



Litigation Finance for In-house Legal Departments

Woodsford Litigation Funding Insight

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In-house legal departments face tremendous financial and operational pressure. According to a recent survey, 88% of general counsel expect to reduce legal spend over the next three years, 76% struggle to meet current workloads, and 75% predict that workload growth will exceed budget limitations.

Most general counsel believe that technological modernization and more effective management of spend on outside counsel *could* result in cost savings. But most lack the resources to *actually* bankroll modernization and more effectively manage outside counsel.¹ Companies experiencing these challenges—and even those not—may decline to pursue high-value litigation that could generate tremendous returns.

Litigation finance is a solution to these problems. Funders like Woodsford provide capital for fees and costs to pursue commercial litigation in exchange for a share of the eventual recovery. The funding is passive—meaning the funder has no decision-making authority—and non-recourse—meaning the funder receives its deployed capital and return only if the litigation results in a recovery.

Companies use litigation funding to pursue new or ongoing litigation at no cost. The funder assumes the financial risk of loss and there generally exist no litigation expenditures to report in—and drag down—the company’s financial statements. A win vindicates the rights of the company and yields possibly massive financial returns, thereby eliminating perceptions of legal departments as mere “cost centers.” What is more, transferring litigation expenditures to a funder enhances budget stability and predictability. It also creates much needed cost savings, which legal departments can reallocate to more pressing objectives, such as investments in the technology and people needed to manage mounting workloads and budget restrictions.

Below is a summary of these and other advantages to litigation funding, as well as a description of the different financing structures available to in-house legal departments.

¹ The data in the above two paragraphs comes from a survey conducted jointly by the Harvard Law School Center on the Legal Profession and Ernst & Young. See Cornelius Grossman, *The General Counsel Imperative: How do you turn barriers into building blocks?*, (April 7, 2021), available at: https://www.ey.com/en_gl/law/general-counsel-imperative-barriers-building-blocks.

Litigation Funding Structures

As noted above, litigation funding is passive and non-recourse. This means the funder lacks decision-making authority over the litigation and receives its capital and return only if the litigation resolves in the company's favor. The latter feature distinguishes litigation finance from traditional lending. Banks and other traditional financiers typically lack the litigation expertise to underwrite the merits of a case. For this reason, they require companies to (1) provide a security interest in company assets and (2) return the principal with interest regardless of the outcome of the company's affirmative litigation. Traditional lending thus, unlike litigation funding, further leverages the company and endangers its bottom line.

Litigation funders like Woodsford provide capital for a wide range of commercial disputes, such as business tort actions, intellectual property disputes, claims for breach of contract, antitrust litigation, and international arbitration, among others. The following are examples of financing structures.

Single Case Funding.

As the name suggests, in this structure, the funder provides capital to cover the fees and costs to pursue a single action. If the company loses, it owes the funder nothing. If the company prevails, the funder receives its deployed capital plus a pre-negotiated share of the recovery. This funding is available at any and every stage of litigation.

Portfolio Funding.

In this arrangement, the funder provides capital to cover the fees and costs for a portfolio of the company's cases. The funder's deployed capital is collateralized by the cases in the portfolio. As with single case funding, the company owes the funder nothing if the company loses all cases in the portfolio. If the company prevails in any of the cases in the portfolio, the funder receives its deployed capital plus a pre-negotiated share of the recovery. As above, this funding is available at any and every stage of the cases in the portfolio.

Portfolio funding is typically less expensive than single case funding. This means the funder receives a smaller portion of a recovery. The reason is simple: single case funding outcomes are binary (i.e., the company wins or loses), representing a riskier investment for funders. The pricing terms of single case funding reflect this heightened risk. Conversely, portfolio funding is less risky, because funders recover their investment if any one of several cases in the portfolio resolves favorably. This diversification allows funders to offer better pricing terms for portfolio funding.

One additional point merits brief mention. Although less common, a portfolio funding structure could involve the funder providing capital, not for the fees and costs of litigation (as above), but for other company initiatives, such as hiring new personnel, purchasing advanced technology, or



other new ventures. In this arrangement, the funder's capital would again be collateralized by a portfolio of the company's affirmative litigations. If the company loses, it owes the funder nothing. If it wins, the funder receives its deployed capital and a pre-negotiated share of the recovery.

Judgment Monetization and Appeals Funding.

A favorable judgment is sometimes just the end of the beginning of a lawsuit. Companies prevailing in affirmative litigation may face a lengthy and uncertain appeal, burdensome collection efforts, or both. Cash flow issues may further exacerbate this problem. Litigation funders allow companies to immediately unlock the

value of these judgments and neutralize the risk of nonrecovery. In this scenario, the funder provides capital secured by the future recovery on the judgment. If the company ultimately fails to recover on the judgment—either due to collection obstacles or a reversal on appeal—it owes the funder nothing. If it recovers on the judgment, the funder receives its deployed capital and a pre-negotiated share of the judgment.

Defense-side Funding.

Defense-side funding is rare. This whitepaper focuses on the advantages of funding offensive litigation. Please contact Woodsford if you are interested in learning more about the various forms of defense-side funding.

