



# A Practical Guide to Choosing a Litigation Funder

Woodsford Litigation Funding Insight

# How to Select the Right Litigation Funder

With litigation finance on the rise and continuously taking different forms, it makes sense for lawyers to educate themselves on funding and the numerous finance solutions that are available to their firms and clients. When clients require or may otherwise benefit from litigation finance, it is arguably incumbent upon the lawyer not only to have adequate knowledge of funding and the products available, but also to help the client in deciding which funders to approach and (more importantly) which ones to avoid. In this regard, lawyers should select only reputable and professional litigation finance providers, who are experienced in the practice of dispute resolution.

With many disputes lasting several years, a litigation funding relationship is a long term one between the funder, the claimant and the lawyers, so choosing the right partner is key. With the number of litigation funders on the rise, it is all the more important to know what to look for when choosing a funder, but practical information, such as how lawyers and claimants can differentiate funders, remains hard to find. The aim of this guide is to offer an insider's view into this topic by explaining important differences between:

- Funder structures
- Funder strategies
- Funder diligence / proposals
- Funder intangibles

Along the way, we will include some sensible suggestions in the form of **Insider Insights**.

# Funder Structures

## What are the important differences between funder structures?

The first question a party seeking litigation funding should ask is: what is the source of the funder’s capital? Litigation funders can be split into those that have capital and those that do not. Funders with capital to invest have raised dedicated funds from institutions, endowments, private investors, universities or asset managers. They have convinced investors to back their team, based on its experience, track record, credibility and strategy. Most of the leading funders have significant capital to invest.

Conversely, some funders operate as pledge funds or essentially as brokers, meaning they may have access to capital, but it is not dedicated for their use. Instead, these ‘funders’ secure engagements with claimants and then seek to raise capital from the market on a case-by-case basis. It is not always obvious at the outset whether a funder is operating under this quasi-brokerage model.

Funders with their own capital to invest can also be distinguished between public or private. Public funders are listed on stock exchanges, subject to regulatory

requirements and the expectations of investors. Other funders raise dedicated time-constrained funds that will be subject to mandates that may preclude them from certain types of investment. Some funders operate privately, for example as family offices, with substantial resources. Indeed Woodsford recently announced a US\$100m commitment from its major shareholder, taking the capital available to the business



to several hundred million dollars. Private equity, hedge funds and other similar entities also participate in litigation funding of cases on a one-off basis. Exhibit A provides an overview of funder structures.

## Exhibit A: Various Funder Structures

Litigation Funder Structures					
Funders with Capital to invest			Funders without Capital to invest		
Public Funds	Private Funds			Pledge Funds	Brokers/Intermediaries
	Family offices	Private equity	Hedge Funds		

### *Insider Insights:*

*As the funding market continues its rapid development, funders are organising themselves to pursue specific market sectors and opportunities. It is important to understand each funder’s structure, as it impacts how it operates, deploys capital and its investment time horizon.*

## Why do these structural differences matter to lawyers and their clients?

The funder's structure can have significant implications for a lawyer and client seeking to fund a case. Funders with capital to invest can offer certainty that the funds required to see a claim through to conclusion are available to be deployed and

that a claim will be funded in a timely manner, versus others that are subject to the uncertainties of the market. Funders with significant capital to invest off their own balance sheet, like Woodsford, have the greatest flexibility when deploying capital and can offer customised solutions for each situation. In our experience, such customisation can be invaluable when funding complex, high-value disputes.

### *Insider Insights:*

*Lawyers and clients should ask directly how a funder is organised, how much capital the funder has available and whether that capital is committed or not. Further, funders like Woodsford, as members of the Association of Litigation Funders (ALF) in London adhere to the ALF Code of Conduct which, inter alia, contains capital adequacy requirements. These are threshold questions, which any funder should be able to answer quickly and easily.*

## Funder Strategies

### What is a funder's strategy?

Funders each have their own strategies, preferences or areas of focus. Two of the foundational elements of any funder's strategy relate to its participation and return profile. Does the funder require an active role (insofar as allowed by the relevant governing laws) or is it a passive investor only? Is the investment made only on a non-recourse basis? Woodsford offers its diverse funding solutions on a passive and typically non-recourse basis.

There are other important questions to raise to understand a funder's strategy. Does the funder consider both new cases as well as those that have already been filed? Can the funder's capital be used for both legal fees and out-of-pocket expenses, or even other uses outside the litigation? Is there a minimum investment size or a preferred relationship between the investment size and realistic minimum damages? Does the funder prefer single case or portfolio investments? Does the funder also consider

judgment monetisation opportunities? What level of risk sharing/alignment with the law firm is viewed by the funder as adequately balancing the interests of all parties?

