A MATTER OF TRIAL AND ERROR, OR BETTING ON APPEALS

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In civil litigation, the function of the appellate review is to correct errors made by the court below and enforce uniform application of law. To make sure that the judgment was fair, the appellate panel is asked by the losing party to second-guess the trial judge and jury. Some, though, try to get to the table in between those two guesses, placing an outside bet on the appellate outcome before the wheel of justice finally stops. They are called appellate funders.

How does one gamble on a pending appeal for money? What kinds of cases are suitable for such bets? And why should anyone only get involved once relatively little remains to be done? Despite the rapidly growing practice where legal claims get funded by third parties, and the concurrent surge of scholarly interest in the phenomenon, the strategy of appellate financiers has not been explored in the literature.

Sampling from the actual portfolio of a leading third-party litigation financier, this Essay demonstrates that making systematic bets on pending appeals is a viable business model applicable to a wide range of cases. "Appellate investments" may include both consumer and commercial cases, including also public-interest actions where prevailing plaintiffs are permitted attorney's fees—even if they themselves do not seek monetary relief. Additionally, the analyzed sample indicates that appellate funders buy both from plaintiffs and plaintiffs' attorneys, often in the same case.

The overview of the business strategy of appellate financing contributes to a larger theme: the role and impact of external money in litigation. In particular, this Essay challenges the assertion that third-party funders necessarily bring about more litigation; after all, appellate funders support prevailing plaintiffs hoping to withstand the procedural onslaught of losing defendants vying for a rematch. Therefore, and contrary to popular belief, this Essay argues that in a dispute funders can generally play either offense or defense, as long as the risks and rewards are right.

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I. APPEALS AS LATER-STAGE LITIGATION INVESTMENTS

Warren Buffett's advice for getting and staying rich is simple enough. "Rule No. 1: Never lose money. Rule No. 2: Never forget Rule No. 1."[1] And while it is really hard to *never* lose money, savvy investors realize that the upside potential of a deal means little unless it is weighed against the downside risk. There is no universally right answer to the question of how many extra dollars one would need to be paid (if things go well) to chance that an additional dollar might be lost (if they do not). For, quite simply, people vary in their attitudes to risk. Many, however, would likely heed Warren Buffett's advice and not as much as dip a toe into the water which looks to them too treacherous, even if surfing it could be highly satisfying.

Figuring out whether a venture is too daring for comfort is not always easy. Nevertheless, one metric usually considered a good proxy for the risk of an investment project is its stage. For example, when Peter Thiel made his angel bet on "The Facebook" in June of 2004, it was a much riskier proposition than the one which attracted Goldman Sachs six and a half years later, with Facebook already thinking about an initial public offering.[2] In the current market, such later-stage investments have been on the rise. In 2014, out of $52 billion injected by institutional investors into private companies, about $31 billion (almost sixty percent) was directed at targets developed enough to consider going public, like Uber or Cloudera.[3]

But what if, instead of young companies, a financier is interested in more unconventional assets, such as legal disputes? The practice where third parties bankroll lawsuits to profit from them has been developing rapidly over the last decade, generating a sizable interest among scholars.[4]

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1 MARY BUFFETT & DAVID CLARK, THE TAO OF WARREN BUFFETT 3 (2006).

2 *See* JP Mangalindan, *Timeline: Where Facebook Got Its Funding*, FORTUNE (Jan. 11, 2011, 3:46 PM), http://fortune.com/2011/01/11/timeline-where-facebook-got-its-funding/; Anupreeta Das, Geoffrey A. Fowler & Liz Rappaport, *Facebook Sets Stage for IPO Next Year*, WALL ST. J. (Jan. 6, 2011, 12:01 AM), http://www.wsj.com/articles/SB10001424052748703730704576066162770600234.

3 *See* Russ Garland, *Venture Investments Soar, Driven by Later-Stage Deals*, WALL ST. J. (Jan. 14, 2015, 11:30 PM), http://www.wsj.com/articles/venture-investments-soar-driven-by-later-stage-deals-1421296203.

4 *See, e.g.*, Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377 (2014) (discussing lending to lawyers and its ethical implications); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004) (offering an early insight into funding of consumer claims); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367 (2009) [hereinafter Molot, *Litigation Risk*] (proposing that by building a portfolio of litigation-related liabilities, a financier may diversify unsystematic risk, reducing randomness in outcomes); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011) (discussing claims investing in the context of legal ethics); Anthony J. Sebok, *What Do We Talk About When We Talk About Control?*, 82 FORDHAM L. REV. 2939 (2014) (discussing why non-lawyers may want control in legal decision-making);

And litigation uncertainty has been singled out as a key aspect of litigation funding; either owing to the fact that it makes sense to transfer such risk to financial third parties better able to assume and diversify it,[5] because some analogies may be found between funding and insurance,[6] or since litigation funders—like Peter Thiel and Goldman Sachs—follow different strategies and have different risk profiles.[7]

The point of departure for this Essay is the latter notion: that those who bet on legal disputes pick the level of uncertainty about the outcome which they think is right for them; and, moreover, that like their colleagues specializing in startups, litigation funders are able and willing to purposefully select a preferred level of risk of financial loss (or subpar return) by betting after a particular key event in the life cycle of a dispute.[8]

What lawyers may take for granted, but what is far from obvious to an asset manager used to dealing in more traditional kinds of investment projects, is that the legal process follows a predictable path with well-defined consecutive milestones. A broad-brush timeline of a dispute normally starts at the time when a cause of action accrues; a complaint is then filed and served on the defendant who replies; next, the defendant's motion to dismiss and other pleadings are litigated; discovery is conducted; parties move for summary judgment; the case is tried; a verdict is reached; adversaries engage in post-trial motion practice; the loser appeals; and an appellate decision is issued.

Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1325–38 (2011) (arguing that with smart regulation third-party funding will increase access to justice and encourage private law enforcement); JOHN BEISNER ET AL., SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES 5–7 (2009), http://legaltimes.typepad.com/files/thirdpartylitigationfinancing.pdf (warning that funding will invite frivolous lawsuits); STEVEN GARBER, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWNS, AND UNKNOWNS (2010), http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf (providing the first empirical overview of the market).

5 *See* Molot, *Litigation Risk*, *supra* note 4, at 392–403; Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 82–101 (2010).

6 *See, e.g.*, Molot, *Litigation Risk*, *supra* note 4, at 376–78 (arguing that the analogy between funding and insurance is valid); Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DEPAUL L. REV. 453, 464–71 (2011) (same); Steinitz, *supra* note 4, at 1295–96, 1310–12, 1334–46 (same). *But see* Michelle Boardman, *Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation*, 8 J.L. ECON. & POL'Y 673 (2012) (arguing the opposite); Catherine M. Sharkey, *The Vicissitudes of Tort: A Response to Professors Rabin, Sebok & Zipursky*, 60 DEPAUL L. REV. 695 (2011) (same).

