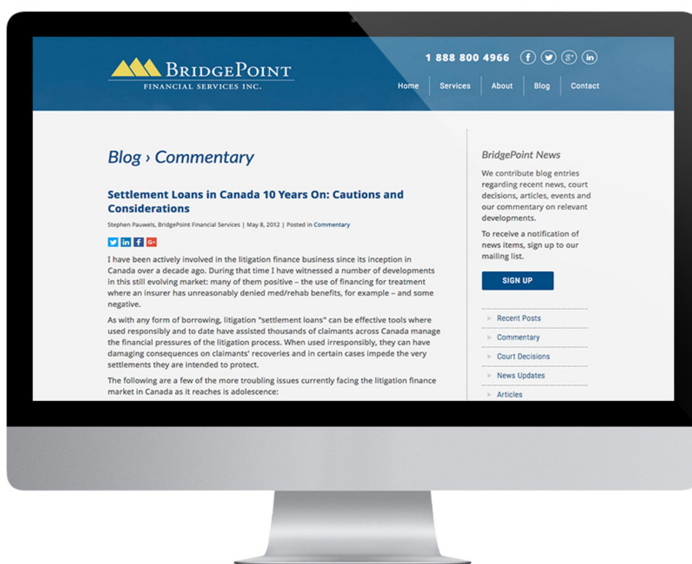

I have been actively involved in the litigation finance business since its inception in Canada over a decade ago. During that time I have witnessed a number of developments in this still evolving market: many of them positive – the use of financing for treatment where an insurer has unreasonably denied med/rehab benefits, for example – and some negative.

As with any form of borrowing, litigation "settlement loans" can be effective tools where used responsibly and to date have assisted thousands of claimants across Canada manage the financial pressures of the litigation process. When used irresponsibly, they can have damaging consequences on claimants' recoveries and in certain cases impede the very settlements they are intended to protect.

The following are a few of the more troubling issues currently facing the litigation finance market in Canada as it reaches is adolescence:

Many litigation lenders have little sense of the value of a claim. Imagine a real estate mortgage market where lenders relied exclusively on the borrowers and their agents to advise them on how much a given property was worth and could therefore support in debt. Google "US subprime mortgage market" for a case study of the nasty repercussions of such a scenario for all participants. Litigation represents an infinitely more complex and risky form of security than real estate yet many lenders in this space – blinded by the allure of charging inordinately high interest rates - rely entirely upon the views of claimants and/or their counsel as the basis for their lending decisions. The inability of some lenders to independently assess a claim's prospective value and monitor their lending decisions accordingly portends a similar fate for them as their US subprime counterparts. As a case in point, one of the original and more active litigation lenders in Canada recently exited the market as the results of its overly aggressive lending practices came to pass.

Too many claimants view their lawsuits as ATMs. The original premise (and promise) of litigation funding was to ensure that claimants could sustain themselves through the final, critical stages of their litigation without succumbing to opportunistic insurer settlement offers. Such "emergency" funds were intended to stave off evictions, keep utilities turned on and put food on tables while counsel negotiated a reasonable resolution of the underlying claims. The advent of an increasing number of litigation lenders promoting "fast" and "easy" money has fostered the perception amongst claimants that their litigation can be repeatedly tapped for discretionary cash like an ATM machine, with little consideration for the costs and consequences until it is too late.

Lawyers are often 'out of the loop' of their client's borrowing decisions. Five years ago, most decisions to borrow against a future legal settlement were made only after a serious dialogue between claimant and counsel about the implications of doing so. In fact, it was typically counsel who made the decision to introduce a litigation lender into the equation once more traditional (and less expensive) avenues of funding were exhausted. Today's claimants are much more aware of their litigation borrowing options through lenders' active online marketing and promotions in venues such as payday

loan outlets resulting in an increasing number of settlement loans being executed without counsels' knowledge. By the time a client presents his/her lawyer with an assignment notice for signature, it is too late to reverse the damage and discuss alternatives.

Many lawyers refuse to get involved with clients' personal financial issues. A claimant's financial distress can be as attributable to their cause of action as their physical or psychological impairments - and may require similar monitoring and treatment. And yet, most lawyers are far less enthusiastic to get involved in addressing any issues of a financial nature.

Consider the following: a recent Canadian Payroll Association study revealed that 57% of working Canadians could not sustain even a one week delay in their paychecks without experiencing financial difficulty1. Now compare this to the ordeal of the average personal injury claimant whose income replacement benefits (if available) take weeks to commence, often fall well short of the actual income needing replacement and are subject to exhaustion or termination by an insurer with minimal notice at any time - typically years before the litigation is resolved. Beyond the brief window where their savings and/or assistance from family and friends can sustain them looms the serious prospect of eviction or similar economic crisis.

Is not assisting a client in coping with the many trials of the litigation process – including those of a financial nature – simply part of a responsible plaintiff personal injury practice? A qualified litigation lender's ability to make the most informed, responsible financing decision is predicated on counsel's co-operation in providing access to certain factual (non-privileged) information about a prospective borrower's claim. Note this does not include providing representations about the value of a claim and any lender requesting this or similar opinions in writing from counsel should raise a serious red flag. Ignoring such basic information requests and/or separately billing for the time spent doing so is a disservice to the client and serves only to steer them towards less diligent lenders - invariably at a higher cost.

In summary, while it is easy to blame claimants who have borrowed excessively and/or on egregious terms as the authors of their own misfortunes, the truth is that both litigation lenders and borrowers' counsel share responsibility in these situations. The population of prospective litigation borrowers is by definition a desperate and vulnerable one. Lenders who offer their services in this specialized area should adopt and abide by responsible lending practices, offer reasonable and clear terms of funding subject to open review by the market and should be held to account by the legal community to demonstrate such practices on a continued basis. Lawyers have the responsibility to educate themselves on all means of financial support available to assist their clients in various circumstances – including litigation financing alternatives. This would prepare them for an open dialogue with their clients where the need arises and reduce the chances of their clients making uninformed decisions with potentially negative implications on the outcome of the litigation for both parties.

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