PANEL 2
New Means of Financing Lawsuits and Law Firms

THE SALE AND SETTLEMENT OF MASS TORT CLAIMS: ALTERNATIVE LITIGATION FINANCE AND A POSSIBLE FUTURE OF MASS TORT RESOLUTION

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I. INTRODUCTION

In recent decades, resolution of mass torts has focused on the use of class actions and non-class mass settlement in a struggle between, on the one side, defense counsel and one or more corporate defendants, and on the other side, numerous plaintiffs' firms and their rosters of client claimants. The use of class actions perhaps reached its apex in the attempt in *Amchem Products, Inc. v. Windsor*[1] to reach a wide-reaching asbestos class settlement affecting hundreds of thousands, or even perhaps millions of claimants.[2] The non-class mass settlement, though also widespread

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1 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 591 (1997).

2 *Id.* at 597.

in asbestos cases,[3] was perhaps most boldly used by the lawyers in $4.85 billion Vioxx mass settlement by Merck.[4]

Both of these routes to mass tort resolution have been subject to continuing problems of both procedure and ethics.[5] The Supreme Court of the United States reversed the *Amchem* class settlement,[6] and appellate courts have largely rejected the certification for trial of mass tort class actions for personal injuries.[7] Similarly, commentators criticized the Merck Vioxx mass settlement for compromising the independent advice of counsel, who were bound by the settlement to recommend the settlement to all of their clients, or withdraw from representing clients who declined to participate.[8]

Amid the problems attending class or non-class routes to mass tort closure, a new promising path for mass tort management and settlement might be found in an unusual place: alternative litigation finance and the sale and settlement of mass tort claims. In recent years, alternative litigation finance, which involves third-party financing of litigation, has expanded markedly in the United States and around the world.[9] If legal and ethical rules continue to evolve to accommodate litigation finance, the trend toward greater involvement of financiers in mass tort litigation might lead not just

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[3] *See id.* at 599-600 (referring to the Center for Claims Resolution in the asbestos litigation).

[4] *See Vioxx Settlement Update,* OFFICIAL VIOXX SETTLEMENT, http://www.officialvioxxsettlement.com/ (last visited Oct. 11, 2013).

[5] *See infra* Part II.

[6] *Amchem*, 521 U.S. at 597.

[7] *See, e.g.*, *id.*; *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1074, 1083 (6th Cir. 1996); Castano v. Am. Tobacco Co., 84 F.3d 734, 737, 740-41 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1294, 1297 (7th Cir. 1995).

[8] *See, e.g.*, Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure,* 96 CORNELL L. REV. 265, 280 (2011) (noting that with regard to the Merck Vioxx mass settlement, "[t]he mandatory-recommendation provision and the mandatory-withdrawal provision . . . were the two most controversial aspects of the Vioxx settlement").

[9] *See* Steven Garber, *Alternative Litigation Financing In the United States: Issues, Knowns and Unknowns*, RAND at 1 (2010), *available at* http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf.

to more widespread legal loans to plaintiffs and their counsel, but also to the outright sale of mass tort claims to financial entities.[10] These new entities would then prosecute the claims against defendants, with continuing good faith involvement of injured claimants in discovery and trial testimony. In addition to providing quick and certain compensation to claimants, financiers' purchase of mass tort claims would also greatly ameliorate the problem of adequate representation and conflicts of interest in mass tort settlement, as the likely emergence of one, or a few, financiers with large numbers of claims would enable lawyers who directly represent them to negotiate far-reaching mass settlements that would bring closure to a defendant in a mass tort.[11]

Part II of this article recounts prior moves in mass tort litigation toward class actions and non-class mass settlement and sets forth the continuing problems accompanying those approaches to mass tort resolution. Part III then examines the contribution that alternative litigation offers in the processing of mass torts, addressing ethical and legal obstacles to greater tort financing, sketching the potential functioning of sale of mass tort claims, and cataloguing the general benefits from such an approach. Part IV then returns to the problem of mass tort resolution, and suggests that the sale of mass tort claims could facilitate efficient and wide-reaching settlements and aid in avoiding procedural and ethical issues that have plagued prior class and non-class attempts at mass settlement. Finally, in Part V, I conclude that the sale and settlement of mass tort claims to third-party financiers would provide a new, beneficial path for mass tort management and should be permitted.

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[10] *See* Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 62, 74, 82-83 (2011) (noting that assignment of personal injury claims is currently prohibited across the United States, but arguing for permitting assignment of such claims).

[11] *Cf.* Garber, *supra* note 9, at 34 (discussing the effect of alternative litigation financing on litigants' bargaining ability).

II. PRIOR PATHS FOR RESOLVING MASS TORTS

A. Class Actions

Perhaps the fundamental question of mass tort litigation is how the claims of numerous, often dispersed individuals may be both justly and efficiently tried or settled. Mass torts may involve dispersed harm to many persons stemming from products liability or harm to a more closely situated group stemming from a single-incident tort, such as a toxic exposure, explosion, fire, or crash.[12] In the United States, prior mass torts have involved asbestos,[13] tobacco,[14] pharmaceuticals,[15] and medical devices,[16] among many others.[17] Such widespread mass torts may involve thousands of claimants and pose challenges to procedural goals of just, efficient, and speedy claim resolution,[18] as well as tort goals of corrective justice, deterrence, and compensation as caretaking.[19]

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[12] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.1 (2004) (discussing single incident and dispersed mass torts).

[13] *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597, 600 (1997).

[14] *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

[15] *See* Monica Langley, *Courtroom Triage: Bayer, Pressed to Settle a Flood of Suits Over Drug, Fights Back*, WALL ST. J. (May 3, 2004) http://webreprints.djreprints.com/2739391193359.html (discussing settlement of claims relating to Baycol).

[16] *See In re* Inter-op Hip Prosthesis Liab. Litig., 204 F.R.D. 330, 335, 342, 348-49 (N.D. Ohio 2001) (approving class settlement of class pertaining to Sulzer hip and knee implants).

[17] *See, e.g.*, *In re* San Juan Dupont Plaza Hotel Fire Litig., 111 F.3d 200, 222-23 (1st Cir. 1997) (discussing mass tort litigation resulting from a hotel fire).

[18] *See* FED. R. CIV. P. 1 (noting that the Federal Rules of Civil Procedure "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding").

[19] *See, e.g.*, Jeffrey O'Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137, 139 (1999) ("[W]e would extend the mixed theory of tort law beyond deterrence and corrective justice to include compensation. We argue compensation is not only a plausible goal of the tort system, it is a desirable–and indeed an essential–goal."); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) (noting

One potential route, in vogue particularly during the 1980s and the 1990s in the United States, was the use of class actions for both trial and settlement purposes.[20] Under Rule 23 of the Federal Rules of Civil Procedure, a court may certify a class action if plaintiffs satisfy all of the requirements of Rule 23(a): that the class representatives be adequate and typical representatives of the class, that there be common issues of fact or law among the class, and that "the class [be] so numerous that joinder of [claims] is impracticable;"[21] and if plaintiffs satisfy at least one subsection of Rule 23(b).[22] In mass torts, although plaintiffs have sought class certification under each subsection of Rule 23(b), plaintiffs have largely focused on certification under Rule 23(b)(3), which requires that common issues predominate over individual issues and that the class treatment be superior to other procedural options.[23]

In the 1980s, for example, plaintiffs successfully settled for an estimated $180 million in a class action against various manufacturers of Agent Orange, in connection with claims of toxic injury by United States soldiers during the Vietnam War.[24] At that time, the *Agent Orange* settlement was the largest civil suit settlement in the history of the United States, and the settlement class was estimated to include ten million people.[25] Interestingly, no verdicts in individual cases appear to have preceded the class

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that the major division between tort scholars is between corrective-justice scholars and deterrence-oriented economics scholars).

[20] *See, e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 148, 154, 167 (2d Cir. 1987) (affirming certification of class and approving class settlement).

[21] FED. R. CIV. P. 23(a).

[22] FED. R. CIV. P. 23(b).

[23] FED. R. CIV. P. 23(b)(3); *see* Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 874 (2005).

[24] *See In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 148, 155, 158 (approving class settlement).

[25] *See Agent Orange Settlement Fund*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/COMPENSATION/claims-postservice-agent_orange-settlement-settlementFund.asp (last visited Oct. 11, 2013); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 341 & n.17 (1986).

litigation and settlement.[26] Before the *Agent Orange* class settlement fund was ordered closed by a court in 1997, the fund distributed approximately $194 million to approximately 52,000 Vietnam veterans, and $74 million to 83 social services organizations that served more than 239,000 Vietnam veterans and their families.[27]

However, in a series of decisions that echoed across the federal appellate courts beginning mainly in the 1990s, courts highlighted the individual issues that rendered such actions unsuitable for trial class certification under Rule 23.[28] Over time, courts determined that each proposed mass tort class might implicate individual issues of medical causation; affirmative defenses such as comparative fault, assumption of risk, and statutes of limitations; damages; choice of law; and product defect if multiple product designs are implicated.[29] Such individual issues might undermine the adequacy and typicality of class representatives under Rule 23(a).[30] In addition, the individual issues may lead to findings under Rule 23(b)(3) that common issues did not predominate over individual issues, and that class treatment was not superior to alternative methods for adjudicating the controversy.[31]

Perhaps the most notable rejection of class treatment of mass torts was the decision by the Supreme Court of the United States in *Amchem Products, Inc. v. Windsor* in 1997.[32] In *Amchem,* the trial court had certified a nationwide asbestos settlement class under Rule 23(b)(3) and approved a class settlement involving possibly millions of claimants and twenty corporate defendants.[33] On

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[26] *See generally* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 143 (1987) (noting that all earlier settlement attempts had failed).

[27] *See Agent Orange Settlement Fund*, *supra* note 25.

[28] *See* FED. R. CIV. P. 23; Stier, *supra* note 23, at 871-72 & n.46.

[29] *See* Stier, *supra* note 23, at 879-84.

[30] *See id.* at 878; FED. R. CIV. P. 23(a).

[31] *See* Stier, *supra* note 23, at 875-76; FED. R. CIV. P. 23(b)(3).

[32] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997).

[33] *Id.* at 597, 605; *see also* FED. R. CIV. P. 23(e)(2) (stating that "the court may approve [the settlement] only after a hearing and on finding that it is fair, reasonable, and adequate").

appeal, the Third Circuit reversed the class settlement, noting that the rigorous requirements of class certification applied to settlement classes as well as classes certified for trial purposes.[34] Though affirming the Third Circuit's reversal of the settlement, the Supreme Court of the United States stated that a court reviewing a class settlement need not consider the manageability of a trial under Rule 23(b)(3), since the class settlement would obviate the need for trial.[35] In addition, the Supreme Court urged that other aspects of Rule 23 designed to protect absent class members "demand undiluted, even heightened, attention in the settlement context."[36] Turning to the asbestos settlement before the Court, the Supreme Court echoed the Third Circuit's assessment of the widespread individual issues within the "sprawling" class[37]:

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma . . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.
>
> The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will

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[34] *Amchem*, 521 U.S. at 609, 611.

[35] *Id.* at 597, 620.

[36] *Id.* at 620 (noting also that a court reviewing a class settlement will not have an opportunity to review class certification as trial proceedings unfold).

[37] *Id.* at 624 (noting that "[n]o settlement class called to our attention is as sprawling as this one").

> depend on singular circumstances and individual medical histories.[38]

The Supreme Court noted that, "[d]ifferences in state law . . . compound these disparities."[39] Generally speaking of mass tort cases and class certification, the Court urged "caution when individual stakes are high and disparities among class members great."[40]

Moreover, the Supreme Court in *Amchem* emphasized that these individual variations created conflicting interests between class representatives and absent class members, undermining adequacy of representation under Rule 23(a)(4).[41] Noting that Rule 23(a)(4) "serves to uncover conflicts of interest between named parties and the class they seek to represent,"[42] the Court highlighted differences in the proposed settlement class between currently injured plaintiffs and exposure-only plaintiffs, as well as "the diversity within each category."[43] The Court also observed that, "[a]lthough the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency."[44]

In light of these obstacles to class certification set forth by the Supreme Court of the United States, as well as numerous appellate courts,[45] plaintiffs' counsel continued to develop creative new

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[38] *Id.* (quoting Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626 (3d Cir. 1996)).

[39] *Id.* (citing *Georgine*, 83 F.3d at 627).

[40] *Amchem*, 521 U.S. at 625.

[41] *Id*.

[42] *Id*.

[43] *Id.* at 626.

[44] *Id.* at 627.

[45] *See supra* notes 35-44 and accompanying text; *see, e.g.*, *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1074, 1078-79 (6th Cir. 1996) (vacating certification of nationwide penile prostheses class); Castano v. Am. Tobacco Co., 84 F.3d 734, 737, 746 (5th Cir. 1996) (reversing certification of nationwide nicotine-dependent class); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1294, 1304 (7th Cir. 1995) (granting writ of mandamus to decertify nationwide blood products class).

approaches to class certification.[46] Plaintiffs sometimes proposed statistical sampling of the class as a way to grapple with individual issues.[47] Court reception was mixed, with the Ninth Circuit accepting statistical sampling in one case, but the Fifth Circuit rejecting sampling as violative of constitutional rights of due process and jury trial, as well as state substantive law requiring individualized causation.[48] In *Ortiz v. Fibreboard Corp.*, plaintiffs sought another asbestos class settlement under Rule 23(b)(1)(B) pertaining to limited fund classes.[49] But the Supreme Court of the United States reversed the Fifth Circuit's affirmance of the class settlement, and the Court imposed rigorous requirements on limited fund classes.[50] Plaintiffs also proposed a punitive-damages-only class under Rule 23(b)(1)(B), premised on the risk of individual litigation exceeding the constitutional limit of overall punitive damages for a defendant's actions, but the Second Circuit reversed certification, noting that the limited fund was merely "theoretical."[51] Finally, plaintiffs narrowed the proposed class certification to only include medical monitoring claims under Rule

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[46] *See infra* notes 47-52 and accompanying text.

[47] *See, e.g.*, Cimino v. Raymark Indus., Inc., 151 F.3d 297, 300 (5th Cir. 1998); Hilao v. Estate of Marcos, 103 F.3d 767, 782, 786 (9th Cir. 1996).

[48] *Compare Hilao*, 103 F.3d at 771, 774 (accepting sampling in human rights class action), *with Cimino*, 151 F.3d at 299, 311 (rejecting sampling in asbestos class action).

[49] Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).

[50] *Id.* at 838-41, 865 (requiring that the fund is adequate to pay all claims, the whole of the fund is paid to the claims, and that claimants are treated equitably).

[51] *In re* Simon II Litig., 407 F.3d 125, 127, 138 (2d Cir. 2005) (stating that the fund proposed was "in essence–postulated, and for that reason it is not easily susceptible to proof, definition, or even estimation, by any precise figure"). By clarifying that each claimant in a tort case should only receive the claimant's share of a total punitive award for the wrongdoing, the Supreme Court of the United States' recent opinion in *Philip Morris USA v. Williams* undercuts the limited-punishment-theory concern that individual claimants might be given punitive damages for harm to others and that such cases might together exceed the constitutionally permissible punitive award. Phillip Morris USA v. Williams, 549 U.S. 346, 349, 356-57 (2007) ("We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now."); *see also* Byron G. Stier, *Now It's Personal: Punishment and Mass Tort Litigation After Philip Morris v. Williams,* 2 CHARLESTON L. REV. 433, 457 (2008).

23(b)(2), but court reception was again mixed, raising questions as to whether such claims might still involve individual issues or might be considered injunctive relief.[52]

Notwithstanding these ongoing attempts for class certification of mass torts, class actions as a way to resolve an entire mass tort, including personal injury claims, have largely been rejected.[53] Even though class settlements in certain limited areas remain significant, such as the recently approved economic loss class settlement of more than $1 billion in the Toyota unintended acceleration litigation,[54] or the $7 billion proposed BP Gulf Oil spill class action (which is also largely economic and property oriented),[55] the trial and settlement class action bubble of the 1980s

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[52] *See* FED. R. CIV. P. 23(b)(2) (providing for class certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"); Barnes v. Am. Tobacco Co., 161 F.3d 127, 130, 143 (3d Cir. 1998) (affirming decertification of medical-monitoring class previously certified under Rule 23(b)(2)).

[53] *See* Deborah R. Hensler, *Goldilocks and the Class Action*, 126 HARV. L. REV. F. 56, 56 (2012).

[54] *See* Jessica Dye, *Toyota Gets Final OK for Settlement of U.S. Class Action,* REUTERS (Jul. 19, 2013), http://www.reuters.com/article/2013/07/19/us-toyota-acceleration-settlement-idUSBRE96I15P20130719 (stating that the federal district court granted final approval to the settlement).

[55] *See Judge OKs Settlement in BP Class-Action Suit*, CNN (Dec. 22, 2012, 1:50 PM), http://www.cnn.com/2012/12/22/us/bp-spill-settlement/index.html. In connection with the BP Gulf Coast oil spill class settlement, the Eastern District of Louisiana approved two separate classes: one involving economic and property claims and another pertaining to medical claims. *In re:* Oil Spill by the Oil Rig "Deepwater Horizon", No. MDL 2179, 2013 WL 144042, at *1 (E.D. La. 2013); *In re* Oil Spill by the Oil Rig "Deepwater Horizon", 910 F. Supp. 2d 891, 900-01 (E.D. La. 2012). The medical-benefits class settlements remain on appeal to the Fifth Circuit by objectors. *See Alerts*, DEEPWATER HORIZON MED. BENEFITS CLAIMS ADM'R, https://deepwaterhorizonmedicalsettlement.com/alerts.aspx (last visited Oct. 12, 2013). Separately, BP has sought relief from the Fifth Circuit with regard to the class settlement claim administrator's allegedly expansive interpretations of the settlement agreement, which subsequently caused BP to raise its estimate of the cost of the class settlement from $7.8 billion to $8.5 billion, and then to state that "no reliable estimate can be made of any business economic loss claims." Richard Thompson, *BP, Plaintiffs' Lawyers Argue Before 5th Circuit on Challenge Over Oil Spill Payments*, NOLA.COM

and 1990s has largely burst, at least in personal injury mass tort litigation.[56]

B. Non-Class Mass Settlement

With the decline in mass tort class actions, a defendant seeking closure in a mass tort needed to obtain an agreement to settle the case and waive claims from each plaintiff.[57] Defendants in asbestos litigation had previously sought to settle large groups of claims through the Center for Claims Resolution and its predecessor, the Asbestos Claims Facility.[58] More recently, at the urging of President Obama, following the BP Gulf Coast oil spill involving Deepwater Horizon, BP created a $20 billion non-class claims fund to compensate fishermen and businesses in the Gulf Coast.[59] In connection with compensation by such funds, plaintiffs agree to waive future legal claims.[60]

While such claims funds are focused on settling large numbers of claims, the funds' attempts to locate and determine each claimant's settlement are laborious, time-consuming, and uncertain; as a result, defendants may not have confidence in obtaining closure in the mass tort.[61] To increase efficiency and move toward closure more quickly, defendants sometimes sought

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(Jul. 8, 2013, 10:36 PM), http://www.nola.com/news/gulf-oilspill/index.ssf/2013/07/bp_plaintiffs_lawyers_argue_be.html.

[56] *See* Hensler, *supra* note 53, at 56 (discussing the decline of class actions due to court decisions and the Class Action Fairness Act of 2005).

[57] *See* Adam J. Levitt, *Sticky Situations in Mass Tort Settlements*, 48 TRIAL 31, 31-32 (Nov. 2012), http://www.whafh.com/modules/publication/docs/672_cid_7_Trial_2012_11Nov_Levitt_Reprint.pdf.

[58] *See* Lawrence Fitzpatrick, *The Center for Claims Resolution*, 53 LAW & CONTEMP. PROBS. 13, 13 (1990); Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1608 (1995).

[59] *See* KENNETH R. FEINBERG, WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL 129 (2012).

[60] *See* Ian Urbina, *BP Settlements Likely to Shield Top Defendants*, N.Y. TIMES (Aug. 20, 2010), http://www.nytimes.com/2010/08/20/us/20spill.html?pagewanted=all&_r=0.

[61] *See generally id.* (explaining who will be eligible for reimbursement and how it will be determined).

to strike package settlement deals with particular plaintiffs' counsel, settling groups of claims at once.[62] For example, in *Amchem*, the Supreme Court of the United States noted that once a class settlement seemed within reach, the Center for Claims Resolution agreed to more than $200 million to settle with plaintiffs' counsel the inventory claims of certain plaintiffs that had already filed lawsuits.[63] Similarly, in the proposed *Ortiz* class action, the Supreme Court of the United States stated that counsel had negotiated a side settlement of 45,000 pending claims from one plaintiffs' firm outside the proposed class settlement.[64] But even these more expansive potential deals with particular firms remained piecemeal in the context of an asbestos mass tort that may have involved millions of claimants.[65]

The $4.85 billion Merck Vioxx settlement in 2007 presented an innovative approach to increasing efficiency and closure from a non-class mass settlement: a fund negotiated by defendants with leading plaintiffs' lawyers, and then offered to all claimants nationwide, with a required high threshold of plaintiff participation before the settlement was binding as to anyone.[66] Merck removed Vioxx pain medication from the market in 2004 because of concerns that Vioxx might cause heart attacks and strokes.[67] The Judicial Panel on Multidistrict Litigation then agreed to transfer federal cases involving Vioxx to a single court for pretrial

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[62] *See* Orlyn Lockard III & Meaghan Goodwin Boyd, *Settling With Thousands? Ethical Issues in Mass Tort Settlements*, 21 ENVTL. LITIGATOR 1, 1 (Fall 2009) (discussing the desirability of group settlements).

[63] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 601 (1997).

[64] Ortiz v. Fibreboard Corp., 527 U.S. 815, 824 (1999).

[65] *Amchem*, 521 U.S. at 597 ("The class proposed for certification potentially encompasses hundreds of thousands, perhaps millions, of individuals tied together by this commonality: Each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies.").

[66] *See* Lewis Krauskopf, *Merck Agrees to Pay $4.85 Billion in Vioxx Settlement*, REUTERS (Nov. 9, 2007), http://www.reuters.com/article/2007/11/10/businesspro-merck-vioxx-settlement-dc-idUSL0929726620071110.

[67] *See* Alex Berenson, *Analysts See Merck Victory in Vioxx Settlement,* N.Y. TIMES (Nov. 10, 2007), http://www.nytimes.com/2007/11/10/business/10merck.html?pagewanted=all&_r=0.

management.[68] In the ensuing individual litigation, Merck won eleven of eighteen cases at trial, and two of the eighteen were declared mistrials.[69] Of the remaining plaintiff verdicts, appellate courts reversed two, and reduced compensatory or punitive damages in another two verdicts.[70] After the judges involved in federal and state cases in Louisiana, New Jersey, and California asked plaintiffs' and defense lawyers to try to negotiate a settlement, the lawyers met periodically in secret for over a year.[71] The plaintiffs' side was led by Russ Herman, a plaintiffs' lawyer and former president of the Association of Trial Lawyers of America, and other plaintiffs' lawyers, such as Christopher Seeger, who was on the lead plaintiffs' lawyer committee for cases in the federal multidistrict litigation transferee court.[72] After the generally applicable three-year statute of limitations had lapsed following the removal of Vioxx from the market, Merck and certain plaintiffs' lawyers announced a nationwide proposed settlement in 2007,[73] which capped total Merck payments at not more than $4.85 billion and provided additional mechanisms to assess plaintiffs' claims and determine individual valuation.[74] In addition, the Vioxx settlement stated that it was only effective if 85% of Vioxx

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[68] *In re* Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352, 1353-54 (J.P.M.L. 2005).

[69] *See* Erichson & Zipursky, *supra* note 8, at 278; Heather Won Tesoriero, *Vioxx Rulings Raise Bar for Suits Against Drug Firms-Decisions by Courts in Texas, New Jersey Boost Merck's Strategy in Liability Cases*, WALL ST. J. (May 30, 2008), http://online.wsj.com/news/articles/SB121207060977129293.

[70] *See* Erichson & Zipursky, *supra* note 8, at 278.

[71] *See* Berenson, *supra* note 67.

[72] *See id*.

[73] *See In re* Vioxx Prods. Liab. Litig., 522 F. Supp. 2d 799, 801 (E.D. La. 2007) (discussing the "withdrawal of Vioxx from the market" in 2004 and the court's potential need to apply each individual "state's statute[s] of limitations"); Berenson, *supra* note 67.

[74] *See* Berenson, *supra* note 67 (stating that each plaintiff would need to show that they experienced a heart attack or stroke within 14 days of taking Vioxx, and that the plaintiff had been taking Vioxx for at least 30 days). The size of each plaintiff's payment varied according to the plaintiff's risk factors, length of use of Vioxx, and severity of injury. *See id.* Plaintiffs could expect to receive, on average, $120,000 per claim, but plaintiffs' lawyers might deduct up to 40% from each plaintiff's settlement for legal fees. *See id.*

plaintiffs signed on to the settlement within one year.[75] Although the $4.85 billion settlement might appear high, analysts had earlier projected liability exceeding $25 billion, and the announced settlement amount therefore represented a manageable figure for Merck.[76] In addition, Merck was able to curtail its legal expenses, which had surpassed $1 billion for the three years of mass tort defense of the Vioxx cases.[77] Indeed, Merck's share price rose following the settlement announcement.[78] A year after the settlement announcement, 99.79% of claimants had enrolled.[79]

Controversially, the Vioxx settlement provided that plaintiffs' law firms participating in the settlement agreed to recommend the settlement to all of their clients who alleged myocardial infarction or ischemic stroke;[80] moreover, if a client refused to participate, the settlement provided that participating plaintiffs' firms would not continue to represent that client.[81] In response, academic commentators and plaintiffs' law firms criticized the provision as compromising the independent advice due to each client, as well as the client's right to decide whether to settle a case.[82] Responding to

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[75] *Vioxx Settlement Update*, *supra* note 4.

[76] *See* Berenson, *supra* note 67 (stating that "$4.85 billion[] represents only about nine months of profit for Merck").

[77] *See id.*

[78] *Id.*

[79] *See* Erichson & Zipursky, *supra* note 8, at 266.

[80] *See Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto*, § 1.2.8.1 (Nov. 9, 2007), http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf (explaining that by enrolling, counsel is affirming that they have recommended the settlement to "100% of the [e]ligible [c]laimants represented by such [e]nrolling [c]ounsel").

[81] *See id.* at § 1.2.8.2.

[82] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009) ("A lawyer shall abide by a client's decision whether to settle a matter."); MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); MODEL RULES OF PROF'L CONDUCT R. 5.6 (2009) ("A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy."); MODEL RULES OF PROF'L CONDUCT R. 1.16 (2009) (setting forth permissible grounds for attorney withdrawal); Erichson & Zipursky, *supra* note 8, at 283; Alex Berenson, *Some*

the growing criticism, Merck and plaintiffs' counsel amended the Vioxx settlement agreement to state that prior participating plaintiffs' counsel affirmed that they had exercised their independent judgment in concluding that the settlement is appropriate for all of their clients.[83] Commentators, however, remained unsatisfied with the provision, given the financial incentive for plaintiffs' counsel to participate in the settlement, as well as the litigation risks of not participating for any of one's clients.[84]

To resolve such problems, the American Law Institute, in its subsequently drafted *Principles of the Law of Aggregate Litigation*, proposed that plaintiffs be allowed to consent to be bound by a substantial majority vote of all clients of a lawyer in approving a mass settlement.[85] The American Law Institute also provided for court review of such non-class settlements to ensure a fair deal for claimants.[86] Professors Howard Erichson and Benjamin Zipursky, however, criticized the American Law Institute's proposal for being in conflict with traditional deference to clients' wishes for settlement.[87] Despite engendering spirited academic discussion, the American Law Institute proposal for advance consent to a mass settlement has not, so far, been adopted by any jurisdiction.[88]

Even with counsel's best intentions of independent judgment in evaluating a proposed mass settlement for one's clients, non-class mass settlements seeking complete closure involve concerns

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Lawyers Seek Changes in Vioxx Settlement, N.Y. TIMES (Dec. 21, 2007), http://www.nytimes.com/2007/12/20/business/20cnd-vioxx.html.

[83] *See Amendment to Settlement Agreement*, §1.2.2 (Jan. 17, 2008), http://www.officialvioxxsettlement.com/documents/Amendments%20to%20Master%20Settlement%20Agreement.pdf.

[84] *See, e.g.*, Erichson & Zipursky, *supra* note 8, at 281 & n.71; *see also Amendment to Settlement Agreement*, *supra* note 83, at §1.2.2 (amending settlement agreement to affirm that enrolled counsel will exercise independent judgment when advising clients).

[85] *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(b)-(f) (2010).

[86] *See id.* at § 3.18.

[87] *See* Erichson & Zipursky, *supra* note 8, at 293.

[88] *Id.* at 296.

of adequate representation.[89] In such settlements, plaintiffs' counsel for many claimants must assess the mass-settlement deal from afar, without the benefit of participating in the negotiations that were, in fact, completed by other plaintiffs' counsel, who might have had clients with somewhat different interests than those of the counsel who did partake in the settlement negotiations.[90] Analogously, in class actions, courts may not approve a proposed class settlement solely because the settlement appears fair, reasonable, and adequate under Rule 23(e),[91] but instead must also ensure that the requirements of Rule 23(a) and (b) are met, including adequacy of representation.[92] The Supreme Court of the United States in *Amchem* rejected assessments of the "chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness."[93] Instead, the Court held that the fairness of a negotiated settlement might be better assessed by also determining whether the persons who did the negotiating were adequately incentivized to negotiate well.[94] Plaintiffs' counsel who do not take part in negotiating the proffered non-class mass settlement are pushed into making just the type of distant, overarching judgment that the *Amchem* Court condemned in the context of class settlements.

In addition, with regard to negotiation incentives, mass settlements may be subject to conflicts of interest that might call

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[89] *See id.* at 283 (explaining the concern with plaintiffs' counsel being able to exercise independent judgment for all clients and the conflict that settlement recommendations have with the legal ethics).

[90] *See id*. at 281, 284.

[91] FED. R. CIV. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the courts approval . . . . If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.").

[92] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621-22 (1997) (explaining that "[s]ubdivisions (a) and (b) [of Fed. R. Civ. P. 23] focus court attention on whether a proposed class has sufficient unity" and adequate representation is "an additional requirement").

[93] *Id.* at 621.