7 *See* Radek Goral, *Justice Dealers: The Ecosystem of American Litigation Finance*, 21 STAN. J.L. BUS. & FIN. (forthcoming 2015) [hereinafter Goral, *Justice Dealers*], http://ssrn.com/abstract=2530798.

8 *Id*. (manuscript at 29–34).

In short, the same procedural roadmap applies to virtually all civil disputes. (A similar logic, but with fewer steps, applies to disputes in arbitration.) Publicly traded funds betting on high-stakes litigation, such as Burford Capital, Ltd. (Burford) or Juridica Investments, Ltd. (Juridica), both explicitly acknowledge that they track progress of funded cases at key junctures, adjusting value of an investment by comparing assumptions made for a given milestone with actual outcomes.[9]

Importantly, however, each of the steps along the path of the legal process is conditional on the success (or failure, depending on the point of view) of the directly preceding step. If the case is concluded at some point due to dismissal or settlement, the process terminates. What matters from the point of view of an outside third party, without access to privileged information about the case considered as an investment, is that phases (or states) in a legal process are often easily observable. In consequence, a financier has the option to take the wait-and-see approach, putting money into only those suits that survived long enough on their own.[10]

This Essay is an empirical study of those third-party funders who choose to do with litigation what Goldman Sachs did with Facebook: they enter the stage only for the last act.[11] That is to say, they fund just the

9 *See, e.g.*, BURFORD CAPITAL, LTD., ANNUAL REPORT 2010, at 16 (2011) (pointing to motion to dismiss, summary judgment, and appeal as examples of key stages of a matter that impact its fair value); JURIDICA INVESTMENTS, LTD., ANNUAL REPORT & ACCOUNTS 2009, at 18 (2010) (stating that a judgment or appeal in a funded case triggers its reassessment).

10 *See, e.g.*, Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 1 (1996) (providing divisibility of litigation as a potential explanation of lawsuits with negative expected value); Bradford Cornell, *The Incentive to Sue: An Option-Pricing Approach*, 19 J. LEGAL STUD. 173 (1990) (arguing that suits have embedded real options); Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1276–89 (2006) (distinguishing different kinds of litigation real options). Grundfest and Huang model for what they call a "learning option," which a plaintiff exercises by paying the cost of developing his case to a point where new information becomes available, enabling the decision of whether to continue with the case or abandon it. *Id*. at 1288, 1290. Analogously, it can be argued that a third-party funder gets—for free—his own learning option, which he exercises by doing nothing, or waiting to learn whether a lawsuit survives until the next phase.

11 This Essay builds on the author's doctoral dissertation on third-party funding of legal disputes in the United States written at Stanford Law School, and it uses first-hand fieldwork data collected for the purposes of that dissertation: forty-five semi-structured interviews and about twenty shorter, informal chats with individuals knowledgeable about some aspects the practice of litigation funding. Radek Goral, Buying Suits: Exploring Business-to-Business Financing of American Disputes (Dec. 2014) (unpublished Ph.D dissertation, Stanford University) (on file with author) [hereinafter Goral, Dissertation]. In addition, this Essay uses data on funded cases retrieved from public records.

appellate phase of a dispute, after its merits and value have already been determined by the lower court, but before all litigation risk is removed.[12]

The rest of this Essay is organized in the following way. Part II explains how appellate funding works. Part III provides concrete examples of different types of lawsuits funded in that way. In Part IV, patterns identified within the sample are confronted with several claims made previously in the literature. This Essay concludes with a brief summary of findings.

II. AFTER TABLES TURN: FUNDING PLAINTIFF'S DEFENSE

Appellate financiers try to guess the outcome of an appeal. More precisely, they invest in the hope that the appellate review will not change the first-instance result advantageous to the backed litigant (normally, the plaintiff). An appellate third-party investment is peculiar in that it is a wager on a post-trial status quo: it funds the party trying to *defend* the ground already gained against the adversary who *attacks* that ground by engaging in additional litigation. Simplifying a little, appellate funding is about taking a financial stake in a plaintiff's case after she turned the table on a defendant.

In the discussed business strategy, a funder may invest in the stake of a plaintiff, an attorney, or both.[13] The "dual-use" nature of the appellate model is significant: third-party funding is a relational business, built around the grid of connections among repeat-players. Third parties provide capital to both the litigant and the litigator, but often their primary relationship is with the lawyer.[14] When in need, such attorneys will likely turn to the financier they know, offering him a chance to invest in an appellate case of a client in the outcome of which they, the lawyers, have a financial stake of their own. Put differently, appeals seem to be funded in the interest of the plaintiffs' attorneys, and, sometimes, their clients as well—rather than the other way around.

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12 *See* Goral, *Justice Dealers*, *supra* note 7, at 33, 35, 41 (placing appellate funding within a larger market framework and identifying its main providers).

13 Certain smaller funders specialize solely in appellate financing, but others offer it as an additional line of business, intended to complement law-firm loans. *See* Goral, *Justice Dealers*, *supra* note 7 (manuscript at 33, 41). In addition, my fieldwork data suggests that sometimes law-firm lenders agree to what in economic, if not legal, terms could be called a debt-to-equity conversion: a funder would *de facto* accept "equity" in appealed judgments (or other assets) as a way to restructure debt of a law firm in financial distress.

14 *See* Goral, *Justice Dealers*, *supra* note 7 (manuscript at 24). For a general discussion of the tripartite relationships between attorneys, their clients and third-party funders and the emergence of lasting relationships between funders and attorneys, see Radek Goral, *Skin in the Game: Why Business Lawsuits Get Third-Party Funded*, 30 NOTRE DAME J.L. ETHICS & PUB. POL'Y (forthcoming 2015) [hereinafter Goral, *Skin in the Game*], http://ssrn.com/abstract=2531045.

Whether the fundee happens to be a plaintiff-appellee or her lawyer, parties transact in litigation equity: the funder pays a lump sum in cash and at times, additionally advances the costs of appellate defense. In exchange, he takes a portion of the judgment of a tentative value, subject to the outcome of the appeal. The financier thus becomes a joint-venture partner and a direct equity stakeholder in a specific suit.

