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Probate Funding and the Litigation Funding Debate

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Abstract

Third-party funding of legal claims is becoming more common, and increasingly more controversial. Whether in the legislative arena or in the courts, the fight over whether and how independent parties might provide funding to litigants has become heated. The fight now threatens to spill over into the probate realm, where funders have begun purchasing probate rights from putative heirs. These probate funding transactions share many characteristics with broader litigation funding but also differ in important respects. The meager existing literature tends to address the issue in a pre-biased and methodologically unsound way, making it impossible to properly assess the nature of probate funding. This Article approaches probate funding in a neutral fashion, analyzing the characteristics of the transaction in order to gain greater insights into not only probate funding but also litigation funding, as well as illuminating the options for lawmakers in deciding how the law should react to the continuing evolution of legal funding generally.

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I. Introduction

The government cares deeply about how and from whom you borrow money.[1] Those who enact laws at the local, state, and federal level have imposed significant regulatory scrutiny on various forms of loans.[2] State usury laws,[3] the federal Truth in Lending Act (TILA),[4] and a host of regulations for specialized loans[5] are all designed to protect borrowers.[6] In choosing to

1. *See* CHRISTOPHER L. ALLEN ET AL., ARNOLD & PORTER LLP, US REGULATION OF BANK LENDING 1 (2015), https://files.arnoldporter.com/UsRegulationOfBankLending.pdf (describing the ways in which the United States controls and regulates lending).

2. *See id.* ("The lending activities of banks in the United States are regulated by a complex, interconnected network of federal and state laws and regulations.").

3. *See, e.g.*, GA. CODE ANN. § 7-4-2(a)(2) (2014) (setting the maximum interest rate at 16% for loans where the principal is less than $3,000); N.Y. BANKING LAW § 14-a (2012) (setting the maximum interest rate for all loans at 16%); CAL. CONST. art. XV, § 1 (setting a maximum interest rate for all loans at 10% for personal loans, and the greater of 10% or 5% plus the prevailing rate on the 25th of the month preceding the execution of the contract or date of the loan).

4. 15 U.S.C. §§ 1601–1693r (2012).

5. *See, e.g.*, GA. CODE ANN. § 10-1-1 (1967) (regulating the financing of installment purchases, particularly those made from telephone, mail order, and door-to-door salesmen); GA. CODE ANN. § 7-5-1 (1987) (regulating financing through credit cards and bank cards); GA. CODE ANN. § 33-22-1 (1969) (regulating the financing of insurance premiums); GA. CODE ANN. § 44-12-130 (1992) (regulating loans from pawnbrokers); GA. CODE ANN. §-10-1-30 (1967) (regulating the financing of car loans).

6. *See supra* notes 3–5 (listing various ways in which regulations seek to protect borrowers). It is not always clear exactly what consumers of loanable funds are being protected from, but for the purposes of this research, the fact of regulatory protections matters far more than the efficacy or necessity of those protections.

regulate loans, however, we often neglect the most important step, defining the subject of regulation.[7] As it turns out, there is a surprising lack of clarity in what constitutes a "loan," which creates no small amount of confusion when courts are asked to apply those laws and regulations to actual transactions.[8] Not the loan you received to buy your house or a new car, and not the money you borrowed to finance law school or medical school, but less thought-of transactions like litigation funding or probate funding.[9] This Article examines the emerging probate funding industry, comparing and contrasting with the better-known litigation funding industry, in order to understand not only the industries themselves but also the attributes of "loans" and why government regulates them heavily.

The debate over funding of lawsuits has raged for almost a decade, and it has generated some peculiar coalitions—free marketers[10] and the plaintiffs' bar[11] opposed to the U.S. Chamber of Commerce[12] and consumer advocates.[13] Free marketers support

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7. *See* Cherokee Funding LLC v. Ruth, 802 S.E.2d 865, 868 (Ga. Ct. App. 2017) (noting how a regulation did "not define the term 'loan'").

8. *See id.* (deciding whether a certain transaction should be classified as a loan or an investment).

9. *See id.* at 870–71 (examining whether a form of litigation funding could be considered a "loan"); *In re* Birnbaum, 118 Misc. 2d 267, 270 (N.Y. Sur. 1983) (evaluating a dispute over funding following probate).

10. *See* Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 367–68 (2009) (advocating for the creation of a market to spread legal risks); Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329, 329–30 (1987) (advocating for markets in personal injury claims); Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J. L. ECON. & POL'Y 613, 613–14 (2012) [hereinafter *To Fund or Not To Fund*] (arguing that litigation funding improves efficiency in the legal system).

11. At least in the consumer legal funding context, it is the clients of the plaintiffs' bar that are more often in need of legal funding options. *See* Kidd, *supra* note 10, at 628 ("Plaintiffs bear the costs associated with time delays in obtaining their day in court, including depletion of defendants' assets, which may not be available to satisfy any damages award.").

12. *See* JOHN H. BEISNER & GARY A. RUBIN, U.S. CHAMBER INST. FOR LEGAL REFORM, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD PARTY INVESTMENTS IN LITIGATION 4–6 (2012), https://www.instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf (presenting several arguments as to why a litigation market is undesirable).

13. *See, e.g.*, Brief Amici Curiae of National Association of Consumer Advocates et al. in Support of Respondents at 12, Oasis Legal Fin. Grp., LLC v.

the ability of litigation funders to offer their services without government regulation, aligning with the plaintiffs' bar that sees litigation funding as an opportunity for lower- or middle-class plaintiffs to afford their day in court.[14] Consumer advocates worry that litigation funding is exploitative, similar to payday lenders, aligning them with the U.S. Chamber of Commerce, which believes that litigation financing exploits plaintiffs—reducing beneficial settlements, distorting the attorney-client relationship, increasing frivolous claims—for profits.[15]

As a relatively new phenomenon, probate funding has been covered minimally in the literature.[16] In order to place probate funding in the context of the larger debate over the funding of legal claims, Part II will provide a basic primer on probate funding and place probate funding in the context of a larger market for financial capital.[17]

Within the larger legal funding debate, and the legislative and judicial battles that serve as the battleground for the future of legal funding, the definition of "loan" takes on extra importance, as existing regulations often encompass only those situations with a borrower and a lender.[18] Given this importance, it is unfortunate

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Coffman, 361 P.3d 400 (Colo. 2015) (No. 13SC497) (stating that litigation financing should be prevented in order "to protect vulnerable borrowers seeking to prosecute their personal injury claims").

14. *See* Molot, *supra* note 10, at 411 (arguing for "litigation risk markets" as a private sector solution to the barriers posed by high litigation costs).

15. *See* BEISNER & RUBIN, *supra* note 12, at 4–6 (stating that litigation funding has "at least four negative consequences for the sound administration of civil justice").

16. Professors Horton and Chandrasekher have begun the conversation about probate funding, albeit with sloppy empirics that obscure more than they reveal. *See* David Horton & Andrea Cann Chandrasekher, *Probate Lending*, 126 YALE L.J. 102, 107 (2016) ("Yet despite the attention lavished on the litigation-finance industry, inheritance-purchasing companies have flown beneath the radar. No law review article has even mentioned the issue . . . ."); *see also* Jeremy Kidd, *Clarifying the "Probate Lending" Debate: A Response to Professors Horton and Chandrasekher*, 93 NOTRE DAME L. REV. ONLINE 149, 150 (2018) (stating that the Horton and Chandrasekher article "does not make the impact that it should have made, due to some unfortunate and avoidable missteps").

17. *Infra* Part II.

18. *See, e.g.*, Oasis Legal Fin. Grp., LLC v. Coffman, 361 P.3d 400, 409 (Colo. 2015) (holding that litigation funding was a loan under the Uniform Consumer Credit Code); Anglo-Dutch Petrol. Int'l, Inc. v. Haskell, 193 S.W.3d 87, 96–97 (Tex. Ct. App. 2006) (deciding that litigation funding was not a loan subject to

that some commentators have given short shrift to the question.[19] This Article will not make the same mistake, beginning with a discussion of loans in Part III, applying legal and economic principles to identify the proper categorization of probate funding and litigation funding. Because neither fits a reasonable definition of "loan," the Part concludes that neither state usury laws nor federal regulations, such as TILA, are applicable.[20]

The doctrines of champerty and maintenance are also regularly invoked in the debate over litigation funding.[21] As probate funding becomes better understood, it is natural that the subject will arise in that context, as well.[22] Any discussion of champerty and maintenance rules should also address the related argument that laws and regulations governing loans and investments are necessary to protect consumers from fraudulent, manipulative, or coercive behavior, or that funders' presence will change the very nature of the dispute.[23] Part IV will examine these concerns as they pertain to probate and litigation funding, to determine if the doctrines are appropriate in either context. Part V will then offer some conclusory remarks.

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state usury laws).

19. Much of the bias is subtle, and may even be unconscious, as in choosing a title like *Probate Lending*, which implies to the reader that he or she is about to read an article about a type of loan. *See* Horton & Chandrasekher, *supra* note 16 (discussing probate funding).

20. *Infra* Part III.

21. *See, e.g.*, Maya Steinitz, *Whose Claim Is This Anyway? Third Party Litigation Funding*, 95 MINN. L. REV. 1268, 1286–1291 (2011) ("The primary barrier [to third-party funding of litigation] is the doctrine of maintenance and champerty."); Joanna M. Shepherd & Judd E. Stone II, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919, 921 (2015) (describing champerty's impact on third-party litigation funding); Anthony J. Sebok, *What Do We Talk About When We Talk About Control?*, 82 FORDHAM. L. REV. 2939 (2014) (discussing the intersection of litigation financing and champerty); Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DEPAUL L. REV. 453, 453 (2011) (describing the history of champerty).

22. *See* Horton & Chandrasekher, *supra* note 16, at 155–59 (analyzing champerty's potential effect on probate lending).

23. *See* Steinitz, *supra* note 21, at 1274–75 (describing multiple avenues of protection available for client protection in a client-litigation funder relationship).

II. Probate Funding vs. Litigation Funding

The general form of the transaction used in probate funding is essentially the same as that used in litigation funding.[24] A party to a legal dispute receives money from the funder in return for an anticipated payment upon successful resolution of the dispute. In both cases, the funding is nonrecourse,[25] so the funder only receives a subsequent payment if there is a positive monetary outcome for the owner of the dispute.[26] The inherent uncertainties of our legal system create the possibility that a funder may receive nothing or, possibly, that any final award will be less than the original payment, resulting in a loss to the funder.[27]

Although the general form may be similar, the precise forms differ in an important way. In probate funding, a potential heir may alienate not only her right to the proceeds of the dispute, but also the right to participate in the dispute.[28] In other words, the funder provides a payment and receives, as compensation, the right to step into the probate dispute and participate directly and for its own benefit.[29] This differs significantly from litigation funding, where the plaintiff receives a payment from the funder but retains full ownership of—and control over—the claim.[30]

24. *See* Horton & Chandrasekher, *supra* note 16, at 103 (referring to litigation funding and probate funding as "similar phenomenon[a]," while also describing the transactional nature of both actions).

25. *See* Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 459 (2012) (stating that litigation funding is typically non-recourse); Horton & Chandrasekher, *supra* note 16, at 115 (referring to the potentially non-recourse nature of probate funding).

26. *See* Steinitz, *supra* note 25, at 459 ("Litigation finance-for-profit, nonrecourse funding of a litigation by a nonparty-is a new and rapidly developing industry globally, and in the United States in particular.").

27. The loss arises because the transaction is nonrecourse, leaving the recipient without any personal liability for any shortfall. In the case of probate funding, Professors Horton and Chandrasekher have documented a handful of cases where the heir's claims were lower than the amount received, and, in one case, where there was no recovery. *See* Horton & Chandrasekher, *supra* note 16, at 143 ("[T]hree loans resulted in lender losses . . . .").

28. *See* Horton & Chandrasekher, *supra* note 16, at 121 ("[W]hen an outside party purchases a portion of the decedent's assets, she also obtains the power to file petitions and objections, to seek to remove the personal representative, and to sue for breach of fiduciary duty.").

29. *See id.* at 121 (explaining the alienation ability of probate funding).

30. *See* Steinitz, *supra* note 25, at 487 ("Particularly in the United States,

Similar to litigation funding, the rights obtained by the probate funder are constrained by the legal rights possessed by the potential heir, so any recovery cannot be greater than the heir's legal inheritance, as determined by the probate process.[31]

Probate funding also looks like litigation funding in its basic purpose—providing funds that the legal claimant wants now, instead of at the conclusion of the dispute.[32] A potential heir may receive notice that she has a potential inheritance coming her way but be unable or unwilling to wait for probate to conclude.[33] Perhaps there are pressing financial obligations that can be satisfied only from the inheritance and that cannot be put off for the duration of probate.[34] Perhaps the heir does not wish to spend the duration of probate being forced to remember the individual who has passed,[35] or to interact with other heirs.[36] Perhaps the heir

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ethical rules rooted in the desire to allow plaintiffs to retain maximum control over their claims have naturally led to discussions of the industry in ethical terms, creating a clear obstacle to litigation funding.").

31. The funding transaction could, therefore, result in the heir being entirely removed from the dispute, with the funder having sole rights to pursue the heir's interest. *See* Horton & Chandrasekher, *supra* note 16, at 115–16 ("Today, many funders not only buy a stake in a pending case but try to maximize the value of their investment by acquiring the power to select counsel and make strategic decisions."). Alternatively, the heir could transfer only a part of her interest and remain active in the probate process. *Id.* This raises the possibility that the heir could take the money and then oppose the funder's legal moves, so a funder's ideal situation would likely involve either a full transfer of rights or else a contractual obligation by the heir to not obstruct the funder's efforts. *See id.* at 118–24 (explaining the process of probate funding).

32. *See id.* at 118 ("Like civil plaintiffs with potential judgments, heirs and beneficiaries have also tried to trade their future inheritance rights for cash.").

