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The MDL Revolution and Consumer Legal Funding

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ARTICLES

THE MDL REVOLUTION AND CONSUMER LEGAL FUNDING

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ABSTRACT

Third-party consumer legal funding, where financial companies advance money on a nonrecourse basis to assist individual plaintiffs with living expenses, is an increasingly popular and controversial part of American litigation. And consumers with mass tort claims pending in Multi-District Litigations (MDLs) constitute the fastest growing sector of those seeking assistance from this billion-dollar funding industry. Policy makers, mass tort plaintiffs' lawyers, and scholars have increasingly raised concerns about exorbitant interest rates and have called for regulations to protect vulnerable consumers from "predatory lending." To date, however, the policy debate has largely relied on anecdotes and speculation because funders have not been forthcoming with facts. This Article begins to fill that important informational void.

We were given unique, unrestricted access to the complete archive of 225,293 requests for funding from 2001 through 2016 from one of the largest consumer litigation financing firms in the U.S., and we are the first to explore the anatomy of litigant finance in mass tort cases. We find that the Funder systematically offers mass tort

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claimants larger advances and more favorable terms along multiple dimensions than it does for consumers with motor vehicle accident claims. Our data analyses involving both categories of claimants offer reassurance about numerous asserted abuses in the funding industry and lead us to recommend that restrictions not be imposed on the availability or cost to consumers of this funding. Rather, we propose that existing market competition be enhanced by the adoption of laws that would ensure greater simplicity, transparency, and consistency in the pre-funding disclosures made to consumers and by removing the prohibitions that most states' Rules of Professional Responsibility currently impose on lawyers' ability to provide financial assistance to their clients.

I. INTRODUCTION

During the past twenty years, the consumer-litigant funding business in the U.S. has rapidly grown into a competitive, billion-dollar industry.[1] Even on the most conservative estimate, the consumer sector of the litigant funding market in 2020 was approximately $1.5 billion.[2] During those same twenty years, the number of mass tort claims brought by individual consumers has similarly skyrocketed. Today, mass tort claims comprise more than 95% of all cases pending

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1. According to a 2018 New York Times article, while the "litigation-finance business has been around for a long time," until recently it was "mostly focused" on commercial litigation, but now there is a new "emphasis on bankrolling consumer suits." Matthew Goldstein & Jessica Silver-Greenberg, *Hedge Funds Look to Profit From Personal-Injury Suits,* N.Y. TIMES (June 25, 2018), https://www.nytimes.com/2018/06/25/business/hedge-funds-mass-torts-litigation-finance.html (describing EJF Capital, a $6 billion hedge fund, which sought to invest almost $750 million in mass tort and personal injury litigation). Consumer-litigant funding's growth is of a piece with the growth of the overall litigation finance market, which in the "last 10 years [has] witnessed unprecedented financial expansion." *See* JOHN H. BEISNER, JESSICA D. MILLER & JORDAN M. SCHWARTZ, U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING MORE LAWSUITS, BUYING MORE TROUBLE: THIRD PARTY LITIGATION FUNDING A DECADE LATER 6 (2020), https://instituteforlegalreform.com/wp-content/uploads/2020/01/Still_Selling_Lawsuits_-_Third_Party_Litigation_Funding_A_Decade_Later.pdf (describing financial expansion). As Allison Chock, Chief Investment Officer of Omni Bridgeway, a leading commercial funder, has said, "[f]ive or ten years ago this industry barely existed in the U.S.A. Now it's thriving . . . ." IMF BENTHAM, ANNUAL REPORT 2018 15 (2018), https://omnibridgeway.com/InvestorPresentations/imf-bentham-limited-annual-report-2018/files/assets/common/downloads/IMF%20Bentham%20Limited%20Annual%20Report%202018.pdf?uni=435a7592f1101a1d964e3bcdf978e693.

2. Given the focus of the financial press and investment firms on the commercial sector, reliable estimates of the size of the consumer-litigant market in the United States are rarely available. The $1.5 billion figure is based on multiple publicly available sources. *See Global Litigation Funding Investment Market to Expand Owing to Increasing Number Of Lawsuit Funders; Market to grow by a CAGR of 8.76% During 2020–2028*, COMSERVE (Dec. 3, 2020, 5:25 AM), https://www.comserveonline.com/news-releases/global-litigation-funding-investment-market-to-expand-owing-to-increasing-number-of-lawsuit-funders-market-to-grow-by-a-cagr-of-876-during-2020-2028/10016187 (referring to 2020 market analysis). *See also* Roy Strom, *Nobody Knows Litigation Finance Size, but It's Not $85 Billion,* BLOOMBERG LAW (June 11, 2020, 3:51 AM), https://news.bloomberglaw.com/business-and-practice/nobody-knows-litigation-finance-size-but-its-not-85-billion?context=search&index=4 (describing how much money investors dedicate to lawsuits every year).

in federal Multi-District Litigations (MDLs),[3] and MDLs comprise more than half of all pending federal civil cases.[4] In 2000, in contrast,

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3. Calculated from U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT - DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING (June 15, 2020), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-June-15-2020.pdf (the most recent available MDL Statistics Report). Approximately 125,095 of the 133,143 pending actions involve product liability and other mass torts. Of the 186 MDLs pending in federal district courts as of June 15, 2020, product liability and other mass torts comprise only about one-third (71 of 186) but include all of the 18 MDLs with at least 1,000 cases pending. The United States Judicial Panel for Multidistrict Litigation (JPML) reported that the 186 pending MDLs involved three categories with 71 total MDLs that could be considered "mass torts": common disaster (3), products liability (64), and miscellaneous (4 of 30). The remaining 119 pending MDLs involved antitrust (48), contract (4), employment practices (1), intellectual property (12), miscellaneous (26 of 30), sales practices (18), and securities (6). U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT - DOCKET TYPE SUMMARY (June 15, 2020), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-June-15-2020.pdf. The JPML reported that 40 of the 186 docketed cases included 1,000 or more total "actions" (that is, individual cases that were consolidated in the MDL court). Only 18 of those 40 cases, however, still had 1,000 or more actions as of the date of the June 15, 2020 Report. The difference is accounted for by actions being resolved while pending in the MDL or having been transferred back to the transferor court. U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT - DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING (June 15, 2020), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-June-15-2020.pdf
See also Baker & Herman, *infra* note 22, at 470–71 & nn. 1 & 2; LAWYERS FOR CIVIL JUSTICE, RULES 4 MDLS: CALCULATING THE CASE [hereinafter Rules 4 MDLs PwrPt] (Oct. 4, 2018), https://static.reuters.com/resources/media/editorial/20181004/rules4mdl—stats.pdf (providing statistics for MDLs). The Lawyers for Civil Justice's (LCJ) calculation of the total number of civil cases "excluded Social Security cases and lawsuits by federal inmates, reasoning that those cases are not typically overseen by U.S. district judges." Alison Frankel, *Defense Group Argues New MDL Stats Prove Need to Change Rules for MDLs*, REUTERS (Oct. 4, 2018), https://www.reuters.com/article/legal-us-otc-mdl/defense-group-argues-new-mdl-stats-prove-need-to-change-rules-for-mass-torts-idUSKCN1ME2EJ.

4. *See* Dave Simpson, *MDLs Surge to Majority of Entire Federal Civil Caseload*, LAW360 (Mar. 14, 2019), https://www.law360.com/articles/1138928/mdls-surge-to-majority-of-entire-federal-civil-caseload ("MDLs accounted for 52 percent of all pending federal civil cases at the end of the last fiscal year . . . up from 47 percent in the previous fiscal year," according to a study from LCJ); *see also Fact Sheet*, RULES 4 MDLS (last visited May 18, 2021), https://www.rules4mdls.com/fact-sheet ("As of September 30, 2018, there were 301,766 civil cases pending in the federal district court system. Of those, 156,511 cases sat within 248 MDLs and accounted for 51.9 percent of federal civil cases."); *Report Reveals Products Liability Cases Make Up 90% of All MDL Cases, 42% of Entire Federal Civil Caseload*, RULES 4 MDLS (Oct. 4, 2018),

MDLs comprised only 16% of all pending federal civil cases, although mass tort claims even then comprised more than 95% of MDL cases.[5] Indeed, the growth in mass tort cases alone accounts for almost 88 percent of the massive growth in MDLs during the past twenty years.[6]

The rapid growth of MDLs has been well documented by commentators, but the concurrent rise of consumer-litigant funding in MDL mass torts has received no attention. Thus, the interactions between these two important phenomena have gone completely unnoticed and unstudied. The reason is straightforward: While statistics on mass tort MDLs have long been readily available, third-party litigant funders (LTPFs) have not been forthcoming with facts. As a result, there has been no quantitative empirical research on (or even focused scholarly study of) mass tort consumer-litigant funding.[7]

This article is the first to present systematic, large scale data on MDL mass tort consumer-litigant funding. We were given unique, unrestricted access to the complete archive of sixteen years of funding applications and funding contracts from one of the largest consumer litigant funding companies in the United States ("Funder"). This comprehensive dataset includes 225,593 requests for funding from 2001 through 2016. These data, which are robust and representative, enable us to make transparent for the first time the terms and true cost to MDL mass tort consumer-litigants of this increasingly popular source of

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https://www.rules4mdls.com/calculating-the-case. This percentage is arguably inflated by the exclusion of Social Security cases and lawsuits by federal inmates (other than death penalty cases), Frankel, supra note 3. See also Abbe. R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 3 (2021) (stating that all MDL proceedings have steadily grown to comprise 21% of all newly filed federal civil cases).

5. John G. Heyburn II, Chair, Jud. Panel on Multidistrict Litig., Reflections on the Panel's Work, Remarks at the ACI Complex Litigation Conference (Dec. 2010), transcript available at https://www.jpml.uscourts.gov/sites/jpml/files/2010-ACI%20Complex%20Litigation%20Conference-Judge%20Heyburn%20Remarks.pdf.

6. Rules 4 MDLs PwrPt, *supra* note 3, at 8; *see also id.* at 7 (stating that "Products Liability cases have made up about 90% or more of cases pending in MDLs since 1992. Before 1992, PL cases were only a fraction of all MDL cases[.] Turning point was the asbestos and silicon breast implant litigation in 1991 and 1992, respectively[.]").

7. There have been only two major empirical studies of consumer-litigant third-party funding and neither study has focused on consumer-litigants with mass tort claims. *See* Ronen Avraham & Anthony J. Sebok, *An Empirical Investigation of Third Party Consumer-Litigant Funding*, 104 CORNELL L. REV. 1133 (2019); Ronen Avraham, Lynn A. Baker & Anthony J. Sebok, *The Mysterious Market for Post-Settlement Litigant Finance,* 96 N.Y.U. L. REV. ONLINE (forthcoming 2021).

cash advances. These data also enable us to better understand mass tort claimants and their unique financial vulnerabilities compared to one-off tort claimants, such as those involved in motor vehicle accidents.

In our data analyses, we provide initial answers to some important questions surrounding the LTPF industry that have not previously been explored. First, does the LTPF industry view MDL mass tort cases[8]—such as those involving pharmaceuticals or toxins—differently than "one-off" torts such as motor vehicle accidents? Although both categories of cases typically involve individual plaintiffs with personal injuries and without prior experience in the legal system, there are systematic differences between the two types of cases that might be expected to impact systematically the plaintiffs' interest in securing LTPF, the attractiveness of the plaintiffs to such funders, and the terms on which LTPF is offered.

Our major findings are, first, that Mass Tort (MT) claimants get a better deal from the Funder than Motor Vehicle Accident (MVA) claimants. In general, MT clients are charged a 0.5% lower monthly interest rate than MVA clients and receive more than twice as much funding. On the other hand, MT claimants are charged higher non-interest fees and receive fewer negotiated "haircuts" at the time the client must pay the Funder the amount owed. Overall, the Funder makes an annual median gross profit of 55% from MT claims and 60%

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8. Mass tort cases will typically be non-class-action cases in which a large number of individuals have been harmed by a product, such as a pharmaceutical, medical device, or toxin, which is alleged to be dangerous and, sometimes, defective. The NFL concussion litigation is the rare instance of a personal injury mass tort proceeding to settlement as a class action rather than as a non-class "aggregate" settlement. *See infra* note 23 and accompanying text.

For a discussion of the difference between a mass action and a class action, *see* Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 739–43 (1997). For a good history of the rise and fall of the mass tort class action, see David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 PENN. L. REV. 1565 (2017) [hereafter *Mass Tort Class Action*]; see also David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981-1994*, 86 FORDHAM L. REV. 1785, 1820-31 (discussing significant aspects of the evolution of the mass tort class action between 1981 and 1997); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1356–57 (1995) (describing early concerns "that a 'mass accident' . . . is ordinarily not appropriate for a class action' because of the presence in such cases of significant issues (including causation and possible defenses) that would impact upon the individual class members differently. Individual issues and defenses, it was felt, would likely overwhelm the common questions, and eventually disaggregation would become inevitable.").

from MVA claims. These findings also suggest that the Funder is sensitive to the litigation risk: The Funder charges MT claimants a smaller interest rate at the front end, likely reflecting, among other things, the fact that these claims less often need "haircuts" at the back end. Moreover, even within each category of claims (MVA or MT) the Funder charges higher interest rates to those cases which are less likely to pay back in full the amount owed. With regard to the funding contracts, we find that the Funder inserts hidden and complicated terms that make it impossible for clients to understand the actual interest rate they eventually will be charged. We find that this phenomenon is worse for MT cases than for MVAs.

