

AN EMPIRICAL INVESTIGATION OF THIRD PARTY CONSUMER LITIGANT FUNDING

Ronen Avraham[†] & *Anthony Sebok*^{††}

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INTRODUCTION

Third party litigation funding (TPF), where financial corporations support plaintiffs’ lawsuits by advancing money as a

[†] Professor of Law, Tel Aviv University Buchmann Law Faculty, and Senior Lecturer, University of Texas School of Law.

^{††} Professor of Law, Benjamin N. Cardozo School of Law. We would like to thank the following members of the consumer litigation funding industry for their comments and encouragement of this research: Harvey Hirschfeld (American Legal Finance Association), Eric Schuller (Alliance for Responsible Consumer Legal Funding), Joshua Schwadron (Mighty), and Alan Zimmerman (Law Finance Group). All views expressed are the authors’. Professor Sebok currently serves as ethics consultant to Burford Capital. Financial support for this research provided to Professor Avraham by the Israel Science Foundation (grant No. 1606/16). Financial support for this research was provided to Prof. Sebok by a Benjamin N. Cardozo School of Law Summer Research Grant. We would also like to thank participants of the 5th IML&E (Paris 2018), private law workshop (Hebrew University 2018), Israeli Law and Economics Association Annual Meeting (Jerusalem 2017), Sienna, Toronto, and Tel Aviv Univ. Conference (Syracuse 2017) and American Law and Economics Association Annual meeting (Yale University 2017).

nonrecourse loan, is attracting both controversy and capital.¹ Media coverage of TPF in connection with lawsuits inspired by the #MeToo movement and other high profile litigation, such as the suit against Gawker Media sponsored by investor Peter Thiel, has thrust the industry out of the shadows of the civil litigation ecosystem and into the limelight.² At the same time, TPF is a fast-growing asset class in the United States and in other nations.³ The 2016 combination of two of the largest litigation funders in the United States, Burford Capital and Gerchen Keller, has created a firm that, by the end of 2017, had \$3.1 billion “invested in and available for legal finance.”⁴ TPF firms generally receive a large premium in the event of a successful litigation outcome, variously as a portion of the amount recovered, a multiple of the amount advanced, or a very high

¹ See, e.g., Joshua Hunt, *What Litigation Finance Is Really About*, NEW YORKER (Sept. 1, 2016), <https://www.newyorker.com/business/currency/what-litigation-finance-is-really-about> [<https://perma.cc/7GQE-D9XF>] (providing an overview of the rise and proliferation of the litigation finance industry); Mattathias Schwartz, *Should You Be Allowed to Invest in a Lawsuit?*, N.Y. TIMES, at B1 (Oct. 22, 2015), <https://www.nytimes.com/2015/10/25/magazine/should-you-be-allowed-to-invest-in-a-lawsuit.html> [<https://perma.cc/L858-9UX7>].

² See, e.g., Matthew Goldstein & Jessica Silver-Greenberg, *How the Finance Industry Is Trying to Cash In on #MeToo*, N.Y. TIMES, at B1 (Jan. 28, 2018) <https://www.nytimes.com/2018/01/28/business/metoo-finance-lawsuits-harasment.html> [<https://perma.cc/HG79-NGYE>] (expounding on the role of settlement-advance companies and traditional litigation funding operations in the #MeToo movement); Eugene Kontorovich, *Peter Thiel's Funding of Hulk Hogan-Gawker Litigation Should Not Raise Concerns*, WASH. POST (May 26, 2016), <https://www.washingtonpost.com/news/voikh-conspiracy/wp/2016/05/26/peter-thiels-funding-of-hulk-hogan-gawker-litigation-should-not-raise-concerns/> [<https://perma.cc/4KFY-CFMB>] (detailing Peter Thiel's involvement in the lawsuit that forced Gawker into bankruptcy); Sam Thielman, *Peter Thiel Has Backed A Startup That Makes It Easier To Sue – And Win*, GUARDIAN (Aug. 24, 2016), <https://www.theguardian.com/technology/2016/aug/24/peter-thiel-legalist-startup-gawker-lawsuit> [<https://perma.cc/XR3H-AV2S>] (highlighting Peter Thiel's involvement with the litigation funding startup Legalist and how such involvement has led to media scrutiny).

³ See, e.g., Drew Hasselback, *The Gavel Gamble: Litigation Emerges As An Asset Class*, FIN. POST (Apr. 29, 2016), <http://business.financialpost.com/legal-post/the-gavel-gamble-litigation-emerges-as-an-asset-class> [<https://perma.cc/K9L5-PP9H>] (in Canada, “[l]awsuits are emerging as a distinct asset class, just like real estate, private equity, precious metals or stocks and bonds”); Patrick M. Jones, *Third-Party Litigation Funding In Bankruptcy Cases*, BANKR. STRATEGIST (Jan. 2013), (“[L]itigation finance is an alternative asset class that has experienced rapid growth in the U.S. in the past decade.”).

⁴ BURFORD CAPITAL, 2017 INTERIM REPORT 1, https://www.burfordcapital.com/wp-content/uploads/2017/07/BUR-27947-Interim-Report-2017_web.pdf [<https://perma.cc/3KDW-US96>]; see also *id.* at 4 (stating that “Burford’s acquisition of Gerchen Keller Capital on 14 December 2016 catapulted Burford into the role of the industry’s largest fund manager”).

fixed interest rate on the amount advanced, among many possibilities.⁵

TPF in the United States is divided between the commercial and the consumer sectors.⁶ In the former, funding is provided to a highly sophisticated litigant, usually a corporation, to help pay for the attorneys and their costs in a commercial dispute.⁷ In the latter, funding is provided directly to individuals, most of whom have never engaged previously in litigation. Importantly, consumer TPF channels money directly to the litigant, providing an important source of financial support during the pendency of litigation.⁸ For this reason and to avoid confusion with commercial TPF, we call this type of funding Litigant TPF (or LTPF). Funding contracts differ in type between the two sectors. Commercial TPF usually pays the funder a percentage of the litigation proceeds upon resolution of the litigation.⁹ In contrast, in LTPF the funder usually receives a payment based on a monthly or annual interest charge. The ultimate payment owed to the funder is determined by the interest rate, the length of time to the resolution of the litigation, and some other features explained below.¹⁰ Our Article focuses on LTPF.

LTPF has been a significant commercial financial activity in the United States since the late 1980s.¹¹ Given that no LTPF firms are publicly traded, the market is hard to measure. All indicators are that it has grown significantly over the past

⁵ See, e.g., Jones, *supra* note 3, at 3 (“Third-party litigation finance can take numerous forms and is limited only by the imagination of the investors and their counterparties.”); Hunt, *supra* note 1 (providing examples of different forms of litigation finance and stating that “[t]he returns can be significant”).

⁶ See generally STEVEN GARBER, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWN, AND UNKNOWN 1 (2010) (providing a comprehensive review of the TPF market).

⁷ *Id.* at 13–15.

⁸ *Id.* at 9.

⁹ In commercial litigation finance contracts, “the financier provides immediate capital to prosecute the case in exchange for a percentage of the future recovery.” Joanna M. Shepherd & Judd E. Stone II, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919, 937 (2015). But there is no “one size fits all” commercial litigation finance contract. Commercial funding is diverse and includes many different types of products. See, e.g., Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 467–471 (2012) [hereinafter Steinitz, *Litigation Finance Contract*] (detailing the unique financing structure of an idiosyncratic litigation funding contract); Shepherd & Stone II, *supra*, at 941–42 (discussing the use of “first money out” and “waterfall” payment structures in TPF).

¹⁰ See GARBER, *supra* note 6, at 9.

¹¹ See Susan Lorde Martin, *Financing Plaintiffs’ Lawsuits: An Increasingly Popular (and Legal) Business*, 33 U. MICH. J.L. REFORM 57, 57 (1999) (noting the sudden increase in media coverage of LTPF).

twenty years.¹² Lawcash, one of the earliest LTPF firms, began in 2000 and by 2002 had advanced a total of more than \$10 million.¹³ By contrast, a recent market survey of twenty-two LTPF firms reported that almost 40% of them were older than eleven years and as a group they had invested almost \$500 million between 2013–2015.¹⁴ The same report disclosed that 80% of respondent firms' business was conducted in only seven states (NY, PA, FL, NJ, IL, NV, GA), which suggests potential for significant future growth in the industry.¹⁵

Over the past ten years there has been an explosion of scholarly commentary about LTPF, with authors approaching it from positive and normative perspectives.¹⁶ LTPF has drawn attention from certain political quarters as well, with groups associated with tort reform in the United States publishing studies critical of both commercial and LTPF in the United States and Europe.¹⁷

¹² See Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 *FORDHAM J. CORP. & FIN. L.* 55, 55 (2004) [hereinafter Martin, *Financing Plaintiffs' Lawsuits*] (stating that litigation finance "has become an industry within the last ten years").

¹³ See Cristina Merrill, *Judgment Call: Firms that Lend to Personal-Injury Plaintiffs Take Steps to Improve Their Bad-Guy Image*, *CRAIN'S N.Y. BUS.* (Jan. 26, 2003), <https://www.crainnewyork.com/article/20030127/SUB/301270728/judgment-call> [https://perma.cc/4XHG-HSA4].

¹⁴ See BRYANT PARK CAPITAL, 2016 CEO SURVEY REPORT: PRE-SETTLEMENT FUNDING 13 (2016) (on file with authors) [hereinafter BRYANT PARK REPORT].

¹⁵ *Id.* at 11.

¹⁶ See generally Ronen Avraham & Abraham Wickelgren, *Third Party Litigation Funding with Informative Signals: Equilibrium Characterization and the Effects of Admissibility* (Univ. of Tex. Law, Law & Econ. Research Paper No. e521, 2019); Ronen Avraham & Abraham Wickelgren, *Third Party Litigation Funding—A Signaling Model*, 63 *DEPAUL L. REV.* 233 (2014) [hereinafter Avraham & Wickelgren, *A Signaling Model*]; Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 *J.L. ECON. & POL'Y* 613 (2012); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry that Has a Place in the United States Market*, 53 *VILL. L. REV.* 83 (2008); Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 *VT. L. REV.* 615 (2007); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 *GEO. L.J.* 65 (2010); Marco de Mompurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 *CARDOZO J. INT'L & COMP. L.* 343 (2011); Anthony J. Sebok, *Litigation Investment and Legal Ethics: What Are the Real Issues?*, 55 *CAN. BUS. L.J.* 11 (2014); Anthony J. Sebok, *Should the Law Preserve Party Control? Litigation Investment, Insurance Law, and Double Standards*, 56 *WM. & MARY L. REV.* 833 (2015); Maya Steinitz, *Whose Claim is this Anyway? Third-Party Litigation Funding*, 95 *MINN. L. REV.* 1268 (2011).

¹⁷ See generally U.S. CHAMBER INST. FOR LEGAL REFORM, SUPPORTING SAFEGUARDS: EU CONSUMER ATTITUDES TOWARDS COLLECTIVE ACTIONS AND LITIGATION FUNDING (2017), https://www.instituteforlegalreform.com/uploads/sites/1/EU_Paper_Web.pdf [https://perma.cc/VS3W-BYMU]; Lisa Rickard [President, U.S. Chamber Inst. for Legal Reform], *This Is Casino Litigation, Where We All Lose*, *N.Y. TIMES* (May 27, 2016), <https://www.nytimes.com/roomfordebate/2016/05/27/the-ethics-of-investing-in-anothers-lawsuit/this-is-casino-litigation-where-we-all>

One of the main critiques of LTPF is that winning plaintiffs often pay usurious interest rates to funders and that this practice often leaves them with almost nothing from the award or settlement.¹⁸ This criticism is directed against LTPF (and not commercial TPF) for a few reasons. The first is that the population of users of TPF in the commercial market are, by definition, commercial actors, and, while some may be more sophisticated than others, observers think that as a group they do not need the same protections consumers require.¹⁹ The second is that there is very little publicly available information about the terms of commercial TPF, given that commercial TPF firms do not make their rates available to the public, do not report the details of their business practices to their shareholders (if they are publicly traded), and fight to protect the details of their contracts and contract negotiations from adverse parties in discovery.²⁰ As a result, the focus on the cost of TPF has really been about the cost of LTPF.

Concern over the cost of LTPF is not, however, grounded in reliable data. Until this Article, academic and policy debate

lose [<https://perma.cc/9QEY-NKYK>]; U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES (2009) [hereinafter U.S. CHAMBER, *Selling Lawsuits*], <https://www.instituteforlegalreform.com/uploads/sites/1/thirdparty litigation financing.pdf> [<https://perma.cc/PJJ2-VMC5>]; U.S. CHAMBER INST. FOR LEGAL REFORM, THIRD-PARTY LITIGATION FUNDING, <https://www.instituteforlegalreform.com/issues/third-party-litigation-funding> [<https://perma.cc/7SUX-WHXZ>].

¹⁸ See, e.g., Jenna Wims Hashway, *Litigation Loansharks: A History of Litigation Lending and a Proposal to Bring Litigation Advances Within the Protection of Usury Laws*, 17 ROGER WILLIAMS U. L. REV. 750, 750 (2012) [hereinafter Hashway, *Litigation Loansharks*] (depicting an instance of LTPF where the plaintiffs were provided loans with interest rates “of up to 280%”).

¹⁹ See Laurie A. Giordano-Vahey and Alissa M. Valentine, *Advocate’s View: An Update on Non-Recourse Litigation Loans*, DAILY RECORD (Oct. 14, 2015), <http://nydailyrecord.com/2015/10/14/advocates-view-an-update-on-recourse-litigation-loans/> [<https://perma.cc/573G-SJNL>] (“[A] sophisticated corporation’s calculated decision to pay a high fee to a funding company to avoid taking the full risk in litigating a claim does not seem unreasonable. . . . [But] from the perspective of an individual plaintiff . . . [LTPF should be] subject to higher scrutiny.”).