33. *See id.* at 125 ("Representatives of [probate lending firms] defended their methods, noting that probate can be agonizingly slow and that a decedent's relatives often cannot wait for bequests or legacies to trickle through the court system.").

34. *See id.* (discussing reasons for probate lending).

35. Whether the heir had a wonderful relationship with the deceased or a horrible one—as would be the case if there were a history of abuse, for example—it would not be irrational to wish to avoid the constant reminders that would come during probate.

36. *When Death Brings Out the Worst: Family Fighting After a Death*, WYG (Mar. 28, 2017), https://whatsyourgrief.com/family-fighting-after-a-death/ (last visited Feb. 19, 2019) (describing the familial problems which can follow the death of a family member) (on file with the Washington and Lee Law Review).

has a high time preference[37] and is concerned about the potentially lengthy duration of the probate process.[38]

The first of these explanations is plausible in both litigation and probate funding; it also often gives rise to a claim of exploitation.[39] The argument is that the funder acts like a payday lender, obtaining consent under financial duress—or by fraudulent means—and causing harm to the recipient of funds.[40] Even if true, that argument glosses over the facts that the duress is not derivative of any action by the funder and that the funder is providing at least a partial solution to the duress.[41] That solution may not be ideal, but it certainly appears preferable to the alternative, which is that the recipient receives nothing and continues in the high-stress state.[42]

The second is realistic only in the context of probate funding because a recipient of litigation funding must remain an active part of the case.[43] Given the cause of a probate dispute—death of

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37. *See, e.g.*, Kenneth S. Lyon, *Why Economists Discount Future Benefits*, 92 ECOLOGICAL MODELLING 253, 254–55 (1996) (explaining that individuals' preference for immediate benefits leads them to place a lower value on future benefits).

38. *See* Horton & Chandrasekher, *supra* note 16, at 125 (relating the justifications offered by probate funding executives).

39. *See* Jean Xiao, Note, *Heuristics, Biases, and Consumer Litigation Funding at the Bargaining Table*, 68 VAND. L. REV. 261, 268 (2015) (noting concern amongst commentators "that financiers exploit consumers by charging exorbitant fees").

40. *But see* Jim Hawkins, *The Federal Government in the Fringe Economy*, 15 CHAP. L. REV. 23, 64–68 (2011) (disputing that payday lenders use misleading contracts and questioning the conclusion that they trick consumers into rolling over their loans); Todd J. Zywicki, *The Case Against New Restrictions on Payday Lending* 23–24 (Mercatus Ctr., Working Paper No. 09–28, 2009), https://www.mercatus.org/system/files/WP0928_Payday-Lending.pdf (concluding that consumers of payday lending services know what they are getting, are satisfied with what they receive, and have limited options in modern financial markets).

41. *See* Zywicki, *supra* note 40, at 23 (arguing payday lenders provide a valuable service by enabling borrowers to cope with unexpected financial disruption).

42. *See, e.g.*, *id.* at 23–24 ("Banning payday lending in these uncertain times would whipsaw these middle-class consumers, driving them still further down the 'lending ladder' to pawnshops or other products.").

43. *Cf.* Ari Dobner, Comment, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1540 (1996) (describing the reasons companies assigned claims would desire a plaintiff to stay involved).

someone who was an important person in the heir's life—a reasonable heir could legitimately want some distance from probate.[44] Many traditional plaintiffs might choose to sell their claims and leave behind the traumatic event that gave rise to their legal claims. Unfortunately, they are prohibited from doing so,[45] but an heir is not and can take her payment and never think about the probate dispute again.

The third possibility is almost never discussed in the context of either probate or litigation funding, but it is a simple economic reality that individuals choose to mitigate their risks and satisfy their time preference.[46] It should be obvious that most people have some preference for security[47] but, if not, flourishing insurance markets provide hard evidence.[48] Likewise, it is common sense that, if presented with a choice of a sum of money now or the same amount of money in a year, the vast majority of people will choose the money now.[49] Either a traditional plaintiff or a potential heir could therefore be excused for making a reasoned tradeoff between

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44. *Cf.* Constance D. Smith, *New and Improved Testaments for Estate Planning Documents*, 32 COLO. LAW. 73, 73 (2003) (discussing the potential for legal documents to "soothe or aggravate the survivors' pain" in the probate process).

45. *See* Geoffrey P. Miller, *On the Costs of Civil Justice*, 80 TEX. L. REV. 2115, 2115 (2002) ("In most cases, the plaintiff can sell res judicata only to the defendant, and the defendant can buy it only from the plaintiff.").

46. *See* Lyon, *supra* note 37, at 254–55; *see also* HENRY N. BUTLER, CHRISTOPHER R. DRAHOZAL & JOANNA SHEPHERD, ECONOMIC ANALYSIS FOR LAWYERS 292–93 (3d ed. 2014) (explaining how individuals estimate the expected value of various situations).

47. Even many who engage in risky behavior, like skydiving, for example, likely purchase auto, home, and health insurance. They insure against some risks, even if they seek out a specific type of risks.

48. *Cf.* David M. Cutler, Amy Finkelstein & Kathleen McGarry, *Preference Heterogeneity and Insurance Markets: Explaining a Puzzle of Insurance*, 98 AM. ECON. REV. 157, 161 (2008) (finding that while individuals who take more risk still purchase insurance, they purchase lower coverage of insurance than their risk-adverse counterparts).

49. Of course, the level of time preference can vary significantly between individuals, as has been known for many years. *See, e.g.*, Walter Mischel et al., *Cognitive and Attentional Mechanisms in Delay of Gratification*, 21 J. PERSONALITY & SOC. PSYCH. 204, 215 (1972) (finding children had innately different strategies and preferences that led to their ability to defer receiving a reward for a more preferable reward or preferring a quicker but less preferable reward).

a future sum—adjusted for the uncertainty of victory, deductions for legal costs, etc.—and a certain sum today.[50]

There are likely many more potential reasons why a plaintiff or heir would choose to receive an up-front payment that will likely be less than the amount later received by the funder.[51] These three, however, particularly when combined, provide ample justification for accepting as rational the choice to enter into a funding transaction. Expanding the discussion to include all forms of legitimate funding,[52] it is clear that individuals regularly agree to make a larger payment in the future in exchange for receipt of funds today. Whether the purpose of the initial funds is to start a business; to purchase a home, car, education, etc.; to pay living expenses during trial; or to avoid the hassle of participating in probate, people of every socioeconomic class voluntarily agree to the tradeoff. Any discussion of funding, therefore, should dispense with assumptions about the irrationality of recipients unless there is specific evidence of that irrationality.

Returning to the structure of probate funding, it may be helpful to imagine it situated on a field defined by two axes. The first is the contingent nature of the obligation to make the future payment.[53] The second is who maintains control over the thing of value.[54] Probate funding is at least partially contingent, and the funder controls the claim.[55] Litigation, on the other hand, is

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50. Indeed, an entire sub-industry has arisen within the legal community, in which companies provide a single lump-sum amount to individuals who have received a structured settlement. *See* Gregg D. Polsky & Brant J. Hellwig, *Taxing Structured Settlements*, 51 B.C. L. REV. 39, 57 n.97 (2010) (citing that settlements may be liquidated for less than the premium set forth for them). These transactions are motivated by a combination of both risk-aversion and time-preference factors.

51. *Cf.* Steven D. Schroeder, *Probate Funding: A Useful Option for So Many*, LITIG. FIN. J. (June 26, 2018), https://litigationfinancejournal.com/probate-funding-useful-option-many/ (last visited Feb. 19, 2019) (discussing potential reasons for wanting to pursue probate funding) (on file with the Washington and Lee Law Review).

52. Excluding loan sharks and illegal gambling advances in order to avoid a discussion of black-market incentives.

53. *See* Kidd, *supra* note 16, at 151 (discussing contingent nature of probate funding as the obligation to repay a debt).

54. *See* Horton & Chandrasekher, *supra* note 16, at 110–30 (contrasting the control permitted over the claim between litigation funding and probate funding situations).

55. *See* Kidd, *supra* note 16, at 151 (describing the nature of probate funding

partially contingent but the recipient controls the claim.[56] Other financial transactions can also be identified by their location on these axes. A nonrecourse home loan is less contingent than a recourse loan,[57] and a home loan in a mortgage state is more at the control of the recipient than a home loan in a deed-of-trust state.[58] A payday loan is more contingent because of the increased risk of default, and a payday lender often has the right to access the recipient's bank account, something unavailable to the holder of a home mortgage.[59]

Even business investments can be categorized in a similar fashion, with bondholders' right to be paid being far less contingent than a venture capitalist or similar investors.[60] Bondholders also have far less control over the thing of value—the assets upon which the bonds are predicated—than a direct investor, though the latter will differ based on the type of investor and the terms of the

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as contingent where the probate funder has the right to pursue some portion of the heir's claim).

56. *See* Steinitz, *supra* note 25, at 487 (describing the desire articulated in the ethical rules to allow plaintiffs to maintain maximum control over their litigation claims related to litigation funding).

57. The difference being, of course, that the recipient of a nonrecourse home loan risks only ownership of the home, where the recipient of a recourse loan is on the hook for the full unpaid balance, so additional assets might be lost.

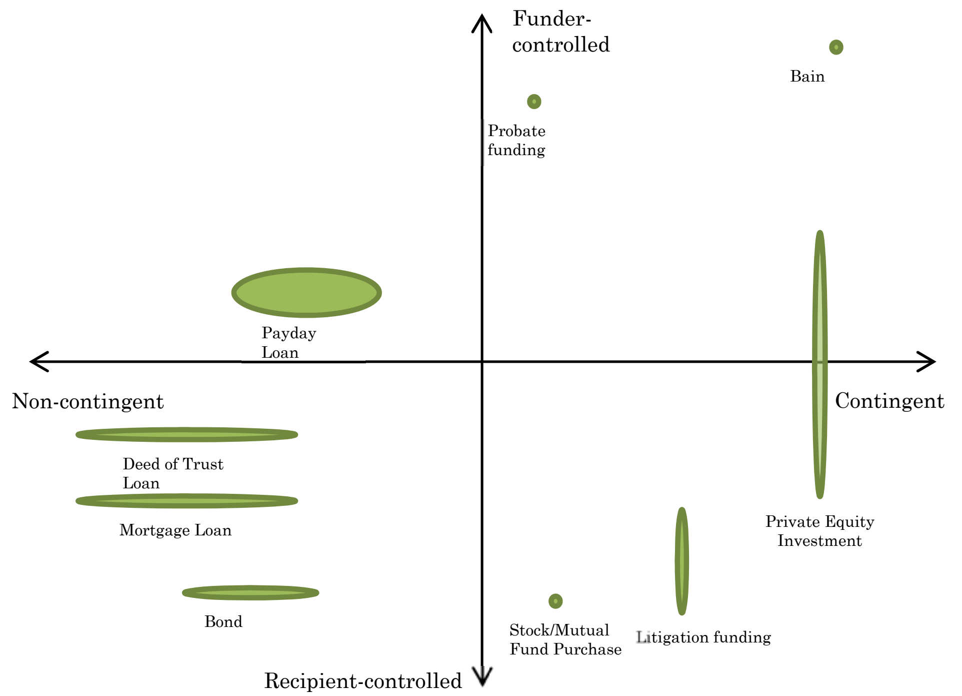
58. In a deed of trust state, legal title to the property passes to a trustee, who holds the property in trust until the loan is repaid. *See* Joshua Norton, Comment, *Left to Their Own (Security) Devices: The Need for the California Legislature to Define Deeds of Trust and Update California Civil Code Section 2932.5 in Accordance with the Modern Lien Theory*, 50 SAN DIEGO L. REV. 197, 206 (2013) ("With a deed of trust, the borrower would convey actual title and the right to sell the property to the trustee for the benefit of a lender and beneficiary in the case of default."). In a mortgage state, legal title to the property passes to the recipient of funds, subject to forfeiture in the event the recipient defaults on his/her payments. *See id.* at 205–06 ("[T]he mortgage is a security device that empowers the mortgagee to initiate a judicial foreclosure on the property upon breach of the contract to pay the debt.").

59. *See* Creola Johnson, *America's First Consumer Financial Watchdog Is on a Leash: Can the CFPB Use Its Authority to Declare Payday-Loan Practices Unfair, Abusive, and Deceptive?*, 61 CATH. U. L. REV. 381, 388 (2012) (describing the payday loan business model and access to borrowers' bank accounts as a necessity of carrying out that model).

60. *But see* Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy*, 108 MICH. L. REV. 727, 730 (2010) (describing how the Chrysler bankruptcy proceeding violated basic principles of bankruptcy law and introduced significant uncertainty into the process).

contract.[61] A visual representation of these relationships is presented in Figure 1.

Figure 1



Obviously, this is a visual representation of *relative positions* of various financial transactions, not an empirical assertion

61. For example, Mitt Romney's 2012 presidential campaign saw private equity firm Bain Capital criticized as immoral, at best, for its method of restructuring, which often included laying off significant numbers of workers. *See* Matt Taibbi, *Greed and Debt: The True Story of Mitt Romney and Bain Capital*, ROLLING STONE (Aug. 29, 2012, 11:00 AM), http://www.rollingstone.com/politics/news/greed-and-debt-the-true-story-of-mitt-romney-and-bain-capital-20120829 (last visited Feb. 19, 2019) (describing the business relationship between Mitt Romney and Bain Capital including the methods for restructuring businesses through investments) (on file with the Washington and Lee Law Review). To the extent this was done through investment, rather than outright purchase of the company, it would fall on the funder-control end of the spectrum, whereas a family investor in a start-up might not insist on any control.

regarding their precise characteristics. Many categories of financial transaction will have some variance in their position on one or both axes.[62] For example, a deed-of-trust or mortgage loan will vary in its contingent nature depending on whether it is contingent or not, and private equity investors will choose how much control they insist upon having.[63] The contingent nature of a bond purchase depends on a number of factors, not least of which is how strictly the federal courts apply priority rules.[64] Litigation funding transactions must always remain in the control of the plaintiff, as per legal ethics rules, but a funder might, theoretically, be granted greater or lesser influence on various decisions.[65]

Figure 1 serves two important purposes. First, within the context of this Part, it presents the important differences between litigation funding and probate funding, helping to define where probate funding falls within the realm of financial transactions. Second, as we proceed to the following discussion of loans and how they are identified, it is helpful to understand probate funding's relation to traditional loan transactions. Specifically, that it is difficult to place them in the same quadrant.