An appellate funder aims to aggregate judgment stakes into a portfolio. Like pre-settlement funders who invest in individual early-stage cases, the appellate-stage strategy is about choosing one case at a time, with risk and return attached to the outcome of each funded case separately. Therefore, an appellate portfolio is a high-stakes, low-volume proposition.[15] Appellate funders are picky, and, as one industry insider put it, "the appellate space is finite"[16]—in part because each investment must be attractive enough to justify both the risk associated with the funder's limited recourse and a higher cost of investment acquisition.[17]

In principle, betting on appellate cases follows the same logic as other strategies of litigation funding: a case is submitted, evaluated, and if it seems promising enough and parties can agree on terms, they sign a funding contract. After closing, the funder keeps an eye on his investment and, depending on the arrangement reached, he may get a say on how the case is managed. In terms of complexity and cost of case selection, the appellate funding is somewhere between the business of attorney lending (which follows a well-structured and largely repeatable procedure of picking law-firm borrowers) and betting on commercial high-ticket disputes (where funders carry out a more detailed and bespoke assessment of candidate cases).

Like their "commercial" brethren, appellate funders also evaluate potential investments in detail and on a case-by-case basis.[18] On the other hand, because of the later stage of their investments, the latter are usually able to obtain better information, and the scope of their inquiries is narrower. The first-instance outcome is known; the risk that the defendant would appeal is already realized; and the future path of the litigation is significantly constrained. Moreover, to the extent that appellate funding is offered by a third-party financier catering to law firms, the funder may benefit significantly from his prior knowledge of the lawyer on the case (because the appellate investment then becomes a part of a long-term relationship between repeat-players).

15 *See* Goral, *Justice Dealers*, *supra* note 7 (manuscript at 38–39).

16 Goral, Dissertation, *supra* note 11 (manuscript at 221).

17 Not every case considered for funding will be funded. Therefore, the cases selected as investments must offer enough of a return to bear a portion of the total underwriting cost, including money spent on evaluation of those cases that were rejected.

18 *See* Goral, *Justice Dealers*, *supra* note 7 (manuscript at 33).

But the logic of an appellate financier, and his evaluation of an "appellate asset," is not limited to legal issues. For one, funders appear to believe that since they invest in legal defense of judgments, questions and risks related to the doctrine of champerty are off the table, reducing the risk that their interest in the case would prove unenforceable.[19] Some also think that the counterparty risk is limited, because appellants are often ordered to secure the judgment by reserving the money or posting a supersedeas bond pending the appellate review.[20]

Appellate funders also consider how their investments may be influenced by the judicial administration, about which they generally seem to hold a less-than-flattering opinion.[21] Echoing a broader sentiment, one interviewee, a trial lawyer-turned-financier, said that in his opinion, betting on judgments was a good idea because appellate courts are reluctant to reverse "knowing full well that the system doesn't have the bandwidth to handle reversals."[22]

Another contact recalled that his company once considered funding an appealed judgment where the defendant's line of argument depended on a single point of law.[23] Because of the high amount at stake, he and his partners asked a retired justice of the high court of the state where the suit was pending to appraise the case.[24] The justice told them that the appeal would definitely be dismissed on procedural grounds.[25] Accordingly, the funder invested.[26] But the plaintiff eventually lost, for reasons that the interviewee believed were unrelated to the merits of the case.[27]

A third funder-side source openly admitted that he was funding appellate cases assuming that each case evaluated as strongly meritorious would nevertheless only have a fifty percent chance of success.[28] He was of the opinion that, excepting clear-cut cases, which rarely survive until trial in the first place, an appeal is essentially a game of chance.[29]

The disenchantment about fairness and predictability of the appellate review notwithstanding, all interviewees familiar with the appellate niche

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19 Goral, Dissertation, *supra* note 11 (manuscript at 222). For a comprehensive overview of champerty, see Sebok, *supra* note 6. The ability to attach their interest to a judgment prompts some appellate funders to voluntarily disclose their investment to the court. *See infra* note 34. In stark contrast, third parties betting on pre-settlement litigation, whether through lawyers or directly, avoid disclosure.

20 Goral, Dissertation, *supra* note 6 (manuscript at 222).

21 *Id.* (manuscript at 223).

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

agreed that well-picked judgments may be highly profitable.[30] Insiders perceive the "appellate market" as underserved by investors, allowing incumbents to bet on fat-tail cases at bargain prices.

III. AN EMPIRICAL SAMPLE OF CHERRY-PICKED APPEALS

Some third-party funders who bet on suits one at a time consider appellate cases as possible investments for their portfolios. In other words, they bet on appeals opportunistically, next to other cases that seem like good investments but are at an earlier stage of development.

To illustrate the above point, consider Burford, which reported an (unsuccessful) investment of $3.1 million in a patent dispute at a stage where "the plaintiff had won a substantial judgment that was on appeal."[31] In a similar vein, Juridica invested in a case where the jury had awarded the plaintiff more than $25 million, which the defendants attempted—in vain—to take all the way to the U.S. Supreme Court.[32]

But is it also possible to invest by taking stakes solely in judgments on appeal. Indeed, some financiers have done as much. To show the potential range of funded appellate litigation, I selected (non-randomly) nine recent lawsuits from the actual portfolio of LFG Special InvestorGroup, LLC (LFG).[33] It appears that in most cases the third party purchased, for cash,

30 *Id.*

31 BURFORD CAPITAL, LTD., ANNUAL REPORT 2012, at 12 (2013). Burford also said that they helped finance operations of a cash-strapped appellee, rather than the appeal itself, in a post–trial matter represented on contingency by an AmLaw 100 law firm. JONATHAN T. MOLOT, BURFORD CAPITAL, LTD., THEORY AND PRACTICE IN LITIGATION RISK 11 (2012), http://www.burfordcapital.com/wp-content/uploads/2015/01/Booklet-Theory-and-Practice.pdf.

32 JURIDICA INVESTMENTS, LTD., ANNUAL REPORT & ACCOUNTS 2012, at 8 (2013).

33 An affiliate of Law Finance Group, a leading third-party funder and a pioneer of law-firm financing, LFG Special InvestorGroup, LLC is a Nevada series limited liability corporation, with separate annual series. *See, e.g.*, Cal. UCC Filing No. 13-7390097928 (UCC1) (Dec. 10, 2013) (listing LFG Special InvestorGroup, LLC as a secured party); Mass. UCC Filing No. 201295436040 (UCC1) (Apr. 26, 2012) (same); N.Y. UCC Filing No. 201208165927485 (UCC1) (Aug. 16, 2012) (same). This suggests that LFG may raise capital for this particular mode of financing in annual rounds, from a separate group of investors with a comparatively higher risk appetite. A series LLC is a fairly novel and highly flexible corporate form, until recently popular mainly in offshore jurisdictions (and Delaware), brought on shore by a number of states competing for income generated by a business-friendly corporate domicile. A series LLC divides a corporation into "cells," which work as internal liability shields: assets and liabilities of each cell are kept separate. Under the structure, each cell may have a different composition of shareholders and different management, and, moreover, some series may be senior with respect to others. For more on the structure of a Nevada series LLC, see NEV. REV. STAT. §§ 86.296, 78.196 (2015), https://www.leg.state.nv.us/nrs/. For a general discussion see, for example, Jennifer Avery, et al., *Series LLCs: Nuts and Bolts, Benefits and Risks, and the Uncertainties That Remain*, 45 TEX. J. BUS. L. 9 (2012) (arguing that although Texas LLCs offer benefits, they

an interest in a challenged judgment by way of assignment.[34] Additionally, LFG would routinely secure its interest in the proceeds of a case with a lien. It would file a UCC1 statement, thus disclosing details of the pledged judgment-cum-collateral; a UCC record would then specify the date of the lower-court judgment, the parties, the docket number, and sometimes also other details identifying the lawsuit in which LFG purchased a stake.[35]