²⁰ See *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 718–19 (N.D. Ill. 2014). Occasionally a commercial TPF firm will describe, in general terms, the content of a contract after an investment has been concluded. See, e.g., JOHNATHAN T. MOBT, THEORY AND PRACTICE IN LITIGATION RISK 10–11 (2015), <http://www.burfordcapital.com/wp-content/uploads/2015/01/Booklet-Theory-and-Practice.pdf> [<https://perma.cc/R4JE-S6QZ>] (describing three investments, including one which in which Burford received “its investment back plus roughly a 2x return on that invested capital”). IMF Bentham, the world’s second-largest commercial TPF firm, “generally aims to get its investment back plus two times the invested amount.” Allison McNeely, *Suing Is Canada’s New Asset Class as Investors Bet on Claims*, BLOOMBERG (Jan. 31, 2018), <https://www.bloomberg.com/news/articles/2018-01-31/suing-is-canada-s-new-asset-class-as-investors-bet-on-outcomes> [<https://perma.cc/NY2H-B8SZ>].

about LTPF has been conducted in an environment of anecdote and speculation. A brief review of some academic work reflects an extraordinary range of reported rates in the LTPF market. In 2004, two articles reported that LTPF cost between 180%–425% per annum.²¹ A 2007 law review note reported that rates of greater than 100% “were not uncommon” in the 1990s, but that rates had decreased since then.²² The 2010 RAND study noted that “there [was] no systematic empirical information about the sizes of financing fees” for any type of TPF, but reported anecdotal evidence of a range of 24%–60% per annum.²³ As recently as 2014, a law review article which purported to be a survey of TPF stated that “it is not atypical for [a TPF provider] to charge 80% interest in the first year of a loan and up to 280% of the total loan amount.”²⁴ A 2015 law review article that argued that TPF was overcharging its customers suggested that TPF rates ranged between 30% to 180% per annum, with the typical rate falling, after compounding, at 47% per annum.²⁵ The 2018 *New York Times* article mentioned at the beginning of this Introduction reported LTPF interest rates of “as high as” 100%.²⁶

It is possible that rates have, on average, declined over the past two decades. On the other hand, it is possible that consumers are at the mercy of a market where rates for similar financial products dramatically differ for no apparent reason. The range that the published reports reflect could mirror an extremely inefficient market, or it could be random noise picked up by scholars, lawyers, and journalists encountering a new business model. Without a much larger and more comprehensive sample, it is impossible to know. This Article is the first comprehensive effort to analyze the behavior of the LTPF market, including providing a measure of the cost of LTPF.

²¹ Yifat Shaltiel & John Cofresi, *Litigation Lending for Personal Needs Act: A Regulatory Framework to Legitimize Third Party Litigation Finance*, 58 CONSUMER FIN. L.Q. REP. 347, 348 (2004) (425%); Martin, *Financing Plaintiffs’ Lawsuits*, *supra* note 11, at 68 (180%).

²² Courtney R. Barksdale, *All That Glitters Isn’t Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707, 728 (2007) (citing the American Legal Finance Association website FAQs).

²³ GARBER, *supra* note 6, at 12.

²⁴ Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 CHI.-KENT L. REV. 11, 12 (2014)

²⁵ Carol Langford, *Betting on the Client: Alternative Litigation Funding Is an Ethically Risky Proposition for Attorneys and Clients*, 49 U.S.F. L. REV. 237, 239 (2015).

²⁶ See Goldstein & Silver-Greenberg, *supra* note 2.

Trustworthy data on the LTPF market is more important than ever before, given increased attention on the industry. Media coverage of alleged abuses by the LTPF industry has increased.²⁷ Media coverage both reflects and drives legislative interest.²⁸ Recently, some American states have enacted laws governing LTPF. These reforms have followed two streams. One stream, which is supported by the LTPF industry, promotes transparency. Maine, Nebraska, Ohio, Oklahoma, and Vermont have enacted laws which explicitly allow LTPF funding for consumers with requirements designed to help the consumer decide whether to contract with a funder free of undue pressure and misinformation.²⁹ These reforms vary in detail, but typical provisions include notice and disclosure provisions, standardized contract language, a minimum cancellation period after signing, and bans on attorney referral fees.³⁰ The other stream, which is supported by “tort reform” pressure groups such as the United States Chamber of Commerce, promotes fixed limits on the rate of return paid by an LTPF contract (usually linked to the state’s usury laws). Arkansas, Indiana, and Tennessee have passed laws that cap the premium charged to a consumer for an advance at a multiple of an

²⁷ See, e.g., Shawn Cohen, et al., *Inside the Cottage Industry That’s Fleecing NYC Taxpayers*, N.Y. POST (Jan. 2, 2018), <https://nypost.com/2018/01/02/how-firms-are-getting-rich-on-the-surest-money-grab-in-nyc/> [<https://perma.cc/C5KV-CKH8>] (asserting that LTPF incentivizes “bogus” lawsuits and detailing a number of recent LTPF arrangements with high payouts); Alison Frankel, *NFL Concussion Case: Can MDL Judges Police Plaintiffs’ Funding Deals?*, REUTERS (Nov. 20, 2017), <https://www.reuters.com/article/legal-us-otc-nfl/nfl-concussion-case-can-mdl-judges-police-plaintiffs-funding-deals-idUSKBN1DK2IE> [<https://perma.cc/U9RJ-XH27>] (reporting on the prevalence of LTPF in the NFL concussion class action case and how the judiciary’s authority may “extend[] to third-party funders who’ve entered deals with individual plaintiffs”).

²⁸ Compare Post Editorial Board, *Crack Down on New York’s Legal Sharks*, N.Y. POST (Jan. 3, 2018), <https://nypost.com/2018/01/03/crack-down-on-new-yorks-legal-sharks/> [<https://perma.cc/M9BC-5A98>] [hereinafter N.Y. POST, *Crack Down on New York’s Legal Sharks*] (admonishing New York City’s legislature to take action against LTPF funds based on the N.Y. Post’s recent exposés), with Bruce Golding, *Lawmakers Square Off over Profitable Cottage Industry*, N.Y. POST (Jan. 15, 2018), <https://nypost.com/2018/01/15/lawmakers-push-back-against-profitable-cottage-industry> [<https://perma.cc/2R2F-GG4Z>] (reporting on the recent legislative developments regarding LTPF).

²⁹ See ME. REV. STAT. ANN. tit. 9-A § 12-101 (effective Jan. 1, 2008); NEB. REV. STAT. § 25-3302(1), (4) (effective Apr. 13, 2010); OHIO REV. CODE ANN. § 1349.55(A)–(C) (effective Aug. 27, 2008); OKLA. STAT. ANN. tit. 14A § 3-801(6) (effective May 29, 2013); VT. STAT. ANN., tit. 8, §§ 2251–60 (effective July 1, 2016).

³⁰ See e.g., VT. STAT. ANN., tit. 8, §§ 2253–54 (effective July 1, 2016) (requiring certain disclosures in LTPF contracts, mandating certain standard contractual language and a minimum cancellation period of five days and prohibiting attorney referral fees); OHIO REV. CODE ANN. § 1349.55(B) (requiring certain disclosures and formatting in LTPF contracts).

annual rate.³¹ To date, the former is unlikely to reduce the interest rates and fees plaintiffs pay, while the latter may drive LTPF providers out of that state's consumer market.³²

While scholarship about litigation financing is still growing, there is almost no empirical research on the industry worldwide or in the American legal system.³³ This research project is the first large-scale empirical analysis of the pre- and post-contract behavior of the LTPF market. Starting from the common-sense premise that policymakers cannot begin to regulate a financial instrument without first understanding the operation of the market, this research is the most comprehensive empirical investigation into how the LTPF system operates in the United States.

We have received from one of the largest consumer litigation financing firms in the United States a unique dataset that has about 200,000 funded and unfunded American cases over a period of ten years. The litigation funding firm has provided us with access to *all* their applications for litigation funding, which are retained electronically. Thus, we have access to the equally large groups of funded and unfunded cases.

The data is very rich. It contains, among other things, the name and address of the party seeking funding, the name of the lawyer representing them, where the applicant's suit has been filed, a brief description of the case, and the amount re-

³¹ See S. 882, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (to be codified at ARK. CODE ANN. § 4-57-109(a)(2)) (effective April 1, 2015) (maximum rate of 17% per annum); IND. CODE § 24-4.5-3-202 (effective July 1, 2016) (maximum rate of 36% plus allowable fees); TENN. CODE ANN. § 47-51-101 et seq. (effective July 1, 2015) (maximum rate of 36% per year for a maximum of three years plus one-time fee of 10% of principal). As of June 21, 2018, New York's Assembly and Senate are considering various proposals that would cap annual rates charged at 25%. See Andrew Denney, *NY Lawmakers Considering Bills to Regulate Consumer Litigation Funding*, N.Y. L.J. (May 29, 2018), <https://www.law.com/newyorklawjournal/2018/05/29/ny-lawmakers-considering-bills-to-regulate-consumer-litigation-funding/> [https://perma.cc/RQ2A-KUJS].

³² See Andrew G. Simpson, *Litigation Financing Firm Exits Tennessee As New Law Goes Into Effect*, INS. J. (July 3, 2014), <http://www.insurancejournal.com/news/southeast/2014/07/03/333772.htm> [https://perma.cc/V7UN-PHPJ] (litigation funder claimed that Tennessee law left it "no choice but to cease service to Tennessee consumers").

³³ There are only two published empirical studies about the industry and they both use data from Australia and only about 113 funded cases. David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PENN. J. BUS. L. 1075 (2013); Daniel L. Chen, *Can Markets Stimulate Rights? On the Alienability of Legal Claims*, 46 RAND J. ECON. 23 (2015); see also Jean Y. Xiao, *An Empirical Examination of Consumer Litigation Funding* (May 2017) (unpublished Ph.D. dissertation, Vanderbilt University), 10-13 (examining 4,403 consumer litigation finance contracts resolved between 2002-2013) [hereinafter Xiao 2017].

quested by the applicant. More information is gathered on applications that are seriously considered for funding. For example, the company may obtain police, hospital, and insurance reports on the incident at the center of the claim, it may conduct independent legal research to determine the likelihood of success and the potential damage award, and the company may also seek details concerning any liens on an award the plaintiff might receive or historical data concerning, for example, whether the plaintiff has ever filed for bankruptcy. In addition, the data set contains data points on the amount funded, the monthly interest rate, the length of the case, the amount owed when the case settles, and the amount eventually collected.

In this Article we provide a comprehensive analysis of funders' *modus operandi*. Our main findings are as follows: first, that the underwriting procedures adopted by the funders are robust, in that only approximately half of the funding applications are approved. This finding suggests that funding may serve as a second layer of case selection (after the initial layer of the plaintiff attorney's own decision whether to take a case).

Second, funders are cautious about investing too deeply in a case. The ratio between average case valuation and average funding amounts is extremely large. Funders invest about 7% of the estimated case value. This may be an artifact of the fact that the funder's internal case valuations may not truly reflect settlement value, but even so, the large difference indicated suggests that funded plaintiffs still have a very strong interest in the outcome of their case even after funding, which is a rational investment strategy for the funder. One of the criticisms of consumer litigation finance is that it leaves the consumer with an inconsequential recovery after the conclusion of her litigation; the data we have collected suggests this is unlikely to be true in most cases.³⁴

Third, the data suggests that 12% of the consumers who receive funding receive it for free, either because they pay nothing to the funder at the resolution of their cases, i.e. a complete

³⁴ See, e.g., Cain, *supra* note 24, at 12 ("On the other hand, if [the consumer] does recover something from her lawsuit, she could very well end up owing . . . as much as 280% more than what she borrowed. If she recovers less than what she owes the [litigation financing company], she will have to turn her entire recovery over to the LFC, leaving her with nothing.") (footnote omitted). This claim has been repeated in popular media coverage of consumer TPF. See N.Y. POST, *Crack Down on New York's Legal Sharks*, *supra* note 28 ("[P]laintiffs whose cases would do well in any court — 9/11 first-responders; brain-injured ex-NFL pros — can wind up with pennies on the dollar.").

default (10%), or they pay only an amount that reflects all or some of the original advance without paying any interest fees on it.³⁵

Fourth, we show that consumer litigant funding pricing is complex and opaque. The advertised or “headline” rate that consumers first encounter suggests an annual return to the funder of less than 50% per annum, but, as we show, the average contract between the consumer and the funder gives the funder the right to a median return of 115% per annum. The final amount due to the funder upon contract is based on a number of variables, including the advertised interest rate, the type of compounding, the inclusion of interest buckets and minimum interest periods, and the addition of nonrecourse fees, which are advanced and treated as contingent costs paid only by clients that pay back their amount due.

Fifth, while the data suggests that the median amount due to the funder reflects a return of about 115%, the median actual annual return is approximately 43% of the amount funded once one takes into account defaults and haircuts.³⁶ Our data is the first comprehensive measurement of the cost of consumer litigation finance. The results we have produced about the embedded interest rate, as high as they might seem, are significantly lower than some of the speculations introduced by critics of consumer litigation finance in debates over reform and regulation.³⁷ The embedded interest rate that we have identified—43% per annum—is close to the statutory rate cap that some members of the consumer litigation finance industry accepted in negotiation with industry critics in Indiana—that is, 36% per annum plus approximately 10% in additional fees.³⁸ Of course, the clients who pay back the full amount due

³⁵ Twelve percent is less than some funders have reported. See Memorandum from William N. Lund, Superintendent, Bureau of Consumer Credit Protection, Department of Professional and Financial Regulation, State of Maine, to Senator Peter Bowman, Senate Chair, Representative Sharon Anglin Treat, House Chair, Joint Standing Committee on Insurance and Financial Services (Apr. 6, 2010) at 2 [hereinafter 2010 Report to Maine I & FS Committee] (“According to officials from the 2 companies currently registered to do business in Maine, between 20% and 30% of all cases result in no funds to the plaintiff, and therefore in those cases, no funds are received by the funding provider.”).

³⁶ We use medians and not means because the data is skewed to the right. The means would have been higher in most of the reported statistics in this paper.

³⁷ See *supra* text accompanying notes 16–21.

³⁸ See IND. CODE ANN. § 24-4.5-3-202(k) (2018):

A provider is permitted to charge the following for each transaction: a 36% per annum fee of the amount; a fee not exceeding an annual rate of 36% of the funded amount; a servicing charge not exceeding an annual rate of 7% of the funded amount; and a one-time docu-

(or sometimes even above it)—roughly one-third of all clients—will find little comfort in the fact that so many others pay less than they owe the funder due to defaults and haircuts.³⁹

Sixth, the data suggests that there is significant *ex post* adjustment of the portion of the litigation proceeds recovered by the funder. A little bit more than half of the transactions between the funder and the consumer were subject to what we call a “haircut”—where the consumer repaid the advance but then repaid a lower return on the funder’s investment than the consumer was contractually obliged to pay. The frequency and the size of the haircuts explain why observers have reported very high rates of return in the consumer funding industry and we observed much lower rates of return—because there is often a dynamic repricing of the investment after the resolution of the consumer’s case that was hidden from observers who only observed the initial contractual interest rate. This result, in turn, suggests further avenues of inquiry, including, for example, (i) why do some consumers receive a haircut from the funder, and (ii) to the extent that the haircut is a product of negotiation between the consumer’s lawyer and the funder, what ethical obligations, if any, does the lawyer assume with regard to securing (or attempting to secure) the haircut?