By presenting detailed data on the actual operation of one Funder with regard to mass tort claimants and motor vehicle accident claimants, we hope to inform policy makers' understanding of how the LTPF industry actually operates. We also hope to inform ongoing debates about how and when, if at all, LTPF is best regulated and how the ethical issues raised for attorneys by LTPF might best be resolved.

In Part II, we present the nuts and bolts of third-party consumer litigant funding. Part III details the differences in the nature, representation, litigation, and settlement of mass tort claims, which are the subject of our study, and one-off tort claims such as motor vehicle accidents, which serve as our control group. These differences cause us to predict that systematic differences may exist between the two groups in the consumer-plaintiffs' interest in securing LTPF, the attractiveness of the plaintiffs to such funders, and the terms on which LTPF is offered. In Part IV, we describe and analyze our unique dataset, which provides initial answers to important questions surrounding the secretive LTPF industry. Our data analyses offer reassurance about certain alleged abuses in the LTPF industry while heightening awareness of others. Our data analyses also reveal systematic differences in the funding terms of mass tort and motor vehicle accident claims. Part V discusses the implications of our findings for consumer protection and legal ethics and concludes by suggesting some regulatory reforms.

II. THIRD-PARTY CONSUMER LITIGANT FUNDING

Third-party consumer litigant funding in the U.S. is one sector of a growing industry in which financial corporations assist with plaintiffs' financial needs by advancing money on a *non-recourse* basis. "Non-recourse" means that the plaintiff must repay the money (plus fees and interest) only if, and to the extent that, the plaintiff ultimately receives compensation for her underlying legal claim. This fact is critical to understanding why such funding has not historically been held to be a "loan" which is subject to state usury laws.[9] This exemption enables funders to charge higher interest and fees than would be permitted if these advances were ordinary consumer loans.[10]

The commercial sector of the LTPF industry provides funding to sophisticated, corporate litigants to help pay their attorneys' fees and costs in commercial disputes.[11] The consumer sector—which is the focus of this Article—provides funding directly to individuals, virtually all of whom will have no previous experience as a litigant and will have retained their attorney on a contingent-fee basis.[12]

There are several important differences between these two sectors in the purposes and contract terms underlying the funding. Third-party funding for commercial litigants typically is used to pay attorneys' fees and costs, and the contract provides the funder a percentage of any recovery upon the resolution of the litigation. For these commercial entities, the funding provides an opportunity to spread risk when the lawyers for the entities are not working on a contingent fee.

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9. *See, e.g.*, Austin T. Popp, *Federal Regulation of Third-Party Litigation Finance*, 72 VAND. L. REV. 727, 733–35 (2019) (noting that the U.S. Supreme Court "set forth the elements of a usurious transaction" in Lloyd v. Scott, 29 U.S. 205, 224 (1830), and that because TPF "agreements are generally nonrecourse, courts have largely construed them as financing agreements rather than as loans"); *see also* Bernardo M. Cremades Roman, Jr., *Usury and Other Defenses in U.S. Litigation Finance*, 23 KAN. J.L. & PUB. POL'Y 15 (2014); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83 (2008).

10. *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 (2012) (recommending using usury laws to protect consumers who receive litigation financing).

11. *See, e.g.*, STEVEN GARBER, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWNS, AND UNKNOWNS (2010) (providing comprehensive review of the market for third-party litigation finance); Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377, 382-83, 386-97 (providing a typology of the three common forms of alternative litigation finance in the U.S. and describing the development of plaintiff-side financing and the contemporary lawyer lending industry); Popp, *supra* note 9, at 735–40 (distinguishing consumer and commercial litigation financing). Financing for plaintiffs' law firms is yet another sector in some countries but is currently largely limited in the U.S. by ethics rules regulating fee sharing. *See, e.g.*, W. Hunter Huffman, *A Great and Profitable Clause: Why the New York City Bar Association Says It Is Time to Pay Attention to Investors Behind the Curtain*, 98 N.C. L. REV. 973, 984–88 (2020) (describing the recommendations of the NYC Bar Association regarding litigation financing).

12. Avraham & Sebok, *supra* note 7, at 1135.

The consumer litigant, in contrast, has usually retained a lawyer on a contingent fee basis so no longer bears any risk for attorneys' fees and litigation costs in the event their legal claim is not successful. Rather, the consumer seeks the funding for basic financial support and living expenses during the pendency of the litigation. The consumer will usually pay the funder the amount financed plus one-time fees and monthly interest based on the length of time from funding to the consumer's receipt of settlement funds or other recovery (if any).[13]

As consumer LTPF has become more common in the U.S., it has drawn increasing attention from scholars, the media, policy makers, certain political groups, and the judiciary. Criticisms of consumer LTPF largely fall into two broad categories.[14] One is that the cost of

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13. *See* Avraham, Baker & Sebok, *supra* note 7; Avraham & Sebok, *supra* note 7, at 1140; Garber, *supra* note 11, at 9.

14. In addition to the two categories of criticisms discussed in this Section, there are other criticisms of litigation funding, which are not relevant to consumer LTPF (but which are potentially relevant to commercial third-party funding) or which are readily managed or rebutted. These criticisms include: (1) that third-party funding increases the amount of frivolous litigation; (2) that funders may seek to have improper influence over litigation decisions and strategy; and (3) that communications between attorneys and funders may result in problematic waivers of attorney–client privilege or of attorney work product protection. For discussions of these criticisms, *see, e.g.*, Popp, *supra* note 9, at 740–44 (discussing "common objections" to litigation funding); Roni Elias, *Mythbusting: Why the Critics of Litigation Finance Are Wrong*, 13 FLA. A&M U. L. REV. 111 (2017) (rebutting various criticisms of litigation funding); Lynn A. Baker, *Alienability of Mass Tort Claims*, 63 DEPAUL L. REV. 265 (2014) (advocating for expanded alienability of mass tort claims); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 72–74 (2011) (discussing the modern trend in favor of assignability of legal claims and away from doctrines of champerty and maintenance); Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding–A Signaling Model*, 63 DEPAUL L. REV. 233, 235 (2014) (portraying the decision of a funder to advance funds to a plaintiff as creating a credible signal that the claim has merit); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 381 (2009) (noting that work-product and privilege issues must be addressed "if information is to be shared with a third party seeking to price and assume litigation risk from a defendant"); Jonathan T. Molot, *The Feasibility of Litigation Markets*, 89 IND. L.J. 171, 186 (2014) (contending that "most of the information that a third-party funder will need to evaluate a lawsuit is factual information of the sort that is discoverable by the adversary in any event"); David Tyler Adams, Note, *Laissez Fair: The Case for Alternative Litigation Funding and Assignment of Lawsuit Proceeds in Georgia*, 49 GA. L. REV. 1121, 1148–49 (2015) (explaining why funding companies are unlikely to fund frivolous claims); NEW YORK CITY BAR ASS'N, REPORT TO THE PRESIDENT BY THE NEW YORK CITY BAR ASSOCIATION WORKING GROUP ON LITIGATION FUNDING (2020) [hereinafter "NYC BAR WORKING GROUP REPORT"], http://documents.nycbar.org/files/Report_to_the_President_by_Litigation_Funding_Working_Group.pdf (describing

such funding to the consumer is simply too high. The claim is that the effective interest rate charged consumers is often usurious and may leave even "winning" plaintiffs with little or nothing from a settlement. Ironically, these critics include business-funded "tort reform" groups such as the U.S. Chamber of Commerce and the Lawsuit Reform Alliance of New York, entities not known for their great concern for consumer plaintiffs.[15] The suggested remedies have included limits on the rate of return to the funder under a LTPF contract. In recent years, Arkansas, Indiana, Nevada, Tennessee, and West Virginia, in fact, have passed laws that cap the premium that may be charged to a consumer under a LTPF contract,[16] and similar legislation is pending

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various proposals by New York state legislative committees to reform litigation funding).

15. The Institute for Legal Reform of the U.S. Chamber of Commerce has authored several lengthy reports critical of litigation finance including JOHN H. BEISNER, JESSICA D. MILLER & JORDAN M. SCHWARTZ, U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING MORE LAWSUITS, BUYING MORE TROUBLE: THIRD PARTY LITIGATION FUNDING A DECADE LATER (2020), https://www.instituteforlegalreform.com/research/selling-more-lawsuits-buying-more-trouble-third-party-litigation-funding-a-decade-later; JOHN H. BEISNER & GARY A. RUBIN, U.S. CHAMBER INST. FOR LEGAL REFORM, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION (2012), https://www.instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf. The Lawsuit Reform Alliance of New York states that one of its "core issues" is "lawsuit lending," and it "supports the prohibition of lawsuit lending or strict regulation under consumer protection laws." *See, e.g.*, LRANY, *Lawsuit Lending*, https://lrany.org/issues/lawsuit-lending/ (last visited May 18, 2021); *see also* LRANY, *Lawsuit Cash Advances: The Real Stories*, https://lrany.org/wp-content/uploads/2017/11/Victims-of-Lawsuit-Lending-2017.pdf (last visited May 18, 2021) (detailing specific victims of litigation financing).

16. *See* ARK. CONST OF 1874 amend. 89, § 3 (maximum rate of 17% per annum); IND. CODE ANN. § 24-4.5-3-202 (West 2020) (maximum rate of 36% plus allowable fees); NEV. REV. STAT. § 604C.310 (maximum rate of 40% per annum); TENN. CODE ANN. § 47-16-110 (West 2019) (maximum rate of 10% per year for a maximum of three years plus allowable fees); W. VA. CODE § 46A-6N-9 (2019) (maximum rate of 18% per annum). Other states have not imposed financial caps but have regulated the content and form of LTPF contracts in order to prevent obfuscation of the total amount the client will ultimately owe the funder. *See, e.g.*, ME. STAT. ANN. tit. 9-A § 12-104 (West 2008); NEB. REV. STAT. § 25-3303 (2010); OHIO REV. CODE ANN. § 1349.55 (West 2008); OKLA. STAT. ANN. tit. 14A, § 3-807 (West 2013); UTAH CODE ANN. § 13-57-301 (West 2020); 8 VT. STAT. ANN. § 2253 (West 2016); WIS. STAT. § 804.01(2)(bg) (2018) (mandating disclosure of third-party compensation agreements that will be paid by proceeds of the action). Maryland requires litigation financers to be formally licensed as lenders, and Colorado similarly considers the funds to be loans subject to the state's usury cap. Brandon Lowrey, *How Litigation Funding Can Save, And Doom, Poor Plaintiffs*, LAW360 (May 13, 2019), https://www.law360.com/articles/1157455/how-litigation-funding-can-save-and-

in the New York legislature.[17] On at least one occasion, such legislation has caused funders to leave a state.[18]

A second concern is that the terms of such financing may not be presented to consumers in a way that is transparent and readily understood. Numerous states have enacted laws that explicitly permit LTPF while imposing requirements aimed at enabling consumers to better understand the funding terms and therefore to make better decisions whether such funding is in their individual best interests.[19] These

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doom-poor-plaintiffs. Similarly, South Carolina and Kansas consider the funds to be loans, subject to such relevant regulations. ANDREW PAULEY & PAUL TETRAULT, NAMIC, CURBING A QUESTIONABLE PRACTICE: A SURVEY OF PUBLIC POLICY MEASURES TO ADDRESS CONCERNS SURROUNDING LITIGATION FUNDING 22 (Feb. 2019), https://www.namic.org/pdf/publicpolicy/190128_LitigationLendingUpdate.pdf. The Alabama Court of Civil Appeals found litigation financing akin to champerty due to its speculative nature, saying it is supported by a gambling consideration and is therefore void as against public policy. Wilson v. Harris, 688 So. 2d 265, 270 (Ala. Civ. App. 1996). Similarly, and more recently, the Pennsylvania Superior Court found a litigation financing agreement to "clearly" meet the requirements of champerty and declared it invalid. WFIC, L.L.C. v. LaBarre, 148 A.3d 812, 819 (Pa. Super. Ct. 2016).

17. In June 2018, the New York Senate, by a vote of 95–1, passed the Consumer Litigation Funding Act (Senate Bill 9105), which limits the amount that the funder may receive to "the maximum annual percentage rate applicable to consumer credit extended to a member of the military as provided for in Title 10, United States Code, Section 987(B)," which was 36 percent at the time. S.B. 9105, 2017–2018 Regular Sessions (N.Y. 2018). The New York legislation further provides that "[a]ny contract which exceeds such rate shall be considered usurious as defined by Section 5-501 of the General Obligations Law." *Id.* This version of the bill did not pass the Assembly prior to the adjournment of the legislative session; however, the bill was reintroduced in the last session. *See* S.B. 4555, 2019–2020 Regular Sessions (N.Y. 2019) (containing the same quoted language as the previous bill). At least one other alternative version was introduced that prohibits an annual interest rate in excess of 25 percent (criminal usury in New York). *See* S.B. 4478, 2019–2020 Regular Sessions (N.Y. 2019) (referred to committee January 8, 2020). For discussion of the New York legislation, *see* NYC BAR WORKING GROUP REPORT, *supra* note 14, at 86–90.

