

# The Feasibility of Litigation Markets

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## INTRODUCTION

Litigation often involves disputes between litigants with unequal resources or risk preferences<sup>1</sup>—and these imbalances may affect litigation outcomes.<sup>2</sup> It is self-evident that a one-time litigant that is risk-averse and/or resource constrained may not be able to hold out and proceed to trial against a better-financed, repeat-player litigant. The stronger party may drive the weaker party to settle (or drop a case), even if the weaker party would likely be better off holding out for a superior result at trial. In some cases, the party with the weaker bargaining position is the defendant—as, for example, where a defendant to a large-dollar class action is engaged in a recapitalization and cannot risk going to trial against a well-financed group of plaintiffs’ attorneys. More often, the party with the weaker bargaining position is the plaintiff—as, for example, where a small, cash-strapped company has a claim against a larger company based on a failed joint venture that was essential to the plaintiff’s business prospects but was only a minor transaction for

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1. *E.g.*, IN LITIGATION: DO THE “HAVES” STILL COME OUT AHEAD? (Herbert M. Kritzer & Susan S. Silbey eds., 2003); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 564 (1987); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don’t*, 37 HARV. J. ON LEGIS. 393, 395 (2000). For an exploration of what we mean by procedural “equality” or “inequality,” see William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002).

2. *See, e.g.*, Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367 (2009) [hereinafter Molot, *A Market in Litigation Risk*]; Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65 (2010) [hereinafter Molot, *Litigation Finance*].

the defendant. Either way, the case may settle based on bargaining imbalances that have nothing to do with the merits of the case.

If a principal goal of our procedural system is to ensure accurate resolution of disputes—so that defendants pay and plaintiffs receive precisely what they should when one applies substantive law to the facts of their case—then these bargaining imbalances represent a serious problem. Like other civil procedure scholars, I think our system should be designed to resolve disputes based on their merits and to minimize the influence of nonmerits factors. But it is not obvious how procedural reform could help a litigant whose risk preferences or financial resources put it at a disadvantage vis-à-vis its opponent.

The question I, and other scholars, therefore have posed is whether the problem is susceptible to a market solution.<sup>3</sup> Rather than look to procedural reform to correct bargaining imbalances, might we rely instead on the market to achieve that goal? Scholars have explored market mechanisms that could enable plaintiffs and their attorneys to obtain the financing they need to pursue their claims effectively and to level the playing field vis-à-vis better-financed, repeat-player defendants.<sup>4</sup> Scholars also have sketched out what such a market would look like on the defense side, proposing a form of “after-the-event” litigation insurance to help risk-averse defendants.<sup>5</sup> In recent years, the topic of litigation finance has become a “hot” one—there are courses dedicated to the subject,<sup>6</sup> numerous conferences<sup>7</sup> that have

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3. See, e.g., Geoffrey P. Miller, Commentary, *On the Costs of Civil Justice* 80 TEX. L. REV. 2115, 2115 (2002) (“A lawsuit is essentially a sale. The defendant buys a valuable asset from the plaintiff, in the form of a release of claims if the case is settled, or a verdict with *res judicata* effect if the case goes to a verdict.”); Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding Pennzoil v. Texaco*, 75 VA. L. REV. 295, 295 (1989) (“It is through negotiation, not adjudication, that legal conflict is typically resolved.”); Molot, *A Market in Litigation Risk*, *supra* note 2; Molot, *Litigation Finance*, *supra* note 2; William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 372 (2001) (“In complex class actions, defendants purchase a commodity—finality. They buy from the plaintiffs’ representative the plaintiffs’ rights to sue.”). *But see* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (“To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying.”).

4. Molot, *Litigation Finance*, *supra* note 2.

5. Molot, *A Market in Litigation Risk*, *supra* note 2, at 380–81.

6. I have taught courses at Harvard, Georgetown, and George Washington on the subject.

7. See, e.g., *Alternative Litigation Funding: a Roundtable Discussion Among Experts*, GEORGE WASHINGTON UNIV. LAW SCH., <http://www.law.gwu.edu/News/20112012events/Pages/AlternativeLitigation.aspx> (providing video of a 2012 conference hosted by George Washington University Law School); *Litigation Finance and Investment Summit*, INFOCAST, INC., <http://infocastinc.com/events/litigation> (providing details for an April, 2011 summit hosted by Infocast); *Third-Party Litigation Funding and Claim Transfer*, RAND CORP., [http://www.rand.org/pubs/conf\\_proceedings/CF272.html](http://www.rand.org/pubs/conf_proceedings/CF272.html) (offering the record of proceedings from the 2009 RAND-UCLA conference); *Third Party Litigation Funding and Claim Transfer: Trends and Implications for the Civil Justice System*, RAND CORP., <http://www.rand.org/events/2009/06/02.html> (providing the program details for a 2009 conference presented by RAND Institute for Civil Justice and UCLA School of Law). There are even academic websites devoted exclusively to the project, such as the one created by

garnered extensive scholarly attention, and a great deal of interest among practicing lawyers and the mainstream media. Indeed, the ABA and the New York City Bar have conducted studies of litigation finance.<sup>8</sup>

But, like other scholars interested in litigation markets, I have faced questions about whether what I posited in theory could actually work in practice. To find out, I took an unpaid leave from teaching and helped to establish Burford Capital, a company dedicated to helping litigants and lawyers manage the financial burdens and risks of litigation. The goal was to see whether the theories I, and other scholars, had espoused in scholarship could actually be implemented in practice.

From an academic's perspective, the project has been valuable in two ways. First, it helped to provide concrete answers to the theoretical questions I had posed. I had asked whether a market mechanism could level the playing field between litigants.<sup>9</sup> I had also identified a series of challenges to the development of a market mechanism—both business and regulatory challenges—and suggested ways to surmount those obstacles.<sup>10</sup> By establishing Burford, I could finally begin to answer some of the questions raised in the scholarship and test whether the prevailing answers were indeed accurate. Second, and equally important, Burford showed me where I had asked the wrong questions. Practical experience has highlighted additional benefits to a litigation risk market that I had not explored, and also raised unanticipated obstacles that needed to be overcome. For example, I had focused on how a market solution could benefit the plaintiff or defendant who is at a comparative *disadvantage* in a lawsuit. I had not considered the likely reaction of their litigation opponents—the litigants with a comparative *advantage* who do not want the playing field to be leveled. In public policy debates and in litigation itself, repeat player litigants paint market solutions in a negative light—suggesting that the profit incentives of those who finance plaintiffs' claims somehow taint the plaintiffs' claims, even if the claims are meritorious and could not be pursued as effectively without financing.<sup>11</sup>

Moreover, where I had focused on the benefits of a market solution to litigants and the litigation system, I had not spent as much time considering the effects on the economics of law practice.<sup>12</sup> I have learned that litigation finance is just as important to lawyers as to litigants. To some lawyers, it offers a way to take cases they otherwise could not. Litigation finance enables the top-flight lawyer at an

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Maya Steinitz. Maya Steinitz, *A Model Litigation Finance Contract: Litigation Funding in Theory and Practice*, <http://litigationfinancecontract.com/> (last updated Sept. 16, 2013).

8. See AM. BAR ASS'N COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES (2013); Press Release, N.Y.C. Bar Ass'n, Third Party Litigation Financing: A New York City Bar Formal Ethics Opinion (June 15, 2011), available at <http://www.abcny.org/media-aamp-publications/press-releases/press-archives-2011/1160-third-party-litigation-financing-a-new-york-city-bar-formal-ethics-opinion>.

9. Molot, *Litigation Finance*, *supra* note 2, at 83.

10. Molot, *A Market in Litigation Risk*, *supra* note 2, at 378–80.

11. See JOHN BEISNER, JESSICA MILLER & GARY RUBIN, U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES (2009), available at <http://www.instituteforlegalreform.com/sites/default/files/thirdpartylitigationfinancing.pdf>.