Woodsford invests across a broad range of claim types and considers both existing cases and those yet to be commenced. We are investors in both single cases as well as portfolio arrangements. Woodsford is also comfortable evaluating an early-stage opportunity and providing rapid feedback regarding whether a matter may be a fit for funding. We do not require detailed memos with respect to our case evaluations. Our capital may be used for general litigation obligations (fees or costs) or other uses as agreed by the parties. We are also comfortable considering smaller investments than those typically preferred by other funders.

Exhibit B highlights important elements of a funder's strategy, which may help the lawyer and claimant to determine whether their case may or may not be a fit:

## Exhibit B: Various Funder Strategies

Litigation Funder Strategies													
Participation		Return Profile		Cases Funded		Funding Offered		Investment Focus					
Active	Passive	Recourse	Non-Recourse	New matters	Existing matters	Cost only	Cost + Legal Fees	Claim type	Investment size	Technology area	Damages / value	Deal structure	Level of alignment

  

Litigation Funder Deal Structures			
Client-side structures		Law firm-side structures	
Single-case funding	Judgment monetisation	Portfolio Funding	Umbrella Funding™

Note: Woodsford's Umbrella Funding™ facility functions as a funding agreement-in-principle, allowing law firms to secure new clients with the confidence that funding will be available on preferential terms and based on an accelerated diligence process.

### *Insider Insights:*

*When reviewing a funder's website, pay close attention to any mention of specific cases that the funder has either invested in, or successfully resolved. Look at the biographies of the team members, paying attention to those in the diligence roles. What firms did they come from? How much trial experience do they have? What types of cases have they litigated or likely reviewed, and how do those cases compare to the case for which funding is being sought? Keep in mind that litigation funding, like many forms of early-stage investing, is about recognising patterns – that is, a good investment has certain characteristics and the purpose of a funder's diligence is to determine whether those characteristics are present.*

### **Why is the funder's strategy important to lawyers and their clients?**

It is essential to work with a funder that has relevant case and claim-type experience. There are several reasons for this. First, the funder's diligence will be more efficient and focused, saving time and effort for all parties. Second, the funder will make a sound appraisal of the case's risks and will

be better equipped to provide a timely and compelling proposal. Finally, the funder will have realistic expectations regarding the way the case will unfold and will be a stronger partner over the long-term. Woodsford has one of the most experienced and long-standing executive teams in the litigation funding market, with its executive team drawn from top US, English and global law firms, and has deep expertise evaluating a broad range of claim types.

### *Insider Insights:*

*Early discussions between funders and lawyers should be a healthy dialogue. Lawyers should feel empowered to interview the funder to test their knowledge of a claim type or technology area. Make sure the funder can clearly articulate its strategy. Should a funder later decline to fund a case, lawyers should take care to distinguish whether this decision was based on the fit with its strategy or the case's merits. Woodsford puts great value on its lawyer relationships and makes every effort to provide timely and useful feedback regarding cases it has evaluated.*

# Funder Diligence / Proposals

## What are the different approaches funders take to conducting due diligence?

Funders take various approaches to due diligence, which can have significant implications for securing case funding. Some funders, like Woodsford, are well organised and able to conduct preliminary diligence efficiently, providing feedback or a commercial proposal within 3-5 days of the receipt of the case background information. Our approach is to offer economic terms quickly, so as not to waste time if a transaction appears unlikely. Other funders may conduct more detailed diligence up-front, requiring a longer period of exclusivity, with the intent to provide a commercial proposal much later in the process.

The experience of the funder is an important consideration for a law firm client. Some funders are new to the market or do not have executive teams with experience

working together. Litigation funding requires a multi-faceted analysis, drawing on complex legal, financial and technical issues. Experienced funders, have the benefit of reviewing thousands of cases over many years and can bring that perspective to discussions with lawyers. Sophisticated funders can also bring substantial analytical, legal and technical resources to bear during the diligence phase of the case, challenging lawyers and offering valuable insights that may improve the case or strategy. Woodsford, for example, has an Investment Advisory Panel (IAP) which consists of jurists from around the world, former top litigators and managing partners from major law firms, a former federal district court judge, a former judge of the ECJ and a former President of the International Court of Arbitration of the ICC. Exhibit C highlights different funder approaches to the diligence process.