III. What's a Loan?

You receive a sum of money today and you promise to pay the source a greater sum in the future—are you the recipient of a loan? Perhaps, but the obvious choice might be wrong, given some additional context. As previously discussed, there are fundamental differences between investments—and even between different types of investments—and traditional loans, to say nothing of the

62. *Cf. infra* notes 55–61 (providing examples of different financial transactions and their variance across the contingent and control axes).

63. *See supra* note 58 and accompanying text (discussing the nature of a deed-of-trust and mortgage loan in regard to its contingent nature).

64. *See, e.g.*, Roe & Skeel, *supra* note 60, at 741–51 (2010) (describing the ways in which the Chrysler bankruptcy violated statutory provisions and established norms, to the detriment of certain debtholders).

65. *Cf.* Horton & Chandrasekher, *supra* note 16, at 115–16 ("Today, many funders not only buy a stake in the pending case, but try to maximize the value of their investment by acquiring the power to select counsel and make strategic decisions.").

transactions that fall somewhere in between.[66] Is the repayment a binding contractual obligation or is it merely aspirational? Is repayment contingent upon some future event, such as a profitable quarter, or is it absolute, with the defaulting recipient's being subject to legal sanctions? Does the funder have any control over the recipient's valuable assets?

The law treats loans and investments differently at both the state and federal level.[67] There may be very good reasons to make the distinction, but, as a preliminary matter, it is important to recognize the legal difficulty this presents. When a transaction is not clearly in one category or the other, the provider of funds will find itself in a quandary.[68] It can proceed under the assumption that the more lenient regulatory regime governing investments applies, but it then runs the risk of lawsuits or even criminal prosecution if it is later determined that it is offering loans and its rate of return is too high.[69] This quandary has important implications for innovation in the finance industry.

Some innovation will occur at the easily-categorized extremes of the spectrum, as either clearly an investment or clearly a loan. It is far more likely, however, that innovations will occur outside of the traditional boundaries of an industry, as entrepreneurs seek to occupy an unfilled niche.[70] The lack of a clear line of demarcation between loan and investment increases the uncertainty costs associated with innovation, and some innovation will be stymied as a result.[71] Similarly, when a dispute arises, courts must attempt

66. *See supra* notes 55–57 and accompanying text (offering examples); *infra* notes 69–71 and accompanying text (offering examples).

67. For example, neither state usury laws nor TILA apply to investments. *Infra* notes 77–82 and accompanying text; *infra* note 115.

68. *See* Tow v. Pajooh, (*In re* CRCGP LLC), 2007 Bankr. LEXIS 370, at *4–6 (Bankr. S.D. Tex. 2007) (discussing the importance of differentiation between loans and investments related to determining appropriate interest rates).

69. *See id.* (discussing the ramifications for an improper classification as an investment when in fact the transaction was a loan).

70. *Cf.* Charles M. Elson & Craig K. Ferrere, *Surplus, Agency Theory, and the Hobbesian Corporation*, 48 WAKE FOREST L. REV. 721, 727 (2016) ("The entrepreneur must first identify this [fresh and unexploited] market niche.").

71. Frank Knight made the distinction between risk and uncertainty, arguing that risk was associated with outcomes that had occurred before but whose future occurrences were reducible only to probabilities and uncertainty was associated with outcomes for which no probabilities were calculable because the outcome had never been realized in the past. FRANK H. KNIGHT, RISK,

to discern which regulatory rules to apply to those involved.[72] Given the potential consequences for those involved, a clearer line should be established.

Applying that line to probate and litigation funding will require consideration of the contingencies inherent in both circumstances. Because probate only commences when there is an actual estate to divide, frivolous claims will be limited to individual claims of being an heir rather than the lawsuit in its entirety.[73] That, and other contrasts between litigation and probate funding, might make one or both less likely to be a loan.[74] Importantly, however, the dividing line need not fall between the two, as it is possible that either both or neither are loans.[75] Furthermore, while

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UNCERTAINTY AND PROFIT 233 (photo. reprint 2014) (1921). In the funding context, whether a court will apply loan regulations to existing services is more a question of risk, but whether a court will apply those restrictions to as-yet unknown funding services is a question of uncertainty. The speed of innovation in the financial sector has resulted in the process receiving its own nickname, "Fintech." It is clear that innovation is not completely stymied in the industry, but, at the margin, increased costs must have a negative impact. *See* BUTLER, DRAHOZAL & SHEPHERD, *supra* note 46, at 5 ("[M]argin refers to the impact of a small change in one variable on another variable. For example, if the price (cost) of a product increases relative to the prices of other products, the people 'at the margin' will substitute the now lower cost product for the higher cost product.").

72. *See Pajooh*, 2007 Bankr. LEXIS 370, at *4–6 (assessing whether the transaction constituted a loan or an investment and what regulatory regime to apply).

73. Someone might make a baseless claim to being an heir, but the probate process itself is still a valid attempt to properly divide the estate among all legitimate claimants. *See* EUGENE F. SCOLES ET AL., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 25–26 (Richard A. Epstein et al. eds., 6th ed. 2000) (describing the probate process and goals of dividing property). By contrast, a lawsuit may have no basis in fact or law. *Compare id.* at 798 (discussing the requirements of probate, including an underlying decedent, before addressing the division of property and any disputes among potential heirs), *with* FED. R. CIV. P. 8(a) (stating the person stating a claim for relief must simply make a short plain statement for the grounds of jurisdiction, entitlement to relief, and alternate reliefs sought without necessarily requiring an underlying situation the court would be required to solve).

74. *Cf.* Horton & Chandrasekher, *supra* note 16, at 110–29 (discussing the differences between probate funding and litigation funding).

75. *Compare id.* (classifying probate funding and litigation funding as loans), *with* Kidd, *supra* note 16, at 151 (concluding while it is possible for probate funding to be a loan, it could potentially be an investment as well).

the contingent nature of the obligation to pay the funder is an important consideration,[76] it should not be the only one.

A. What Does the Law Have to Say?

The Restatement (First) of Contracts makes it illegal "to pay excessive interest for a loan or to promise to do so,"[77] with "excessive" defined by separate state law.[78] It also states that usury requires that "the debt must be unconditionally repayable."[79] The Restatement next creates an express exception to usury rules for those contracts in which "repayment" was contingent on "the occurrence of a condition,"[80] but warns that usury rules would still apply if the diminution in repayment upon failure of the condition were "slight" or if "the probability of the occurrence of the contingency on which diminished payment is promised is remote."[81] If so, the courts would presume that the

76. *See, e.g.*, Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 96–97 (Tex. App. 2006) (refusing to apply usury laws to a litigation funding agreement because the funder's ability to recover was contingent on the outcome of the lawsuit); Capela v. J.G. Wentworth, LLC, No. CV09-882(SJF)(WDW), 2009 WL 3128003, at *10 (E.D.N.Y. Sept. 24, 2009) (reasoning that a structured settlement was not a loan because there was no absolute obligation to pay the settlement installments); Sheri P. Adler, Note, *Alternative Litigation Finance and the Usury Challenge: A Multi-Factor Approach*, 34 CARDOZO L. REV. 329, 334–35 (2012) (stating the majority rule that litigation funding is not subject to usury laws because they are only contingently repayable). *But see* Oasis Legal Fin. Grp., LLC v. Coffman, 361 P.3d 400, 409 (Colo. 2015) (determining that an absolute repayment obligation was not necessary for the Uniform Consumer Credit Code definition of loan to apply).

77. RESTATEMENT (FIRST) OF CONTRACTS § 526 cmt. a (AM. LAW INST. 1932).

78. *See id.*, Special Note ("The rate permitted by law varies in different States, and often in the same State in regard to different kinds of loans."). The Restatement (Second) of Contracts contains no mention of usury restrictions so, to the extent courts prefer to refer to the Restatement—as opposed to the state laws making usury illegal—they must cite the First Restatement. *See, e.g.*, WRI Opportunity Loans II, LLC v. Cooper, 65 Cal. Rptr. 3d 205, 212 (Ct. App. 2007) (applying the Restatement (First) of Contracts for a usury issue). For an example of such a state law, see GA. CODE ANN. § 7-4-2(a)(1)(C)(2) (2018) (establishing a maximum rate of 16% interest for loans under $3,000); *id.* § 7-4-10(a) (requiring the forfeiture of any interest should the creditor attempt to collect greater than the maximum rate of interest).

79. RESTATEMENT (FIRST) OF CONTRACTS § 526 cmt. b (AM. LAW INST. 1932).

80. *Id.* § 527.

81. *Id.* cmt. a.

contract, though meeting the formal requirements for the exception, is merely a "device for obtaining usurious profit."[82]

These two sections give rise to the current standard for what constitutes a "loan"—the obligation to repay may not be contingent.[83] Precisely what counts as "contingent," however, remains a subject of dispute among the academic literature and in the courts.[84] Some argue, in effect, that statistically small contingencies should be disregarded as merely "colorable,"[85] an appeal to the early Restatement, which contained warnings for the courts to be on the lookout for usurious loans concealed in camouflaging language.[86]

The authors of the Restatement were wisely anticipating human nature, which is that individuals will look for some way to circumvent restrictions on their self-interest.[87] If nothing else, caution regarding the rule of law would raise concerns about individuals' ability to bypass legitimate laws and regulations merely by being cleverer in packaging the transaction than the drafters of those laws and regulations.[88]

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82. *Id.*; *see also* Vee Bee Serv. Co. v. Household Fin. Corp., 51 N.Y.S.2d 590, 600 (Sup. Ct. 1944) (ignoring "pretended" contingencies when determining whether usury laws apply).

83. RESTATEMENT (FIRST) OF CONTRACTS §§ 526–527 (AM. LAW INST. 1932).

84. *See* Justin T. Toth, *Texas Usury Law: When Is a Borrower's Promise to Repay Absolute?*, 32-OCT HOUS. LAW. 42, 43–45 (1994) (discussing the difficulties courts have had in applying the contingent rule for usury).

85. *See* Horton & Chandrasekher, *supra* note 16, at 141–42 ("The odds that the lender will get burned 'must be substantial . . . for a mere colorable hazard will not prevent the charge from being usurious.'"). Professors Horton and Chandrasekher conclude that probate funding transactions are "absolutely repayable." *See id.* at 143 ("Like the litigation loans in these cases, probate loans are 'absolutely repayable.'"); *see also* Walton Guano Co. v. Copelan, 37 S.E. 411, 413–14 (Ga. 1900) ("To carry the case beyond the usury statute, however, the hazard or contingency must be bona fide, and not a mere color of a risk, or such possibilities of unexpected loss as might occur in the ordinary course of the borrowing and lending of money.").

86. *See* RESTATEMENT (FIRST) OF CONTRACTS § 526 cmt. b (AM. LAW INST. 1932) ("[T]he transaction, though intended as a loan with interest, is sometimes disguised as a sale, or all or part of the promised payments by the borrower, aside from the principal, are stated as commissions or expenses.").

87. *See* BUTLER, DRAHOZAL & SHEPHERD, *supra* note 46, at 384–85 (describing human behavior to want to minimize costs and maximize benefits and how individuals have a tendency to commit crimes when the cost of punishment is less than the benefit they obtain for committing the crime).

88. *Cf.* Susan Lorde Martin, *Financing Litigation On-Line: Usury and Other*

An absolute rule requiring courts to disregard small contingencies, however, faces two important obstacles. First, the Restatement does not provide a clear definition for what constitutes a "remote" contingency.[89] Given the nature of statistical measures—that a small probability can still be a statistically significant one[90]—it is impossible to define a valid threshold for what contingencies can be summarily dismissed. Second, the Restatement itself rejects a blanket approach, focusing instead on the intent of the parties to the transaction.[91] It is legitimate to question a transaction that appears to have no real risk, but the purpose of doing so is to determine whether the funder intended to make a loan—intended to have an absolute right of repayment—and is hiding that intent behind creative terms and clever structure.[92]

Another way in which the risk debate gets sidetracked is a focus on ex-post success rates, rather than ex ante probabilities. It is not uncommon to hear opponents of litigation funding argue that, because funders receive over 90% of the funds they were promised from the recipients, that there is no real risk.[93] An early

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Obstacles, 1 DEPAUL BUS. & COM. L.J. 85, 85 (2002) (describing instances where parties structured transactions to create contingency and avoid usury laws). Whether or not the laws and regulations are good policy choices are an equally important but separate matter.

89. *See* RESTATEMENT (FIRST) OF CONTRACTS § 527 cmt. a (AM. LAW INST. 1932) ("If the probability of the occurrence of the contingency on which diminished payment is promised is remote, or if the diminution should the contingency occur is slight as compared with the possible profit to be obtained if the contingency does not occur, the transaction is presumably usurious.").

90. *See* NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE xxii, xxiv (2d ed. 2010) (describing situations that are outliers—or carry small probabilities of occurrence—as "Black Swans" but stating they carry an extreme impact as well and describing the events of September 11, 2001 as a "Black Swan" where it was extremely unlikely to occur, but carried an extreme impact).

91. *See* RESTATEMENT (FIRST) OF CONTRACTS § 526 cmt. b (AM. LAW INST. 1932) ("[T]he usurious nature of the transaction frequently depends upon the intention with which it is entered into.").