[94] *See id.* (suggesting that "if a fairness inquiry under Rule 23(e) controlled certification" lawyers might not have any incentive to try to negotiate for the best settlement).

into question the advisability of a particular claimant's signing on.[95] Plaintiffs' counsel negotiating such a mass settlement might represent hundreds or thousands of claimants, including current claimants with varying medical injuries and conditions, as well as future claimants with latent problems.[96] The many varying interests might raise formal conflicts of interest for the attorneys under Model Rule of Professional Conduct 1.7.[97] Under Rule 1.7, a lawyer may not represent a client if there is a concurrent conflict of interest, which arises *inter alia* when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."[98] Although such a conflict might be overcome for a mass tort settlement if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client," and "each affected client gives informed consent, confirmed in writing[,]"[99] a lawyer might not be able to provide such representation to clients if, for example, the defendant in a mass settlement negotiation proposes to raise one group of clients' settlement value only if another group's settlement value is reduced. The *Amchem* Court did not focus on the extent to which such adequacy of representation requirements were also required under ethics rules, such as Model Rule 1.7 of the Model Rules of Professional Conduct, though such a conflicts analysis is appropriate in both class and non-class settings.[100] Furthermore, any mass settlement must comport with Rule 1.8(g), the aggregate

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[95] *See* Erichson & Zipursky, *supra* note 8, at 284.

[96] *See id.* at 284 (expressing the fact that not all plaintiffs will be well served by a mass settlement due to their differing circumstances and conditions).

[97] MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009).

[98] *Id.* A conflict of interest may also occur when "the representation of one client will be directly adverse to another client." MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (2009).

[99] MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2009).

[100] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009) (explaining that conflict of interest may exist if representing one client materially limits representing another client); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 637-38 (1997) (Breyer, J., concurring in part, dissenting in part) (stating that with regard to adequacy of representation, "this Court cannot easily safeguard such interests through review of a cold record").

settlement rule, which has been sensibly interpreted to require that each plaintiff to a mass settlement be not only informed of his or her own settlement amount (or process for determining settlement amount in a mass settlement), but also told the amounts to be obtained by other plaintiffs.[101]

In sum, the non-class mass settlement method initiated by the Merck Vioxx litigation presented a new route to closure for mass torts, but one with certain continued drawbacks.[102] Under this approach, individual trials could result in verdicts that would help determine claim values for pending claims. As claim values become more detailed through a trial verdict track record, plaintiffs and litigants would likely have more common ground on which to negotiate a mass settlement. Settlement might then be negotiated by defense counsel and certain leading plaintiffs' counsel, who represent some, but not all, claimants. As in the Vioxx settlement,[103] the resulting agreement might be effective only if a high percentage of plaintiffs agreed to settle their claims in the agreement, so as to obtain closure for defendants. But as with class actions, problems of adequacy of representation could occur, as not all plaintiffs' counsel would likely participate in settlement negotiations, and those undertaking the negotiations may have clients with interests that differ not only from each other, but also from the plaintiffs represented by plaintiffs' counsel not present in the negotiations.[104] Future mass settlement agreements might remove the criticized provisions of the Vioxx settlement, requiring participating plaintiffs' counsel to recommend uniformly the settlement to all clients and to withdraw from further representing

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[101] *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2009). For aggregate settlements, Rule 1.8(g) provides the following requirements:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Id.

[102] *See* Levitt, *supra* note 57, at 32-33.

[103] *See* Berenson, *supra* note 67.

[104] *See* Lockard & Boyd, *supra* note 62, at 14.

any client who refuses to take part in the settlement.[105] But the removal of such provisions may lead to fewer plaintiffs participating in the mass settlement, and the defendant may need to have its lawyers find and negotiate additional settlements with plaintiffs, rendering the pursuit of closure on the mass tort more difficult and costly.[106] Accordingly, while the non-class settlement offers an additional route to mass tort closure in the wake of the general demise of mass tort class actions, significant problems of adequacy in representation and efficiency in seeking closure remain.

III. THE SALE OF MASS TORT CLAIMS

One potential area for assistance with the problems of mass tort resolution comes from an increasingly important area, not from the Federal Rules of Civil Procedure, but from alternative litigation finance and the possibility of the sale of tort claims.[107] While the sale of tort claims involving personal injuries is currently generally prohibited, that ban should be reassessed in light of the benefits of such sales for tort litigation generally and mass tort litigation in particular.[108] Globally and domestically, in recent years, alternative litigation finance has increased markedly, including not only loans to law firms and litigants with pending claims, but also, in some instances, company investment in commercial litigation in return for a share of the upside of the verdict.[109]

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[105] *See* Berenson, *supra* note 82.

[106] *See id.*

[107] *See Creative Investing Through Alternative Litigation Funding*, MIM REPORTER (Litig. Mgmt. Inc., Mayfield Heights, Ohio), Spring 2012 at 3, http://www.medicineforthedefense.com/Portals/0/LMI_MIM_Spring_2012.pdf.

[108] *See* Sebok, *supra* note 10, at 62 (noting that assignment of personal injury claims is currently prohibited across the United States).

[109] *See* ABA Comm'n on Ethics 20/20, White Paper on Alternative Litigation Finance 1 (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111019_draft_alf_white_paper_posting.authcheckdam.pdf [hereinafter White Paper]; Garber, *supra* note 9, at 13 (noting that the most commonly financed commercial disputes appear to involve antitrust, intellectual property, and contract law); Elizabeth Chamblee Burch,

In mass torts, various companies have made loans to plaintiffs' firms.[110] Some of these loans have been recourse loans, in which the borrowing law firm must repay the loan regardless of the results of a case.[111] For example, Napoli Bern borrowed, on a recourse basis, $35 million from Counsel Financial in connection with 9/11 litigation.[112] Moreover, Burford Capital has lent money in connection with Ecuadoran personal injury cases brought against Chevron.[113] Such loans might exceed 20% per year in interest.[114]

In addition, finance companies have made loans to injured plaintiffs, and the loans have been made on a nonrecourse basis, so companies cannot seek any repayment of the loan beyond the proceeds of the lawsuit.[115] Such loans assist injured plaintiffs with medical bills and lost wages during the pendency of the suit.[116] Perhaps because lenders are unable to seek repayment outside the

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Financiers as Monitors in Aggregate Litigation, 87 N.Y.U. L. REV. 1273, 1303 (2012).

[110] *See* White Paper, *supra* note 109, at 8; Garber, *supra* note 9, at 13.

[111] *See* Garber, *supra* note 9, at 13; Burch, *supra* note 109, at 1278 n.17; Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 98, 100-01 (2010).

[112] *See* Binyamin Appelbaum, *Betting on Justice: Putting Money on Lawsuits, Investors Share in the Payouts*, N.Y. TIMES (Nov. 15, 2010), http://www.nytimes.com/2010/11/15/business/15lawsuit.html?pagewanted=all; Joseph Goldstein & Susan Edelman, *Assembly Speaker Sheldon Silver's Firm Gets Cut of 9/11-Suit Payouts*, N.Y. POST (Aug. 22, 2010), http://nypost.com/2010/08/22/assembly-speaker-sheldon-silvers-firm-gets-cut-of-911-suit-payouts/.

[113] *See* Lawrence Hurley, *'Master of Disaster' Dons New Guise as Plaintiffs' Attorney in Pollution Case*, N.Y. TIMES (Feb. 1, 2011), http://www.nytimes.com/gwire/2011/02/01/01greenwire-master-of-disaster-dons-new-guise-as-plaintiff-74496.html?pagewanted=all; Roger Parloff, *Have You Got a Piece of This Lawsuit?*, CNN MONEY (June 28, 2011, 2:06 PM), http://features.blogs.fortune.cnn.com/2011/05/31/have-you-got-a-piece-of-this-lawsuit/.

[114] *See* Garber, *supra* note 9, at 13; Alison Frankel, *Helping Underfunded Plaintiffs Lawyers–At a Price*, 4 LEGAL INTELLIGENCER 1104 (Feb. 14, 2006).

[115] *See* White Paper, *supra* note 109, at 6-7; Garber, *supra* note 9, at 9-10; Burch, *supra* note 109, at 1301-02 (discussing consumer legal funding); Molot, *supra* note 111, at 93.

[116] *See* White Paper, *supra* note 109, at 7-8.

lawsuit proceeds, the loan interest rates have been high, with rates between 36% and 150% per year.[117] But because the loans are nonrecourse, they have been viewed as not subject to state usury laws.[118]

While alternative litigation finance arrangements provide useful capital to plaintiffs' firms and early compensation to plaintiffs, alternative litigation finance companies do not currently control the conduct of the lawsuit.[119] Injured plaintiffs remain the clients, and lawyers must ethically follow the client's interests and objectives, not those of third-party funders.[120] Accordingly, third-party funders have no right to decide whether to settle or on what terms.[121]

While the theoretical and practical aspects of the alternative finance revolution continue to be mapped, if one steps beyond current debates on litigation finance and looks to where litigation finance is heading, an intriguing new approach appears that has interesting, helpful implications for mass tort settlement: the sale of mass tort claims. If permitted to do so, various institutional investors might purchase tort claims from claimants, perhaps using

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[117] Burch, *supra* note 109, at 1302.

[118] *See* Garber, *supra* note 9, at 10; Burch, *supra* note 109, at 1302. *But see* White Paper, *supra* note 109, at 13-14 (noting recent arguments that usury laws might also apply to nonrecourse loans).

[119] *See* J. Burton LeBlanc and S. Ann Saucer, *All About Alternative Litigation Financing*, TRIAL (Law Office Mgmt.), Jan. 2013, *available at* http://www.justice.org/cps/rde/justice/hs.xsl/19869.htm.

[120] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued . . . . A lawyer shall abide by a client's decision whether to settle a matter."); MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (2009) ("A lawyer shall not accept compensation for representing a client from one other than the client unless . . . the client gives informed consent; [and] there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship"); Burch, *supra* note 109, at 1320-21 (discussing third-party litigation funders' lack of decision-making control).

[121] *See* The Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2011-2: Third Party Litigation Financing, *available at* http://www.nycbar.org/index.php/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02.

intake personnel functioning like insurance adjusters in talking to the injured persons, or perhaps to claimants' attorneys who may have already done initial intake of the claims. As multiple bidders enter the market for such claims, likely utilizing expertise on claim valuation from lawyer staffed departments specializing in such matters, the growing market for sale of mass tort claims might develop claim values quickly and accurately.[122] Moreover, the price of claims might vary over time in accordance with significant developments in the litigation, such as verdicts in individual trials.[123] Claimants who agree to sell their claims to financiers might then be incentivized to continue to participate in the lawsuit in good faith, perhaps by the financiers' making periodic payments to the client (rather than a lump-sum), providing claimants a continued financial stake in the claims, or offering a bonus payment to claimants upon winning the lawsuit.[124]

Permitting the sale of tort claims would have significant benefits for mass tort claims overall.[125] Plaintiffs may be seriously injured and in need of swift funds for medical bills and lost wages.[126] The sale of the plaintiff's tort claim might bring early

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[122] *See* Peter Charles Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 YALE J. ON REG. 435, 444-45 (1995) (predicting an "expanded number of bidders competing for a victim's claim" and that the emerging bidder market will develop tort claims more quickly than plaintiffs' lawyers can do so presently). Choharis also predicted that "tort investors will be able to employ or hire more experts in various technical areas, such as actuarial sciences, pharmacology, and even specialized legal fields, and to develop more sophisticated databases regarding various kinds of torts and tortfeasors." *Id.* at 486.

[123] *See* Choharis, *supra* note 122, at 484.

[124] *See id.* at 482 (suggesting additional payments based upon litigation contingencies to ensure participation of the tort victim after the sale of the claim); Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329, 340 (1987) (discussing methods to incentivize continued participation by the injured victim after the sale of a tort claim).

[125] *See infra* notes 125-137 and accompanying text.

[126] *See* Shukaitis, *supra* note 124, at 334. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2009) (providing that generally "[a] lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation"); O'Connell & Robinette, *supra* note 19, at 139 (discussing compensation as a tort goal).

compensation for the tort claimant, rather than waiting years for trial and appeal or for a settlement to be offered to the plaintiff by the defendant.[127] Moreover, the injured plaintiff might be particularly risk-averse in light of the injury's potentially devastating effect on its finances, and therefore welcome the opportunity to trade the uncertainty of a jury trial for a set payment on an offer to sell the tort claim to a financier.[128] Indeed, the claim values received by the injured plaintiff from financiers might allow the plaintiff to avoid the verdict variability of juries and thereby quickly obtain an averaged figure without the objections under constitutional and state law that have troubled jury sampling in class actions.[129]

Moreover, the amount that mass tort claimants might receive may be bolstered by the likely superior position financier plaintiffs would have in prosecuting such claims against defendants.[130] For example, claim purchasers might obtain economies of scale as they more easily coordinate prosecution of claims and perhaps hire larger firms that might be able to manage the litigation more

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[127] *See* Michael Abramowicz, *On the Alienability of Legal Claims*, Yale L.J. 697, 735 (2005); Shukaitis, *supra* note 124, at 334-35.

[128] *See* Abramowicz, *supra* note 127, at 736 (discussing a claim seller's ability to avoid risk); *cf.* Molot, *supra* note 111, at 72-73 (arguing that litigation finance markets lead to more accurate settlements by reducing risk-averse bias among litigants).

[129] *See* Cimino v. Raymark Indus., Inc., 151 F.3d 297, 335 (5th Cir. 1998) (rejecting class action jury sampling); Abramowicz, *supra* note 127, at 737; Choharis, *supra* note 122, at 444 (arguing that tort claimants will obtain more equitable payments from the sale of their claim, avoiding idiosyncratic jury awards, and that the tort claim purchase price would "derive from the average jury award, not atypically high or low awards, thereby eliminating the 'lottery' aspect of bringing a lawsuit for individual plaintiffs"). *But see* Hilao v. Estate of Marcos, 103 F.3d 767, 786-87 (9th Cir. 1996) (approving sampling); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 833 (1992) (arguing for class action sampling and contending that "[a]ggregation, properly conducted, will provide awards that are more accurate, not less"). One commentator has also argued that the alienation of tort claims is not problematic as a matter of corrective justice. *See* Abramowicz, *supra* note 127, at 717.

[130] *See* Choharis, *supra* note 122, at 486.

efficiently.[131] In addition, financiers would have the option of paying their plaintiffs' firms via the billable hour or flat fees;[132] at present, of course, plaintiffs' counsel generally bring mass tort cases via the contingency fee and receive nothing if they lose the case.[133] Without having the distraction and potential bias that comes from bearing final responsibility and risk exposure for the determination of the appropriate resources to be invested in a case, plaintiffs' lawyers would be able to focus more directly on litigation strategy.[134] Mass torts, in particular, are expensive to bring because of the frequently complicated scientific issues necessitating expert witness testimony and the document-intensive corporate factual background of such cases.[135] Furthermore,

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[131] *See* Burch, *supra* note 109, at 1336; Choharis, *supra* note 122, at 475 (arguing that a tort claims market would allow for "closer monitoring of legal representation").

[132] *See* Burch, *supra* note 109, at 1278 (arguing that financiers should choose to pay plaintiffs' firms via the billable hour). In addition, the billable hour or flat fee, combined with the larger size of plaintiffs' firms, might increase the likelihood of ethical litigation behavior generally by plaintiffs' lawyers, as plaintiffs' counsel are insulated from the complete downside risk of receiving nothing in a litigation, and the institutional-preservation instincts of larger firms seek to avoid malpractice claims and enhance reputation for future clients by creating and perpetuating a culture of ethical conduct. *See id.* (noting that the billable hour reduces lawyer pressure on the client to settle).

[133] *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2009) (permitting contingent fees); Molot, *supra* note 111, at 90 (stating that "[t]he principal market for litigation claims in this country is found in the contingent fee system"). A multidistrict litigation court may also authorize a common benefit fund to compensate lead plaintiffs' lawyers in the MDL process, whose work on common issues, such as discovery, generates substantial benefits for plaintiffs' counsel nationwide. *See, e.g.*, Stier, *supra* note 23, at 926 & n.397 (discussing assessment for the common benefit fund in the phenylpropanolamine multidistrict litigation). The common benefit fund may be generated through an assessment on the settlements or verdicts of plaintiffs' attorneys who use work-product generated by lead MDL plaintiffs' lawyers. *See id.* at 926.

[134] *See* Burch, *supra* note 109, at 1275 ("The problem, in part, is that plaintiffs' attorneys play two, often conflicting roles: They serve as both financiers and agents. These dual roles can pull attorneys in divergent directions.").

[135] *See id.* at 1287 (suggesting that initial investment in mass torts may be millions of dollars, but that later cases may be brought for low hundreds of thousands of dollars).

financier plaintiffs might be able to obtain cheaper capital to fund mass tort, resource-intensive suits compared to plaintiffs' firms because institutional claimholders may assemble wider, better risk-diversified portfolios.[136] Deep-pocketed financier plaintiffs would likely match more equally the resources of defendants and defense counsel, thus reducing the David-versus-Goliath concern that plaintiffs' counsel might be potentially overmatched by defense counsel in mass tort litigation.[137] In addition, in any mass settlement negotiation, financier claim purchasers might receive more because they could negotiate with relatively less risk-averseness than injured plaintiffs.[138]

The sale and settlement of mass tort claims faces several obstacles, however. Some states follow the traditional prohibitions on investing in litigation, including barratry, the stirring up of suits; maintenance, the supporting a litigant by bankrolling a suit; and champerty, the making money off investing in a lawsuit.[139] Moreover, unlike many legal claims, the sale or assignment of an injured plaintiff's tort claim to a purchasing investor is generally not permitted.[140]

But prohibitions on lawsuit investing generally, and the sale of personal injury claims in particular, have been undermined by

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[136] *See* Abramowicz, *supra* note 127, at 739; Choharis, *supra* note 122, at 480 (arguing that the lower capital costs of some tort purchasers compared to plaintiffs' counsel would lead to higher compensation for injured plaintiffs).

[137] *See* Choharis, *supra* note 122, at 489 (stating that because of near equality in resources between tort investors and defendant, defendant "will not be able to wear down plaintiffs as easily"). *But see* Stier, *supra* note 23, at 899 (discussing the strength and development of wide-reaching plaintiffs' counsel networks).

[138] *See* Molot, *supra* note 111, at 88; Shukaitis, *supra* note 124, at 336.

[139] *See* White Paper, *supra* note 109, at 10 (quoting Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 273 (S.C. 2000)); BLACK'S LAW DICTIONARY 262, 1039 (9th ed. 2009); Choharis, *supra* note 122, at 460-61; Sebok, *supra* note 10, at 72-73; Shukaitis, *supra* note 124, at 330.

[140] *See* Sebok, *supra* note 10, at 74-75 (noting that personal injury claims may not generally be assigned or sold in the United States, except for Texas and Mississippi).

trends of increasingly similar conduct in the law.[141] For example, lawyers in the United States have long been able to use the contingency fee, which is a form of plaintiffs' counsel's investment in the suit.[142] Moreover, state survivorship statutes permit others to bring tort claims on behalf of deceased claimants.[143] In addition, insurance subrogation agreements function much like the sale of a claim, with the insurer's payment to the claimant at the outset, in return for the ability to recover payments in litigation.[144] Furthermore, a bare majority of states have already changed their laws to allow some form of champerty.[145] And academic commentators, including Professors Elizabeth Chamblee Burch, Jonathan Molot, and Anthony Sebok, have urged further changes to allow third-party funders to operate free from concern about common law doctrines prohibiting investment in lawsuits.[146]

An additional concern in the sale of mass tort claims is the preservation of attorney-client privilege and work-product protection, in light of the potential need to have claimants' attorneys provide information to potential financier claim purchasers.[147] While an attorney would be permitted to share such otherwise confidential information, as long as the client agreed, courts would need to make clear that providing such information would not waive attorney-client privilege.[148]

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[141] *See* Binyamin Appelbaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. TIMES (Nov. 14, 2010), http://www.nytimes.com/2010/11/15/business/15lawsuit.html?pagewanted=all.

[142] *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2009) (permitting contingency fees and setting forth requirements for contingency fee agreements).

[143] *See* Sebok, *supra* note 10, at 77.

[144] *See id.* at 83.

[145] *See* Del Webb Cmtys., Inc. v. Partington, 652 F.3d 1145, 1156 (9th Cir. 2011) ("The consistent trend across the country is toward limiting, not expanding, champerty's reach."); White Paper, *supra* note 109, at 12; Burch, *supra* note 109, at 1328 & n.267; Sebok, *supra* note 10, at 98-99 & n.162.

[146] *See* Burch, *supra* note 109, at 1328; Sebok, *supra* note 10, at 133; Molot, *supra* note 111, at 105.

[147] *See* FED. R. CIV. P. 26(b)(3) (setting forth the work-product protection); White Paper, *supra* note 109, at 33.

[148] *See* White Paper, *supra* note 109, at 32 (discussing potential for privilege waiver in context of alternative litigation finance); Burch, *supra* note

Outside of ethics-specific concerns, some may also be concerned about consumer protection.[149] Injured claimants might be seen as subject to exploitation by sophisticated financiers, who might undercompensate claimants in purchasing claims.[150] But emerging markets of claim values in mass torts, with claim valuations spread via information technology and media, might help inform claimants about the value of their claims prior to the sale to a financier.[151]

An additional recurring concern about litigation financing is that it would subsidize the bringing of unmeritorious or even frivolous litigation.[152] While the bringing of baseless litigation remains a serious concern, the response should not be an overbroad limitation of litigation financing of all claims, regardless of their merits.[153] Instead, lawsuit reform should focus on proper procedures to root out only unmeritorious claims. At present, before reaching a jury, a civil suit must pass various procedural and ethical tests, including the plaintiffs' attorneys' ethical obligation to not bring a frivolous action;[154] procedural rules providing court-imposed penalties for bringing frivolous claims,

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109, at 1326 (arguing that sharing information with potential third-party funders should not waive attorney-client privilege or work-product protection).

[149] *See* Tatyana Taubman, *Access to Justice with Protection: Improving Alternative Litigation Financing with Consumer Protections* 26 (unpublished note for George Washington University Law School conference entitled Alternative Litigation Funding: A Roundtable Discussion Among Experts), *available at* http://www.law.gwu.edu/News/20112012events/Documents/ALF_ConferenceNote.pdf.

[150] *See generally* Garber, *supra* note 9, at 12 (discussing the ethical concerns of alternative litigation financing).

[151] *See* Choharis, *supra* note 122, at 486.

[152] *See, e.g.*, JOHN BEISNER ET AL., SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES 4 (2009).

[153] *See* Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 591 (2010) (arguing financiers will pursue meritorious claims to maximize return).

[154] *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2009) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

such as Rule 11 of the Federal Rules of Civil Procedure;[155] and defendants' motions for summary judgment,[156] directed verdict,[157] and judgment notwithstanding the verdict.[158] In addition, a jury verdict's damage award which is deemed by the judge to shock the conscience may be reduced through remittitur,[159] and any punitive damages award is also reviewed for compliance with the growing punitive damages guidelines from the Supreme Court of the United States.[160] I have elsewhere argued that for mass torts, concern

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[155] *See* FED. R. CIV. P. 11. Under Rule 11, every pleading and written motion must be signed by an attorney, who represents that the paper is not being used to harass or cause needless delay; that the "legal contentions are warranted by existing law or by a non-frivolous argument for extending [the law]"; and that "the factual contentions [either] have evidentiary support or . . . will likely have evidentiary support after a reasonable opportunity for [additional] investigation or discovery." *Id.* Rule 11 also empowers the court to impose sanctions for violations, although one is offered a twenty-one day safe harbor period to retract without sanction the potentially offending paper after an opposing litigant has brought the issue to the attorney's attention. FED. R. CIV. P. 11(c).

[156] *See* FED. R. CIV. P. 56 ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

[157] *See* FED. R. CIV. P. 50(a). Rule 50(a) provides as follows:

> If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

FED. R. CIV. P. 50(a).

[158] *See* FED. R. CIV. P. 50(b). Rule 50(b) states:

> No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59.

FED. R. CIV. P. 50(b).

[159] *See* Byron G. Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 TEMP. L. REV. 1013, 1025-26 (2007) (discussing remittitur).

[160] *See* Philip Morris USA v. Williams, 549 U.S. 346, 352-53 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416, 418-19, 422-24, 426-

about verdict variability recommends against the use of trial class actions[161] and the use of issue preclusion,[162] and additional safeguards to prevent against abusive litigation may also be warranted.[163] For example, a loser-pays system in which the losing litigant must reimburse the legal fees of the prevailing party is used by much of the world and might be helpfully grafted into procedure in the United States to prevent the pursuit of nuisance-value settlements.[164] Indeed, perhaps the chief objection to a loser-pays system in mass torts is that impecunious injured plaintiffs might fear to bring meritorious litigation because of the prospect of having to pay defendant's legal fees.[165] But that concern does not apply to financier claim purchasers who might manageably bear the risk of loser-pays in suing the defendant.[166] In sum, while lawsuit reform remains worthy of serious study and proposal, litigation finance and the sale of mass tort claims should not be rejected because they enable the bringing of lawsuits, particularly in light of the broad potential benefits of the sale of mass tort

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27 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562, 568, 572, 574-75 (1996); Stier, *supra* note 159, at 1027-28.

[161] *See* Stier, *supra* note 159, at 1016.

[162] *See* Byron G. Stier, *Another Jackpot (In)Justice: Verdict Variability and Issue Preclusion in Mass Torts*, 36 PEPP. L. REV. 715, 716-17 (2009).

[163] *See id.* at 717.

[164] *See* Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice,* 76 TEX. L. REV. 1863, 1863 (1998) (noting that the American rule, in which both sides bear their own attorneys' fees, "stands in sharp contrast to the 'English rule,' long followed in Great Britain and most European nations, that the loser must pay the successful party's attorneys' fees"). To continue to encourage settlement, a loser-pays rule could be integrated with the offer-of-judgment rule, which penalizes parties who receive a verdict that is less than a previous rejected settlement offer. *Cf.* FED. R. CIV. P. 68 (requiring that the party who later obtains less than the offer reimburse the opposing litigant's costs but not the opposing litigant's attorneys' fees).

[165] *See* Sherman, *supra* note 164, at 1863-64 (discussing the access-to-courts concern).

[166] *See* Choharis, *supra* note 122, at 474-75.

claims, not only for mass tort litigation, but also for mass tort settlement.[167]

IV. MASS TORT CLAIM MARKETS AND MASS SETTLEMENT

The sale of mass tort claims would also improve the use of mass tort settlement, rendering such settlements more efficient and offering a new solution for adequacy of representation concerns that have troubled both class and non-class settlements.[168] Initially, as discussed above, the presence of financiers and claim purchasing would likely develop claim values.[169] In that claim valuation process, financiers would likely employ sophisticated mass tort counsel who might better and more quickly value claims than the many dispersed plaintiffs' counsel, some of whom lack broad knowledge about mass tort litigation.[170] In addition, as cases progress through trial and juries deliver verdicts, additional information about claim values could be factored into claim estimates.[171] These claim values might serve as a touchstone for settlement discussions between financiers and defendants, although, of course, financiers would seek a premium from the defendants from the price the financiers paid to purchase the claims from injured plaintiffs.[172] The resulting mass settlements would also reduce public resources tied up in judicial management and trial of the cases.[173]

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[167] *See* Lyon, *supra* note 153, at 609 (arguing that third-party funding promotes access to justice).

[168] *See* Choharis, *supra* note 122, at 445; *see generally* FED. R. CIV. P. 23(g)(1)(B) (noting that that fair and adequate representation of class interests is a concern).

[169] *See* Choharis, *supra* note 122, at 519 (arguing that a tort claims market will approximate claim values).

[170] *Id.* at 486.

[171] *See* Stier, *supra* note 159, at 1056-57 (discussing the use of individual jury verdicts in pricing claims for mass tort settlements).

[172] *See* Joanna M. Shepherd, *Ideal Versus Reality in Third-Party Litigation Financing*, 8 J. L. ECON. POL. 593, 595 (2012).

[173] *See* Choharis, *supra* note 122, at 445 (noting that settlements becoming more common will promote efficiency and relieve court dockets).

Moreover, the sale of mass tort claims to financiers would improve the problem of representation in mass settlement.[174] If litigants in mass torts sell their claims to a financial investor, who might indeed compile hundreds or thousands of claims against a defendant, then the financial entity would have its own individual counsel in negotiating mass settlements.[175] With one client selling its claims, the lawyer would not have conflicting loyalties to various claimants, as would class counsel, thus avoiding problems of Rule 23(a) adequacy and conflicts of interest.[176] Rather, the attorney representing the financier would seek only to maximize the aggregate monetary return to the financier.[177] In addition, the attorney would be negotiating a settlement for the claims for which the financier has access to the factual details and circumstances of all the claims affected.[178] The approach, therefore, improves upon the Vioxx model, in which select plaintiffs' counsel negotiate a settlement that is offered to vast numbers of injured claimants, many of whom are not represented by the select plaintiffs' attorneys involved in the negotiations.[179]

Furthermore, even if several financier entities joined together to negotiate a mass settlement, their individual counsel might be able to manageably meet with that defendant in a single

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[174] *See id*. at 474-75 (arguing that a market for the purchase of tort claims leads to closer monitoring of legal representation).

[175] *See id.* at 494 (noting that investors that purchase claims from individual victims retain separate counsel).

[176] *See* FED. R. CIV. P. 23(a); MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009) (concurrent conflicts of interest); MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2009) (aggregate settlement rule); Choharis, *supra* note 122, at 497 (discussing interclass rivalries and conflicts of interest); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 982-83 (1995).

[177] *See* Choharis, *supra* note 122, at 498 (noting that tort investors with diversified claim portfolios would have aligned interests).

[178] *See generally* Bruce Patsner, *The Vioxx Settlement: Salvation or Sell-Out?*, UNIV. OF HOUS. LAW CTR. HEALTH LAW PERSPECTIVES 3 (Feb. 26, 2008), http://www.law.uh.edu/healthlaw/perspectives/2008/(BP)%20vioxx.pdf (noting that six plaintiffs' attorneys represented approximately 95% of all plaintiffs during the secret Vioxx negotiations).

[179] *See generally supra* note 66 and accompanying text (explaining the Vioxx approach).

negotiation and assemble a single, far-reaching deal.[180] With likely superior access to capital than plaintiffs' firms, these financial entities might obtain broader inventories of claims than well-funded plaintiffs' firms might be able to maintain.[181] Accordingly, a mass settlement negotiation between a defendant and the perhaps several financier claim holders widely invested in the mass tort might be able to bring substantial closure to a mass tort defendant, as was sought by Merck in the Vioxx mass settlement.[182] Moreover, investor-entity claim holders also might be able to exact from defendants a more significant closure premium because of the delivery of multiple claims for settlement, compared to dispersed settlements, which await the agreement of individual injured plaintiffs.[183] Again, each financier would be represented by an attorney without conflict of interest,[184] as the attorney would, in the group negotiations, simply maximize the aggregate monetary return for the lawyer's financier client. The result would be mass settlements negotiated without alienation of representation concerns, and claimants would receive quicker compensation.[185]

Although any one financier and its lawyer would, of course, be interested in maximizing overall return for claims, one might object that the injured plaintiffs, whose continued participation might have been purchased not only for an initial lump-sum payment, but also for a residual percentage of any judgment or

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[180] *See generally* Choharis, *supra* note 122, at 498 (noting that the defendant's interest can still be met through "faster and fairer mass tort settlements").

[181] *See generally id.* at 445 (arguing that investors will be able to outbid plaintiffs' firms).