18. In Tennessee, for example, one of the nation's largest funders announced that it was leaving that market the day legislation went into effect which capped interest at 10% of the amount advanced plus one fee per year of $360. Andrew S. Simpson, *Litigation Financing Firm Exits Tennessee As New Law Goes Into Effect*, INSURANCE JOURNAL (July 3, 2014), https://www.insurancejournal.com/news/southeast/2014/07/03/333772.htm; TENN. CODE ANN. § 47-16-110 (West 2019).

19. *See, e.g.*, ME. REV. STAT. ANN. tit. 9-A, § 12-104 (West 2007); NEB. REV. STAT. § 25-3303 (2010); OHIO REV. CODE ANN. § 1349.55(A)(1) (West 2008); OKLA. STAT. ANN. tit. 14A, § 3-807 (West 2013); and VT. STAT. ANN. tit. 8, §§ 2251, 2253 (West 2015). *See also supra* note 16.

reforms, which are often supported by the LTPF industry, do not by themselves reduce the interest rates and fees consumers pay. However, support for such reforms is broad and includes scholars who have called on law makers to ban complex contractual provisions, such as "interest buckets" and minimum interest periods, which prevent even savvy consumers from being able to calculate easily or accurately the true costs of the transaction to them.[20]

Although there is significant scholarly commentary on LTPF, there has been almost no quantitative empirical research on the industry in the United States or elsewhere.[21] And there has been no empirical research on consumer LTPF in mass tort MDLs as distinct from other types of litigation. This omission merits attention, given the continued growth of mass tort litigation, the increasing media coverage of alleged abuses in the industry with respect to mass torts, the growing popularity of LTPF with mass tort claimants, and the increasing attention the industry is receiving from policy makers and regulators at all levels of government.

III. MASS TORTS VS. TRADITIONAL "ONE-OFF" TORTS

For the purposes of our analyses in this Article, mass tort claims are civil claims related to personal injuries and deaths alleged to have been caused by a particular product, toxin, or event. Examples include claims involving various pharmaceuticals (e.g., Vioxx, Risperdal, hormone-replacement therapy), medical devices (e.g., hip replacements, trans-vaginal mesh), exposure to toxins (e.g., Agent Orange, asbestos, Roundup), and events such as plane crashes, the World Trade Center clean up (and associated respiratory illnesses), and playing in the NFL (and associated concussions and CTE injuries). These cases are regularly filed in both state and federal courts, with the federal filings typically being consolidated, at the request of one or both

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20. *See, e.g.*, Avraham, Baker & Sebok, *supra* note 7; Avraham & Sebok, *supra* note 7, at 1143.

21. The major exceptions are Avraham, Baker & Sebok, *supra* note 7, and Avraham & Sebok, *supra* note 7, at 1138. *See also* David Abrams & Daniel Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075 (2013); Daniel Chen, *Can Markets Stimulate Rights? On the Alienability of Legal Claims*, 46 RAND J. ECON. 23 (2015) (serving as the only other published empirical studies about the industry, but which, like the 2013 Abrams & Chen study, uses data from Australia on only about 113 funded cases); Jean Y. Xiao, *An Empirical Examination of Consumer Litigation Funding* (May 2017) (Ph.D. dissertation, Vanderbilt University) (examining 4,403 consumer litigation finance contracts resolved 2002–2013).

of the parties, in a single federal district court pursuant to the Multi-District Litigation (MDL) statute.[22] Because they allege personal injuries and deaths, these cases are rarely certified as class actions under Rule 23.[23] Rather, each of the plaintiffs in these mass tort cases will have individually retained his or her chosen legal counsel, almost always on a contingent fee basis. And many of those law firms will come to represent hundreds or thousands of plaintiffs with similar claims.

These mass tort claims merit special attention in an empirical examination of LTPF for several reasons. First, cases in MDLs now comprise more than half of all pending federal civil cases and mass torts comprise more than 95 percent of all MDL cases.[24] Not surprisingly given their aggregate "bet the company" potential, mass tort cases have long been the focus of corporate "tort reform" groups that continue to seek various changes to the MDL process, including with regard to third-party funding. These groups lobbied an MDL-focused subcommittee of the Advisory Committee on Civil Rules to adopt a new rule that would require plaintiffs and their counsel in mass tort cases to disclose any outside sources of funding.[25] In addition, four

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22. *See* Lynn A. Baker & Stephen J. Herman, *Layers of Lawyers: Parsing the Complexities of Claimant Representation in Mass Tort MDLs*, 24 LEWIS & CLARK L. REV. 469, 473–74 (2020); *see also* Baker, *supra* note 14, at 267–68.

23. The NFL concussion settlement is a rare exception. *See In re* NFL Players Concussion Injury Litig., 821 F.3d 410 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 607 (2016), 137 S. Ct. 591 (2016); *see also* Marcus, *Mass Tort Class Action*, *supra* note 8, at 1566; Alexandra D. Lahav, *Mass Tort Class Actions—Past, Present, and Future*, 92 N.Y.U. L. REV. 998, 1007–08 (2017); Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1600 (2016). The U.S. Supreme Court decision in Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997), followed by Ortiz v. Fibreboard, 527 U.S. 815 (1999), largely made class action personal injury settlements obsolete. *See, e.g.*, Alison Frankel, *In NFL Concussion Case, 3rd Circuit Reopens Door for Personal Injury Class Actions*, REUTERS (April 19, 2016), http://blogs.reuters.com/alison-frankel/2016/04/19/in-nfl-concussion-case-3rd-circuit-reopens-door-for-personal-injury-class-actions/ (noting that the fen-phen diet drug class action settlement in the early 2000s and the settlement through a class actions of some personal injury claims in the BP oil spill litigation have been the only "high-profile" class action settlements of personal injury claims since *Amchem* and *Ortiz*). In upholding the District Court's certification of the settlement class and approval of the NFL concussion settlement, the Third Circuit explicitly distinguished *Amchem* and held that the class satisfied Rule 23(a)'s four threshold requirements for certification. See *In re* NFL Players Concussion Injury Litig., 821 F.3d at 427–35.

24. *See supra* note 3 and accompanying text.

25. *See* ADVISORY COMMITTEE ON CIVIL RULES, MDL SUBCOMMITTEE 219 (2019), https://www.uscourts.gov/sites/default/files/2019-04_civil_rules_agenda_book.pdf (noting proposal before the Committee from the

Republican Senators introduced legislation in Congress in February 2019 that would require similar disclosures by plaintiffs and their counsel in federal civil actions.[26]

Second, these mass tort claims might be expected to be of relatively high value compared to other tort claims such as those resulting from motor vehicle accidents, in part because their successful prosecution tends to involve complex (and therefore expensive) issues of science and medicine.[27] A contingent fee lawyer will typically be less

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U.S. Chamber Institute for Legal Reform "calling for the addition to Rule 26(a)(1)(A) of an additional disclosure requirement: '(v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action by settlement, judgment or otherwise'"). The Meeting Notes from January 28, 2020 of the Committee on Rules of Practice and Procedure noted that the MDL Subcommittee "reported that it had concluded that issues regarding third-party litigation funding (TPLF) did not seem particularly pronounced in relation to MDL litigation . . . . Accordingly, the subcommittee recommended suspending further work on the possibility of developing an amendment idea directed toward TPLF in MDL litigation." COMM. ON RULES PRAC. AND PROC., JUDICIAL CONFERENCE OF THE UNITED STATES COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 313 (Jan. 28, 2020), https://www.uscourts.gov/sites/default/files/2020-01_standing_agenda_book_final.pdf.

26. The Litigation Funding Transparency Act of 2019, S. 471 116th Cong. (2019) (introduced on February 13, 2019), includes a proposed amendment to § 1407, new subsection (g)(1), that states:

> (g)(1) In any coordinated or consolidated pretrial proceedings conducted pursuant to this section, counsel for a party asserting a claim whose civil action is assigned to or directly filed in the proceedings shall—
>
> (A) disclose in writing to the court and all other parties the identity of any commercial enterprise, other than the named parties or counsel, that has a right to receive payment that is contingent on the receipt of monetary relief in the civil action by settlement, judgment, or otherwise; and
>
> (B) produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the contingent right.

https://www.congress.gov/bill/116th-congress/senate-bill/471/text. The legislation did not receive a vote in the 116th Congress. *See S. 471 (116th): Litigation Funding Transparency Act of* 2019, GOVTRACK, https://www.govtrack.us/congress/bills/116/s471 (last visited May 18, 2021).

27. *See* Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011), for a valuable empirical study of the process by which many motor vehicle accident claims are resolved relatively quickly and inexpensively. In contrast, the cost of litigating a science-intensive mass tort case can range from $250,000 to more than $1 million. *See* Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1952 (2017); confidential interviews by Lynn A. Baker with various mass tort attorneys; Freeman Engstrom, *supra* note

interested in representing an individual with a low-value claim that is expensive to litigate. Anecdotal evidence suggests that law firms that represent mass tort plaintiffs tend to specialize in mass tort work, although they may also represent plaintiffs in "one-off" personal injury claims involving motor vehicle accidents.[28] Firms that specialize in the latter types of torts, however, rarely represent mass tort plaintiffs. Indeed, our data confirm this fact. Only 5% of law firms in our dataset represent both MT and MVA clients who requested funding. Of the firms with clients in both categories, 90% of the firms have fewer than ten cases of the other type while only a few firms have a substantial number of clients in both categories.

Finally, the litigation and settlement process for mass tort claims differs significantly from that for one-off personal injury tort claims in terms of timing and plaintiff "autonomy." Mass tort claims are rarely resolved quickly or individually. Rather, anecdotal evidence suggests that the defendants usually allow these claims to accumulate in courts across the country for many months.[29] Once an MDL is requested and ordered, the claims filed in federal court will all be transferred to the appointed MDL judge for consolidated pre-trial discovery. The MDL judge may also eventually preside over the selection and trial of several "bellwether" cases. It will therefore be several years—sometimes as many as eight—before any significant number of the claims are settled.[30] Typically, the defendant will negotiate multiple "inventory" settlements with firms (or consortia of firms) that

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11, at 386-88 (detailing the multi-million-dollar cost to plaintiffs' counsel of various mass tort trials as well as of various multi-year mass tort litigations).

28. For example, the website for Baron & Budd, P.C., a major mass tort law firm, lists the various mass tort claims that the firm is currently prosecuting involving pharmaceuticals, medical devices, and environmental claims, but also indicates that the firm handles "serious accidents" involving trucks and busses. *See* BARON & BUDD, https://baronandbudd.com (last visited May 18, 2021).

29. *See, e.g.*, Baker, *supra* note 14, at 267.

30. For example, the Prempro MDL involving drugs prescribed to women to replace estrogen lost during menopause was created in 2003. The first trial was held in 2006 and the defendant, Pfizer, "won dismissals of more than 3,000 cases prior to trial." Jeff Feeley, *Pfizer said to pay $330M in Prempro settlement*, BLOOMBERG NEWS (Feb. 8, 2011, 3:42 PM), https://www.bloomberg.com/news/articles/2010-08-27/pfizer-settles-arkansas-prempro-case-before-retrial-over-punitive-damages. Some 15 cases were decided by juries between 2006 and 2011, with Pfizer losing eight. *Id.* Settlement negotiations involving several law firms' inventories began in Summer 2010, with a settlement of "more than 2,200 lawsuits" of the "more than 10,000 claims" pending in the federal MDL and various state courts announced in February 2011. *Id.*

each represent a large number of the claimants. On rare occasion, a nationwide "global" settlement may be negotiated.[31]

Thus, virtually all mass tort claimants will receive a settlement offer that is part of a larger, contemporaneous group of hundreds or thousands of offers. Although each individual's offer will reflect certain characteristics of that individual's claim relative to the other claims in the group, no one's settlement offer value will have been individually negotiated between the plaintiff's counsel and defense counsel.[32] Each individual who receives such an offer will have the opportunity to decide whether to accept the offer. But the options for a claimant who is considering declining the offer may be very limited and largely unattractive.[33]

As the description above makes clear, the mass tort claimant has very little control over the amount or timing of any settlement "demand" or (counter-)offer from the defendant. The claimant in a one-off motor vehicle accident, by contrast, is likely to have substantially more control over the amount and timing of at least the settlement demand.[34] And the one-off tort claimant who declines an initial

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31. The $4.85 billion nationwide Vioxx settlement in 2007 is perhaps the best known truly "global" settlement. *See* Baker, *supra* note 27, at 1944. For a list of the handful of other public, aggregate settlements to date, *see* Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1500–01 (Table 7) (2017).

32. *See* Lynn A. Baker, *Mass Tort Remedies and the Puzzle of the Disappearing Defendant*, 98 TEX. L. REV. 1165, 1166–67 (2020) (observing that the typical mass-tort personal-injury settlement agreement "will not indicate the amount that the defendant is offering for the release of any particular claimant's claims but will specify only the total amount that the defendant will pay in exchange for a release of all of the covered plaintiffs' specified claims against the defendant.").