The appellate transactions discussed below involved a definite sale of an interest (rather than a loan secured by such interest) in individual lawsuits (rather than pools of lawsuits). Thus, in each of those cases LFG became a party in interest by acquiring litigation equity from a plaintiff, her counsel, or both of them.

A. Personal Injury: Gonzalez

Plaintiff filed a slip-and-fall lawsuit against the City of New York, seeking to recover for damages sustained in a lobby of a public school in Brooklyn during snowy weather.[36] The case went before the jury, which found the defendant one hundred percent at fault and ordered it to pay $1 million in damages; accordingly, the judge entered judgment for the plaintiff.[37] The city appealed and two years later, the appellate division reversed and remanded on the question of liability.[38] The case currently awaits retrial. After the initial jury verdict was appealed, the plaintiff obtained financing against her rights to the judgment from LFG.[39] On the

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also raise tax, bankruptcy, and corporate governance issues); Amanda J. Bahena, *Series LLCs: The Asset Protection Dream Machines?*, 35 J. CORP. L. 799, 808–25 (2010) (discussing series LLCs in the light of bankruptcy laws and asserting that bankruptcy courts should not recognize individual series as persons); and Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 405–06 (2007) (describing the idea of series LLCs generally and pointing out issues that call for a careful statutory design).

34 In some matters, LFG notified the court about its interest, and filed an assignment agreement. *See, e.g.*, Assignment of Judgment (Partial)/Acknowledgment of Assignment, Chaudhry v. City of Los Angeles, No. CV 09-01592-RGK (RZx) (C.D. Cal. Aug. 21, 2012), ECF No. 456. Typically, the plaintiffs as judgment creditors "owning the legal and/or equitable rights, title and interest in and to the Judgment and Proceeds thereof" sell a portion of their "Judgment Rights," up to a named sum, in exchange for an undisclosed "value received." *Id.* They also give LFG as the purchaser an explicit right to notify the court, the defendant, its insurer, and other third parties of its rights as assignee. *Id.*

35 For an in-depth look at the process of using future proceeds from pending law cases as collateral for secured-credit transactions, see Radek Goral, *The Law of Interest Versus the Interest of Law, or on Lending to Law Firms*, 29 GEO. J. LEGAL ETHICS (forthcoming 2015), ssrn.com/abstract=2617057.

36 See Gonzalez v. City of New York, 970 N.Y.S.2d 286 (App. Div. 2013).

37 *See* Judgment, Gonzalez v. City of New York, No. 194462007 (N.Y. Sup. Ct. June 8, 2011), 2011 WL 11004084, *rev'd*, 970 N.Y.S.2d 286 (App. Div. 2013).

38 *See Gonzalez*, 970 N.Y.S.2d 286.

39 N.Y. UCC Filing No. 201208165927485 (Form UCC1) (Aug. 16, 2012).

same day that LFG disclosed its financing of Ms. Gonzalez, it also went on record as creditor of the plaintiff's counsel.[40]

B. Medical Malpractice: Alta Bates

The lawsuit alleged that negligence by a hospital and a doctor during surgery caused death of a patient.[41] The case went to trial, and the jury found the hospital liable, awarding $175,000 for mental anguish and an additional $1 million for wrongful death, which—because of the preemption under the Medical Injury Compensation Reform Act (MICRA)[42] and a preexisting settlement—the judge reduced to $220,000.[43] The hospital appealed, but the appeal was dismissed.[44] Post-judgment, LFG backed both the plaintiff[45] and her attorney.[46]

C. Product Liability: Evans

In 2004, the plaintiff sued a tobacco company for wrongful death, negligence, and breach of duty to warn (among other claims), asserting that his mother died of lung cancer because she was addicted to menthol cigarettes manufactured by the defendant.[47] After six years of litigation and fourteen days of trial,[48] the jury returned a verdict for the plaintiff, ordering the tobacco company to pay more than $150 million in compensatory and punitive damages (net of interest and attorney's fees).[49]

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40 N.Y. UCC Filing No. 201208165927500 (Form UCC1) (Aug. 16, 2012) (indicating as debtor a New York personal injury law firm of The Edelsteins, Faegenberg & Brown, LLP).

41 Keys v. Alta Bates Summit Med. Ctr., 185 Cal. Rptr. 3d. 313, 315–16 (Cal. Ct. App. 2015).

42 MICRA provides a limit of $250,000 for damages for noneconomic losses in any action for injury against a health care provider based on professional negligence. CAL. CIV. CODE § 3333.2 (West 2015).

43 *See* Judgment on Jury Verdict, Keys v. Alta Bates Summit Med. Ctr., No. RG09478812 (Cal. Super. Ct. Jul. 11, 2013), 2013 WL 4565813, *aff'd*, 185 Cal. Rptr. 3d. 313 (Cal. Ct. App. 2015).

44 *Alta Bates*, 185 Cal. Rptr. 3d. 313 (affirming judgment).

45 Cal. UCC Filing No. 13-7390097928 (Form UCC1) (Dec. 10, 2013).

46 Cal. UCC Filing No. 13-7390098050 (Form UCC1) (Dec. 10, 2013) (disclosing the financing of The Willoughby Law Firm from the Northern California, specializing in medical malpractice and personal injury).

47 Evans v. Lorillard Tobacco Co., 990 N.E.2d. 997, 1005–06 (Mass. 2013).

48 *See* Evans v. Lorillard Tobacco Co., West's Jury Verdicts – Massachusetts Reports (Thomson Reuters/West) (Mass. Super. Ct. Dec. 10, 2010), 2010 WL 5145125.

49 *See* Special Jury Verdict Form at 5–6, Evans v. Lorillard Tobacco Co., No. 2004-2840-A (Mass. Super. Ct. Dec. 14, 2010), 2010 WL 5137965 (awarding $21 million to the son and $50 million to the mother's estate in compensatory damages); Special Verdict Question, *Evans*, No. 2004-2840-A (Mass. Super. Ct. Dec. 16, 2010), 2010 WL 5137966 (awarding $81 million in punitive damages).