[182] *See generally* Molot, *supra* note 111, at 97 (arguing that one lump settlement is more efficient than several individual settlements).

[183] *See generally supra* note 75 and accompanying text (noting that the Vioxx settlement would be effective only if 85% of the plaintiffs agreed to the settlement).

[184] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2009); Choharis, *supra* note 122, at 445 (suggesting that a tort claims market would "avoid the inter-class rivalries which currently beset mass tort litigation").

[185] *See generally* Choharis, *supra* note 122, at 480, 482-83 (noting swifter compensation for claimants from sale of tort claims and the issue of alienation).

settlement, do not have the same interest.[186] Any injured claimant would likely want to maximize his or her own settlement value in connection with any back-end payout, not the aggregate settlement value. And indeed, variation in settlement values among groups of claimants was part of the problem of class settlements affected by individual issues and inadequate representation,[187] and raises concerns of conflicts of interest that may affect both class and non-class settlements.[188] If mass tort claims are sold to the financier, however, the claim holder's initial payment and any supplemental payment after trial or settlement would be determined by contract between the injured claimant and the financier.[189] The financier's lawyer negotiating a mass settlement between the financier and the defendant would have no client relationship with injured claimants and owe them no duty of loyalty, thus raising no conflicts of interest.[190] Indeed, the defendant might wish to settle all of the claims held by the financier for a lump sum without any formal breakdown connecting portions of the payment with individual cases. Accordingly, in buying a claim from an injured claimant, a financier might wish to set forth the way in which injured claimants would be paid, such as a fixed lump sum or a percentage of the settlement (based on the overall number claims settled), in the event of a mass settlement not tied to particular claims. If the injured claimant does not want to take that deal, he or she need not consent to the contractual payment offered; unlike the American Law Institute proposal, the injured plaintiff would not problematically delegate his or her consent to settlement of the

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[186] *See generally* Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 581 (2003) (noting that conflict among class members is common).

[187] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 624-25 (1997) (citing Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626 (3d Cir. 1996)) (noting individual issues in a proposed "sprawling" asbestos class settlement).

[188] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009).

[189] *See* Choharis, *supra* note 122, at 511 (noting that a contract is an option between plaintiffs and financiers).

[190] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009).

claim to his attorney,[191] but rather would be selling the claim to the financier.

An additional objection might be that if claimants' attorneys assisted in selling the claims of numerous clients to financiers, the sale of tort claims would effectively duplicate the conflict of interest problem previously present in non-class mass settlements. Of course, tort claimants could sell their claims directly to financiers without plaintiffs' counsel,[192] but claimants might lack understanding of how much their claim is worth or might have already contacted plaintiffs' counsel to sue the defendant. As a result, claimants may enter the financial stream through plaintiffs' lawyers who might then counsel the claimants about their sale of claim to the financiers.[193]

While certain aspects of the plaintiff-counsel-to-financier claim transfer could raise concerns of conflicts of interest in aggregate settlement,[194] the approach nevertheless improves upon the Vioxx settlement. In the Vioxx litigation, distant plaintiffs' lawyers negotiated a settlement that would apply to all claimants, including those with whom the negotiating attorneys had no client

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[191] *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(b)-(f) (2010).

[192] Comment 2 to Rule 4.3 of the Model Rules of Professional Conduct provides as follows:

> This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

MODEL RULES OF PROF'L CONDUCT R. 4.3 cmt. 2 (2009).

[193] *See* Choharis, *supra* note 122, at 443 (opining that attorneys may help tort victims "package and market" their claim to tort purchasers to maximize sale price).

[194] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009) (concurrent conflict of interest); MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2009) (aggregate settlement rule).

relationship.[195] The plaintiffs' lawyers who undertook such negotiations also presumably had limited data about the non-represented claimants suing Merck.[196] In the sale-of-torts-claim setting, however, any piecemeal sale of multiple claims to financiers would likely be negotiated by lawyers who actually represented the claimants and who, therefore, had superior access to claimants' information in negotiations. Financial investors likely would not need to negotiate a mass offer for all claimants, as a defendant, such as Merck, would, in order to move forward to obtain closure; unlike the mass tort defendant, the financier does not have the prospect of a mass tort's unpredictable liability lowering its share price, limiting its ability to raise capital and make strategic acquisitions, and tainting its public image and advertising.[197] In addition, multiple financiers might likely appear, perhaps leading to more flexible and personally tailored claim payments, allowing the injured plaintiff more than one option to sell a claim and reducing the likelihood of a mass offer of claim purchase by the financier to all claimants.[198] All of these differences suggest that even the sale of multiple claims by plaintiffs' counsel to a financier would be superior to a non-class mass settlement negotiated by select plaintiffs' counsel and the defendant in the Vioxx litigation.

V. CONCLUSION

The sale and settlement of mass tort claims holds the promise for more efficient processing of tort claims, speeding compensation to claimants and easing concerns of adequate representation or conflicts of interest in mass settlement.[199] The

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[195] *See* Patsner, *supra* note 178, at 3.

[196] *See id.* (noting that many petitioners were not part of the settlement negotiations).

[197] *See generally* William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 838 (1995) ("[T]he full measure of claims against a defendant may force it into bankruptcy.").

[198] *See* Choharis, *supra* note 122, at 490 (suggesting that a market for the selling of mass tort claims will offer multiple purchasers for the claims).

[199] *Id.* at 498.

approach, thereby, may improve upon both mass tort class actions and recent non-class mass tort settlement. Sale and settlement of mass tort claims, however, would not cure all procedural problems in connection with mass torts.[200] Left unaddressed, for example, is the continuing problem of representing future claimants who are presently uninjured and unaware of their exposure and risk.[201] In addition, policymakers may resist greater involvement of financiers in mass tort claims following the financial crisis of 2008.[202] But while the sale and settlement of tort claims may not solve all mass tort problems or may not currently be politically palatable to all, I argue that the approach offers a step forward for mass tort litigation and mass tort settlement.

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[200] *See generally* Choharis, *supra* note 122, at 514 (noting that the sale of mass torts will not eliminate the problem of "tort victims' claims exceeding tortfeasors' assets").

[201] *Cf.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997) (stating that for future claimants, "the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous").

[202] *See* Molot, *supra* note 111, at 102 n.122.

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CROWD-CLASSING INDIVIDUAL ARBITRATIONS IN A POST-CLASS ACTION ERA

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ABSTRACT

Class actions are in decline, while arbitration is ascendant. This raises the question: will plaintiffs' lawyers skilled in bringing small-value, large-scale litigation – the typical consumer, employment, and antitrust claims that have made up the bulk of class action litigation over the past forty years – hit upon a viable business model which would allow them to arbitrate one-on-one claims efficiently and profitably. The obstacles are tremendous: without some means of recreating the economies of scale and reaping the fees provided by the aggregative device of Rule 23, no rational lawyer would expend the resources to develop and arbitrate individual, small-value claims against well-heeled defendants. But despite these complications, we think there are at least two possible models that might allow for informal aggregation of like claims in at least some subset of cases.

One hybrid model would seek a judicial liability judgment upon which serial, individual arbitrations could later rely. The antecedent judicial judgment could take a number of different ,so long as it has preclusive force that can be leveraged in subsequent arbitration hearings. A second, complementary model envisions "arbitration entrepreneurs" (either lawyers or non-lawyers) purchasing legally-identical, individual claims which these legal capitalists believe to have value in the arbitral forum. Upon procuring as many discrete claims as the market will bear, the arbitration entrepreneur would seek to resolve the hundreds or even thousands of claims she has amassed in a single arbitral session. With one arbitration entrepreneur as the lawful owner of a multitude of claims, this form of aggregation implicates neither the prohibition against class arbitration nor the contractual definition of "a claim" subject to arbitration.

CROWD-CLASSING INDIVIDUAL ARBITRATIONS IN A POST-CLASS ACTION ERA

MYRIAM GILLES
ANTHONY SEBOK

The Supreme Court's recent rulings limiting class action litigation make it increasingly difficult, if not impossible, for lawyers to represent vast numbers of absent class members in court.[1] In particular, the Court has repeatedly endorsed class action waivers in arbitration agreements, sending parties to individually arbitrate claims that would otherwise have been litigated under Rule 23 in the federal courts.[2]

While many commentators have questioned whether individuals will indeed seek to arbitrate their disputes in light of these developments,[3] we think the better question is whether plaintiffs' lawyers skilled in bringing small-value, large-scale litigation – the typical consumer, employment, and antitrust claims that have made up the bulk of class action litigation over the past forty years – will hit upon a viable business model which would allow them to arbitrate one-on-one claims efficiently and profitably.

At first blush, the financial incentives for lawyers to seek out and arbitrate individual, small-value claims appear quite weak.[4] In the

[1] *See, e.g.,* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

[2] *See* AT&T Mobility v. Concepcion, 131 S.Ct. 1740 (2011); American Express v. Italian Colors Restaurant et al., 570 U.S. __ (June 20, 2013).

[3] *See, e.g.,* Jean Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 Sw. L. Rev. 87 (2012) (exploring whether it is "realistic to think that class actions might be replaced by individual claims [and whether] many individuals who were blocked from filing class actions [will] proceed individually" in arbitration); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 646 (2012) ("Nor should anyone expect that consumers will actually go forward with one-on-one arbitrations, even as consumer arbitration clauses are liberalized to provide ostensible incentives to intiate proceedings…").

[4] The financial incentives for the defendant run in exactly the opposite direction. As Korn and Rosenberg explain, the incentive for a defendant to invest heavily to defeat a small-value consumer claim is the same in individual arbitration as in a class action: *Concepcion's* "pro-defendant bias is endemic to the process of resolving common question claims in individual arbitrations . . . [and] occurs in the individual arbitration process because of the lack of symmetry between the defendant's classwide stake and

absence of some mechanism to achieve economies of scale – i.e., to reduce the otherwise exorbitant information and transaction costs of individual claiming – no rational lawyer would expend the resources to develop and arbitrate small-value claims against well-heeled defendants. Even in the best-case scenario – say, a credit card company's undisclosed policy imposing late charges on payments posted after 3:00 pm on the due date[5] -- determining the inception and extent of the policy, what forms of disclosure are required by relevant laws and regulations, the identity of the injured consumers, and other salient facts would require an army of lawyers and staff. And this army would necessarily have to deal with hundreds or thousands of individual clients, rather than simply a handful of class representatives, which would itself absorb a tremendous amount of time and money.[6]

In all but the simplest cases, expert testimony and other expensive forms of proof would be necessary – all of which would be on the lawyers' dime at the front-end and would non-recoupable,[7] even if the claims are subsequently successful.[8] Further, the rules governing the dominant arbitral bodies do not provide for consolidation of related cases before a single arbitrator, nor is there any intra-arbitration *res judicata*

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each plaintiff's recovery-specific stake in the outcome of the common question litigation." David Korn and David Rosenberg, Concepcion's *Pro-Defendant Biasing of the Arbitration Process: The Class Counsel Solution* at *4 (on file with the authors).

[5] Based on allegations made in Discover Bank v. Superior Court, 113 P.23d 1100 (2005), overruled by *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011).

[6] Adam Zimmerman blog ("Individuals must develop their own evidence, retain witnesses, expend time, and support their claim for damages with a well-grounded legal theory. Most studies of small claiming patterns suggest that these problems, combined with apathy, inertia and cognitive bias, will persist."). *See also* [cite] (reporting that Vioxx plaintiffs' lawyers reportedly spent 10,000 hours interviewing, meeting, reviewing individual clients' files at a cost of $13.5 million.).

[7] The bulk of expert fees constitute out-of-pocket costs that lawyers must pay during the course of litigation. While plaintiffs lawyers' may seek reimbursement for costs associated with generating an expert report upon successful completion of the litigation, courts are bound by the limit of 28 U.S.C. § 1821(b), which sets expert fees at only forty dollars per diem. *See Amex* I, 554 F.3d 300, 318 (2d Cir. 2009); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 439 (1987).

[8] This, of course, assumes that a single expert report could be retailed across multiple individual arbitrations – which remains an open legal question, and may depend upon the confidentiality provisions of the underlying agreement. *See, e.g.,* Amex v. Italian Colors [cite oral argument transcript].

effect awarded to prior victories.[9] Informal cost-sharing by centralizing expert work is further doomed by the confidentiality terms that are standard in contemporary arbitration agreements.[10] Procedurally, therefore, individual arbitration provides no incentives to consolidate or even serialize claims formally or informally: lawyers seeking to individually arbitrate our hypothetical misrepresentation/consumer fraud case across multiple plaintiffs would not be guaranteed the ability to bring these claims seriatim before the same arbitrator in a compressed time-frame, to use the same expert report or other evidence across multiple arbitrations, nor to rely upon prior arbitral determinations of fraud, liability, or damage.

And, perhaps most critically, the amount of money an attorney could expect to make by bringing a series of individual arbitrations will not, in most (all?) cases, justify these significant expenditures of time and money.[11] Again, take our credit card late-fee example: even if a group of attorneys were somehow able to identify a segment of affected consumers, develop a streamlined and efficient means of presenting the straightforward facts of each case to an arbitrator, and "win" a significant number of these individual arbitrations, these lawyers would still walk

[9] *See* Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 734 (1981) (denying preclusive effect to an arbitrator's resolution of an employee's Fair Labor Standards Act claim).

[10] *See, e.g.*, In re American Express Merchants' Litig., 554 F.3d 300, 307-8 (2009) (*Amex I*) (finding the arbitration agreement contains a "confidentiality provision [that] effectively block[s] that method of informal cost-sharing" because it precludes the introduction of evidence adduced in one arbitration in subsequent arbitrations).

[11] Gilles & Friedman, *supra* note __, at 646 ("The main problem will be attracting plaintiffs' counsel: rational lawyers will be deterred by prohibitive disincentives."), *citing* Concepcion, 131 S.Ct. at 1761 (Breyer, J., dissenting) ("What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"); Sutherland v. Ernst & Young LLP, 768 F.Supp.2d 547, 553 (S.D.N.Y. 2011) ("Even if [plaintiff] were willing to incur approximately $200,000 to recover a few thousand dollars, she would be unable to retain an attorney to prosecute her individual claim…[Plaintiff's counsel] will not prosecute her individual claim without charge, and will not advance the required costs where the [arbitration] Agreement's fee-shifting provisions present little possibility of being made whole."); Picardi v. Eighth Judicial District Court, 251 P.3d 723, 725 (Nev. 2011) (noting plaintiffs' argument that "the class action waiver was exculpatory because, in cases . . . where the individualized claims are relatively small, it is almost impossible to secure legal representation unless those claims are aggregated with the claims of other similarly situated individuals").

away with little or nothing for their efforts. Thirty-three percent of, say $30, even if multiplied by ten thousand claims, is only $100,000 – which be utterly insufficient to cover the costs of case intake, expert fees, neutrals' fees, travel, and other expenses.[12] And the availability of attorneys' fees under fee-shifting statutes is not, in itself, a reliable or realistic inducement in consumer cases. Furthermore, the rules of the arbitral bodies prohibit the separate award of costs (unless authorized by an underlying fee shifting statute), rendering many arbitral claims net-negatives.[13]

In sum, individual, small-claims arbitration seems to mean exactly that: claims are brought on behalf of one person without regard to others affected by the same or similar allegedly injurious conduct; an arbitrator decides the claim and if the plaintiff is successful, the defendant pays the small amount at stake in the proceedings; the presence of lawyers is discouraged (by the defendant, the rules of the arbitral associations, and the arbitrator) because the proceedings are meant to be quick and efficient, without procedural hiccups or substantive overkill. On this view, there seems little room to develop a business model that harnesses the potentially large numbers of people who are harmed in small ways by corporate practices, but who may not have any knowledge of the harm or lack any incentive to pursue their small claims.

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[12] *See* Gilles & Friedman, *supra* note __, at 646-7 (noting that even the Concepcions' case is not as uncomplicated as it may appear and that they could "surely incur well over $25,000 in legal fees to establish liability in a one-on-one proceeding"); Glover, *supra*note __, at 1210 ("it is inconceivable that a private attorney, who might be sufficiently expert in consumer fraud, would have the economic incentive to root out consumer fraud if the only economic gain is to be had through individual arbitrations; the significant investment of resources required to identify wronged individuals and to pursue their small claims one-by-one likely would not justify any eventual gains").

[13] Although it is theoretically possible that a layperson could secure funding from a litigation funding company in a jurisdiction in which so-called "alternative litigation funding" is legal, it is obviously risky (and imprudent) to borrow against the possibility of later vindication—especially when, as noted above, the compensation in a consumer case can be so small. *See* Anthony J. Sebok, *The Inauthentic Claim,* 64 VAND. L. REV. 61 (2011) (discussing the litigation funding industry in the United States); STEVEN GARBER, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWNS AND UNKNOWNS (2010), available at: http://www.rand.org/pubs/occasional_papers/OP306/ (same). In any event, it is highly unlikely a consumer could obtain funds given that "consumer" side funders do not fund litigation but only purchase a property interest in the future proceeds of a case funded by a contingency fee attorney. *Id*.

Perhaps this analysis is too parochial, and in a post-class action universe, one must boldly consider options outside traditional legal contexts.[14] Possibly claimants themselves may become so frustrated with corporate malpractice that they will seek out efficient means of banding together through the use of social media and other technological developments. Indeed, we may already be witnessing the early stages of an internet-driven movement towards democratizing claims-bringing. For example, California lawyer Heather Peters, who had purchased a Honda Civic with electrical problems, decided to opt-out of the class action settlement and instead filed her own lawsuit in small claims court.[15] She also created a website to blog about the process of filing and litigating the claim, opened a Twitter account for brief updates, and posted a YouTube video of the car's problems, all in the hope of sparking a "small claims flash mob" of other Honda purchasers to do the same.[16] And it partly worked: nearly a thousand claimants individually opted out of the class action settlement and filed their own small claims suits against Honda.[17] But Ms. Peters herself was unsuccessful: while she won nearly $10,000 in small claims court, she lost on appeal and was required to pay Honda's court costs.[18] Nonetheless, her story underscores the possibilities that

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[14] And, it seems that corporate entities are sufficiently worried about this possibility to warrant our attention. *See, e.g.,* Alan Kaplinsky & Mark J. Levin, *Consumer Advocates Form "Anti-Arbitration" Organization*, Oct. 9, 2012, available at http://www.ballardspahr.com/alertspublications/legalalerts/2012-10-09-consumer-advocates-form-anti-arbitration-organization.aspx ("The attempted use of mass arbitration to destroy consumer arbitration does a great disservice to consumers who stand to benefit from the efficiencies and economies inherent in the arbitral process.").

[15] Jerry Hirsch, *Honda Loses Small Claims Court Suit Over Civic Hybrid Fuel Economy*, L.A. Times, Feb. 2, 2012,available at http://articles.latimes.com/2012/feb/02/business/la-fi-autos-honda-lawsuit-20120202 (last visited June 26, 2013) (reporting that Ms. Peters opted out of a class action settlement that would have paid her $300 and coupons towards the purchase of another Honda vehicle.

[16] Jerry Hirsch, *Car Owner takes legal fight away from lawyers*, L.A. TIMES, Dec. 27, 2011, available at http://articles.latimes.com/2011/dec/27/business/la-fi-autos-honda-smallclaims-20111227 (last visited April 7, 2013).

[17] Honda Wins Reversal of Civic Hybrid Small-Claims Judgment, Huffington Post, Apr. 20, 2012, available at http://www.huffingtonpost.com/2012/04/20/honda-hybrid-lawsuit_n_1441913.html (reporting that 1,700 Honda owners were spurred by Ms. Peters to opt out of the settlement and bring claims on their own).

[18] Jerry Hirsch, Honda Wins Reversal of Civic Hybrid Small-Claims Judgment, L.A. Times, May 9, 2012, available at http://www.latimes.com/business/money/la-fi-mo-honda-civic-lawsuit-20120509,0,3088344.story.

exist where a single person can leverage social media and her knowledge of an underlying claim to bring about a massive and untapped response by claimants all over the country. Indeed, Ms. Peters was able to accomplish something that massive print and mailer class notice rarely can: actual, engaged responses from injured parties seeking remedy.

A related example is Consumer Count, an organization designed to use social media "to help multiple consumers bring claims against companies without resort to class actions."[19] Consumers can post complaints about companies' practices or products on the Consumers Count website, and "once a 'critical mass' of consumers has complained about the same practice, Consumers Count will spring into action and refer to the complaints to a law firm which can then enter into fee agreements with the multiple consumers and attempt to pursue their claims in court, in arbitration, through referral to a governmental agency, or in the press."[20]On this model, motivated claimants could use Facebook, Twitter,[21] Google+, and other social networking sites to locate and communicate with potential claimants; gather information on potential claims via YouTube, Shutterfly, Photobucket, Instagram, or Flickr; track claimants via Pinterest, Foursquare, and Yelp; manage information on blog-style platforms such as Tumblr; survey claimants on Reddit or Betterific to gauge experiences with specific arbitrators; raise money and solicit contributions on ActBlue or Kickstarter[22]; and perhaps even offer "litigation kits" via Groupon[23] to enable claimants to easily bring their

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[19] Sternlight, *supra* note __, at 124; see also www.consumerscount.org (last visited June 26, 2013).
[20] *Id*.,
[21] Twitter provides a platform that allows its users to release timely bits of information (through "Tweets" of 140 characters or less) that allow single voices "that might have gone otherwise unnoticed" to reach "millions of people." About Twitter, Twitter, http://twitter.com/about (last visited June 18, 2012).
[22] Kickstarter describes itself as "the world's largest funding platform for creative projects," and it works by having project creators post an idea and a funding goal, and if users like the idea, they can pledge money. If the project succeeds in reaching its funding goal, users' credit cards are charged. 44% of Kickstarters projects have been fully funded, and applies a 5% fee to funds collected. *See* http://www.kickstarter.com/help/faq/kickstarter%20basics (last visited April 4, 2013).
[23] Groupon is a social media site that offers discounts on goods and services offered by its advertisers. The advertiser then pays Groupon a percentage of the fee earned by the advertiser from registered Groupon users who obtain and use the discounts. North Carolina's state bar has raised the concern that lawyers' use of Groupon would constitute impermissible fee-splitting. *See* North Carolina Proposed Formal Ethics Opinion 7 [cite]

own claims in arbitration. This grassroots, tech-savvy approach to accessing, identifying, and enabling individual claimants to effectively arbitrate disputes is further assisted by the increase in online arbitration methods.[24] By leveraging the internet's vast resources and connectivity,[25] as have "political campaigns, social protest movements, product launches, and new businesses globally,"[26] claimants may be empowered to engage the arbitral fora in new and powerful ways.[27]

But we think the grassroots model is ultimately incomplete, in part because it is not "scalable".[28] While it may be trendy to contemplate the impact of social media on all aspects of modern life, we remain unconvinced that the ability to communicate in virtual communities and networks will have significant effects in engaging injured claimants. The impediments that many scholars have described remain, even with the

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[24] Jeff Howe, *The Rise of Crowdsourcing*, WIRED MAGAZINE, 2006 ("Crowdsourcing is an online, distributed problem-solving and production model.").

[25] Irwin A. Kishner & Brooke E. Crescenti, *The Rise of Social Media*, 27 ENT. & SPORTS L. 24, 24 (2010) (reporting on a recent study finding "that 73 percent of Americans regularly use social media"); Matthew Auer, *The Policy Sciences of Social Media*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1974080 (last visited April 6, 2013).

[26] CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS (2008) (describing the striking use of flash mobs in antigovernment protests in Belarus, which used text messaging and weblogs to bring protesters together, with little or no advance planning); Molly Land, *Networked Activism*, 22 HARV. HUM. RTS. J. 205 (2009).

[27] A number of commentators have pointed to the increased reliance on networks and social norms to replicate or improve accountability, access and information in complex litigation. *See, e.g.*, Elizabeth C. Burch, *Litigating Together: Social, Moral and Legal Obligations*, 91 BOSTON U. L. REV. 87 (2011); Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863 (2005); Howard Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000).

[28] By "scalable" we simply mean taking a well-functioning, smaller-scale program and replicating its essential functions so that it can work in a similar fashion for more people. *See* Paul N. Bloom and Brett R. Smith, "Identifying the Drivers of Social Entrepreneurial Impact: An Exploratory Empirical Study," *in* PAUL N. BLOOM & EDWARD SKOOT, SCALING SOCIAL IMPACT: NEW THINKING (2010) at 11; *see also* Sternlight, *supra* note __, at 118 (noting that, while using the internet to identify potential claimants may be "effective in some cases [where] consumers' claims are large enough and easy to identify," but that it may not work in other contexts).

help of the internet.[29] We would also worry that only the most egregious, widespread, or newsworthy corporate conduct would pique the interest of injured consumers, leaving most wrongdoing unremedied.[30] And, as Jean Sternlight writes, "it seems unlikely that the internet can help many consumers *win* their claims -- bringing a claim is one thing, and winning that claim is yet another."[31] In the end, it seems to us necessary to engage the ability and experience of plaintiffs' lawyers or motivated entrepreneurs in any enterprise that involves ferreting out, investigating, and bringing small-value claims.[32] The question therefore remains: is there a viable business model which would allow plaintiffs' lawyers or entrepreneurs to arbitrate small, individual claims efficiently and profitably?

We think there are two potential approaches that might allow for informal aggregation of arbitral claims in at least some subset of appropriate cases. The first is a hybrid model which seeks an initial public

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[29] Zimmerman, *supra* note __ ("There are many impediments for individuals who choose to litigate by themselves. Individuals must develop their own evidence, retain witnesses, expend time, and support their claim for damages with a well-grounded legal theory. Most studies of small claiming patterns suggest that these problems, combined with apathy, inertia and cognitive bias, will persist."); *see also* Sternlight, *supra* note __, at 118 (asserting that few consumers see notices or choose to respond, and are unlikely to be aware that "they are subjected to particular small but incorrect charges on, for example, their cell phone bill"); *id.* ("we all suffer from information overload as it is: how many of us have ever even looked at the websites that already list ongoing class actions from which one might seek relief, much less taken any steps to benefit from such a website?").

[30] Critics of crowdsourcing have noted that participants are a nonrandom sample of the population, and that a crowdsourced project will often fail due to lack of motivation. *See, e.g.*, Daren Brabham, *Managing Unexpected Publics Online: The Challenge of Targeting Specific Groups with the Wide-Reaching Tool of the Internet*, INT'L J. OF COMM. (2012), available at http://ijoc.org/ojs/index.php/ijoc/article/view/1542/751; *see also* Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 111 (2011) (reporting that between 2003 and 2007, only 170 consumers out of nearly 54 million subscribers saw fit to access AT&T's inexpensive arbitration procedure); Coneff v. AT&T Mobility, 620 F. Supp.2d 1248, 1258 (W.D. Wash. 2009), rev'd on other grounds, 673 F.3d 1155 (9th Cir. 2012) (finding only an "infinitesimal" number AT&T customers had filed arbitration claims).

[31] Sternlight, *supra* note __, at 118-9.

[32] J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1176-1217 (2012) ("the ferreting out of misconduct like consumer fraud requires expertise frequently not in the hands of consumers; they are thus unlikely, on their own, to possess or process relevant information in such a way that would motivate them to arbitrate").

determination of liability in court, followed by the contracted-for, atomized, serial arbitration proceedings(which, in our view, would function in effect like damages inquests). The public court determination might come about in several different ways. In some cases, the plaintiffs' lawyers may be able to bring an individual claim in court seeking a declaratory judgment of the defendant's wrongdoing. This may be possible where there are any claimants who are not covered by an arbitration clause, or where the demand for declaratory or injunctive relief is determined to be outside the authority of a single arbitrator.[33] In other cases, the judicial liability determination can come about through public enforcement actions, whether brought by agencies acting in a law enforcement capacity or by state Attorney Generals in *parens patriae*.[34] Indeed, enterprising plaintiffs' lawyers might even be well advised to offer their services at a discount to public enforcers in order to obtain the springboard of a judicial liability holding.[35]

Once lawyers have obtained a judicial declaration of wrongdoing, many of the financial disincentives to individual arbitration described above are altered. Most significantly, lawyers are spared some of the expense of proving wrongdoing: in the case of an arbitration-free client, for example, lawyers would be able to recoup their fees and other related costs of proving wrongdoing. In the case of a public enforcement action, those costs have been absorbed by the state. In addition, once relieved of the financial burden of re-proving liability in each arbitration, lawyers need only identify and contract with similarly-situated claimants for

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[33] There may be claimants whose contracts, by happenstance, do not yet contain a class action waiver. Lawyers representing those individual claimants in court can litigate liability, and if successful, this judgment can be used in subsequent arbitrations by similarly-situated claimants. *See Marcus Corp. v. American Express Co.,* No. 04 cv 05432 (GBD), 2005 WL 1560484 (S.D.N.Y. July 5, 2005) (an action alleging claims on behalf of a merchant who does not have an arbitration clause, along with identical claims on behalf of a putative class).

[34] Public entities litigate and obtain judgments on all manner of claims. Importantly, these enforcers are not subject to contractual waiver provisions; on the other hand, state actors often settle for consent decrees with no admission of liability, which have no preclusive force in subsequent arbitrations. *See infra* Part II.A.

[35] After all, public lawyers already "face resource constraints that limit the scope of possible enforcement actions," and given these "shrinking state budgets and the growing list of potential big-ticket claims involving harms to consumers" and others, it would seem an ideal moment to partner with the private bar. Maggie Lemos, *State Enforcement of Federal Law*, 85 N.Y.U. LAW REV. 698, 761 (2011).

serialized arbitrations. And, even these transaction costs are significantly reduced where discovery under the hybrid model produces the identities of affected consumers, enabling lawyers to contact potential clients to determine their willingness to sell, assign or otherwise have their claims arbitrated.[36]

With the fully-enforceable judicial declaration in hand, lawyers could then move to the arbitral fora to individually arbitrate claims in what essentially become a series of damages inquests. Here, a liability judgment obtained court that has preclusive effect on identical claims and may generate the functional equivalent of precedent. These effects are neither certain nor complete, as the major arbitral bodies currently do not provision for mass, serial arbitration of like claims; but we predict that necessity will likely force these entities to change or amend their rules in order to better manage mass claiming. Up until now, the American Arbitration Association ("AAA") and JAMs have had little reason to develop comprehensive solutions to mass arbitration, but in our view, these associations will inevitably consider consolidation procedures, appointment of arbitrators qualified to administer mass arbitrations, the admissibility of evidence and expert testimony from prior, like hearings, and other aggregation-friendly rules.The second and complementary model envisions "arbitration entrepreneurs" – either lawyers or non-lawyers – buying up legally-identical, potentially-valuable individual claims that are subject to arbitration.[37] Upon procuring as many discrete

[36] Arguably the most straightforward means of using Rule 23 to obtain the identities of injured victims is through the notice requirement, but Rule 23(c)(4) does not require notice to be provided to class members in a (b)(2) class, given that its members cannot opt out. Some courts have nonetheless required notice in some (b)(2) class actions where necessary.