33. *See, e.g.*, Baker, *supra* note 27, at 1952 (noting that "a client who is considering declining a settlement offer made as part of an aggregate settlement may face only unattractive options" and detailing those options); *see also id.* at 1963–64 (noting that in the mass tort context, "continuing to represent a nonsettling claimant may well impose 'an unreasonable financial burden' on the contingent fee claimant's counsel, justifying withdrawal under [the relevant state equivalent(s) to ABA Model Rule 1.16(b)(6)]"). As Nora Freeman Engstrom has detailed, the unattractive options for claimants (and their attorneys) who are considering declining a settlement offer may include complying with a court's *Lone Pine* order which is commonly crafted to hasten case resolution. *See generally* Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2 (2019); Nora Freeman Engstrom & Amos Espeland, Lone Pine *Orders: A Critical Examination and Empirical Analysis*, 169 U. PA. L. REV. ONLINE 91 (2020).

34. Not all claimants in one-off motor vehicle accidents will have such control, however. See generally Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011) (offering a descriptive and normative analysis of

settlement offer may have various plausible options, including proceeding to trial.[35]

Two other differences between mass tort claims and one-off tort claims merit mention. First, the one-off tort claimant is likely to know immediately both that she has been in a car accident and that she may, therefore, have a legal claim. The mass tort claimant, in contrast, may be ill but may not know the cause of her injuries or, therefore, that she has a legal claim, for several years after the use of the product or the occurrence of the events that give rise to her eventual claim. Second, the one-off tort claimant may ultimately have a claim against the opposing party's insurer rather than the party, and this may significantly increase the speed with which the claimant receives a settlement offer and the relative attractiveness of that offer. Insurance is unlikely to play this role in most mass tort claims. Our dataset enables us to explore whether the duration from injury to settlement in mass tort MDLs is in fact longer than in one-off tort claims.

These systematic differences in the nature, representation, litigation, and settlement of mass tort and one-off tort claims such as motor vehicle accidents cause one to predict that systematic differences may exist between the two groups in the plaintiffs' interest in securing LTPF, the attractiveness of the plaintiffs to such funders, and the terms on which LTPF is offered. Should systematic differences be found in the anatomy of LTPF for the two groups of tort claimants, those differences in turn may—or may not—suggest the need for, or benefits

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"settlement mills" for the resolution of some auto accident claims); Nora Freeman Engstrom, *Run-of-the Mill Justice*, 22 GEO. J.L. ETHICS 1485 (2009) (comparing the claim resolution practices of "settlement mills" to those of more conventional personal injury law firms). In other work, however, Nora Freeman Engstrom, has noted that auto accident claims as a whole are "brought more frequently [and] tried more often" than other tort law causes of action, despite the fact that plaintiffs' lawyers who handle these claims in high volume "tend to settle at least minor-injury claims in a fairly routinized manner." Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 53 WAKE FOREST L. REV. 293, 299, 301 (2018) [hereinafter "*When Cars Crash*"].

35. Although the typical one-off tort claim may be less valuable than the typical mass tort claim, a trial of the former claim may have a positive net expected value due to the comparatively low costs of litigating a claim that does not involve complex science or medicine (or involve a Fortune 500 corporate defendant). The cost of litigating a science-intensive mass tort case can range from $250,000 to more than $1 million. *See* Baker, *supra* note 27, at 1952; confidential interviews by Lynn A. Baker with various mass tort attorneys; *see also* Freeman Engstrom, *supra* note 11, at 386-88; Freeman Engstrom, *When Cars Crash, supra* note 34, at 302–03 (describing how car accident litigation does not heavily rely on expert testimony and how car crash plaintiffs generally are awarded less than other tort plaintiffs).

of, different regulatory treatment of LTPF for the two groups. Finally, any such systematic differences in the anatomy of LTPF for the two groups of tort claimants may have implications for the ethical issues that this funding may pose to lawyers representing these claimants.

IV. DATA ANALYSIS

A. *General*

In this Article, we present and analyze sixteen years of data privately obtained from one of the largest consumer litigation financing firms in the U.S. ("Funder").[36] The comprehensive dataset includes approximately 225,593 requests for funding from 2001 through 2016. These requests come from 123,102 different clients who brought 130,866 different cases (a small minority of clients brought more than one case).[37] Although it would be best to sample data from multiple funders across the whole consumer sector, that is not a realistic possibility. Each funder jealously guards its data.[38] Indeed, even armed with an order from the federal judge in the NFL concussion litigation, class counsel was not able to obtain any systematic information from the funders regarding the terms of their contracts with the players.[39]

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36. This is an updated, and therefore somewhat larger, data set than that discussed in Avraham & Sebok, *supra* note 7, which included only 203,307 funding requests. The same funder is the source of both data sets.

37. Thus, for example, a client with two different types of claims, such as a car accident and a Vioxx claim, would have two different "cases" in our data set. And each such "case" might also include more than one funding request (and grant or denial of funding).

38. All consumer funders in the United States are privately held investment corporations or partnerships. The data used in this Article, to which we were given unique and unrestricted access, are not publicly available even in the few states that mandate some form of reporting to state regulators. *See e.g.*, ME. REV. STAT. ANN. tit. 9-A, § 12-107) (West 2007) (stating in subsection 4 that the administrator is to prepare and submit to the Insurance and Financial Services Committee an annual report that includes aggregate funding information reported by those companies registered to conduct business in Maine).

39. Class Counsel in the NFL concussion litigation reported to Judge Brody that various funders known to have NFL concussion class members as clients "refused to respond to discovery request that were propounded upon them pursuant to the Court's Order of July 19, 2017 . . ., such that Class Counsel has been unable to determine . . . the terms of the [funding] agreements . . . ." See Co-Lead Class Counsel's Reply Memorandum in Further Support of Motion to (1) Direct Claims Administrator to Withhold Any Portions of Class Member Monetary Awards Purportedly Owed to Certain Third-Party Lenders and Claims Services Providers, and (2)

In light of how jealously funders guard their data, one might reasonably wonder why this one was willing to share its comprehensive raw data with us. The Funder felt that accurate data would be more beneficial to the industry as a whole than the anecdotes and speculation that appear in media reports. In addition, the Funder had known and worked with one of us for many years and trusted us to be fair and to not misuse the data. The Funder did not request, and did not have, any influence or control over our data analyses, our statistical results, or the content of this Article. The only restrictions were that we maintain the anonymity of the Funder and not make the raw data public.

We believe the Funder is a good representative of the larger consumer LTPF sector. To begin, the Funder is relatively large compared to the other funders competing in the consumer LTPF space.[40] Further, although we cannot state the precise share of the existing consumer LTPF market represented by the Funder in this study, the relatively large size of the Funder suggests that it is significant.[41] In addition, the breadth of the Funder's geographical reach—its clients come from every state in the United States and the District of Columbia—

Direct Disclosure to Claims Administrator of Existence of Class Member Agreements with All Third Parties [hereafter *"Co-Lead Class Counsel's Reply Memorandum"*], 4–5, Turner v. NFL (*In re* NFL Players' Concussion Injury Litig.), 301 F.R.D. 191, 194 (E.D. Pa. 2014); *id.* at n.3 (stating that Class Counsel was left to support its various claims about the problematic terms of class members' funding contracts with evidence from a few contracts from five funders.); *Id.* at n.4 (summarizing the terms that four class members received from four different funders for advances on their NFL class settlement payments and noting that a fifth funder's "terms and actual agreements are already part of the record before the Court").

40. *See* Radek Goral, *Justice Dealers: The Ecosystem of American Litigation Finance,* 21 STAN. J.L. & FIN. 98, 137 (2015) (listing the major consumer litigation funders in the United States). The Funder whose data are studied here appears on this list.

41. While there have been recent efforts by private consultants to measure the size of, and identify the leading firms in, the *commercial* LTPF space, there have been no similar efforts regarding the consumer LTPF sector. *See, e.g., $2.3 Billion of Capital Deployed Over 12-Month Period Across U.S. Commercial Litigation Finance Industry, According to First-of-Its-Kind Study*, BUSINESS WIRE (Nov. 19, 2019, 9:00 AM), https://www.businesswire.com/news/home/20191119005098/en/2.3-Billion-of-Capital-Deployed-Over-12-Month-Period-Across-U.S.-Commercial-Litigation-Finance-Industry-According-to-First-of-Its-Kind-Study (reviewing the "first reliable calculation of the size of the U.S. litigation finance industry," according to the Westfleet Advisors Litigation Finance Buyer's Guide). Some academic studies have tried to define the scope and size of the consumer LTPF sector, but these efforts are qualitative, not quantitative. *See* Goral, *supra* note 40.

gives us confidence that its distribution of case-types reproduces the distribution of legal claims that comprise the general market for consumer LTPF.[42] Consumers who seek out LTPF are typically personal injury claimants, especially those involved in motor vehicle and slip-and-fall accidents.[43] Individuals litigating labor law, Jones Act, assault, or police brutality claims together comprise a very small portion of applicants for consumer LTPF.[44]

Because we have unrestricted access to all the funding applications received by the Funder, we are able to study both the funded and unfunded requests. The data are very comprehensive and include, among other things, the name and address of the individual seeking funding, the name and state of the law firm (if any) representing them, where the applicant's lawsuit has been filed (if it has been filed),[45] a brief description of the underlying case, the date of the incident at the center of the claim, the amount requested by the applicant, and the date of the funding request. Additional information is provided for applications that the Funder seriously considers, and may include: police, medical, and insurance reports on the incident at the center of the claim; information on any liens that might attached to an applicant's recovery; and, sometimes, whether the applicant has ever filed for bankruptcy.[46] Finally, for requests ultimately funded, the data include the amount funded, the date of funding, the monthly interest rate, the fees, the amount due the Funder when the underlying case settles, the amount ultimately collected by the Funder, and the date of repayment.

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42. *Cf.* Goral, *supra* note 40.

43. *See* Avraham & Sebok, *supra* note 7, at 1147 (showing the case type distribution of a dataset that is slightly older and therefore somewhat smaller than that used in the current study, but includes 203,307 of the 225,552 funding requests); *see also, e.g.*, *Pelvic Mesh Lawsuit Funding Firm, Fair Rate Funding, Reports Johnson and Johnson Settlement Offer for Over 2,000 Mesh Lawsuits*, PRNEWSWIRE (January 28, 2016, 2:37 PM), https://www.prnewswire.com/news-releases/pelvic-mesh-lawsuit-funding-firm-fair-rate-funding-reports-johnson-and-johnson-settlement-offer-for-over-2000-mesh-lawsuits-300211623.html).

44. Avraham & Sebok, *supra* note 7, at 1147.

45. The Funder tells us that "while a vast majority of the cases have already been filed, not all cases are. Notwithstanding, every client must have already retained counsel." E- mail from Funder to authors (Sept. 9, 2010) (on file with authors).

46. The Funder tells us that "[i]f the injury occurs after the bankruptcy filing, we will fund the case. Conversely, if the injury occurs before the bankruptcy, then we will not fund the case since the pending lawsuit would be considered part of the bankruptcy estate." E-mail from Funder to authors (Nov. 9, 2019) (on file with authors).

We decided to work at the case level and therefore consolidated multiple funding requests related to the same underlying legal case into one line.[47] After doing some cleaning, we were left with 125,945 cases (coming from 118,565 clients). The cases in our data set involve a wide range of legal claims. The two that are the focus of this paper are: motor vehicle accidents (MVA) (71,782 cases) and mass tort cases (MT) (8,536).[48] MVA is the largest category of cases (or claims) in our dataset and will serve as the default against which we will compare mass torts.

The claimants in each of the two categories live in every state in the U.S. and the District of Columbia, but the allocation across the states is substantially different for the MT claimants and for the MVA claimants. More than 50% of all the MVA claimants in our dataset live in three states: NY (33%), NJ (10%), and Florida (10%). The MT claimants, however, are differently, and much less, geographically concentrated, with seven states accounting for 50% of the claimants: Florida (10%), Texas (10%), California (8%), Georgia (7%), NY (7%), Ohio (5%), and Pennsylvania (3%).