Benefits of Litigation Funding

Litigation finance offers many benefits. Those using it may transform their in-house legal department to a profit generator; transfer risk and remove litigation expenditures from their balance sheet; stabilize legal department budgets and effectively negotiate with outside counsel; bankroll the modernization of their department; hire the best lawyers and experts; receive the benefit of a second set of seasoned eyes; and improve dispute dynamics.

1. Transform the In-house Legal Department to a Profit Generator

Companies need in-house counsel to mitigate risk and protect rights. But accomplishing these goals is costly, and external stakeholders often regard in-house legal departments as necessary but undesirable cost centers.

In-house counsel therefore face a conundrum when deciding whether to pursue affirmative litigation. On one hand, they want to vindicate the company's rights and recover damages for its injuries. On the other hand, they have finite resources and

affirmative litigation is often unpredictable, expensive, and lengthy. In-house counsel—particularly those facing budget cuts and workload increases—may conclude that affirmative litigation is too risky or unjustified in light of more pressing department objectives, despite the serious merit and value of the unpursued claims.

A recent survey commissioned by Woodsford's fellow funder, Burford Capital, demonstrates the impact of the above conundrum. According to the survey results, 49% of senior financial officers said their companies "failed to pursue judgments due

"The go-to firm for us: professional, creative, consistent, and timely. If a client called me tomorrow and said they wanted litigation funding, Woodsford is the firm I would recommend."

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to cost in 2020, with half of those reporting the amounts at stake to total \$20 million or more."²

² See 2021 Legal Asset Report: A Survey of Finance Professionals, Burford Capital, 15, available for download at <https://www.burfordcapital.com/insights/insights-container/2021-legal-asset-report/>. The survey includes responses from 378 senior financial officers, all of whom work for companies with annual revenues at or above \$50 million and the majority of whom work for companies with annual revenues at or above \$500 million.

Litigation finance fixes this problem. With it, companies can pursue claims and judgments at no risk. A loss costs the company nothing. A win is a financial windfall that transforms an in-house legal department to a profit generator that adds tremendous value to the company. Indeed, in-house counsel sitting on potentially valuable claims may even have a fiduciary duty to explore whether access to litigation finance justifies pursuit of the claims.

2. Transfer Risk and Remove Litigation Expenditures from the Balance Sheet

Claims are not recorded as assets on a company's balance sheet, but the expense of paying lawyers and out-of-pocket litigation costs are included as liabilities. Litigation therefore adversely impacts a company's financial statements. Even worse, litigation is often unpredictable and exorbitant. Companies pursuing it risk wasting their limited resources with nothing to show for it.

But when litigation funders provide non-recourse capital to cover fees and costs, funders assume the risk of loss on the litigation and companies remove litigation expenditures from their balance sheets. In short, litigation to recover on high-value claims becomes, in most instances, cost-free and risk-free.

3. Stabilize In-house Budgets and Effectively Negotiate with Outside Counsel

Legal department budgeting is notoriously difficult. Factors beyond the control of legal departments may trigger sizable and unforeseen fluctuations. These factors could include, among others, urgent business initiatives requiring the unanticipated use of both internal and external resources; new laws requiring a rapid, company-wide response; new litigation directed at the company; outside counsel's runaway fees and costs; or adverse and costly developments in ongoing litigation.

Litigation funding is not a cure-all for these problems. But it can help. First, because funders cover the expenses of ongoing litigation, partnership with a funder typically immunizes a legal department budget from an adversary's expensive litigation tactics or outside counsel's oscillating fees on the funded matters. Second, litigation funders like Woodsford have expertise in arranging innovative alternative fee arrangements, discounts, and caps on fees with outside counsel. Partnering with a litigation funder may, therefore, result in more economical relationships with outside counsel, without the opportunity cost of devoting valuable in-house resources to the pursuit of such economical relationships.

4. Bankroll the Modernization of the In-house Legal Department

As noted above, most in-house legal departments must increasingly do more with less. Effectively managing this dynamic may require innovation, which may require investment in new people, services, or technology—a tough sell when companies



expect in-house legal departments to economize.

Again, litigation finance offers a lifeline. If in-house legal departments use a litigation funder to cover the fees and costs of ongoing litigation, companies can reallocate what would have been spent on litigation to investments that streamline the legal department. Put differently, with funding, companies can pursue litigation to vindicate their rights, preserve the potential of a large judgment, and facilitate investment in operational enhancements.

5. Hire the Best Lawyers and Experts

Litigation funders and companies alike want to win. And litigation is often a prime example of the axiom, “you get what you pay for.” So companies partnering with a funder generally need not be bargain shoppers—they can hire the best lawyers and experts to advance their claims. Moreover, companies that have yet to engage a law firm or need to add local or specialized counsel will benefit from the deep network of world-class lawyers that well-established funders like Woodsford maintain.

6. Receive the Benefit of a Second Set of Seasoned Eyes

Litigation finance also functions as a no-cost means of validating a company’s claims. Before agreeing to fund a case or portfolio on a non-recourse basis, litigation funders like Woodsford undertake due diligence review and analysis. Funders evaluate the evidentiary and legal strength of each claim, the financial merits of each claim, and the anticipated defenses and counterclaims. An unbiased review from a team of economically rational experts at a developmental stage of the litigation can greatly improve the strategy and value of the case.