[37] This arbitration entrepreneur would resemble the claims agents of yore – non-lawyers who actively identified, investigated, processed, aggregated and assisted injured parties in bringing their claims in exchange for a fee or percentage of recovery. Claims agents have a long and somewhat controversial history in Anglo-American society. Blackstone called them "the pests of society" and early English courts renounced them as "prowling assignees." Agents were held to be "officious intermeddlers" and the doctrines of champerty and maintenance were deployed by courts to stop them from "stirring up strife and contention" in pursuit of profit or some other self-interested motive. Huber v. Johnson, 68 Minn. 74, 78 (Minn. 1897). However, as the Supreme Court has noted, resistance to the claims agent gradually disappeared during the Nineteenth Century, so that "'*many, probably most, American jurisdictions* [allowed] an assignee'" to help another enforce their legal rights. *Sprint Communs. Co., L.P. v. APCC Services*, 554 U.S.

claims as the market will bear and which can net a profit, the arbitration entrepreneur would then file a single arbitration seeking to collectively resolve the hundreds or even thousands of claims she has amassed. This claims-buying model resembles previous efforts to individually process claims that had marginal but not negligible value when viewed in isolation and significant value when handled by a specialist or repeat player.[38]

We are taking the claims-buying model one step further and extending it to the next frontier for civil justice in the United States: arbitration. In doing so, we build on the precedent set in the debt-buying industry, where firms purchase debt claims from credit card companies, cell phone providers and other providers of consumer credit, and bring massive numbers of individualized recovery proceedings. Consumer credit is a powerful example of mass small claims litigation that makes economic sense, although ironically, it is an example where the consumer is the defendant, not the plaintiff.[39]

This paper will proceed as follows: Part I will describe the current state of class action and arbitration jurisprudence, with particular focus on the Supreme Court's recent pronouncements approving class action waivers in arbitration agreements. Part II takes up the hybrid model of securing a "judicial launchpad" prior to engaging in mass arbitrations. Part III focuses on the claims-buying model, which contemplates the intervention of an arbitration entrepreneur modeled against the practices of consumer debt buying companies in recent years. This Part will focus on the ability to freely buy, trade, assign and sell claims in arbitration, as well as the question of whether a single arbitration seeking to represent collective claims can survive under current law and practice.

269, 282 (2008) (*quoting* Clark & Hutchins, *The Real Party in Interest*, 34 Yale L.J. 1, 264 (1925).

38 *See, e.g.*, the cases discussed in *Sprint Communs. Co., L.P*, 554 U.S. at 280-81 ("[D]uring the 19th century, most state courts entertained . . . suits by individuals who were assignees for collection only . . . .").

39 *See* Lauren Goldberg, Note, *Dealing in Debt: The High Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711 (2006).

PART I
THE END OF CLASS ACTIONS

Class action litigation is in decline.[40] Over the past decade, the Supreme Court and a number of influential circuit courts have revealed deep-seated skepticism (and hostility) to class action litigation, finding doctrinal and policy-based rationales to support cutting back on this potent procedural device.[41] Standards for certifying high-stakes class actions have become increasingly more demanding,[42] small-claims consumer

[40] Although some studies show that the number of class actions filed has remained fairly steady over the past three years, others reveal that, given the increased evidentiary and burden of proof standards that plaintiffs must satisfy, a significant number of these classes are not certified. Compare Fulbright & Jaworski LLP, 7th Annual Litigation Trends Survey Report (2010), available at http://www.fulbright.com/litigationtrends (last visited Jan 9, 2013), with Joel S. Feldman, Simone R. Cruickshank, and Gary J. McGinnis, *Evidentiary and Burden of Proof Standards for Class Certification Rulings*, 11 BNA CLASS ACTION LITIG. REP. 536, 541 (June 11, 2010). Securities fraud class actions appear to be the exception. *See* Jordan Milev, Robert Patton, and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2011 Mid-Year Review* (National Economics Research Associates, July 26, 2011), available at www.nera.com/nera-files/PUB_Mid-Year_Trends_0711(3).pdf (last visited Jan 9, 2013) (reporting that securities class action filings remained steady and suggesting that "a wave of new cases alleging breach of fiduciary duty in connection with" mergers and acquisitions is the cause).

[41] *See, e.g.,* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623 (2012) (asserting that judicial decisions limiting class action litigation are primarily concerned that "class practice allows private lawyers to assume the representation of vast sets of absent plaintiffs and to use that power, monitored by no one except overworked judges, as a club with which to extract massive settlements from risk-averse corporations"); Robert Klonoff, *Reflections on the Future of Class Actions*, 44 LOYOLA U. CHI. L.J. 533 (2012).

[42] Whereas courts previously avoided any "preliminary inquiry into the merits" at the class certification stage, recent years have seen the development of a standard under which plaintiffs are required to prove by a preponderance of the evidence – just as they would at trial – any fact necessary to meet the requirements of Rule 23, even if it also goes to the merits. *See e.g.,* In re Initial Public Offerings Securities Litigation, 471 F3d 24, 41–42 (2d Cir 2006) (rejecting the "some showing" standard and adopting a requirement that plaintiffs provide "definitive" proof, through "affidavits, documents, or testimony to . . . [establish] that each Rule 23 requirement has been met"); In re Hydrogen Peroxide Antitrust Litigation, 552 F3d 305, 316, 320 (3d Cir 2008)("overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met. . . . Factual determinations necessary to make Rule 23 findings must

class actions have been fundamentally circumscribed,[43] and employment class actions must now meet ever-more restrictive interpretations of the commonality requirement of Rule 23(a).[44] With few exceptions,[45] the Supreme Court's jurisprudence in this area has been marked by an effort to limit, restrict and reduce the availability of class remedies.

A. *Class Action Waivers*

The real game-changer has been a series of Supreme Court decisions upholding class action waivers and instructing lower courts to enforce arbitration agreements according to their specific terms.[46] In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, the Court held that the Federal Arbitration Act ("FAA") prohibits arbitrators from imposing class arbitration on parties that have not agreed to such procedures.[47] And then in *AT&T Mobility LLC v. Concepcion*, the Court struck California's so-

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be made by a preponderance of the evidence"). *See also* Comcast v. Behrend, __ S.Ct. __ (No. 11-864) (March 27, 2013) (finding that under a rigorous analysis of Rule 23(a)'s certification requirements, plaintiffs' expert failed to establish that damages can be measured on a classwide basis).

[43] Consumer class actions have been plagued by the adoption of an "implicit requirement" of ascertainability, under which courts in consumer cases have refused to certify classes in the absence of "reliable proof of purchase or a knowable list of injured plaintiffs." This ascertainability requirement has sounded a death knell for many (if not most) cases arising from small retail purchases, where consumers are unlikely to retain proof of purchase. *See* Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 331 (2010).

[44] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). *See also See, e.g.,* Arthur H. Bryant, Editorial, *Class Actions Are Not Dead Yet*, NAT'L L.J., June 20, 2011, at 46; John C. Coffee Jr., *The Future (if Any) of Class Litigation After 'Wal-Mart,'* NAT'L L.J., Sept. 12, 2011, at 12; Editorial, *The Wal-Mart Ripple Effect*, WALL ST. J., Oct. 18, 2011, at A36.

[45] *See, e.g.,* Erika P. John Fund v. Halliburton, 131 S.Ct. 2179 (2011) (plaintiff-friendly decision finding that loss causation is not a component of reliance, and therefore, irrelevant at the class certification stage); Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437-48 (2010) (upholding Rule 23 over inconsistent state law); Amgen v. Connecticut Retirement Plans & Trust Funds, __ S.Ct. __ (Feb. 27, 2013) (finding proof of materiality is not required before certifying a class based on the fraud-on-the-market theory).

[46] *See* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 671-73 (2012); Concepcion, 131 S. Ct. at 1745-46; Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010); Stolt-Nielsen, 130 S. Ct. at 1773-76.

[47] 130 S. Ct. 1758 (2010).

called "*Discover Bank* rule" – a judge-made rule providing that arbitration agreements attended by class action waivers are unenforceable if those agreements are contained in standard form consumer contracts.[48] Most recently, in *American Express v. Italian Colors Restaurant*, a 5-3 majority held that class action waivers embedded in arbitration clauses are enforceable even where proving the violation of a federal statute in an individual arbitration would prove too costly to pursue.[49] In short, "the Court has nearly concluded its slow march toward universal arbitrability."[50]

Not surprisingly, many corporate actors have shrewdly responded to this spate of judicial decisions by incorporating class action waiver language in their standard-form contracts with consumers and employees,[51] rendering these groups unable to band together and seek legal redress. Since 2000, when the Supreme Court began to develop its pro-arbitration jurisprudence in earnest,[52] a significant number of companies have inserted arbitration clauses into their contracts with consumers and employees.[53] And it's a fair bet that number has spiked

48 AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746, 1748 (2011), *abrogating* Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

[49] 570 U.S. at __ ("the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy").

[50] David Horton, *Arbitration and Inalienability*, 60 U. KANSAS LAW REV. at __.

[51] *See, e.g.,* Myriam Gilles, *Killing With Kindness,* 88 NOTRE DAME L. REV. 825, __ ("most companies can quickly amend their clauses in response to or anticipation of litigation outcomes, revealing a nimble and adaptive corporate feedback loop"); Ann Marie Tracey & Shelley McGill, *Seeking a Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in* AT&T Mobility LLC v. Concepcion, 45 LOY. L.A. L. REV. 435, 440 (2012) ("It will take only seconds for businesses to amend unilaterally their online contracts of adhesion and remove class actions from existence, assuming they have not already done so.").

[52] *See, e.g.,* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 89 (2000) ("[W]e have recognized that federal statutory claims can be appropriately resolved through arbitration....").

[53] See, e.g., J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1167 (2012) (reporting on a study of contracts imposed by financial services and telecommunications firms finding "that 75 percent contained mandatory arbitration clauses, and 80 percent contained class action waivers," and that "a stunning 93 percent of these companies' employment agreements mandated arbitration" (*citing* Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REF. 871, 882–84 (2008)); see also Linda J. Demaine & Deborah R. Hensler, "*Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The*

since the Court's 2011 decision in *Concepcion*, where the majority lauded AT&T's arbitration clause as being fundamentally fairer and better for consumers than litigation.[54] As a result of the Court's extended emphasis on AT&T's "consumer-friendly" arbitration clause, it "has become a sort of gold standard to transactional attorneys," and corporate advisors are actively urging clients to follow AT&T's model.[55] Our research indicates

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Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55, 62 n.30 (2004) (finding that approximately 55 percent "of businesses that offer an ongoing product or service" included an arbitration clause in the written contract); Chris Drahozal & Peter Rutledge, *Contract and Choice*, __ B.Y.U. L. REV. __ (forthcoming 2013) (reporting that 48% of consumer credit card agreements contain arbitration clauses, and that 99% of those clauses contain class action waivers).

[54] AT&T's arbitration clause provided that all fees and costs of suit are recoverable by a prevailing plaintiff, and offered cash bounties where claimants receive an arbitration award superior to defendant's final pre-award offer, among other features. AT&T Mobility Arbitration Agreement (on file with the authors).

[55] See, e.g., Gibson Dunn LLP, *U.S. Supreme Court Finds That Class Action Waivers in Arbitration Agreements Are Enforceable under the Federal Arbitration Act* (Apr. 27, 2011), http://www.gibsondunn.com/publications/pages/USSupremeCourtFinds-ClassActionWaiversInArbitrationAgreementsAreEnforceableUnderFederalArbitrationAct.aspx (last visited Jan. 20, 2013) ("The wording of the majority decision in AT&T Mobility does not seem to require similar provisions in an arbitration agreement, although the Court did observe that the district court concluded that the guaranteed amounts would put the Concepcions in a better position than if they were participants in a class action."); Alan Kaplinsky, *Status of Overdraft Fee Litigation*, 1871 PLI/CORP. 209, 2011 (recommending that banks facing class action liability on overdrafts—"only a handful [of which] have arbitration provisions"—draft "the types of consumer-friendly features necessary to ensure enforceability"); see also JOSEPH MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS, §2.14 (8th ed. 2011) ("Although *Concepcion* was not predicated on the existence of consumer-friendly provisions, cautious drafting should lead companies to hew closely to the terms of the agreement involved in that case and: [m]ake consumer arbitration low cost or cost-free [and] . . . [c]onsider using premiums: financial incentives for customers or employees to arbitrate and allow arbitrators to award attorney's fees."); Weil, Gotshal & Manges LLP, *Second Circuit Strikes Down Class Arbitration Provisions in In re American Express Merchants Litigation*, *3 (Feb. 26, 2009), available at http://www.weil.com/files/upload/WeilBriefing_LitReg_090226.pdf (last visited Jan. 20, 2013) ("Another option for businesses to consider, to the extent they wish to increase the possibility that their class arbitration waiver provisions will be enforceable under In re American Express, is the inclusion of a fee-shifting provision for attorneys' fees and expert costs."); Hilary B. Miller, *What Payday Lenders Need to Do About Arbitration* (May 2, 2011), http://myemail.constantcontact.com/What-Payday-Lenders-Need-To-Do-About-Arbitration---Now.html?soid=1101566873044&aid=SGkv356PqJU (last visited Jan. 20, 2013) ("Lenders should give serious consideration to updating their agreements to provide for

that clients have taken this advice to heart as an efficient means of avoiding nearly all forms of aggregate liability.[56]

In the aftermath of *Concepcion*, lower federal courts have compelled individual arbitration of otherwise class-able claims in the vast majority of cases,[57] and courts will likely continue to do so in the wake of

every one of the consumer protections included in the AT&T arbitration agreement. In other words, at a minimum, the lender-eats-fees provision, venue, preservation of small court claims, opt-out and bump-up provisions of AT&T's clause should be an element of any class action waiver provision.").

[56] *See* Gilles, 88 NOTRE DAME L. REV. at __ (showing that 32 major U.S. consumer-oriented companies amended their arbitration clauses in the aftermath of *Concepcion* to add more consumer-friendly provisions).

[57] *See, e.g., Coiro* v. Wachovia Bank, N.A., 2012 WL 628514, at *6 (D.N.J. Feb. 27, 2012) ("After considering the evidence presented to it, the Court is not convinced that Plaintiff has met her burden in demonstrating that enforcement of the class-action waiver would effectively preclude any action seeking to vindicate proposed class members' legal rights."); Emilio v. Sprint Spectrum L.P., 2012 WL 917535, at *4 (S.D.N.Y. Mar. 16, 2012) ("Petitioner has not demonstrated that any of his statutory rights would be precluded through the Court's enforcement of the class action preclusion provision . . . ."); LaVoice v. UBS Fin. Servs., Inc., 2012 WL 124590, at *7–8 (S.D.N.Y. Jan. 13, 2012) (finding the evidence of prohibitive costs of individual arbitration "too speculative to justify the invalidation of an arbitration agreement"); Herrington v. Waterstone Mortg. Corp., 2012 WL 1242318, at *2 (W.D. Wisc. Mar. 16, 2012) (finding plaintiff failed to prove that the costs of individually arbitrating her claims would be prohibitive "because she failed to conduct any comparison of the costs of litigating in federal court"); Khan v. Orkin Exterminating Co., 2011 WL 4853365, at *4 (N.D. Cal. Oct. 13, 2011) (where plaintiff is "seeking to establish that it is too costly for him to pursue consumer protection claims on an individual as opposed to a class basis, the Court notes that post-*Concepcion* decisions have rejected the cost of litigation as a basis for invalidating a class action waiver"); Tory v. First Premier Bank, No. 10 C 7326, 2011 WL 4478437, at *4 (N.D. Ill. Sept. 26, 2011) ("*Concepcion* moots any argument on the cost benefits to the plaintiff of a class action versus an individual arbitration."); Black v. JP Morgan Chase, Civil Action No. 10-848, 2011 WL 3940236, at *21 (W.D. Pa. Aug. 25, 2011) (same); In re Apple and AT&T iPad Unlimited Data Plan Litig., 2011 WL 2886407, at *3 (N.D. Cal. July 19, 2011) ("Plaintiffs contention that their modest claims 'simply do not provide sufficient motivation for an aggrieved customer to seek redress' on an individual basis is the very argument that was struck down in *Concepcion*."); Arellano v. T–Mobile USA, Inc., 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011) (finding that *Concepcion* forecloses argument that an arbitration agreement is void because small claims might be prohibitively expensive to pursue on an individual basis); Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1207 (11th Cir. 2011) (finding that "[i]nsofar as Florida law would invalidate [class action waivers] as contrary to public policy . . . such a state law would 'stand[] as an obstacle to the accomplishment and execution' of the FAA, and thus be preempted" under Concepcion) (internal citations omitted); Simpson v. Pulte Home

American Express. And there seems no help in sight: neither legislation overruling *Concepcion*[58] nor regulatory measures rendering class action waivers unenforceable appear likely in the current political climate.[59] To

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Corp., 2012 WL 1604840, *5 (N.D. Cal May 7, 2012) ("In view of *Concepcion* and its progeny, the Court is not persuaded by Plaintiffs' contention that the class action waiver is substantively unconscionable."); Alvarez v. T-Mobile USA, Inc., 2011 WL 6702424, *7 (E.D. Cal. Dec. 21, 2011) (refusing to consider public policy-based arguments against enforcement of class action waiver because "those arguments are not viable post-*Concepcion* [as] state laws advancing those policies are preempted by the FAA"); In re California Title Ins. Antitrust Litig., 2011 WL 2566449, at **2–3 (N.D. Cal. June 27, 2011); Clemins v. Alliance Data Sys. Corp, No. 11-C-36 (E.D. Wisc. Oct. 12, 2011) (applying *Concepcion* and enforcing class action waiver in credit card agreement); Chavez v. Bank of Am., 2011 WL 4712204 (N.D. Cal. Oct. 7, 2011); Kaltwasser v. AT&T Mobility LLC, 812 F. Supp. 2d 1042, 1048-9 (N.D. Cal. 2011) (declaring that the vindication-of-right doctrine has no viability after *Concepcion*, at least insofar as class action waivers are concerned); Villegas v. U.S. Bancorp, No. C-10-1762, 2011 WL 2679610, (N.D. Cal, June 20, 2011).

[58] Congress continues to consider various versions of the Arbitration Fairness Act, which would amend the FAA to invalidate all arbitration clauses in consumer or employment contracts. *See* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong., 1st Sess. § 4, 155 CONG. REC. H1517 (Feb 12, 2009) (invalidating agreements requiring arbitration of employment, consumer and civil rights disputes); Arbitration Fairness Act of 2007, S1782 § 4, 110th Cong, 1st Sess., 153 CONG. REC. S9144 (July 12, 2007) (invalidating agreements requiring arbitration of employment, consumer and civil rights disputes); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong, 1st Sess., § 4, 153 CONG. REC. H7774 (July 12, 2007) (invalidating agreements requiring arbitration of employment, consumer and civil rights disputes).

In the immediate wake of the Supreme Court's decision in *Concepcion,* Senators Al Franken and Richard Blumenthal, along with Congressman Hank Johnson, reintroduced a 2011 version of the bill, which would prohibit class waivers in all consumer, employment, and civil-rights-related contracts. This most recent version has also failed to garner much legislative support. *See*, *e.g.*, Editorial, *Gutting Class Action*, N.Y. TIMES, May 12, 2011, at A26 (noting that the chances of federal legislation overriding Concepcion "aren't great in the current political environment").

And again, in 2013, anticipating the outcome in *American Express*, another version of the bill was introduced in the House and Senate. *See* H.R. 1844, 113th Cong., available at http://www.govtrack.us/congress/bills/113/hr1844/text; S. 878, 113th Cong., available at http://www.govtrack.us/congress/bills/113/s878. And again, the odds of either even making it through committee seem slim.

[59] For example, the Dodd-Frank Act created the Consumer Financial Protection Bureau ("CFPB"), and required the agency to conduct a study of and submit a report to Congress on the use of arbitration in consumer transactions, and "prohibit or impose conditions or limitations on the use of . . . arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers." Dodd-Frank Wall Street Reform

sum it up: we now exist in a world where contractual bans on aggregate claiming are per se enforceable, where every company has the option to exempt itself from class action liability by simply adding a "consumer-friendly" arbitration clause language to its terms and conditions, and where the Supreme Court has repeatedly hailed arbitration as providing a relatively inexpensive vehicle for addressing individual, small-value claims-- one that is both more accessible than the courts and where claimants might fare at least as well as they might in court.

These developments in class action and arbitration jurisprudence foretell a massive transformation in adjudicative structures and procedures, as claims shift wholesale into arbitral fora. Currently, however, the major arbitral bodies appear ill-prepared for the onslaught of claims that may be coming their way now that public courts have closed the door to many forms of aggregate litigation.

B. *Arbitral Unease with Aggregation*

Arbitration, in its ideal form, allows both sides of a legal dispute to trade the advantages of adjudication in a court of law in exchange for advantages gained in so-called "alternative dispute resolution" systems. Under basic economic theory, both contractual partners can benefit from arbitration.[60] It is theoretically possible that "individuals may be better off agreeing [to] arbitration clauses instead of retaining their right to go to court, if the resulting cost savings are passed on to consumers through reductions in the price of goods and services [or] to employees through higher wages."[61] And it is even more likely that the businesses which

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and Consumer Protection Act § 1021, 12 U.S.C § 5511, § 5518. (2010). The CFPB is currently running its arbitration study, but the embattled agency has other items on its plate. *See, e.g.*, Jennifer Bendery, *Richard Cordray CFPB Confirmation Imperiled by Senate Republicans, Again*, available at http://www.huffingtonpost.com/2013/02/01/richard-cordray-cfpb_n_2599838.html.

[60] *See, e.g.*, Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 5-7 (1995) (describing benefits that parties might derive from ex ante alternative dispute resolution agreements).

[61] Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 741; *see also* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements--with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 255 (2006) ("[W]hatever lowers costs to businesses tends over time to lower prices to consumers."); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91-93 (asserting that

employ and enforce arbitration clauses against consumers, employees and others benefit from a combination of fewer claims, reduced costs, and greater predictability in outcomes. The idea that arbitration could work to the mutual advantage of parties who were otherwise typically locked in conflict was a major reason for the early enthusiasm for arbitration among progressives and reformers.[62]

The reality is more complex, and the debate over whether arbitration can be beneficial for most potential litigants is tied up in arguments over consent, access, cost, and the neutrality of decisionmakers.[63] This article will not delve into these debates; rather, we take the arbitral rules and practices as a given. But we also predict that these rules and practices may prove insufficient to the task of

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adhesion agreements to arbitrate are fair in that they allow companies to pass on savings in costs from standard forms to their customers and employees).

[62] Arbitration gained prominence in the labor industry, for example, as a means of fostering self-government and peace preservation. *See, e.g.*, Textile Workers Union of Am. v. Lincoln Mills of Alabama Goodall-Sanford, Inc., 353 U.S. 448, 462-63 (1957) (Frankfurter, J., dissenting) (observing that judicial intervention in arbitration threatened "the going systems of self-government"). An early arbitration scholar, Frances Kellor, commenting on arbitration in general, noted that "any instrumentality which reduces the burden of waste and cost of disputes to a nation is an activating power for the advancement of civilization." FRANCES KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS 117 (1948).

Laura Nader has argued that the ADR movement gained momentum when elite lawyers endorsed a "harmony model" of law which turned away from a traditional conflict-driven legal system (which had dominated the nation's first 150 years). Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Reform Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 7 (1993). To illustrate her point, Nader cited Chief Justice Warren Burger, who extolled arbitration and "said lawyers should serve as healers, rather than warriors, procurers, or hired guns." *Id. See also* Deborah Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 85 (arguing that the premise under which parties with legal claims prefer to resolve their "claims through mediation rather than adversarial litigation and adjudication seems to be based on questionable assumptions and debatable extrapolations from other social conflict contexts").

[63] *See, e.g.*, Jean R. Sternlight, *ADR is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L. J. 289, 303 (2003) (asserting the importance of a conflict resolution "system that contains multiple procedures (e.g. both litigation and mediation)"; Richard Delgado, *Alternative Dispute Resolution Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391 (1997) (attacking mediation because of power imbalances for minorities in American society); Bryant Garth, *Tilting The Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927 (2002).

administering and managing mass individual arbitrations under either model we describe in the next two Parts – necessitating amendment and revision to account for the impending surge of claims.

For example, the major arbitration associations and their supporters often tout the "streamlined and efficient" manner in which arbitration is conducted.[64] These efficiencies are largely achieved by rules limiting the parties' ability to engage in fact-discovery,[65] exchange pre-hearing briefs,[66] rely on standard admissibility of evidence,[67] or appeal arbitral decisions.[68] Arbitration hearings are restricted to brief presentations of sworn evidence, with few of the procedures that serve as markers of due process in the civil justice system.[69] As critics of arbitration have long argued, these seemingly neutral rules may have disproportionately negative effects on consumers and employees.[70] But,

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[64] *See, e.g.,* Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, POL'Y ANALYSIS, Apr. 18, 2002, at 3 ("[A]rbitration typically reduces costs ... by streamlining discovery.").

[65] For example, the AAA's Healthcare Payor Provider Arbitration Rules, which govern billing-related disputes, limit discovery to one deposition per party unless ordered by the arbitrator. *See* AAA Rule 19. Similarly, AHLA rules provide that the "arbitrator may allow the parties to conduct such reasonable discovery and exchange exhibits as the arbitrator believes necessary or proper." *See* AHLA Rule 4.02. *See also* Foremost Yarn Mills v. Rose Mills, 25 F.R.D 9 (E.D. Pa. 1960) (finding that the FAA does not make discovery procedures available to parties to an arbitration").

[66] *See* AAA Rule 28 (describing preparation of an "Arbitration Record" in advance of hearing, which should states facts both conceded and in dispute, in lieu of pre-trial briefing).

[67] *See* AAA Rule 31 ("Conformity to legal rules of evidence shall not be necessary.")

[68] The FAA limits judicial review of arbitral awards to cases involving "manifest disregard of the law," 9 U.S.C. § 10, or "evident material miscalculation." 9 U.S.C. § 11(a)-(c). The Uniform Arbitration Act and the acts adopted by most states allow an award to be vacated only upon the showing of: (a) corruption, fraud or other influence exercised as a means of obtaining the award; (b) evident partiality or misconduct on the part of the neutral arbitrators; (c) the arbitrators exceeding their powers; (d) arbitrator's refusal to postpone a hearing or refusal to hear material evidence without sufficient cause; or (e) lack of agreement to arbitrate by the parties. *See also infra* Part III.A.

[69] *See, e.g.,* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) ("[T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, often are severely limited or unavailable.")

[70] *See, e.g.,* Jean Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 683 (1996) (asserting

for our limited purposes here, these privately-ordered modifications of the public adjudicative system will not have distinctly negative effects on the models we describe, as they do not in themselves create any obstacles to informal aggregation of claims.

Other rules may, however, prove deeply problematic to any efficient massing of arbitrations. Formally, it is now broadly accepted that "[p]rinciples of stare decisis and res judicata do not have the same doctrinal force in arbitration proceedings as they do in judicial proceedings."[71] This means that each arbitration stands on its own and has no precedential effect on similar, unrelated arbitration proceeding.[72] And, because arbitrators lack the authority to enjoin ongoing wrongful activity, each claimant bringing a separate claim has no overall impact on policy or practices that have widespread effect.

But even informally, the principal arbitral associations have promulgated a set of rules and expectations that hinder any attempt to generate precedent. For example, the AAA currently requires that "all disclosures to the arbitrator, and any determinations of the arbitrator, shall remain confidential, not subject to disclosure in any subsequent arbitration or litigation between the parties."[73] Further, no arbitral body currently requires that a legal record of the proceedings be kept.[74] This means that,

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that the arbitral rules limiting discovery harm consumers because the corporation is the party with all the records, and the consumer is the one that needs access to them).

[71] *See, e.g.,* Connecticut Light & Power Co. v. Local 420, 718 F.2d 14, 20 (2d Cir. 1983), *citing* Butler Armco Independent Union v. Armco Inc., 701 F.2d 253 (3d Cir.1983); Metropolitan Edison v. NLRB, 663 F.2d 478 (3d Cir.1981), cert. granted, 457 U.S. 1116 (1982); Riverboat Casino, Inc. v. Local Joint Executive Board of Las Vegas, 578 F.2d 250 (9th Cir.1978).

[72] As a practical matter, however, arbitrators may take prior decisions into account, and, given the informal evidence rules of arbitration, it is hard to see on what grounds efforts to include information about prior decisions could be excluded, even if they do not have any binding effect. *See* Korn & Rosenberg, *supra* note __ at *30 n.89 ([a]rbitrators increasingly rely on arbitral precedents—case records, orders, and awards—in making their decisions").

[73] AAA Rule 14.6. While parties in traditional litigation can also obtain confidentiality orders and submit documents and testimony under seal, obtaining privacy in traditional litigation is a far more burdensome and less certain process than in arbitration.

[74] *See, e.g.,* House Grain Co. v. Obst, 659 S.W.2d 903 (Tex. App. 1983). *See also* Gordon Firemark, *Arbitration in Entertainment Contracts: Worth Fighting About?* ("[S]ince no written opinion exists, an arbitration award has little or no significance as precedent for the parties or others to follow in future situations."); Ted Johnson, *Arbitration Clauses Irk Creatives*, VARIETY (Oct. 2011), available at

even in a jurisdiction such as California that requires publicity of arbitral awards, there is no requirement that the arbitrator explain her reasons or provide any reliable analysis of the issues.[75] The rules that shroud arbitration decisions are bolstered by the underlying contracts of many consumer-oriented companies, which specifically provide that "no arbitration award or decision will have any preclusive effect as to the issues or claims in any dispute with anyone who is not a named party to the arbitration."[76] Moreover, it would be naive to assume that all of this can be dealt with by back-end judicial review of arbitral decisions; such review is quite limited by FAA §10 to cases involving "manifest disregard of the law" – a high standard that seems especially difficult where an arbitrator's regard for "the law" is opaque.[77]

Taken together, these rules contemplate and conspire to silo individual claims by removing any practical means of transmitting information adduced or determinations made in one arbitration to subsequent, related arbitrations. Broad confidentiality and the absence of a written record make it virtually impossible to reproduce in arbitration the collateral estoppel effects that create the efficiencies witnessed in traditional litigation.[78]

Indeed, the problem may lie deeper than the arbitral bodies' positive rules or the unilateral ability of companies to add even more iron-clad promises of privacy to existing arbitration clauses; the utter absence of procedures designed to facilitate mass arbitrations is also striking. For example, neither AAA nor JAMs currently have any discernible rules on how to obtain a single arbitrator for a set of related arbitrations, how to schedule related arbitrations in a compressed timeframe, or how to use a

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http://www.variety.com/article/VR1118045188 (asserting that because there is no precedential value from prior arbitration proceedings, it is as if each new proceeding is like "groundhog day").

[75] Rule R-41(a)-(b); *see also* Standing up For Seniors: How the Civil Justice System Protects Elderly Americans, www.justice.org/seniors (predicting that "many offenses will never see the light of day due to arbitration clauses" because, "[w]hile litigation has revealed instances of abuse," arbitration reveals nothing).

