



# 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, as well as other aspects that we will explore, antitrust matters are a good fit for litigation funding. In this whitepaper, we provide insight into how clients, litigators and funders interact to drive favorable outcomes in antitrust matters.

## The Basics of Litigation Funding

Litigation funding, also known as “litigation finance” or “third party funding,” is simply an alternative means for claimants to fund the costs of legal disputes.

Rather than an individual, corporation or institution paying the costs out-of-pocket or a lawyer proceeding on full contingency, a commercial litigation funder, such as Woodsford, finances the cost of some or all of the litigation in return for a share of any award.

This kind of funding is typically non-recourse — if the claim is lost, the claimant is not liable to repay the investment of the funder. Thus, in a normal funding arrangement, the litigation funder shoulders the majority of the risk.

Funding is increasingly part of the legal mainstream, becoming more commonplace

in the US and major jurisdictions globally. Woodsford, with a presence in Philadelphia, San Francisco, New York, London, Tel-Aviv, Singapore and Melbourne, has funded many types of claims, including antitrust matters. In the spring of 2019, we were proud to announce that in coordination with preeminent antitrust firm Hausfeld LLP, we are funding a high-profile competition (antitrust) claim worth \$120m in England against a number of large train operating companies. This claim has generated significant media attention, with the BBC, The (London) Times and the London Evening Standard covering the story in some detail.

As stated above, this whitepaper will look specifically at antitrust matters and how they can benefit from the involvement a funder like Woodsford.

## 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, state and even global 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 may be better than a purely client-funded matter, in which the appetite and ability to fund a case may likely change over time. The example below highlights how litigation funding played a role in supporting a large antitrust case.

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 as outlined above, 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. 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.

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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.

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.

#### **Individual v. Collective Actions:**

Many antitrust actions involve multiple plaintiffs which have been injured by anti-competitive conduct. In the US, class actions are often an effective mechanism to allow adjudication on a group-wide basis.

However, in some instances, an individual plaintiff may have strong claims that would be better brought as a stand-alone action. In such instances, the plaintiff faces a difficult choice: participate as a class member and risk a smaller recovery, or "opt-out" and pursue claims individually, allowing more control and a potential for higher recovery, but requiring substantial investment in litigation costs. The availability of litigation funding, and the expertise that a funder like Woodsford brings, can help ease that decision making process and facilitate the best recovery for a plaintiff considering opting out.

## Evaluating Antitrust Matters for Funding

Reputable funders such as Woodsford will review many hundreds of claims each year and will only end up funding a small fraction of them. Due to the level of investment and the binary (win-lose) nature of the risk involved, claims need to overcome a high bar before a funder will start writing checks. Woodsford conducts all of its diligence in-house, enabling us to make investment decisions efficiently. In the process to review an antitrust matter outlined below funding typically proceeds through the following 3 stages and we aim to either decline the investment opportunity or move to stage 3 (the detailed diligence phase) within a week of receiving an enquiry:

- **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

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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 dialogue and one in which the funder is responsive to questions as well. The claimant and its lawyers should also take the measure of the funder at this stage as not all funders are created equal. In particular, the claimant and its

representatives should be mindful of:

- 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?

### **The softer benefits of funding**

Having your client's case reviewed by an expert, dispassionate, objective third-party adds an extra (and free) layer of professional due diligence to their claims. In 2017, leading global firm Freshfields Bruckhaus Deringer stated: "To our ears, the concern sometimes expressed that funding breathes life into unmeritorious claims rings false. On the contrary, the involvement of a funder adds an additional layer of diligence at an early stage of the process, leading to greater rigor in risk and cost-benefit assessments. This brings with it greater objectivity that would, if anything, tend to weed out less meritorious cases."

At Woodsford, we have also found that if and when our involvement in a case is made known to the defendant, it often leads to rapid and positive settlement discussions, even with defendants that typically do not settle. The knowledge that the claimant is fully-resourced and that the claim has overcome the high bar set by the funder before they will invest, sends a very strong message.

It should also be emphasized that litigation funders do not control the litigation that they finance. However, sophisticated funders such as Woodsford are staffed with expert litigators with decades of top law firm experience who can, and often do, offer a valuable resource to the claimant and their

lawyers. All decisions regarding the case and potential settlement should always remain firmly in the hands of the lawyer and claimant. Clearly though, the main role of the funder is to relieve some of the financial stresses of litigation, particularly those unique to antitrust matters, allowing the lawyers to focus on successfully prosecuting the complex dispute.

Finally, the reality of today's globalized economy means that anticompetitive

behavior and its economic impacts increasingly span jurisdictions. While antitrust enforcement and private litigation take place within a national jurisdictional framework, it behooves lawyers and potential plaintiffs to understand how similar matters may be proceeding in other jurisdictions. Because of Woodsford's global reach, we can add substantial strategic value to antitrust claims that have a broad jurisdictional footprint.

## Building a successful relationship to benefit your clients

If there is a theme to be drawn from large antitrust 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 – an important consideration for the funder since it assumes a passive role in the case.

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.

Josh joined Woodsford from Rembrandt IP Management, LLC, where he served as Vice President of Business Development. At Rembrandt, Josh was responsible for sourcing and reviewing all acquisition and commercialization opportunities as well as for the creation of new offerings that leveraged Rembrandt's expertise and capital. 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®), where he led analysis activities for IV's communications and software patent portfolios. Josh was also a Partner at Foster Chamberlain, LLC a business development group that works with large companies and research labs to commercialize new technologies and launch new ventures. 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 and with offices in London, the USA, Tel-Aviv 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 is a founder member of the Association of Litigation Funders of England and Wales.

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