## Exhibit C: Various Funder Diligence Approaches

Litigation Funder Diligence Approaches	
Front-end orientated, Shorter diligence period	Back-end orientated, Longer diligence period
<ul style="list-style-type: none"><li>• Gathers basic case information</li><li>• Provides feedback or a commercial proposal within 3-5 days</li><li>• Pursues parallel path of detailed diligence and putting litigation funding agreement in place over 30-day exclusive diligence period</li></ul>	<ul style="list-style-type: none"><li>• Conducts extensive diligence up-front, often under longer term period of exclusivity (e.g. 60, 90, 120 days)</li><li>• Provides commercial proposal later in the process, after significant diligence has been completed</li></ul>

### *Insider Insights:*

*Reputable and well-organised funders should guide the lawyer through its diligence process, so that both parties are clear on the path forward and the realistic timing. However, as mentioned, the diligence process should also be an interactive dialogue, with lawyer and funder exchanging information along the way, to avoid any last-minute surprises toward completing a transaction.*

## What are the different approaches funders take to preparing proposals?

Funders also provide proposals of varying depth and breadth. Some funders will provide a proposal which just contains the major economic terms. This approach can lead to confusion or further negotiation if

substantive elements of the transaction have not been agreed by the parties.

Experienced funders prefer to provide a more robust proposal which includes the major economic terms, but also includes the most significant substantive contract provisions appropriate for a transaction of this nature. These contract terms may

describe the representations and warranties to be made by the parties, the circumstances under which the agreement may be terminated or other important considerations.

In our experience, providing a more detailed term sheet first benefits both parties and allows potential issues to be addressed in a timely and amicable fashion. Exhibit D compares these two approaches.

## Exhibit D: Various Funder Proposal Approaches

Litigation Funder Proposal Approaches	
Economic Terms Only	Economic Terms + Substantive Contract Terms
<ul style="list-style-type: none"> <li>Describes the investment to be made by the funder and the approach for determining the funder's return</li> </ul>	<ul style="list-style-type: none"> <li>Includes economic terms</li> <li>Also provides additional (and useful) detail regarding the definitive litigation funding contract, the due diligence process and the representations and warranties to be made by each party in closing a transaction.</li> </ul>

## Funder Intangibles

Litigation funding is an analytical business, so it is perhaps surprising that some of the most important ways to differentiate funders fall under the category of "intangibles". These elements can also be referred to as

"off-term sheet" considerations. In our experience, these intangibles, which are highlighted in Exhibit E, can end up being far more important than any ink put on the page of a term sheet or contract.

## Exhibit E: Funder Intangibles

Funder Intangibles			
Values		Operations	
<p><b>Integrity</b></p> <p>Is the funder committed to backing strong claims and supporting credible claimants that have been wronged? Does the funder have a good reputation?</p>	<p><b>Alignment</b></p> <p>Is the funder serious about a fair allocation of potential proceeds amongst the parties, with the claimant receiving the majority of the proceeds?</p>	<p><b>Flexibility</b></p> <p>Is the funder able to be responsive to the needs of the claimant and law firm in developing bespoke funding solutions that work?</p>	<p><b>Responsiveness</b></p> <p>Is the funder engaged and willing to do what is necessary to help the parties succeed and proceed quickly?</p>

### *Insider Insights:*

*An experienced funder could even alter the settlement dynamics of a funded case. This would occur when the funder's participation is disclosed to the defendant to enhance the claimant's negotiation position. The fact that an expert, dispassionate, objective third-party has assessed the claim and is prepared to invest significant funds on a non-recourse basis, sends a very strong message to the defendant. Woodsford, in fact, funded a case which resolved in an attractive settlement, with the defendant citing Woodsford's sophistication and financial backing as rationale for settling the matter, which created an attractive financial outcome for the claimant.*

## Final Thoughts

As a market leader, Woodsford takes its responsibility to educate stakeholders about funding seriously, whether they decide to use our funding or not. Woodsford also recognises that funders must earn and establish trust with claimants and law firms. Only then will they become a partner of genuine capability and value.

## About the authors

Josh Meltzer is the Managing Director, US for Woodsford.

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 commercialisation 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. In his capacity as the head of Rembrandt's funding business, Josh led origination efforts and negotiations with counterparties, as well as completed transaction diligence.

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

Mitesh Modha

Mitesh Modha is Business Development & Origination Director for Woodsford, based in London. Mitesh joined Woodsford from Kain Knight, a market leading costs litigation firm, where he was a Director. In his 9 years at Kain Knight, he was exposed to every aspect of costs litigation on large commercial matters including costs recovery, adverse costs and costs hearings. In particular, he was instructed to advise in respect of funding and budgeting issues on a significant and widely publicised group shareholder action against a UK bank. Prior to joining Kain Knight, Mitesh was a freelance County Court Advocate for 5 years, having previously completed the Bar Vocational Course. Prior to that he was awarded a 1st Class Honours LLB degree from the University of Kent.

## 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 **Mitesh** directly at ([mmodha@woodsfordlf.com](mailto:mmodha@woodsfordlf.com))