The data we have provided is important for any policy discussion. We think that our results at minimum support reforms designed to make pricing transparent by removing complex pricing mechanisms such as “interest buckets” and minimum interest periods described below.

ment fee not to exceed \$250 for the transaction with a funded amount of less than \$5,000 or not to exceed \$500 for a funded amount of at least \$5,000.

One consumer litigation funding trade organization, the Alliance for Responsible Consumer Legal Funding (ARC), supported the Indiana law. See *Landmark Legal Funding Laws in Vermont and Indiana Set the Standard for Consumer Protection*, PR NEWswire (June 27, 2016), <http://www.prnewswire.com/news-releases/landmark-legal-funding-laws-in-vermont-and-indiana-set-the-standard-for-consumer-protection-300290234.html> [https://perma.cc/KNP5-QB58].

³⁹ Eyal Zamir, *Drowning in a Bucket: Nonrecourse Loans for Litigants*, JOTWELL (Feb. 25, 2019) (reviewing Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer Litigant Funding*, 104 CORNELL L. REV. 1133) <https://contracts.jotwell.com/drowning-in-a-bucket-nonrecourse-loans-for-litigants/> [https://perma.cc/5LZJ-3JWS].

I
DATA ANALYSIS

A. General

The data originally contained 203,307 funding requests filed by 113,298 different individuals involved in 120,230 different cases. After masking and cleaning it we ended up having 191,144 funding requests filed by 106,800 individuals involved in 111,982 different cases.⁴⁰

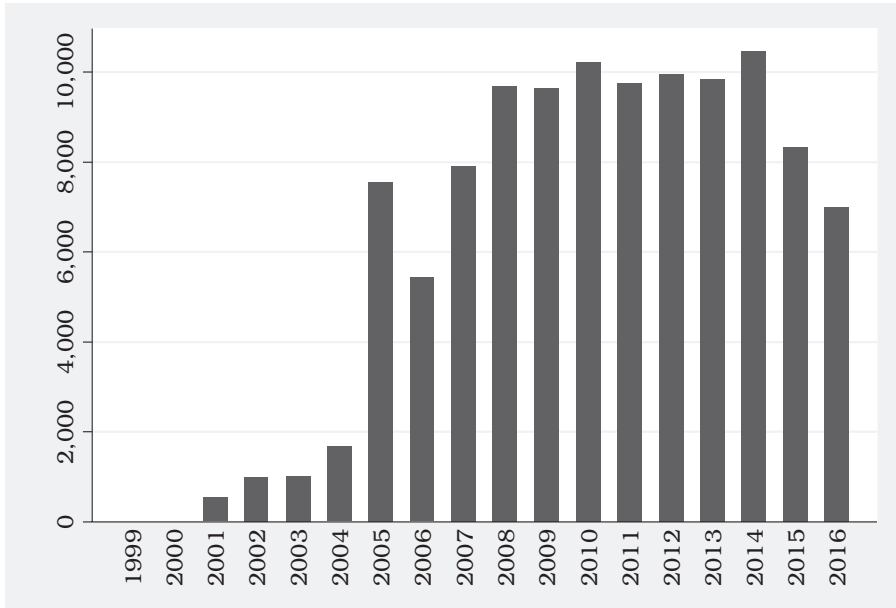
The vast majority of individuals in our dataset (102,383 individuals (96%)) brought just one case, while 3815 (3.5%) individuals brought two different cases. The remaining 0.5% brought on average about 3.5 different cases.

When a client brings a case, she sometimes files for more than one funding request. For example, of the 96% of clients who brought just one case, 75% filed one funding request, 13% filed two funding requests, and another 12% filed on average 5.3 requests. To keep things simple, we combined those requests and work at the case level. Therefore, we were left with 111,982 pre-settlement consumer funding cases coming from 106,800 different consumers. Funding requests come from clients whose average age is 42 years. They live in every single state in the United States. 32% of funding cases come from New York. Other significant origin states include Florida and New Jersey, about 9% each, as well as California, Georgia, Pennsylvania, and Texas, about 4 to 5% each.

Chart 1 presents the distribution of cases per year. It shows that the number of cases has peaked around 10,000 cases annually.

⁴⁰ We excluded cases where funding was extended to lawyers. These cases are fundamentally different—both in terms of the amount funded and interest rate charged—from cases brought by regular clients. Therefore, we dropped 455 lawyer-clients with 1,471 cases and 1,677 funding requests. For consumer-clients, there are three types of business lines. The most important one is called “pre-settlement.” These funding requests come from clients who request funding before their case is settled. There are 195,602 such requests. Next, there are 6,028 “post-settlement” requests. These requests come from clients who have secured a settlement or a verdict in their favor and, while waiting for the money to arrive, they need some funding. Next, there are 4,458 requests where the funder bought older receivables from other funders. Because buying old receivables and post-settlement funding seem to us to be different types of business lines, we dropped both types of these requests. We also dropped 264 pending cases and 325 cases that were withdrawn by the client before the funder completed processing them.

CHART 1—NUMBER OF CASES PER YEAR

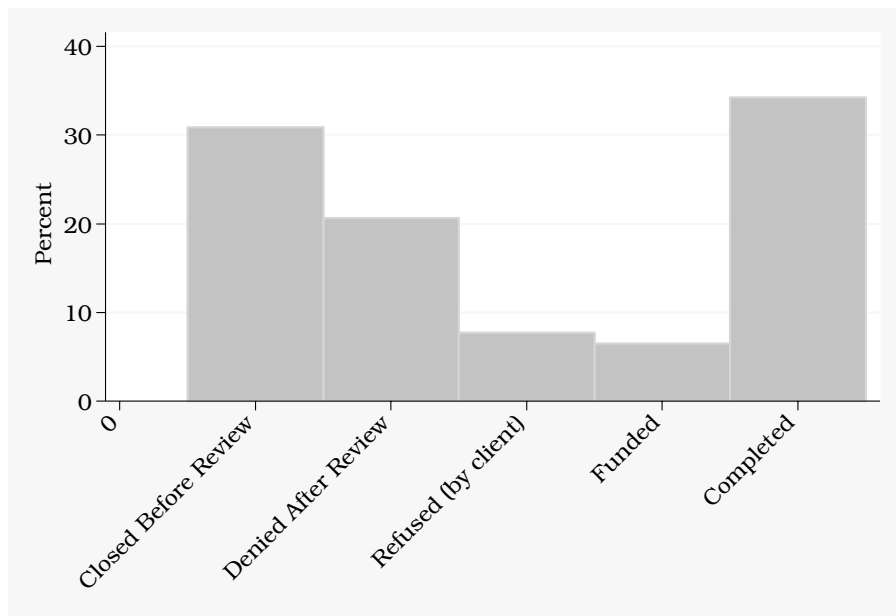


Each funding request must undergo a multistage process. Possible statuses in our dataset for such requests include: Completed, Funded, Refused, Closed Before Review, and Denied After Review.⁴¹ Generally, about a little bit more than one-in-two cases (52%) are not funded, of which about 60% are denied outright and the remainder are denied after an underwriting process.⁴² Chart 2 presents these results.

⁴¹ In the funder's dataset, Completed is coded as Settled. However, that is confusing when we start talking about the underlying case being settled. We therefore used Completed. In addition, there are two other statuses—Withdrawn and Still In Review—but these were too few to matter, so we ignore them.

⁴² Data from Bryant Part Capital's report suggests that the average approval rate in the industry is about 57%. However, there seems to be a lot of variation, as 45% of the respondents had an approval rate under 50%. BRYANT PARK REPORT, *supra* note 14, at 17.

CHART 2—CASE STATUS



More specifically, in our pre-settlement dataset, 38,318 (34%) of the cases are “completed,” meaning that they underwent a full underwriting process, the client was actually funded, the underlying lawsuit ultimately settled, and the funder was paid. Then, 7,302 (6%) of the cases were “funded,” meaning that the requests went through a full underwriting process, money was offered to the client, and the client has agreed to the terms and accepted the funds, but the underlying lawsuit has not yet settled and the obligation to the funder is still outstanding. Next, in 8,637 (8%) cases the funding was “refused by the client,” meaning that the request went through a full underwriting process, was approved, and money was offered to the client, but the client refused to take the funding.⁴³

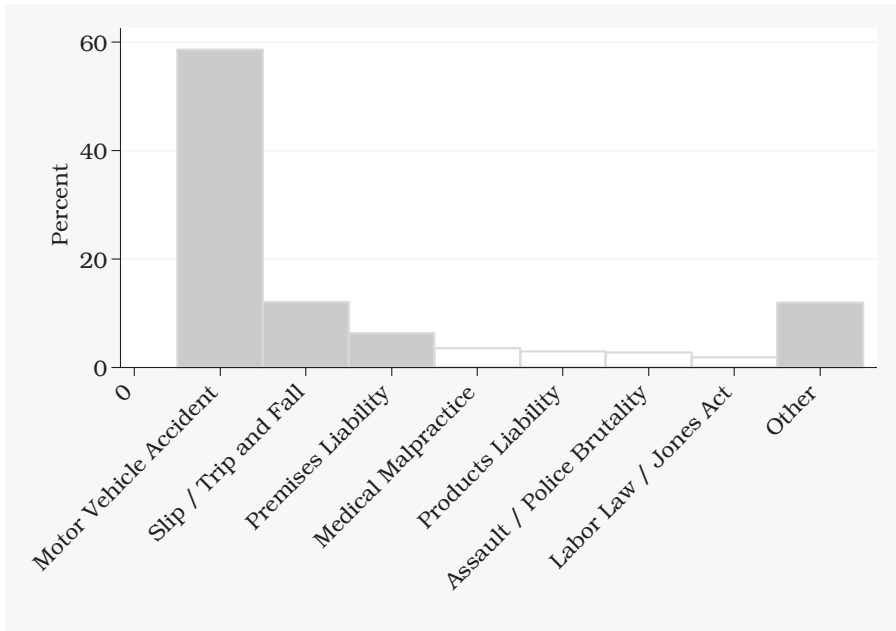
Next, 34,575 (31%) cases were “closed before review,” meaning that the application did not go through a full under-

⁴³ The data provided by the funder did not give any further information about whether these consumers received funding from another funder or whether they simply decided not to receive funding at all. The former suggests that there is price competition in consumer funding among funders. In any case, even if all of the consumers belonged to the latter group, their behavior offers an insight into the funder’s practice of charging a “processing fee” paid only by the other 38% of the applicants whose applications were accepted and who proceeded with the funding—they are the only applicants from whom the funder could practically charge and collect a fee.

writing process and was denied outright. Lastly, 23,150 (21%) cases were “denied after review,” meaning that the application underwent a full underwriting process but funding was eventually not approved by the funder.⁴⁴

The underlying cases vary in subject matter. Specifically, 65,638 cases (59%) involved car accidents, 13,480 cases (12%) featured suits for general negligence, 7,047 cases (6%) were categorized as premises liability, and 13,452 cases (12%) were labelled “other.”⁴⁵ Chart 3 categorizes these cases by subject matter.

CHART 3—CASE TYPE



B. The Underwriting Process

In our dataset, funding requests in 45,620 different cases (40%) were “executed,” meaning they went through the underwriting process (they were not denied or closed before review), money was offered to the client, and he accepted it (the funding

⁴⁴ The difference between claims that were denied after review, closed before review, and refused is that the first and the second options do not contain data about any specific terms of the offer that was made to the client (because such an offer was not actually made) while the refused cases do contain such data, such as the monthly rate and amount funded.

⁴⁵ The “other” refers not only to funding requests that the company labelled under “other” (many of which are mass torts related requests) but also to other funding request categories that had under 200 requests.

was not refused).⁴⁶ Of these cases, 16% were still being litigated at the end of the period, or there has not been a settlement at the end of the period (these are coded as “Funded”). The remaining 38,318 cases (83%) had been “completed” and money was paid back to the funder. Most of our analysis below will focus on these closed-claims completed cases.

We start by inquiring into the number of days between the completed cases’ various milestones. For the completed cases, the median number of days from the date of the accident to the date the client first contacted the company is 308. The median number of days between that date and the date of first funding is ten (future funding requests for the same case were processed much faster because the details about the case were already known). During the ten days in which the funder processes the first funding request, it collects information about the client, the lawyer representing him, the court where the case is handled, and basic facts about the underlying case. For example, if the case involves a car accident, the funder documents a short description of facts surrounding the incident. The funder also records the injuries the client suffered, including whether he suffered fractures or needed any surgeries, the length of the medical treatment he went through, and the amount of time the client was out of work. Following this preliminary investigation, the funder then collects data on the defendant’s insurance carrier, its rating, and the scope of coverage the defendant holds. Lastly, the funder estimates the underlying case value including the lost wages and medical expenses involved. In our dataset, we have case evaluation for 84% of the cases in which requests were funded or completed. The median (average) case valuation is \$36,000 (\$183,000).⁴⁷

Once the funds are extended to clients, it takes another 417 days (median) for the case to be completed.⁴⁸ Table 1 summarizes the results.

⁴⁶ Recall the difference between cases and requests, as more than one request can be funded in a single case.

⁴⁷ It is a limitation of the data set that the funder does not record the gross proceeds recovered by those clients with completed cases who recovered something (which comprise 90% of all completed cases). See *infra* Table 7. There is no way, therefore, to evaluate the accuracy of the case valuations. By way of comparison, a recent study of New York City tort litigation disclosed that, on average, the proceeds paid in both settled cases and adjudicated cases was about \$90,000. See Eric Helland, Daniel Klerman, Brendan Dowling & Alexander Kappner, *Contingent Fee Litigation in New York City*, 70 VAND. L. REV. 1971, 1985 (2017).

⁴⁸ Compare to 15.7 months (about 471 days) reported in BRYANT PARK REPORT, *supra* note 14, at 14.