12. I did consider the effects of a market solution on lawyers and their professional roles. Molot, *A Market in Litigation Risk*, *supra* note 2, at 433–38.

hourly fee firm to represent a small plaintiff with a meritorious claim even if the client cannot afford his or her hourly bills and his or her firm refuses to agree to contingent fee arrangements. But, to another lawyer, the opportunity to represent a small plaintiff who has obtained financing is not worth it if the lawyer has built a reputation representing large defendants and worries that clients would disapprove of his or her decision to work on a financed plaintiff's case.<sup>13</sup> Very often for a litigator, more important than the question of whether litigation finance is good for the legal system is whether it is good for the litigator's pocket book. I have learned that lawyers' attitudes toward litigation finance depend as much on their own personal financial interests as on their political preferences or policy views.<sup>14</sup>

This Article attempts to link theoretical scholarship about litigation risk markets with a real-world examination of how such markets actually work in practice. Part I briefly describes the state of academic discourse on litigation finance, noting the questions scholars have asked and answered regarding the feasibility and desirability of a market in litigation risk. Part II then analyzes the practical workings of at least one litigation finance company—describing how an actual market mechanism evolved, what obstacles it faced, and where it fit within broader, albeit nascent, markets. Finally, Part III links the two projects, relying on practical experience to provide answers to the questions scholars have asked and raising new questions scholars had not previously considered.

#### I. THE SCHOLARLY PROJECT: A MARKET SOLUTION TO A PROCEDURAL PROBLEM

A great deal of civil procedure scholarship is motivated by a desire to improve the accuracy of our procedural system. Some of that scholarship, including much of my own, has noted that the very features of our system designed to ensure accuracy—the extensive pretrial practice and exhaustive discovery—may sometimes have the opposite of their intended effect.<sup>15</sup> By rendering litigation unduly expensive, time-consuming, and burdensome, the pretrial process may lead parties to forego their rights or settle cases based on expense and delay, rather than on the merits.<sup>16</sup> Scholars concerned with how litigation burden and expense may undermine litigation accuracy have explored ways to streamline the process and accelerate the moment when law is applied to fact.<sup>17</sup>

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13. A lawyer at a large, defense-oriented firm might also be unable to accept such a case because of a conflict of interest.

14. Having seen litigants' and lawyers' financial interests affect their policy views, I have had to look inward and ask the same questions about myself, once I took the leap from the scholarly to the practical and worked to build a business that implemented my scholarly model. See *infra* Part III.C.2.

15. See Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 994–95 (1998) [hereinafter Molot, *Changes in the Legal Profession*] (citing work of other scholars as well); Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 61–62 (1997) [hereinafter Molot, *Tort Law Incentives*] (citing work of other scholars as well).

16. See Molot, *Changes in the Legal Profession*, *supra* note 15, at 995; Molot, *Tort Law Incentives*, *supra* note 15, at 62.

17. See Molot, *Changes in the Legal Profession*, *supra* note 15, at 1026–50; Molot, *Tort*

Though interesting and potentially important, the ideas advanced in this scholarship are very difficult to implement. Scholars can advocate for alternative dispute resolution mechanisms designed to replicate the adjudicative process more efficiently (as I have).<sup>18</sup> They can embrace a more aggressive, earlier use of summary judgment as a way to weed out weak claims and defenses (as I also have).<sup>19</sup> But given the potential adverse consequences of any proposed change, the difficulty of comparing hypothetical costs and benefits, and the procedural obstacles to implementing any major reform, the status quo tends to prevail.

There is one important problem in this field, however, that can be addressed without any need for procedural reform: the problem of bargaining imbalances.

Sometimes a lawsuit is a battle of equals. Consider a suit between two companies litigating over a failed business venture. If the companies are of equal size and the dollars at stake are manageable for plaintiff and defendant alike, then one would expect the suit to settle based on the merits. To be sure, both parties will complain about the litigation process—it is too expensive, time-consuming, and burdensome.<sup>20</sup> But given that they are equally well-suited to bear those burdens, one would expect them to settle based on their perceptions of the merits and their expectations for trial (or, at least, that is how the theory goes).<sup>21</sup>

However, what if one of the litigants is much smaller than the other? The failed business venture may have been central to one company's development—the core project on which it had pinned its hopes and to which it had devoted all of its financial resources. For the other company, the failed business venture might have been one of dozens it pursues each year and the dollars at stake not at all significant to the company's financial health. A lawsuit between these two companies would present very different settlement dynamics from the lawsuit between two equal adversaries. The smaller company—very often the plaintiff—typically would not

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*Law Incentives*, *supra* note 15, at 108–16; see also Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 110–18 (2003) [hereinafter Molot, *Old Judicial Role*].

18. See, e.g., Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL’Y 37, 51–54 (2002) (describing mediation building processes which involve, among other things, any identifiable interested parties, experts, and neutral facilitators); Molot, *Litigation Finance*, *supra* note 2, at 80; Molot, *Old Judicial Role*, *supra* note 17, at 91.

19. See Michael J. Davidson, *A Modest Proposal: Permit Interlocutory Appeals of Summary Judgment Denials*, 147 MIL. L. REV. 145, 206–16 (1995) (exploring the possibility of making denials of summary judgment appealable); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 320 (1986); Molot, *Changes in the Legal Profession*, *supra* note 15, at 1030–32; Molot, *Litigation Finance*, *supra* note 2, at 77; Geoffrey P. Miller, *Preliminary Judgments* 21–22 (N.Y.U. Ctr. for Law, Econ. and Org., Working Paper No. 08-29, 2008), available at <http://ssrn.com/abstract=1144030>. *But cf.* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 92 (1990) (survey of 140 contested summary judgment motions found that 122 were made by defendants and only 18 were made by plaintiffs).

20. See Molot, *Tort Law Incentives*, *supra* note 15, at 61.

21. See Steven Shavell, *Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

have the financial resources to hire top-flight hourly counsel to litigate the case. Having devoted so much capital to a business venture that failed, it would have a hard time raising more capital to litigate over that failed project. The larger company, typically the defendant, would have no such difficulty. Indeed, faced with a lawsuit from the smaller company, the larger company might not only hire the best counsel money can buy, but also give its lawyers free rein to pursue a litigation strategy designed to drag out the process and inflict as much pain as possible on its adversary. In that circumstance, even if the weaker of the two parties has a very strong case on the merits, it would have a difficult time turning down a low settlement offer that would free it of the burdens of ongoing litigation. Thus, the ultimate resolution of the case would likely be influenced as much by the bargaining imbalances between the parties as by the underlying merits of the case. Without a credible threat of taking the case through trial (and appeal)—and lacking the resources needed to take full advantage of the process available to it—the weaker of the parties could not extract a settlement for the amount to which it is lawfully entitled.<sup>22</sup>

In theory, the problem of bargaining imbalances can work to the disadvantage of either party. In some instances, it is the defendant that cannot credibly threaten taking a case to trial.<sup>23</sup> Consider the company faced with a nationwide class action. It may have ample resources to defend the case vigorously; indeed, its legal fees might even be covered by insurance. But the potential liability could far exceed any insurance coverage and significantly threaten its financial health. If the company is in the midst of a recapitalization or is otherwise concerned about how capital providers or investors perceive the pending suit, this may put extraordinary pressure on the defendant to dispose of the risk and settle the case. The plaintiffs' attorneys, in contrast, might view the suit as just one in their portfolio of cases—and if the case is big enough, they very likely will have spread the risk of losing any particular suit over a consortium of firms who would share in the burdens of the case and the benefits of any fee award.<sup>24</sup> As a result, the plaintiffs' attorneys might be better positioned to hold out for an attractive settlement than the defendant. Indeed, unable to proceed to trial and risk a catastrophic loss, the defendant may be induced to pay more for the suit than the merits alone would suggest is appropriate.

Where bargaining imbalances threaten to skew settlements, the most promising solution to this problem may lie in a market mechanism, rather than procedural reform. If it is a defendant that finds itself at a disadvantage—because it needs certainty at a moment when the litigation process cannot offer it—the defendant might look to a market actor to provide insurance against a bad litigation outcome.<sup>25</sup> The litigation insurer would absorb a different risk from the property and casualty insurer: whereas conventional insurance protects against the occurrence of a litigation-triggering event, litigation insurance would be sold *after*

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22. See Molot, *Litigation Finance*, *supra* note 2, at 84.

23. See Molot, *A Market in Litigation Risk*, *supra* note 2, at 389–90.

24. The enormous risk and cost associated with class action litigation for both sides helps explain the evolution of a well-capitalized plaintiffs' bar for at least certain types of cases.