92. *Cf.* Kraft v. Mason, 668 So. 2d 679, 684 (Fla. Dist. Ct. App. 1996) (explaining the necessity of intentional charging; creating a transaction that charges usurious rates separate from the necessity that the party be malicious in that intention).

93. Although even the U.S. Chamber's Institute for Legal Reform concedes that there is risk, it argues that the risk can be mitigated by spreading it across a portfolio of cases. *See* BEISNER & RUBIN, *supra* note 12, at 4 ("[Third-party

entrant into the probate funding debate has made the same argument,[94] but its premise is so fundamentally flawed that it is difficult to take the argument seriously.[95] Stating the flaw succinctly, ex ante probabilities and ex post results are separate and independent questions, and the former is not always represented in the latter.

Consider a simple probability example. You bet $50 on the flip of a coin. You bet on heads and the flip comes up tails. You lose, and your ex-post success rate is zero, even though your ex ante probability of winning was 50%. Extending the example, if you bet on heads fifty times in a row and the flip comes up tails fifty times in a row, your ex-post success rate is still zero and the ex-ante probability of each flip was still 50%.[96] In similar fashion, an angel investor or venture capitalist—or even day trader[97]—might have tremendous success for a long time but that high ex-post success rate is irrelevant to the nature of the transactions, which have an ex-ante probability of success of less than 100%.

Returning to the test proposed by the Restatement, what do the parties to a probate or litigation funding transactions intend? The recipient intends to receive funds right now, rather than at the end of an uncertain legal process.[98] The funder provides funding

litigation financing] providers can mitigate their downside risk by spreading the risk of any particular case over their entire portfolio of cases and by spreading the risk among their investors.").

94. *See* Horton & Chandrasekher, *supra* note 16, at 109 ("[T]he probate lenders in our dataset recouped the principal ninety-six percent of the time. Even more remarkably, all the probate loans in our dataset that were repaid surpass California's usury limit.").

95. For a description of this and other foundational flaws in Horton and Chandrasekher, see Kidd, *supra* note 16. In a subsequent piece, Horton doubles down on the methodological and logical flaws, rather than fixing them. *See* David Horton, *Borrowing in the Shadow of Death: Another Look at Probate Lending*, 59 WM. & MARY L. REV. 2447, 2476–94 (2018) (presenting empirical results without addressing methodological flaws).

96. *See* NASSIM NICHOLAS TALEB, FOOLED BY RANDOMNESS: THE HIDDEN ROLE OF CHANCE IN LIFE AND IN THE MARKETS 155 (2005) ("If a series is long enough you may get eight heads or eight tails in a row, perhaps even ten of each. Yet you know that in spite of these wins the conditional odds of getting a head or a tail is still 50%.").

97. *See id.* (discussing the application of the concept of "regression to the mean" to stock brokers).

98. *See* Horton & Chandrasekher, *supra* note 16, at 125 (describing the benefit of cash immediately in exchange for assignment of proceeds from eventual

now in exchange for the right to recover some portion of a potential future award or settlement.[99] An experienced funder will, of course, develop methods of choosing where to allocate funding so as to maximize the likelihood of success,[100] so the funder will anticipate that a strong majority of the funding transactions will end up being profitable. In the case of litigation funders, that anticipation is all that the funder has, as there are very few—if any—ways in which a litigation funder can impact the result.[101] Given the fact that a probate funder takes control of at least a part of the heir's claim, the funder's anticipation of profit will be coupled with an understanding of the work that will need to be done in order to achieve it.[102]

The relative success of funders notwithstanding, funding of legal claims is an industry filled with uncertainties that arise from the very nature of the judicial process.[103] The fact that a fallible human being—the judge—holds the power to make vital legal determinations would be sufficient to create risk of an adverse outcome,[104] but each other party to the dispute will also engage in

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inheritances).

99. *See id.* (describing the process whereby an heir will assign a future interest in an estate for current payoff).

100. A funder who cannot do so will soon be either bankrupt or looking for new ways to invest her money. Professors Horton and Chandrasekher express incredulity that probate funders could achieve their high success rates unless success were a foregone conclusion. *Cf. id.* at 109 ("We prove that probate loans involve no such contingency. Indeed, the probate lenders in our dataset recouped the principal ninety-six percent of the time. Even more remarkably, all probate loans in our dataset that were repaid surpass California's usury limit."). In essence, they have identified nothing more than the fact that there is a very small variance in the outcomes for the probate claims that the funder has chosen to become involved in. Given the need for any business to have a business model that avoids as many industry-specific risks as possible, it is unclear what other outcome they anticipate would exist in a market with free entry and exit.

101. *See* Steinitz, *supra* note 25, at 487 (describing the desire articulated in the ethical rules to allow plaintiffs to maintain maximum control over their litigation claims related to litigation funding).

102. *See* Kidd, *supra* note 16, at 151 (describing the nature of probate funding as contingent where the probate funder has the right to pursue some portion of the heir's claim).

103. *See id.* at 152 (discussing the uncertainty of whether an heir will be entitled to a portion of the estate as well as timing of when that payment will occur).

104. *See* Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2362 (1999) (recognizing that judges

efforts to maximize their returns, undercutting the recipient's claims in ways that may or may not be anticipated. Any flaws in the discovery process will only heighten those uncertainties.[105] In the case of probate, we must also consider that fiduciary responsibilities are often assigned to family members who may or may not be trustworthy.[106] Finally, the mere existence of a judicial process signals the uncertainty inherent in the system;[107] if there were no real risk, the entire process would require nothing more than a clerical resolution. A minority of legal disputes might fit that description, but not all.

As a result, there is always a statistically significant chance that any party will lose. Once a judgment has become final, some certainty is available,[108] but, prior to that point, there is always a real chance of an adverse jury or bench verdict, reduction of damages award on appeal, denial of anticipated attorney's fees, depletion of the estate through mismanagement or excessive legal costs, or any number of other adverse events that can reduce or eliminate recovery.[109] A rational funder, therefore, must always expect that any given funding decision could be unprofitable.

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are not immune to human error and citing this as a reason for redundancy in the judicial process).

105. *See* George Shepherd, *Failed Experiment:* Twombly*,* Iqbal*, and Why Broad Pretrial Discovery Should Be Further Eliminated*, 49 IND. L. REV. 465, 495 (2016) (discussing the sensitivity litigation costs have to changes and uncertainty in the discovery process).

106. An untrustworthy fiduciary might abscond with the estate or might waste the estate through excessive litigation, as conceded by Professors Horton and Chandrasekher. *See* Horton & Chandrasekher, *supra* note 16, at 143 ("[O]ne company lost its entire investment when the personal representative stole the decedent's assets and then disappeared."); *see also id.* at 163 ("[P]robate litigation is notorious for allowing attorneys and personal representatives to bleed the estate dry."). Other contingencies that could lead to an heir not receiving the expected inheritance include unforeseen medical bills or child support obligations, as well as the discovery of an unknown will that disinherits an intestate heir that received funding.

107. *See* Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 368 (2009) ("[N]o matter how much judges may strive for clarity and predictability, law practice will always be laden with uncertainty.").

108. Of course, there is still some risk associated with collection of the judgment.

109. *See id.* at 371 (discussing the ongoing risk of negative outcomes including ongoing costs of litigation).

A recipient's expectations will include these same uncertainties, but will also include a measure of time preference, as described above.[110] A litigant or heir may not wish to bear the risks associated with the judicial process or may not care to wait until the lawsuit concludes or funds are released from probate.[111] The greater the time pressures on the recipient, or the more complicated the dispute, the greater the incentives to seek out funding.[112] Even in the case of probate, where there is certainty that an estate exists, an heir could make a rational determination that funding now is preferable to waiting.[113] In fact, outside of a case of coercion, the fact that litigants and heirs choose funding indicates that they view the risks of litigation or probate—the contingencies that others disparage as merely "colorable"—as being real and significant. After all, the funding they accept is lower than the value of the claim, so they have paid the funder to assume the risks.

Given the risks that funders face in either the probate or the litigation context, a funder could be excused for insisting on an absolute right to repayment.[114] Having done that, the funder would have placed her right to recovery outside the vagaries of the judicial system and her business practices under the authority of state usury laws and various federal and state regulations, such as

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110. *Supra* notes 46–50 and accompanying text.

111. *See* Horton & Chandrasekher, *supra* note 16, at 135 (discussing the "notorious delays" of the probate process and engaging with arguments that the probate process is "snail-like").

112. *See* David Lazarus, *Sorry for Your Loss—Would a Cash Advance Ease Your Pain?*, S.F. CHRON. (Oct. 8, 2004, 4:00 AM), https://www.sfgate.com/business/article/Sorry-for-your-loss-would-a-cash-advance-ease-2719166.php (last visited Feb. 19, 2019) (describing some heirs that use these programs as being "hard-pressed for money") (on file with the Washington and Lee Law Review).

113. *See* Lyon, *supra* note 37, at 254–55 (explaining that individuals prefer benefits now to benefits in the future, leading them to accept a discounted present amount). Time preference and substantive risk have obvious overlap, as well. There is always risk that the probate process will take longer than expected, with each passing day representing not only time that the heir does not have access to her inheritance but also the risk that some inefficiency will enter the process and reduce the total amount to be distributed amongst the heirs. The passage of time can therefore reduce the heir's total award even if the heir's share of the estate ends up exactly as expected.

114. *See* Molot, *supra* note 107, at 368 (discussing the uncertainty always present in law based on judicial determinations).

TILA.[115] In other words, the funder could choose to loan funds to recipients, and many financial institutions take that path in other industries. When a funder makes a different choice, they do so with the intent of exposing themselves to the contingencies inherent in probate or litigation. That intent, according to the Restatement, should lead to the conclusion that probate and litigation funding are not carefully disguised loans but something else.[116]

115. The Truth in Lending Act (TILA) would therefore apply to probate and litigation funding only if provision of funds to the recipient constitutes credit. *Cf.* Truth in Lending Act, Pub. L. No. 90-321, §§ 102–03, 82 Stat. 146, 146–47 (1968) (codified at 15 U.S.C. §§ 1601–02 (2012)) (discussing the purpose of the TILA as covering credit which entails debtor deferment of payment). TILA covers extension of "credit," which is defined as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." *Id.* § 1602(f). Two types of credit are covered, open-end and closed-end. Open-end credit requires repeated transactions and a finance charge on outstanding balance, something that is present in neither probate nor litigation funding. *See id.* § 1602(j) ("The term[] 'open end credit plan' . . . mean[s] a plan under which the creditor reasonably contemplates repeated transactions . . . and which provides for a finance charge."). Closed-end credit is defined only as consumer credit that is not open-end. *See* 12 C.F.R. § 226.2(a)(10) (2018) ("Closed-end credit means consumer credit other than 'open-end credit' as defined in this section."). Legal funding is, therefore, either closed-end credit or not covered by TILA. A recipient of funding could loosely be said to repay the amount received, but would be considered credit only if it also qualified as debt. TILA does not include an express definition of "debt," but state courts have regularly defined debt in terms of contingencies. *See* Horton & Chandrasekher, *supra* note 16, at 140 (describing debt in the context of contingencies (citing Britz v. Kinsvater, 351 P.2d 986, 991 (Ariz. 1960))). Rather than treat the state-law question as definitive as some do, it is worth considering the stated congressional intent in enacting TILA, which is to increase the "informed use of credit" by increasing "awareness of the cost thereof by consumers." 15 U.S.C. § 1601(a) (2012). "It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . ." *Id.* The intent of this language seems both clear—to keep consumers from unwittingly agreeing to credit terms that will hurt them in the long run—and not inclusive of legal funding. There is no long-term harm because there are no additional consequences if the funder receives no payment. Finance charges do not pile up, outstanding balances do not become insurmountable over time, and the funder has zero claim to anything the recipient owns.

116. *See* RESTATEMENT (FIRST) OF CONTRACTS § 529 (AM. LAW INST. 1932) (discussing intent to make a loan as outweighing the form of the transaction).

B. What About Economics?

Although the Restatement focuses on the contingent nature of the transaction,[117] that is not the only way to judge whether something is a loan. Specifically, economics provides another set of criteria which center around the concept of interest rates as the "price" of money.[118] To an economist, a loan is when the recipient—who needs money she does not currently possess—rents money from someone who possesses a surplus.[119] The recipient will "rent" money from the lender by paying back more than the original amount,[120] based on how long the money is kept.[121] The difference between what is received and what is repaid is the rental price of money, known commonly as the interest rate.[122]

Two primary factors are relevant to the determination of the interest rate. First, the time preference of the potential lender, with the necessary interest rate being higher for lenders who

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117. *See id.* (discussing the element of unconditional repayment as necessary for usury).

118. *See* BUTLER, DRAHOZAL & SHEPHERD, *supra* note 46, at 629 (defining interest rate as "[t]he price of a loan, expressed as a percentage of the loaned amount per year").

119. *See* Abba P. Lerner, *Interest Theory—Supply and Demand for Loans or Supply and Demand for Cash*, 26 REV. ECON. & STAT. 88, 88 (1944) (describing the increases and decreases of demand by lenders deciding whether to loan their money out or spend it themselves). Technically, anyone who possesses more money than necessary to sustain life is a potential lender. Of course, each of us spends money on things we don't absolutely need, so we don't typically begin looking to lend out our surplus as soon as we determine that we have sufficient funds to meet basic needs like shelter, clothing, and food. However, if the borrower begins to raise the price she is willing to pay to rent our money, we will begin to consider forgoing some of those things that are nice but not necessary.

120. The payment of interest, above and beyond the principal borrowed, guarantees that the total amount paid back will be more than the total amount borrowed. The borrower is therefore paying extra for the immediate use of the lender's money.