[76] *See, e.g.*, Agreement for American Express Card Acceptance, Nov. 2012 (on file with the authors).

[77] FAA § 10.

[78] *See, e.g.*, Collins v. D.R. Horton, Inc., 361 F.Supp.2d 1085, 1097 (D.Ariz.2005) ("The reasons for requiring arbitrators to apply res judicata and collateral estoppel are the same as those underlying the doctrines themselves—finality, protection of judgments, prevention of duplicative litigation, and avoidance of inconsistent results.")

single expert report across multiple arbitrations. There are no "best practices" governing damages calculations or the alignment of awards across arbitrations. Nor do the major arbitral associations currently offer volume discounts on arbitral costs or neutrals' fees for those seeking to arbitrate a mass of related claims.

On the other hand, nothing *prevents* one or all of arbitral bodies from adopting new practices designed to meet new needs of the parties before them. In fact, if, as the Supreme Court has repeatedly held, a "fundamental attribute" of arbitration (at least as intended by Congress) is "to facilitate streamlined proceedings," then it is hard to see why arbitral bodies would resist accommodating parties who must appear in related separate arbitrations by coordinating schedules, offering volume discounts on arbitral costs or neutrals' fees, or even providing greater transparency about awards for similar claims.[79]

So while existing procedures are clearly designed to aid the individual claimant in the individual arbitration to resolve a specific, fact-intensive dispute, we think claimants and lawyers will push for more friendly procedures to maximize efficiencies, and that ultimately, the arbitral bodies will find workable mechanisms to manage mass arbitrations. After all, there was a period (between *Bazzle* and *Stolt-Nielsen*) during which the AAA changed its rules to accommodate class arbitration. It eliminated the presumption of confidentiality and promulgated other class-friendly procedures.[80] These changes demonstrate that arbitration is a market-driven, private enterprise, and that the arbitral bodies are fully capable of responding to changes in client needs and the legal environment.[81] The models we describe in the next two Parts are heavily reliant on the ability of private arbitration to adapt to evolving public needs.

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[79] *See AT&T Mobility* at 1748 ("The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to *facilitate streamlined proceedings*.") (emphasis added).

[80] *See* AAA Supplementary Rules of Class Arbitrations (July 14, 2005).

[81] For example, in 1999, the AAA significantly revised its rules in response to concerns relating to discretion and authority of arbitrators. Over the years, the association has added Optional Procedures for Large, Complex Cases, and amended the Expedited Procedures for small cases to make them more efficient.

PART II
THE HYBRID MODEL

One potential work-around to current anti-class action jurisprudence and the inefficiencies of individual arbitration is to leverage the rules and authority of a judicial judgment to maximize the efficiency of mass private arbitrations. This hybrid approach, drawing on both judicial and arbitral processes, will not work in all cases and faces serious challenges; nonetheless, we think the various pathways to obtaining a public liability ruling will motivate entrepreneurial lawyers in a significant subset of claims.

A. *The Public Liability Ruling*

Lawyers seeking an enforceable judicial judgment upon which to base subsequent serial arbitrations have a number of options. This may be possible where, for example, the arbitration clause specifically denies the arbitrator the authority to grant injunctive relief in an individual arbitration. In this scenario, plaintiffs may argue that claims for injunctive relief are properly before the court.[82] One challenge that plaintiffs will confront, even in the subset of cases where they can show that broad injunctive relief is necessary, is the argument that even claims for injunctive or declaratory relief must nonetheless be brought in an individual arbitration hearing. In other words, defendants may argue that the individual plaintiff could obtain the broad, and even potentially market-wide, injunctive relief in an individual proceeding – and more specifically, in the contracted-for individual arbitration.[83] But it remains

[82] Of course, many of the cases comprising contemporary class practice do not implicate injunctive concerns. Oftentimes, the complained-of conduct has ceased by the time a class action is filed, or by the time certification is sought.

[83] *See, e.g.*, Craft v. Memphis Light, Gas, and Water Div., 534 F.2d 684, 686 (6th Cir. 1976), *aff'd*, 436 U.S. 1 (1978) (finding (b)(2) class certification inappropriate where class treatment is "not needed"); Ali v. Quarterman, No. 9:09-CV-52, 2009 WL 1586691, at *1 (E.D. Tex. June 4, 2009) (justifying denial of certification because injunctive relief in pending non-class action would provide same remedy); Access Now Inc. v. Walt Disney World Co., 211 F.R.D. 452, 455 (M.D. Fla. 2001) (finding "complexity and expense" of class action unnecessary when injunctive relief in a single case would provide same remedy); Fairley v. Forrest Cnty., Miss., 814 F.Supp. 1327, 1329-30 (S.D. Miss. 1993) (determining class action unnecessary because declaratory and injunctive relief would have same effect); see also United Farmworkers of Fla. Hous. Project, Inc. v.

to be seen how many defendants will be willing to agree that plaintiffs may take aim at their nationwide practices in a string of individual, largely non-reviewable arbitrations.[84]

A second pathway to a judicial ruling on liability that can be used in the arbitral arena arises where there are some stray claimants who are not bound by arbitration clauses, but who are similarly situated with the claimants who are bound by such clauses. This arises more frequently than one might think[85]: large consumer-facing organizations encounter massive challenges in managing multiple iterations of agreements, phasing out legacy or grandfathered agreements and regularizing terms and

City of Delray Beach, 493 F.2d 799, 812 (5th Cir. 1974) ("Even with the denial of class action status, the requested injunctive and declaratory relief will benefit not only the individual appellants ... but all other persons subject to the practice under attack."); Green v. Williams, 1980 U.S. Dist. LEXIS 17881, at *5 (E.D. Tenn., Dec. 17, 1980) (finding that "certification of an action as a class action under Rule 23(b)(2)... is inappropriate where the injunctive and declaratory relief sought… would automatically accrue to the benefit of the class members").

[84] *See infra* text accompanying notes __-__ (describing AT&T's response to thousands of individual arbitrations filed to block its merger with T-Mobile); *see also* AT&T Mobility v. Concepcion, 131 S.Ct. at 1750 (in derogating class arbitration, the majority concluded "[w]e find it hard to believe that defendants would bet the company with no effective means of review"). *See also* Barbara Black, *Arbitration of Investors' Claims Against Issuers: An Idea Whose Time Has Come?*, 75 LAW & CONTEMP. PROBS. 107, 108 (2012) (asserting that "the very narrow grounds for judicial review of arbitration awards may make the risk of an aberrational award unacceptably high"); Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 454 (2010) (identifying high-risk categories where defendants prefer litigation over arbitration); Sternlight, *supra* note __, at 91 (noting that "a company might hurt itself rather than consumers by eliminating class actions, because the company might then face numerous individual claims brought in arbitration" – which may create a greater financial threat if injunctive relief is sought that could force the company to change its practices in ways that harm its profitability).

[85] Given how easy it is for businesses to add or amend arbitration clauses to their new and existing agreements, one might assume that all companies have done so effectively in response to recent pro-arbitration legal decisions. *See, e.g.*, Gilles, 88 NOTRE DAME L. REV. at __ (noting that "most companies can quickly amend their clauses in response to or anticipation of litigation outcomes, revealing a nimble and adaptive corporate feedback loop"), citing Ann Marie Tracey & Shelley McGill, *Seeking a Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in* AT&T Mobility LLC v. Concepcion, 45 LOY L.A. L. REV. 435, 440 (2012) ("It will take only seconds for businesses to amend unilaterally their online contracts of adhesion and remove class actions from existence, assuming they have not already done so.").

conditions in the wake of acquisitions and mergers.[86] Of course, the judicial liability ruling will have no value in the arbitral arena unless the requirements of non-mutual, offensive issue preclusion are met. But here, where the arbitral claimants by definition "could not easily have joined" the prior judicial proceeding,[87] the test boils down to whether the issue in the two proceedings is identical.

A third route to judicial resolution runs through the offices of public enforcers. Where state attorneys general, administrative agencies or others establish critical liability facts in the course of judicial enforcement actions, the predicate may be established for plaintiffs' lawyers to avail themselves of serial arbitration strategies. For example, when a state attorney general pursues a claim against a wrongdoer on behalf of citizens of the state, she generally does so based on a state or federal remedial statute that specifically provides for a broad grant of *parens* patriae authority to seek injunctive or declaratory relief.[88] Those efforts can inure to the benefit of private lawyers, who may employ judgments attained in enforcement actions in later arbitral hearings alleging the same wrongdoing. Indeed, it may be in the interests of private lawyers to enlist public enforcers towards these ends, and even to offer their services at discounted rates.[89]

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[86] A surprising example comes from Alan Kaplinsky who observes that, in the *Checking Overdraft* cases, where the players were sophisticated and well attuned to the dangers of class litigation, a number of the defendant institutions were vulnerable because they failed to maintain class waivers with respect to some subset of their consumers. Alan Kaplinsky, *Status of Overdraft Fee Litigation*, 1871 PLI/CORP. 209 (2011) (reporting that "only a handful [of banks] have arbitration provisions" leaving many vulnerable to class action liability on overdrafts").

[87] *See, e.g.,* Parklane Hosiery v. Shore, 439 U.S. 322, 331 (1979) ("The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where … the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.").

[88] *See,* Gilles & Friedman, *supra* note __, at 662.

[89] *Id.*, *supra* note __, at 669. In these arrangements it will be particularly important for the State to retain control of the litgation, since the private counsel will have an interest in obtaining a judicial resolution that can be retailed in arbitrations. But that is nothing extraordinary: the state must retain ultimate authority in any event under the law of most states. *Id*. at __ ("The principal legal constraint is the requirement, imposed by several courts, that the AG must maintain total control over all key decision making lest the retainer agreement [with private counsel] violate public policy as an unlawful delegation of the AG's authority.").

Whatever pathway to a judicial resolution is taken, this entire model depends upon the supposition that arbitrators will accord preclusive effect to the liability determinations made in court.[90] The case law suggests that they should – *i.e.*, that the doctrine of *Parklane Hosiery* ought to apply with full force in the judicial-to-arbitral context: "[a]rbitrators are not free to ignore the preclusive effect of prior judgments under the doctrines of res judicata and collateral estoppel."[91]

B. *The Return on Investment*

Tremendous benefits obtain from a judicial determination of liability. First, if there is an underlying fee-shifting statute,[92] lawyers can recover their fees and costs in the case of an individual claimant or in representing an arbitration-free client seeking an injunction or declaratory judgment. The current practice is for courts to grant class counsel attorneys fees on a rate-times-hours-worked lodestar basis (generally

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[90] It appears settled that determinations made in the arbitral fora are accorded preclusive effects in subsequent litigation. *See* WAYNE J. POSITAN & DOMENICK CARMAGNOLA, EMPLOYMENT TORTS, IN BUSINESS TORTS LITIGATION 81, 123 (David A. Soley et al. eds., 2d ed. 2005) (citing examples where preceding arbitration decisions were deemed to have preclusive effect in subsequent court proceedings). This appears the case even where "the arbitration procedures, especially regarding discovery, may offer less protection than those of a civil trial." Steven P. Nonkes, *Reducing the Unfair Effects of Nonmutual Issue Preclusion Through Damage Limits*, 94 CORNELL L. REV. 1459, 1474 (2009).

[91] Aircraft Braking Sys. Corp. v. Local 856, 97 F.3d 155, 159 (6th Cir.1996); Miller v. Runyon, 77 F.3d 189, 193 (7th Cir.1996); John Morrell & Co. v. Local Union 304A, 913 F.2d 544 (8th Cir.1990); Collins v. D.R. Horton, Inc., 361 F.Supp.2d 1085, 1097 (D.Ariz.2005) ("The reasons for requiring arbitrators to apply res judicata and collateral estoppel are the same as those underlying the doctrines themselves—finality, protection of judgments, prevention of duplicative litigation, and avoidance of inconsistent results."), *affirmed*, 505 F.3d 874, 880 (9th Cir. 2007).

[92] Alexander G. Osevala, *Let's Settle This: A Proposed Offer of Judgment For Pennsylvania*, 85 TEMP. L. REV. 185, 195 (2012) (noting that there are over "200 federal and close to 2,000 state statutes that allow the shifting of attorneys' fees"). These include civil rights statutes, *see, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. § 12205 (2006); Civil Rights Attorney's Fee Act, 42 U.S.C. § 1988 (1982); employment-related statutes, *see, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (2006); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (2006); and consumer rights statutes, Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(3) (2006).

without a multiplier[93]) in non-common-fund, statutory fee-shifting cases.[94] If the claim is brought by the public enforcer – by the legal staff of a state attorney general, agency or other public entity, or in conjunction with private lawyers – the costs of proving wrongdoing are paid in salaries to public officials or in accordance with contracts entered into with private lawyers.[95] In either event, the ability to recover these initial investment costs is critical to the profitability of the next phase of the venture.

Importantly, however, expert costs are not generally recoupable.[96] The Supreme Court has repeatedly held that the "costs" recoverable under 28 U.S.C §1920 and FRCP 54(d) exclude expert witness fees, and that the cost-shifting provisions of statutes such as the Clayton Act simply do "not permit a shift of expert witness fees."[97] Not all cases require expensive or extensive expert engagement, but for those that do, counsel will necessarily factor this cost into the initial determination of whether the case is worth the investment.

Second, the antecedent court proceeding may make available a list of injured victims, either through discovery or in the case of judicially-mandated class notice.[98] Once lawyers can contact victims to explain the nature of the claim, they can structure a variety of agreements that would allow the claimant to transfer, assign, or pay a percentage of recovery upon success of her claim in arbitration. Because the attorney is acting for herself and not representing the claimholder in a legal proceeding, ethical restrictions should not stand in the way; for example, neither MRPC 1.8(a), which imposes special duties on attorneys who seek to enter into a business transaction with a *client*, nor MRPC 7.3(a), prohibiting direct solicitation of a *client*, limits an attorneys freedom of action compared to

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[93] *See, e.g.,* Purdue v. Kenny A. ex rel. Winn, 559 U.S. 542 (2010) (finding that enhancement of the lodestar is may only be awarded in "rare" and "exceptional" circumstances).

[94] *See* MANUAL FOR COMPLEX LITIGATION, § 24.13 ("[I]n a statutory fee case... the lodestar is the appropriate method.")

[95] *See* Gilles & Friedman, *supra* note __, at __ (describing contacting strategies between public and private enforcers).

[96] 28 U.S.C. §1920.

[97] *See* West Virginia University Hospitals, Inc v Casey, 499 U.S. 83, 94, 99-100 (1991); Crawford Fitting Co v J.T. Gibbons, Inc, 482 U.S. 437, 442 (1987).

[98] This assumes that the information is not protected by a protective order – which typically limits information to the instances of the litigation for which it was produced – which is far more likely in a case brought on behalf of an arbitration-free client or when representing the state.

an arbitration entrepreneur who is not an attorney, would apply to our model.[99]

The transaction costs of contacting each claimant and negotiating each retainer agreement will be high, but attorneys will have an incentive to run as many arbitrations as possible off a single liability judgment to increase their overall profit.[100] Also, we can imagine lawyers negotiating volume discounts on arbitration rates and neutrals' fees, which would also incentivize greater numbers of claims in order to reduce overall transaction costs.

Importantly, profit margins in these individual arbitrations would remain small – but because other costs can be significantly reduced or recouped on the hybrid model, any damages awarded in the individual arbitrations are gravy. Nevertheless, the low profit margins will make many claims unattractive to many lawyers, and more generally, renders this model an imperfect substitute for class action litigation. Still, we think the hybrid approach has the potential to be a second-best in a world purged of the class action device, where lawyers experienced in aggregate litigation are seeking ways to ply their trade and where the alternative is that vast number of small-value claims are simply never brought.[101]

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[99] ABA Model Rules of Professional Conduct ("MRPC"), Rule 1.8(a) limits the circumstances under which a lawyer may enter into a "business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client." MRPC Rule 7.3(a) prohibits "in‑person, live telephone or real-time electronic contact" to solicit *professional* employment. A lawyer may contact a non-client to solicit a non-professional business relationship. *See, e.g.* Indiana State Bar Association Legal Ethics Committee, Formal Opinion 02-1 (2002) (lawyer may contact non-clients to market financial products and lawyer may market financial products to clients as long safeguards required by MRPC Rule 1.8(a) are observed).

[100] It is not obvious that the transaction costs of aggregating small-value claims are necessarily prohibitive. In Australia, for example, litigation funding firms such as IMF have built a successful business model based on opt-in consumer class actions. *See* Christopher Hodges, John Peysner & Angus Nurse, *Litigation Funding: Status and Issues* 55-57 (2010) *available at* http://ssrn.com/abstract=2126506 ("Absent legislative change that would enable a funder to recover from all members of a class (and such a rule would be highly questionable on constitutional grounds), the right to recovery has to be contractual . . . [t]hus, funders need to have contracted with all, or at least a sufficient number, of class members before committing their money.").

[101] Some commentators believe that class action lawyers are moving entirely away from fields typically associated with aggregate litigation. *See, e.g.,* Ronen Avraham & John M. Golden, *From PI to IP: Yet Another Unexpected Effect of Tort Reform*, at http://ssrn.com/abstract=1878966 (July 12, 2012).

PART III
THE CLAIMS-BUYING MODEL

A second and complementary model envisions "arbitration entrepreneurs" – either lawyers or non-lawyers – buying up the claims of similarly-situated plaintiffs and then filing a single arbitration seeking to collectively resolve the hundreds or even thousands of accrued claims.[102] To some extent, this model proceeds from fairly straightforward business principles: for example, the initial legal research and reconnaissance into the strength and value proposition of the legal claim, as well as its potential risks and costs, resembles the inquiry that any entrepreneur would undertake prior to investment. Pricing and purchasing the claims on the open market should also be fairly clear-cut. The questions that this model provokes will center on the buying of legal claims and the bundling of those claims into a single arbitral hearing or a series of informally aggregated, streamlined, hearing.

A. *Buying Claims*

Consumers have legally enforceable rights and obligations which may have monetary value. For example, if a consumer has purchased a product, she has rights in warranty and tort law in the event of a legally cognizable injury.[103] The conventional way to transfer these rights is by assignment.[104] An assignment is the act of transferring to another all or

[102] From the perspective of the claims-buying model, lawyers and non-lawyers are the same in every respect: A lawyer buying a claim and litigating it on her own behalf is not representing a client nor earning a fee (although they may be a client and may pay a fee to a lawyer who may be in fact, themselves). *See Ness v. Gurstel Chargo, P.A.*, 2013 U.S. Dist. LEXIS 39012 (D. Minn. Mar. 20, 2013).

Note that in at least one state (New York) attorneys are prohibited from purchasing legal claims for themselves from anyone. See NY CLS Jud § 488 ("An attorney or counselor shall not . . . take an assignment of or be in any manner interested in buying or taking an assignment of a . . . thing in action, with the intent and for the purpose of bringing an action thereon.").

[103] *See,e.g.*, Robert F. Cooter, *Commodifying Liability*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 139 (F. H. Buckley, ed. 1999).

[104] *See* Harold R. Weinberg, *Tort Claims as Intangible Property: An Exploration from an Assignee's Perspective*, 64 KY. L.J. 49 (1975) *and* Andrea Pinna, *Financing Civil Litigation: The Case for the Assignment and Securitization of Liability Claims*, in NEW TRENDS IN FINANCING CIVIL LITIGATION IN EUROPE 119 (Mark Tuil and Louis Visscher, ed. 2010).

part of one's property, interest, or rights.[105] While transfer of legal claims was prohibited at early common law, the rule of non-assignability has been almost fully abandoned,[106] with the exception of personal injury claims.[107] Importantly, for the purpose of the claims-buying model, the modern law of assignment does not distinguish between purchases of single claims as opposed to multiple claims.[108]

Indeed, bulk assignment of claims has a long history in the United States,[109] as courts have come to recognize the benefits of bundling claims.[110] Nonetheless, barriers may persist against the purchase of claims

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[105] 6 AM. JUR. 2D, Assignments § 1 (2010).

[106] *See* Osuna v. Albertson, 184 Cal. Rptr. 338, 345 (Ct. App. 1982) (noting "the tendency of modern jurisprudence [to] strongly favor[] the assignability and the survivability of things in action"); McKenna v. Oliver, 159 P.3d 697, 699 (Colo. App. 2006) (finding that Colorado law generally favors the assignability of claims, with an exception for causes of action for invasion of privacy); Conrad Bros. v. John Deere Ins. Co., 640 N.W.2d 231, 236 (Iowa 2001) ("[T]he law now generally favors the assignability of choses in action, and courts have permitted the assignment of insurance policies under statutes providing for the assignment of contracts in exchange for a money payment."); Lemley v. Pizzica, 36 Pa. D. & C.2d 327, 330 (Ct. Com. Pl. 1964) ("The trend of judicial decisions as to the assignability of certain causes of action is to enlarge, rather than to restrict the causes that may be assigned."); Wis. Bankers Ass'n v. Mut. Sav. & Loan Ass'n of Wis., 291 N.W.2d 869, 876 (Wis. 1980) (describing the principle of assignability as exemplifying a trend of increasing commercial flexibility, shared by the courts and legislature).

[107] This exception is enforced everywhere except in Texas. *See, e.g.*, Beech Aircraft Corp. v. Jinkins, 739 S.W.2d 19, 22 (Tex. 1987) ("[A] cause of action for damages for personal injuries may be sold or assigned [in Texas].").

[108] The Supreme Court held that an assignee could purchase the contract claims of approximately 1400 payphone operators against various major long-distance phone companies even if the assignment required the assignee to return all of the damages recovered to the assignors (in exchange for a fee, the assignee took the claims "lock, stock, and barrel" and promised to remit "all proceeds" collected from the defendants to the assignors. *Sprint Communs. Co., L.P.*, 554 U.S. at 272 and 286.

[109] *See, e.g.,* McCord v. Martin, 166 P. 1014, 1015 (Cal. Dist. Ct. App. 1917) (assignment of other shareholders' fraud claims to one shareholder to prosecute upheld); Metropolitan Life Insurance Co. v. Fuller, 61 Conn. 252 (1891) (policyholders assigned claims to Fuller to prosecute after he had successfully sued the defendant in a prior proceeding; assignments were upheld against allegations of champerty). In the *Sprint* opinion, Justice Breyer pointed to *Spiller v. Atchison, T. & S. F. R. Co.*, 253 U.S. 117 (1920), which involved approximately 2000 individual claims assigned to a single assignee who then brought 2000 suits in order to collected (and remit) the damages suffered by the assignors. *See* Atchison, T. & S. F. R. Co. v. Spiller, 246 F. 1, 20 (8th Cir. Mo. 1917).

[110] *Id.* ("It would manifestly be both useful and convenient to policy-holders of the plaintiff, residing in this state, who . . . having . . . just demands, the individual

by lay persons or lawyers.[111] A minority of jurisdictions impose limitations on the assignment of claims for speculation or profit, by legislation.[112] Other states have held that bulk assignments for profit by parties without any connection to the underlying claim are against public policy.[113] In those states where bulk assignments are illegal, arbitration entrepreneurs could get around the prohibition by offering their services as "representatives" of the consumer in exchange for a large—perhaps all—of the recovery (minus a small payment paid in advance)[114] or buying a share of the underlying property interest for a token amount.[115]

enforcement of which, to any person in ordinary circumstances, would be so expensive and difficult as to amount to a practical impossibility, that a more fortunate person, of experience, ability and inclination, should assist them, and wait for his compensation until the suits were determined, and be paid out of the fruits of it.").

[111] It should be noted that the purchase of claims to be arbitrated by an attorney in her own name is not the same thing as the purchase of a claim by an attorney from her client, which may raise serious ethical issues. *See* MODEL RULES OF PROFESSIONAL RESPONSIBILITY 1.8(i) (lawyer may not acquire an interest in cause of action of client). This does not prohibit a lawyer from purchasing a claim from a non-client, though some states prohibit this practice by statute. *See, e.g.*, NEW YORK JUD. LAW § 489 (prohibiting an attorney from taking an assignment of a claim in order to bring suit upon it).

[112] For example, New York's Judicial Law § 489 provides, in part, that no person or corporation shall "solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a . . . thing in action, or any claim or demand, *with the intent and for the purpose of bringing an action or proceeding thereon*. (emphasis added) This restriction has been interpreted quite broadly, and allows for the purchase of legal rights which *may* require litigation to be realized if informal means fail. As the New York Court of Appeals recently stated, § 489 distinguishes between an assignee "who acquires a right in order to make money from litigating it" and "one who acquires a right in order to enforce it." *Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors v. Love Funding Corp.*, 918 N.E.2d 889, 895 (N.Y. 2009).

[113] *See, e.g.*, Accrued Fin. Servs. v. Prime Retail, Inc., 298 F.3d 291 (4th Cir. 2002) (company with expertise in forensic accounting took assignments of the legal claims of commercial tenants in over 50 shopping malls and promised to remit to the assignors between 50-60% of any discrepancies discovered and paid to the company by the assignors' landlords, some of which were in Maryland; this was held to violate Maryland public policy against champerty). As noted in note __, *supra*, Minnesotan courts struck down bulk assignments to claims agents on behalf of landowners. *See Gammons v. G. Gulbrason*, 78 Minn. 21 (1899), *Gammons v. Johnson*, 76 Minn.76 (1899), *and Huber v. Johnson*, 68 Minn. 74 (1897). In these cases, the Minnesota Supreme Court held the conduct of all the parties—including the layperson who took partial assignments in the causes of action and the lawyer who sued the railroad—violated Minnesota's public policy. This is still good law in Minnesota.

[114] Arbitral bodies generally permit a consumer to have a representative appear on her behalf before the neutral, and this right is almost certainly part the 'best practices'

B. *Challenges to Aggregating Purchased Claims*

When our arbitration entrepreneur has purchased as many discrete claims at the right price as possible, she will then seek to resolve them all in a single arbitral session. The claim-buying model is contingent upon successfully aggregating purchased claims in the arbitral fora, as this is crucial for the entrepreneur to recoup the costs of investigating and purchasing the claims. We suspect that defendants faced with these massive aggregations will immediately call foul, and assert, among other things, that contractual definitions of "a claim" subject to arbitration do not contemplate multitudes of individual claims bundled together to be decided as a collective.[116] Defendants are clearly uncomfortable with non-class aggregation of arbitration claims, as illustrated by AT&T's post-*Concepcion* response to three law firms' efforts to sign up individual AT&T customers to arbitrate claims that the company's proposed merger with T-Mobile violated the Clayton Act.[117] One of the firms, Bursor &

endorsed by major arbitral bodies. *See, e.g.*, National Task Force on the Arbitration of Consumer Debt Collection Disputes, *Consumer Debt Collection Due Process Protocol Statement of Principles*, Principles 9 ("The right to be counseled by an attorney or other representative is an important one that is frequently reflected in standard rules governing ADR proceedings.") (2010).

[115] Ironically, Justice Breyer argued that the fact that a prohibition against assignment could be so easily circumvented by purchasing a share of the property interest at stake for a dollar supported the Court's conclusion that there was no "practical" argument for barring mass assignments to claims agents. *Sprint Communs. Co., L.P.*, 554 U.S. at 289. Justice Roberts argued that the lack of any interest in the underlying claim made all the difference in the world for Article III standing: "'When you got nothing, you got nothing to lose.'" *Id.* at 301 (Roberts. C.J, *dissenting*, *quoting* Bob Dylan, Like a Rolling Stone, on Highway 61 Revisited (Columbia Records 1965)).

[116] Joel Rosen & James Shrimp, *Yes to Arbitration, But Did I Also Agree to Class Action and Consolidated Arbitration*, 30 FRANCHISE L.J. 175, 176 (2011) ("A franchisor might opt for the streamlined procedures and limited review of arbitration for a single dispute with a franchisee that involves limited monetary exposure; however, the franchisor might not opt for the streamlined procedures and limited review of the arbitration of dozens, if not hundreds or thousands, of claims brought in a consolidated or class action arbitration with millions of dollars at stake.")

[117] In June 2011, AT&T announced a $39 billion takeover of T-Mobile that was immediately controversial. The Justice Department, the Federal Communications Commission ("FCC) and various state regulators objected to the merger, and in August 2011, DOJ filed suit alleging the proposed merger violated the Clayton Act, Section 7. United States v. AT & T Inc., No. 1:11–cv–01569 (D.D.C.).

Fisher, sued the FCC for the release of data relating to the merger, and then posted this information on its website, urging consumers to individually arbitrate their claims in order to block the merger.[118] The firms filed more than 1,000 individual demands for arbitration – each "almost identical to each other aside from the names and addresses of the claimants"[119] – before AT&T eventually enjoined the arbitrations on the grounds that the demand (to block the merger) exceeded the scope of the arbitration agreement.[120] We should expect similar responses from defendants faced with mass arbitrations under our claims-buying model, although such challenges are belied by the prominent example of claims-buying and aggregation in the debt-collection industry, which we consider in detail in the final subsection.

Nearly every arbitration clause we have examined broadly defines a "claim" as a dispute or controversy between the parties. Presumably, once our arbitration entrepreneur has lawfully purchased the "claim," she has the right to adjudicate it to judgment in accord with the terms of the arbitration agreement. It is fairly clear that, where the underlying agreement does not contemplate or explicitly prohibits class arbitration, our entrepreneur cannot aggregate her claims in that form.[121] But nothing in the underlying agreement nor in the FAA itself appears to preclude informal aggregation of claims by a single owner in a single hearing. Indeed, even the most aggressive peddlers of class action waivers require only that "all parties to the arbitration must be individually named" and proclaims that "there is no right or authority for any claims to be arbitrated on a class-action or consolidated basis…or joined or consolidated with claims of other parties."[122] But the legal entrepreneur would name each claimant from who she purchased a claim in her notice of arbitration. Further, resolving all purchased, related claims in one fell swoop is not the equivalent of joinder or consolidation as those terms are used in the

[118] *See* http://www.fightthemerger.com/ (last visited June 26, 2013)
[119] AT&T Mobility LC v. Bernardi, 2011 WL 5079549 at *2 (N.D. Cal. 2011).
[120] *See, e.g.,* AT & T Mobility LLC v. Bushman, et. al., No. 11–80922 (S.D.Fla. Sept. 23, 2011); AT & T Mobility LLC v. Smith, No. 11–5157, (E.D.Pa. Oct. 7, 2011); AT & T Mobility LLC v. Gonnello, No. 11–5636 (S.D.N.Y. Oct. 7, 2011).
[121] *See* Stolt-Nielsen, 130 S. Ct. at 1773-76 (finding that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the parties agreed to class arbitration).
[122] Agreement for American Express Card Acceptance, Nov. 2012 (on file with the authors).

federal rules.[123] Nor is this form of aggregation a class action, as it does not seek to meet the procedural requirements of Rule 23 and does not bar subsequent claims.[124]

C. *A Case Study: Small-Value Debt Collection Litigation*

Despite the economic inefficiencies inherent in pursuing small-value claims, companies are nonetheless expending a great deal of time, money and effort doing just that.[125] The nation's most vigorous civil law enforcement is the consumer debt collection industry, where professional companies pursue claims against consumers involving relatively small amounts.[126] Typically, these consumer debts are purchased for 4% of face

[123] While there seems currently no formal right by a participant in arbitration to demand that her arbitrations be scheduled on the same day if she has multiple claims against the same opponent, there is some evidence that arbitral bodies have, in the past, accommodated this rather simple and easy request. One arbitral body, NAF, created a subsidiary (Forthright) whose purpose was to administer arbitrations on behalf of corporate clients who were plaintiffs in the hundreds of thousands of arbitrations brought before its neutrals. During Forthright board meetings, board members discussed "methods to increase the number of *large batch claims* being processed by arbitrators." Complaint, State of Minnesota v. National Arbitration Forum, Inc., *supra* note __ at 37. The practicality of such coordination (and the pretextual nature of any objection from defendants party to the arbitration agreement) is illustrated by the best practices recommended by the AAA, which strongly encourages the use of remote arbitrations. *See* National Task Force on the Arbitration of Consumer Debt Collection Disputes, Principle *supra* note __ at 7 ("In some cases, it may be reasonable to conduct proceedings by telephone or electronic data transmission, with or without submission of documents. *Such options may be particularly desirable in the case of arbitration of small claims,* since the parties have the choice of going to small claims court.") (emphasis added).