Chart 1 shows the number of cases per year in each of these two claim categories for 2001 through 2016. There was a substantial increase in MVA cases in 2005, and the number of cases per year involving MVA claims has remained well above the 2004 levels ever since. A similar jump in the number of MT cases per year did not occur until 2011, perhaps suggesting that our Funder entered the MT market comparatively later, that many more MT claims have been brought since 2011 than in previous years, or both.[49] In what follows we

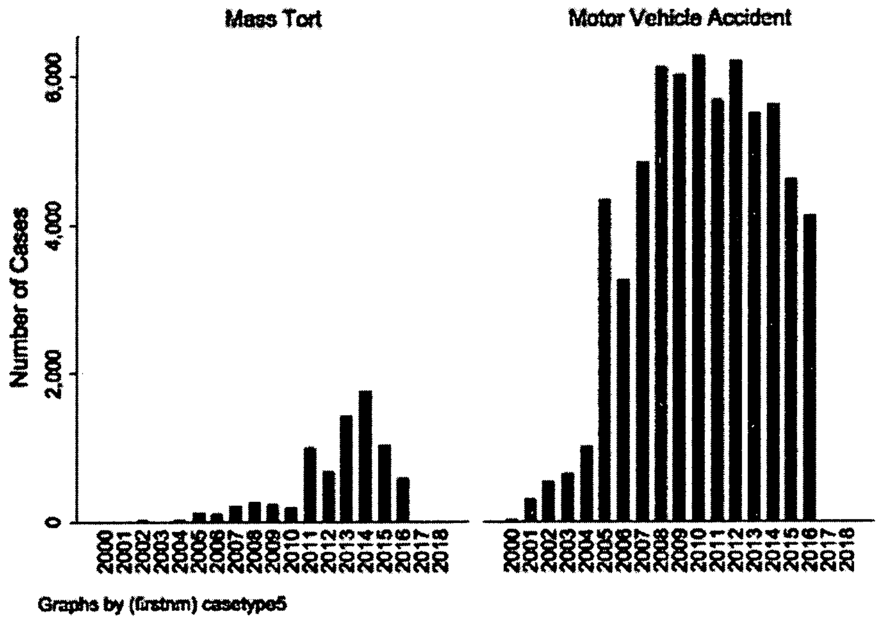
47. The vast majority of individuals with claims of the two types of interest to us brought only one case, and in that case the majority brought only one funding request. Specifically, 97.34% of MT claimants and 95.67% of MVA claimants brought just one case. Of the claimants within each claim type who brought only one case, a large majority made only one funding request in connection with their claim: 69.16% of MT claimants and 74.45% of MVA.

48. The number of cases for MVA and MT include both pre- and post-settlement cases. The other most common types of claims other than MVA and MT at the center of a funding request are: Slip-and-fall claims (14,753), premises liability (7,533); medical malpractice (4,312); assault/police brutality (3,386) and labor law/Jones Act/FELA (2,277).

49. We do not know why the number of cases in each category is lower in recent years. Perhaps it is because competition within the industry has increased. The data do not suggest it is because the funder received more requests for funding involving other categories of claims since the total number of cases that the Funder handled declined.

restrict our analysis to the 71,351 MVA and 8,441 MT pre-settlement cases only. We discuss the post-settlement cases in a different article.[50]

Chart 1 – Number of Cases Per Year Per Claim Type



B. The Review and Underwriting Process

Each funding request undergoes a review process in which the Funder examines all the available data and speaks with the client's lawyer. The results of this process are depicted on Chart 2 below. A substantial number of cases in both claim categories were "closed before review," which means that the funding application was denied outright and did not proceed further through the underwriting process: 28% of MVA cases and 23% of MT cases. An additional, substantial number of cases were "denied after review," meaning that the application underwent a full underwriting process but was ultimately not approved for funding: 18% of MVA cases and 17% of MT cases. In sum, each case receives rigorous scrutiny during the underwriting process, and only 55–60% of cases are ultimately approved for funding: 55% of MVA cases and 60% of MT cases.

Interestingly, not all applicants whose cases completed the underwriting process and were approved for funding ultimately accepted

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50. Avraham, Baker & Sebok, *supra* note 7.

the funding. Applicants declined the funding in 8% of the approved MVA cases and in 14% of the approved MT cases. Why a much higher proportion of approved applicants with MT claims reject funding compared to approved applicants with MVA is puzzling at this point, especially given that, as we detail below, the terms offered to MT clients are, on their face, better than those offered to MVA clients.[51]

The remainder of the approved cases in each category were "executed," meaning that they went through the entire underwriting process (were not "closed before review" or "denied after review"), money was offered to the client, and the client accepted the funding (funding was not "refused by client"). The executed cases are either "funded" or "completed." The "funded" cases are ones in which the obligation to the Funder is still outstanding because the underlying lawsuit has not yet settled nor otherwise been resolved. The vast majority of the executed cases, however, are "completed," meaning that the underlying lawsuit was resolved, and the Funder has been paid. In our data set, completed cases account for 88% of executed MVA cases, and 61% of executed MT cases. These numbers may suggest either that proportionally more MT claims were funded more recently, or that MT cases take longer to resolve from the time that the client obtains funding. Below, we return to this point in more detail.[52] Most of the further analyses in the sections below will focus on these completed cases.

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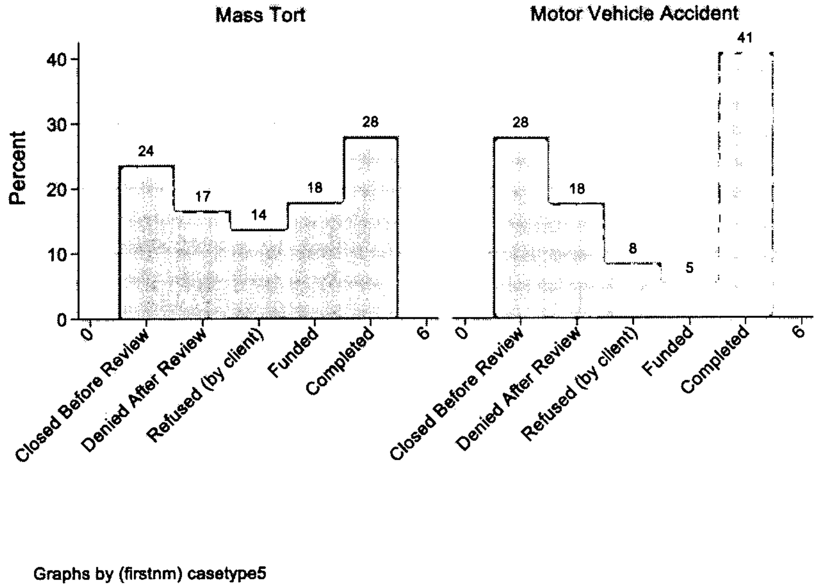
51. We have no way to measure the risk to the Funder presented by each category. One possible explanation for the higher rate at which MT clients decline approved funding is that MT cases are less risky, and clients may know that, and may therefore refuse to take even the relatively better terms (compared to MVA clients) they receive from the funder.

52. *See* discussion of Table 1 below.

Chart 2 – Status of Funding Requests



C. The Completed Cases

i. The Funding Timeframe and Amount

As summarized in Table 1 below, our data indicate that the underwriting process for the completed cases proceeds expeditiously in both categories of claims, with a median of only nine to thirteen days from the date the client first contacts the Funder until the date of first funding. There are substantial differences between the categories, however, in how soon after the date of the accident or incident the client contacts the Funder. MVA claimants apply for funding within one year after the accident (see Table 1, Row 1; the median is 241 days and the average is 391 days). The MT claimant, in contrast, does not contact the Funder until more than five years after the incident that gave rise to the legal claim (median of 1842 days and average of 2082 days). Although striking, this difference is not surprising. An individual injured in a car accident knows immediately that the incident has occurred and that she may have a legal claim. Statutes of limitation further ensure that an individual who has been able to retain a contingent-fee attorney in connection with that claim will have done so before the statute has run, typically two years after the accident.[53] Many mass tort claims, however, are not discovered by anyone until several years after the relevant incident. For example, many mass torts involving pharmaceuticals will involve thousands of individuals who may have been taking the relevant drug for years before a dangerous side-effect and related failure to warn become public. Only when that information is available will these individuals be able to appreciate that they may have a legal claim and may therefore want to retain legal counsel.

Once the client applies for funding, the Funder obtains information about the client, the law firm representing her, the client's injuries (including time lost from work) and medical treatment received, and the underlying legal claim. The Funder also collects information about the defendant and its insurance, if any. Finally, the Funder estimates the gross value of the underlying legal claim.

As Table 1 below shows, the gross estimated case values differ substantially between the two categories, with MT claims having an estimated median value about five times that of MVA claims. The mean estimated value, however, is only 70% larger for MT than for MVA (Table 1a, Row 4). The difference between the ratios of the means and medians in each category suggests that MVA has many more high-value outliers than MT has. It is not surprising that MT claims are of higher estimated value than MVA claims because MT claims typically involve complex issues of science and medicine and are typically much more expensive to litigate than MVA claims. Therefore, contingent-fee attorneys will be likely to represent MT plaintiffs only when the expected recovery is significant enough to cover the substantial expense for experts.[54] The injuries in MT claims may also be more serious on average than in MVA claims.

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53. *See, e.g.*, *What Statute Governs*, 1A AMERICAN LAW OF TORTS § 5:26 (noting that the statute of limitations for personal injury tort actions is "often one, two, or three years") (March 2021 update).

54. A contingent-fee attorney in a mass tort case may also be willing to represent a significant number of plaintiffs with weaker claims. By acquiring a large "inventory" of claims, even if some are relatively weak, a mass tort plaintiffs' lawyer may increase his bargaining power when negotiating a settlement of his inventory with the defendant. In addition, by representing a large group of plaintiffs, the lawyer and his clients may benefit from certain economies of scale, which may enable the lawyer to profitably represent claimants with weaker claims whom the lawyer could not afford to represent absent the aggregation. *See* Silver & Baker, *supra* note 8, at 744–48 (discussing benefits of aggregation for plaintiffs, including economies of scale and increased bargaining leverage).

Table 1 – Stages and Amount of Funding

			Mass Tort	Motor Vehicle	Diff bet. MT and MVA Significant?
1	# of days between Accident and funding application	Median	1842	241	***
		Avg.	2085	391	***
2	# of days between application and receipt of Funding	Median	13	9	***
		Avg.	34	21	***
3	# of days between Funding and Completion	Median	384	401	
		Avg.	577	567	
4	Estimated Case Value	Median	$127,892	$25,000	***
		Avg.	$167,842	$98,255	***
5	Amount Funded	Median	$5,000	$2,000	***
		Avg.	$11,441	$5,227	***

*** significant at the 1% level. There are 2,369 MT and 29,056 MVA observations.

As one might expect, these significant differences between the two groups in the median and mean estimated claim value affect the amount that the Funder is willing to advance the client. We observe that the amount funded—both mean and median—in MT cases is at least twice as great as the amount funded in the MVA cases. This may reflect the fact that MT claims typically involve much larger recoveries for plaintiffs, and therefore the Funder is facing a lower risk that the amount eventually recovered by the client will not be enough to cover the full amount due to the Funder, including all the contractual interest and fees. We call this a "haircut risk." It is also possible that MT claims have a smaller risk that the litigant will receive nothing for her claim and will default on its agreement with the Funder. We call this a "default risk." We elaborate on these two risks below.

Overall, it seems clear that the Funder is cautious about investing too deeply in a case, extending funds that are less than 10% of the estimated gross case value. This is a rational investment strategy for many reasons. First, the contingent attorneys' fees alone will take approximately 33%–40% of the claimant's eventual *gross* recovery. From the client's share of the recovery, further deductions will then be taken—typically including reimbursable litigation expenses and medical liens—leaving the claimant with only half or less of the total gross recovery in many cases.[55] Second, the fees and interest that accrue on the amount funded mean that the amount the client ultimately owes the Funder may be significantly more than the amount originally funded, with the total amount owed increasing with the length of time until the claim resolves and the Funder is paid. If the Funder invests too much, it might not be able to recover the amount due simply because it will be more than the amount the client receives from the defendant (net of attorneys' fees, litigation costs, and liens). Finally, the large difference between the Funder's estimated valuation of the case and the amount funded suggests that the plaintiff will retain a very strong interest in the outcome of her case even after funding, and this will secure her cooperation with her lawyer both throughout the litigation and at the time a settlement is offered.

After the funding is offered to the client, the funding case is completed and the Funder receives repayment 1 to 1.5 years later (Table 1, Row 3, a median (average) of 384 (577) days for MT claims, and 401 (567) days for MVA claims). These differences, however, are not statistically significant. The fact that MT and MVA cases are funded for about the same length of time might seem surprising. Given the substantial lack of control over her individual claim that the MT claimant has relative to the typical MVA claimant,[56] and given the greater scientific and medical complexity of the MT claim noted above, one might have expected the MT claimant to take longer to resolve her underlying legal claim and repay the Funder. One possible explanation for this unexpected finding is that the median MT claimant waits longer after she has retained an attorney and her legal claim has been filed before seeking funding. This is consistent with the fact, noted at the outset of this section, that the MT claimant seeks funding much longer after the incident than the MVA claimant. Alternatively, it might reflect the fact that the Funder funds only claims that are at an advanced stage of litigation, and that occurs—for both categories of claims—about 1 to 1.5 years before they ultimately resolve. Many group settlements of MT claims will involve delays of six months or longer from the time the claimant accepts her settlement offer until she

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55. Any medical liens will be deducted from the client's share of the recovery. The handling of reimbursable litigation expenses, however, varies depending on the relevant state's Rules of Professional Responsibility and any applicable state Rules of Court in conjunction with the terms of the particular attorney-client contract. Sometimes these expenses come "off the top" and are shared by both the client and the attorney, but other times they are deducted solely from the client's share of the recovery.