Among post-trial motions, the judge reduced the "extraordinarily large" compensatory damages, but not the punitive damages;[50] in addition, plaintiff was awarded over $2.5 million in attorney's fees and costs.[51] The tobacco manufacturer challenged the outcome. The Massachusetts Supreme Judicial Court granted direct review, and then remanded on the issue of punitive damages only.[52] In October of 2013, the tobacco company paid $79 million to settle the case.[53] Plaintiff secured appellate funding from LFG against his "rights and proceeds."[54] The third-party financier terminated his lien in the judgment immediately after the defendant paid the amount agreed in the settlement.[55]

D. Wrongful Termination: Taylor

Taylor was a whistleblower case. A former deputy chief of police in Burbank sued alleging that the city retaliated against him for complaining about sexual harassment and discrimination against minority police officers.[56] The jury agreed with the whistleblower; consequently, the court entered judgment for the plaintiff in the amount of $1.3 million.[57] Moreover, the defendant was ordered to pay more than $850,000 in attorney's fees, expert witness fees, and costs.[58] The city contested the judgment, but the appeal ultimately proved unsuccessful.[59] LFG has been

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50 *See* Memorandum of Decision and Order on Lorillard Tobacco Company's Motion for Remittitur, Evans v. Lorillard Tobacco Co., No. SUCV200402840 (Mass. Super. Ct. Sept. 2, 2011) [hereinafter Remittitur Order], 2011 WL 7090720, *aff'd in part, rev'd in part*, 990 N.E.2d. 997 (Mass. 2013).

51 *See* Memorandum of Decision and Order on Plaintiff's Request for Attorneys Fees and Costs, *Evans*, No. SUCV200402840 (Mass. Super. Ct. Dec. 2, 2011), 2011 WL 7090715. The compensatory damages were remitted to $10 million for Willie Evans and $25 million for the mother's estate. Remittitur Order, *supra* note 50. Hence, the lower court outcome, if upheld on appeal, would have been worth $116 million before interest and costs.

52 *See Evans*, 990 N.E.2d at 1025–27 (holding that some jury instructions were prejudicial to the defendant).

53 *See* Lorillard, Inc., Quarterly Report (Form 10-Q), at 29 (Oct. 23, 2013).

54 Mass. UCC Filing No. 201295436040 (Form UCC1) (Apr. 26, 2012) (registering the lien).

55 Mass. UCC Filing No. 201307593440 (Form UCC3) (Oct. 25, 2013) (terminating the lien).

56 Taylor v. City of Burbank, No. B242502, 2014 WL 2153762 (Cal. Ct. App. May 22, 2014).

57 Judgment on General Verdict, Taylor v. City of Burbank, No. BC 422 252 (Cal. Super. Ct. Apr. 12, 2012), 2012 WL 1670540 (entering judgment for the plaintiff), *aff'd*, No. B242502, 2014 WL 2153762 (Cal. Ct. App. May 22, 2014).

58 *Taylor*, 2014 WL 2153762, at #3.

59 *Id.*

disclosed as funder of both the whistleblower[60] and his attorneys,[61] who are secured on their rights to the appealed judgment.

E. Employment Discrimination: Muniz

Plaintiff sued her employer, claiming that she was demoted because she was a woman.[62] The case proceeded to trial, even though the court granted in part the defendant's motion for summary judgment.[63] The jury found that the plaintiff's surviving claims were justified in principle; nevertheless, they awarded her only $27,000—a small fraction of what her attorney asked for.[64] Following the verdict, each party claimed victory, and both moved the court for costs. The judge held that the plaintiff should be considered the prevailing party, despite the modest damages recovered, and ordered the employer to pay costs exceeding $700,000.[65] In effect, the plaintiff's attorney won for himself twenty-five times more than the sum he won for the client. The defendant appealed, arguing abuse of discretion by the lower court; however, the Ninth Circuit affirmed with a minor exception.[66] Parties settled the remaining difference soon after.[67] Here, LFG was betting that the court of appeals would not reduce the attorney's fees award too much, backing financially the counsel to the plaintiff as a creditor secured on his proceeds from the case.[68]

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60 Cal. UCC Filing No. 12-7330892590 (Form UCC1) (Sep. 28, 2012).

61 Cal. UCC Filing No. 12-7330305357 (Form UCC1) (Sep. 25, 2012) (disclosing debt of Gregory W. Smith, lead counsel in the case); Cal. UCC Filing No. 12-7342712574 (Form UCC1) (Dec. 28, 2012) (disclosing the same for Christopher Brizzolara, Mr. Smith's co-counsel).

62 *See* Order Denying Plaintiff's Motion for Leave to File an Amended Complaint and Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, Muniz v. UPS, Inc., 731 F. Supp. 2d 961, 963–66 (N.D. Cal. 2010) (No. C 09-01987 CW).

63 *Id.* at 977.

64 *See* Verdict Form, *Muniz*, 731 F. Supp. 2d 961 (N.D. Cal. 2010) (No. C-09-1987 CW), 2010 WL 5816928.

65 *See* Order Granting and Denying Various Motions, *Muniz*, 731 F. Supp. 2d 961 (N.D. Cal. 2011) (No. C 09-01987 CW), 2011 WL 3740808, *aff'd in part, vacated in part*, 738 F.3d 214, 227 (9th Cir. 2013).

66 *See Muniz*, 738 F.3d at 227 (vacating the portion of fees attributable to the work of a paralegal and remanding for determination of attorney's fees).

67 *See* Stipulation Regarding Satisfaction of Judgment and Order, *Muniz*, No. C-09-01987 CW (N.D. Cal. Jan. 13, 2014) (dismissing the case after remand on parties' stipulation).

68 Cal. UCC Filing No. 12-7328265056 (Form UCC1) (Sep. 10, 2012) (recording the financing of Stephen R. Jaffe and his law firm).

F. *Breach of Warranty:* Hoang

Mr. Hoang purchased a home from a bank, but he discovered that the plot of land he acquired was contaminated.[69] He sued the seller, and the jury found the bank in breach of contract, awarding $2,320,000 in damages.[70] The court entered judgment for the plaintiff, additionally awarding $115,000 in attorney's fees.[71] The bank appealed; however, the California Court of Appeal dismissed it.[72] In this case, LFG funded both the plaintiff and his attorney during the post-trial stage.[73]

G. *Breach of Contract:* Tary Network

Defendant, an aircraft company, was commissioned to customize and finish out two luxury jets.[74] The client, shielded by two special-purpose entities registered in the British Virgin Islands, paid substantial deposits to rent hangars and retain labor for the job.[75] After the contractor backed out and withheld the deposits, the jet owners sued in Texas state court.[76] After a jury trial, the court awarded the plaintiffs more than $55 million in damages and interest.[77] Defendant challenged the lower court outcome, and the parties stipulated after trial that it would be reasonable for the plaintiffs to recover about $1.25 million in attorney's fees, should the appeal prove unsuccessful.[78] However, the Court of Appeals of Texas sided with the appellants,[79] and after the remand the case awaits retrial

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69 Hoang v. Cal. Pac. Bank, No. A139139, 2014 WL 3616424, at *1–2 (Cal. Ct. App. July 23, 2014).