TABLE 1—STAGES OF FUNDING

Time between:	Median # of Days:
Accident to contact	308 days
Contact to 1 st funding	10 days
1 st funding to completion	417 days

C. The Return on the Investment

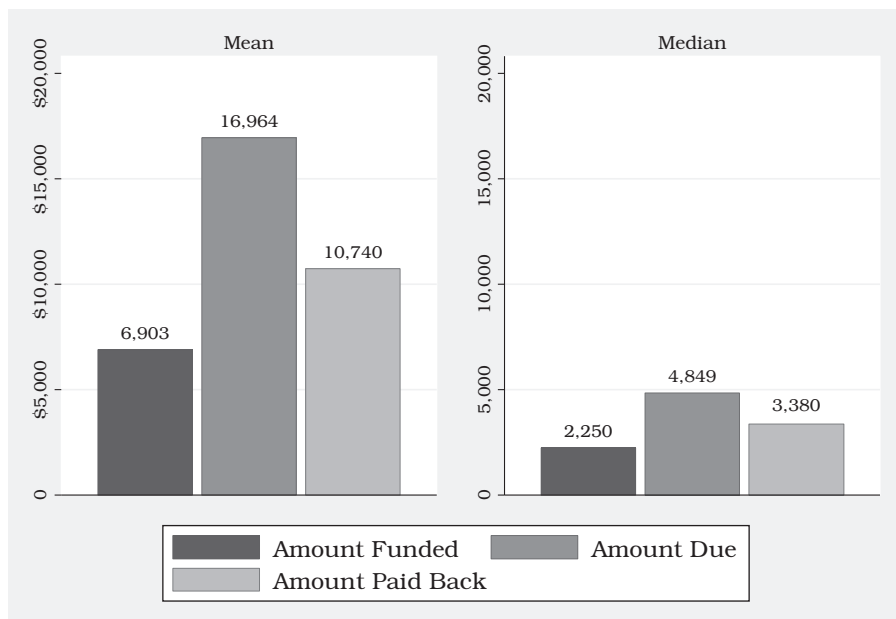
The total amount of money funded by the funder also varied from case to case. The average total amount funded for the 38,318 cases that were completed in our dataset was \$6,903, and the median was \$2,250.⁴⁹ The “Amount Due” is the amount owed to the funder when the case settles. The average Amount Due for the 38,318 cases that were completed was \$16,964 and the median was \$4,849. These numbers reflect a markup of 145% and 115%, respectively.⁵⁰ However, the Amount Due was not—for various reasons discussed below—always paid back in full. The “Amount Paid Back” is the amount that the client actually paid back to the funder.⁵¹ The average Amount Paid Back to the funder is \$10,740 and the median is \$3,380. These numbers reflect a markup of 56% and 50%, respectively. Chart 4 summarizes:

⁴⁹ Compare to an average of \$3,781 reported in the Bryan Park Capital Report. *Id.*

⁵⁰ We calculated markup in the following way: (amount due/amount funded)-1.

⁵¹ As noted above, the funder records only the amount paid by the consumer to the funder—and not the gross or net proceeds in the underlying case. As a result, it is not possible to know, on average, the percentage of the consumer’s recovery that went to the funder, and the percentage that went to the consumer (and her lawyer).

CHART 4—THE UNDERWRITING PROCESS (COMPLETED CASES)



Because the distribution of the amounts funded, due, and paid back is skewed by a relatively small number of unusually high outlying amounts (potentially miscodings), we will work with the medians because we believe they better reflect the general story we tell in this Article. As Chart 4 shows, had the clients paid back all the money they owed (including the fees), the funder would have had a markup on the median case of 115% for the funding period (417 days-median). However, the amount actually paid back is much smaller, bringing it to a median markup of 50% for the funding period, or 43% per annum.⁵² The difference between the amount owed and the amount paid back is because some clients did not pay anything back, and many of them received a haircut on their balances.

We will return to the amount paid back later. For now, we would like to focus on the amount due. Specifically, one would wonder how the funder could be owed 115 cents on the dollar in a little more than one year. This is puzzling as the median posted monthly interest rate is 3.2% in our dataset. So one would reasonably assume that the yearly interest rate should

⁵² This is a result of taking the median amount paid back across all completed cases and dividing it by the median amount funded across all completed cases. Another way of calculating the markup is to do the same division for every single case and weigh it by the amount funded. Under this approach, the funder's markup was 41% per annum.

be twelve times that number, or about 38%, and, for the length of the funding about 45%, as the median length is about fourteen months. In other words, the average consumer, who might not look carefully at the fine print of the funding contract, might reasonably *expect* that the cost of funding would be 38% per annum, and, if she knew that the median length of a case to resolution after funding was fourteen months, that the total cost of her funding would be 1.45 times her advance. We call this the *expected interest rate*. But the expected interest rate is not the same as the interest rate that the consumer commits herself to pay upon contracting with the funder. There is a puzzling difference between the actual (or embedded) interest rate in the contract (about 115%) and the expected interest rate (about 45%).

To resolve this puzzle, the next section explains the under-the-hood of the funding transactions. It starts by explaining the exact way the interest rates are calculated. Then it describes various novel features used by funders such as minimum interest period and interest buckets. Lastly, it covers the way the fees work in these funding requests.

D. The Determinants of the Effective Interest Rate

1. *Compounding*

There are three types of interest rates offered to the clients. The most basic one is called “simple” and has no compounding elements in it. If a client received \$1,000 with a 3% interest rate, it means that after a year—or twelve months—he would owe 36%, which translates to \$360 and therefore to a total debt of \$1,360. Similarly, after fourteen months, (which is the median time a case in is completed) he would owe 42%, which translates to a total of \$1,420. We refer to the 42% interest rate as the *expected interest rate*. However, less than about 4% of the completed cases were funded with a “simple” interest rate. In 8% of the completed cases, the interest rate was compounded annually, meaning that at the end of the year the interest is added to the principal before the next monthly interest rate applies. Thus, in our example above, after a year the client would still owe \$1,360, and yet after fourteen months she would owe \$1,443. However, by far the most prevalent type of funding is one where the interest rate is compounded on a monthly basis. Indeed, in about 88% of the completed cases, the interest is compounded on a monthly basis. This means that, in our example above, after one year our client would owe \$1426, and after fourteen months she would owe \$1,513.

This means that disclosure of the compounding type is crucial for clients' welfare. Clients who do not understand that their funding is compounded monthly, as might well be the case, will end up paying not the 42% expected interest on a fourteen-month funding, but rather 51%. Table 2 summarizes:

TABLE 2—THE IMPACT OF COMPOUNDING TYPES ON
HYPOTHETICAL AMOUNT DUE
(Assuming: \$1,000 funding, 3% monthly rate,
14 months length)

Type of Interest	% of Completed Cases Funded in This Way	Amt. Due After 12 Months	Amt. Due After 14 Months	Total Interest Rate per Funding Period
Simple	4%	\$1,360	\$1,420	42% (Expected Interest Rate)
Compounded Annually	8%	\$1,360	\$1,443	44%
Compounded Monthly	88%	\$1,425.70	\$1,513	51%

As a side note, we observe that in our example, we assumed all types of funding come at a 3% monthly interest rate. However, the average monthly interest is not identical between the types but rather varies by type. Cases compounded monthly are charged on average the highest interest rate—3.18%; those compounded annually—2.50%; and those not compounded at all—2.16%.

2. *Minimum Interest Period and Interest Buckets*

Most cases feature a minimum number of months for which interest will be charged, regardless of the actual length of the funding. For example, a Minimum Interest Period (MIP) of three months means that monthly interest will be charged for the *first* three months even if the money has been paid back within two months. In addition, most cases have another very similar feature called Interest Buckets (IB), which represents the intervals (in months) beyond the MIP for which interest will be charged, even if the money was paid back at some point during the interval. For example, an IB of three months means that money paid back within ten months will still be charged interest as if it were paid back after twelve months. Often our

dataset features an MIP that equals zero and then a positive IB. In that case the IB starts from day one. Thus, MIP is interesting in and of itself only when it is different from zero and is not equal to the IB. Otherwise, these two features converge to one. Overall only about 10% of our completed cases do not feature one or both of these. Observe that these two features are similar to early payment penalties: clients pay an extra fee for not paying back at the IB exit stations. We will come back to this point below.

For the monthly compounding, the median MIP is three months, and every other IB is also three months; for the annual compounding, it is six and six, and for the no compounding, it is three and one months, respectively. The larger IB or MIP are, the more profits the funder makes. Chart 5 presents the results.

CHART 5—MINIMUM INT. PERIOD AND INT. BUCKETS (MEDIANS)

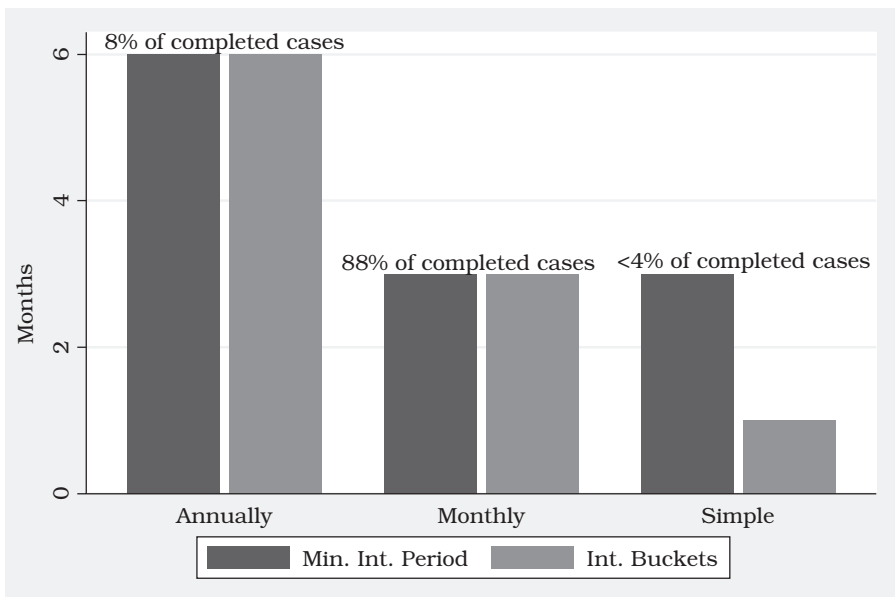


Chart 5 shows that for simple interest (representing only less than 4% of the completed cases), the median MIP was three months and the median IB was one month. For the annually compounded funding (representing 8% of the cases), the median MIP and IB were both six months long. Lastly, for the monthly compounded funding (representing 88% of the cases), the median MIP and IB were three months.

To demonstrate the impact of the buckets (MIP and IB) on the amount due, we present in Table 6 the impact of two repre-

sentative IBs (three months and six months) on the amount due for a \$1,000 funding over a period of fourteen months.⁵³

TABLE 3—THE IMPACT OF INTEREST BUCKETS ON
HYPOTHETICAL AMOUNT DUE
(Assuming: \$1,000 funding, 3% monthly rate,
14 months length)

Type of Compounding Interest	With No IB		With IB=3		With IB=6	
	Amt. Due	Total Int. Rate	Amt. Due	Total Int. Rate	Amt. Due	Total Int. Rate
Simple	\$1,420	42%	\$1,450	45%	\$1,540	54%
Annual	\$1,443	44%	\$1,486	49%	\$1,624	62%
Monthly	\$1,510	51%	\$1,558	56%	\$1,702	70%

In Table 3 above, we suggested that clients who do not understand the difference between simple interest and monthly compounding will be surprised to learn that they will pay 51% instead of the expected 42% on a fourteen-month \$1,000 funding with 3% interest rate. Table 4 below shows that not understanding in addition the meaning of a six-month bucket might surprise the client even more, for she would have to pay 70% on that same funding, almost 30% more than the expected interest rate she would have paid with simple interest and no buckets—42%.

3. Fees

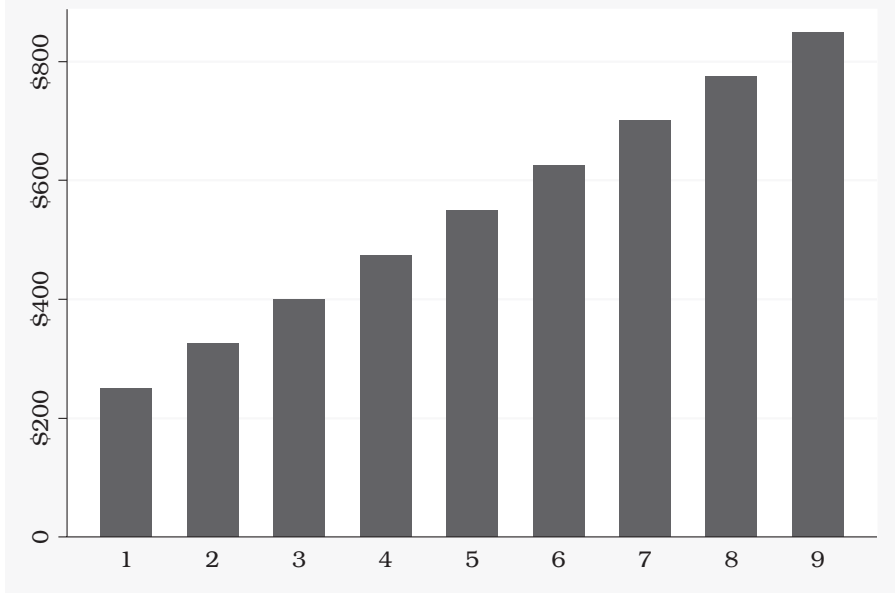
Another way in which clients pay funders is through fees. The fee is a contingent one, paid if and when the client pays money back to the funder. Thus, in effect, the fee amount is added to original amount funded, only that the client never receives this amount—it stays with the funder. As was noted above, the putative rationale for a fee is that the funder has to spend money upfront to determine whether to fund a case. Why this is not simply counted as overhead that the interest rate charged is supposed to cover is unclear, but there are other consumer finance industries, such as the residential mortgage industry, that charge fees in a similar way. Unlike the residential mortgage industry, however, only a subset of the applicants whose applications are processed pay the processing fee, since the fee is paid *ex post*. The only appli-

⁵³ To make the calculation easier, we assume that the MIP is either identical to IB or is equal to zero. This assumption allows us to use just the IB.

cants who actually pay the funder a fee are those applicants whose cases are funded *and* produce a recovery larger than the amount funded. In effect, the funder absorbs the cost of fully or partially vetting applicants it rejects, as well as applicants it accepts but whose cases yield no return, as overhead.

In other words, only “winners” pay the fee, while “losers” get their fee waived. More to our point is the fact that since the fees are not “paid” until after a client knows he is a winner, they are treated as an advance, and the cost of the advance is compounded at the same terms the original funding is compounded.⁵⁴ The most frequent fee for the *first* funding request in a completed case is \$250; 54% of the completed cases were charged this fee. A fee of \$350 often follows this (24% were charged this fee). Then, a fee of \$150 (18% were charged this fee). Recall, however, that many cases have more than one funding request. In these cases, a \$75 charge usually accompanies any additional request for funding. Chart 6 presents the average total fee paid in completed cases per the number of requests.