121. Typically, the longer a borrower wishes to hold the lender's money, the more opportunities for immediate consumption or alternative investments a lender will have to forgo. Because the lender will have to be compensated for these lost opportunities, a higher interest rate will need to be paid. *See, e.g.*, *Daily Treasury Bill Rates*, DOT, https://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=billrates (last visited Feb. 19, 2019) (showing interest rates for treasury bills by maturity) (on file with the Washington and Lee Law Review).

122. *See* BUTLER, DRAHOZAL & SHEPHERD, *supra* note 46, at 629 (defining interest as the "price a borrower pays for a loan").

greatly value the ability to buy what they want immediately.[123] Second, the risk of non-payment.[124] There is always some chance that the recipient will be unable or unwilling to make the promised payments in the future, and a potential lender will need to charge a risk premium for the use of her money.[125] The risk premium can be lowered if the loan is a recourse loan—so that the lender has personal recourse against the borrower for any unpaid balance—and if the loan is securitized, but there will always be some risk that even a borrower who wants to pay will be prevented from doing so by unforeseen circumstances.[126]

In many ways, this analysis is similar for investments; a potential investor has many options for spending her money, so a recipient must be willing to agree to terms that will convince the investor to forgo current spending and assume the risk that all the invested funds will disappear.[127] The difference between the two

123. *See* Zywicki, *supra* note 40, at 9 (discussing the acquisition of payday loans by parties as being related to their urgent need of money even if it means taking a higher rate).

124. *See* Nicole Shea, *Seven Factors That Determine Your Mortgage Interest Rate*, CONSUMER FIN. PROTECTION BUREAU (Sept. 29, 2017), https://www.consumerfinance.gov/about-us/blog/7-factors-determine-your-mortgage-interest-rate/ (last visited Feb. 19, 2019) (discussing credit score—a predictor of how reliably you will repay your loan—as an important factor to determining loan interest rates) (on file with the Washington and Lee Law Review).

125. One way to understand a risk premium as part of the interest rate is to imagine a potential lender who does not need the money immediately but has firm commitments that must be made in the future. That lender will want to purchase an insurance policy that guarantees payment in the event that the borrower fails to make the promised payments. It is safe to assume that, absent certain extreme conditions, a lender will not pay a borrower to take her money. Therefore, the lender will require the borrower to pay the premiums on the insurance policy. Most loans don't have an express insurance policy, but the greater the risk of non-payment, the higher the interest rate because the lender is self-insuring against the risk of non-payment. *See* Till v. SCS Credit Corp., 541 U.S. 465, 474 (2004) (Stevens, J., plurality opinion) ("A debtor's promise of future payments is worth less than an immediate payment of the same total amount because the creditor cannot use the money right away, inflation may cause the value of the dollar to decline before the debtor pays, and there is always some risk of nonpayment.").

126. *See* Robert J. Barro, *The Loan Market, Collateral, and Rates of Interest*, 8 J. MONEY, CREDIT, & BANKING 439, 439 (1976) (discussing the benefits of having collateral in a lending situation including an incentive for borrowers to pay back their debts and protecting the lender's interest in the money).

127. *See What is Risk?*, U.S. SEC. & EXCHANGE COMMISSION,

lies in the nature of the agreement. With a loan, the only thing of value being exchanged is money—money now for money later. Hence, the description of a loan as a rental of money. With an investment, there is at least one other thing of value being exchanged. With bond investments, there is a promise of repayment, but that promise is embodied in a physical or electronic security.[128] With stock investments, there is no promise of repayment, only certain voting rights and a share of any declared dividend.[129] With other investments, an equity stake in the company might be demanded or even partial control over the operations of the company. Some resemble loans in minor ways but, in any investment scenario, money is not the only thing changing hands.

A straightforward analysis of probate and litigation funding transactions indicates some elements that appear similar to loans, but other elements that run counter to that explanation. In both cases, funding is provided to the recipient before the end of the legal dispute, and without a promise of repayment.[130] When a funder enters into an agreement with a potential heir or litigant, there is no way to discern what the outcome of the dispute will be, so the funder knows neither whether nor when she will get paid.[131] Without this information, it is impossible for a funder to know

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https://www.investor.gov/introduction-investing/basics/what-risk (last visited Feb. 19, 2019) (describing the risks involved with investment) (on file with the Washington and Lee Law Review).

128. *See Corporate Bonds*, U.S. SEC. & EXCHANGE COMMISSION, https://www.investor.gov/introduction-investing/basics/investment-products/corporate-bonds (last visited Feb. 19, 2019) (contrasting corporate bonds with common stocks and the absence of equity in the company) (on file with the Washington and Lee Law Review). The important difference is that the security can be transferred to another person, and transferability is a characteristic that creates value.

129. *See What Are Stocks?*, U.S. SEC. & EXCHANGE COMMISSION, https://www.investor.gov/introduction-investing/basics/investment-products/stocks (last visited Feb. 19, 2019) (detailing the nature of an exchange including the rights and benefits assumed by the investor) (on file with the Washington and Lee Law Review).

130. *See* Horton & Chandrasekher, *supra* note 16, at 115 (discussing the purchase of litigation claims); *id.* at 118 (discussing the exchange of rights as an heir for cash).

131. *Cf.* Steinitz, *supra* note 25, at 491–92 (discussing the uncertainties that investors are faced with when investing in litigation).

what the effective interest rate will be,[132] making application of usury laws unjust.

More importantly, however, the lack of any reasonable certainty regarding whether or when a return payment will be received is strong evidence that something other than money is changing hands.[133] No critic of funding has ever argued that funders are philanthropists,[134] so it would be odd to see funders-as-lenders giving away money without a promise of repayment—perhaps even a secured promise—and a schedule of payments. Instead, the funder receives a right to some future potentiality. While not reduced to a written form like a stock or bond, this right to a potential future payoff is a thing of value that changes hands in addition to money, making the transaction similar to an investment.[135]

In the case of probate funding, the case is even stronger that what is occurring is something other than a loan. A probate funder takes over the claims of the potential heir; while the funder is still

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132. Even some critics concede this fact but then calculate interest rates and argue that the funding transactions are usurious. *See, e.g.*, Horton & Chandrasekher, *supra* note 16, at 154 (arguing that funders should be able to "derive educated guesses" about the interest rate). While it is true that a funder could include a savings clause that would immediately reduce the repayment amount to whatever amount would fall below the usury limits doing so would place the funder in the unique situation of having to maintain profitability while being prohibited from obtaining any certainty regarding revenues. *See id.* at 145–46 ("[S]ome courts refuse to enforce these provisions, reasoning that they encourage lenders to charge all their customers astronomical rates and then merely 'refund . . . the usurious amounts' to 'the few debtors who complain.'").

133. *Cf.* Molot, *supra* note 107, at 371–72 (discussing the funder's assumption of risk of litigation in the context of a corporation funding its own litigation).

134. Many, in fact, assert exactly the opposite. *See* Xiao, *supra* note 39, at 268 (noting a concern by some critics "that financiers exploit consumers by charging exorbitant fees").

135. In a unique formulation of this argument, the Georgia Court of Appeals describes litigation financing as an investment in the "common venture" of litigation, with plaintiffs and defendants being the common venturers. *See* Cherokee Funding LLC v. Ruth, 802 S.E.2d 865, 870 (Ga. Ct. App. 2017) ("[I]t is clear that the Defendants and the individual Plaintiffs are involved in a common venture, which is to prevail in the underlying personal injury lawsuits."). While not a traditional way of representing the nature of litigation, it is true that the results of a trial are dependent on the efforts of the plaintiff and defendant, jointly, and that the funder's profit is dependent entirely on those efforts, rather than her own. *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 38–55 (1995) (describing private law as pitting plaintiff and defendant against each other in order to derive a judicial outcome).

pursuing claims founded in the person of the heir, the right to the portion of the estate covered by the funding transaction belongs entirely to the funder.[136] As such, a probate funder has not loaned money to the recipient. The funder is not even a passive investor in an endeavor controlled by the heir. Instead, the funder has purchased a property right and is maximizing the value of that right.[137] Nothing about the transaction looks like a mere rental of money—the definition of a loan.

Whether we rely on legal tests or economic intuition, it is difficult to support the assertion that either probate or litigation funding are loans. There may be other reasons to regulate these financial transactions, as discussed in the following two Parts, but treating them as loans completely mischaracterizes these transactions in a way that violates both legal and economic principles.[138]

III. Maintenance and Champerty

Even if usury rules are not appropriate, funding of legal claims might be properly subject to other regulations, such as maintenance and champerty rules. These ancient common-law rules are designed to avoid abuses in the legal system, so the rules' application to funding transactions rests on whether these transactions are likely to lead to the same abuses.[139] That question is related to—but separate from—whether funding transactions introduce unfair financial terms into a contract. Some states have already abandoned champerty and maintenance[140] but in the

136. *See* Horton & Chandrasekher, *supra* note 16, at 121 (discussing the nature of control over the probate claim by the funder).

137. *See id.* (describing the control a probate funder has over the claim similar to those of property rights).

138. *Infra* Part IV.A–B.

139. *See* Steinitz, *supra* note 25, at 486–87 (discussing the medieval origin of champerty and the goal of preventing abuses).

140. *See* Steinitz, *supra* note 21. at 1290 ("[A] minority of states such as Massachusetts and South Carolina have abandoned champerty altogether."); *see also* Saladini v. Righellis, 687 N.E.2d 1224, 1226–27 (Mass. 1997) ("We also no longer are persuaded that the champerty doctrine is needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position. There are now other devices that more effectively accomplish these ends."); Osprey, Inc. v.

majority of states where they are still in full force, legislators and judges will need to determine whether or not to apply them to probate and litigation funding.[141]

A. Maintenance and Champerty Rules and Legal Funding

Understanding the origins of maintenance and champerty rules is an important first step in determining whether they are properly applicable to the funding of legal claims. Maintenance is the support of a lawsuit by an outside party, usually when the outside party provides material support to one of the litigants.[142] Champerty is a form of maintenance, in which the outside party receives, in exchange for the material support, a promise of some portion of the lawsuit's proceeds in exchange for the material support.[143] In medieval times, maintenance was a crime and a tort,[144] and judges refused to enforce contracts that attempted to transfer interests in legal claims.[145]

The rules originally evolved, in large part, as a means of protecting the poor against exploitation by wealthy and powerful individuals who could afford to buy legal claims on the cheap.[146]

Cabana Ltd. P'ship, 532 S.E.2d 269, 279 (S.C. 2000) ("We abolish champerty as a defense because we believe it no longer is required to prevent the evils traditionally associated with the doctrine as it developed in medieval times"); TMJ Haw., Inc. v. Nippon Tr. Bank, 153 P.3d 444, 449 (Haw. 2007) ("[T]his court has repeatedly rejected blind adherence to rules crafted to meet anachronistic societal demands . . . .").

141. *See, e.g.*, N.Y. JUD. LAW § 489 (Consol. 2018) (prohibiting purchase of claims by corporations).

142. *See Maintenance*, BLACK'S LAW DICTIONARY 954 (6th ed. 1990) ("An officious intermeddling in a lawsuit by a non-party by maintaining, supporting or assisting either party, with money or otherwise, to prosecute or defend the litigation.").

143. *See Champerty*, BLACK'S LAW DICTIONARY 231 (6th ed. 1990) ("A bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration of receiving part of any judgment proceeds.").

144. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *134–35 ("And therefore, by the Roman law, it was a species of the *crimen falsi* to enter into any confederacy or do any act to support another lawsuit.").

145. *See* Walter Wheeler Cook, *The Alienability of Choses in Action*, 29 HARV. L. REV. 816, 816 (1916) (discussing the assignability of "*choses*" in the common law courts of England).

146. *See* Horton & Chandrasekher, *supra* note 16, at 110–11 ("Claim sales were so strongly associated with sharp practices that the word 'champerty'

That justification for bans on the sale of claims continued to the modern era.[147] Other justifications for the restrictions were added over time, including the one most law students likely learn—that allowing third parties to purchase legal claims would encourage more litigation.[148] While the rules weakened over time with regard to some claims,[149] judges remained uncomfortable with third-parties pursuing claims that were based in personal injury, as transactions of that sort appeared as "traffic[king] in human pain and suffering."[150]

Are probate and litigation funding champertous? Do they raise the types of concerns that maintenance rules were designed to avoid? The answer, unsurprisingly, is it depends on who you ask. There is surprisingly little actual data in the legal funding literature regarding whether funding transactions are abusive and exploitative; at best, most commentators limit themselves to

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derives from 'champart,' an arrangement that allowed wealthy landowners to exploit tenants without violating the usury laws."); *see also* Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 55 (1935) (describing the practice of wealthy individuals buying claims "far below their value"); W.S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*, 33 HARV. L. REV. 997, 1006–07 (1920) (describing Roman regulation of such practices by "prohibit[ing] assignments to persons more powerful than the [plaintiff]").

147. *See* Rice v. Stone, 1 Allen 566, 569 (Mass. 1861) (defending the doctrines by noting that they prevented oppression of the poor by "the rich and powerful"); *see also* Thallhimer v. Brinckerhoff, 3 Cow. 623, 644 (N.Y. 1824) (pointing out that the rules were implemented to limit the "power of great men, to whom rights of action were transferred").

148. *See* Horton & Chandrasekher, *supra* note 16, at 111 ("Gradually, however, the champerty and non-assignability rules began to decay."); *see also* Steinitz, *supra* note 21, at 1288 ("[M]odern policy rationale most often cited in support of the imposition of champerty restrictions includes a desire to discourage excessive, unnecessary, or speculative litigation—often associated with third parties seeking profit, rather than redress, through suits."); Lampet's Case (1612) 77 Eng. Rep. 994, 997 (K.B.) ("And first was observed the great wisdom and policy of the sages and founders of our law, who have provided, that no possibility, right, title, nor thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits.").

149. *See, e.g.*, Brashear v. West, 32 U.S. 608, 616 (1833) ("That a chose in action is assignable in equity, is not controverted."); Cook, *supra* note 145, at 822 (relating the courts' historical doctrine that "a chose in action is assignable in equity but not at law").