70 Jury Verdict on the Complaint, Hoang v. Cal. Pac. Bank, No. RG10528400 (Cal. Super. Mar. 6, 2013), 2013 WL 1901745, *aff'd*, No. A139139, 2014 WL 3616424 (Cal. Ct. App. July 23, 2014).

71 *See* Judgment on the Jury Verdict, *Hoang*, No. RG10528400 (Cal. Super. Mar. 14, 2013), 2013 WL 1931913 (entering final judgment); First Amended Judgment on Jury Verdict, *Hoang*, No. RG10528400 (Cal. Super. Nov. 8, 2013) (entering amended judgment and awarding attorney's fees).

72 *Hoang*, 2014 WL 3616424.

73 Cal. UCC Filing No. 13-7375738721 (Form UCC1) (Aug. 29, 2013) (stating the plaintiff as debtor); Cal. UCC Filing No. 13-7375738963 (Form UCC1) (Aug. 29, 2013) (securing LFG on the litigation interest of the plaintiff's lawyer, Mr. Earl Johnson).

74 *See* Plaintiffs' First Amended Petition at 3–4, Tary Network Ltd. v. Associated Air Ctr. L.P., No. DC-10-01620 (Tex. Dist. Ct. May 23, 2012).

75 *Id.* at 1, 3–7.

76 *Id.* at 7–10.

77 Final Judgment, *Tary Network*, No. 10-01620 (Tex. Dist. Ct. Mar. 22, 2013), 2013 WL 10543035, *rev'd*, 2015 WL 970664 (Tex. App. Mar. 4, 2015).

78 *See* Plaintiffs' Motion for Judgment on the Jury Verdict at 5, *Tary Network*, No. 10-01620 (Tex. Dist. Ct. Mar. 18, 2013); Defendants' Proposed Order Regarding Plaintiffs' Attorneys' Fees, *Tary Network*, No. 10-01620 (Tex. Dist. Ct. Mar. 20, 2013).

79 *Tary Network*, 2015 WL 970664 (reversing judgment and remanding the case).

scheduled for May of 2016.[80] Here, LFG disclosed that it holds interest in that part of the appealed judgment which is owed to the plaintiffs' counsel—a high-profile Texas law firm focused on commercial and intellectual-property cases.[81]

H. Tortious Interference: American Master Lease

American Master Lease (AML) owned a business method on structured real estate investments.[82] The dispute at hand stems from a falling-out among the shareholders of the company. Three of them, jointly holding less than half of the stock, wanted to make a deal with a private equity firm, Idanta Partners (Idanta), which the majority shareholder vetoed.[83] Nevertheless, the minority believed they could find a way around the block: the three founded a new company to which they licensed the valuable business method—claiming they were authorized to issue a license on behalf of AML.[84] Immediately after, Idanta purchased an eighty-five percent stake in the startup.[85] The majority shareholder, through AML, brought suit against Idanta and several of its partners, alleging tortious interference, and aiding and abetting a breach of fiduciary duty[86] (The minority partners whose tort was aided and abetted were sued in a separate action.)[87] Plaintiff prevailed: the jurors ordered that Idanta and several of its partners pay in excess of $7 million in restitution and interest.[88] On appeal, the judgment of the superior court was upheld as to liability, but defendants were granted a new trial as to the amount of the

80 Revised 162nd Uniform Scheduling Order (Level 3), *Tary Network*, No. 10-01620 (Tex. Dist. Ct. Sept. 16, 2015) (entering into docket tentative trial date of May 9, 2016).

81 Tex. UCC Filing No. 13-0032792633 (Form UCC1) (Oct. 15, 2013). The statement discloses as debtor the law firm of Gruber Hurst Johansen Hail Shank, LLP. The firm states that its "fundamental goal is to focus on results, sharing in the risk and rewards with our clients by maintaining a stake in the outcome." *Overview*, GRUBER HURST JOHANSEN HAIL SHANK, LLP, http://www.ghjhlaw.com/OurFirm/Overview (last visited Dec. 4, 2015).

82 *See* Am. Master Lease LLC v. Idanta Partners, Ltd., No. B247478, 2014 WL 4678703, at *1–2 (Cal. Ct. App. Sept. 22, 2014).

83 *See id.*

84 *See id.* at *1.

85 *See* Am. Master Lease LLC v. Idanta Partners, Ltd., 171 Cal. Rptr. 3d. 548, 557 (Cal. Ct. App. May 5, 2014), *aff'd*, No. B247478, 2014 WL 4678703 (Cal. Ct. App. Sept. 22, 2014).

86 *See* Complaint at 7–13, *Am. Master Lease*, No. BC367987 (Cal. Super. Ct. Mar. 15, 2007).

87 Roberts v. Andrews, No. BS120091 (Cal. Super. Ct. Apr. 10, 2009); *see Am. Master Lease*, 171 Cal. Rptr. 3d. at 559.

88 *See* Am. Master Lease LLC v. Idanta Partners, Ltd., 43 Trials Digest 15th 8 (Thomson Reuters/West) (Cal. Super. Ct. July 19, 2012), 2012 WL 5332483.

disgorgement.[89] The case was remanded to the superior court for further proceedings and as of the date of this Essay, it is about to go before the Los Angeles jury for the second time.[90] Given the mandate of the court of appeals, the plaintiff is certain to prevail, although the original jury award may be reduced. In the dispute between AML and Idanta, plaintiff's trial counsel obtained financing from LFG against the share of the challenged judgment they are owed as attorney's fees.[91]

I. Theft of Trade Secrets: InfoFlows

In 2004, Steve A. Stone, a high-level software engineer at Microsoft, founded InfoFlows Corporation (InfoFlows).[92] His focus was on technology that allowed tracking of specific images on the Internet.[93] The startup soon found a partner in Corbis Corporation (Corbis), an "image farm" founded by Bill Gates, with an inventory of more than 100 million images available for commercial license.[94] Corbis retained the talents of Mr. Stone for a project involving development of "smart media object[s]."[95] In 2006, Corbis contracted InfoFlows to build for it a tailor-made license management system; parties agreed that Corbis would own the final product, but InfoFlows would retain most of the underlying technology.[96] But after InfoFlows had developed the software, Corbis rejected it and terminated the agreement (the parties would continue to disagree as to why the software was rejected).[97] Shortly after, InfoFlows launched its image management system as an independent product.[98] As it would turn out later, a few months before the contract was signed, Corbis—without telling Mr. Stone or naming him as an inventor—filed a non-public patent application which, according to Mr. Stone, was based on his technology.[99]

89 *See Am. Master Lease*, No. B244689 (Cal. App. 2nd Feb. 25, 2014), *vacated*, 225 Cal. App. 4th 1451 (May 27, 2014).