CHART 6—MEDIAN FEES PER # OF REQUESTS (COMPLETED CASE)



⁵⁴ There is another type of fee that is not compounded. This fee covers actual small costs (such as FedEx, etc.) that the funder paid to external entities for their services. This fee is not included in the analysis.

All in all, in the completed cases in our dataset the average fee paid was \$308 on an average of \$6,919 amount funded, which is about 4.5%. The median fee was \$250, which amounts to 11% of the \$2,250 median amount funded. But both the 4.5% and the 11% figures are misleading. In practice, the fee varies by the size of the amount funded. Thus, when we calculate the ratio of the fee to amount funded in every single case, we find that the median (average) ratio of the total fees to the amount funded is an astonishing 12.5% (15%).

This fee, recall, is compounded with the rest of the amount funded. Therefore, we can translate it to an effective interest rate. Table 4 demonstrates the impact of this fee on the interest rate the client would have ended up paying had the funder charged him an equivalent higher interest rate instead of a fee. To make it tractable we present the results just for cases that were compounded on a *monthly* basis, which is the most prevalent type of compounding. Table 4 thus copies the last line from Table 3 and adds a 12.5% fee to the amount funded.

TABLE 4—THE IMPACT OF FEES ON HYPOTHETICAL AMOUNT DUE
(Assuming: \$1,000 Funding, 3% monthly rate,
14 months length, \$150 fee)

Type of Interest	Fees	With No IB		With IB=3		With IB=6	
		Amt. Due	Total Int. Rate	Amt. Due	Total Int. Rate	Amt. Due	Total Int. Rate
Compounded Monthly	None	\$1,510	51%	\$1,558	56%	\$1,702	70%
Compounded Monthly	15%	\$1,698.75	70%	\$1,753	75%	\$1,914	91%

Recall that with a simple interest the expected interest rate paid on a fourteen-month funding with no buckets was 42%. Table 4 shows that once fees are added to the calculation the median case with a six-month bucket is effectively charged 91%, which is 2.16 times the simple interest rate of 42%.

Lastly, recall that we started this section with the puzzling question of why there is a markup of 115%. In this section we were able to explain how one might get to 91% over the median period. However, we used IB and MIP of six months, while the prevalent ones for monthly compounded interest are actually only three months. Therefore, we are unable to explain the entire gap. The remaining difference might be due to averaging and rounding error in the various steps we have taken. For

example, we have used a monthly interest rate of 3%. Had we used the median interest rate in our dataset, which is 3.2%, we would have gotten to 99% instead of the 91% mentioned in Table 4.

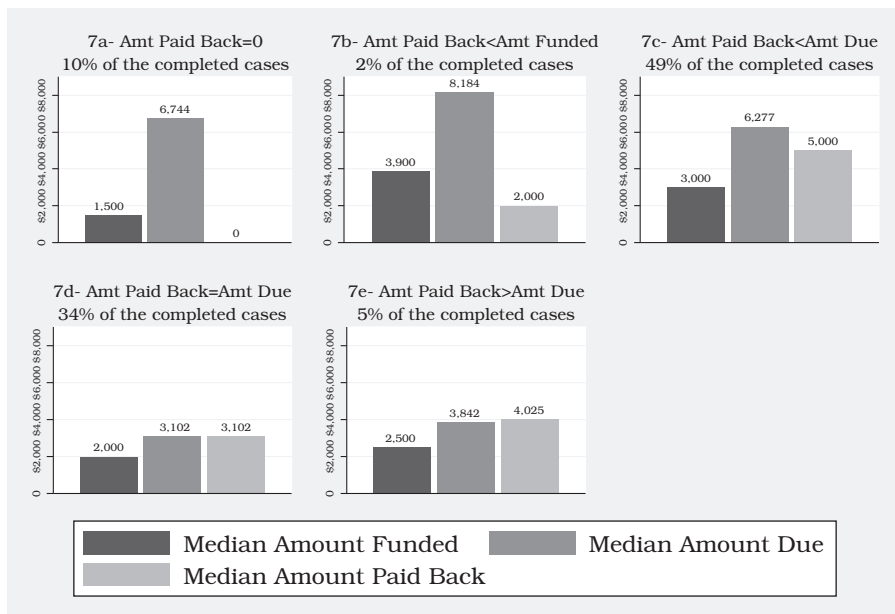
However, recall from Table 3 that the amount paid back was much lower than the amount due. Whereas the median amount due was 115% higher than the median amount funded, the median amount paid back was about 50% higher. This large haircut is explained in more detail in the next section.

4. Haircuts

Of the 38,318 cases completed in the dataset, in 10% of the cases the client paid nothing. The reasons for a \$0 payment to the funder are various. The client may have lost the case or accepted a voluntary dismissal. Or the money she received from the defendants may have been insufficient to cover outstanding liens against her, including her own attorney's liens for costs and expenses.⁵⁵ In an additional 2% of the cases, the funder received a positive amount which was equal to or lower than the amount funded. In these cases, there was a positive recovery (either a judgment or a settlement) but, for reasons not disclosed in the data (e.g. liens, etc.), there was nothing left to pay the premium component of the return based on the embedded interest rate. In contrast, in the remaining 88% of the cases, the client paid back more than the amount she was funded, which means the funder made some profit. In a little more than half of those cases, the funder recovered less than the amount due, whereas in a little bit less than half it recovered the amount due or even more. Chart 7 provides more details.

⁵⁵ As was noted in the 2010 Report to Maine I & FS Committee, *supra* note 35, at 3, "large competing liens and debts owed by the consumer (such as medical provider liens, back child support, back taxes or separate civil judgments against the plaintiff) that must also be paid out of any recovery and that have priority status over the lien of the legal funding advance."

CHART 7—HAIRCUTS (COMPLETED CASES)



As Chart 7a shows, in 10% of the cases there was a complete default—the funder lost 100% of its investment. Chart 7b shows that in 2% of the cases, the funder got some money back. The funder in those cases lost almost half of its investment.

Of the 88% of the completed cases where the funder made some profit, as Chart 7c shows, in almost one in every two completed cases that paid back more than the principal, the client got a haircut and did not pay back the entire amount due. In those cases, the funder earned an interest rate of 66% profit. Next, as Chart 7d shows, about one-third of the clients paid exactly the amount due. In those cases, the funder earned an interest rate of 55%. Lastly, about 5% paid back even more than the amount due. In those cases, the funder earned an interest rate of 61%.⁵⁶ There is an interesting irony reflected in the results in Chart 7c and 7d. The funder made more money on those cases where it agreed to take a haircut than those where it took no haircut (66% v. 55%). In fact, the irony is

⁵⁶ This is roughly consistent with some anecdotal reporting by industry actors. See Martin Merzer, *Cash-Now Promise of Lawsuit Loans Under Fire*, FOX BUS. (Apr. 19, 2013), <http://www.foxbusiness.com/personal-finance/2013/03/29/cash-now-promise-lawsuit-loans-under-fire/> [<https://perma.cc/FAL8-8BGV>] (quoting Eric Schuller, director of government affairs for Oasis Legal Finance: “in 47% of the cases we fund, we get less than our contracted amount. 22% of the time, we get less than the principal back, and 10% of the time, we get zero back”).

double, since the embedded interest rate for the cases in chart 7c (the haircut cases) is almost double the embedded interest rate for the cases in chart 7d (the full payment cases).⁵⁷

In Table 4 we saw that, due to compounded interest, buckets, and fees, the amount due by the client in an average case translates to an annual interest rate of 78%, which, given the median length of a funding in our dataset (fourteen months), would yield a return on each of the funder's investments of 91%. However, as Chart 7c shows, even though the funder made some profit 88% of the time, in almost half (49%) of the overall cases the funder received less than it was entitled to receive per the funding agreement.

We could not tell from the data why the funder accepted less than the client contractually owed it in these cases. It may have been because, although the client's case was settled for a positive amount—large enough to cover the repayment of the advance and some of the amount due—it was not large enough to cover all of the amount due. Another likely explanation is that, although the client received sufficient net proceeds from the resolution of her case to cover the amount due, the proceeds were less than she and her lawyer anticipated, and therefore the funder voluntarily agreed to forego its legal right to full payment of the amount due. This is what we have called the haircuts to the amount due.

The cumulative effect of these haircuts is significant. Recall from Chart 4 that, after accounting for the risk of a complete default and no return on investment at all, the funder made an average of 50% on the median case, whereas, had the funder been able to receive the amount due in all the cases where the client fulfilled her agreement with the funder (the embedded interest rate), the funder would have received 115% in the median case.

This means that those clients who do not receive any haircut (39% of the clients) cross-subsidize the clients who default (10% of all clients), who pay no premium for their advance (2% of all clients), or who receive the haircuts (49% of the successful clients). Those who pay “full freight” generate the cross-subsidy via the features of compounded interest (buckets and fees), so that in effect the funder earns an interest rate of 50%—after accounting for defaults and haircuts—in fourteen months.

⁵⁷ Perhaps the haircuts are nothing more than proof of the adage, “if something looks too good to be true, it probably is.”

The number 50% is interesting because it is so close to the expected simple interest rate of 45%. The posted median interest rate of 3.2% monthly translates to a 38% annual simple interest rate, which, given the median length of a funding in our dataset (fourteen months), would yield (assuming no compounding, buckets, fees, etc.) an average return on each of the funder's investments of 45%.

In other words, through a very complicated and circuitous process the funder ends up with a return on its capital that is quite similar to what he would have received in a regime in which every client took out a recourse loan at a simple 3.2% per month without any compounding, minimum interest periods, interest buckets, fees, or haircuts.⁵⁸ It also represents an annual cost of capital (43%) to the consumer that is higher than most forms of borrowing available to consumers, although it is still relatively less expensive than other forms of nonrecourse consumer lending, such as payday lending.

E. Law Firms

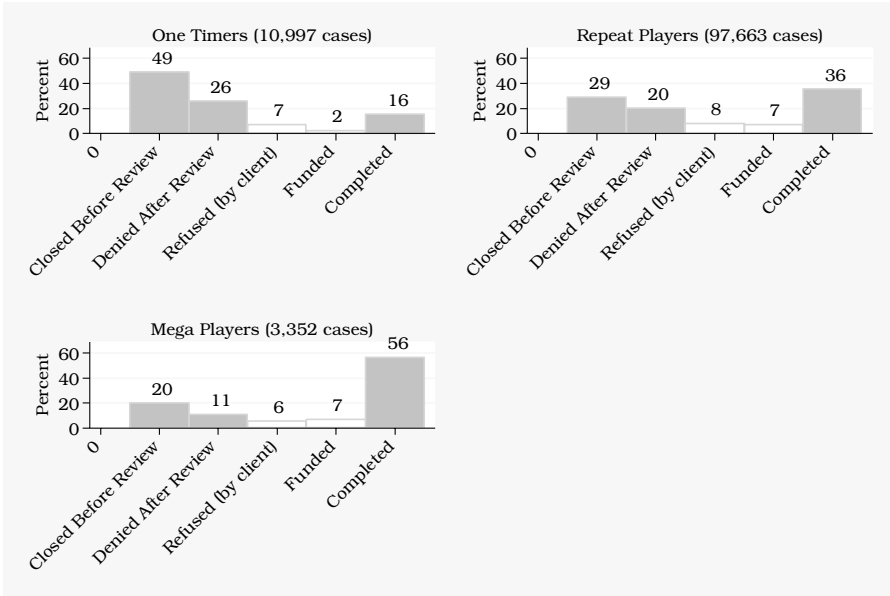
There are 20,125 different law firms in our dataset. Of those, 10,997 law firms (55%) brought just one case. The rest are repeat players who brought more than one case. Specifically, 16% brought two cases, 8% brought three cases, 4% brought four cases, etc. Overall, 90% of the law firms brought fewer than ten cases. At the other end of the distribution, we found that one law firm brought 2,317 cases; another firm brought 1,035 cases; six more firms brought between 500 to 1,000 cases; and 123 firms brought between 100 and 500 cases.

We were interested in studying whether the repeat players are different from the one-timers. To do that, we compared the 10,997 law firms that brought only one case, the 9,126 firms that brought between 2–1,000 cases, and the two “mega repeaters” that brought over 1,000 cases each to the funder. We called the first group the “one-timers,” the second group the

⁵⁸ Our findings are consistent with the results drawn from a much smaller study. See Xiao 2017 *supra* note 33, at 103, 118, 135. That study found that funders encountered a default rate of approximately 8% and took haircuts in about 47% of all completed cases—rates almost identical to our results. Xiao's results differ from ours in certain aspects. The average duration of the cases in her study was 11.4 months and the average gain relative to the amount funded, net defaults, and haircuts was 58%. *Id.* at 103. Our results for the median case are fourteen months and 50%. It is striking, however, that despite the difference in the average length of time of the advance extended by funders, the net average gain for funders in both studies is almost identical.

“repeat players,” and the third group the “mega-players.” The results are in Chart 8.

CHART 8—CASE STATUS PER TYPE OF PLAYERS



As Chart 8 shows, the funding applications submitted by clients of repeat players were more likely to be approved than the applications of one-timers. Whereas 25% of the roughly 11,000 cases brought by clients of one-timers were accepted (i.e. Completed, Funded or Refused by the client), 51% of the roughly 98,000 cases brought by the repeat players were accepted, and 69% of the roughly 3,400 cases brought by the mega-players were accepted. At the end of the day, only 18% of the clients of the one-timers received funding, 43% of the repeat players’ clients received funding, and 63% of the mega-players’ clients received funding. Recall that, by comparison, the median approval rate for all 111,000 cases was 48% and the median percentage of applicants who received funding was 40%.

Another interesting question is whether the characteristics of the *completed* cases differ between clients of the one-timers, the repeat players, and the mega-players. Chart 9a presents the funding terms that clients of each type of player are getting.