25. See Molot, *A Market in Litigation Risk*, *supra* note 2.

the bad event has occurred and would be sold to protect against a worse-than-expected litigation outcome.<sup>26</sup> So long as an insurer is willing to accept the entire liability, without policy limits or with very high policy limits, it would enable the defendant team to proceed to trial. Able to threaten a trial, the defendant could not be coerced into an unduly high settlement.

Plaintiffs seeking to level the playing field against a better-financed adversary would likely look for financial assistance, as well as insurance against a loss.<sup>27</sup> The small company could look to a market actor to advance legal fees and litigation expenses, and perhaps even to finance its operations while the suit is pending. With adequate financing in hand, the small company could retain the best counsel for the case and would be able to ensure that its lawyers have the resources they need to keep up with the defendant. By shifting some of the expense and risk of litigation to a financier, the small company would level the playing field in the litigation and improve settlement dynamics.<sup>28</sup>

But if market actors in theory could help level the playing field for the disadvantaged litigant—and promote merits-based resolutions—there are also potential obstacles to the development of an effective market mechanism. For one thing, market entrants might face regulatory obstacles—for example, insurance regulation for defense-side risk-bearers<sup>29</sup> and champerty and maintenance rules for plaintiffs'-side financiers.<sup>30</sup> They might also face even more daunting economic obstacles, such as raising a large enough capital base to relieve large corporations of enormous risks in very large lawsuits.<sup>31</sup> Moreover, although the development of a market solution would not require the same sort of procedural changes as other, more traditional reform proposals, one could not develop such a mechanism without attention to procedural rules—such as the treatment of third-party litigation insurers and financiers under the attorney-client privilege and work product doctrines.<sup>32</sup>

Some of these obstacles can be evaluated using conventional legal and economic analysis, and scholars (including myself) have begun to do just that. They have looked at the regulatory, economic, and procedural issues that are likely to be of concern to litigation insurers and financiers.<sup>33</sup> But their conclusions on these points are necessarily tentative—and, in this respect, no different from the conclusions of scholars who promote conventional procedural reform. In the absence of an actual, working market mechanism, scholarship on litigation finance suffers from the same problems as scholarship on conventional procedural reform efforts. A scholar may argue that, *in theory*, his or her proposed solution is feasible and desirable, but lawyers, judges, students, and other scholars will wonder whether these theoretical musings would actually work in practice. To see if a market mechanism really

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26. *Id.* at 381–82.

27. *See* Molot, *Litigation Finance*, *supra* note 2.

28. *Id.* at 88.

29. Molot, *A Market in Litigation Risk*, *supra* note 2, at 428–33.

30. Molot, *Litigation Finance*, *supra* note 2, at 105–09.

31. Molot, *A Market in Litigation Risk*, *supra* note 2, at 392.

32. *Id.* at 420–21; Molot, *Litigation Finance*, *supra* note 2, at 104.

33. *See* Molot, *A Market in Litigation Risk*, *supra* note 2, at 392; Molot, *Litigation Finance*, *supra* note 2, at 105–09.

could work—and to understand just how it would affect litigation dynamics—one would have to examine some real world litigation risk transfers.

## II. THE PRACTICAL PROJECT: CONSTRUCTING A MARKET IN LITIGATION FINANCE

While presenting a paper at a RAND-UCLA conference on litigation finance, I met some lawyers and business people who had read some of my scholarly work and were interested in partnering with me to create a dedicated litigation funder. I agreed, and we formed Burford Capital, a litigation finance provider that raised public capital on the London Stock Exchange's Alternative Investment Market.<sup>34</sup> Burford raised its money in London because investors in the United Kingdom were ahead of U.S. investors in viewing litigation as a market opportunity. Whereas in the United States, plaintiffs who are short on funds have historically looked to contingent fee attorneys to finance their cases, in the United Kingdom contingent fee arrangements historically had been prohibited,<sup>35</sup> and claimants therefore typically look to third-party capital providers to finance their cases. U.K. investors therefore understood the model and thought that it would work just as well in the United States as in the United Kingdom—indeed, potentially better given the sheer size of the U.S. market.

When Burford was formed I agreed to serve as chair of its investment committee. Soon thereafter, Georgetown granted me an unpaid leave of absence, and I expanded my role in the venture and devoted myself full-time during my leave to building the business. Burford is now four years old and has hired a talented underwriting staff—litigators with decades of experience at top law firms and in senior in-house positions at major companies. Burford built this dedicated team of investment professionals to conduct extensive due diligence on each opportunity and to negotiate and document litigation risk transfers with Burford's counterparties. Litigants approach Burford's team of legal professionals asking whether their cases are financeable. Burford's legal team then conducts extensive diligence that includes an examination of the facts of the dispute, the governing law and forum, the quality of the legal team the litigant has hired or proposes to hire, and the respective financial resources of the parties. If the Burford legal team decides that a case is indeed financeable, the team then works to line up financing on terms that meet both the litigant's needs and Burford's return expectations.

Burford has committed more than \$300 million in capital across more than fifty deals involving commercial disputes in the United States, the United Kingdom, and international arbitration. In each of these deals Burford has been a passive provider of financing. It does not control litigation or settlement decisions and does not interfere with the traditional attorney-client relationship. Nevertheless, clients and their lawyers rely on Burford to monitor cases should there be a need for additional

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34. *Burford Capital Limited ORD NPV*, LONDON STOCK EXCHANGE, <http://www.londonstockexchange.com/exchange/prices-and-markets/stocks/summary/company-summary.html?fourWayKey=GG00B4L84979GGGBXASQ1>.

35. English solicitors could work for “conditional fees,” which involve a discount off of their hourly fees and a comparable uplift in the event of success. But until recently they could not work for a percentage of the recovery. Jonathan T. Molot, *Fee Shifting and the Free Market*, 66 VAND. L. REV. 1807, 1820–21 (2013).



financing, and they often ask Burford for input on major litigation decisions (as they know that Burford has experienced litigators on staff and that Burford's financial interests are aligned with those of the client).

Some cases have come to Burford late in the litigation process. Indeed, in some cases a litigant paying an hourly fee to a law firm has run out of money just a few months before trial. Without financing, the litigant knows that its law firm will have to withdraw and it will have to find substitute counsel willing to take the case on a contingent fee basis. In those cases, Burford has deposited enough funds in the law firm's client trust account to pay accumulated arrearages and to cover the budget for hourly fees going forward.

In other cases, a business (or a law firm) may approach Burford at the outset of litigation when the client is choosing among law firms. In those cases, the client might prefer a firm or lawyer that works on an hourly fee basis, but may not have sufficient funds available to cover the preferred lawyer's fees, or may have better uses for its capital. By obtaining financing from Burford, the client can retain the lawyer and firm of its choice and yet do so on a synthetic contingent fee basis, by granting Burford a share of the recovery in exchange for the cash needed up front to cover the law firm's fees. In still other cases, Burford has provided cash for a purpose other than enabling the litigant simply to pay its lawyers' bills. For example, Burford has worked with insurance companies so that part of Burford's investment pays the premium for an insurance policy—and Burford and the insurer together take a much larger band of risk than Burford could take alone. In such cases, Burford's offerings are designed not only to provide a business with much needed cash in the short term, but also to protect the business against a worse-than-expected litigation outcome down the road.

Finally, Burford has provided financing to law firms, rather than litigants, in situations where lawyers and clients have agreed to straight contingent fee arrangements and law firms seek financing to ensure that they have the resources they need to represent their clients vigorously. Burford's financing helps to level the playing field between a law firm that has agreed to take a time-consuming case on a contingent fee basis and a firm whose client has endowed it with abundant financial resources.

Because Burford's counterparties want to retain the confidentiality of the information they share with Burford—including the very fact that they have obtained financing—I am not able to identify their lawsuits or describe precisely how the availability of financing changed the dynamics of particular cases. There have been two instances in which reporters have discovered, and written about, Burford's financing and those are cases about which I am free to say something—one of which is a prototypical Burford investment and the other of which is an outlier.<sup>36</sup> I am also able to speak about the dynamics in other cases, provided that I avoid details that would identify the party who obtained financing and the lawsuit in question. My discussion of some of these cases is set forth in Part III below.