90 *Am. Master Lease*, No. BC367987 (Cal. Super. Ct.) (docket showing trial scheduled for Dec. 16, 2015).

91 Cal. UCC Filing No. 13-7380115685 (Form UCC1) (Sep. 30, 2013) (disclosing the financing of Graham & Martin LLP).

92 Corbis Corp. v. Stone, No. 64505–6–I, 2012 WL 1020250, at *2 (Wash. Ct. App. Mar. 26, 2012), *review granted in part, denied in part*, 290 P.3d 131 (Wash. 2012).

93 *Id.*

94 *Id.* at *1; *see also* CORBIS, http://corporate.corbis.com/company-fact-sheet/ (last visited Oct. 17, 2015); *About Us*, CORBIS, http://corporate.corbis.com/about-us/our-business/ (last visited Oct. 17, 2015); *infra* note 102.

95 *Corbis Corp.*, 2012 WL 1020250, at *1.

96 *See id*. at *3–4.

97 *See id*. at *5.

98 *Id*.

99 *Id*. at *3.

In early 2007, both parties sued, each alleging that the other misappropriated trade secrets and breached the contract.[100] The case culminated in a three-week trial in August of 2009, which brought the plaintiff an overwhelming victory.[101] The jury dismissed all causes of action asserted by Corbis, and found in favor of InfoFlows on all eight claims allowed by the judge to be tried, awarding damages in excess of $36 million.[102] Corbis moved for judgment as a matter of law and remittur, but the trial court upheld the jury award except for one claim, ordering the defendant to pay more than $20 million.[103] Both parties filed an appeal, the net outcome of which reduced the trial-court award by $7 million.[104] The result proved disappointing to both InfoFlows and Corbis, with both seeking review by Washington's highest legal authority. Adding another twist to the acrimonious dispute, the Washington Supreme Court granted review, but limited it to a single claim by InfoFlows on which the jury had put a price tag of $16.5 million but which both courts below had subsequently dismissed.[105] Ultimately, the case was discontinued before oral arguments,[106] signaling a settlement.[107]

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100 *Id.* at *5.

101 *See id.* at *6.

102 *Id.* at *6; *see also* Verdict, Corbis Corp. v. Stone, No. 07-2-03244-4 SEA (Wash. Super. Ct. Aug. 24, 2009), 2009 WL 3829327.

103 *Corbis Corp.*, 2012 WL 1020250, at *6; *see also* Judgment Against Corbis Corporation, Including Declaratory Judgment and Permanent Injunction, *Corbis Corp.*, No. 07-2-03244-4 SEA (Wash. Super. Ct. 2010), 2010 WL 3267776 (entering final judgment and awarding attorney's fees), *rev'd*, 2012 WL 1020250 (Wash. Ct. App. 2012), *review granted in part, denied in part*, 290 P.3d 131 (Wash. 2012).

104 The appellate court then set aside the award for fraudulent inducement (worth $7 million), affirmed dismissal of the conversion award (worth $16.5 million), and reversed a pre-trial grant of summary judgment favorable to Corbis. *See Corbis Corp.*, 2012 WL 1020250, *1–2.

105 Order, *Corbis Corp.*, 290 P.3d 131 (Wash. 2012) (No. 87555-3) (granting review).

106 *See Supreme Court – Briefs*, WASHINGTON COURTS, http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coabriefs.briefsByTitle&courtId=A08&firstLetter=C (last visited Oct. 16, 2015) (hearing date set for May 23, 2013); *Dockets and Oral Argument Calendars for 2013*, WASHINGTON COURTS, http://www.courts.wa.gov/appellate_trial_courts/supreme/calendar/?fa=atc_supreme_calendar.display_file&fileID=dspCalYear&yr=2013 (last visited Oct. 16, 2015) (no hearing held).

107 Outside of the *InfoFlows* litigation, Corbis is noteworthy for its impact on the image-licensing industry. As Lawrence Lessig argues:

> [T]he modern-day painter, using the tools of Photoshop, sharing content on the Web, must worry all the time. Images are all around, but the only safe images to use in the act of creation are those purchased from Corbis or another image farm. . . . [T]here is a highly regulated, monopolized market in cultural icons . . . .

LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 186 (2004); *see also id. at* 134–45 (arguing that technology-enabled constraints on creative process stifles innovation). It is profoundly ironic that the very company that Professor Lessig mentions by name as a

It appears that after Corbis appealed to the Washington Supreme Court, InfoFlows secured funding from LFG against its rights to the challenged judgment, as modified by the intermediate appeal.[108]

IV. DISCUSSION

The sampled cases from the appellate portfolio actually built by a third-party funder identified in the previous Part inform the question of how third-party money bankrolls the legal industry in the United States.

First, because appeals are much narrower than trial proceedings in the first instance and usually pivot around points of law, appellate funding is largely cross-substantive and independent of the plaintiff's status. While the market for legal claims has been repeatedly classified based on who gets the money (corporations, consumers, or attorneys),[109] in reality the market is fragmented and more complex. From a funder's point of view, the common denominator for appealed lawsuits to invest in is a particular level of risk and control associated with late-stage investments in litigation equity. The nature of a disputed cause of action or the person who brings it, although relevant, seem secondary.

Second, the anecdotal portfolio of LFG emphasizes the central role played by litigation attorneys in third-party funding arrangements. The majority of the examined cases saw the funder consolidate his stake by backing both the plaintiff and her counsel. Sometimes, he would buy only from the lawyer—either because the stake of the plaintiff was financially insignificant (*Muniz*), or because the plaintiffs likely had no interest in giving up equity, even if their contingency lawyers did (*Tary Network* and *American Master Lease*). Only in one of the selected cases, *Evans*, did LFG fund the plaintiff without also funding the lawyers.[110]

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symbol of the aggressive enforcement of intellectual property rights would illegally take ideas from a startup. Or at least that is how the King County jury saw it after hearing the *InfoFlows* case.

108 Wash. UCC Filing No. 2013-031-5279-7 (Form UCC1) (Jan. 31, 2013) (registering a secured interest in judgment rights); Wash. UCC Filing No. 2013-165-8141-6 (Form UCC3) (June 14, 2013) (terminating security).