CHART 9A—THE FUNDING TERMS

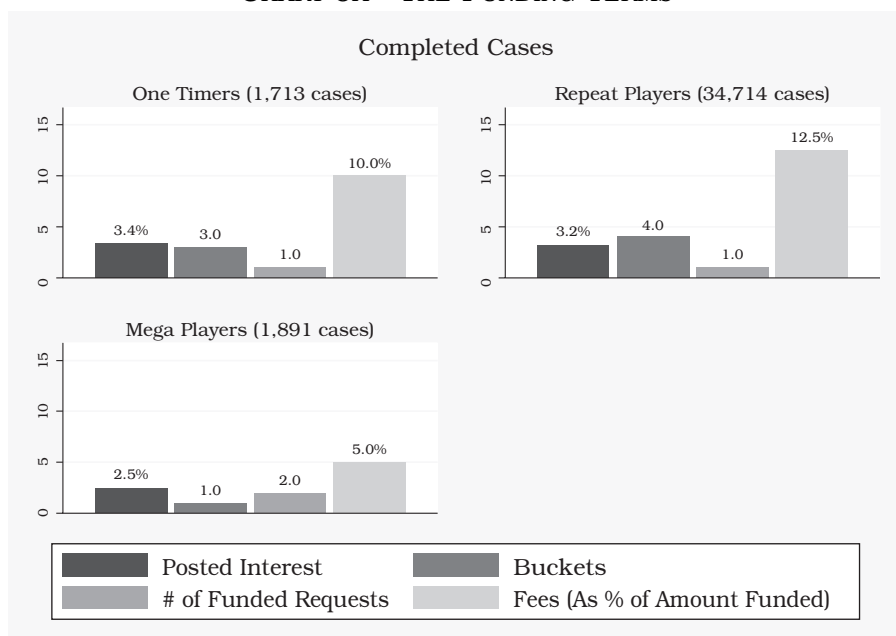
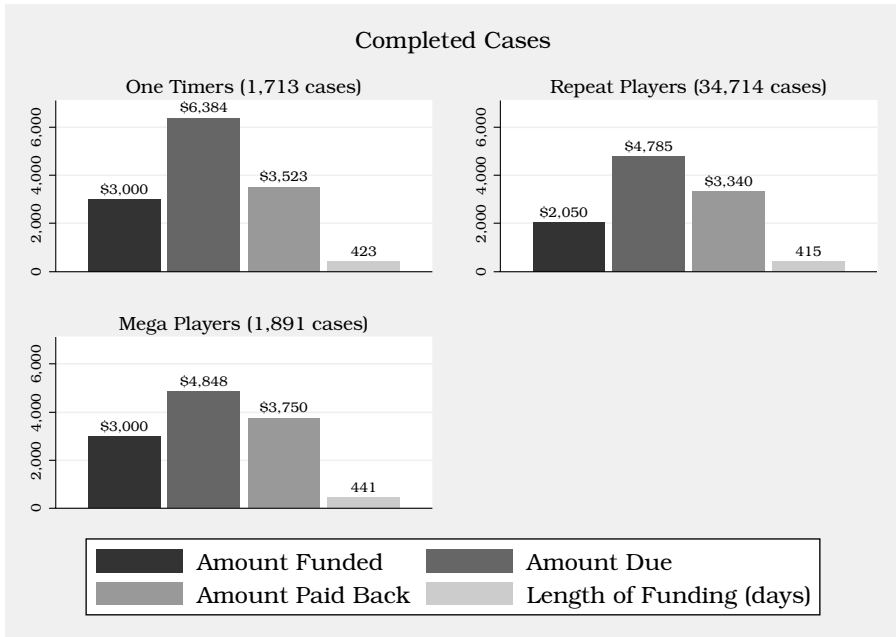


Chart 9a shows that cases brought by clients of the mega-players get better *ex ante* terms than those brought by either the one-timers or the repeat players in various ways. First, the median posted monthly interest rate is smaller—2.5% instead of 3.4% for the one-timers and 3.2% for the repeat players. The median length of the buckets is one month instead of three months for the one-timers and four months for the repeat players. The mega-players get an extra funded request per case compared to the one-timers and the repeat players. Finally, the median percentage fee (relative to the amount funded) their clients pay is half of the one-timers' clients' median percentage fee—5% instead of 10%—and less than half of the fee paid by the rest of the clients, who, as we saw above in subpart D.3, pay a median fee of 12.5% of the amount funded.

Interestingly, we found no difference in the type of compounding: clients of one-timers, repeat players and mega-players get primarily interest rate that is compounded monthly.

One would expect that the better terms that clients of the mega-players get would translate to lower paybacks to the funder. Surprisingly, this is not the case. Chart 9b presents the return on the investment to the funder.

CHART 9B—RETURN ON INVESTMENT



We first observe that the median amount funded is identical for the one-timers and the mega-players (\$3,000) and is lower for the repeat players (\$2,050). Next, we observe that the embedded rate (median amount due to median amount funded) is much lower for the mega-players' clients (62%) than the clients for either the one-timers (113%) or the repeat players (133%). This makes sense given the results in Chart 9a—the mega-players' clients got much better terms *ex ante* than any other client whose case was funded. These better terms translate to a lower amount due.

What is striking, however, is the variation of the embedded and effective rates among the clients of the three types of firms we examined. The one-timers' clients paid an effective interest rate (median amount paid back to median amount funded) of 17%, compared to an embedded interest rate of 113% based on their amount due. The repeat players' clients paid an effective interest rate of 63%, compared to an embedded interest rate of 133% based on their amount due. The mega-players' clients paid an effective interest rate of 25%, compared to an embedded interest rate of 62% based on their amount due.

Each of these groups of clients got a reprieve from the funder; these are the haircuts identified in subpart D.4. It is plausible that the mega-firms negotiated relatively good deals *ex ante* for their clients—the embedded rates secured by these

clients are half of the rates obtained by all the other clients represented by the other firms. As a result, the mega-players' clients could only get so much of an *ex post* rate reduction before it reached zero. But the mega-firms' clients still got haircuts more often than clients represented by the repeat players or the one-timers. As Table 5 illustrates, the mega-players' clients got haircuts in 59% of their completed cases, compared to 48% for all the other firms' clients.

TABLE 5—DEFAULTS AND HAIRCUTS BY LAW FIRM TYPE
(38,318 Complete Cases)

	One-Timers	Players	Mega-Players
Complete Default	15%	10%	8%
Amount Funded Not Recovered	3%	2%	2%
Amount Due Not Recovered	48%	48%	59%
Amount Due Recovered	29%	34%	25%
More Than 100% Recovered	5%	5%	5%

Recall that in Chart 4 we reported that for all cases, the median effective rate was 50% and the embedded rate was 115%. Not surprisingly, the repeat players' clients, who made up 88% of the cases in Chart 4, resemble the median case in many respects. We observe, however, that the cases brought by the clients of one-timers and the mega-players behaved very differently than the median or the repeat players' clients' cases. First, the one-timers' cases turned out to be poor performers for the funder. The gap between the expected return (the amount due) and the actual return (the amount paid back) was huge (113% vs. 17%). This was the result of two factors. First, a relatively large number of defaults (and negative capital recoveries), and second, large haircuts, frequently given. The mega-players also did not generate high effective rates for the funder, either—only 25%. But the funder probably saw these cases as good performers. The default rate (and negative capital recoveries) for the clients of the mega-players was almost half that of the clients of the one-timers. And, although haircuts were given generously (59% of all completed cases), the funder still got much of what it had expected, since the gap between the embedded rate and the effective rate (62% vs. 25%) was relatively narrow compared to the clients of the one-timers.

The analysis above leads us to hypothesize that a poor outcome for a first-time client turns some lawyers into one-timers. The funder may not want to deal with a lawyer who has brought it a case that defaulted or needed a large haircut. It is

also possible that a lawyer whose funded client defaulted or who needed a large haircut might shy away from encouraging other clients to pursue funding. Mega-players are the flip-side of the one-timers. The funder had such a good experience with the mega-firms' clients that they offer multiple benefits to their clients. First, the mega-players' clients are significantly more likely to be approved for funding; second, they receive significantly better terms *ex ante*, and third, they are significantly more likely to receive a haircut once they complete a case. The cases the mega-firms bring are good enough, in fact, that the funder finds it profitable to give their clients a large discount on the price of funding compared to the rest of the cases they fund.

One possibility is that mega-players get different types of cases and this is why their performance is different. However, although we found that mega-players are more likely to bring auto accident cases, nothing in our analysis changes. Xiao (2017) hypothesizes that there is some evidence that "a longer financier-law firm relationship duration is associated with a lower absolute return, a lower return ratio, and a lower interest rate" than the default rate of cases brought by one-timers.⁵⁹ Our result is consistent with this hypothesis, since it is likely that the mega-players have a long-term relationship with the funder. It is possible that repetitious, routinized interactions between law firms and funders create higher degrees of trust that are reflected in higher approval rates. It is equally likely that repeat interactions result in lower screening costs and long-term relationship incentives that allow funders to lower the cost of funding *ex ante*.⁶⁰

II

A REVIEW OF THE RESULTS

This Article provides numerous insights into the practice of consumer litigant funding that answer a few questions and may help shape future policy debate.

First, we show that consumer litigant funding is based on underwriting criteria that result in a significant number of applications being screened out and rejected.⁶¹ While these results do not, in themselves, indicate that the cases accepted by LTPF funders are meritorious, they indicate that funders are

⁵⁹ Xiao 2017, *supra* note 33, at 124.

⁶⁰ *Id.* at 114 (discussing research on relationship lending which suggests that duration is correlated with reduced interest costs).

⁶¹ See *supra* notes 40–48 and accompanying text.

exercising a certain degree of screening in the underwriting/selection process. As other commentators have noted, LTPF providers “focus on basic information about the lawsuit” and “the strength of the consumer’s case” when deciding whether to reject the application.⁶² As a matter of economics, it would make sense for a funder to take steps to screen potential lawsuit investments in favor of those they reasonably believe are stronger, both because they profit from screening better cases and because they can further profit from credibly signaling to adverse parties that the lawsuit they face is credible.⁶³ The fact that, in our sample set, the funder rejected more than half of the cases presented to it is consistent with this prediction.

Tort reform groups and some scholars have argued that LTPF will fuel frivolous litigation.⁶⁴ The tort reform argument has not held up well under serious academic scrutiny.⁶⁵ This Article does not directly engage this debate, although our results do provide additional reasons to be skeptical of the tort reformers’ claim. Beyond showing the second level of screening, our results cut also against the claim that a litigant who was not genuinely motivated to file a claim would be induced to file a frivolous claim by the prospect of funding.⁶⁶ Recall that funding applications were filed 308 days after the (putative) injury.⁶⁷ Recall as well that we found that funders rejected slightly more cases than they accepted.⁶⁸ Although we do not have data on when clients filed their lawsuits, many of them may have filed them less than ten months after they were injured. For these clients, it would be far-fetched to conclude that a 50% chance of receiving \$2,250 many months later would motivate them to visit a lawyer.⁶⁹ The more plausible

⁶² Paige Marta Skiba & Jean Xiao, *Consumer Litigation Funding: Just Another Form of Payday Lending?*, 80 LAW & CONTEMP. PROBS. 117, 123 (2017) (“The financier assesses the strength of the consumer’s case by looking at factors such as potential damages . . .”).

⁶³ See Avraham & Wickelgren, *A Signaling Model*, *supra* note 16, at 248.

⁶⁴ See Sasha Nichols, *Access to Cash, Access to Court: Unlocking the Courtroom Doors with Third-Party Litigation Finance*, 5 U.C. IRVINE L. REV. 197, 228 (2015) (“[Businesses fear that] giving potential plaintiffs and litigators more money will ‘permit[] [them] to offload risk’ and encourage plaintiffs and attorneys to file more lawsuits, many of which would be frivolous.”) (second and third alterations in the original) (citing U.S. CHAMBER, *Selling Lawsuits*, *supra* note 17, at 5); Jeremy Kidd, *Modeling the Likely Effects of Litigation Financing*, 47 LOY. U. CHI. L.J. 1239 (2016).

⁶⁵ See Shepherd & Stone II, *supra* note 9, at 950 (stating that the claim “that financing encourages *frivolous* litigation . . . is easy to dispatch”).

⁶⁶ See *supra* notes 61–62 and accompanying text.

⁶⁷ See *supra* Table 1.

⁶⁸ See *supra* Chart 2.

⁶⁹ See *supra* notes 46, 49 and accompanying text.

conclusion to draw from our results is that clients decide to file lawsuits for reasons that have nothing to do with funding (which they may not even be aware of when they first meet with a lawyer) and then make the decision to apply for funding when they are under financial pressure.⁷⁰

Second, we show that consumer litigant funding pricing is complex and opaque. The final amount due to the funder upon contract is based on a number of variables, including the advertised interest rate, the type of compounding, the inclusion of interest buckets and minimum interest periods, and the addition of nonrecourse fees, which are advanced and treated as contingent costs paid only by clients that paid back their amount due.⁷¹ The implications of this finding are potentially quite significant. It suggests that consumers seeking litigation funding may benefit from less opaque contract terms even in states that have called for full disclosure of the interest rate.

Others have already noted that LTPF contracts are *more* opaque than payday loan contracts, a form of subprime lending to which LTPF has been compared.⁷² Skiba and Xiao observe that the contingent nature of the outcome—the very thing that justifies the relatively high price paid by the consumer for the advance he receives, and which separates it from a loan—makes it much harder for the consumer to comprehend and compare an LTPF contract to a loan.⁷³ We would add to this that a further source of potential consumer confusion is the specific way that these contingent contracts have been drafted. The employment of compounded interest, interest buckets, and minimum interest periods, and the addition of contingent so-called “processing” fees take a consumer who is already unlikely to rationally evaluate the cost of the advance and increase his potential misunderstanding.⁷⁴

⁷⁰ In fact, LTPF might discourage frivolous litigation. Were a client to find a lawyer to accept a frivolous case, the rejection by the funder a few months later might serve as a negative signal to the plaintiff or his lawyer and this in return might cause him to drop the case or agree to a low-ball offer. See Xiao 2017, *supra* note 33, at 10, 18–19 (discussing the impact of funding on settlement activity).

⁷¹ Giordano-Vahey & Valentine, *supra* note 19 (discussing nonrecourse litigation loans); see *supra* subparts D.1, D.2.

⁷² Skiba & Xiao, *supra* note 62, at 127–28.

⁷³ *Id.* at 127 (“[F]unding’s relationship to lawsuits hides its impact on consumers’ cash flow due to the effects of salience, differential mental accounting, and lack of the pain of payment.”).