[124] The Court rejected the argument that mass assignments by multiple claimholders to a single claims agent who would litigate on their behalf was a "circumvention" of F.R.C.P. Rule 23. *See Sprint Communs. Co., L.P.*, 554 U.S. at 291. As the court noted in that case –which, we recognize, was not a mass arbitration but a mass lawsuit – class actions "are but one of several methods by which multiple similarly situated parties get similar claims resolved at one time and in one [] forum. *Sprint Communs. Co., L.P.*, 554 U.S. at 291. We couldn't agree more, and the claims-buying model should be seen as a separate but parallel legal pathway to achieve many (but not all) of the same goals as a class action.

[125] *See* Lauren Goldberg, Note, *Dealing in Debt: The High Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711 (2006).

[126] The FTC reports that the average face value of the consumer debt accounts purchased by companies whose only purpose is to sue on those accounts is $1,348. Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry*, Table 2 (2013). The face value of the accounts purchased is not an accurate measure of the value of the

value, a discount which reflects that "debt buyers typically do not attempt collections on all accounts they purchase, do not usually realize recoveries on every account for which collections are attempted, and do not typically recover the full face value on accounts for which they do realize recoveries."[127] The basic business model is to cast a broad net in the hope of catching a small piece of a portion of a large portfolio.[128]

Given a purchase price of four cents to the dollar, the actual recovery for any claim that is made (and there is no reason to assume that debt buyers make a claim on every debt they purchase) is most likely a fraction of the original face amount. For the debt buyer to turn a profit, however, the actual recovery must still be greater, in the aggregate, than his information and transactions costs, plus his original investment in the aggregate. Given that information and transaction costs typically exceed the compensation that any single case can produce, there is no reason to believe that merely aggregating small-value consumer cases changes that equation. Aggregation of a small-value claim without an additional source of savings merely reproduces the negative value problem in bulk.[129] So how do the debt-buyers enforce their legal rights without losing money?[130] They sue.

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claim made by the debt buyers as plaintiffs, since the debt sold is "charged off" debt which means that the original owner of the debt (a bank) has determined that it was unlikely to recover it. *Id.*

[127] *Id.* at 23.

[128] *Id.* ("'[Debt] buyers hope to make a profit by collecting at least a small percentage of [the accounts they purchase].'") (quoting source at n. 44).

[129] This is assuming that the variation in compensatory award in small value cases is not large and that the average compensatory award in a small value case does not exceed the average sum of the information and transaction costs in a individual small value case.

[130] Some have suggested that debt buyers are able to keep transaction costs low by seeking payment by informal means, such as telephone calls and other contacts. *See* Rick Jurgens and Robert J. Hobbs, *The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts*, National Consumer Law Center 6 (2010). But others observe that informal collection methods are decreasing, not increasing, as the ownership of debt moves from the original debt holders to professional debt purchasers. *See* Jon Leibowitz et al., Federal Trade Comm'n, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* at 6 (July 2010) ("Collectors may also employ litigation more quickly than in the past; industry sources 'have noted that the growth of the debt-buying industry has resulted in increases in collection lawsuits because entities that purchase delinquent debt often use collection law firms as their *primary tool for recovery*.'") (emphasis added).

The number of cases filed against consumers by debt buying companies in recent years is staggering. A 2010 report from the National Consumer Law Center, based on data gathered by journalists and other sources, gave a snapshot of the volume of the litigation: In Massachusetts debt collectors filed 575,000 lawsuits between 2000 and 2005, or three out of every five civil lawsuits.[131] In Minnesota, the volume of debt collection lawsuits doubled from 2006 to 2008, and the volume of default judgments rose 58 percent in a single year.[132] In the San Francisco Bay Area, the number of lawsuits filed to collect consumer debts rose to 96,000 in 2009 from 53,700 in 2007.[133] In New York City, "researchers concluded that a surge in debt collection lawsuits was a major contributor to a near tripling in all civil court lawsuits, from 213,000 in 2000 to 618,000 in 2007."[134] In 2008 Encore Capital Group, which hires outside law firms to do collections on a contingency fee basis, reported that its lawyers filed nearly 450,000 lawsuits, up 18% in just one year; and Portfolio Recovery Associates Inc. paid outside attorneys $33 million in contingency fees, up 14 percent from $29 million in 2007.[135] Academic research supports these observations.[136]

And it isn't simply that debt collection companies are inexhaustible litigators, but that they have learned how to litigate on the margins in a highly cost-effective manner. Partly, this is a function of the lack of competition within the industry: the FTC reports that, even though "there are no significant barriers to entry into the debt buying industry,"

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[131] Jurgens & Hobbs, *The Debt Machine*, *supra* note __ at 13 ("In Boston, 40,000 debt collection suits accounted for 85 percent of all small claims cases over a five year period.").

[132] *Id.* at 16.

[133] *Id.*

[134] *Id.*, *citing Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York*, MFY Legal Services Inc., Consumer Rights Project, June 2008.

[135] *Id.*

[136] Richard M. Hynes, *Broke But Not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1, 25 ("The overwhelming majority of civil suits filed in Virginia are consumer debt collection filings, and the evidence suggests that consumer debt collection accounts for a very high percentage of the civil filings of other states."), Spector, *supra* note __ at 279 (describing debt buyer cases as making up a "sizeable portion" of the Dallas County docket); and Judith Fox, *Do We Have a Debt Collection Crisis? A Cautionary Tale of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355, 370 (increase in civil docket between 2005-09 in Indiana due to debt collection cases).

the industry is dominated by "large debt buyers [who] purchase most debt."[137] For example, one study of Indiana consumer debt litigation found that thirteen debt buying firms accounted for 79% of all filings, with one firm dominating the docket by filing 22% of all consumer debt plaintiff suits.[138] A similar pattern was found in Dallas: two firms appeared in 36% of all the consumer debt suits, and five plaintiffs comprised 64% of all the suits filed.[139]

The concentration of claiming by a handful of firms necessarily produces a form of specialization. And, in turn, specialization by its very nature produces economies of scale by reducing both information and transaction costs. And finally, where there is concentration and specialization, cost-effective aggregation of like claims becomes possible. Not only are information and transaction costs reduced by lowering the cost of regularly performing certain tasks (or getting certain information) compared to an individual who completes such tasks only occasionally, but by transforming these tasks so they can be efficiently done for thousands, if not tens of thousands, of similar legal claims.[140]

The debt collection industry has used the high volume of claims to take advantage of two features of small claims courts: (a) the high default rate by defendant-consumers;[141] and (b) the minimum factual foundation

[137] FTC Report, *supra* note ___ at 14. In 2008 nine companies bought 76.1% of all consumer debt (with a face value of $55 billion)—and 78% of that was bought directly from credit card issuers who, presumably, found it too expensive to try to enforce their legal rights. *Id*. at Table 1.

[138] Fox, *supra* note __ at 372.

[139] Spector, *supra* note at 280.

[140] There is some evidence that this is exactly what has happened after the debt buying industry took over the enforcement of the banks and other creditors legal rights. The main innovation was to figure out how to turn arbitration and small claims courts into creditor/plaintiff "judgment mills." *See* Holland, *supra* note __ at 272 ("'small claims courts' have in reality become 'creditor's courts'"). A large debt buyer said that filing cases against debtors in small claims and similar courts "allows us to work accounts that we would not normally pursue through the use of contingent fee collection attorneys because of cost." See Portfolio Recovery Associates Inc. Form 10-K for 2008, p. 11.

[141] *See, e.g.*, A Broken System, *supra* note __ at 7, n.8 (estimating that the rate of default judgments in consumer debt cases in small claims court is between 60%-90%); Claudia Wilner & Nasoan Sheftel-Gomes, Neighborhood Econ. Dev. Advocacy Project, et al., Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-income New Yorkers, May 2010, p. 1 (90%); Fox, *supra* note __ at 379 (74%); Urban Justice Center, Debt Weight, the Consumer Credit Crisis in New York City and Its Impact on the Working Poor 21 (2007) (80%) *and* Russell Engler, *Out of Sight and Out of Line: The*

required by the fora to sustain a default judgment.[142] These two factors combine to lower the cost of making a claim by reducing transaction costs to a minimum and information costs to potentially near zero, since the risk of being challenged on the factual foundation of the claim is, it turns out, close to zero.

The debt buying industry's experience with mass small-value litigation has important lessons for us. First, while much of the mass litigation action has taken place in small claims court in recent years, the debt buying industry initially launched its mass claiming campaign in the arbitral fora.[143] Plainly, these creditors perceived no legal barriers to exercising their rights under their contracts to arbitrate hundreds of thousands of claims. The arbitral bodies were able to handle the flood of cases, but only because they were dealing with a group of highly concentrated specialty debt purchasers who were repeat players before the neutrals.[144] One firm had more than 1,000 employees and 24 offices, operated two call centers and "had an infrastructure that supported 35,000

Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons, 85 CAL. L. REV. 79, 119 (1997) (70% to 90%).

[142] Spector concluded that more than 95% of the complaints filed by consumer debt plaintiffs in Dallas County "failed to provide any information regarding date of default or calculation of the amount allegedly owed, allegations the FTC suggests are necessary to insuring due process." Spector, *supra* note __ at 298. A further reason why debt buyers are rational to invest so little in information about their cases is that they can limit their losses if a defendant answers the complaint and challenges the plaintiff's claim in court. As Spector observed in Dallas, there were a "surprising number" of voluntary dismissals without prejudice in the cases she observed when the defendant appeared (62%; 75% if a lawyer appeared with the defendant). *Id.* at 295.

[143] *See* Staff Report of the Domestic Policy Subcommittee Minority Staff, Oversight and Government Reform Committee, *Justice or Avarice: The Misuse of Litigation to Harm Consumers*, July 22, 2009 (describing the shift from arbitration to small claims court in consumer debt cases).

[144] In 2006 the National Arbitration Forum heard 214,000 consumer debt arbitration claims, of which 125,000 were filed by two law firms (who also partly owned the companies that owned the debt). *See* Second Consolidated Amended Class Action Complaint, In re: National Arbitration Litigation Forum Litigation, Civ. No. 09-1939 (PAM-JSM) (D. Minn., May 5, 2010) at 12. The number of arbitrators used to process this flood of cases was extraordinarily small, and the speed with which they disposed of the cases was remarkable. *See* Public Citizen, *Press Release: Mandatory Arbitration Stacks Deck Against Credit Cardholders, Data Show*, September 27, 2007 ("90 percent of the NAF cases were handled by just 28 arbitrators, who awarded businesses $185 million. One arbitrator handled 68 cases in a single day – an average of one every seven minutes, assuming an eight-hour day.").

lawsuits per month, 20,000 arbitration filings per month and $55 million in collections per month."[145]

Second, however, it is not clear the arbitral bodies are similarly equipped to handle the large volume of claims that arbitration entrepreneurs may bring to them on a claims-buying model in the post-class action era. In its 2010 report, the FTC concluded that consumer debt arbitration "failed" to provide consumers with "meaningful choice" and was not "fair to creditors, collectors, and consumers."[146] The justification for arbitration (and the sacrifice of traditional elements of adjudication) had not been realized, and the problem did not lie just in one "bad apple" like the NAF. Even the AAA's specialized consumer debt arbitration program was a dismal failure in part because 97% of consumers did not participate and suffered default judgments.[147]

We recognize, therefore, that the post-class action era poses both an opportunity and a challenge to entrepreneurs who want to do well by "doing good" for consumers. If the promise of mass arbitration for consumers will be a reality, stakeholders in the arbitral profession will have to work together to help the major arbitral bodies develop structures that are large and robust enough to handle thousands of claims. The leading arbitral bodies have, until now, rarely attempted to process claims at this scale, and when they did, they failed miserably. An explicit commitment to developing truly meaningful mechanisms for virtual hearings and efficient scheduling are at the top of our list, and we see no legal reason why consumers cannot demand this sort of accommodation.[148]

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[145] *See* Jurgens & Hobbs, *Forced Arbitration*, *supra* note __ at 10.

[146] *A Broken System*, *supra* note __ at 40-41.

[147] *See* Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L. J. 77 (2011) at Table 2. The program was designed to process thousands of claims brought by a single creditor against consumers. *Id.* at 83 and Appendix A (describing the program). This disappointing result is consistent with the FTC's conclusion, which was that "over ninety percent of consumers do not participate in [consumer debt] arbitration." Jon Leibowitz et al., Federal Trade Comm'n, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*, 54 (July 2010). This estimate was based on a submission from Richard W. Naimark of the AAA. *Id.*

[148] In fact, we would be curious to know why a defendant would resist an arbitration entrepreneur's reasonable demands for this sort of flexibility. If arbitral bodies failed to adopt these mechanisms, then state legislatures could require them. We would be even more curious to know under what interpretation of the FAA a federal court would hold

CONCLUSION

We have described two possible models that might overcome the anti-aggregation jurisprudence of recent years. Neither is a sure bet, both face serious challenges, and even if used in tandem by sophisticated legal risk-takers, these approaches do not provide a very satisfactory substitute for class action litigation. But if we still believe that, in this post-class action moment, sound public policy requires some form of aggregative procedure be available for small-claim plaintiffs who would not have the incentive or resources to remedy harms or deter wrongdoing in one-on-one proceedings – then we must begin to examine second-best proposals, as imperfect as they may be. The alternative is too grim to conceive.

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that such state regulation is inconsistent with Congress's goal of promoting arbitration as an alternative to litigation.

ON THE CASE DECEMBER 3, 2019 / 7:50 PM / 2 MONTHS AGO

Mass arbitration ethics: Can one firm protect the interests of tens of thousands of clients?

Alison Frankel 9 MIN READ

(Reuters) - I've been proselytizing quite a bit of late about mass arbitration as a way of restoring leverage to workers (and, potentially, consumers) forced to accede to mandatory arbitration contracts in which they waive the right to sue or arbitrate as a class. Everyone knows that it doesn't make economic sense for a plaintiffs' firm to represent a single worker demanding to arbitrate a $100, or even $1,000, wage-and-hour claim. But if you represent 1,000 or 5,000 or 10,000 workers with very similar claims, the economics change – especially when you also have the leverage of millions of dollars in arbitration fees to encourage employers to negotiate.

Employers facing mass arbitration campaigns have been known to resort to words like "extortion" and "shakedown," to describe such negotiation requests. But really, they're complaining about the consequences of the very contracts that they imposed on their workers. As U.S. District Judge **William Alsup** of San Francisco observed at a hearing last week in a case involving mass arbitration against the delivery service DoorDash, there's some poetic justice, to use Alsup's phrase, in watching companies that fought for the right to force their workers to arbitrate squirming to respond when masses of workers do, in fact, demand to vindicate their contractual rights.

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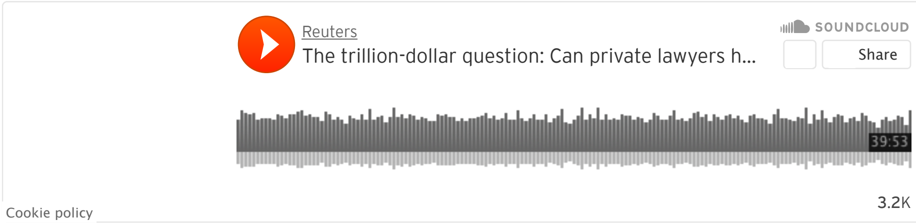

If workers' interests are being compromised, though, mass arbitration loses its patina of righteousness. DoorDash and other companies facing mass arbitration have raised concerns about whether a single law firm, **Keller Lenkner**, can ethically and responsibly represent tens of thousands of workers. And though Keller Lenkner has repeatedly assured judges and arbitrators that it can – and there is virtually no credible evidence that the firm has failed to serve the interests of the tends of thousands of employees it represents – it's worth highlighting why mass arbitration is potentially a tricky business.

The ethical complexities of representing masses of clients are laid out in a declaration that DoorDash's lawyers at **Gibson Dunn & Crutcher** filed in connection with that hearing last week before Judge Alsup in San Francisco. The hearing addressed a motion for a temporary restraining order that Keller Lenkner ended up withdrawing, but not before Gibson Dunn executed some hard jabs in a brief opposing the TRO. DoorDash's lawyers described a "shakedown scheme" in which Keller Lenkner approached the company with a letter vowing to file thousands of arbitration demands – with fees approaching $20 million – unless DoorDash chose to discuss an alternative resolution of workers' claims.

In Gibson Dunn's telling, Keller Lenkner has never had the slightest intention of actually arbitrating thousands of individual cases – and, according to DoorDash's lawyers, has rejected every proposal to establish an orderly process of adjudicating claims individually. In fact, according to DoorDash and its lawyers, Keller Lenkner is so heedless of its clients' individual claims that some of those clients don't even show up in the company's records as DoorDash workers.

As I said, Keller Lenkner has very sound responses to those accusations. Partner **Warren Postman** told Judge Alsup at last week's hearing that the firm has partnered with **Quinn Emanuel Urquhart & Sullivan** and is prepared to litigate every client's case. Postman also said he had brought along boxes full of declarations and retention agreements to assure the judge of Keller Lenkner's client relationships. If there are gaps in the record of his clients' work for DoorDash, he said, it's probably because DoorDash hasn't used all criteria to search for those workers' records.

TRENDING

Trump says lead impeachment Democrat Schiff has not paid 'price, yet'

But the declaration Gibson Dunn submitted from **Richard Zitrin**, an ethics professor at the University of California, Hastings, did not rely on assertions of improper behavior. (Zitrin even said that although he had seen documents suggesting that some Keller Lenkner clients were not DoorDash workers and that Keller Lenkner was using arbitration fees as leverage to obtain a global settlement, “it is not now my opinion that plaintiffs’ counsel has engaged in unethical conduct.”) But the professor said it is “hugely problematic” and “near impossible” for plaintiffs’ firms to meet their ethical obligations to every client when they represent a massive client base. “Where, as here, plaintiffs’ counsel purports to represent thousands of clients against a particular defendant, red flags go up in my mind about whether such representation meets the ethical requirements all lawyers must abide by,” the professor wrote.

Those ethical concerns are particularly acute, Zitrin said, when clients are weighing individual settlement offers. Zitrin said he has advised firms that to fulfill their ethical duties in mass litigation, they should, among other things, obtain extensive conflict waivers from every client; should, to the extent possible, inform all clients of settlement offers to other clients; should assure that the interests of non-settling clients are protected; and should not coerce clients to settle even if the law firm recommends accepting the deal. “Without such complete protection for clients, it is my opinion that such massive mass actions cannot be done ethically,” Zitrin wrote.

Keller Lenkner’s **Travis Lenkner** sent me a long email responding to Zitrin’s declaration and, more broadly, to assertions by mass arbitration defendants that his firm cannot ethically vet and represent tens of thousands of workers seeking individual arbitration. Lenkner said that the firm has consulted “numerous experts” to ensure that it is complying with ethical rules and has a team of lawyers and professionals who keep the firm’s clients apprised of developments in their cases. Even Zitrin, the law professor who submitted a declaration on DoorDash’s behalf, admitted that it’s possible to represent a mass client base ethically, Lenkner said, and there is not “a shred of evidence” that his firm has done anything less.

Hong Kong bans entry of visitors from China virus province

Trump lawyers offer surprisingly un-Trumpy defense to impeachment

Xi says China faces 'grave situation' as virus death toll hits 42

Bernie Sanders, stuck in Trump's trial, leans on star power of 'AOC'

"It takes real chutzpah for these companies and their lawyers to question our ethics, without support, when they are the ones who engineered a system that requires individual arbitration and promised courts that individual arbitration would be accessible and streamlined," Lenkner's email said. "Now that firms like ours have done the work necessary to bring a substantial number of claims in individual arbitrations, defendants are showing their true colors. Many defendants thought arbitration agreements would let them avoid accountability for widespread legal violations, they are angry that this isn't true, and they are lashing out."

Keller Lenkner's client relationships will likely be put to the test in its mass arbitration campaigns against DoorDash and the delivery service Postmates. Both companies have reached prospective class action settlements that encompass claims by Keller Lenkner clients. The firm attempted, unsuccessfully, to intervene in the Postmates settlement in state court in San Francisco, but has made clear that it will object to the deal if it receives preliminary approval. It will presumably take the same approach to the more recently disclosed DoorDash prospective settlement. Will the firm advise its clients to opt out? Will it weigh each client's possible recovery under the settlements before offering that advice?

These settlements could be an example of the ethical minefield Zitrin warned about. Keller Lenkner had better step carefully.

The views expressed in this article are not those of Reuters News.

BENTHAM IMF

New Means of Financing Lawsuits and Law Firms

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FEBRUARY 7, 2020

What is Commercial Litigation Funding?

- Commercial vs. Consumer Funding
- Commercial sector financing (vs. consumer funding)
  - A contract between the funder and litigant or funder and law firm
  - Usually non-recourse
  - Amount and form of recovery may depend on the length of the case and/or amount of recovery
  - Extensive due diligence (impacts privilege issues which will be discussed)
- Common subject matters: breach of contract; breach of fiduciary duty; intellectual property; copyright; patent; domestic and international arbitrations; complex business disputes; antitrust; environmental; and qui tam.

Partnering with Commercial Litigation Funders for Mass Tort Cases

Clients

Access funding directly from select commercial litigation funders to help cover legal fees and costs for mass tort cases

- Typically available on a single-case or portfolio basis
- Not offered by all commercial litigation funders

Law Firms

Access portfolio funding from commercial litigation funders to help mitigate risks assumed when handling cases on contingency

- Typically available for portfolios containing a combination of mass tort and commercial litigation cases
- Offered by well-capitalized commercial litigation funders

Flexible Bespoke Solutions

Claimant Funding

Funder contracts with the claimant, from whom a portion of any litigation proceeds are received

Typical Uses

- Paying legal fees and costs
- Monetizing litigation assets
- Obtaining working capital
- Preserving resources
- Improving corporate balance sheets

Features

- Non-recourse
- Aligns incentives
- Available at any stage of litigation
- Flexible pricing models
- Hedges risk

Law Firm Funding

Litigation funding company provides financing directly to the law firm, collateralized solely by the law firm's contingency share of a portfolio of cases.

Typical Uses

- Sharing risk
- Improving the bottom line
- Delivering service at competitive prices
- Smoothing cash flows
- Increasing revenues with measured risk

Features

- Non-recourse
- Available for diverse portfolios of cases
- Offsets operating costs between recoveries

Ethical Considerations

Confidentiality

Attorney-client Privilege

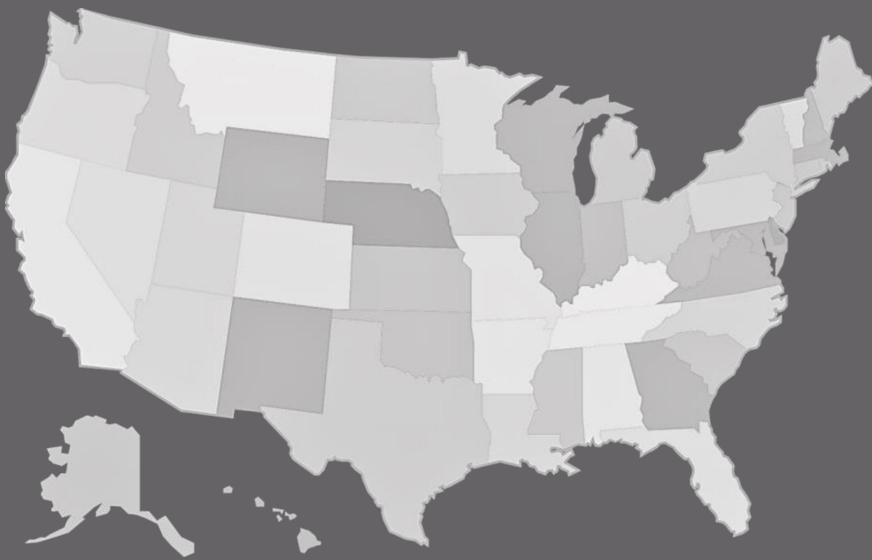
Fee Sharing

Champerty and Maintenance

A 2019 study conducted by *ALM Intelligence* found that 93% of law firm respondents who have used funding reported a positive experience and 98% would use it again.

US Regulation of Funding

- Prohibited or restricted in approximately 20 states under these legal concepts:
  - ***Maslowski v. Prospect Funding Holdings, LLC,* No. A16-0770, 2017 WL 562532 (Minn. Ct. App. 2017)**
  - ***Boling v. Prospect Funding Holdings, LLC,* No. 1:14-CV-00081 (W.D. Ky. 2015)**
  - ***Telesocial v. Orange,* No. 3:14-cv-03985 (N.D. Cal. 2015)**: continuance to find funding



- Otherwise self-regulated in US – subject to judicial control and legal ethics rules
- The ABA, NY State Bar, NYC bar and other state bars have issued guidance to lawyers advising clients about litigation finance.

Industry Disruption: Impede or Facilitate?

State proposals in Illinois, California, Utah, Arizona, New Mexico permitting non-lawyer ownership or investment in law firms.

Non-binding NYCBA Formal Opinion 2018-5: Litigation Funders' Contingent Interest in Legal Fees and Model Rule 5.4(a)

Recommendations

- Familiarize yourself with local laws, rules, and ethical decisions regarding litigation funding.
- Enter into a Non-Disclosure Agreement prior to engaging in substantive discussions with funders. Do not simply rely on oral assurances of confidentiality.
- In jurisdictions with statutory prohibitions on champerty and maintenance, review case law regarding how those statutes are applied.
- Review Local Rules regarding mandatory disclosure.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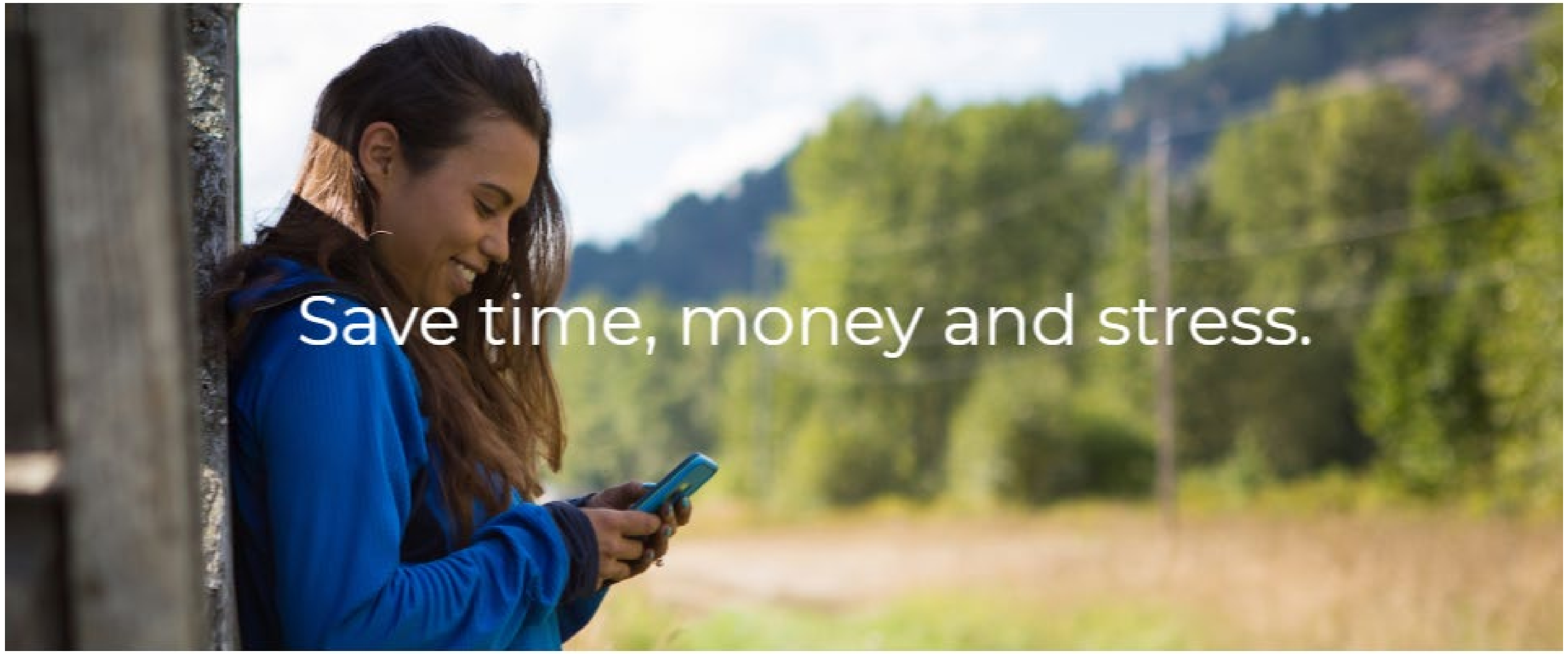
Civil Resolution Tribunal



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The British Columbia Civil Resolution Tribunal (CRT) is Canada's first online tribunal. The CRT resolves:

Motor vehicle injury disputes up to $50,000

Small claims disputes up to $5,000

Strata property (condominium) disputes of any amount

Societies and cooperative associations disputes of any amount


Walmart

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Board Approves Public Comment on Tech Task Force's Regulatory Reform Options Under Consideration

Menu of Options Intended to Expand Access to Legal Services While Maintaining Public Protection

Friday, July 12, 2019 Categories: News Releases

The 23-member Task Force includes 11 public members, 10 lawyers, and two judges. The non-attorney majority is designed to help ensure that the Task Force focuses on protecting the interests of the public. The Task Force will deliver its final report to the Board of Trustees no later than December 31, 2019.

Proposed Rule 5.4 [Alternative 1] – Clean Version

Rule 5.4 Financial and Similar Arrangements with Nonlawyers [Alternative 1]

(a) A lawyer or law firm* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:

(6) a lawyer or law firm may share legal fees with a nonlawyer if the lawyer or law firm complies with the requirements set forth in paragraph (b).