150. S. Farm Bureau Cas. Ins. Co. v. Wright Oil Co., 454 S.W.2d 69, 70 (Ark. 1970).

discussions of "interest rates" which, as discussed above,[151] is irrelevant to a discussion of legal funding. Likewise, the data is sparse on whether funding increases total litigation,[152] due in large part to the complexity of the question.[153] The final element, judges' distaste for the practice in cases involving personal injury, is not subject to empirical testing.[154] There are reasons to suspect, however, that legal funding does not raise the type of concerns that champerty and maintenance rules were meant to avoid.

1. Exploitation of the Poor?

With regard to the first motivation for these rules—exploitation of the poor by the wealthy and powerful[155]—it does stand to reason that the poor would have higher financial pressures, possibly leading them to accept a worse deal from a funder than a wealthy recipient. This is one area where usury arguments and champerty arguments overlap. As discussed *supra*,[156] interest rates are the price of money and, at times, people find themselves in desperate need of money.[157] The reasons for the pressures are varied, but the poor are likely to feel financial pressures more acutely, and it can lead them to make some very

151. *See supra* notes 143–45 and accompanying text (explaining why an interest rate cannot be calculated ex ante, absent some notion of when or if repayment will occur).

152. One substantive analysis has been attempted, with data from Australia, finding "slower case processing, larger backlogs, and increased spending," but without a statistically significant correlation between funding and filing rates. David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075, 1097–103 (2013).

153. *See id.* at 1097–98 (discussing that Australia does not serve as the "ideal experiment" for assessing the effects of champerty and maintenance laws because the Australian states have different legal approaches to litigation funding).

154. *See S. Farm Bureau*, 454 S.W.2d at 70 (exemplifying judges' distaste for third-parties pursuing claims based in personal injury by describing such claims as "traffic[king] in human pain and suffering").

155. *See supra* Part IV.A.1 (discussing the creation of champerty and maintenance rules "as a means of protecting the poor against exploitation by wealthy and powerful individuals who could afford to buy legal claims on the cheap").

156. *See supra* Part III.B (providing an economics definition of loans and interest rates).

157. *See supra* Part III.B (same).

unwise decisions.[158] Usury laws, like champerty rules, seem tailored to avoid something akin to coercion.[159]

With a traditional loan, agreeing to a bad deal might cause long-term harm to the recipient, such as a loan where interest rates are so high that the promised repayment is impossible.[160] A recipient in that circumstance might enter what is colorfully called a "debt spiral."[161] Payday lenders regularly receive criticism for lending on terms that, to the critic, appear coercive,[162] and litigation funders are occasionally referred to as the payday lenders of the legal realm.[163] However, closer examination shows this invective to be poorly applied.

In the case of consumer litigation funding,[164] the financial pressures that could lead the plaintiff to make a bad funding choice

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158. *See supra* Part IV.A (providing a background on the origins of maintenance and champerty rules).

159. Most state laws are silent as to the purpose of usury restrictions, and it is possible to view those restrictions as an unprincipled mish-mash of rules and exceptions. *See* Horton & Chandrasekher, *supra* note 16, at 138–39 (discussing the origins of champerty rules).

160. *E.g.*, Stacy Cowley, *Payday Loans' Debt Spiral to be Curtailed*, N.Y. TIMES, June 2, 2016, at A1 ("The very economics of the payday lending business model depend on a substantial percentage of borrowers being unable to repay the loan and borrowing again and again at high interest rates . . . .").

161. *See, e.g.*, *id.* (describing inability of certain borrowers to repay a loan). It is not clear why a funder would make a loan that she knew the recipient could not repay, given that the funder's business model requires repayment. Something just short of that, however, could be both profitable to the funder and not render the recipient completely destitute. Doing so would require the funder to identify the precise amount of interest that would require the recipient to pay every dollar not absolutely required for survival.

162. *See* Hawkins, *supra* note 40, at 68–72 (describing the arguments in favor of payday regulation based on perceived high costs that manipulate consumers).

163. *See* Brief, Amici Curiae, *supra* note 13, at 12 (arguing that the Colorado Legislature acted to protect consumers from excessive fees charged by litigation funders). *But see* Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83, 84–85 (2008) (describing litigation funders favorably as "merely one of a variety of subprime financial arrangements, such as home mortgages, payday loans, car-title loans and rent-to-own transactions, which can empower people without access to more traditional credit sources").

164. This is a subset of litigation funding, in which the plaintiff receives money from the funder for various living expenses only indirectly related to the plaintiff's ability to pursue the case. *See* Jeremy Kidd, *Modeling the Likely Effects of Litigation Financing*, 47 LOY. U. CHI. L.J. 1239, 1278–79 (2016) (describing the uses of the funds provided by the funder to the recipient in a consumer litigation

are already present, and could lead a poor plaintiff to accept a bad settlement choice—accepting a worse settlement from the defendant than a wealthy defendant would.[165] It is not clear, therefore, that litigation funding leaves the recipient worse off and could, potentially, make the recipient better off by allowing the plaintiff some relief from financial pressures in order to make a more reasoned judgment about what the case is worth and whether the settlement offer is fair.[166] A potential heir does not face the same settlement pressures as a litigation plaintiff, so a probate funder might be able to exert pressures on the heir to agree to a disadvantageous funding arrangement.[167]

Importantly, however, neither probate funding nor litigation funding reach the level of coercion that is often attributed to payday lenders because the funding agreements are nonrecourse.[168] The plaintiff or heir receives the money immediately and may never have to pay anything to the funder. There is no danger of losing other valuable assets and no chance of a debt spiral.[169]

The worst case scenario for the recipient would be that the entire award is obtained by the funder, leaving the recipient with no additional funds at the end of the claim.[170] While it is understandable that the recipient could find that outcome

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context). Consumer litigation funding can be distinguished from commercial litigation funding, where a funder provides money to a business that is engaged in a legal dispute—often contractual—but is experiencing cash flow problems. *See id.* (describing the mechanics of commercial litigation funding). Also distinguishable are more entrepreneurial forms of litigation funding, where a large investment firm provides funding for a large class action. For a more in-depth discussion of these categories, see *id.* at 1278.

165. *See id.* at 1255 (discussing the costs of litigation).

166. *See id.* at 1278–79 (providing three reasons why consumer litigation financing presents a lower level of risk than hedge fund litigation financing).

167. *See* Horton & Chandrasekher, *supra* note 16, at 114–15 (discussing entrepreneurs taking a stake in any future litigation settlements).

168. *See* Paige Marta Skiba & Jean Xiao, *Consumer Litigation Funding: Just Another Form of Payday Lending?*, 80 L. & CONTEMP. PROBS. 117, 119 (2017) (discussing difference between payday lending and consumer litigation funding).

169. *See id.* ("Because funding is nonrecourse, its customers cannot fall into the debt spiral that regulators often worry about with respect to payday lending.").

170. *See id.* at 117 ("If the lawsuit proceeds are less than the total amount owed to the financier, the plaintiff must pay the financier only the lawsuit proceeds . . . .").

disappointing, a complete analysis must also consider that the recipient is not left empty-handed. After all, the initial transaction resulted in the transfer of funds to the recipient.[171] The greater the financial need of the recipient, the greater the value to the recipient of the funds, which undercuts the arguments that funding is coercive.[172]

In the case of probate funding, this "worst-case" scenario is actually far more likely, given the ability of the probate funder to obtain all of the rights of the heir and proceed without any further involvement from the heir. Rather than making coercion more likely, however, it can actually reduce the likelihood of coercion. The heir enters the transaction knowing that the payment will be the only funds received in relation to the estate; the heir walks about with check in hand and need not contemplate the estate or the funder ever again.[173] Unless the funder engaged in fraud by misrepresenting the nature of the transaction—in which case the funding contract would be voidable by the recipient—there can be no harm to the recipient.[174]

Moreover, to the extent that coercion or exploitation is a perceived problem with funding transactions, the solution is not banning the transactions, but increasing competition in the market.[175] After all, if one funder is dominant in the market, that funder could leverage its market power to offer lower amounts to recipients or require promises of higher future payments.[176] In a competitive market, the offers made to recipients will be bid up by multiple funders.[177] Similarly, regulation of funding transactions is likely to be influenced by large players in the market to their

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171. *See id.* (explaining consumer litigation funding).

172. *See id.* at 126 ("[C]onsumers of litigation finance are using their nonrecourse loans for living expenses, which signals that these plaintiffs are cash-constrained.").

173. That ability is almost certainly of value to the recipient.

174. *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. b (AM. LAW INST. 1981) ("Typical instances of voidable contracts are those where one party was an infant, or where the contract was induced by fraud, mistake, or duress, or where breach of a warranty or other promise justifies the aggrieved party in putting an end to the contract.").

175. *See* Jeremy Kidd, *Fintech: Antidote to Rent-Seeking?*, 93 CHI.-KENT L. REV. 165, 170 (2018) (discussing how competition benefits consumers).

176. *See id.* at 177 (discussing maintaining market power).

177. *See id.* at 170 (explaining how competition benefits consumers).

advantage and to the detriment of competition and, consequently, recipients.[178]

At a superficial level, both forms of litigation funding might appear subject to concerns regarding exploitation and coercion. In one way, probate funding might be marginally more like champerty than litigation funding, but only because there are other coercive elements in the litigation setting that are not present in probate.[179] Furthermore, it is important to remember that the nonrecourse nature of both types of funding significantly reduces the overall financial burden that recipients will face. As a result, the first factor does not weigh heavily in favor of funding as champerty.

2. Increasing Litigation?

Depriving an heir or plaintiff of the right to choose funding as an option is paternalistic and violative of their autonomy, especially if there are no reasonable alternatives. However, if funding increases litigation significantly, there may be spillover effects that could justify intervention.[180] Does either form of funding risk a substantial increase in litigation? The answer is likely no.[181] Surprisingly, the idea that litigation funding increases total litigation—and frivolous litigation, in particular—has been advanced by both proponents and opponents. Proponents, of course, make the claim as part of their argument that the courts are effectively closed to the poor and middle class, with litigation financing increasing access to justice.[182] Opponents argue that

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178. *See id.* at 169–70 (discussing regulations and the costs of compliance).

179. *See supra* note 156 (stating the motivations behind the development of maintenance and champerty rules).

180. *See, e.g.*, Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533, 545 (2007) (explaining the tragedy of the commons problem). It is worth pointing out that Sinden places her arguments regarding externalities in the context of a tragedy of the commons problem. *See id.* (discussing the tragedy of the commons and the problem of market failure). In reality, commons problems and externalities are related but different types of market failure, although the distinction is not necessarily fatal to the author's overall argument.

181. For a more detailed description of the argument, see Kidd, *supra* note 175, at 1255–56 (providing a background on consumer litigation funding).

182. *See id.* at 1254–55 (summarizing the argument).

waves of new litigation will swamp our judicial system and damage the economy.[183]

Both, it turns out, are likely wrong. In arguing that litigation funding will increase litigation, both proponents and opponents make a fundamental mistake—they ignore the independent judgment that the funder must exercise in deciding whether to provide funding.[184] When the funder's need to at least break even is included in the analysis, it becomes clear that introduction of a funder cannot turn a losing case into a winning one.[185] Apart from minor increases arising from plaintiffs with no access to capital or entrepreneurial-minded litigants bent on path manipulation,[186] litigation funding should not be expected to increase the amount of litigation substantially.[187]

Probate funding is a relatively new subject of academic inquiry, so the literature is minimal, but the first analysis attempted to quantify the effects of funding on probate litigation.[188] The conclusion? Probate funding increases

183. *See* BEISNER & RUBIN, *supra* note 12, at 4 ("[Third Party Litigation Financing] can be expected to prompt an increase in the filing of questionable claims."); Joshua G. Richey, Comment, *Tilted Scales of Justice? The Consequences of Third-Party Financing of American Litigation*, 63 EMORY L.J. 489, 500 (2013) (concluding that litigation funding "encourages parties to file frivolous claims"); Kidd, *supra* note 175, at 1255–57 (arguing that litigation funding improves efficiency in the legal system); Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 743–45 (2005) (addressing concerns regarding the alienability of legal claims).

184. *See* Kidd, *supra* note 175, at 1241 (providing a background on consumer litigation funding).

185. *See id.* at 1249–54 ("[T]here is little reason to suspect that liberalizing litigation-financing rules will have a significant impact on the volume of cases brought.").

186. *See id.* at 1261–63 (providing a background on consumer litigation funding); Kidd, *supra* note 10, at 629–33 (discussing the debate over the funding of litigation).

187. *See* Kidd, *supra* note 175, at 1249–54 (explaining why the amount of litigation may not increase). This is not to say that litigation will not increase over time, even after an expansion of litigation funding, only that any increase is likely not caused by litigation funding. One can be concerned about the general increase in litigation—particularly frivolous litigation—yet be calm about the advent of funding.

188. *See* Horton & Chandrasekher, *supra* note 16, at 155–67 (explaining why "probate lending seems manifestly different than litigation lending and heir hunting").

litigation.[189] Those results, however, are subject to a host of criticisms, both methodological and theoretical, which render them largely unreliable.[190] Returning to the original objections that led to maintenance and champerty restrictions, probate funding simply cannot lead to third parties "exciting and stirring up suits"[191] because probate funding is only possible when there is an estate in probate, and that requires someone to die. Providing money to an heir does not create the disputed estate[192] nor will it make more people die.[193] The only potential effect is to increase the number of procedural motions filed during the resolution of existing probate disputes.[194]

Raising the number of procedural motions will increase the total costs of the probate system—though few procedural motions require the same level of expenditure as the filing of a new probate claim—but the cost of those motions must be weighed against the benefit achieved by them in terms of increased efficiency.[195] After all, the size of the estate to be divided is fixed, except to the extent it is depleted through legal costs or other wasteful probate expenses.[196] A probate funder's recovery has an upper bound

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189. *See id.* at 158 ("[T]here is a statistically significant relationship between probate loans and full-fledged litigation.").