56. *See* sources cited *supra* notes 33–34.

receives payment.[57] Thus, the Funder may have good information about the likely value of a claim 1.5 years before an MT claim finally resolves. The relevant client's lawyer may be involved in settlement negotiations or (along with the Funder) may have good information about the approximate per-claim average received to date by other lawyers who have already entered into "inventory" settlements with the defendant. Earlier in the litigation, in contrast, the relevant client's lawyer might have very little information about when or if the defendant would be negotiating settlement agreements, which categories of claims would be settled, and what the average gross settlement value of a claim was likely to be.

ii. The Return on the Funder's Investment

a. The Contractual Aspired Profit.

We have seen that the amount funded varies not only case to case but also systematically between the two claim categories. As Table 2 below shows, there are also variations in the terms offered to the clients in each category. Specifically, the median posted monthly interest rate charged by the Funder differs significantly, with MT claimants contracting to pay interest of about 2.70%–2.75% and MVA claimants contracting to pay about 3.1%–3.2% (the differences are significant at the 1% level, Table 2, Row 1). This is consistent with the possibility that the Funder considers the MT claims to be less risky than the MVA claims. Later, we will explore whether MT cases have a lower default risk, haircut risk, or both.

Table 2 (Row 4) also shows that the Funder's annual, contractual aspired profit differs between the two types of claims. That is, the Funder's median annual aspired profit (based on the amount funded, the amount due at the completion of the case under the terms of the funding contract, and the length of the funding) is 72% for MT claims, and 87% for MVA. Because the length of the funding is quite similar for both categories (see Table 1, Row 3), this difference reflects the

57. This delay is often due to the need for the plaintiffs' counsel to meet the participation threshold in the settlement agreement. *See* Baker, *supra* note 32, at 1166–67 (describing the participation threshold in mass tort settlement agreements); *see also* Baker, *supra* note 27, at 1947–52 (discussing participation thresholds); *see also supra* note 39 and accompanying text (describing NFL concussion settlement claimants seeking funding during the delay between the approval of the settlement and settling claimants' receipt of funds).

difference in interest rate, as well as some "additional" components explained below.

The average annual aspired profit is higher than the median for each category, suggesting the outliers might be driving the results for the averages (Row 4). However, when we weight the average aspired profit by the amount funded in each claim, the aspired profit decreases substantially, suggesting that smaller amounts funded receive higher interest rates. We cannot tell whether this fact reflects the Funder's estimation that smaller amounts funded are in cases involving greater risks of both default and haircuts, or whether it reflects a greater ability of the Funder to extract rent from claimants with low-value claims (or small funding requests) regardless of the risk they impose.

Table 2 – Potential Return on Investment

			Mass Tort	Motor Vehicle	Diff bet. MT and MVA Significant?
1		Median	2.75%	3.2%	***
	Posted Int. Rate	Avg.	2.7%	3.1%	***
2		Median	$5,000	$2,000	***
	Amount Funded	Avg.	$11,466	$5,227	***
3		Median	$9,103	$3,961	***
	Amount Due	Avg.	$27,140	$13,515	***
4		Median	72%	87%	***
		Avg.	88%	115%	***
	Annual Aspired Profit	Weighted Avg.	63%	70%	***

*** significant at the 1% level. There are 2,369 MT and 29,056 MVA obs.

Still, one may wonder how, with a posted interest rate of about 3% a month for a median period of 12–13 months, the Funder is able to be owed a profit of 60%–70% on the dollar for MT claims and 70% for MVA claims. The answer is hidden in the "additional" components of the funding contracts: the compounding mechanism, the interest buckets, and the fees. We now discuss these elements.

b. *The "Additional" Components*

One would expect that with a "simple" interest rate of about 3% a month, clients will owe the Funder less than 40% profit for the median funding period of about 12 months for MT and 13 months for

MVA (Table 1, Row 3).[58] However, this calculation assumes "simple" (rather than compounded) interest, no interest "buckets," and no non-recourse fees. The next subsections explain how the Funder profits from these "additional" components of the funding contract.

1. Compounding

In fact, the most prevalent type of interest charged by the Funder for both MT and MVA fundings is not "simple" interest but interest compounded monthly. This means that every month the accrued interest is added to the principal and (together with the principal) is subject to each future month's interest rate.

Table 3 shows that the contracts for 86% of MVA claims and 89% of MT claims include this type of interest. This adds about 7% a year to the baseline annual interest if interest rates were simple and not compounded.

Table 3 – The "Other" Components of a Funding Contract

		Mass Tort	Motor Vehicle
% of Claims With This Type of Interest Rate	Compounded Annually	6%	9%
	Compounded Monthly	89%	86%
	Simple	4%	4%
Buckets	MIP (Months)	3	3
	IB (Months)	6	4
Fees	Accrued Fee	$350	$250
	Non-Accrued Fee	$35	$31

There are 2,369 MT and 29,056 MVA observations.

58. 12*3%=36% and 13*3%=39%.

2. Buckets

Another feature of the funding contract is that the client cannot pay back the amount due whenever she wants without paying a penalty of sorts. Rather, most of the Funder's contracts include "exit stops" every several months. This means that if a contract has an exit stop every six months, for example, and the client misses that stop by one day, she will have to pay interest (compounded monthly) for another six months. Our Funder distinguishes between the first stop, called the Minimum Interest Period (MIP), and all the subsequent stops, called Interest Buckets (IB). Table 3 above shows that the median MIP for both MVA and MT is three months whereas the median IB is four months for MVA and six months for MT. This adds an annual interest rate of about 5%–10% (depending on the length of the funding) on top of the basic interest rate.

3. Processing Fees

In addition to the interest discussed above, clients pay fees in connection with the processing of their claims. There are two types of fees and both are charged to the clients on a non-recourse basis. This means that the clients do not actually pay any fees when they accept the funds. The non-accrued fees are money the Funder is basically reimbursed for snail-mailing documents and the like. This is not a lot of money, about $30 or so, and these non-accrued fees are simply added to the total ultimately due by the client. The other type of fee is an accrued fee for processing the funding claim, and this fee is subject to compounded monthly interest and buckets. Table 3 (above) shows that the median accrued fee for MT claims is 40% larger than the median accrued fee for MVA claims. Given the median amount of funding, these non-recourse processing fees add another 7%–15% to the Funder's profit, depending on the claim type.

Together, these three features of the Funder's contract—interest compounded monthly, interest "buckets," and processing fees—help explain why the Funder's aspired profit is so much greater than if only simple interest were charged. These features also help explain why the aspired profit on MVA claims is greater than the aspired profit on MT claims even though both types of claims are funded for similar lengths of time. First, the interest rate on MVA claims is higher, likely reflecting a higher risk of defaults and haircuts. Second, even though the median accrued processing fee ($350) for MT claims is larger than the median accrued fee ($250) for MVA claims, the smaller amount funded in MVA claims means that the fees comprise 14%–17% of the amount funded in MVA claims compared to 7%–9% in MT claims. This in turn makes the Funder's total aspired profit (which includes profits from the fees) larger in MVA than in MT claims.

c. *The Actual Profit*

Notwithstanding the high aspired profit, the Funder's actual profit was much lower for each of the claim types. As Table 4 below shows, the median and average amounts paid back by the client (Table 4, Row 3) are substantially less than the median amount due to the Funder (Row 2) for each of the claim types. That is, the Funder's actual annual median return on its investment over the duration of each type of funding case is 55% for MT claims and 60% for MVA claims.

Table 4—Actual Annual Return on The Investment

			MT	MVA
1	Amount Funded	Median	$5,000	$2,000
		Avg.	$11,466	$5,227
2	Amount Due	Median	$9,103	$3,961
		Avg.	$27,140	$13,515
3	Amount Paid Back	Median	$6,545	$2,839
		Avg.	$18,194	$7,891
4	Annual Actual Profit	Median	55%	60%
		Avg.	65%	77%
		Weighted Avg.	38%	43%
All differences between MT and MVA are significant at the 1% level. There are 2,369 MT and 29,056 MVA observations.				

What causes the Funder's return on its investment to fall from a median aspired annual interest rate of 72%–87% to a median actual annual interest rate of 55%–60%? Because the funding provided to the client is non-recourse, the Funder is assuming the risk both that the client ultimately receives a recovery for the underlying legal claim and that the recovery is large enough for the client to repay the Funder the amount financed plus the accrued contractual interest and fees. As shown below in Charts 3 and 4, only 38% of MVA claims and 53% of MT claims were paid in full to the Funder. The rest were either not paid in full or not paid at all. This difference between MVA and MT claims in the rate of payment affirms what we hypothesize above: MT claims pose a smaller risk for the Funder than MVA claims. The next section elaborates on this difference.

iii. Defaults and Haircuts

In the vast bulk of cases, the Funder does make some profit. That is, the client pays back more than the amount originally funded.[59] As Charts 3 and 4 below also show, however, the client pays back the full amount (or more)[60] contractually due to the Funder (including all interest and fees) in only 53% of completed MT cases and 38% of completed MVA cases. There is substantial *ex post* adjustment of the contractual funding terms, with the Funder needing or agreeing in almost half of the MT cases, and in the majority of the MVA cases, to take a "haircut" of at least 12% (MVA) and 15% (MT) (See Table 5 below).

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59. As set out on Charts 3 and 4, the percent of completed cases in which the Funder made some profit and the percent of completed cases in which the Funder received the full amount due are: MT–93% (some profit above the amount originally funded) including 53% with payment of full (or more) amount due (Chart 3); MVA–88% (some profit above the amount originally funded) including 38% with payment of full (or more) amount due (Chart 4).

60. We understand from the Funder that the few clients who end up paying more than the total amount due to the Funder do so because the client's lawyer, upon the resolution of the client's case, sends the Funder that (too large) amount without confirming with the Funder the precise amount due. E-mail from Funder to authors (Feb. 5, 2019) (on file with authors). It is unclear why the Funder does not refund the balance to the client, as clearly it should.

Chart 3 – Haircuts in Completed Cases Involving MT Claims

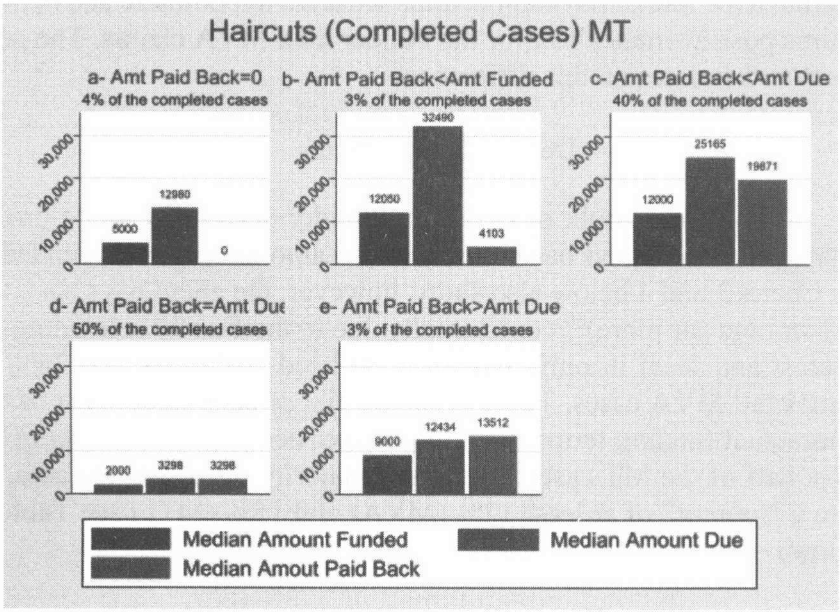
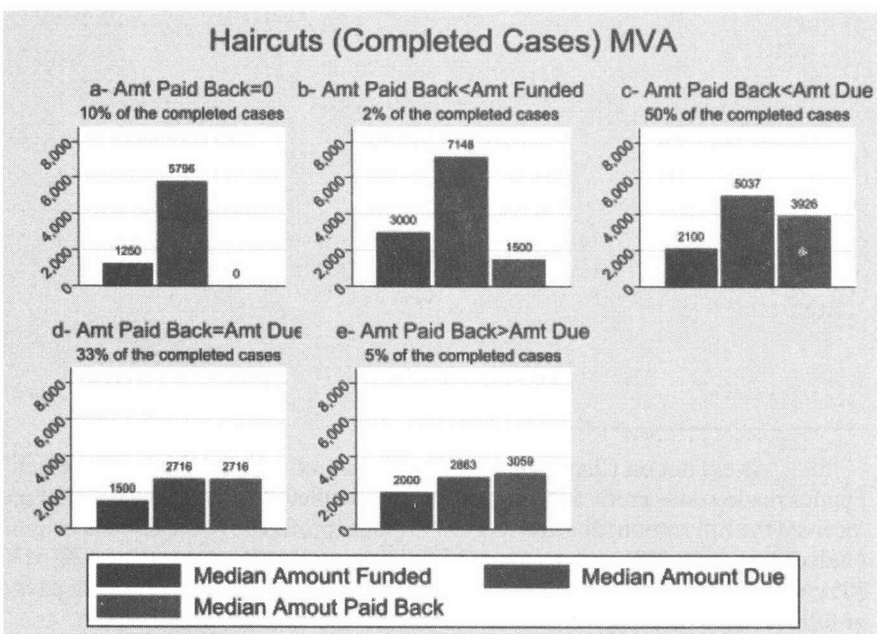