Although Burford's capital has been used by different businesses for different purposes, as a general matter Burford's financing has enabled those businesses to retain higher-quality counsel and/or mount a more vigorous prosecution of a case

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36. See *infra* Part III.A.

than would have been possible without Burford financing. Each of the lawsuits that Burford financed likely would have been pursued in some form even without Burford financing—so Burford cannot take credit (or blame) for the existence of these lawsuits. Each litigant that Burford financed at the outset is one that would have found some lawyer to handle its dispute if it had been unable to finance it, although that lawyer would not have had the experience, ability, or resources possessed by the lawyer ultimately selected.<sup>37</sup> Each case that Burford financed midstream, because the hourly firm was going to withdraw, would have been continued with a substitute law firm, but the quality of the representation (and, in my view, the outcome) would have changed. And where law firms have agreed to contingent fee arrangements, rather than hourly fee arrangements, and then have relied on Burford for financing, the law firms' deals with Burford have provided them with the resources they have needed to represent their corporate clients vigorously, though they would have pursued those cases in some fashion regardless. Burford's financing likely enabled the law firms to resist the temptation to divert lawyer hours and firm resources from contingent fee matters to hourly fee matters in order to cover overhead and maintain their profits per partner.

More than twenty-five of Burford's investments have resulted in settlements or final judgments. Burford's investments so far have been profitable—it has received its money back and a 46% profit across all of its concluded cases. These returns are net of losses, but they took time to generate and do not reflect uncommitted capital still in reserve, so the annualized rate of return for the portfolio as a whole is lower than 46%.<sup>38</sup>

That Burford so far has made money, rather than lost it, answers two core questions that scholars have posed about litigation finance. First, the fact that a company can earn money for its investors by investing in litigation risk suggests that more capital can be raised in the future and that a more fulsome market is indeed feasible. Indeed, in the United States there are at least four other dedicated litigation finance companies that provide capital for business disputes.<sup>39</sup> Second, the fact that Burford has been able to make money suggests that it has invested in

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37. I cannot say for sure that the converse is true: that is, that every business or lawyer Burford declined to finance nonetheless proceeded with its claims. I do know that in many instances the businesses that approached Burford had a number of options for pursuing their claims. A decision by Burford not to fund in these instances merely eliminates one of those options, and leaves the plaintiff free to proceed with a law firm on a contingent fee basis.

38. See Trading Update from Burford Capital, Burford Capital Reports Significant Progress in 2012 (Jan. 24, 2013), available at <http://www.burfordcapital.com/wp-content/uploads/2013/01/Burford-Trading-Update-24Jan2013-FINAL.pdf>.

39. Bentham is a subsidiary of the Australian Funder, IMF. See BENTHAM CAPITAL, <http://www.benthamcapital.com/>. Juridica, like Burford, raised its money on the London Stock Exchange. See JURIDICA INVS., <http://www.juridicainvestments.com/>. Parabellum, launched by a team that provided litigation finance at Credit Suisse, recently announced that it has capital to invest. Press Release, Parabellum Capital LLC, Top Credit Suisse Banker Joins Parabellum Capital, a Leader in Legal Finance; Firm Secures Substantial Capital Facility (Jan. 24, 2013), available at <http://www.pnewswire.com/news-releases/top-credit-suisse-banker-joins-parabellum-capital-a-leader-in-legal-finance-firm-secures-substantial-capital-facility-188178271.html>. The most recent entry is Gerchen Keller Capital. See GERCHEN KELLER CAPITAL, <http://www.gerchenkeller.com>.

winning cases more often than losers, providing practical support for an academic model that relies on third-party financiers to enable cash-strapped or risk-averse plaintiffs to pursue meritorious claims.<sup>40</sup>

But if the existence of Burford and its cohorts suggests that litigation finance is feasible, one needs to dig deeper into their experience—both the individual cases and their reception among policymakers—to see how their actual experience bears upon the questions that academics have posed.

### III. PRACTICAL LESSONS FOR THE SCHOLARLY PROJECT

When I examine the deals that Burford has done and the public discourse that has surrounded them, I have found support for the conclusions that I and other scholars had reached in our academic work, and I also have confronted new issues that have not yet been explored.

#### *A. Practical Reinforcement for the Scholarly Project*

Burford's basic business proposition is based on an academic theory propounded in scholarly work: a market mechanism can help level the playing field between unequal adversaries and help the weaker party to obtain the merits resolution to which it is entitled, either by enabling it to proceed to trial or (more likely) by enabling it to negotiate a fair settlement because it is able to afford a trial. I have seen that premise proven true again and again. Confidentiality obligations prevent me from describing litigation dynamics in so much detail as to identify the parties to the dispute, but I can describe a few examples to provide color.

In one case (which an enterprising *American Lawyer* reporter was able to discover and the client and lawyer have discussed publicly),<sup>41</sup> Burford provided financing to a multimillion dollar real estate developer engaged in a business dispute with an even larger real estate developer. The smaller developer had the right to build a specified number of residential units on a piece of land it had purchased at auction from the State of Arizona as part of a large planned community. The larger developer, which served as master developer for the broader project, did everything in its power to prevent the smaller developer from proceeding (most likely because it had a competing residential development of its own across the street). The larger developer succeeded in shutting down the smaller developer's project, causing it to lose the land and all of its sunk development costs. The smaller developer sued and had the foresight to hire one of the best lawyers at one of the best law firms in the country to litigate its high-stakes, complicated business dispute. (The litigator, Barry Ostrager of Simpson Thacher

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40. One might object that a litigation financier's profits could mean either that it has accurately predicted litigation outcomes or that it has had a big enough win to offset a large number of small losses. In Burford's case, no single victory has accounted for more than 20% of its returns, and Burford's win-loss ratio so far exceeds 80%.

41. Andrew Longstreth, *Litigation Finance Firm Backs Big Winner in Arizona Dispute*, N.Y. L.J., July 30, 2010, at 5.

Bartlett, was consistently rated in the top ten nationally by various ranking organizations.)<sup>42</sup>

As the case progressed, however, the plaintiff ran out of money—and the real estate collapse in 2008 rendered it asset-rich but cash-poor. With summary judgment briefing due in a month and trial scheduled six months later, the law firm was going to have to withdraw at the end of 2009, as the client had accumulated more than a million dollars in arrears and was facing as much as five million more if the case went all the way through trial. The client recognized that if it had to find another law firm to take the case at that late stage, it would risk losing the positive momentum it had accumulated and would likely dramatically sacrifice the quality of its counsel. Rather than seek substitute counsel, the client sought out a deal with Burford, under which Burford advanced \$5 million (later increased to more than \$6 million) to cover the arrearages and the costs of the litigation through trial. Burford saw a strong case on the merits—one in which both the governing legal documents and the equities favored the plaintiff. There was a risk that a jury might misunderstand those legal documents (which were rather complicated) and an even greater risk that the jury would discount the plaintiff's damages (or award no damages at all) based on the subsequent collapse in the real estate market. Although the real estate decline happened well after the events in question—and the plaintiff's damages were properly calculated based on the damage it suffered at the time of the defendant's actions—there was the risk that a jury would nonetheless devalue the plaintiff's claim because subsequent events may have rendered it less valuable. Burford took the risk, advancing the funds in exchange for a share of the recovery.

The law firm stayed on and litigated the case to conclusion—attempting unsuccessfully on numerous occasions to settle the case (the parties were just too far apart on damages numbers). The jury returned a \$110 million verdict, holding the defendant accountable for its conduct and awarding the plaintiff its due. Following the verdict, the parties ultimately settled the case—agreeing upon a resolution which discounted the jury verdict based on appellate and enforcement risk, but which left the plaintiff, and Burford, with an attractive outcome. (Burford was entitled to its money back plus 40% of the net recovery, which, after a law firm uplift, would provide Burford with its investment back plus a very attractive return on that invested capital. Post-settlement, Burford more than tripled its money on the case.<sup>43</sup>) Without Burford's funding, I am confident that the result would have been different.

