



# Litigation Funding for Antitrust Matters

Woodsford Litigation Funding Insight

Few types of litigation rival antitrust matters in terms of their size, complexity and cost. It is due to these basic characteristics, in conjunction with other aspects that we will explore, that antitrust matters are a fit for litigation funding. In this short whitepaper, we provide visibility regarding how clients, litigators and funders interact to drive favorable outcomes in antitrust matters.

# The Fit Between Antitrust Matters and Litigation Funding

Many antitrust cases have the following characteristics which make them an ideal fit for litigation funding:

## **Large Size/Significant Complexity:**

Antitrust cases can be large and high-stakes, with implications that can reshape companies and entire industries. Given the challenges inherent in such disputes, funding is a viable and rational way to address uncertainty across a range of litigation risks. Indeed, the diversity of antitrust matters themselves – and the varied issues that arise as they are pursued – cannot be overstated. Antitrust cases may be focused or can involve parallel government and private actions, spanning multiple federal and state jurisdictions. These cases can involve a single plaintiff or groups of plaintiffs pursuing multi-faceted actions resembling class actions. Antitrust claims may involve other commercial (or even criminal) claims, further complicating their management. A good example of this is the interplay between antitrust and intellectual property law, which can give rise to complex and protracted litigation, where corporate titans may clash to define an industry's IP standards. From the litigator's perspective, funding can give the law firm confidence that a complex matter is well-resourced to proceed across any number of uncertain outcomes. This scenario can be preferred versus a purely client-funded matter, in which the appetite and ability to fund a case may likely change over time. The following example highlights how litigation funding played a

role in supporting a large antitrust case.

**Example:** Several groups of small producers/manufacturers, spread across the country, sought to bring an antitrust case against their largest industry competitor in response to that company's broad, aggressive series of acquisitions which had consolidated market power and limited competition. The plaintiffs were working with an experienced law firm that recommended organizing the actions into several coordinated litigations, each of which was sizable, to be filed in multiple United States District Courts. The cases included complaints for several violations of antitrust law, including predatory pricing, and conspiracies to restrain trade. Due to the scope of the cases – and the need to put them on a sound financial foundation from the outset – litigation funding was put in place.

## **High Cost:**

As practitioners can attest, antitrust matters, due to their complexity, are extremely expensive to litigate. These cases are particularly expert-intensive, often requiring intricate analyses from economists or statisticians, and it is not uncommon for expert fees alone to exceed \$1 million. And these costs can be difficult for many plaintiffs to absorb. Due to their nature, antitrust cases often involve smaller plaintiffs – with businesses that may have been compromised or damaged by the alleged behavior – versus large and deep-pocketed defendants able to afford

elite counsel from top law firms. Absent its own significant financial resources to pursue its case, a small claimant may even be forced into a low-figure settlement that does not reflect fair value or an adequate financial remedy for the damage that has been sustained. Unfortunately, defendants often pursue a “war of attrition” strategy to blunt or derail a meritorious plaintiff from prosecuting its claim. The following example highlights how litigation funding addresses the cost of antitrust matters.

**Example:** Several small service providers, operating within a mature market and similar geographic region, sought to bring a multi-faceted antitrust litigation against a large national company. The defendant was operating in a nascent but tangential market, one in which its offering potentially represented a viable alternative for the plaintiffs’ offering. The defendant was accused of anticompetitive and predatory pricing practices, intended to capture market share within the targeted geography and drive competitors, that could not afford to operate at such pricing levels, out of the market. In this circumstance, litigation funding was put in place to address the extremely high burden of expert costs, as both a renowned economist and a cost accountant were to be retained to develop damage theories and calculations (which

had previously been explored by the law firm on a preliminary basis). As the case progressed, each expert was heavily involved in the preparation and presentation of the plaintiff’s case as well as in responding to arguments put forth by various experts for the defendant.

### **Potential for Risk-Sharing Between Law Firms and Funders:**

If there is a theme to be drawn from these cases, it perhaps is that they tend to attract the most experienced litigators and law firms. And many of these law firms are also increasingly willing to devote contingency resources to antitrust cases, allowing funders to share risk with these law firms, which is an important consideration for the funder since it assumes a passive role in the case.

It should also be emphasized that litigation funders do not control the litigation. Although sophisticated funders are staffed with expert litigators with decades of top law firm experience and can be a valuable resource, all decisions regarding the case and potential settlement should remain firmly in the hands of the lawyer and claimant. By relieving some of the financial stresses of litigation, particularly those unique to antitrust matters, working with a funder allows a lawyer to focus on the merits of a complex dispute.