Chart 4 – Haircuts in Completed Cases Involving MVA Claims



It is not clear from looking at the data alone why, in the "haircut" cases, the Funder agrees to (or needs to) accept on average 12%–15% less from the client than the full amount contractually due. One possibility is that the client's entire recovery simply is not large enough to provide for full repayment to the Funder; that is, the Funder might be contractually entitled to all the available money, which is less than the amount due. Another possibility is that the client's recovery is large enough for the Funder to receive full repayment, but the client will then receive so little, if anything, of the settlement proceeds that the client (or her lawyer, on the client's behalf) might have a credible threat to decline her settlement offer unless the Funder agrees to a haircut. In both types of tort cases we are examining, resolution will almost always occur via settlement and the client will always have the option to accept or decline a settlement offer. A client who has received an advance from the Funder may, in essence, have already received the bulk of her net settlement funds in that way and will have little incentive to accept an eventual settlement offer from the tort defendant if the entire proceeds will go to the Funder, to her lawyer (for fees and the reimbursement of litigation costs), and to resolve private or governmental medical liens.[61] Neither the client's contingent-fee lawyer nor the Funder will receive any money if the client does not accept the settlement offer. Thus, the client's lawyer has a substantial incentive to negotiate a haircut with the Funder on behalf of the client (and himself). And the Funder has similar incentives to agree to a haircut rather than receive nothing, especially if the Funder's effective profit will be significant, even with a negotiated haircut.[62]

Table 5 below further explores the various repayment subgroups. First, the *ex ante* contractual interest rates are at least two points higher for MVA claims compared to MT claims for every subgroup, suggesting that the Funder prices into the interest rate the *ex ante* higher default and haircut risks of MVA claims compared to MT claims. Second, within each claim type, the Funder charges *ex ante* a lower interest rate to the subgroup that ends up paying back the full amount due compared to the subgroups that do not. For MT, the Funder charges *ex ante* 2.5% (Row 4) to claims ultimately in the full repayment subgroups compared to 3% to claims in the other subgroups;

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61. One of us (Baker) has heard numerous anecdotes from plaintiffs' lawyers that some clients with LTPF advances have told the lawyer that they will not accept their settlement offer unless the lawyer reduces the attorneys' fees the client must pay or negotiates a reduction in the amount the client must pay the Funder or both.

62. We have heard various anecdotes from practicing lawyers of their ability to negotiate haircuts with funders at the time a client's case is settling. One such lawyer said she was easily able to obtain these discounts for her clients, "even though I don't consider myself an especially good negotiator." This entire issue raises some interesting and important ethical concerns, which we take up in Section V.B. *infra*.

for MVA, the *ex ante* interest rates are 3.1% (Row 4) compared with 3.25%. This suggests that, within each claim type, the Funder is able to identify the lower risk claims at the outset of the funding process. Third, cases involving haircuts have been funded longer at the time of resolution. This is not surprising and can explain why the haircut is needed in at least some of these cases: The (*ex ante* higher) interest for those cases accumulates over a longer period and therefore might be more likely to cause the full amount due the Funder to exceed the client's eventual net recovery. Lastly, while the overall median unconditional haircut in MT and MVA is 0% and 2% (Row 6), respectively, the average unconditional haircut (not displayed in the table) is 14% and 20%, for MT and MVA, respectively.[63]

Interestingly, even the cases in which the Funder agrees to a "haircut" are still highly profitable for the Funder (Table 5 below). Indeed, the Funder's median profit over the entire funding period in completed cases with a negotiated haircut is no less—and in the case of the MT claims is substantially more—than the Funder's profit in analogous completed cases in which the full amount due is paid. Overall, notwithstanding defaults and haircuts, the Funder's profits are 52% (MVA) and 39% (MT) over the entire funding period (Row 6),

Table 5 – Median Haircuts and Profit in Completed Cases for Entire Funding Period (Pre-Settlement Cases)

		MT (2,369 obs)					MVA (29,056 obs)				
		% of cases	Avg # days	Interest Rate	Median Haircut	profit	% of cases	Avg # days	Interest Rate	Median Haircut	Profit
1	PB=0	3%	1035	3%	100%	-100%	9%	1194	3.25%	100%	-100%
2	PB<Funded	3%	1147	3%	82%	-39%	2%	908	3.25%	80%	-43%
3	PB<Due	41%	840	2.975%	15%	58%	52%	617	3.2%	12%	60%
4	PB=Due	50%	304	2.5%	0%	32%	33%	318	3.1%	0%	60%
5	PB>Due	3%	391	3%	-1%	43%	4%	294	3.35%	-3%	60%
6		100%	576	2.9%	0%	39%	100%	568	3.15%	2%	52%

63. A *conditional* haircut reflects the size of the haircut conditioned on there being a haircut at all. So, for example, suppose there are 200 clients, and each of them owes the Funder (amount due =) $3000. Suppose that half of them pay in full and the other half each receive a $1000 haircut (and therefore pay back only $2000). The average (and median) conditional haircut is $1000. That is, conditional on a client receiving a haircut at all, the average size of the haircut is $1000. In contrast, the *unconditional* haircut is only $500. Since half of the clients received a haircut of $1000 and half received a haircut of $0, the average (unconditional) haircut is $500. From the *ex ante* perspective, the Funder is interested in the unconditional haircut. When the Funder sees a new client, it knows that, on average, the client will ultimately receive a (unconditional) haircut of $500. In reality, half of the clients will receive a (conditional) haircut of $1000 and half will receive a haircut of $0.

which translates to an annual median profit of 60% and 55% for MVA and MT, respectively.[64]

It is interesting to compare the median amount originally funded in each of the repayment subgroups in Charts 3 and 4 above as another possible indicator of how well the Funder is able to predict risk. For both MVA and MT, much larger amounts of money in general were funded in the subgroups that ended up with a haircut relative to the subgroup that paid in full.[65] One reason could be that, when the Funder invests a large amount, the interest and fees ultimately result in a sum of money that the client cannot, or does not want to, pay back in full.

D. Summary

The data portray a consumer LTPF industry with a rigorous underwriting process with only 55% (MVA) and 60% (MT) of cases ultimately approved for funding. Consumers appear to scrutinize the funding offers carefully with 8% (MVA) and 14% (MT) of approved applicants declining the funding. The underwriting process proceeds quickly, taking a median of only 9 to 13 days from the date the client first contacts the Funder until the date of funding. MVA claimants apply for funding much sooner after the underlying accident or event than do MT claimants: a median of 241 days (MVA) versus 1842 days (MT). MT claims are estimated by the Funder to have a median gross value nearly 5 times that of MVA claims. For both types of claims, however, the Funder extends funds that amount to less than 10% of the estimated gross case value, and the median funding claim is completed and the Funder repaid 1 to 1.5 years later.

There were systematic differences in the funding terms of the MT and MVA claims, with the MT claimants contracting to pay monthly interest of 2.7%–2.75% compared to 3.1%–3.2% for MVA claimants. This interest was compounded monthly for more than 85% of both types of claims. Interest "buckets" added an annual interest rate of about 5%–10% to the basic interest rate for both types of

64. *See* Row 4 in Table 4 above.

65. Specifically, if we ignore the two small subgroups in the extremes (the complete default group and the group that paid more than owed), we can see (on Charts 3 and 4 above) that for MVA the median amount funded in the two subgroups that received a haircut was $3000 and $2200 compared with $1500 in the subgroup that paid in full. Even more pronounced is the difference for MT. For the MT claims, the median amount funded in the two subgroups that received a haircut was $11,325 and $12,120 compared with $2000 for the subgroup that paid in full.

claims. The non-recourse processing fees added another 14%–17% for MVA claims, which is twice as high as the equivalent addition to MT claims (7%–9%). These features all contributed to the Funder's median annual *aspired* profit of 72% for the MT claims and 87% for MVA claims. The Funder's median annual *actual* profit was similarly lower for MT claims (55%) than for MVA claims (60%). We found substantial *ex post* adjustment of the funding terms for both types of claims, which explains the difference between the Funder's actual and aspired profit. Only 38% of MVA claims and 53% of MT claims were paid in full to the Funder, with the Funder agreeing to take a "haircut" of 12%–15% of the amount due in the remaining cases. Even these "haircut" cases were still profitable for the Funder, however. The client defaulted entirely, or repaid less than the amount originally funded, in 7% of MT cases and 12% of MVA cases, indicating that such non-recourse, pre-settlement funding does pose real risks for the Funder even with a rigorous underwriting process.

V. IMPLICATIONS FOR CONSUMER PROTECTION AND LEGAL ETHICS – SOME THOUGHTS AND PROPOSALS

Our data analyses may offer reassurance about certain alleged "abuses" in the LTPF industry while heightening awareness of others. Our data may also underscore the lack of critical nuance in the criticisms of LTPF offered to date by many scholars, journalists, and policy makers. In this Section, we first discuss two issues that have received significant scholarly and media attention: the cost of LTPF to consumers and the related claim that the LTPF client is often left with little or nothing at the end of the litigation. We go on to examine the issue of transparency in the funding disclosures and propose some reforms. We conclude by discussing several issues of legal ethics that LTPF raises for plaintiffs' lawyers and the larger legal profession.

A. Consumer Protection

Many scholars and policy makers have expressed concern about the claimed costs to consumers of LTPF but have had no systematic, large-scale data at hand.[66] The industry has not been forthcoming with facts. And even armed with an order from the federal judge in the NFL concussion litigation, counsel for the class was not

66. *See supra* notes 15-19 and accompanying text.

able to obtain any systematic information from the relevant funders regarding the terms of their contracts with the players.[67] In sum, the debate to date regarding LTPF has been based solely on anecdote and speculation, and the reported interest rates have been eye-popping. Two scholars have reported that LTPF costs between 180% and 435% per year.[68] Another has asserted that "it is not atypical for an [LTPF provider] to charge 80% interest in the first year of a loan and up to 280% of the total loan amount."[69] The media has further disseminated these rumors, with the *New York Times*, for example, reporting LTPF interest rates of "as high as" 100%.[70] On this score, our data should be somewhat heartening. We found the actual (weighted) average annual interest rates borne by the Funder's clients are 38% (MT) and 43% (MVA).[71]

Are even these interest rates "too high"? We think it is important to ask, "as compared to what alternative?" The interest rates may be high compared to those on a home-equity loan or a credit card held by someone with an excellent credit score. But we think it is reasonable to assume that the individuals seeking LTPF do not have those options available. Indeed, our data suggest that LTPF is likely "funding of last resort" for the clients who seek it. One of our most striking findings is the small median amount of the fundings: $2000 for MVA

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67. Thus, the class counsel in the NFL Concussion litigation who expressed concern about predatory lending and asked Judge Brody to take action with regard to the LTPF advances to class members were not able to obtain or present any systematic empirical data to support their concerns. *See Co-Lead Class Counsel's Reply Memorandum*, *supra* note 39, at 4–5 n.4 (summarizing the terms that four class members received from four different funders for advances on NFL class settlement payments and noting that a fifth funder's "terms and actual agreements are already part of the record before the Court").

68. Yifat Shaltiel & John Cofresi, *Litigation Lending For Personal Needs Act: A Regulatory Framework To Legitimatize Third Party Litigation Finance*, 58 CONSUMER FIN. L.Q. REP. 347, 348 (2004) (435%); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 68 (2004) (180%).

69. Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 CHI.-KENT L. REV. 11, 13 (2014).

70. Matthew Goldstein & Jessica Silver-Greenberg, *How the Finance Industry Is Trying to Cash In on #MeToo*, N.Y. TIMES, Jan. 28, 2018, at https://www.nytimes.com/2018/01/28/business/metoo-finance-lawsuits-harassment.html. *See also* Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y. TIMES, Jan. 16, 2011, at https://www.nytimes.com/2011/01/17/business/17lawsuit.html (describing consumer who received an advance of $9,150 from Oasis Legal Finance, then owed Oasis $23,588 when he received an initial settlement payment of $27,000 just 18 months later).

71. *See supra* Table 4, line 4.

and $5000 for MT. We would add that LTPF for consumers is a robust and growing industry; and one might reasonably expect funders to compete on the contractual terms they offer consumers.[72]

A second criticism of LTPF by some legal scholars and media is that it leaves the consumer with little or nothing at the conclusion of the litigation.[73] Our data, in contrast, suggest that this will rarely occur. The Funder advanced only a small percentage of the underlying legal claim's median gross estimated value (3.9% (MT) to 8.0% (MVA)) and only for a median period of 12.8 (MT) to 13.4 (MVA) months (384 (MT) to 401 (MVA) days).[74] Even when the consumer paid the full amount due at the end of the funding period, the median amount paid ranges from 132% (MT) to 160% (MVA)—that is, the amount advanced plus a supplement of 32%–60% of that amount.[75] Thus, if the median amount advanced is only 8% (MVA) of the legal claim's gross estimated value, and if the median amount ultimately to be repaid is 12.8% (MVA) of the gross estimated value (160% x 8%), even the funding client who pays the full amount due the Funder will be left with a sizeable recovery. Finally, it should be noted that consumers in 7% (MT) and 11% (MVA) of cases actually made a profit at the Funder's expense; at the end of the funding period they ultimately paid back less than the amount originally advanced—indeed, they paid nothing at all in 3% (MT) and 9% (MVA) of the cases.[76]

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72. That the industry has plenty of potential competitors is clear from various court filings in the NFL concussion litigation, which note that 27 different funders had advanced money to some of the nearly 1000 total individuals who reportedly obtained advances on their settlement funds. *See* Declaration of Orran L. Brown, Sr., *In re* NFL Players' Concussion Injury Litig., MDL No. 2323 (E.D. Pa. Oct. 23, 2017) (Document 8470-2) (stating that "[t]o date, BrownGreer [the claim processor for the NFL concussion class settlement] has received Claim Forms identifying twenty-seven different lenders who expect to be paid portions of ninety-one different Class Members' monetary awards").