⁷⁴ Many people lack an understanding of numeracy (that is, “the capacity to do a simple calculation related to compounding of interest rates”), inflation, and risk diversification. Annamaria Lusardi & Olivia S. Mitchell, *The Economic Importance of Financial Literacy: Theory and Evidence*, 52 J. ECON. LITERATURE 5, 10–12

The comparison with payday lending raises interesting questions about the evolution of the TPF industry, which has, generally speaking, followed different contract models in its commercial and consumer branches. As noted in the Introduction, a commercial TPF advance typically entitles the funder to a portion of the client's net recovery or, more typically, a multiple of the initial advance.⁷⁵ Although no legal impediment exists, commercial TPF providers simply do not employ the "loan-like" model universally employed by LTPF providers, and vice versa. This may be a result of historical accident and path-dependency, as well as of other contingent factors such as the fact that commercial TPF arose out of the efforts to treat litigation rights like securities.⁷⁶ Commercial TPF and LTPF share the same legal DNA—they are both the sale of a general intangible, as the UCC would describe it.⁷⁷ But commercial TPF looks like, and behaves like, venture capital or some other form of investment vehicle, while LTPF looks like, and behaves like, a subprime debt product.⁷⁸

(2014) (summarizing studies in which consumers did not understand, *inter alia*, compounding interest).

⁷⁵ See Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 894 (2015) ("In fact, the funder often calculates its rate of return as a multiple of the amount invested rather than a percentage of the amount recovered.").

⁷⁶ The earliest attempt at modern commercial TPF may be the 1976 attempt by an attorney to raise funds for an antitrust suit by selling shares in the suit to investors. See Daniel C. Cox, *Lawsuit Syndication: An Investment Opportunity in Legal Grievances*, 35 ST. LOUIS U. L.J. 153, 154–55 (1990); see also Donald L. Abraham, *Investor-Financed Lawsuits: A Proposal to Remove Two Barriers to an Alternative Form of Litigation Financing*, 43 SYRACUSE L. REV. 1297, 1297, 1302–03 (1992) (describing efforts in the 1980's at lawsuit syndication).

⁷⁷ *U.S. Claims, Inc. v. Flomenhaft & Cannata, LLC*, 519 F. Supp. 2d 515, 528 (E.D. Pa. 2007) ("General intangibles" are defined in Article 9 of the UCC as "any personal property, including things in action, *other than accounts*." The official commentary further makes clear that "general intangible" is a residual category intended to serve as a catchall for various types of collateral which are not otherwise specifically defined in Article 9.") (citing UCC § 9-102(a)(42) and UCC § 9-102, cmt. 5(d)). TPF contracts are simply contracts to purchase contingent proceeds arising from choses in action. See *Devon IT v. IBM Corp.*, 2013 U.S. Dist. LEXIS 184278 at *15–*16 (E.D. Pa. Nov. 21, 2013) (discussing commercial TPF contracts). While some courts have held that consumer TPF contracts create consumer debt, this view is widely rejected. See Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TUL. L. REV. 405, 411 n.30 (2017) ("The vast majority of states that regulate third-party funding do not characterize third-party funding as a loan, but Colorado provides a notable exception.") (citing *Oasis Legal Fin. Grp., LLC v. Coffman*, 361 P.3d 400 (Colo. 2015)).

⁷⁸ Compare Steinitz, *Litigation Finance Contract*, *supra* note 9, at 463–65 (commercial TPF as venture capital), with Hashway, *Litigation Loansharks*, *supra* note 18, at 778–83 (consumer TPF as usurious lending).

The results of this study suggest that, although the actual cost of capital to consumers is less than many critics believe, the design of the LTPF contract is different from the design of commercial litigation contracts in ways which are hard to explain or justify. For example, why, if LTPF is essentially the same “product” as commercial TPF, is the former priced like a loan and the latter priced like a contingent property interest? This question is especially pointed given that the consumer shopping for LTPF has already had direct experience with one form of contingent property contract—the contingent fee agreement he or she (presumably) already signed before securing, and in order to secure, his or her LTPF. We cannot prejudge whether LTPF contracts should resemble commercial TPF contracts in price. We want to suggest that, rather than focus entirely on the price of LTPF, reformers should focus on why the industry has collectively added to their basic price additional cost-generating features such as nonrecourse processing fees, various types of compounding, minimum interest periods, and buckets—features found in neither commercial TPF nor the standard contingent fee offered by lawyers to their clients.⁷⁹

Starting with compounding, it is not clear what the economic rationale for it is in our context. According to a famous urban legend, it is claimed that Albert Einstein stated that compound interest is “the greatest invention of mankind” or “the most powerful force in the universe.”⁸⁰ To be clear, compound interest has been around for hundreds of years, perhaps even more, and yet, it is not clear why we have it at all instead of converting it to a simple (albeit higher) interest. One possible explanation is that compound interest reflects the fact that the investor has the right to claim the principal plus the accrued interest on any given day and then reinvest the total sum. Take

⁷⁹ Contingent fees are controversial in their own right and have been the subject of debate for decades. See Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 625–28 (1995). It is possible that the conventional price for plaintiff’s legal representation for consumers—between 30% and 40% of net recovery—is, in effect, much higher than the real cost of consumer TPF reported in this study (56% of every dollar advanced). That is not the point. The point is to ask why consumer TPF is priced so differently than a lawyer’s contingent fee, given that the two products offer overlapping (but not identical) services. See *id.* at 653 (discussing the various products “bundled” into a contingent fee, which include, among other things, consumer credit).

⁸⁰ David Mikkelsen, *Einstein and Compound Interest*, SNOPEs (Apr. 19, 2011), <https://www.snopes.com/fact-check/compound-interest/> [https://perma.cc/6W8W-57HV].

for example a simple CD bank account. The client can, on any day, withdraw the money with the interest accrued and reinvest it. To avoid the transaction costs associated with repeat withdrawals and reinvestments, banks compound the interest rate they pay their clients holding CD accounts on a daily basis. It is hard to see, however, how this rationale carries to LTPF, as the funder does not have the right to demand early repayment and reinvest the money. In fact, the contingent nature of the transaction means that the funder has no right to recall its investment until after the client wins at trial or receives a settlement. Therefore, we do not see an economic justification for not converting the compounded interest to a simple interest without any compounding.⁸¹

Next, we are skeptical of the funders' use of buckets and minimum interest periods. We observe that the buckets function similar to "early penalties" or "prepayment penalties," features known in mortgage lending and cellphone contracts.⁸² However, whereas in mortgage lending and cellphone contracts one can provide economic justification for such practice, in LTPF we could not find one. In cell phone contracts the early penalty enables the provider to offer a free device to its consumers.⁸³ This "free" device is being paid by consumers throughout the length of the contract. In a world without early penalties, consumers would not be able to get the benefit of a new device because cell phone companies rely on a consistent payment schedule to provide the "free" device.⁸⁴ The economic rationale for early penalties in mortgage lending is different. In the mortgage lending world, the reason for the early penalties stems from the advantage the borrower has over the lender vis-à-vis changes in interest rates.⁸⁵ Because clients have always

⁸¹ We are aware of the fact that compounded interest applies in many other contexts which also cannot be justified by the explanation we provided above, i.e., the investor's right to recall her investment. We leave the job of justifying compound interest rate in these contexts—home mortgage, home equity loans, credit card accounts, and more—to others.

⁸² See e.g., CFPB, *What is a Prepayment Penalty?* (Sept. 25, 2017), [https://www.consumerfinance.gov/ask-cfpb/what-is-a-prepayment-penalty-en-1957/\[https://perma.cc/DV6X-6HJ6\]](https://www.consumerfinance.gov/ask-cfpb/what-is-a-prepayment-penalty-en-1957/[https://perma.cc/DV6X-6HJ6]) (describing the practice of, and reasoning behind, prepayment policies in the mortgage industry); Oren Bar-Gill, *Consumer Transactions*, in *THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW* 465, 465–68, 477 (Eyal Zamir & Doron Teichman eds., Oxford Univ. Press 2014) (providing the example of "early termination fees in the cell phone market"); see also *In re Cellphone Termination Fee Cases*, 122 Cal. Rptr. 3d 726 (2011) (striking early termination fees in cell phone contracts).

⁸³ *In re Cellphone*, 122 Cal. Rptr. 3d at 733–36.

⁸⁴ *Id.*

⁸⁵ See CFPB, *supra* note 82.

the option to refinance, lenders worry about adverse selection (or de-selection). Specifically, lenders worry that borrowers refinance whenever the interest rate goes down, whereas lenders do not have a symmetric option to force a refinance when interest rates go up. The early penalty fee compensates lenders for the risk of decreasing interest rates and consumers' respondent refinancing. Reviewing the rationales for early penalties in both cellphone and mortgage contracts, we cannot see any purpose for buckets and minimum interest periods in LTPF other than that they allow the funder to present a lower "headline" monthly rate.

Third, we show that the pricing of consumer litigant funding is dynamic *after the initial price is set, at the end of the life-cycle of the funding relationship*. After the resolution of the consumer's case, there is a widespread practice of underpayment by the consumer to the funder. See Chart 7. More than half of the consumers who receive funding pay less than the amount due agreed at contract. There is a significant gap between the amount that the funder gets the consumer to promise to pay upon contracting (the embedded rate) and the amount that the funder receives upon resolution of the consumer's case (the effective rate). The embedded rate may indeed be 115% per annum in the median case, while the effective rate is closer to 43% per annum.

Fourth, we show that lawyers matter in the formation and execution of the LTPF contract. Lawyers' experiences with LTPF are correlated with the likelihood that their clients will have their cases approved for funding; the terms of their funding *ex ante*; and the actual markup earned by the funder from the funding contract *ex post*. Certain lawyers who have formed very strong relationships with the funder appear to be able to provide the funder with portfolios of cases in exchange for lower funding costs to their clients *ex ante*, while others, who have less experience with the funder, achieve savings for their clients by securing cost reductions *ex post*.

III

IMPLICATIONS FOR POLICY

These four insights into the behavior of the LTPF contract from initial contact between consumer and funder to the conclusion of their relationship raises two areas of further inquiry.

A. Consumer Protection

Economics teaches us that market players always respond to consumers' demand.⁸⁶ Behavioral economics teaches us that sophisticated market players respond to the demand generated by consumers that are imperfectly rational due to various cognitive biases.⁸⁷ As a general matter, sophisticated sellers will seek to decrease the perceived price for the consumers without really decreasing the actual price. As scholars have long noted, this interaction between market forces and consumers' imperfect rationality often results in contracts that defer costs to the future and that are more complex than necessary.⁸⁸ Indeed, that is exactly what we observe in third party litigant funding.

That costs are deferred to the future seems inherent to the nature of LTPF and arguably should not be criticized as a trick funders play on their clients. Whereas in many consumer contracts contingent costs deferred long into the future are underestimated by consumers and therefore should be avoided, in the case of LTPF they actually enable consumers who are otherwise liquidity constrained to cash their legal claim. Indeed, a major appeal of the transaction to the consumer is exactly its contingent, nonrecourse nature. However, it seems harder to explain what the economic justification is for why the processing fees are added to the principal, are compounded with it, are subject to the same MIP and IB provisions, and are paid back only when and if the principal is paid back. Why instead does not everybody—including those who were rejected by the funder (those who refused the funding, and those who could not pay back anything)—pay uniform processing fees which reflect the real processing fees? It seems to us that the best explanation is behavioral—adding the processing fees to the principal hides their true cost from the imperfectly rational client.⁸⁹

Deferring the fees to the future is not the only type of unnecessary complexity consumers face. As already mentioned above, multidimensional pricing (compounding interest, MIP, IB) is another. We could not find any economic rationale for these provisions and we therefore estimate that they serve as tools to reduce the perceived total costs to the consumer. Consumers' cognitive biases simply prevent them from being able

⁸⁶ Bar-Gill, *supra* note 82, at 465–68.

⁸⁷ *Id.*

⁸⁸ *Id.* at 471–75.

⁸⁹ *Id.* at 472.

to price these terms into the perceived total price of the contract, even if they were aware of these terms. But the truth is that most likely they are not. In fact, we have not encountered a single person, a lawyer or an academic dealing with this industry, that was aware of this practice.

Further, the burden on complexity does not fall on all consumers in the same way. The weak ones, usually the poorer ones, who are even less able than the average consumers to understand the true nature of the transaction, bear a larger share of the burden complexity generates. In that sense, complexity is regressive.

But the unnecessary complexity of the contract is not only harming consumers, especially the poor ones; it is also harming the market for LTPF.⁹⁰ If consumers are unable to comparison shop between contracts in a meaningful way, competition is hindered. And hindered competition creates monopoly prices and reduces total welfare. Further, another inefficiency stems from the fact that when consumers do not fully perceive the real price of the contract, they might well enter into a transaction which costs them more than it is worth to them.⁹¹

So what should be done? As we already mentioned above, the controversy surrounding consumer litigant funding includes calls for various types of consumer protection. The two leading approaches are (a) to insist on greater clarity in the contracts or (b) to place caps on the maximum amount that a funder may charge as a per annum interest against the advance.⁹² We think there are better ways to protect consumers. First, policy makers can prohibit contract terms that are likely to conceal the embedded interest rate from the consumer. The embedded interest rate is a result of four features that may present jointly or severally in the funding contract: daily, monthly, or annual compounding; investment buckets; minimum interest periods; and processing fees advanced on a non-recourse basis. Together, these produce an opaque pricing system that converts what seems to be a simple expected premium of 45% for the typical advance for fourteen months (3.2% per month) to an embedded rate of 115% in the median case.⁹³

As was already mentioned, we could not find an economic rationale for the compounding, MIP, IB and contingent fees.

⁹⁰ *Id.* at 475.

⁹¹ After all, consumers may have alternatives to LTPF, such as credit cards or other subprime debt instruments, or early settlement.

⁹² Bar-Gill, *supra* note 82, at 475.

⁹³ *See supra* subpart I.C.

We therefore think they need to be prohibited. Prohibiting specific terms is not a novel idea; it is done in various places in the world. In the United States, early termination fees are restricted in similar contexts, such as early termination fees in cellphone and mortgage contracts (where they are called prepayment penalties), as well as late fees in credit cards contracts.⁹⁴

A softer way to regulate LTPF is to set default rules that eliminate complexities. Under this approach, funders who would like to restore complexity to their contract will have to specifically inform consumers about it and require their separate consent to such an opt-out.⁹⁵ We are skeptical, however, that such a solution will change anything on the ground. Our prediction is that funders will opt out of the default rules and that imperfectly rational consumers will not understand the implications of such a move for their welfare.

Another soft way to regulate the market is by improving disclosure. As was mentioned above, various legislatures have played with disclosure reforms. These reforms require greater transparency to the consumers of the various complexities in the contract. For example, many states require disclosure about the compounding mechanism or the fees. But there is another option. Policy makers can require funders to provide consumers with a single figure that fully reflects the annual rate. This number, akin to APR in credit cards and mortgage markets, should reflect all complexities in the contract.⁹⁶ Such a number will enable consumers to better estimate what the transaction is worth to them, as well as to better comparison shop. Indeed, credit card reforms went in this direction.