Two other cases (not publicly reported) are almost identical to the first in important respects—meritorious claim in a business dispute (that is, a claim that Burford's underwriting team believed was entitled to win on the merits), plaintiff runs out of money, law firm threatens to withdraw. In those two other cases, however, the plaintiff did not come to Burford until *after* the law firm had already withdrawn. In one case, the plaintiff had switched to a new firm willing to take the

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42. CHAMBERS USA: AMERICA'S LEADING LAWYERS FOR BUSINESS 1485–86 (Fionna Boxall et al. eds., 4th ed. 2006).

43. BURFORD CAPITAL 2012 ANNUAL REPORT 13, *available at* <http://burfordcapital.com/wp-content/uploads/2012/10/2012-FY-Results-Burford-Capital-Annual-Report-TEMP.pdf>.

case on a contingent fee and then sought funding from Burford for expenses. In the other case, the plaintiff sought Burford's help in lining up substitute hourly fee counsel and took enough funding from Burford to fund the entire case. The plaintiff that received assistance in selecting substitute counsel obtained just as happy a result as in the example above: a verdict for tens of millions of dollars that it likely would not have obtained without counsel of the caliber it chose. The client, the law firm, and Burford were all of course thrilled with the result. The plaintiff that switched firms before coming to Burford for expenses did not do quite so well. The new law firm staffed the contingent fee matter with less experienced lawyers and did not litigate the case as effectively as its predecessor. Moreover, the plaintiff's risk aversion remained strong, despite having passed off the costs of litigation to Burford and the law firm. The plaintiff ultimately accepted a settlement offer that was well beneath the value of its claim—one that covered the contingent fee firm's opportunity cost, returned Burford's investment, and provided only modest compensation to the plaintiff for the harm it had suffered at the hands of the defendant.

When one examines these three cases, one sees how financing can provide a business claimant with the resources it needs to retain topflight counsel and increase its chances of collecting that to which it is legally entitled. But whether a plaintiff actually takes advantage of this boost to its position depends upon the client and the decisions it makes. Burford does not pick counsel for the client and it does not control litigation or settlement decisions.<sup>44</sup> A risk-averse plaintiff may benefit from financing, but it may remain risk averse even with funding in place.

Burford has also improved litigation dynamics through deals with law firms, sometimes covering a portfolio of business claims that the law firm has agreed to handle on a contingent fee basis. The law firms and cases have varied considerably. In some instances, the law firm and the clients are both enormous players—including AmLaw 100 firms representing Fortune 100 companies. In one such scenario, a business with strong meritorious claims had a responsibility to shareholders to pursue those claims but did not want to invest millions of dollars to do so. The law firm was happy to proceed on a contingent fee basis, but the investment was simply too large for firm management to accept entirely on its own. Burford provided sufficient capital to reduce the law firm's exposure to an acceptable level and enabled the firm to proceed on the fee basis that the client preferred.

In other instances, the lawyers and matters are smaller in scale. A common example is where a practice group at a large firm finds itself under pressure from firm management either to shed its contingent fee matters or devote more work to hourly fee business, which would interfere with its ability to represent its contingent fee clients diligently. The practice groups have sought financing in an effort either to bring in enough cash to satisfy firm management or, where firm

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44. Although, as an economic matter, one could imagine why Burford would want to do both of these things, its business model is premised upon respecting client autonomy and the attorney-client relationship, and so it does not require the client to choose a particular lawyer or to agree in advance to accept a particular settlement. It can—and does—decline to fund a case where the client has chosen inadequate counsel or where the client's settlement expectations are unrealistic.

management preferred a clean break, to facilitate a departure from the large firm by enabling the practice group to cover expenses and overhead upon starting a new, smaller firm. In either case, Burford financing has enabled lawyers to provide their clients with the quality representation that the client deserved.

### *B. Surmounting Potential Obstacles*

The three principal obstacles explored by scholars and summarized above are (1) regulatory regimes that might prohibit or restrict the implementation of a market in litigation risk, (2) work product and privilege issues that would arise when litigants shared information with third-party financing or insurance sources, and (3) business obstacles that might interfere with plaintiff- or defense-side risk transfers. Practical experience suggests that none of these obstacles is insurmountable; although salutary policy changes might help to accelerate the development of a thriving litigation market, the market can develop on its own even in the absence of these changes.

#### 1. Regulatory Regimes

When it comes to the financing of business claims and/or the lawyers who litigate them, government regulation does not pose a meaningful obstacle to market transactions. The common law doctrines of champerty and maintenance, which long ago stood in the way of third-party financing, have been abandoned in the vast majority of states,<sup>45</sup> and even where the doctrines continue to place restrictions on the financing of personal claims, they generally have no application to business disputes.<sup>46</sup> Business claims are financeable virtually everywhere, even in the states that have retained restrictions on the financing of personal claims, but there may be a subset of seemingly commercial claims that are capable of being characterized as personal and, therefore, subject to the old champerty and maintenance doctrines. For example, one would think that a business suing its former transactional lawyers for an obvious mistake that cost the business tens of millions of dollars would be characterized as a commercial or business claim. However, in a couple of states (Virginia and Colorado), there is the possibility (though by no means certainty) that a court might characterize the malpractice claim as a personal claim, not susceptible to financing.<sup>47</sup> When faced with a claim that presents such a risk, Burford has declined to provide financing rather than to test the boundaries of applicable law.<sup>48</sup> Such an example is quite rare, however, and businesses that seek

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45. See *Del Webb Cmty., Inc. v. Partington*, 652 F.3d 1145, 1156 (9th Cir. 2011) (noting a well-recognized and “consistent trend across the country . . . [of] limiting, not expanding, champerty’s reach”); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011).

46. See Sebok, *supra* note 45.

47. There is also a recent Pennsylvania state court decision holding that malpractice claims against a lawyer are subject to champerty restrictions. *Frank v. Tewinkle*, 45 A.3d, 434 (Pa. Super. Ct. 2012).

48. Given the discussion below regarding lawyers’ attitudes toward financing, one can understand why a litigation funder like Burford, which depends upon law firms for referrals

financing for commercial disputes generally are not prevented from doing so by any governing law.

Law firms that seek financing likewise can do so without regulatory risk, though in some cases the terms of a financing deal may have to be structured to take into account prohibitions against fee splitting. Every state bar except for the District of Columbia prevents lawyers from sharing fees with nonlawyers. The purpose of these prohibitions is to prevent the unauthorized practice of law—and D.C. has carved out an exception from the prohibition to enable lawyers and other professionals (e.g., accountants or lobbyists) to offer professional services side-by-side in a single firm and share profits. Law firms have long been permitted to obtain financing, however, and most of the top law firms in the nation have at least some sort of credit line from major banks, which is secured by the fees they earn from their clients. Indeed, in my work at Burford I have seen instances in which a major financial institution holds a security interest in the contingent fee entitlement of a top law firm in a major piece of litigation. As long as the financier's interest in the litigation outcome is entirely financial, and the capital provider has no power to influence the law firm's representation of its client or to interfere in the attorney-client relationship, then the financing of law firms does not pose a problem.<sup>49</sup> Jurisdictions like Australia and the United Kingdom have gone several steps further, permitting nonlawyers to own equity in law firms, and even allowing law firms to become publicly traded. In the United States, in contrast, nonlawyers who provide financing to a lawyer must remain passive providers of financing, rather than active managers of a law firm's business.

The ABA has issued a report confirming that a lawyer can comply with his professional obligations while litigating a financed case.<sup>50</sup> The ABA working paper on the subject advised lawyers to be careful to ensure that they do not let their own financial interests trump those of their clients, but made clear that existing rules permitted lawyers to litigate financed cases and that there was no need for any revision of those rules.<sup>51</sup>

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and opportunities, would choose not to invest in a meritorious legal malpractice claim regardless of the governing law. *See infra* text accompanying notes 69–72.

49. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 10, cmt. b (2011) (stating that the rule against fee-splitting “should be construed so as to prevent nonlawyer control over lawyers’ services, *not* to implement other goals such as preventing new and useful ways of providing legal services or making sure that nonlawyers do not profit indirectly from legal services in circumstances and under arrangements presenting no significant risk of harm to clients or third persons”) (emphasis added); Douglas R. Richmond, *Other People’s Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 676–77 (2005) (analyzing and rejecting arguments that litigation financing involves fee splitting with nonlawyers).