(b) A lawyer shall not practice law in a law firm in which individual nonlawyers in that firm hold a financial interest unless each of the following requirements is satisfied:

(1) the firm's sole purpose is providing legal services to clients;

(2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;

(3) the nonlawyers have no power to direct or control the professional judgment of a lawyer;

(4) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct and agree in writing to undertake to conform their conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

(5) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under rule 5.1;

(6) compliance with the foregoing conditions is set forth in writing.

Proposed Rule 5.4 [Alternative 2] – Clean Version

Rule 5.4 Financial Arrangements with Nonlawyers [Alternative 2]

A lawyer or law firm* shall not share a legal fee with a person* or organization not authorized to practice law unless:

(a) the lawyer or law firm* enters into a written* agreement to share the fee with the person or organization not authorized to practice law;

(b) the client has consented in writing,* either at the time of the agreement to share fees or as soon thereafter as reasonably* practicable, after a full written* disclosure to the client of: (i) the fact that the fee will be shared with a person* or organization not authorized to practice law; (ii) the identity of the person* or organization; and (iii) the terms of the fee sharing;

(c) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship; and

(d) the total fee charged is not unconscionable as that term is defined in rule 1.5 and is not increased solely by reason of the agreement to share the fee.

U.S. CHAMBER
Institute for Legal Reform

Selling More Lawsuits, Buying More Trouble

Third Party Litigation Funding A Decade Later

JANUARY 2020

U.S. CHAMBER
Institute for Legal Reform

An Affiliate of the U.S. Chamber of Commerce

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Prepared for the U.S. Chamber Institute for Legal Reform by

John H. Beisner, Jessica D. Miller, and Jordan M. Schwartz, Skadden, Arps, Slate, Meagher & Flom LLP

Executive Summary

In 2009, the U.S. Chamber Institute for Legal Reform (ILR) published *Selling Lawsuits, Buying Trouble: Third Party Litigation Funding in the United States*, which described the introduction of third party litigation funding (TPLF) in the United States and warned of the possible ill effects of an unregulated and undisclosed financing regime on the American civil justice system at large.[1]

The 2009 paper began by explaining what TPLF is and how it works.[2] As the paper explained, TPLF "is a term that describes the practice of providing money to a party to pursue a potential or filed lawsuit in return for a share of any damages award or settlement."[3] TPLF generally falls into two broad categories: (1) consumer lawsuit lending, which typically involves individual personal injury cases; and (2) investment financing, which includes investments in large-scale tort and commercial cases and alternative dispute resolution proceedings. In either scenario, the TPLF provider essentially invests money in the outcome of lawsuits, betting that they will be successful.

At that point, TPLF was "not widespread" in the United States and was largely concentrated in Australia.[4] As the paper presaged, however, that is no longer the case. Over a decade later, the TPLF landscape has changed dramatically, with the practice becoming an increasingly ubiquitous feature of civil litigation in the United States. "Lawsuit finance is no longer in its infancy in the United States. What began as a financial tool for 'David vs. Goliath' cases—small plaintiffs who used funding to sue large defendants in bet-the-company cases—has gone mainstream."[5] An annual survey of in-house counsel and law firm lawyers taken by Burford Capital Limited (Burford)—the largest TPLF company in the world—reported that, "[i]n 2018, it's hard to find any lawyers who say they've never heard of litigation finance."[6] According to the survey, "[r]eported use [of litigation finance] has risen dramatically."[7]

In addition to introducing the phenomenon of TPLF, the 2009 paper drew from the Australian experience to warn about potential dangers associated with the practice, including the prospect of frivolous and abusive litigation and various ethical consequences, particularly those at play when TPLF is involved in aggregate litigation or class actions. Unfortunately, a decade later, those warnings have proved well-grounded. Although TPLF arrangements generally are not required to be disclosed—and therefore largely operate under a veil of secrecy—those that have been made public tell an ominous story of TPLF spawning frivolous and abusive litigation, particularly in the mass tort arena; TPLF spurring myriad ethical violations, ranging from improper fee-splitting between lawyers and funders to conflicts of interest and violations of decades-old champerty and maintenance prohibitions; and TPLF seeping into the class action arena, subordinating the interests of class members to those of outside funders.

This paper seeks to update the earlier 2009 research regarding TPLF.

- Part I recounts the dramatic expansion of TPLF in the United States, as well as its diversification.
- Part II chronicles some of the most egregious examples of frivolous and abusive litigation that have been facilitated by TPLF.
- Part III addresses the various ethical implications of TPLF.
- And Part IV proposes potential solutions for reining in TPLF, including—at a minimum—a disclosure requirement such as the one currently under consideration by the federal Advisory Committee on Civil Rules.

The TPLF Industry Has Expanded by Leaps and Bounds

The most logical starting point for any assessment of TPLF in the United States is a review of the economic health of the industry supporting the practice, which has become both richer and more diversified over the past decade.

One recent article described investment in the TPLF industry as capital "rush[ing] into [the] space like a flash flood into a canyon gully."[8] The TPLF industry is now massive, with some analysts estimating "that litigation finance is at least a $10 billion industry."[9] Although the industry has already become an economic behemoth, it still has plenty of room to grow, considering "U.S. tort system costs totaled $429 billion in 2016, or 2.3 percent of the nation's [GDP]."[10] TPLF companies are also expanding the ways in which they invest in litigation and the types of litigation they are willing to fund, fueling the expansion of TPLF and increasing the likelihood that it will encourage the filing of spurious lawsuits. The rapid financial expansion and funding diversification of the industry are described in more detail below.

Financial Expansion

The last 10 years have witnessed unprecedented financial expansion on the part of those engaged in TPLF. As one recent article put it, "[t]he figures just get bigger and bigger,"[11] or as Allison Chock, chief investment officer of a prominent funding company, summed it up: "[f]ive or 10 years ago this industry barely existed in the USA. Now it's thriving … ."[12] According

"TPLF companies are also expanding the ways in which they invest in litigation and the types of litigation they are willing to fund, fueling the expansion of TPLF and increasing the likelihood that it will encourage the filing of spurious lawsuits."

to one recent survey, "private funders in the U.S. have a whopping $9.52 billion under management for commercial case investments."[13] The following examples illustrate this trend:

- Burford recently revealed that it held "new investment commitments of $1.3 billion in 2018."[14] That staggering figure "represent[s] 30x growth from 2013."[15] Burford also recently secured $667 million in new capital from an undisclosed sovereign wealth fund.[16] Burford, which can be seen as emblematic of the TPLF industry, has gone from receiving "131 inquiries for funding … in its first twelve months of doing business, [to receiving] 1,470 inquiries for funding in 2018."[17] "In other words, demand grew 1022%."[18]

- In late 2018, Bentham IMF, an Australia-based litigation funder, announced the launch of a new litigation fund.[19] The new fund—the fourth fund of its kind launched by Bentham that is focused on U.S. litigation—will initially be valued at $500 million, with the potential for investors to increase the fund to $1 billion.[20] Charlie Gollow, Bentham's U.S. Chief Executive, emphasized the increasing demand for litigation funding in the U.S. by saying in a press release that "[i]n the last three years, we've seen a 110% increase in qualified applications for funding in the U.S. and greater interest in larger deals."[21]

- Therium Group Holdings Limited (Therium) recently surpassed the $1 billion institutional investment milestone, largely thanks to its recent announcement of a new $430 million fund.[22] The new fund is the largest to date for Therium and follows a $265 million fund raised in February 2018.[23]

- Longford Capital Management LP, which was founded in 2014 and invests in contract, antitrust, and other claims, raised $56.5 million for its first fund.[24] The litigation funder experienced significant economic growth in its initial venture, obtaining returns in the "70-90 percent range."[25] The funder has announced a whopping $500 million for a second fund, dwarfing the initial $56.5 million.[26]

The dramatic increases in investments illustrated above point to one unmistakable conclusion: litigation funders are reaping enormous financial benefits from investing in litigation. Although many funders are not publicly traded and therefore need not report their earnings and various other economic figures, the numbers reported by two of the largest publicly traded funders (Burford and Bentham) support this conclusion and portend even greater expansion of TPLF going forward. Specifically, in its 2018 annual financial report, Burford touted after-tax profit of $328 million, up 24 percent from 2017, and

> *"The dramatic increases in investments … point to one unmistakable conclusion: litigation funders are reaping enormous financial benefits from investing in litigation."*

"Another indicator is the growth of practice groups providing legal advice regarding TPLF."

cash generation at a "robust" $513 million, up 41 percent from 2017.[27] Burford also reported income of $420 million, which is up 23 percent from 2017.[28] Similarly, according to Bentham's most recent financial report (June 2018), Bentham's net assets have almost doubled from $206.3 million in June 2017 to $367.8 million in June 2018.[29] The news for total investments was similar, with Bentham reporting $190.9 million in 2017 and $321.3 million in 2018.[30]

As the numbers above amply demonstrate, investments in the TPLF industry are extremely lucrative, and the finance world has noticed.[31] *The New York Times* recently reported that, "according to lawyers and lending executives … [h]edge funds such as Fortress Investment Group, Pravati Capital and Virage Capital Management have lent money to mass-tort law firms in recent years."[32] The TPLF industry is an attractive market for hedge funds, largely because the industry is not subject to the same limitations as the stock market or, as one article described it, "is uncorrelated with anything else."[33] Indeed, the TPLF industry is considered to have "investments that won't perform in lock step with stock markets or the overall economy."[34] Accordingly, many hedge funds are jumping to invest in litigation. For example, EJF Capital (based in Arlington, Virginia), a $6 billion hedge fund, began raising money in early 2018 for a new $300 million fund dedicated to investing in mass tort cases.[35] The new fund is on top of the $450 million that the hedge fund already invested in personal injury law firms.[36]

The financial success of TPLF has come with other indicators of a maturing industry that are further solidifying the influence of litigation funding on the American civil justice system. For example, due to the significant growth of the TPLF industry, Chambers & Partners—one of the world's most renowned legal directories—started ranking funders in the U.S. and U.K. in 2018.[37] Another indicator is the growth of practice groups providing legal advice regarding TPLF. One law firm, McDonald Hopkins LLC, has even opened up a new practice group focused exclusively on the TPLF industry.[38] The new practice group "will represent plaintiffs who are seeking litigation funding for individual cases and portfolios of cases and law firms who are seeking litigation funding for portfolio cases … . The firm will also represent litigation funders who are seeking assistance with due diligence as they evaluate potential investments."[39] These are attributes of a robust TPLF industry—one that is becoming enmeshed in the U.S. civil justice system.

Expanding Funding Models

The TPLF industry is not only growing financially but is also diversifying and becoming more sophisticated, expanding into portfolio investing, defense-side litigation funding, claim monetization, crowdfunding and other models—all of which have enabled the industry to reach more cases and more sectors of the civil justice system.

PORTFOLIO INVESTING

As funders seek to get their hands on more profit, they have transitioned from funding individual cases to investing in an entire portfolio of cases at a given firm. Under this approach, the funder essentially bankrolls all or part of a firm's operations, including the firm's day-to-day operating expenses, and then takes a cut of any litigation proceeds.[40] By spreading an investment across a portfolio of cases, funders hope to make their investments less risky: "In a sector already adverse to risk, a portfolio of cases could work much the same as mutual funds, helping to improve the chances of strong returns from multiple sources, rather than relying on just one piece of litigation."[41] Funders have enthusiastically embraced this model, largely eschewing their previously touted vetting processes for evaluating the merits of the cases that they are financing.

> *"Funders have enthusiastically embraced this model, largely eschewing their previously touted vetting processes for evaluating the merits of the cases that they are financing."*

For instance, Burford's portfolio investments have "grown to become a significant portion of Burford's investment[s] … . In 2018 alone, Burford committed over $450 million to portfolio finance investments,"[42] and 62 percent of Burford's investments are described as portfolio investments, compared to only 15 percent of single case finance.[43] Portfolio investing is becoming a bigger and bigger part of the industry, with one article reporting that "[o]f the litigators who obtained third-party funding in 2017, nearly 40% used the capital received to finance portfolios containing several cases."[44] And according to a more recent survey of private funders, 47 percent of total investments made in cases in the 12-month period ending in June 2019 went to portfolio arrangements.[45]

DEFENSE-SIDE FUNDING

The TPLF industry has long funded plaintiffs, but it is now making a concerted effort to fund defendants as well. Because the nature of litigation financing is traditionally dependent on the funded party "winning" the case and getting a payout, defense-side financing takes on some unique packaging of claims, such as a hybrid model in which both defense and plaintiff-side claims, or counterclaims, are packaged together.[46] Essentially, the theory is that under the hybrid model of defense-side litigation funding, the client would have certain claims of its own "with enough upside to offset the risks associated with financing the defense" of other claims in the same or other litigations.[47] As this description illustrates, however, even so-called defense-side funding encompasses significant elements of traditional plaintiff-side funding.

On the other side of the spectrum is "'pure defense' financing."[48] A typical agreement would provide that the case is "successful" if it is settled below a certain threshold.[49] The funder would agree to finance the legal fees and to cover any settlement that exceeds the agreed-upon threshold. Conversely, the client would agree to pay the funder a multiple of the funder's investment if the case is ultimately "successful."[50] However, in many respects, such arrangements may look more like law firm bonus compensation arrangements than actual litigation funding.

Although there has been much recent talk about funding defendants' litigation efforts, the extent to which such activity is occurring is far from clear.[51]

CLAIM MONETIZATION

Another new and sophisticated funding model is "claim monetization." In claim monetization, "parties use the capital for a purpose other than covering the costs of litigation."[52] For example, the funder might provide the plaintiff with "working capital," which serves as an "advance" on an ultimate judgment.[53] As with other forms of litigation funding, claim monetization is non-recourse in nature, which means that the funder is only repaid in the event that the client prevails in the underlying litigation.

Although this paradigm resembles the model employed by consumer lawsuit lending—i.e., the practice of funders advancing money to individuals to pay for their living expenses during the pendency of litigation—monetization is increasingly being used by commercial entities. "Parties large and small are interested in pure claim monetization at various stages of litigation, even if they are willing to pay their counsel on an hourly basis."[54] And monetization can be provided as a lump-sum payment or on a schedule of key developments, such as surviving a motion to dismiss or withstanding a later dispositive motion. "Claim monetization is merely a different way to unlock a litigation asset's value. In contrast to typical litigation funding, monetization's main benefit is time: it is no secret that litigation often takes years to resolve, and monetization enables parties to realize the value of their litigation assets without waiting to prevail in litigation."[55]

CROWDFUNDING AND OTHER MODELS

Yet another funding model employed by litigation funders is crowdfunding. In particular, one company, LexShares Inc., is attracting investors, commercial plaintiffs, and plaintiffs' firms to its online marketplace by applying a crowdfunding strategy to TPLF.[56] Accredited investors are able to shop among individual cases and

> *"In claim monetization, 'parties use the capital for a purpose other than covering the costs of litigation.'"*

contribute as little as $2,500 in the hopes of reaping an eventual profit when a matter settles or produces a favorable judgment.[57] Unlike traditional TPLF firms, LexShares solicits investments using a crowdfunding model, which allows ordinary accredited investors to choose among cases vetted though LexShares' due diligence.

Notably, the examples of funding models described above are by no means exhaustive. Indeed, Burford recently announced a new $300 million fund for post-settlement deals, which marks yet another different type of fund to emerge in the industry.[58] It stands to reason that the continued expansion of TPLF will foster even more kinds of funding models in the near future.

At bottom, there is no question that, in contrast to 10 years ago, TPLF has become a prominent facet of civil litigation in the United States. And it has been accompanied by sophisticated changes in funding methods that will likely accelerate its growth.

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TPLF Gone Awry

When ILR released its *Selling Lawsuits* paper roughly a decade ago, the authors—looking to the experience of TPLF in Australia—predicted that TPLF would not only increase the volume of litigation, but also encourage the filing of frivolous and abusive litigation.[59] After all, TPLF companies are mere investors, and they base their funding decisions on the present value of their expected return. As such, even if a lawsuit has little or no merit, it may be a worthwhile investment if there is a possibility (however small) of recovering a very large sum of money.

In addition, TPLF 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—which is presumably why portfolio-based funding has become so pervasive. For these reasons, TPLF providers have higher risk appetites than most contingency-fee attorneys and will be more willing to back claims of questionable merit. Sure enough, this is the very dynamic that has played out in the TPLF arena over the last 10 years, perhaps best exemplified by the abusive and fraudulent *Chevron Corp. v. Donziger* litigation and the foray of litigation funders into the mass tort arena—both of which are explored in greater detail below.

Chevron Corp. v. Donziger

Two years after publication of the original *Selling Lawsuits* paper, one of the most notorious examples of TPLF playing a role in fueling abusive and frivolous litigation occurred in the case of *Chevron Corp. v. Donziger*.[60] In *Donziger*, an investment by a fund associated with Burford helped sustain a lawsuit against Chevron filed in an Ecuadorian court, alleging environmental contamination in Lago Agrio, Ecuador. Burford invested $4 million with the plaintiffs' lawyers in the Lago Agrio suit in October/November 2010 in exchange for a percentage of any award to the plaintiffs. In February 2011, the Ecuadorian trial court awarded the plaintiffs an $18 billion judgment against Chevron.[61] In March 2011, Judge Lewis Kaplan of the U.S. District Court for the Southern District of

"Judge Kaplan also lamented the plaintiffs' lawyers' 'romancing of Burford,' which the court found led the plaintiffs' counsel to adopt a litigation strategy designed to maximize the plaintiffs' ability to collect on any judgment—rather than focus on securing a judgment ethically and honestly."

New York issued an injunction barring the plaintiffs from trying to collect on their judgment because of what he called "ample" evidence of fraud on the part of the plaintiffs' lawyers.[62] Long before Burford had made its investment in the case, Chevron had conducted discovery into the conduct of the plaintiffs' lawyers under a federal statute that authorizes district courts to compel U.S.-based discovery in connection with foreign proceedings, and at least four U.S. courts throughout the country had found that the Ecuadorian proceedings were tainted by fraud.[63]

Sometime in 2011, Burford decided not to provide any additional funding in the Lago Agrio case.[64] Nevertheless, its year-long involvement—and its initial decision to invest $4 million despite allegations of fraud in the proceedings—vividly shows that TPLF investors have high risk appetites and are willing to back claims of questionable merit. Chevron ultimately sued the lead plaintiffs' attorney for civil racketeering for procuring the judgment fraudulently. In 2014, Judge Kaplan found that the "decision in the Lago Agrio case was obtained by corrupt means."[65] Judge Kaplan also lamented the plaintiffs' lawyers' "romancing of Burford," which the court found led the plaintiffs' counsel to adopt a litigation strategy designed to maximize the plaintiffs' ability to collect on any judgment—rather than focus on securing a judgment ethically and honestly.[66]

Mass Torts Warehouse

Because the increasingly common portfolio strategy by definition involves funding a larger and broader array of cases, it can be expected to increase the filing of ill-considered cases. Indeed, a case filed in 2015 revealed that TPLF is being used in major mass tort proceedings where lawyers amass as many "faceless clients as possible" without adequately investigating the merit of the claims.[67] A lawsuit brought by a former employee of plaintiffs' law firm AkinMears in connection with the use of TPLF in litigation involving allegedly defective mesh products summarized the business model employed by the law firm as follows:

> (i) borrow as much money as possible; (ii) buy as many television ads and/or faceless clients as possible; (iii) wait on real lawyers somewhere to establish liability against somebody for something; (iv) use those faceless clients to borrow even more money or

> buy even more cases; (v) hire attorneys to settle the cases for whatever they can get; (vi) take a plump 40% of the settlement from the thousands and thousands of people its lawyers never met or had any interest in meeting; and (vii) lather, rinse, and repeat.[68]

This lawsuit, which had been reported on in the press, ultimately settled. However, the allegations in the petition underscore the tendency of TPLF to engender dubious claims in the mass tort arena. As one article explains, the funding company's "investment in a claims-bundling firm, known not for trial work but for multi-million-dollar TV blitzes aimed at potential mass tort claimants, was a far cry from the funder's usual customers: companies with big business disputes for their Am Law 200 firms."[69] In short, the AkinMears case illustrates that the buying and selling of questionable mass tort lawsuits on a massive scale is not only supported by third party funding, but is capable of reaching new heights precisely because of the availability of such funding.

Unnecessary Surgeries for the Sake of Dividends

In April 2018, *The New York Times* chronicled an even more troubling (albeit related) consequence of TPLF: litigation funders were pushing plaintiff law firms to encourage women to undergo unnecessary surgeries in order to drive up the value of their claims.[70] The article describes the story of a woman receiving a phone call from a stranger who tells the woman that she has a defective mesh implant and that she needed surgery to remove it. "Just like that, she had stumbled into a growing industry that makes money by coaxing women into having surgery—sometimes unnecessarily—so that they are more lucrative plaintiffs in lawsuits against medical device manufacturers."[71] "While studies have shown that up to 15 percent of women with mesh implants will encounter problems" and that "removing the mesh is not always recommended," some TPLF companies in control of litigation will apparently do anything necessary to increase the potential recovery, including pushing women to undergo unnecessary and dangerous surgeries.[72]

> *"[T]he buying and selling of questionable mass tort lawsuits on a massive scale is not only supported by third party funding, but is capable of reaching new heights precisely because of the availability of such funding."*

"If the government is not even aware that a relator has further assigned its interest (let alone the terms of that assignment) to an outside third party, then it obviously cannot properly supervise those cases in which it does not intervene."

TPLF Being Used to Buy and Sell False Claims Act Lawsuits

Funders have also signaled that they are interested in entering the False Claims Act (FCA) fray.[73] Although funders have promoted the view that litigation funding "has the potential to increase the number of legitimate claims reaching the Department of Justice,"[74] it ignores serious constitutional and statutory problems with introducing TPLF into the FCA arena. In addition, the funders' view is precisely backwards, as TPLF-based FCA claims would engender more vexatious and frivolous lawsuits under that statute.

As a threshold matter, the use of TPLF is not authorized by the FCA. As the Supreme Court has explained, the FCA vests standing in a private *qui tam* relator by "effecting a partial assignment of the Government's damages claim."[75] To have standing to bring suit under this statute, the relator must comply with several important statutory requirements, including, for example, disclosing her case to the United States and affording it the opportunity to investigate and intervene in the proceeding.[76] However, the FCA does not authorize the relator to re-assign the government's claim to outside funders, which would effectively constitute a sale of all or part of the relator's share of the government's claim with consideration payable only to the relator.

Importantly, there are good reasons for this lack of statutory authorization. TPLF arrangements are generally kept secret, including from the government, whose interest the relator is pursuing. If the government is not even aware that a relator has further assigned its interest (let alone the terms of that assignment) to an outside third party, then it obviously cannot properly supervise those cases in which it does not intervene. Nor can it properly evaluate the fundamental question of whether the relator's assignment of its interest to a third party warrants the government intervening in the first place—such as if the funding

"[S]uch delegation of executive power to outside entities with a pecuniary interest in the underlying litigation would be especially problematic in light of the punitive nature of FCA proceedings."

agreement places constraints on the relator's actions that are incompatible with the interests of the United States—or dismissing the case altogether.

Moreover, permitting TPLF in the FCA context would raise serious constitutional questions by delegating control of FCA lawsuits—an executive function—to individuals who (unlike the *qui tam* relator) are complete strangers to the alleged misconduct at issue in the litigation. Indeed, such delegation of executive power to outside entities with a pecuniary interest in the underlying litigation would be especially problematic in light of the punitive nature of FCA proceedings.[77] The use of TPLF in FCA cases threatens the fundamental due process rights of defendants by undermining the impartiality and neutrality of these quasi-criminal proceedings. "'If you got pulled over by a cop and the cop made more money if he gave you a ticket and less if he didn't, no one would think that was fair.'"[78]

When a relator sells the government's claim to a financially interested TPLF entity, it is essentially creating that same kind of scenario. After all, and as elaborated throughout this paper, TPLF entities naturally and inevitably seek to influence the lawsuits they finance by, for example, deterring reasonable settlements so that they can maximize the return on their investment. And such pressure is extremely difficult to resist, raising the specter that a relator will subordinate the public interest in favor of the TPLF entity's personal, pecuniary interest. To be sure, private relators are also motivated at least in part by a desire to obtain a financial reward for their prosecution of the government's claims.

However, in stark contrast to relators (whose identity is known and over whom the government can exercise proper oversight), TPLF entities operate unbeknownst to the government and can therefore seek to exert control and influence over the prosecution of an FCA case with impunity. Needless to say, such a troubling dynamic does not exist when the government itself, or a properly supervised relator, is bringing claims against a defendant alleged to have violated the FCA.

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Allowing TPLF to fester in FCA litigation would also pose serious risks to the nation's civil justice system by incentivizing vexatious and frivolous litigation. As just discussed, because the goal of TPLF funders is to maximize the return on their litigation investments, they will naturally seek to exercise control over those investments by influencing key litigation decisions, such as those pertaining to settlement. And because most funder compensation turns on the plaintiff obtaining a monetary settlement, TPLF could jeopardize the chances of a non-monetary settlement that would satisfy the government but not the funder, needlessly protracting litigation. In addition, companies that might not already be involved in TPLF could seek to exploit the FCA's treble damages provision by bankrolling claims of questionable merit against their competitors for financial advantage. The result would be frivolous and vexatious litigation, which is expressly discouraged by the FCA.[79]

TPLF Potentially Being Used to Burden New York City with Abusive Litigation

There have also been troubling reports about litigation funders fleecing indigent people by encouraging them to file lawsuits against the City of New York and then charging them interest rates as high as 124 percent.[80] These schemes target vulnerable individuals, including convicted criminals, with promises of money for suing the city (often alleging mistreatment in the criminal justice system), but in the end the firms take home the bulk of the money.[81]

In short, TPLF is being used to gamble on questionable—and sometimes fraudulent—litigation. And because TPLF arrangements generally need not be disclosed, there are undoubtedly many other instances of abusive or frivolous litigation that have evaded public scrutiny. Inevitably, as TPLF companies continue to expand their coffers and multiply their returns on litigation finance, more and more examples of TPLF gone awry will come to light.

TPLF Is a Recipe for Ethical Impropriety

The many ethical concerns surrounding TPLF—initially touched upon in the original *Selling Lawsuits* paper—have not gone away. On the contrary, the handful of TPLF arrangements that have seen the light of day confirm that the practice is threatening core ethical principles.

These principles include that:

- the plaintiff and his or her lawyer (as opposed to an outsider) should control the prosecution of the underlying litigation[82];
- lawyers may not share fees with nonlawyers[83];
- lawyers have a fiduciary obligation to adequately represent class members in putative class litigation[84]; and
- lawyers and judges must avoid conflicts of interest.[85]

TPLF Undermines A Party's Control Over His Or Her Lawsuit

One of the most glaring ethical problems resulting from TPLF is the tendency of funders to exercise control over the underlying litigation. Such efforts are inevitable. If a third party has a financial stake in a lawsuit, that third party will naturally seek to control the lawsuit and, as a result, the lawyers being funded by that third party will be controlled by that third party, sometimes to the detriment of the actual party in interest. The ensuing interference in the fundamental attorney-client relationship contravenes Model Rule

> *"If a third party has a financial stake in a lawsuit, that third party will naturally seek to control the lawsuit and, as a result, the lawyers being funded by that third party will be controlled by that third party, sometimes to the detriment of the actual party in interest."*

of Professional Conduct 2.1, which specifically requires attorneys to exercise independent professional judgment and to provide honest legal advice to their clients.[86] As a 2012 ABA Working Group on litigation funding explained, "[t]he attorney's advice should be based solely on what is best for the client, without regard to extraneous considerations such as the lawyer's interests or the interests of third parties."[87]

The exercise of control by outside funders also implicates the centuries-old prohibition against champerty, which bars "someone from funding litigation in which he or she is not a party."[88] The prohibition against champerty "is intended to prevent courts from becoming trading floors where people buy and sell lawsuits based on their perceived merit."[89] Although the TPLF industry has promoted the view that this doctrine (as well as the parallel doctrine outlawing maintenance, the funding of existing litigation) are a dead letter,[90] recent state and federal court decisions in the TPLF arena belie the notion that champerty and maintenance principles are moribund. Over the past few years alone, certain litigation funding agreements have been declared unenforceable under the laws of Minnesota, New York, North Carolina, Pennsylvania, and Kentucky, based on provisions purporting to vest the funder with control over key litigation decisions.[91]

Consistent with their unfounded claims regarding the vitality of champerty and maintenance, TPLF entities continue to deny that they can exercise control over litigation in which they invest. But such protestations are not credible. Would a hedge fund or other funder really invest in a venture it has no ability to influence?

> *"Notably, the 'best practices' guide of Bentham IMF, one of the largest litigation funding companies in the world, contemplates robust control by funders."*

Notably, the "best practices" guide of Bentham IMF, one of the largest litigation funding companies in the world, contemplates robust control by funders. Specifically, it notes the importance of setting forth specific terms in litigation funding agreements that address the extent to which the funding entity is permitted to: "[m]anage a litigant's litigation expenses"; "[r]eceive notice of and provide input on any settlement demand and/or offer, and any response"; and participate in settlement decisions.[92] Indeed, one need only look at the few funding agreements that have been disclosed to see that third party funders are adhering to Bentham's "best practices" and exercising a large degree of control over the litigations in which they choose to invest.

For example, in *Boling v. Prospect Funding Holdings, LLC*, the plaintiff entered into a series of funding agreements to finance his lawsuit, which eventually—after the resolution of his lawsuit—led to the plaintiff seeking a declaratory judgment that the agreements violated Kentucky's prohibition against champerty and also violated the state's usury laws.[93] The U.S. Court of Appeals for the Sixth Circuit recently affirmed the district court's conclusion that the agreements were unenforceable, recognizing that the agreements "effectively g[a]ve Prospect substantial control over the litigation."[94] As the Court of Appeals made clear, the funding agreements were rife with clauses that ceded control over the underlying litigation from the claimant to the funder. Specifically:

- "All four Agreements limited Boling's right to change attorneys without Prospect's consent, otherwise Boling would be required to repay Prospect immediately."[95]
- The funder "had the right to examine the 'case files and to inspect the correspondence, books and records relating to [the plaintiff's] case or claim.'"[96]
- Two of the agreements at issue "authorized [the funder] to request 'pleadings, notices, orders, motions, briefs or other documents … correspondence,' [the plaintiff's] medical records, and 'documents relating to any other material developments with respect to' [the plaintiff's] claim or recovery in the suit."[97]
- Another provision "actually provided that if [the plaintiff] replaced his attorney, or hired an additional attorney, without notifying [the funder] and ensuring that the new attorney executed an acknowledgment of the litigation-funding agreement, [the plaintiff] was immediately required to pay [the funder] the amount due at 40 months of funding (over $34,000 for the $5,000 loan in the 2012 Agreement and over $68,000 for the $10,000 loan in the 2013 Agreement) regardless of when [the plaintiff] changed attorneys."[98]

In holding that these provisions rendered the TPLF agreements champertous under Kentucky law, the Sixth Circuit reasoned that the "conditions raise quite reasonable concerns about whether a plaintiff can truly operate independently in litigation."[99] As part of its analysis, the Court of Appeals expressed concern that "agreements like this may interfere with or discourage settlement, which is inconsistent with Kentucky's public policy, 'because an injured party may be disinclined to accept a reasonable settlement offer where a large portion of the proceeds would go to the firm providing the loan'" and that "such conduct encourages and multiplies litigation."[100] The Sixth Circuit's decision and explication of these agreements, and how they undeniably work to exert control over a litigation, is not an isolated incident.