## Evaluating Antitrust Matters for Funding

The process to review an antitrust matter for funding typically proceeds through the following stages:

- **Initial Review:** A funder, such as Woodsford’s evaluation of an antitrust matter typically begins with a case review, conducted with the litigating attorney under a non-disclosure agreement. The funder will seek to

understand the basic theory of the case – that is, what is the key anti-competitive practice that is alleged and what evidence exists to support its occurrence and quantify its impact. The funder will also seek to understand the litigation budget and the funding requirements, including the breakdown and timing of anticipated expert costs. The funder will endeavor to evaluate whether the basic economic

theory of the case works and whether the scope of the case is appropriate for the law firm to properly execute on its strategy.

- **Funding Proposal:** Once a fit from initial discussions may be apparent, the next step involves the funder creating a proposal, which may lead to a definitive agreement between the parties and a commitment from the funder to conduct detailed diligence toward closing the transaction.
- **Detailed Diligence:** From understanding the basic tenets of the case, the funder will work with the litigator to delve into other issues in greater depth such as the strategy, the standing of the plaintiff, the anticipated venue, and the specific antitrust violations. United States antitrust law is a diverse legal framework, a collection of federal and state laws that govern the conduct of businesses to promote competition. Given myriad regulatory and procedural complexities, it is essential that an antitrust case is framed properly at the outset. Accordingly, the law firm's thoughtfulness, level of preparation and command of the key case issues are critical considerations for the funder throughout the diligence effort.

Sophisticated funders prefer that the diligence process be a two-way dialog and one in which the funder is responsive

to questions as well. As in many relationship development situations, it helps for the litigator and/or claimant to start with basic questions and an understanding of the following:

- Where is the funder's focus in the initial discussions?
- Does the funder seek to develop a deep understanding of the needs of the parties?
- How responsive is the funder to questions?
- Is the funding structure tailored specifically for the case or is it being imposed by the funder as a standard course of business?
- How clearly is the funder able to explain its review process?
- What is the funder's willingness to share feedback?



## Building Trust Between Law Firms and Funders

Given the complexity of antitrust matters, it is hardly surprising that a funder's diligence is rigorous. However, what is less appreciated is how funding discussions also enable law firms and funders to build trusted relationships, with benefits for the case in question and beyond. Ultimately, success in funding antitrust matters, like any

other complex dispute, comes down to the essential concept of balance. Experienced funders seek neither to assume all the risks nor to pass them to others, instead recognizing that only balanced arrangements can sustain a case over the long-term and through challenges in the high-stakes arena of antitrust litigation.

## About the author

Josh Meltzer is the Managing Director, US for Woodsford Litigation Funding and leads the growth of the company in the United States.

Josh joined Woodsford from Rembrandt IP Management, LLC, where he served as Vice President of Business Development. Josh planned and launched Rembrandt's litigation funding business, managing the initiative from inception to an operating company, encompassing a multi-disciplinary team, a large opportunity pipeline and a portfolio of completed investments.

Prior to joining Rembrandt, Josh held licensing and strategy roles at Intellectual Ventures Management LLC (IV). Previously, Josh was founder and CEO of Transportation Safety Systems Inc., a company formed to monetize a proprietary automotive safety technology. Josh also held multiple roles at General Electric Company and its financial services unit GE Capital, spanning venture capital, structured finance, investments, and operations.

Josh holds a BS in Finance from The University of Maryland, where he graduated Magna Cum Laude.

## About Woodsford Litigation Funding

Founded in 2010, with offices in London, Philadelphia and Singapore Woodsford Litigation Funding provides tailored litigation financing solutions for businesses, individuals, and law firms. This includes both single case and portfolio litigation funding and arbitration funding. Woodsford's Executive team blends extensive business experience with world-class legal expertise. Woodsford Litigation Funding is a founder member of the Association of Litigation Funders of England and Wales.

Woodsford's role in supporting claimants in David versus Goliath litigation was highlighted in a landmark ruling of the English High Court: Essar Oilfields Services Limited v Norscott Rig Management PVT Limited [2016] EWHC 2361 (Comm)

For further information, visit [www.woodsfordlitigationfunding.com](http://www.woodsfordlitigationfunding.com) or email **Joshua Meltzer** at [jmeltzer@woodsfordlf.com](mailto:jmeltzer@woodsfordlf.com)