However, as appealing as it may sound, operationalizing it in LTPF is much harder. Whereas in credit cards the APR basically collapses compounded interest and fees into a simple figure, in LTPF the contract is more complex. Consumers have limited control over when their case will conclude; furthermore, because of the buckets, a delay in the conclusion of a case may dramatically increase the "APR."⁹⁷ Therefore, policy makers who support an APR-like approach to LTPF should at least prohibit MIP and IB.

Another potential way to mitigate this problem is to provide consumers with statistical information on how similarly situ-

⁹⁴ Bar-Gill, *supra* note 82, at 477 n.6.

⁹⁵ *Id.* at 483–84.

⁹⁶ *Id.* at 479.

⁹⁷ *See supra* Table 3.

ated consumers have performed in the past. For example, the funder could inform the client in the following way: clients that have taken similar amounts to yours, and that have been subject to the same terms as yours, have ended up repaying us after X months an amount which is tantamount to \$1,500 for every \$1,000 advanced to them. Indeed, similar disclosures have been proposed in payday loans, credit cards, mortgage loans, and cell phones.⁹⁸

Here, again, one may fear that funders will find creative ways to offset the benefits of this requirement. We therefore recommend the more paternalistic solution of prohibiting any contract terms that affect price other than a simple interest rate. In other words, compounding, minimum interest periods, interest buckets, and contingent processing fees would be prohibited.⁹⁹ These prohibitions should be enforced by administrative fines or punitive damages for those funders who put them in the contract.

B. Legal Ethics

This Article demonstrates that the effective interest rate *paid* by consumers in completed cases is very different from the interest rate embedded in the contract before those cases are completed. We know more about the process that generated the median embedded interest rate than the effective interest rate, since every consumer within our study had to receive terms from the funder (although we do not know how many of those consumers dickered over those terms).¹⁰⁰ We know less about the process that generated the effective rate because not

⁹⁸ Bar-Gill, *supra* note 82, at 481.

⁹⁹ Three further points. First, we are not convinced that processing fees should be absolutely prohibited, just those that are contingent on the outcome. Second (and by extension of the prohibition on compounding), the consumer should be charged the processing fee at the time it is incurred. Finally, we observe that there are further, even more paternalistic steps that could be taken that we have chosen to forego. For example, Maya Steinitz has proposed that, at the conclusion of a consumer's case, the court review the liens on the client's funds in escrow to ensure that the client's net recovery is no less than 50% of the proceeds, net the lawyer's legal fee and the funder's right to payment under the LTPF contract. If the client would receive less than 50%, then the funder's right to payment would be capped at an amount to ensure that the client received at least 50%. See Maya Steinitz, *Testimony on Third Party Financing of Lawsuits* (U. Iowa Legal Studies Research Paper No. 2018-11), <https://ssrn.com/abstract=3178963> [<https://perma.cc/4T8Y-X57K>].

¹⁰⁰ We know, for example, that there seems to be a correlation between the terms offered by the funder to clients whose cases are funded depending on whether the clients are connected with lawyers who are one-timers, repeat players, or mega-players. See *supra* subpart I.E.

every consumer received a haircut. Of the 32,781 consumers who paid the funder back at least the advance they received, 18,799—more than half—got haircuts of varying degrees.¹⁰¹ We assume that the funder did not offer the concession without a rational motivation. The most likely motivation is that the consumer balked at paying the full price to which she had agreed. Perhaps some consumers balked at settlement because they received a lower net recovery (after paying their lawyers and liens) than they had expected and wanted to increase their own net recovery at the funder's expense.

The prevalence of the haircuts and their role in bringing the actual interest rate down to the levels we have demonstrated seems to point to an important and hidden role of the consumer's lawyer in the funding relationship after the funding contract has been negotiated and signed by the consumer. This study has already pointed to strong circumstantial evidence that the funder cared about the identity of the lawyer connected to the cases it funded; as seen in Subpart I.E, the funder treated clients of one-timers, repeat players, and mega-players very differently at every stage of the funding process. This section assumes that differential treatment, when it occurs, is not the result of unilateral decisionmaking by the funder, but of bilateral negotiation between the funder and the lawyer on behalf of her client. This section asks, to the extent that the lawyer is playing an active role in securing advantageous treatment for her client, what, if any, are the lawyer's obligations to that client and to all her other clients similarly situated?

A lawyer can assist her client in applying for or receiving funding.¹⁰² A lawyer is obliged to "exercise[] independent professional judgment" and "render candid advice" if asked by the client about LTPF.¹⁰³ One New York case, focusing on the back end of the client's relationship with a funder, has held that unless separately negotiated, a lawyer's scope of representation does not include advocating for the client in her business dealings with a funder.¹⁰⁴

¹⁰¹ See *supra* Chart 7c.

¹⁰² See, e.g., Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Op. 2012-3; New York City Bar Ass'n, Formal Op. 2011-02 (2014) (detailing obligations of lawyer whose client requests assistance in obtaining consumer TPF).

¹⁰³ See New York City Bar Ass'n, Formal Op. 2011-02 (2014).

¹⁰⁴ *Francis v. Mirman, Markovits & Landau, P.C.*, No. 29993/2010 (N.Y. Sup. Ct. Kings Cty. Jan. 3, 2013). The client, who settled his case for \$150,000, paid his lawyer a contingent fee of \$50,000; had expenses of \$2,211 and owed two TPF firms \$98,415 arising from two advances totaling \$27,000. The client alleged that

A narrow focus on the legal aspects of a client's contract with a funder entails that a lawyer's ethical obligations are defined by the scope of representation implied by law in a standard retainer agreement. Our results suggest that the ethical obligations of lawyers go further and may include a positive duty to reasonably protect the financial interests of all of their clients that secure LTPF from the same funder, regardless of whether the client asked for additional representation in their dealings with a funder.

Our analysis is based on the intersection of two principles in the law of lawyering—the idea that some nonlegal activities carry with them obligations in their performance similar to those of legal activities, and the idea that a lawyer faces a conflict of interest if there is a significant risk that her ability to represent a client is materially affected by a personal interest.

First, it is likely that LTPF is a “law-related” service as that term is used in the Rules.¹⁰⁵ Rule 5.7, which discusses law-related services, approaches the issue from the perspective of a lawyer who provides a law-related service in the context of a discrete transaction, where the client purchases the service from the lawyer in a transaction separate from the lawyer's representation.¹⁰⁶ The question that arises when a lawyer secures haircuts for some clients and consciously elects not to secure them for others is whether there is a risk that the typical client would “fail[] to understand that the services [securing haircuts] may not carry with [it] the protections normally afforded as part of the client-lawyer relationship.”¹⁰⁷ We think that this condition is *potentially* satisfied when the lawyer ne-

his lawyer failed to competently negotiate with two LTPF providers, leaving him with a net recovery of \$111 out of a \$150,000 settlement in a personal injury claim. The court held that the retainer agreement defined a scope of representation limited to the client's tort action. *See also* Christine Simmons, *Client Sues Firm After Funders Recover Most of His Settlement*, N.Y. L.J., July 19, 2012 (also discussing the *Francis* case).

¹⁰⁵ MODEL RULES OF PROF'L CONDUCT r. 5.7, cmt. 9 (AM BAR ASS'N 2011) states that:

A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

¹⁰⁶ *See, e.g.*, Arizona State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 05-01 (2005) (applying Rule 5.7 to referral of client to investment service in which the lawyer has a financial interest).

¹⁰⁷ MODEL RULES OF PROF'L CONDUCT r. 5.7, cmt. 9 (AM BAR ASS'N 2011) .

gotiates on behalf of any client with a funder.¹⁰⁸ Negotiating a smaller payment to the funder, who has a lien on the client's funds, is a law-related service even if it is not one that lawyer regularly offers the public and for which she would not charge separately. We think that this condition is presumptively satisfied when the lawyer negotiates on behalf of any client with a funder but does not, absent any good reason, negotiate on behalf of another client who has a contract with the same funder.

Second, if the haircut negotiation of any one client—including the decision not to negotiate a haircut on behalf of any one client—is affected by the lawyer's practice of negotiating haircuts for her other clients, then Rule 1.7(a)(2) is triggered.¹⁰⁹ The rule says that a "concurrent conflict of interest exists if . . . 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 . . . or by a personal interest of the lawyer."¹¹⁰ Typically, this rule is triggered when a lawyer is representing two clients in legal matters who are also business competitors, or where the lawyer has a business interest that would be affected by her representation of a client in a legal matter. But if Rule 5.7 extends this duty of fair play to matters that are not strictly speaking legal, but law-related, then the lawyer has a conflict if the delivery of those law-related services to one client would materially limit her ability to deliver that service to another client, or if the delivery of the law-related service to a client would be materially limited by the lawyer's personal interests in the delivery of that service.¹¹¹

The pattern of haircut negotiations uncovered in this study indicates a conflict of interest with regard to both other clients and the lawyer. If the lawyer is only able to secure haircuts for some clients, but not others, then the decision by the lawyer to secure a haircut for Peter by definition affects her ability to secure it for Paula. Further, if the lawyer's ability to secure a haircut for some clients but not others is determined by her

¹⁰⁸ The negotiation of a haircut occurs in the context of the lawyer's fiduciary duty in connection with the client's proceeds, including the maintenance of an escrow account for the funds that are delivered by the defendant and the payment of all other parties who have valid liens which the lawyer is obliged to either pay or for whose benefit the lawyer must hold funds, in accordance to the law of the jurisdiction. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: SAFEGUARDING & SEGREGATING PROP., § 44 (Am. Law Inst. 2000).

¹⁰⁹ MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2018).

¹¹⁰ *Id.*

¹¹¹ MODEL RULES OF PROF'L CONDUCT r. 5.7, cmt. 1 (AM. BAR ASS'N 2011).

desire to maintain good relations with the funder, then her decision not to pursue a really good haircut for Paula (as opposed to a merely mediocre haircut, or no haircut at all) means that the lawyer's personal interests (in managing her practice) affect Paula.

It should be simple for lawyers to comply with their obligation under Rule 1.7(a)(2) by securing client consent to the conflict as provided for under the rule.¹¹² This conflict is one which should be consentable and is unlikely to interfere with the lawyer's competent and diligent representation of any of her clients.¹¹³ Among the clients of the mega-players, who already benefited *ex ante* from their lawyers' strong relationship with the funder, it would not be difficult, and it would be fairer, if the lawyer disclosed to clients upon being retained that if they received funding with the aid of the lawyer, there was a one in three chance that they would not enjoy the same opportunity of a post-settlement haircut that was enjoyed by other clients similar to them represented by that lawyer.

But this should not be the end of the story. We do not know why more than half of the typical consumers got haircuts, or how they were calculated, or whether the savings enjoyed by some could be spread more evenly to all. It seems premature to assume that the savings could be spread, but it also seems premature to assume that the current method of distributing the savings—*ad hoc* negotiations by the lawyers after the case is concluded—is the best way to ensure the welfare of the class of consumers who use LTPF. Full disclosure, which Rule 1.7 would require, seems like a good first step. Nothing would prevent state regulators from taking further steps and requiring the funders to explain how decisions to grant haircuts are made. A regulator could demand that the funders treat the LTPF consumer in a nondiscriminatory fashion after their case has been concluded. At the very least, transparency would promote competition among the funders, resulting in improved consumer welfare.

CONCLUSION

LTPF is an old idea that has become new again. As legal practice becomes more market-driven, it is inevitable that litigation will be commodified and legal claims will be, at least

¹¹² MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2018).

¹¹³ See MODEL RULES OF PROF'L CONDUCT r. 1.7(b) (AM. BAR ASS'N 2018) (describing conditions under which a lawyer facing a conflict found under Rule 1.7(a) may represent a client).

partially, bought by third parties. This Article has examined the behavior of only one part of the market in litigated claims—one occupied by vulnerable, less-sophisticated consumers. It is a market which, like many consumer markets, may need to be regulated.

This Article shows that the deals struck between consumers and funders are both better and worse for the consumer than has been reported by academics and in the media—the interest rates are not as high as reported, while the simplicity of the contract is not as good as was thought.

One may argue that a consumer in TPF is not a borrower (because a nonrecourse loan is not a loan) but rather that he is selling an asset (or a portion of an asset). If correct, there are no obvious parallels for policymakers to use to measure whether the market for these claims is in need of intervention through some kind of regulatory mechanism, because sellers' protection law is yet to be developed. According to the selling-of-an-asset account of the transaction, we show that the median consumer sells \$3,380 of his future contingent proceeds from his lawsuit in return for a sum of \$2,250 he can use immediately, and, in exchange, transfers to the funder (the buyer) a 12% risk that he will never deliver the future proceeds, as well as the risk he will deliver only a portion of them in fourteen months. On this view, comparisons with subprime debt and payday lending are less relevant, as LTPF might really be a hybrid between a sale and a loan, and as such, should be approached with an open mind based on accurate data.

However, from a more substantive point of view, what matters is not whether clients are, from a formalistic legal perspective, sellers or borrowers (or a hybrid) but rather that they are unsophisticated individuals dealing with sophisticated repeat players. As such, they need protection, and regardless of what is used as a point of comparison, any discussion must start with an accurate picture of the typical price paid for consumer litigation claims, and we provide that.

This Article provides some of the data that is necessary for a clear-eyed analysis of the reforms that should be adopted, depending on the goals sought by the state and the bar. The two most important findings of this Article, we believe, are, first, that funders confuse consumers by applying a multidimensional pricing scheme which includes fees, buckets, and compounding interest. Second, that what we call the "embedded interest rate"—which is the figure featured in every media and academic account of LTPF—is not the "effective in-

terest rate.” The effective interest rate—the average premium actually paid by the consumer and actually earned by the funder—is 50% for the median advance of fourteen months, which is smaller than the hundreds of percent the media likes to cite. We also explain why these two rates differ by focusing on the role played by *ex post* haircuts, which are practices hidden from view. The fact that some clients essentially cross-subsidize others has unknown distributional effects.

It is possible that removing the complexity at the front end would not lead to a reduction in the number of haircuts negotiated at the back end of the funding cycle, but it might reduce the indeterminacy of the size of those haircuts. If the real price of consumer litigant funding is, on average, closer to 43% per annum for the median case, it seems to us that both consumers and funders would benefit from having that fact known as clearly and transparently as possible. Moreover, consumers will also benefit from knowing they have a 54% chance of paying about 60% interest for their loan, about a 34% chance of paying 55% interest for their loan, and a 10% chance of paying nothing.