Similarly, the elaborate funding agreement utilized by Burford in the *Donziger* litigation previously discussed "provide[d] control to the Funders" through the "installment of 'Nominated Lawyers'"—lawyers "selected by the Claimants with the Funder's approval."[101] The law firm of Patton Boggs LLP had been selected to serve in that capacity, and the execution of engagement agreements between the claimants and Patton Boggs, "a firm with close ties to the Funder, [was] a condition precedent to the funding."[102] "In addition to exerting control, it [was] clear that the Nominated Lawyers, who among other things control[led] the purse strings and serve[d] as monitors, supervise[d] the costs and course of the litigation."[103]

> *These fee-sharing agreements are particularly problematic because they may exist without the attorney's client being fully aware of their existence—much less their ramifications—and are per se violative of Rule 5.4(a).*

As the Sixth Circuit aptly recognized in *Boling*, provisions like those described above vest the funder with significant control over key litigation decisions, threatening the autonomy of both the claimant and his or her lawyer. And even when a funder's efforts to control a plaintiff's case are not overt, the existence of third party litigation funding naturally subordinates the plaintiff's own interests in the resolution of the litigation to the interests of the TPLF investor.

TPLF Encourages Unethical Fee-Sharing Between Lawyers and Nonlawyers

Although all TPLF funding agreements have the potential to disrupt the attorney-client relationship, this concern is perhaps most apparent in contingency-based funding agreements entered into directly between a funder and an attorney as compared to contracts entered into between the funder and the litigant itself. These fee-sharing agreements are particularly problematic because they may exist without the attorney's client being fully aware of their existence—much less their ramifications—and are per se violative of Rule 5.4(a).

Model Rule 5.4(a) prohibits an attorney or law firm from sharing legal fees with a nonlawyer except in limited circumstances.[104] "As stated in the comments to Rule 5.4, this prohibition is intended to 'protect the lawyer's professional independence of judgment.'"[105] "Fee splitting is [also] viewed as running the risk of granting nonlawyers control over the practice of law or potentially enabling lay persons to practice law without authorization."[106] Such a risk is essentially another variant of the control problem previously discussed, and demonstrates why it is especially egregious when a funding agreement is entered into between a funder and the claimant's lawyer, who owes a fiduciary duty to his or her client. While "[f]unders may … insist upon contracting directly with the client in order to circumvent the prohibition,"[107] some are ignoring this bedrock principle, as the *Gbarabe v. Chevron Corp.* case (described below) illustrates.

TPLF Can Engender Conflicts of Interest

Another potential ethical concern is the possibility of conflicts of interest. According to Canon 2 of the Code of Conduct for United States Judges, judges must avoid even the appearance of impropriety in all activities.[108] In particular, "[a] judge should not allow … financial … or other relationships to influence judicial conduct or judgment."[109] Similarly, judges shall perform their duties "impartially," disqualifying themselves from any matters in which they have a "financial interest."[110]

Disclosure of TPLF arrangements can ensure that judges faithfully abide by these important canons. "As some TPLF entities are multi-billion- and multi-million-dollar publicly traded entities, requiring disclosure of their role will allow judges to determine whether they have a conflict of interest in administering a case. And for privately held TPLF entities, the web of interpersonal relationships judges [or other judicial officers] have could be impacted as well, leading to unintentional appearances of impropriety."[111]

This problem was once again on display in the *Donziger* case mentioned above.[112] During a deposition in that proceeding, lead plaintiffs' lawyer Steven Donziger was asked to identify the company that had helped finance the underlying suit against Chevron.[113] Only after being ordered to answer the question by the special master presiding over the case did Donziger disclose that the funder was Burford.[114] The special master then disclosed that he was former co-counsel with the founder of Burford, and that he had received marketing materials from that same individual aimed at litigation funding.[115] The special master also disclosed that he was friends with Burford's former general counsel.[116] The special master did not recuse himself from the racketeering litigation, and the parties did not insist that he do so.[117] Nonetheless, as the special master recognized, the deposition "prove[d] … that it is imperative for lawyers to insist that clients disclose who the investors are."[118]

These Problems Are Magnified in Class Actions

It is no secret that in our civil justice system, the stakes are much higher in class (as opposed to individual) litigation. Class actions can be especially profitable for third party funders given the number of class members who may be involved and the aggregation of double- and triple-damages claims. But they are also uniquely prone to abuse. Defendants faced with improvidently certified, meritless lawsuits already feel intense pressure to settle before trial, culminating in "judicial blackmail."[119] "Critics of class action litigation have … pointed out that the propensity for plaintiffs' lawyers to file allegedly frivolous lawsuits and the potential for massive jury verdicts have generally been sufficient to force corporations into settling unfounded claims or deter otherwise honest corporations from expanding their operations."[120]

Moreover, few class actions provide meaningful benefits to class members in the first place. Indeed, "every study that has" looked at consumer and employee

> *"Allowing TPLF to fester in the class action setting will not only reduce the downside risk to mounting frivolous class actions, but also guarantee that such proceedings deliver even less money for the actual class members."*

class action settlements "reached the same conclusion: The overwhelming majority of [such] class actions deliver nothing to class members."[121] Those studies establish that lawyers are reaping most of the benefits of class action settlements. Allowing TPLF to fester in the class action setting will not only reduce the downside risk to mounting frivolous class actions, but also guarantee that such proceedings deliver even less money for the actual class members.

Ten years ago, few, if any, class actions used third party funding. However, TPLF has now undeniably seeped into the class action context. For example, the Virginia-based hedge fund EJF Capital specifically targets "class-action injury lawsuits" at "hefty interest rates," with the loans to be repaid by law firms "as they earn fees from settlements and judgments."[122] "[C]lass actions [also] make up a significant portion of the cases that [Bay Area-based Law Finance Group] invests in."[123] "Other firms, like New York-based Counsel Financial, also market themselves as offering various kinds of financing to class-action plaintiffs['] attorneys."[124]

Consistent with the veil of secrecy that has shrouded TPLF arrangements outside the class action context, the agreements that have been entered into in the class action realm have likewise gone undisclosed to class members or courts, even though some agreements require that portions of any recovery by the class be paid to the funder. This fact, and the increasing prevalence of TPLF arrangements in class actions, not only raise serious ethical questions, such as unethical fee-sharing under Rule 5.4(a), but also implicate the adequacy of representation that Rule 23(a)(4) requires must be established prior to certifying a putative class action.

"[T]he agreements that have been entered into in the class action realm have likewise gone undisclosed to class members or courts, even though some agreements require that portions of any recovery by the class be paid to the funder."

These ethics and adequacy issues were illustrated in *Gbarabe v. Chevron Corp.*[125] In that putative class action, the two attorneys representing the plaintiffs acknowledged to the court that they had to seek third party funding to advance their case and obtained a number of time extensions as a result.[126] When funding was apparently obtained but the plaintiffs refused to disclose its terms, Chevron moved to compel production.[127] Chevron argued, among other things, that the information about funding was relevant to the adequacy of the class representatives under Rule 23(a)(4) due to the possibility that the funding agreement created a conflict of interest with absent class members.[128] Chevron also argued that the agreement could be relevant to the suitability of the attorneys as representatives of the class under Rule 23(g), which requires a court appointing class counsel to consider "the resources that counsel will commit to representing the class" and further permits the court to consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[129]

The court agreed and ordered production of the funding agreement, which contained several significant provisions. Specifically, the agreement referred to a "Project Plan" for the litigation developed by counsel and the funder with restrictions on counsel deviation, particularly with respect to hiring only identified experts.[130] The agreement expressly prohibited the lawyers from engaging any co-counsel or experts "without [the funder's] prior written consent."[131] Further, the agreement required that counsel "give reasonable notice of and permit [the funder] where reasonably practicable, to attend as an observer at internal meetings, which include meetings with experts, and send an observer to any mediation or hearing relating to the Claim."[132]

The funding agreement also provided that the lawyers shall endeavor to "recover the maximum possible Contingency Fee,"[133] a requirement that may conflict with class member interests. Further, under the agreement, counsel agreed that the funder would be repaid its $1.7 million investment in the case by way of a "success fee" of six times that amount ($10.2 million), to be paid from attorneys' fees—plus two percent of the total amount recovered by the putative class members.[134] In other words, the agreement required attorneys to share their fees with nonlawyers, raising Rule 5.4(a) issues.

Provisions like these—which vest control in a funder as opposed to the actual plaintiffs and appear to subordinate the interests of the class members to those of the funder—raise serious ethical concerns for all of the reasons already discussed in this paper. Indeed, these concerns apply in spades in class proceedings given that class representatives tend to be among the least sophisticated and zealous, generally leaving the plaintiffs' attorneys in the driver's seat in such cases. In *Gbarabe*, for example, the representative knew nothing about the details of the funding agreement. Under these circumstances, it is difficult to see how the plaintiff could be expected to protect the putative class' interests regarding an agreement between the attorneys and a third party funder. And of course, such ethics- or adequacy-based problems are not only detrimental to the interests of the class members that the class device was supposedly designed to protect, but also threaten the interests of defendants. After all, these problems pose a substantial risk that any final resolution of classwide litigation could be invalidated by a court that ultimately learns that money belonging to the class must be siphoned off to pay a funder that has remained hidden during the course of the litigation.

Ultimately, the district court denied certification in *Gbarabe* on several grounds, including adequacy of representation. Although the court did not expressly tie the TPLF agreement to its ruling on adequacy, it did find that plaintiffs' counsel "failed to diligently prosecute this case"—a failure the court suggested may have been linked to their struggle in securing funding early on in the litigation.[135] But it did not address any of the important issues presented by the TPLF agreement in the case, leaving them for further development by future cases. Nonetheless, class counsel and the named plaintiffs already have significant difficulty satisfying their fiduciary obligations to the class they are seeking to represent, and adding a funder to the class action mix only exacerbates that challenge and makes carrying out those fiduciary responsibilities all the more difficult.

> *"[A]dding a funder to the class action mix only exacerbates that challenge and makes carrying out those fiduciary responsibilities all the more difficult."*

Proposals for Reform

As the prior sections of this paper demonstrate, TPLF has gained a foothold in—and poses a number of nettlesome problems for—the American civil justice system. But there are means available to at least temper the adverse effects of TPLF.

Indeed, there are a handful of sensible measures that would go a long way toward that end, some of which have already been adopted in various forms by certain jurisdictions. At a minimum, lawmakers and rule makers should seriously consider requiring the disclosure of TPLF arrangements. Other potential reforms include outright prohibitions of TPLF fee-sharing arrangements between funders and lawyers on the ground that they violate Rule 5.4, as well as a prophylactic ban on TPLF in class actions.

> *“At a minimum, lawmakers and rule makers should seriously consider requiring the disclosure of TPLF arrangements.”*

Disclosure

At a bare minimum, TPLF arrangements should be disclosed at the outset of civil litigation. After all, unless some light is shined on these agreements, plaintiffs will continue to utilize TPLF—in some situations, potentially illegally—without fair notice to the court or the opposing party. Disclosure would minimize the prospect for these abuses and promote other salutary effects on our civil justice system. Specifically:

- **Disclosure will reduce the likelihood of unethical fee-sharing between lawyers and nonlawyer funders consistent with Rule 5.4**. As the *Gbarabe* case illustrates, funders sometimes enter into arrangements directly with lawyers rather than the actual party litigant. Such agreements blur the line between lawyers and nonlawyers and threaten the professional independent judgment of attorneys, which is a cornerstone of the ethics rules. If TPLF agreements are disclosed as a matter of course early on in the life of a civil case, the parties and the court can determine whether any provisions purport to commingle lawyer and nonlawyer funds in contravention of Rule 5.4.

- **Disclosure will minimize conflicts of interest**. As the *Donziger* case previously discussed illustrates, TPLF raises serious conflict-of-interest questions. Such conflicts can arise based on a pecuniary, familial, or other personal interest in the funder on the part of opposing counsel or perhaps even the court itself. As a result, the court needs to know the identity of funders to assess whether it or anyone else involved in the litigation unwittingly has a conflict of interest that warrants recusal or some other remedy. Disclosure would furnish that information.

- **Disclosure will help ensure that plaintiffs have control over the litigation**. As the examples summarized in this paper make clear, funders routinely seek to exercise control over key strategic decisions in litigation they finance. Mandatory disclosure requirements could temper this problem by discouraging funders from insisting on inappropriate control provisions in the first instance. And if funders persist in inserting such problematic provisions in their funding arrangements, disclosure will provide the courts with the necessary information to nullify them.

- **Disclosure of funding arrangements will further the enforcement of rules against champerty and maintenance**. As discussed above, the funding industry's mantra that states no longer recognize champerty and maintenance sweeps too broadly and ignores the recent judicial rulings from multiple states reaffirming the vitality of these important doctrines. Courts and parties cannot ensure that funding agreements are faithful to these principles unless they are disclosed.

- **Disclosure will facilitate efficient proportionality and cost-shifting determinations**. Under the Federal Rules of Civil Procedure, the parties' resources are highly relevant to a number of questions, including whether discovery is being conducted in a proportional manner.[136] Since a funder is effectively a real party in interest, its resources should be considered in resolving the question of proportionality. In addition, it should bear responsibility (to the same degree as any other party) in the event there is wrongdoing and a corresponding imposition of sanctions or costs.[137]

- **Disclosure will facilitate more realistic settlement negotiations**. Courts sometimes want to hear from all parties with authority over the fundamental question of settlement. As some of the examples previously discussed in this paper illustrate, funders routinely seek to weigh in on that key strategic decision. But absent disclosure, a funder's role is completely hidden from the court and the opposing party, undermining accurate and realistic settlement negotiations between the parties.

- **Disclosure in FCA cases will ensure that claims being asserted on behalf of the government are actually being prosecuted for the public interest**. As previously discussed, the legal and ethical concerns implicated by TPLF are

As previously discussed, the legal and ethical concerns implicated by TPLF are accentuated in FCA litigation because the claims being prosecuted are those of the United States.

accentuated in FCA litigation because the claims being prosecuted are those of the United States. Disclosure of TPLF in this context would apprise the government of its existence and afford the United States the opportunity to dismiss the case or intervene in order to avoid the nettlesome ethical, statutory, and constitutional problems previously discussed.

- **Disclosure would shine much needed light on abusive litigation funding practices**. For example, as already discussed, *The New York Times* recently published an exposé on litigation funders financing unnecessary surgery so women could file stronger claims in the vaginal mesh litigation.[138] Another publication reported on funders using their investments to encourage the filing of frivolous claims against New York City.[139] And in another troubling report, funders financed substantial advertising to buy control of mass tort claims.[140] These unseemly episodes would have come to light much sooner had funding disclosure been required.

Some legislatures and judicial bodies have begun to take heed of these important rationales. In 2018, Wisconsin enacted a comprehensive litigation funding disclosure requirement.[141] The Wisconsin law provides that "a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person … has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise."[142]

In late 2018, the U.S. District Court for the Northern District of California adopted a TPLF disclosure requirement for class actions. The court added to its "Standing Order for All Judges" a provision requiring that "in any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim."[143] As one attorney who studies the litigation funding industry explained, the Northern District of California rule is "really a harbinger and a signal that

Some legislatures and judicial bodies have begun to take heed of these important rationales.

courts … need to consider the presence of third-party financiers in a lawsuit and consider their role."[144]

U.S. District Court Judge Paul Grimm of the District of Maryland, for example, recently required lawyers seeking to lead a sprawling MDL concerning a huge data breach of Marriott hotels to disclose whether they plan to receive outside finance.[145] In a recent article, Judge Grimm remarked that "it's important judges know everyone with a stake in a case" because "[w]hat you don't know, if you have third-party funding, is if someone from the outside has made a decision, an investment decision, that this case has merit, and they have advanced the money to take the case forward … [t]hen, when it comes time to resolve the case, those people are not in the room, and if they have minimal expectations of what they must recover in order to maximize their investment, that is an influence, a potential influence, in how the litigation is conducted and how the litigation might be resolved."[146] Another judge overseeing a large swath of federal opioid cases, Judge Dan A. Polster of the U.S. District Court for the Northern District of Ohio, also required that lawyers connected with the cases disclose to the court (but not to opposing parties) the fact of any third party funding.[147]

Notably, disclosure of TPLF arrangements is already required in several foreign countries that allow TPLF.[148] For example, Hong Kong recently enacted a law requiring the disclosure of TPLF arrangements in arbitration.[149] Similarly, Australia requires the disclosure of a TPLF funder's identity and portions of the underlying agreement in class action cases.[150] And in Canada, where TPLF has also been countenanced, TPLF arrangements are increasingly being subjected to various disclosure requirements in the class action arena.[151]

> *"Notably, disclosure of TPLF arrangements is already required in several foreign countries that allow TPLF."*

Importantly, "[r]equiring disclosure of a litigant's financial relationships in a case is not an original concept."[152] After all, Rule 26 also already requires that defendants automatically disclose (without need for a request) at the outset of litigation "any insurance agreement" that may apply to the litigation.[153] Thus, defendants already must disclose arrangements they may have for financing the prosecution or settlement of a litigation matter. Requiring that TPLF arrangements be disclosed would simply bring plaintiffs' Rule 26 disclosure obligations in line with those of defendants.

Against this backdrop, the federal judiciary's Advisory Committee on Civil Rules is actively considering a proposal to amend Federal Rule of Civil Procedure 26 and place TPLF agreements on the list of items that must be automatically disclosed.[154] And a bill pending in the U.S. Senate, the Litigation Funding Transparency Act of 2019, would require the disclosure of TPLF arrangements in both class actions and mass tort multidistrict litigation

“A uniform rule is needed to make disclosure a standard practice routinely followed in all federal courts.”

proceedings.[155] Notably, a recent study conducted at the direction of the federal Advisory Committee on Civil Rules concluded that around half of U.S. federal appellate courts and one quarter of federal district courts already have rules that appear to require identification of litigation funders in civil litigation matters.[156] However, those disclosure requirements vary widely and are often ignored or misunderstood. A uniform rule is needed to make disclosure a standard practice routinely followed in all federal courts.

In short, there are a number of vehicles for instituting a mandatory disclosure requirement. Needless to say, a robust disclosure regime is a necessary first step to ensuring that TPLF in a given case is not running afoul of core legal and ethical precepts.

Fee-Sharing

Agreements to share fees between lawyers and nonlawyer funders are now a recurring feature of TPLF, as the *Gbarabe* case makes clear. Such arrangements threaten the independent professional judgment of attorneys, who have a fiduciary obligation to act in their clients’ best interests rather than curry favor with an outside entity funding a lawsuit. They also threaten to take control away from the lawyer’s client and place it in the hands of the funder, which has a financial incentive to influence key strategic decisions of the litigation it has rolled the dice on.

The New York City Bar Association recently recognized as much when it issued an August 2018 interpretation of New York’s version of Rule 5.4(a). That interpretation concluded that fee-sharing with a litigation funder is unethical where “the lawyer’s future payments to the funder are contingent on the lawyer’s receipt of legal fees or on the amount of legal fees received in one or more specific matters.”[157] As the opinion explains, Rule 5.4(a) “presupposes that when nonlawyers have a stake in legal fees from particular matters, they have an incentive or ability to improperly influence the lawyer.”[158] In short, the opinion concluded that one of the most common litigation funding arrangements—i.e., a deal under which a funder provides money to litigate a matter in

“Such arrangements threaten the independent professional judgment of attorneys, who have a fiduciary obligation to act in their clients’ best interests rather than curry favor with an outside entity funding a lawsuit.”

> “[T]he opinion concluded that one of the most common litigation funding arrangements—i.e., a deal under which a funder provides money to litigate a matter in exchange for a percentage of the fee ultimately collected by plaintiffs' counsel—violates Rule 5.4(a).”

exchange for a percentage of the fee ultimately collected by plaintiffs' counsel—violates Rule 5.4(a). Hardly the first professional association to reach this decision, the New York City Bar Association joined earlier decisions by the state bar associations of Maine, Nevada, Utah, and Virginia.[159]

The ethics rules are designed to protect the attorney-client relationship and safeguard the fair administration of justice. Instead of creating exceptions to these time-tested canons, state bar associations and courts should reaffirm their vitality and make clear that TPLF arrangements are not outside their scope. Because lawyer-funder agreements under which attorneys share their fees with outside funders facially run afoul of Rule 5.4, they should be explicitly prohibited.

Class Actions

TPLF in the class action context can also be a recipe for abuse, as the *Gbarabe* case illustrates. Because such aggregate litigation already raises significant concerns regarding control of the litigation, injecting TPLF into class actions increases the danger that a class action will be prosecuted primarily for the benefit of attorneys and funders, and not for the benefit of the class of claimants. As a result, policymakers should consider prohibiting TPLF in class actions.

> “[I]njecting TPLF into class actions increases the danger that a class action will be prosecuted primarily for the benefit of attorneys and funders, and not for the benefit of the class of claimants.”

Conclusion

It can no longer be denied that TPLF is becoming increasingly prevalent in the United States. As this paper demonstrates, the marketplace for selling lawsuits and buying trouble has only multiplied and diversified, with TPLF companies investing billions of dollars, creating increasingly sophisticated investment models and reaching parts of the legal industry previously thought incompatible with litigation funding.

As expected, the problems have multiplied and diversified as well, with TPLF leading to dubious mass torts warehouses, unnecessary surgeries being foisted on unsuspecting plaintiffs, and funding agreements that plainly vest undue influence and control in the hands of the outside funder in both individual and class litigation. These problems illustrate the need for placing reasonable limits on TPLF, including—most fundamentally—a requirement that TPLF arrangements be disclosed at the outset of civil litigation both to the court and to the opposing party. The time for studying and observation has passed, and policymakers must now take concrete action to mitigate the abuses posed by this increasingly pervasive feature of our civil justice system.

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63 *See, e.g.*, Mem. Op. & Order Rejecting Claims of Att'y-Client Privilege & Ordering Produc. of Docs. at 11, *In re Chevron Corp.*, No. 1:10-mc-00021-JCH-LFG, ECF No. 173 (D.N.M. Sept. 13, 2010) (finding "that … discussions trigger the crime-fraud exception, because they relate to corruption of the judicial process, the preparation of fraudulent reports, the fabrication of evidence, and the preparation of the purported expert reports by the attorneys and their consultants"); *In re Appl. of Chevron Corp.* at 9, No. 3:10-cv-01146-IEG-WMC, ECF No. 81 (S.D. Cal. Sept. 10, 2010) (crime-fraud exception applies because "[t]here is ample evidence in the record that the Ecuadorian Plaintiffs secretly provided information to Mr. Cabrera, who was supposedly a neutral court-appointed expert, and colluded with Mr. Cabrera to make it look like the opinions were his own"); Order at 12, *Chevron Corp. v. Champ*, No. 1:10-mc-00027-GCM-DLH, ECF No. 26 (W.D.N.C. Aug. 30, 2010) ("While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court. If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill."); Hr'g Tr. 23:14-20, *In re Appl. of Chevron Corp.*, No. 2:10-cv-02675-KM-MCA, ECF No. 34 (D.N.J. June 17, 2010) (plaintiffs' lawyers' actions could not constitute "anything but a fraud on the judicial proceeding"). On the Lago Agrio suit, *see generally* Roger Parloff, *Have you got a piece of this lawsuit? The bitter environmental suit against Chevron in Ecuador opens a window on a troubling new business: speculating in court cases*, Fortune (June 28,

2011), https://fortune.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/.

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65 *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 644 (S.D.N.Y. 2014).

66 *Id.* at 479.

67 David Yates, *"Mass tort warehouse" fires fund officer to avoid paying him millions for acquiring 14,000 mesh claims, suit alleges*, SE Tex. Rec. (Oct. 10, 2015), http://setexasrecord.com/stories/510642299-mass-tort-warehouse-fires-fund-officer-to-avoid-paying-him-millions-for-acquiring-14-000-mesh-claims-suit-alleges.

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69 Julie Triedman, *Arms Race: Law Firms and the Litigation Funding Boom*, Am. Law. (Dec. 30, 2015), http://www.americanlawyer.com/id=1202745121381/Arms-Race-Law-Firms-and-the-Litigation-Funding-Boom.

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71 *Id.*

72 *Id.*

73 *See* Donald Vinson, *How Litigation Finance Funds Whistleblower Actions*, Law360 (Jan. 5, 2016), https://www.law360.com/articles/742754/how-litigation-finance-funds-whistleblower-actions.

74 *Id.*

75 *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000).

76 *See* 31 U.S.C. §3730(b)(2)-(4).

77 *See United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 956 & n.24 (10th Cir. 2008) (recognizing punitive nature of FCA, which "seeks to sanction and deter wrongful conduct through the imposition of up to treble damages").

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83 *See* ABA Model R. Prof'l Conduct 5.4(a).

84 *See* Fed. R. Civ. P. 23(a)(4).

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135 *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2017 WL 956628, at *7 n.7, *35 (N.D. Cal. Mar. 13, 2017) ("After discovery, Chevron now asserts that plaintiff's September 17, 2015 request for an extension [to file a class certification motion] was not actually based on difficulties presented by the rainy season, but rather due to the fact that plaintiff did not obtain funding until November 2015.").

136 *See* Fed. R. Civ. P. 26(b)(1) (scope of discovery shall be "proportional to the needs of the case, considering … the parties' resources … [and] whether the burden or expense of the proposed discovery outweighs its likely benefit").

137 Austin T. Popp, *Federal Regulation of Third-Party Litigation Finance*, 72 Vand. L. Rev. 727, 755 (2019).

138 Goldstein & Silver-Greenberg, *How Profiteers Lure Women*, *supra* note 70 ("[H]undreds … of women have been sucked into this assembly-line-like system … fueled by banks, private equity firms and hedge funds, which provide financial backing. The profits are immense.").

139 *See* Cohen et al., *supra* note 80.

140 Fisher, *supra* note 33.

141 *See* Jamie Hwang, *Wisconsin law requires all litigation funding arrangements to be disclosed*, ABA J. (Apr. 10, 2018), http://www.abajournal.com/news/article/wisconsin_law_requires_all_litigation_funding_arrangements_to_be_disclosed.

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145 *See* Amanda Bronstad, *Dozens of Lawyers Vie to Lead Data Breach Case Against Marriott*, Law.com (Apr. 22, 2019), https://www.law.com/2019/04/22/dozens-of-lawyers-vie-to-lead-data-breach-case-against-marriott/.

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147 Julie Steinberg, *Opioid Litigation Finance Arrangements Must be Disclosed*, Big Law Business (May 8, 2018), https://biglawbusiness.com/opioid-litigation-finance-arrangements-must-be-disclosed/. The order issued by Judge Polster requires attorneys who have obtained third party litigation funding to submit the following to the court *in camera*: (i) a brief description of the funding; and (ii) sworn affirmations from counsel and the funder stating that the arrangement does not create any conflicts of interest; does not undermine counsel's obligations; does not affect counsel's independent professional

judgment; does not give the funder control over litigation strategy or settlement decisions; and does not affect party control of settlement. *See* Order Regarding Third-Party Contingent Litigation Financing at 1-2, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP, ECF No. 383 (N.D. Ohio May 7, 2018).

148 Haston, *supra* note 111 (noting a "[g]lobal TPLF [d]isclosure [t]rend").

149 Kluwer Arbitration Blog, *Hong Kong Approves Third Party Funding for Arbitration* (July 16, 2017), http://arbitrationblog.kluwerarbitration.com/2017/07/16/hong-kong-approves-third-party-funding-arbitration/.

150 *See* Federal Court of Australia, Class Action Practice Note GPN-CA, paragraph 6.

151 *See Defendant access to third-party funding agreements in Canadian class actions*, Canadian Class Action Defence (Nov. 21, 2018), https://www.lexology.com/library/detail.aspx?g=912d3a6c-b609-458b-bdb1-f55d9b28df7d&utm_source=lexology+daily+newsfeed&utm_medium=html+email+-+body+-+general+section&utm_campaign=toronto+lawyers+association+subscriber+daily+feed&utm_content=lexology+daily+newsfeed+2018-11-23&utm_term=. Courts in Ontario have taken the lead in requiring the disclosure of funding agreements in class proceedings subject to certain redactions. *Id.*; *see also* Ranjan K. Agarwal & Doug Fenton, *Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context*, 59 CBLJ 65 (2017).

152 Haston, *supra* note 111.

153 Fed. R. Civ. P. 26(a)(1)(A)(iv).

154 *See Report of the Advisory Committee on Civil Rules* at 176-179, Committee on Rules of Practice & Procedure (Dec. 4, 2018), https://www.uscourts.gov/sites/default/files/cv12-2018_0.pdf; *see also* Caroline Spiezio, *General Counsel Push for Full Disclosure of Third-Party Litigation Funding in New Letter*, The Recorder (Jan. 31, 2019), https://www.law.com/therecorder/2019/01/31/general-counsel-push-for-full-disclosure-of-third-party-litigation-funding-in-new-letter/. The organizations that have endorsed this proposal include: the Advanced Medical Technology Association, the American Tort Reform Association, DRI – The Voice of the Defense Bar, the Federation of Defense & Corporate Counsel, the Financial Services Roundtable, the Florida Justice Reform Institute, the Insurance Information Institute, the International Association of Defense Counsel, the Las Vegas Metro Chamber of Commerce, Lawyers for Civil Justice, the Louisiana Lawsuit Abuse Watch, the Michigan Chamber of Commerce, the National Association of Mutual Insurance Companies, the National Association of Wholesaler-Distributors, the National Retail Federation, the Pennsylvania Chamber of Business and Industry, the Pharmaceutical Research and Manufacturers of America, the Product Liability Advisory Council, the Small Business & Entrepreneurship Council, the South Carolina Chamber of Commerce, the South Carolina Civil Justice Coalition, the State Chamber of Oklahoma, the Texas Civil Justice League, the U.S. Chamber Institute for Legal Reform, the U.S. Chamber of Commerce, the Virginia Chamber of Commerce and Wisconsin Manufacturers & Commerce.

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157 N.Y. City Bar, Formal Opinion 2018-5: Litigation Funders' Contingent Interest in Legal Fees at 1.

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159 *Id.* at n.8 (citing Prof'l Ethics Comm'n Me. Bd. of Overseers of the Bar, Op. 193 (2007); State Bar of Nev. Op. 36 (2007); Utah Bar Ass'n Adv. Op. 97-11 (1997); Va. State Bar Standing Comm. on Legal Ethics, Advisory Op. 1764 (2002).)

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