



# Litigation Funding for Whistleblower claims

Woodsford Litigation Funding Insight

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Our current political climate has given rise to a spotlight on whistleblowers, and the topic has sparked ongoing national debates and newsworthy headlines. Amid the controversy has been a broader conversation about the growing pace of qui tam litigation, which can be attributed to increased regulatory scrutiny and new statutory avenues for whistleblowers to identify fraud. However, qui tam litigation has not been the only burgeoning legal development over the last several years. The use of third-party funding to support these claims has expanded rapidly across the legal world.

Increasingly, sophisticated claimants appreciate how funding can help manage costs and offset legal risk, and savvy lawyers recognize how third-party funding can expand their practice and offer their clients flexibility on fees. As a result, lawyers who pursue qui tam matters should become familiar with litigation funding and its many advantages.

Due to the substantial costs and risks associated with qui tam proceedings, these claims are a natural fit for litigation funding. Partnering with a litigation funder can provide claimants and their counsel with access to additional resources, and help to offset their risk to a third party. In this whitepaper, we provide insight into how claimants, litigators and funders can work together to achieve favorable outcomes in qui tam matters.

# The Basics of Litigation Funding

Litigation funding involves a third party financing some or all of the costs and expenses for one or more legal disputes in exchange for a share of the proceeds recovered from the resolution of the dispute(s). Rather than an individual paying for litigation expenses out-of-pocket, or a law firm proceeding with a fully contingent engagement, a commercial litigation funder can provide access to the necessary resources instead.

These investments are generally non-recourse, which means that the funder is only entitled to a return if the case has a successful outcome. With this type of non-recourse arrangement, claimants and

law firms are able to advance a meritorious claim while also mitigating the inherent risks of litigation. Over the last decade, third-party funding has become more



commonplace in the United States and around the globe, increasingly becoming part of the legal mainstream.

## Benefits of Funding for Whistleblower Claims

Litigation finance is a useful tool for lawyers and their clients in many high-value practice areas, including business contracts, intellectual property, antitrust, financial services, class actions, and international commercial and investment arbitration. Increasingly, litigation funding is being used in whistleblower claims arising under various states' false claim acts, or under federal agency whistleblower statutes including those of the Internal Revenue Service (IRS), Commodity Futures Trading Commission (CFTC), and the Securities and Exchange Commission (SEC). These statutes and provisions are powerful tools for individuals to report fraud or corruption, and to share in any financial recovery. For example, successful IRS whistleblowers may be awarded anywhere from 15% to 30% of the funds the government recovers as a result of their claim. According to the 2018 IRS Annual Report to Congress, the agency made 217 awards to whistleblowers

in that fiscal year alone, totaling about \$290 million after accounting for certain reductions. Similarly, in a press release from March of 2019, the SEC announced a \$50 million award to two whistleblowers who provided crucial information that "strengthens the agency's ability to protect investors and the capital markets".

In addition to statutory mechanisms for reporting fraud, there are also strict laws in place to prevent workplace retaliation against whistleblowers and protect their confidentiality. The Dodd-Frank and Sarbanes-Oxley Acts give individuals the opportunity to bring these claims under federal law, and also provide another avenue for recovery. However, the most notable whistleblower claims arise under the False Claims Act (FCA). In these types of actions, private citizens are authorized to bring civil suits on behalf of the federal government in the form of *qui tam*

proceedings. In return, these individuals, known as “relators,” share in the proceeds of the litigation. Qui tam litigation is the U.S. government’s primary tool for recovering losses sustained as the result of fraud, leading to the recovery of billions of dollars in settlements and judgments. Qui tam litigation is a natural fit for litigation funding because these matters—unlike typical commercial litigation—are almost always brought on behalf of individuals who are unlikely to have substantial resources to engage lawyers on a traditional fee-paying basis. As a result,