50. *See* AM. BAR ASS’N COMM’N ON ETHICS 20/20, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 29–30 (2012), *available at* [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20111212\\_ethics\\_20\\_20\\_alf\\_white\\_paper\\_final\\_hod\\_informational\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf).

51. *Id.*

## 2. Privilege and Work Product Protection

An additional obstacle to litigation finance considered by scholars is the risk that litigants seeking financing might fear that any information they turn over to a potential third-party funder might end up in the hands of their adversary.<sup>52</sup> In practice, this is a risk that can be managed easily with a bit of care. For one thing, most of the information that a third-party funder will need to evaluate a lawsuit is factual information of the sort that is discoverable by the adversary in any event. Although it might be useful for a third party funder to be privy to an attorney's analysis of the case—and this is common practice in the United Kingdom—a good funder will have to analyze the merits on its own and will not rely on the analysis offered by the litigant or his attorney, who of course have strong incentives to paint as rosy a picture of the merits as possible. For another thing, information exchanges between litigants and funders can be structured so as to warrant work product protection and common interest privilege protection.<sup>53</sup>

As a policy matter, the arguments for protecting communications with funders are quite strong. First, the very reason that a litigant might seek funding—to level the playing field against a better-financed adversary—counsels against penalizing the party for seeking that funding. Why should a party who pays his attorneys by the hour obtain a different level of protection than a party who cannot? Likewise, why should communications between a defendant and its insurer receive different treatment from communications between a plaintiff and a funder? Second, communications between a litigant or his lawyer and a potential funder are just the sort of core work product that should not be shared with an adversary. A funder deciding whether to fund a case will want to hear about the lawyer's strategy for litigating it and the litigant and/or lawyer's settlement expectations—matters that should not be turned over to the other side. Indeed, there is no legitimate reason why a litigation adversary would want to see such communications—only the illegitimate desire to pick the other side's brain and anticipate its strategy.

The doctrinal support for work product protection of materials shared with funders is equally strong.<sup>54</sup> Work product doctrine protects materials “prepared in anticipation of litigation . . . by or for another party or its representative,” and to the extent that a litigant's attorney prepares a memo about a case, there is no doubt that this memo would be protected as work product.<sup>55</sup> The only question, then, is

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52. See Molot, *A Market in Litigation Risk*, *supra* note 2, at 381; Molot, *Litigation Finance*, *supra* note 2, at 112 n.143.

53. See *Mondis Tech., Ltd. v. LG Elecs., Inc.*, Nos. 2:07-CV-565-TJW-CE, 2:08-CV-478-TJW, 2011 WL 1714304, at \*3 (E.D. Tex. May 4, 2011) (protecting as work product documents prepared “with the intention of coordinating potential investors to aid in future possible litigation”); Molot, *A Market in Litigation Risk*, *supra* note 2, at 381.

54. *Devon IT, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160, at \*1 n.1 (E.D. Pa. Sept. 27, 2012) (holding that funding agreement and all communications between the litigant and the outside funding source were “protected by the work-product doctrine” because the “matters directly involve[d] the mental impressions of counsel” and production would have revealed “[l]itigation strategy, matters concerning merits of claims and defenses and damages”).

55. FED. R. CIV. P. 26(b)(3).



whether sharing such a memo with a litigation financier would serve to waive that work product protection. For a party's disclosure to waive work-product protection (in contrast to attorney-client privilege), the litigant must effectively provide access to the litigant's adversary, or else substantially increase the chances of disclosure to the adversary.<sup>56</sup> Disclosure pursuant to a confidentiality agreement to someone who is not a litigation adversary, but rather a potential source of financing for the litigation, does not increase the risk of exposure to an adversary and does not waive the protection.<sup>57</sup>

Provided they approach the question carefully, litigants, lawyers, and funders can structure their relationships so as to fit squarely within the applicable doctrines and ensure that the doctrinal result matches the policy underlying the relevant doctrines and protects against disclosure. Where a litigant seeks funding, it ideally should have its lawyer retain a potential source of funding (whether a funder or an intermediary such as a broker) as a consultant to answer the question of whether the case is "financeable." Just as a litigator might retain a technology consultant at the outset of a patent case to better understand the patented technology in question, so too may a litigator retain a consultant to decide if a case is financeable and to provide feedback on the terms that would likely attach to such financing. Once a third-party funder says "yes, the case is financeable," then of course there will be a negotiation between the funder and the litigant, and so the funder will have to make clear that, in responding to an initial inquiry, it is not providing the litigant with its undivided loyalty. However, if the negotiation is successful and the funder ends up financing the case, then the litigant and funder might receive protection not only under the work-product doctrine that would apply to their initial communications, but also under common interest privilege.<sup>58</sup> Upon concluding a deal, they would indeed have a common legal interest because the funder would be directly entitled to a portion of the proceeds received from any suit, as opposed to simply having an indirect interest in the business benefits that would flow from the litigant's victory. A relatively recent decision by the U.S. District Court for the Eastern District of Pennsylvania protected communications between Burford and lawyers for the company it financed under both work product and common interest doctrines.<sup>59</sup>

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56. See *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1428 (3d Cir. 1991) ("[T]he disclosure must enable an adversary to gain access to the information.").

57. Litigants and funders may also rely on common-interest privilege, which protects communications between parties with a common "legal" interest in a case—including communications with an insurer, though they have to be careful to follow formalities to ensure that they receive the protection. Compare *Devon IT*, 2012 WL 4748160, at \*1 n.1 (no waiver of work-product protection over documents shared with litigation funder pursuant to a confidentiality agreement) and *United States v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010) (protecting disclosure to external auditor) with *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376–77 (D. Del. 2010) (rejecting common-interest privilege because plaintiff and litigation financing companies did not assert a common-interest agreement).

58. *Leader Techs, Inc.*, 719 F. Supp. 2d 373. Indeed, provided that they execute a common-interest agreement at the outset, common-interest protection should attach even before they execute an actual funding agreement, just as it would to a potential business acquirer in the course of its diligence on a target company.

59. See *Devon IT, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012).

### 3. Business Obstacles

A third set of obstacles considered by scholars are business, or economic, obstacles that may interfere with the development of an efficient market mechanism. These obstacles fall into two categories, one that is common to plaintiff- and defense-side risk transfers and the other unique to the defense side. First, common to both, was the question of whether capital providers really would be willing to invest in litigation risk. I had argued before launching Burford that although some people view litigation as unpredictable, and therefore not an appropriate asset class in which to invest, in fact litigation risk is no harder to manage than many other types of investment risk.<sup>60</sup> Provided that investors had confidence in the team of lawyer-investors charged with evaluating legal risk, scholars posited that many investors seeking high returns, uncorrelated with market fluctuations, would be willing to invest in litigation risk. This instinct has been proven true to some extent, as Burford has raised \$300 million in public markets in London, a competitor named Juridica raised nearly \$200 million in the same markets, the Australian public company IMF has opened a U.S. subsidiary called Bentham, and former Credit Suisse bankers have been able to raise a \$200 million credit facility.<sup>61</sup> (A number of private English funds have raised more than another \$200 million among them, though this is largely dedicated to U.K. litigation.)<sup>62</sup> This is not to say that raising capital for investments in litigation is easy. While Burford and some others have succeeded in raising capital, many others have tried and failed. But this may be as much a reflection of the difficulty associated with raising a new fund in turbulent market conditions as a reflection of any inherent difficulty with raising capital to invest in litigation. Moreover, to the extent that the existing funds prove to be profitable—as Burford has so far—this will likely facilitate additional capital raises.<sup>63</sup>

The other business obstacle I noted in my scholarship on defense-side risk transfers (which has garnered less attention among other scholars) was specific to the large risks at stake for corporate defendants.<sup>64</sup> I posited in my scholarship that even if one were able to raise enough money to fund legal fees for plaintiffs (as companies like Burford have done), it would require capital of a different magnitude to be able to accept the risk on the defense side of a large, adverse legal judgment.<sup>65</sup> Investing in plaintiffs' claims is a bit like purchasing call options—one invests pennies (or dimes) in the hope of earning dollars (or at least quarters). Backing defendants, in contrast, is like selling insurance—one must risk dollars in order to make pennies (or perhaps dimes). Insurance companies take in premiums that represent only a small fraction of the total amount they theoretically could lose. Indeed, any insurance company would go bankrupt many times over if all of its policyholders filed claims at the same time. But insurers know that all policies will

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60. See Molot, *A Market in Litigation Risk*, *supra* note 2, at 380–85.