7. Improve the Dispute Dynamics

Working with a well-resourced litigation funder can have substantial strategic benefits and change the dynamics of a dispute. Unfunded plaintiffs may be more

“Woodsford are more innovative and willing to be creative. . . . And if they do something, they do it right.”

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likely to feel financial pressure to accept a lower settlement offer, whereas funded plaintiffs can litigate with the confidence that they are positioned to do what it takes to achieve the best result. Further, although a funder’s involvement is usually confidential, the disclosure of the involvement of a sophisticated professional funder like Woodsford sends a powerful message to tribunals and defendants—an objective third party with substantial expertise in disputes chose to risk its own non-recourse capital based on the merits of the case. This fact could motivate otherwise uncompromising defendants to offer a meaningful settlement.



8. Receive Support from Start to Finish

Litigation funders can continue offering support to in-house legal departments throughout the litigation lifecycle. As noted above, reputable funders will remain passive investors, with companies retaining control and decision-making authority over their claims. That said, funders like

Woodsford have in-house legal experts with deep and specialized experience who are ready and willing to provide an extra layer of review and advice throughout the litigation, from determining the ideal jurisdiction in which to file the complaint through the final resolution of the dispute and collection of the judgment.

Conclusion

Budget cuts and proliferating workloads threaten the status quo for many in-house legal departments. Those subject to these threats—as well as those unaffected by them—may regard affirmative litigation as too lengthy, risky, and costly to pursue. And yet, affirmative litigation has the power to strengthen and enrich the company.

It may be time to innovate with new tools. Litigation finance is one such tool. It allows companies to exploit the financial value of affirmative litigation at no cost and no risk

and with their preferred lawyers. As discussed above, it gives in-house legal departments an opportunity to overcome operational challenges, shift perceptions about their value, and generate returns for their companies.

Woodsford is a leading global litigation funder. We offer flexible and innovative financing and are happy to explore whether structured, non-recourse funding could benefit your company.



About the authors

Bob Koneck is the Director of Litigation Finance for Woodsford's US operations. Bob is a US lawyer and former litigator. As Director of Litigation Finance, Bob now helps to deliver customized funding solutions to lawyers and plaintiffs, allowing them to fairly pursue justice, minimize costs, and mitigate risk.

Prior to joining Woodsford, Bob worked as a commercial litigator and completed federal clerkships at the U.S. District Court for the District of Minnesota and the U.S. Court of International Trade. Through the latter clerkship, Bob also assisted with non-trade civil cases before his judge by designation in federal appellate and district courts in other parts of the US. Bob has represented both plaintiffs and defendants, has substantial experience with both individual and collective actions, and has handled a broad range of commercial disputes.

Bob received his J.D. from Columbia Law School, where he was a Harlan Fiske Stone Scholar, Moot Court Student Editor, and Teaching Fellow. He received his B.A. from St. Olaf College, where he graduated magna cum laude and was admitted to the Phi Beta Kappa Society.

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Alex Lempiner is Executive Vice President, General Counsel and Secretary for Woodsford US. In this role, Alex oversees the corporate and legal matters affecting the Company in the United States. Leveraging more than 20 years of legal and industry experience, Alex is a strategic partner who is passionate about litigation funding and levelling the playing field to offer access to justice for those who need it most.

Alex began his legal career in the Global Corporate Finance Group of the international law firm, Milbank LLP, in its New York office. During his 6 years at Milbank, Alex represented administrative agents, lenders and borrowers in a wide range of syndicated financings and capital markets transactions.

Alex left Milbank to join Coventry First, LLC, where, as the company's first in-house lawyer, he helped to grow Coventry into the undisputable leader in the life settlement market. As Senior Vice President and the Chief Compliance Officer, Alex managed all operational matters, implemented company-wide processes to ensure regulatory compliance and structured, drafted and negotiated credit facilities for various life insurance products.

After 12 years with Coventry, Alex decided to join Rembrandt IP Management, LLC, a Philadelphia-based investment firm, to help the company build its litigation funding operations. As Corporate Counsel and Secretary, Alex had responsibility for all corporate governance and legal matters and drafted and negotiated all of the company's transaction documents while coordinating investment diligence and voting on the final investment decisions.

Alex obtained his Bachelor of Arts in Pre-Law from The Pennsylvania State University where he was admitted into the Phi Beta Kappa Honor Society and his Juris Doctorate from New York University School of Law. He is licensed to practice law in New York and Pennsylvania.

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About Woodsford

Founded in 2010 and with a presence in London, Philadelphia, New York, San Francisco, Minneapolis, Toronto, Singapore, Brisbane, and Tel Aviv, Woodsford provides tailored litigation financing solutions for businesses, individuals, and law firms. This

includes single case and portfolio litigation and arbitration funding. Woodsford's Executive team blends extensive business experience with world-class legal expertise. Woodsford is a founder member of the International Legal Finance Association (ILFA).