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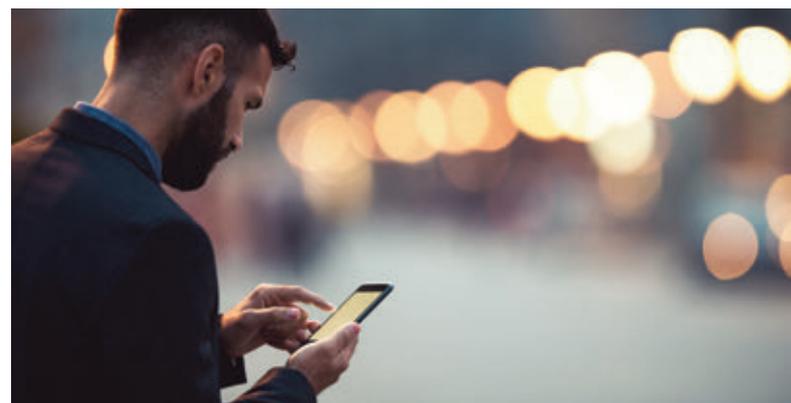
expert witnesses, and reviewing internal government position papers, mediation briefs and presentations. This work is necessary to further the relator’s interest in the case, but few law firms have the ability or the inclination to shoulder the financial burden year after year.

Some qui tam proceedings can take nearly a decade to reach a resolution, meaning legal fees, discovery costs, and expert witness expenses can be prohibitive. While the FCA contains fee-shifting provisions, allowing a prevailing plaintiff to recover their attorney’s fees, these provisions are of limited value in the midst of litigation. Too often, qui tam litigators are required to make hard choices about how to prosecute claims against very well-resourced defendants on a limited budget, or are forced to turn away representation in other promising matters because they already have too much contingency risk in their current docket.

Given the significant time and cost considerations in qui tam cases, relators and their lawyers are increasingly in need of financing. In turn, well-resourced litigation funders like Woodsford fill this gap and ensure that legitimate claims are not suppressed due to lack of resources.

lawyers who specialize in this area of law typically proceed on a contingency basis and can incur substantial financial risk in prosecuting these matters through to victory. Moreover, while the Department of Justice may intervene early in some cases, budgetary constraints will often lead the government to decline intervention in meritorious matters (while retaining the right for later intervention), effectively outsourcing the litigation to outside counsel.

The relator’s lawyers will be expected to carry out a significant amount of work, including factual and legal research, corresponding with the defendant, interviewing fact witnesses, liaising with



# How to Obtain Funding for Qui Tam Claims

A third-party funder like Woodsford might offer funding at various stages in the litigation, including post-verdict (e.g. on appeal).

Securing funding for a qui tam litigation involves the same process as for any other type of case; litigation funders are looking to finance meritorious claims with a realistic path to a return on their investment. However, unlike other types of disputes, third-party funders encounter more challenges to accessing information in qui tam cases. In the early stages of a government investigation, the case is filed under seal and there is no publicly available information about the frauds involved in the suit. Lack of transparency, long gaps between filing and potential payment, and

outcome. Because of these hurdles, it can often be challenging for claimholders and their lawyers to secure financing for qui tam cases. Therefore, working with a funder that has specific expertise in this niche area is essential.

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The skilled team of lawyers and other professionals at Woodsford can add significant value in vetting claims. The involvement of an experienced funder adds an additional layer of diligence at an early stage of the process, leading to better risk and cost-benefit assessments. We invest in strong cases that we believe are materially more likely than not to have a successful outcome. As part of this analysis, we will examine in detail the following considerations:

- Who is the relator? Who else stands to gain from the litigation? Do we trust them, and their motivation for i) bringing the claim and ii) seeking funding?
- Who are the relator's lawyers and other advisors? Do they have relevant experience, expertise and a track record of success?
- Who is the defendant? Are they ‘good for the money’? Will they ‘play fair’?
- What court or tribunal will decide the claim? Can we trust them to render an impartial and well-reasoned decision?
- Is the claim likely to succeed on the merits?
- What is the realistic quantum of the case?
- How much will it cost? How much of that cost is sought from us, and who else will contribute?

the strong possibility there will be no reward at all can make it difficult to assess the likelihood of a favorable



- How long will it take?
- Is the defendant likely to comply with any judgment or award? If not, where and how will any such judgment or award be enforced and against what assets?