109 *See, e.g.*, Deborah R. Hensler, *Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?*, 63 DEPAUL L. REV. 499, 501 (2014) (noting that low-end tort actions and high-end commercial suits are two distinct markets for third-party funders); Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 574 (2010) (claiming that litigation funding takes the form of either loans to personal injury plaintiffs or "syndicated lawsuit[s]"); GARBER, *supra* note 4, at 7–17 (distinguishing consumer funding, commercial funding, and lending to law firms).

110 It is possible that the *Evans* lawyers chose to wait and keep their equity. Mr. Evans was represented by Davis, Malm & D'Agostine P.C. (Davis Malm), an established and relatively large law firm from Boston. Davis Malm enjoys a long-term relationship with a bank from its own community, Eastern Bank from Massachusetts, which holds a blanket lien on all assets of the law practice, including "all accounts and accounts receivable," "all

The analyzed sample suggests that, as a rule, plaintiffs and their claims were third-party funded because of the connection between the financier and the lawyer, not the other way around.[111] The funder-lawyer-plaintiff chain would also help explain why the model of appellate financing is, generally speaking, the domain of those funders who, like LFG, have started out as law-firm lenders.

When combined, the two previously made assertions—that appellate funding is cross-substantive and that deals are often brokered by lawyers—lead to another notable conclusion: the American market for suits is not limited to actions for damages. The strategy of appellate funding makes business sense also in those cases where, as in public-interest litigation, plaintiffs seek an injunction or token damages but their attorneys can still win substantial attorney's fees due to a statutory fee-shifting rule.[112] Appellate funders could fund class counsel, including actions where class members receive no money.[113]

Finally, in virtually all sampled cases funding was directed at plaintiff-appellees—which means that the third-party financier bet on the party defending the lower-court outcome during additional litigation initiated by a defendant-appellant. In other words, appellate funders bet not on the success of appellate litigation, but on its failure—they go short on the defendant's case in the hope that the trial judgment will be upheld. This supports the claim that the third-party business is concentrated on the

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contract rights," and "all rights under judgments, all commercial tort claims and choses in action." *See* Mass. UCC Filing No. 201189924970 (Form UCC1) (Aug. 19, 2011). Two alternative explanations are also plausible. One is that the plaintiff's counsel was funded, but I failed to find the "financial footprint" of the transaction–which is not very likely given that LFG is a meticulous record keeper. Another possibility is that lawyers were funded through the plaintiff, and the price paid by the funder for the litigation stake sold by the plaintiff was then shared between him and his lawyers according to the split agreed in the contingency fee agreement.

111 *Cf.* Goral, *Skin in the Game*, *supra* note 14 (arguing that financiers often use law firms as conduits for third-party capital investments).

112 For example, The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2012), allows "reasonable attorney's fee[s]" as part of the costs awarded to parties who win in federal court against state actors who violated federal rights "under color of [law]" (42 U.S.C. § 1983); in sex discrimination cases under Title IX (20 U.S.C. §§ 1681–88); or in race discrimination cases under Title VI (42 U.S.C. §§ 2000d–2000d-7). In California, courts may award attorney's fees to prevailing parties enforcing "an important right affecting the public interest." CAL. CIV. PROC. CODE § 1021.5 (West, Westlaw through Ch. 511 of 2015 Reg. Sess.).

113 In a certified class action, lead counsel may be awarded reasonable attorney's fees. *See* FED. R. CIV. P. 23(h). The fees should consider, among others, the benefit conferred on the class. *See, e.g.*, Goldberger v. Integrated Res., Inc., 209 F.3d 43, 53–56 (2d Cir. 2000). But such benefits do not necessarily have to be monetary. *See, e.g.*, Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1311 (3d Cir. 1993); *In re* Ikon Office Sols., Inc. Sec. Litig., 209 F.R.D. 94 (E.D. Pa. 2002).

plaintiff side because of the economic incentives and realities of American litigation. Given opportunity and a satisfactory metric of litigation success, third parties seem more than happy to make money playing defense.

The last point is particularly salient, because it sheds new light on the policy debate over the risks and benefits of litigation funding. In particular, one of the key arguments raised by critics has been the assertion that the presence of third-party money causes more litigation and, therefore, it promotes frivolous suits that would otherwise fail to ever make it into a court of law.[114] And while the onus for such an assertion remains with the critics who, so far, have failed to discharge it,[115] the anecdotal data presented in this Essay shows a major flaw in the critics' argument.

It might be true that some of the third-party money is used to bring new suits or help those plaintiffs who have already filed last longer in the fight than they would have on their own. But there are also modes of financing, such as appellate funding, which seek to prevent additional—and potentially frivolous—litigation (which may include the appellate stage as well as a retrial if the appealed judgment is reversed). Therefore, those who take as an axiom that more litigation is bad should wholeheartedly embrace appellate funding, which is to a defendant's appeal what insurance is to a plaintiff's suit at the lower-court level: a source of money thrown at the opponent in order to thwart his procedural efforts.

CONCLUSION

This Essay provides a short introduction to appellate financing, a niche in the market for third-party funding of litigation which might be analogized to later-stage venture investing. It is a business strategy that consists of acquiring an economic stake in a judgment challenged by the losing defendant; therefore, it is a wager *against* the appellant and *for* the post-trial outcome. Often, a funder obtains a stake in a judgment from both the plaintiff-appellee and her contingency attorney, which underscores the important role of attorneys in third-party funding arrangements.

Appellate funding is not limited to a particular genre of litigation, such as personal-injury or commercial lawsuits. In fact, it quite is possible to fund appeals also in those disputes where, as in public-interest litigation or class actions, plaintiffs win little or no money, or the judgment award is too

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114 *See, e.g.*, Paul H. Rubin, *Third-Party Financing of Litigation*, 38 N. KY. L. REV. 673, 677 (2011) (pointing out, in critique of third-party funding, that the availability of external financing allows plaintiffs to bring lawsuits which would not be filed without it); BEISNER ET AL., *supra* note 4, at 5–7 (contending that third-party financing encourages "frivolous and abusive" lawsuits).

115 *See* Hensler, *supra* note 109 (deconstructing the argument that funding promotes frivolous suits and critiquing its underlying assumptions in the context of class actions).

dispersed. In such cases plaintiff's attorneys may be able to earn substantial fees, and attorney's fees make investible financial assets.

Since appellate financiers bankroll plaintiffs who defend against further legal action, their practice challenges the claim that third-party funding inevitably leads to more litigation, some of it unmeritorious. Rather, it seems that funding is directed primarily at plaintiffs because of a relatively stronger demand from that side of the bar. Yet financiers seem ready to back any party, at any stage of legal process—as long as the risk-return profile of a litigation investment suits their preferences.