61. See *supra* note 40 and accompanying text.

62. See CALUNIUS LITIG. FUNDING & ARBITRATION FIN., <http://www.calunius.com>; HARBOUR LITIG. FUNDING, <http://www.harbourlitigationfunding.com>.

63. See *supra* note 38.

64. See Molot, *A Market in Litigation Risk*, *supra* note 2, at 399–400.

65. *Id.*

not result in claims—and indeed, that only a small portion of them will trigger claims. Successful insurance companies take in enough premiums to cover claims and expenses, while leaving a little bit for profit (and earning investment interest on the premiums while the policies are outstanding).

For an insurer to be successful, it must take in premiums from a large enough customer base that a loss on any particular policy will not have a meaningful effect on the insurer's financial health. Given that an insurer's balance sheet must be many times larger than the largest claim it expects to face, dedicated litigation funders like Burford are not in a position to accept very large defense-side risks. Raising hundreds of millions of dollars in equity may be enough to fund dozens of plaintiffs' claims, but it is not enough to insure an equal number of defendants, unless one uses that equity to purchase an insurance company with a much larger, existing balance sheet which can take on a per case risk that is many times larger than the legal fees involved. The key to building a defense-side business is to start with an insurer with a large enough nonlitigation business that is willing to take on some litigation-specific policies.

Despite these obstacles, Burford has made some progress moving into insurance. Although Burford initially launched its business with a focus on commercial plaintiffs—precisely because it lacked the capacity to insure large, defense-side risks—Burford has done at least one insurance-related deal in the United States and, more significantly, has acquired the largest U.K. provider of “after-the-event” litigation insurance, which opens up new avenues for defense-side risk transfers.

In the U.S. deal, Burford invested \$10 million in a case where a commercial plaintiff had already won a \$50+ million jury award. Under the terms of its deal, Burford was to receive back its investment and a return on that investment if the jury verdict was affirmed, would receive back a portion of the investment if the jury verdict was scaled back considerably by the appellate court, and would receive nothing if the plaintiff were to receive nothing. The plaintiff used roughly one-third of Burford's \$10 million to purchase an insurance policy from an insurer that guaranteed the plaintiff at least a \$30 million recovery (a level at which Burford would receive back some, but not all, of its \$10 million). Because the insurers in question write policies for many things *other* than litigation risk, the insurers were able to accept \$30 million in risk over-and-above Burford's \$10 million, making it possible for Burford to offer a litigant nearly \$40 million in protection, which is far beyond what a \$300 million fund could do for a single case.

This is not to say that defense-side deals are as easy to structure and close as plaintiff-side deals. When the risk to be transferred involves tens, or perhaps hundreds, of millions of dollars in potential liability, as opposed to legal fees in the single digits or low teens, a risk transfer is much more difficult to accomplish. But my early experience with one such U.S. deal suggests that a defense-side market is indeed possible.

Second, Burford in 2012 acquired from Barclays's former private equity arm a company that is the leading provider of “after-the-event” litigation insurance in the United Kingdom. In England, litigants fearful of losing and bearing their opponents' legal fees can purchase after the event (ATE) insurance to guard against this loss. The purchasers of ATE insurance tend to be claimants, rather than defendants, but it is available to both sides. Burford's ATE policies are reinsured

by Munich Re, which of course has a much larger balance sheet than Burford. Having moved into insurance with the backing of an insurer like Munich Re, Burford may be able to begin insuring the larger risks that would be of significance to larger corporate defendants.

### *C. Challenges Not Anticipated in the Scholarship*

Although my practical experience at Burford has generally reinforced the views espoused by academic proponents of litigation finance—about the value of litigation markets and their ability to surmount both regulatory and business obstacles—my experience at Burford has highlighted two aspects of litigation finance and litigation risk transfers that I neglected in my prior academic work. My experience has not only provided some answers to the questions posed by scholars, but also revealed new questions that I had not anticipated.

#### 1. Opposition from Institutional Beneficiaries of Risk Imbalances

First, while scholars have examined the benefits of litigation risk transfers *both* for plaintiffs *and* for defendants—and indeed, I had begun my project with a focus on defendants—scholars generally have focused on the benefits to the *weaker* party of leveling the playing field. Scholars had not considered that those who naturally benefit from an uneven playing field would cling to that advantage and seek to attack litigation funding. A corporate defendant able to afford the most expensive firm's hourly bills often has a natural advantage in litigation because it can outspend its opponent, drag out the litigation process, and induce the plaintiff to settle for less than it otherwise would so as to avoid the ongoing costs and risks of litigation. Sometimes the defendant will be up against an impressive hourly fee firm that is on a short leash because of budgetary concerns and may therefore advise its client to settle if it does not want to bear the expense of ongoing litigation. Sometimes, the plaintiff will be represented by a contingent fee firm that lacks the will and/or the resources to match the efforts of a large, well-funded hourly fee defense firm. Either way, an imbalance in resources and risk preferences works to the defendant's advantage. And to the extent that financing levels the playing field, it effects an unwelcome change in litigation dynamics. If the defendant can paint litigation finance in a sinister light—and seek discovery of funding arrangements and communications with funders—it will do so. Anything the defendant can do to offset the effects of financing—and turn financing into a liability for the plaintiff rather than an asset—it may well choose to do. Indeed, when defending against a strong claim on the merits, it will often be in the interests of the defendant to focus discovery on a side issue that derails the litigation and interferes with the plaintiff's litigation strategy.

Defendants have sought to undermine the salutary effects of litigation finance not only through litigation tactics, but also by participating in public policy discussions on the topic. The U.S. Chamber of Commerce has come out in opposition to litigation finance because it perceives (incorrectly) that its members

are most likely to be pitted *against* beneficiaries of litigation funding.<sup>66</sup> Given that Burford and its competitors invest in disputes *between* businesses, Burford is just as likely to invest on the side of a business that is a member of the Chamber as on the side of a business that is not. The Chamber makes the additional mistake of lumping all litigation together, refusing to acknowledge that the vigorous pursuit of a meritorious business claim is a markedly different thing from the pursuit of a meritless one. To the extent that the Chamber acknowledges a distinction between meritorious and meritless suits, it also fails to recognize what is self-evident to litigation funders: investors can only make money if they fund meritorious suits. Funding meritless suits is a sure way to lose money. Indeed, it is potentially more costly for a litigation funder than for a contingent fee attorney. A contingent fee attorney who realizes over time that a suit is weaker than first believed can mitigate his or her loss by spending less time on the case and devoting more resources to other matters. A litigation funder—which has invested cash, rather than just opportunity cost—may not have the same flexibility to mitigate its losses (though that may depend upon the terms of the funding agreement and how much of the funding is invested at the outset).<sup>67</sup> To the extent that funders support only suits they believe to be meritorious and to the extent that they fund disputes between businesses, the Chamber’s arguments against funding seem facially unupportable. When one cuts through these arguments, the Chamber’s essential problem is with litigation finance’s core virtue: that it tends to level the playing field between unequal adversaries. The most influential supporters of the branch of the Chamber that has targeted litigation finance—the Institute of Legal Reform—are typically the stronger, rather than the weaker, party in litigation. Even though the weaker party is often a small business that is *also* a member of the Chamber of Commerce, those smaller constituencies do not carry the same weight at the Chamber—or at least with the Chamber’s Institute of Legal Reform—which raises much of its money from a small group of large companies.

Fortunately, the Chamber’s suspicion of litigation finance may not be long lived. To the extent that misperceptions of litigation finance are driven by an aversion to plaintiffs’ claims, and a sympathy for the defendant, those misperceptions may begin to fade if defense-side litigation risk transfers become broadly available to corporate defendants. The public policy discourse surrounding litigation risk transfers has, to date, focused on financing plaintiffs’ claims. This is true in large part because plaintiff-side risk transfers are more easily achieved and are therefore becoming more common.<sup>68</sup> As a result, it is not surprising that the industry would be viewed favorably by commercial plaintiffs and their lawyers, and less favorably by corporate defendants and their attorneys. However, as noted above, Burford has begun to establish relationships with insurers that may finally make risk transfers feasible for defendants. To the extent that Burford is helping a business defend itself against a class action—or helping a business to mitigate defense-side risk that

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66. See BEISNER ET AL., *supra* note 11.