190. *See* Kidd, *supra* note 16 (responding to Professors Horton and Chandrasekher).

191. BLACKSTONE, *supra* note 144, at *133–34.

192. The decedent has determined the likelihood of probate by the manner of holding property, since there are ways of avoiding probate, such as holding assets in joint tenancy with rights of survivorship. If an estate meets the statutory threshold under state law, it must pass through probate.

193. Of course, unless it could increase birth rates, probate funding could not increase the amount of potential estates because everyone must die. As a result, the most it could do is temporally shift the existence of disputed estates to the present time, leaving fewer in the future.

194. Horton and Chandrasekher define litigation broadly, to include any "request for relief that sparks an objection from an adverse party." Horton & Chandrasekher, *supra* note 16, at 157. They concede that they have defined the term broadly and, by so doing, might have made it more difficult to rely on their results. *See id.* at 160 ("[B]ecause we defined 'litigation' so broadly—as any contested petition—we may have swept up claims that may be only tenuously related to the presence of a lender.").

195. *See* Kidd, *supra* note 10, at 617–22 (arguing that litigation funding improves efficiency in the legal system).

196. *See* Skiba & Xiao, *supra* note 168, at 123 (explaining that the costs of litigation reduce the funders' payouts).

defined by the heir's interest, so unnecessary procedural motions would only serve to diminish the funder's recovery.[197] If those motions improve the efficiency of the process, however, the funder and all other heirs benefit.[198]

One way that a funder's involvement might improve efficiency is to minimize the impact of family dynamics on the estate.[199] Specifically, it might be difficult for an individual heir to be the one to contest disposition of the will, even though the proposed disposition is unfair and inefficient.[200] Family dynamics can therefore raise transaction costs that impede an inefficient resolution of the dispute, and an outsider who is not bound by those family dynamics could reduce transaction costs and allow an improved outcome of the dispute.[201]

For example, if probate is likely to be contentious, costs are likely to be higher and heirs might be legitimately concerned that any efforts to secure their rights will result in recriminations.[202] It

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197. Filing any legal motion increases the legal costs of probate and reduces the overall payout to the heirs. An heir might file out of spite or in response to some relational dynamic amongst the heirs, but a funder has only financial returns in mind. *See* Kidd, *supra* note 10, at 618 (discussing how costs of litigation filings may affect legal decisions). Those returns will already be less than those of the original heirs, since the funder has paid a specific sum for the right to recover from the estate. *See id.* (discussing the impact of filings costs on litigation). The costs of any filing therefore represent a larger share of the profits of a funder, making a funder less likely, under normal conditions, to initiate any filing unless its benefit clearly outweighs the cost. *See* Skiba & Xiao, *supra* note 168 (explaining that the costs of litigation reduce the funders' payouts).

198. Horton and Chandrasekher, albeit with a very limited sample, find that there is no increase in the amount of time required to resolve the probate dispute, even though the number of motions may have increased. Horton & Chandrasekher, *supra* note 16, at 163. This is strong evidence that the extra motions are not burdensome.

199. *See* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960) (explaining the costs of undertaking a market transaction); Jeremy Kidd, *Kindergarten Coase*, 17 GREEN BAG 2D 141, 145–46 (2014) (explaining how bargaining can increase market efficiency).

200. *See* Kidd, *supra* note 199, at 143–48 (discussing the efficiency of litigation when considering individual and group plaintiffs).

201. *See id.*

202. Heirs might worry that the estate will be depleted by legal wrangling or that the distribution of assets will be different than they would otherwise expect. A contentious probate will also typically last longer. Heirs that are more risk averse or who have a higher time preference will be willing to pay a premium to a funder in exchange for the funder to assume those risks. Horton and Chandrasekher acknowledge this, conceding that it is possible that "litigation

is possible that all family gatherings would be awkward, at best, for years to come. A funder might file motions that the traditional heirs would have filed—and which should have been filed—under less contentious circumstances.[203] By so doing, the funder may have sped up the process, eliminated waste, and resolved the dispute more efficiently.[204]

There is one filing that might result in the interests of the funder being misaligned with the interests of the heirs—a petition to be appointed personal representative.[205] A funder might seek to be assigned purely to gain the fees associated with that service.[206] However, because someone was going to receive payment for those responsibilities, it is merely a transfer from the likely alternative to the funder. Moreover, the funder is far more likely than any given heir to have developed expertise in disposing of an estate quickly and efficiently, the funder's primary goal[207] and what

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causes loans." *See* Horton & Chandrasekher, *supra* note 16, at 160 ("Rather than establishing that loans lead to litigation, they could point in the other direction: that litigation causes loans.").

203. *See id.* at 161 (discussing the effect of litigation funding on the volume of litigation).

204. The one exception are those heirs that would have benefited from contention, either because they prefer contention—every family seems to have someone like that—or because they were going to be the personal representative and be paid for the duration of probate. *See* Kidd, *supra* note 10, at 621–22 (arguing that litigation funding improves efficiency in the legal system).

205. *See* Horton & Chandrasekher, *supra* note 16, at 161–64 (discussing considerations surrounding the appointment of a personal representative).

206. Horton and Chandrasekher chalk this desire up to "rank self-interest." *Id.* at 162. That assertion ignores the reality that every individual is motivated by self-interest and that self-interest can yield tremendous benefits for others. *See* 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 26–27 (1776)

> [M]an has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their selflove in his favour, and shew them that it is for their own advantage to do for him what he requires of them. . . . It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our diner, but from their regard to their own interest.

207. The funder, more than anything else, wants their investment in the estate to be profitable, and that requires speed and minimal costs. *See* Kidd, *supra* note 199, at 149–51 (explaining why a funder will seek to resolve the estate rapidly, with minimal costs).

should be the primary goal of the court, as well.[208] Individual heirs might wish the process to drag on for a variety of personal reasons, but the only interests that are common to all heirs are those that speedily and cheaply dispose of the estate.[209] A funder's interests are therefore properly aligned with the heirs and its appointment as personal representative should result in net benefits to the estate.[210]

Neither probate nor litigation funding are likely to increase the amount of litigation, given the nature of the incentives they face.[211] Litigation funders largely follow where lawyers have already gone, funding claims that have already been brought.[212] Although they may allow a claim to continue when it would otherwise have been resolved, the existence and nature of the claim are not determined by the presence of funding. Similarly, probate funding cannot increase the number of probate disputes and any increase in total motions is likely to lead to improvements in efficiency and payouts to the heirs.

3. Ulterior Motives

The final justification for champerty and maintenance restrictions was the belief that there was something intensely personal about legal claims, something that could not simply be transferred to a third party.[213] This criticism is sometimes leveled

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208. Outside of a complete dereliction of duty, a court would seemingly only choose a funder who has to be the personal representative because it viewed the funder—who has no connection to the decedent—as the one most capable of disposing of the estate efficiently, minimizing costs and increasing the overall amount that can be divided amongst the heirs.

209. *See* Skiba & Xiao, *supra* note 168.

210. Horton and Chandrasekher appear to concede this point, that replacing a lazy or inefficient personal representative will result in an improved outcome for the heirs. *See* Horton & Chandrasekher, *supra* note 16, at 161–64 (discussing considerations surrounding the appointment of a personal representative). Immediately thereafter, however, they refer to this as "inefficient hypervigilance," as if the heirs would have been far happier with a lower recover. *Id.*

211. *See* Kidd, *supra* note 164, at 1249–54 (explaining why the amount of litigation may not increase).

212. *See id.*

213. *See* Horton & Chandrasekher, *supra* note 16, at 111 ("[S]ociety saw

at legal funding, that the introduction of a funder will change the nature of the dispute.[214] In the case of litigation funding, these concerns are not entirely unfounded, although they may be exaggerated.[215]

For example, a litigation funder might provide funding in a case in order to pursue goals directly opposed to those of the recipient, such as through path manipulation.[216] Path manipulation is an exploitation of the path-dependent nature of U.S. law to actively move the law in directions that are unrelated to the case at hand.[217] Alternatively, the judicial process might also be distorted by a funder who becomes involved out of spite and a desire to injure one of the parties to the lawsuit.[218] In either case, the presence of the funder does not change the underlying facts of the case, nor will the funder necessarily act contrary to the interests of the litigant.[219] However, because a traditional litigation victory is not the primary objective of the funder, the litigant might be disadvantaged by the funder's actions.[220]

Probate funding seems less likely to be subject to these misaligned incentives. Path manipulation is a strategic manipulation of the law's evolution, and requires both careful

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lawsuits as intrinsically personal and thus not capable of changing hands.").

214. *See id.* at 110–11 (discussing the common law's disfavor of "outsiders who injected themselves into cases").

215. *See id.* at 111–12 (discussing the reasoning behind the evolution in champerty and non-assignability rules throughout history).

216. *See* Kidd, *supra* note 10, at 629–33 (discussing the strategy of path manipulation); Kidd, *supra* note 164, at 1261–63 (describing the potential of third-party litigation to lead to path manipulation).

217. *See* Kidd, *supra* note 10, at 629–33 (providing a background on path manipulation and its purposes).

218. In early 2016, it was revealed that venture capitalist Peter Thiel had paid for the case brought by Terry Bollea, also known as Hulk Hogan, against the tabloid website Gawker. Matt Drange, *Peter Thiel's War on Gawker: A Timeline*, FORBES (June 21, 2016, 1:22 PM), http://www.forbes.com/sites/mattdrange/2016/06/21/peter-thiels-war-on-gawker-a-timeline/#34a4a1ea7e80/ (last visited Feb. 19, 2019) (on file with the Washington and Lee Law Review). Thiel was willing to incur the cost in order to punish Gawker for earlier revelations that Thiel is gay. *Id.*

219. *See* Kidd, *supra* note 199, at 149–51 (discussing how the monetary interests of the litigant and funder may align).

220. *See* Kidd, *supra* note 164, at 1261 ("The value of path manipulation is different from normal monetary awards, in that the value can be achieved even if the case is lost.").

planning and just the right set of cases.[221] Probate seems a far more stochastic process, subject to a randomness that would seem to defy attempts at long-term, strategic planning.[222] Spite funding is likely already prevalent in probate cases, but arising from family members' encouraging inefficient choices as a way of getting back at other heirs.[223] It is unlikely to come from commercial funders, who see probate funding as an opportunity for arbitrage, demanding efficiency where inefficiency would otherwise prevail.[224] By increasing the efficiency of the process, they increase the returns on their investment.

It is possible to see the profit motive of funders as a two-edged sword, improving the payout to heirs but only by enforcing rights that no one else wishes to enforce.[225] If, however, a funder is purchasing the entirety of the heirs' interests, as described below, then its enforcement of those rights is entitled to the same respect as any choice by a traditional heir.[226] Moreover, there are reasons to suspect that the traditional heirs might prefer enforcement of rights even though they personally cannot be seen to do so.

Traditional heirs face two primary motivations in their capacity as heirs. The first is monetary, in that they would prefer more money to less and, as such, they would prefer the most efficient probate process.[227] The second is relational, in that they would prefer to be able to interact with the other heirs in the future

221. *See, e.g.*, Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 239–41 (1999) (discussing how the NAACP used path manipulation to defeat segregation and how the Women's Rights Project used path manipulation in seeking heightened protection for women under the Equal Protection Clause of the Fourteenth Amendment). For a discussion of the incentives that could lead a party to engage in path manipulation, see Kidd, *supra* note 164, at 1272–78.

222. *See* Kidd, *supra* note 10, at 629–33 (discussing the strategy of path manipulation); Kidd, *supra* note 164, at 1261–63 (describing the potential of third-party litigation to lead to path manipulation).

223. *See, e.g.*, Bollea, *supra* note 218 (discussing Peter Thiel's spite lawsuit).

224. *See* Kidd, *supra* note 199, at 145 (describing the funder's need for efficient resolution of the estate).

225. *See, e.g.*, Horton & Chandrasekher, *supra* note 16, at 162 (describing how probate funders are incentivized to protect their investment).

226. *See id.* at 121 (discussing the alienation of probate rights).

227. *See* Kidd, *supra* note 164, at 1246–50 (defining expected payout of lawsuits).

without significant conflict.[228] Challenge another heir's selection as personal representative or dispute a choice made by the personal representative and family reunions could be very awkward for the indefinite future.[229] If a choice to challenge the personal representative will increase the monetary payout to the remaining heirs but also increase conflict in the future, many or all of the heirs may choose to do nothing.[230] This choice is perfectly rational, resulting from the individual heirs' higher subjective valuation of the relational value of abstaining.[231] Allowing a funder into the system allows for actions that improve the payout to all heirs but that could not have been taken by any traditional heir.[232]

Now, when the challenge is filed, it is filed by this outsider, rather than an heir.[233] The previous personal representative may

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228. The conflict arises from one traditional heir challenging another, disrupting the harmony that exists within that group. Of course, some families exhibit entirely different relational dynamics and a challenge between family members would not disrupt the harmony of the family/friends because that harmony does not exist. In those cases, of course, at least one traditional heir will make the challenge and this critique simply doesn't apply. *See supra* Part IV.A.2 (discussing, in part, familial relations and probate proceedings).

229. *See supra* Part IV.A.2 (discussing, in part, familial relations and probate proceedings).

230. Heirs face the payout function $\pi = f(m, -c)$, where m represents the monetary award and c represents conflicts arising from actions taken during probate. Standard assumptions regarding utility of wealth assure that $\frac{\partial \pi}{\partial m} \geq 0$. For most individuals, it can be assumed that avoidance of conflict is an improvement, so $\frac{\partial \pi}{\partial c} \leq 0$. Some actions taken within the probate process will improve monetary awards only by disturbing family or friends who area also heirs; if m and c both increase, the sign of the change in overall payout will be indeterminate, dependent on the magnitude of the two effects. Revealed preferences would indicate that a petition or objection not filed by the heirs is seen as yielding a net decrease in payout because the conflict effect dominates. Forcing the heirs to file this petition or objection would therefore reduce the payout of at least one heir.