Indeed, perhaps the most pivotal developments in qui tam cases are whether or not the Department of Justice decides to intervene. If the government joins in the case, it will take on the primary responsibility for investigating and pursuing the claim. A private individual who successfully pursues a qui tam action after the government declines to participate is entitled to a larger award than he or she would have received if the government had been involved. Under the False Claims Act, the relator's share ranges from 15% to 25% if the government intervenes, and from 25% to 30% if the government does not. The



Funder's return generally comes from the relator's share of the proceeds; therefore, we seek as much clarity as possible in determining the likelihood of a recovery. As noted earlier, financing for qui tam litigation is generally non-recourse. If the claim is lost, the relator is not liable. Given this risk, Woodsford conducts a detailed diligence process and will invest in only the most meritorious of claims.

## Legal Considerations in Litigation Funding

The in-house experts at Woodsford can help relators and their lawyers navigate the litigation funding process while protecting the relator's privacy. Qui tam cases in particular can involve highly sensitive documents and other materials, which are often at the crux of the litigation. Before we evaluate new matters, a carefully drafted non-disclosure agreement is executed. Woodsford takes the issue of confidentiality seriously, and ensures that safeguards are in place to protect privileged information.

Additionally, our funding agreements make certain that we do not have undue influence over the conduct of the case at any stage. The principle that we do not seek to control the litigations that we fund is firmly enshrined in our business. As a founding member of the Association of Litigation Funders, we helped to draft, and we strictly follow, the Association's Code of Conduct.

Under the Code, litigation funders are prevented from taking control of litigation or settlement negotiations and from causing the litigant's lawyers to act in breach of their professional duties. We never seek to control the litigation, nor in any way interfere with the legal and ethical obligations on the relator and their counsel.



## A Look Ahead

One of the most discussed topics regarding qui tam litigation has been about the effect of government intervention. Historically, when the Department of Justice declines to intervene in a False Claims Act case, it is a major turning point in favor of defendants. In the past, the odds of winning a qui tam case significantly decrease should the DOJ decline to intervene, as this was thought to indicate the claim lacks merit, and the burden of litigation was substantially increased without the government's assistance.

However, because of the government's budgetary constraints, it increasingly declines to intervene in matters that have merit and which go on to result in findings of fraud and substantial awards. Now, in the absence of intervention, qui tam lawyers will not be faced with the dilemma of pressing on without the government's assistance. While the burden of litigating

such claims remains substantial, at least with litigation funding, counsel can be assured they have the financial resources to prosecute those claims fully.

Whistleblower claims, and qui tam matters in particular, will continue to be some of the most complex, expensive, and risky types of litigation a claimant may undertake. Qui tam litigation has seen a considerable uptick in recent years, and there is no question that the Department of Justice currently faces a growing backlog of qui tam claims and lacks the resources to intervene in every meritorious matter. Given these attributes, we expect to witness increased use of litigation funding for whistleblower matters in the coming years. Woodsford looks forward to working with relators and their counsel to seek justice and be fairly compensated for the often-difficult decision to take action when uncovering fraud or corruption.



## About the author

Sarina Singh is the Director of Litigation Finance, US for Woodsford. She is an experienced legal and business development professional with expertise in building strategic partnerships. Sarina leads initiatives to drive growth across the US market, and works closely with claimholders and law firms nationwide to identify investment opportunities, develop customized funding solutions, and implement strategies to mitigate the risks of litigation.

Sarina holds a B.A. in Political Science from Temple University. She received her J.D. from University of Maryland School of Law, where she was a member of the Maryland Law Review.

## About Woodsford Litigation Funding

Founded in 2010 and with a presence in London, Philadelphia, New York, San Francisco, Toronto, Calgary, Singapore, Brisbane and Tel Aviv, 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 **Sarina** ([ssingh@woodsfordlf.com](mailto:ssingh@woodsfordlf.com)) directly.