67. For academic inquiry into the terms of litigation funding contracts, see Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455 (2012). Indeed, Professor Steinitz has launched a website dedicated to the project. See Steinitz, *supra* note 7.

68. See *supra* notes 63–65 and accompanying text.

would otherwise interfere with a recapitalization or merger—the Chamber is likely to be entirely supportive.

## 2. Effects on Law Firm Economics

A second issue I had not anticipated in my scholarship, but have confronted at Burford, is just how much perceptions of litigation finance are driven by the economics of law practice. For many lawyers, litigation finance offers an attractive path to an expanded practice. Consider the law firm partner whose corporate client wants a contingent fee arrangement, but whose management committee does not. By introducing a finance company to intermediate between law firm and client, the law firm partner can satisfy both stakeholders, as the financier would pay the firm's hourly bills in exchange for a share of the recovery. For that law firm partner, financing offers a way to take on a case he could otherwise not. He can offer clients the fee arrangement they desire and thereby win additional business.

But the law firm partner who has built a practice representing large defendants may fear that if he takes a funded case for a small plaintiff (assuming he has no formal conflict of interest), he will be perceived to have aligned himself with a litigation funder and will lose stature with his regular base of defense clients. Indeed, the law firm partner who finds himself in this defense-oriented camp may well be the one whom clients retain not only for specific representations, but also to participate in policy debates, pushing tort reform and other litigation-reducing public policy initiatives.

The fact that a small subset of lawyers is less likely to litigate financed cases is not a significant impediment to the growth of litigation finance. In the absence of financing, clients that do not want to pay hourly fees must find a lawyer willing to proceed on a contingent fee basis. If the availability of financing expands the universe of lawyers that clients can choose, this is a positive consequence, even if that universe does not extend to every lawyer at every firm. Burford, to date, has worked with over half of the AmLaw 50 and has provided financing for lawsuits brought by AmLaw 50 law firms on behalf of Fortune 100 clients. There does not seem to be a shortage of top lawyers eager to litigate cases that are financed by third parties.

What is more significant about the legal profession's reaction to litigation funding is what it says about the legal profession's evolving approach toward the traditional hourly fee model. Litigation funding is simply one manifestation—albeit a pretty glaring one—of a much broader shift in the legal profession's self-conception. There has been a fair bit written about the transformation of law from a profession to a business—both embracing it and lamenting it.<sup>69</sup> Large law firms today seek to emulate other moneymaking ventures, with an emphasis on

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69. See, e.g., David B. Wilkins & G. Mitu Gulati, *What Law Students Think They Know About Elite Law Firms*, 69 U. CIN. L. REV. 1213, 1213 (2001) (“Although the majority of legal scholarship continues to focus on law, a number of academics have begun to investigate the norms, institutions, and practices of lawyers.”); cf. David B. Wilkins, *The Professional Responsibility of Professional Schools to Study and Teach About the Profession*, 49 J. LEGAL EDUC. 76, 76 (1999) (lamenting “the law school's systematic and pervasive failure to study and to teach about the profession”).

marketing, cost-cutting, and managing and motivating their employees.<sup>70</sup> But the lawyers at those firms continue to conceive of themselves as professionals (not just business people) who are duty-bound to serve their clients.<sup>71</sup>

Litigation finance highlights that when lawyers agree to alternative billing arrangements, they are providing their clients with *two* distinct offerings: (1) legal services, and (2) financing and/or financial risk management. When a litigation funder enters the scene, it effectively separates these two functions, leaving the lawyers to focus on providing legal services and the financial investors to provide the financial risk management and financing. To risk-averse lawyers who confront the question, this arrangement is ideal: these hourly fee lawyers recognize their clients' need for financial risk management and are happy to leave that offering to someone other than the lawyers. To another group of more risk-embracing lawyers, the separation of offerings is unnecessary: these contingent fee lawyers prefer to offer financing themselves and to reap the returns associated with absorbing litigation risk and expense from their clients. Yet, to a third, smaller group of lawyers, the separation of offerings only serves to highlight an aspect of law practice that they would rather not consider. These lawyers not only refuse to provide financing or bear risk themselves, but they do not even want to have to think about a client's need for risk management and financing. They not only are uncomfortable litigating funded cases, but they are reluctant to acknowledge, let alone embrace, the changes in the nature of law practice and litigation that so occupy their managing partners.

The different attitudes toward risk exhibited by hourly fee and contingent fee lawyers have long been prominent, in large part because they have historically found themselves on the opposite sides of cases. But what is newer to the legal profession in the last couple of decades is the divide among hourly fee lawyers between those who understand that litigation decisions are business decisions for their clients and those who cling to old conceptions of the legal profession—and, relatedly, between those who view law practice itself as a business and those who resist such a changed self-conception.<sup>72</sup> My practical project in litigation finance

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70. See, e.g., Kristin L. Fortin, *Reviving the Lawyer's Role As Servant Leader: The Professional Paradigm and A Lawyer's Ethical Obligation to Inform Clients About Alternative Dispute Resolution*, 22 GEO. J. LEGAL ETHICS 589, 595 (2009) ("The rise of the law-as-business model, emphasizing profit above all else, has manifested itself in many ways."); Samuel J. Levine, *Faith in Legal Professionalism: Believers and Heretics*, 61 MD. L. REV. 217, 235 (2002) (explaining that scholars have noted that "the practice of law now resembles more a business than a profession, observing that 'lawyers aggressively seek out new clients' by advertising 'in the various public media,' and placing greater emphasis on public relations").

71. Frederick L. Trilling, *The Strategic Application of Business Methods to the Practice of Law*, 38 WASHBURN L.J. 13, 16 (1998) ("Many lawyers continue to purport the classic differentiation between a business and a profession by restating the vision of a profession as 'a group pursuing a learned art as a common calling in the spirit of public service.' This is then contrasted with a business which instead seeks to maximize profits in the best Adam Smith tradition. Yet such a distinction is not realistic.")

72. See *id.*; Levine, *supra* note 70, at 219 ("Despite the evidence apparently supporting the position that law has evolved into a business, others have responded by reaffirming the professionalism model, arguing that legal practice remains true to its professional ideals.")

has taught me that a broader inquiry is needed into lawyers' attitudes toward the business of law practice, an inquiry that goes well beyond the question of litigation finance. This inquiry would consider such questions as the shift of work from junior associates to staff attorneys and the outsourcing of document review to nonlawyers or foreign lawyers, the wisdom of a partnership track in contrast to traditional corporate advancement schemes that include options and other forms of incentive pay, the growth of two-tier partnerships (with equity and nonequity partners), the reliance of law firms on banks for credit lines, and the value of partnerships between lawyers and other professionals, like accountants—just to name a few. Lawyers' attitudes toward litigation finance offer a glimpse into the rapid changes the legal profession is undergoing and the intense debates that are raging within law firms about these changes.

#### CONCLUSION

Scholars have posited that, in theory, a thriving market in litigation finance should be able to level the playing field in commercial litigation and thereby help to promote litigation accuracy. But that is in theory. Whether this theoretical model could work in practice was something scholars could not know until it was actually tried. Having now helped to construct an active litigation finance business, I am pleased to find that what I and other scholars have posited in theory is indeed feasible. My practical project has reinforced the arguments advanced in the scholarship.

That said, the practical experience also has highlighted questions I had missed as a scholar and provided fodder for additional scholarly inquiry. In particular, the introduction and growth of litigation finance helps to bring into sharper focus a broader change in the legal profession's self-conception and serves to highlight marked differences in lawyers' attitudes toward the profession's evolution. My hope is that lawyers and scholars will pay careful attention to the ways in which litigation finance bears upon these broader changes. Litigation finance is likely to be just one evolution of many in the business of litigation and in the economics of law practice, and the lessons learned from litigation finance may prove useful to the profession during a period of rapid transformation.