231. *See* Kidd, *supra* note 164, at 1246–50 (defining expected payout of lawsuits).

232. Unlike the heirs, the funder will likely never have to interact with any heirs in the future, so no familial dynamics will be disturbed by filing a petition or objection that will displace an heir or disturb the expectations of various heirs. *See* discussion *supra* Part IV.A.2 (discussing how familial dynamics affect litigation decisions). In effect, while the funder still values wealth, $\frac{\partial \pi_F}{\partial m} \geq 0$, the funder need not fear future conflict, so $\frac{\partial \pi_F}{\partial c} = 0$.

233. *See* Horton & Chandrasekher, *supra* note 16, at 118 (describing the alienation of probate rights as "bring[ing] an outsider into the judicially-supervised probate system").

still be upset at being removed, but the ill-feelings are far more likely to be directed at the funder, rather than the other heirs—even the heir who sold an interest to the funder.[234] Every heir—including the original personal representative—will enjoy the increased payout, and any future conflict will have been reduced or eliminated. In this way, many probate disputes can be viewed as having a dual equilibrium. In the first, lower-value equilibrium, all parties accept the inefficiencies of a given personal representative as a way of maximizing total value.[235] A second, higher-value equilibrium exists where all parties can enjoy higher total value, but it requires an external actor who does not attach any negative value to future conflict with the heirs.[236]

Although there are ways in which the presence of a funder might change the fundamental nature of the case, circumstances where that is likely to be the case are rare. In other ways, the presence of a probate funder can make subtle changes, but those changes tend to improve the efficiency of the dispute and improve the collective outcomes for the heirs.[237] When considered with the lack of increased litigation and the lack of exploitation in funding transactions, there is little justification left for arguing that probate and litigation funding are champertous.[238] As a word of caution, it is possible that, at some future time, new entrants to the funding market or changes in the overall structure of the market could alter this analysis. For the time being, however, there is no reason to apply maintenance and champerty rules to the funding of legal claims.

B. Legal Funding as Purchase of Property

Even if the reader disagrees with the foregoing, there is one more reason as to why both usury laws and champerty rules should

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234. *See* discussion *supra* Part IV.A.2 (discussing familial relations and probate proceedings).

235. *See supra* note 207 (discussing how the monetary interests of the litigant and funder may align).

236. *See supra* note 207.

237. *See* Kidd, *supra* note 199.

238. *See* Kidd, *supra* note 164, at 1249–54 (explaining why the amount of litigation may not increase).

not apply to probate funding at least: they are more accurately described as a purchase of a property interest.[239] In many cases, what an heir stands to inherit is actual property, real or personal.[240] Even in those cases where the heir inherits money, it is often derived from the sale of property,[241] indicating that the heir had a de facto interest in that property.[242]

An owner of property is entitled to sell that property without concern for whether the profit or loss will exceed government usury limits, because the sale of property is simply not governed by those laws. Likewise, an owner is entitled to sell property without regard for whether the property is subject to dispute, so long as the buyer is aware of the legal dispute.[243] The existence of the legal dispute over ownership just makes the property interest contingent, which will impact the purchase price, but it does not limit the alienability of whatever interest the seller may possess.[244]

Under modern rules, courts "generally do not apply the doctrine [of champerty] to parties who first acquire an interest in property and then bring a cause of action related to that property,"[245] which is what probate funders do.[246] The history of inheritance alienation, however, is convoluted, with courts often refusing to enforce the sale of an expected inheritance while the testator was still alive.[247] Some jurisdictions allowed the sale of

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239. *See* Horton & Chandrasekher, *supra* note 16, at 110 ("Plaintiffs with civil claims and individuals who expect to inherit from a probate estate possess property rights that depend on the outcome of a matter in court.").

240. Horton and Chandrasekher make this point explicitly in their empirical analysis. *See id.* at 157 (describing how one independent variable used was whether the probate process "divided *property* unequally among similarly-situated relatives") (emphasis added). They also describe a number of funding transactions in which the funder was granted an interest in real property. *Id.* at 144 n.244.

241. *See id.* at 163 n.319 (discussing the special considerations regarding the liquidation of real assets in the probate process).

242. *Id.*

243. *See* 7 CORBIN ON CONTRACTS § 28.20 (2018) (discussing the duty to disclose).

244. *Id.*

245. Horton & Chandrasekher, *supra* note 16, at 160–61.

246. *See id.* (providing description of probate funders' actions when acquiring a probate interest).

247. Courts argued that such transactions were likely to be unfair. *See, e.g.*, Graef v. Kanouse, 238 N.W. 377, 379 (Wis. 1931) (concluding that the sale of

inheritance rights once the testator had passed,[248] but some commentators remain unconvinced by the "formalistic logic"[249] that prohibits alienability prior to the testator's death but permits it afterwards.

It is not clear whether use of the term "formalistic" is intended to deny any logical distinction between pre-death and post-death but, from the perspective of a probate dispute, there can hardly be a more intuitive line of demarcation. Prior to the testator's death, the property belongs to her, and the heir may never inherit, so an attempted alienation borders on metaphysical.[250] Perhaps the uncertain nature of the transaction is what led courts to reject such agreements.[251] However, once the testator has passed, she is no longer capable of owning property and her will—or state law in the

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inheritance rights were sure to be "burdensome and unfair"). Also, these transactions are exploitative of vulnerable individuals. *See, e.g.*, *In re* Strange's Estate, 300 N.Y.S. 23, 25 (N.Y. Sup. Ct. 1937) (justifying a rule against alienability of inheritance rights as "protect[ing] improvident children" from "money speculators"); Hite v. Hite, 166 N.E. 193, 196 (Ohio 1929) (arguing that those who sell their inheritance rights are "defenseless and exposed to the demands of the other [party] under the pressure of necessity"). Other courts reasoned that the heir had no property right to alienate, since the testator retained full control over property while she lived, *see, e.g.*, Hart v. Gregg, 32 Ohio St. 502, 511 (1877) ("During the father's life, all that the son had was a mere naked possibility . . . which could not be released, assigned, or devised."), or for unstated public policy reasons. *See, e.g.*, Flatt v. Flatt, 225 S.W. 1067, 1068 (Ky. 1920) ("[T]his court has uniformly held in many cases that a sale of a mere expectancy in land is against public policy . . . ."); *In re* Zimmerman's Will, 172 N.Y.S. 80, 89 (N.Y. Sup. Ct. 1918) ("I have little doubt that in our law a voluntary assignment of a *spes successionis* would not be enforceable, even in equity.").

248. *See, e.g.*, Hite v. Hite, 166 N.E. 193, 196 (Ohio 1929); *In re* Michels' Estate, 63 P.2d 333, 334 (Cal. Dist. Ct. App. 1936) ("The title of the decedent in and to the properties of his estate vested immediately upon his death in . . . his sole heir . . . [giving her] an absolute right to assign her interest in the estate . . . ."); Phelan v. Elbin, 79 A. 187, 189 (Conn. 1911) ("The heir at law takes a vested interest in all the real estate of an intestate immediately upon the latter's death.").

249. *See* Horton & Chandrasekher, *supra* note 16, at 120 (discussing the uncertainty caused by the conflicting approaches to alienation).

250. A society could choose a rule that would allow individuals to voluntarily contract for the transfer of property that neither one owns, so long as there is no fraud or deception. It is possible to believe that the purchaser of such a contingency is foolish while still permitting them their foolishness. Public policy goals might weigh in favor of a ban on such transactions—as they do with bans on gambling—but that is a political choice. *See supra* note 247 (identifying cases that refused to alienate interests due to unstated public policy reasons).

251. *See supra* note 247 and accompanying text.

absence thereof—will determine who is the owner of the property that comprises her estate.[252] At the moment of her death, the interests of the heirs are no longer metaphysical, but enforceable under law.[253]

It is also an abuse of language to claim that a probate funder is able to "literally[] buy[] a lawsuit."[254] The only thing that the funder literally purchases is the heir's interest in the estate, whatever the probate court determines that to be.[255] Of course, that interest must include the right to defend that interest against all who would diminish its value, including other heirs during the probate process.[256] Such a right was surely possessed by the original heir and, absent some specific mention in the contract of sale, the purchaser would obtain all rights not personal to the original heir.[257] The right to file motions in probate—as opposed to the right to file or maintain a lawsuit—is, at best, indirect and derivative of what the funder has actually purchased.[258]

When a probate funder purchases a property interest previously owned by an heir, she is not subject to usury laws any more than would be the purchaser of real estate who obtains a large profit from the later sale of the property.[259] She is no more subject to champerty restrictions than would be a purchaser of real

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252. *See supra* note 248 (citing cases which articulated the interests in the estate transfer immediately upon death of testator).

253. *See* Horton & Chandrasekher, *supra* note 16, at 104 (telling the story of a decedent's assets going through probate).

254. *Id.* at 121 (citing *In re* Estate of Davis, 467 N.E.2d 402, 403 (App. Ct. Ill. 1984)).

255. *See id.* at 118–30 (providing a background of probate lending).

256. *See id.*

257. The court in *In re Davis* was asked to rule specifically on the alienability of the right to contest the will, not on the alienability of inheritance rights, generally. *See In re* Estate of Davis, 467 N.E.2d 402, 403 (App. Ct. Ill. 1984) (addressing a contest to a decedent's will). It was therefore opining specifically about the right to file a lawsuit to contest the will. *See id.* at 404 (discussing whether appellant had a vested interest in the decedent's estate). A rule prohibiting assignment of the right to contest a will is logically compatible with a rule allowing full alienability of the interests defined by that will. *See id.* at 403 (discussing an appellant's ability to contest a will).

258. *See supra* Part IV.A.2 (discussing the distinction between motions filed in probate and lawsuits).

259. *See* Horton & Chandrasekher, *supra* note 16, at 118–30 (providing a background of probate lending).

estate who then files lawsuits to ward off nuisances, attempted adverse possession, unlawful easements, or waste by tenants. She is not merely an heir hunter, selling information about the estate to heirs in return for a later payout, but has purchased property—sometimes identifiable, tangible property. The nature of probate funding transactions makes champerty and usury restrictions inapplicable.[260]

Litigation funders, in those states that have maintained their rules against maintenance and champerty, will find this latter argument unavailing. While most litigation funding does not pose the type of threats that champerty restrictions were intended to prevent,[261] most states do not recognize a fully-alienable property right in legal claims, at least not universally.[262] Any attempt by a litigation funder to contract for the full property rights of the plaintiff in her legal claim is likely to be disregarded as an illegal contract.

V. Conclusion

Probate funding, in its current form, is relatively new, likely emerging during the early 2000s.[263] It is similar to litigation funding in many ways, but it is also different in important ways, making it an exciting new point of reference in the debate over the funding of legal claims. [264] It is also largely unregulated,[265] making it an outlier in the realm of financial and funding services.[266] The

260. *See supra* Part III (discussing the legal background of champerty and usury laws).

261. *See supra* Part IV.A (distinguishing litigation funding and champerty restrictions).

262. Legal claims can be transferred under certain circumstances, such as in bankruptcy or when a business is purchased, but the right to alienate legal claims entirely and in all circumstances is not recognized.

263. *See* Horton & Chandrasekher, *supra* note 16, at 125 (discussing the history of probate lending).

264. *See id.*

265. *See id.* at 107 (identifying that "only one state statute expressly regulates [inheritance-purchasing]"); CAL. PROB. CODE § 11604.5(b)(2) (West 2016) (legislating who qualifies as a transferee for value in the purchase of beneficial interests in estates).

266. *See supra* note 247 (highlighting the dearth of state of laws surrounding inheritance-purchasing).

absence of regulation makes many people nervous, so there will undoubtedly begin a movement to regulate probate funders. Before doing so, lawmakers and regulators should be careful to understand exactly what probate funding is, so that regulation will not destroy an emerging market for a product that at least some consumers find valuable.

One of the most destructive things that regulators can do is apply ill-fitting but existing regulations because the to-be-regulated activity looks similar to something that is already subject to regulations. To be effective, regulations should be seen and wielded as precision instruments, not sledgehammers designed to smash the regulated activity into submission. An ill-fitting regulation, like an incorrect screwdriver, is more likely to strip the head of a screw, making it unusable. Rather than making heirs' lives worse off by destroying the probate funding market, regulators should seek to understand how probate funding is similar and different from existing financial products and services.[267] This Article provides a beginning to that understanding. That understanding can also inform the ongoing debate regarding litigation funding by contrasting the two types of funding.

In the end, probate and litigation funding both differ significantly from traditional loans because they are nonrecourse and because the very nature of our legal system includes significant risk. Instead, they bear some resemblance to various forms of investments, making existing usury laws inapplicable. The potential harms that give rise to usury laws and champerty restrictions are largely absent from litigation funding and almost entirely absent from probate funding.[268] Finally, probate funding looks a great deal like a transfer of property rights, which would place it entirely outside the realm of usury and champerty rules. Litigation funding has many of the same characteristics but current law does not allow full alienation of personal legal claims.

Neither probate nor litigation funding are a particularly good fit for existing regulations, as they do not occupy the same space

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267. *See supra* Part III (discussing how champerty and usury differ from probate lending).

268. *See supra* Part III (discussing the legal background of champerty and usury laws).

or serve the same function as most financial services and products. Probate funding, in particular, differs substantially, making it particularly troubling that some have begun calling for the application of current laws and regulations. This Article should provide a counter to those notions. If regulation of litigation and especially probate funding is needed, it should occur according in a way that accepts the reality of the funding model, rather than a caricature.