73. *See supra* notes 15–18; *see also, e.g.*, Cain, *supra* note 69, 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 LFC, she will have to turn her entire recovery over to the LFC, leaving her with nothing."); *see also* 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/ ("[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.").

74. *See* Table 1, Row 3.

75. *See* Table 5, Row 5.

76. *See* Table 5, Row 1.

Given our findings, we do not recommend any restrictions be imposed on the availability or cost to consumers of the types of LTPF we studied. There is clearly demand for this funding and denying or restricting its availability is unlikely to benefit consumers. Because LTPF appears to be funding of last resort and because there is a growing market for this funding, our recommendation is that the existing market competition be enhanced. Toward that end, and to ensure that the consumers who seek LTPF are fully informed about its financial terms and true cost, we recommend the adoption of laws that would ensure greater simplicity, transparency, and consistency across funders with regard to the pre-funding disclosures made to clients.

To begin, we would prohibit compounded interest, interest "buckets," minimum interest periods, and any other hidden or unclear terms in the funding contract in order to aid consumer understanding of the true cost of LTPF. The problem with compounded interest is not merely a lack of transparency. As has been shown in multiple peer reviewed studies, the human brain cannot accurately process exponential growth (which is the effect of compounded interest on money borrowed), a phenomenon called "exponential growth bias."[77] It would, therefore, seem imperative for funders to charge only simple interest that enables the client to more easily understand her total amount due to the funder at any given point in time and therefore to make a better informed decision whether to contract for the funding at all. In addition, simple interest will better enable the consumer to compare the cost of LTPF with the cost of other forms of consumer credit, which commonly are priced by effective annual interest rates.

In addition, to further enhance market competition, we would recommend a mandatory, standardized, simple disclosure format for LTPF fundings that would include the following:

- The amount of cash advanced to the client and the date of the advance;

77. *See, e.g.*, Eyal Zamir & Doron Teichman, Mathematics, Psychology, and Law: The Legal Ramifications of the Exponential Growth Bias (March 14, 2021) (unpublished manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3804329) (exploring the exponential growth bias in legal scholarship and highlighting numerous examples in which the law interacts with exponential processes, examining the normative and policy implications of a systematic human tendency to underestimate exponential growth).

- The total amount due to the funder after one month, six months, one year, and after each additional month and year up to three total years; and

- The effective annual interest rate being charged, including all fees charged to the consumer by the funder.

Clear information and the standardization of its presentation would enable the client to better understand the true cost of the LTPF over various periods of time and to comparison shop more easily and accurately among LTPF vendors. In addition, disclosure of the effective annual interest rate being charged would better enable the client to compare the true cost of LTPF with the cost of other potentially available sources and types of consumer credit. At least one state, Maine, already requires disclosures along these lines.[78]

B. Legal Ethics

Perhaps the most significant and undiscussed ethics-related aspect of LTPF at present is the prohibition most states' Rules of Professional Responsibility currently impose on lawyers' ability to provide financial assistance to their clients.[79] We believe serious consideration should be given by all state bar associations that are not among the eleven that have relaxed this restriction. In particular, these state bars should consider adopting a rule that explicitly permits a lawyer to advance "reasonably necessary medical and living expenses" to a client, with repayment being contingent on the outcome of the matter.[80] Although the arguments for prohibiting attorneys from making

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78. *See generally* ME. CONSUMER CREDIT CODE §12-104 (2020).

79. Today, most states' rules of professional conduct do not allow lawyers to make loans for living expenses to clients for any reason. See ABA/BNA LAWYERS' MANUAL ON PROF. CONDUCT 51:801 (2018). This is almost certainly due to the American Bar Association's decision to disallow such loans in its Model Rules of Professional Conduct. *See* MODEL RULES OF PROF'L CONDUCT r. 1.8(e) (Am. Bar Ass'n 1983).

80. *See, e.g.*, TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.08(d)(1) (2019) (providing that "a lawyer may advance or guarantee court costs, . . . and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter."); *see also* D.C. RULES OF PROF'L CONDUCT r. 1.8(d)(2) (2007) (providing that "A lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may pay or provide: (2) Other financial assistance which is reasonably necessary to permit the client to institute or maintain

the litigation or administrative proceeding."). CAL. RULES OF PROF'L CONDUCT r. 4-210(A)(2) (1992) (providing that a lawyer is not prohibited "[a]fter employment, from lending money to the client upon the client's promise in writing to repay such a loan").

In addition to Texas, California, and D.C. discussed above, eight states allow lawyers to make clients loans for living expenses in narrower circumstances: Alabama, Louisiana, Minnesota, Mississippi, Montana, New Jersey, North Dakota, and Utah. *See* ALA. RULES OF PROF'L CONDUCT. r. 1.8(e)(3) (2008) (stating "a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise of assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer"); LA. RULES OF PROF'L CONDUCT r. 1.8(e) (2006) (Permitting financial assistance in addition to court costs and litigation expenses to clients in "necessitous circumstances" and imposing various limitations and conditions); MINN. RULES OF PROF'L CONDUCT r. 1.8(e)(3) (2021) (providing "a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and . . . that no promise of such financial assistance was made to the client . . . prior to the employment of that lawyer by that client."); MISS. RULES OF PROF'L CONDUCT r. 1.8(e) 2a & b (2020) (providing that a lawyer may advance "[r]easonable and necessary medical expenses associated with treatment for the injury giving rise to the litigation or administrative proceeding for which the client seeks legal representation: and [r]easonable and necessary living expenses incurred." Lawyers can advance minor sums "under dire and necessitous circumstances," including to prevent foreclosure or repossession or for necessary medical treatment. Payments aggregating $1500 or less must be reported to the Mississippi Bar's Standing Committee on Ethics within 7 days following each payment.); MONT. RULES OF PROF'L CONDUCT r. 1.8(e)(3) (2020) (providing "a lawyer may, for the sole purpose of providing basic living expenses, guarantee a loan from a regulated financial institution whose usual business involves making loans if such loan is reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle the case because of financial hardship rather than on the merits, provided the client remains . . . liable for repayment . . . without regard to the outcome of the litigation and . . . neither the lawyer nor anyone on his/her behalf offers, promises or advertises such financial assistance before being retained by the client."); N.J. RULES OF PROF'L. CONDUCT r. 1.8(e) (2020) ("A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that . . . (e)(3) a legal services or public interest organization, a law school clinical or pro bono program, or an attorney providing qualifying pro bono service . . . may provide financial assistance to indigent clients whom the organization, program or attorney is representing without fee."); N. DAKOTA RULES OF PROF'L CONDUCT r. 1.8(e)(3) (2009) ("[A] lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment . . . without regard to the outcome of the litigation and, . . . that no promise of financial assistance was made to the client . . . prior to these advances to clients might have seemed persuasive fifty years ago, the case for providing attorneys (and their clients) this additional funding option now seems compelling.[81] Indeed, the ABA in August 2020 took a very small step in this general direction but only with regard to lawyers representing indigent clients pro bono.[82] Under a more permissive, more broadly applicable rule, the attorney could—but would have no obligation to—offer clients an additional funding alternative to LTPF. If the attorney passed through to the client the cost

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the [client's] employment of that lawyer . . . . "); UTAH RULES OF PROF'L CONDUCT r. 1.8(e)(2) (2017) (a lawyer representing an indigent client may "pay . . . minor expenses reasonably connected to the litigation.").

Finally, in June 2020, the New York court system's Administrative Board approved an amendment to N.Y. RULES OF PROF'L CONDUCT r. 1.8(e) "allowing legal services organizations and pro bono attorneys to provide financial assistance to low-income clients beyond the costs and expenses of litigation that had previously been permitted." *See News Advisory*, N.Y. STATE UNIFIED COURT SYSTEM (June 18, 2020), https://www.nycourts.gov/LegacyPDFS/press/pdfs/AV20_08.pdf. In addition, "a handful of courts and ethics committees have approved financial assistance in small amounts beyond litigation expenses, even where the text of the rule would forbit it." ABA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY [AND] STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 107, at 12 & n. 45 (2020) [hereinafter "ABA REPORT ON RES. 107"] available at https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/107-annual-2020.pdf.

81. For discussion of the arguments historically given for the prohibition, *see generally, e.g.*, Philip G. Schrag, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)*, 28 GEO. J. LEGAL ETHICS 39 (2015); Cristina D. Lockwood, *Adhering to Professional Obligations: Amending ABA Model Rule of Professional Conduct 1.8(e) to Allow for Humanitarian Loans to Existing Clients*, 48 U.S.F. L. REV. 457 (2014).

82. The ABA House of Delegates on August 3–4, 2020, adopted as revised the proposal of the Standing Committee on Ethics and Professional Responsibility to amend Model Rule 1.8(e) to permit "a lawyer representing an indigent client pro bono" to "provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses." Resolution 107, revised as adopted, available at https://www.americanbar.org/content/dam/aba/administrative/news/2020/08/2020-am-resolutions/107.pdf. Unfortunately, from our perspective, however, the ABA's small step forward included a problematic step backward. The amendments to Model Rule 1.8(e) included new Comment 13, which provides that

> [f]inancial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

at which the lawyer obtained the funding, one would expect that to be a significantly lower cost than for a similar amount obtained by the client through LTPF.[83] And by increasing the supply of funding available to litigants, this should further increase the competitiveness of the LTPF market to the benefit of the consumer.

Our findings also highlight the potential role of the consumer's lawyer in the LTPF process, which raises other intriguing, and potentially complex, questions of legal ethics. At the front end of the process, a funder often requires the participation of the consumer's lawyer to provide or confirm basic information about the consumer's legal claim. As various filings in the NFL concussion litigation made clear, however, many plaintiffs' lawyers dislike LTPF and do not want to assist their clients in obtaining it.[84] An individual's tort lawyer has no ethical or other obligation to aid that client's efforts to obtain LTPF,[85] but declining to do so may well cause the client to fire that lawyer and retain new, cooperative counsel.[86]

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83. A lawyer who would seek to charge the client any premium in addition to the actual cost to the lawyer of obtaining the money would confront a host of problematic conflicts of interest.

84. See *In re National Football League Players' Concussion Injury Litigation*, 923 F.3d 96, 102 (3rd Cir. 2019):

> Following approval of the settlement, the District Court and class counsel took various steps to address cash advance agreements. In July 2016, class counsel first sent a letter to the class warning of predatory lending. The letter advised class members to avoid encumbering their settlement proceeds whenever possible. . . . In June 2017, class counsel advised the Court that he was concerned with solicitations being sent to the class, including by high interest lenders, and received the Court's permission to send another letter to the class regarding the practice. In July 2017, Judge Brody scheduled a hearing for September 19, 2017, to address deceptive practices targeting the class, including solicitations from litigation funders.

See also, e.g., Ken Belson, *After N.F.L. Concussion Settlement, Feeding Frenzy of Lawyers and Lenders*, N.Y. TIMES, Jul. 16, 2017, https://www.nytimes.com/2017/07/16/sports/football/nfl-concussion-settlement-lawyers.html?_r=0 (discussing how lenders and consultants besieged class member); Ken Belson, *Judge Moves to Halt 'Deceptive Practices' Around N.F.L. Concussion Settlement*, N.Y. TIMES, Jul. 19, 2017, https://www.nytimes.com/2017/07/19/sports/nfl-concussion-settlement-lawyers.html.

85. MODEL RULES OF PROF'L. CONDUCT r. 2.1 (AM. BAR ASS'N 2000) (In representing a client, a lawyer is ethically obligated to "exercise independent professional judgment and render candid advice."); *see also, e.g.*, Ohio Sup. Ct. Bd. Of Comm'rs on Grievances & Discipline, Op. 2012-3, 1–13 (2012) (detailing obligations of a lawyer whose client requests assistance in obtaining LTPF); New York City Bar Ass'n, Formal Op. 2011-02, 1–7 (same).

86. At least in Texas, this raises the further question of whether such a firing by the client should be deemed to be for "good cause" such that the original

If the tort lawyer does cooperate with the client's efforts to obtain LTPF, the lawyer has been found to have various related ethical obligations. The most basic would seem to be the obligations imposed by the relevant state equivalents to ABA Model Rule 2.1 to "exercise independent professional judgment and render candid advice."[87] Other obligations have been found to include: advising the client of the potential costs and benefits of such financing as well as possible alternatives; obtaining the client's informed consent before sharing privileged information with a financing company, including explaining the potential for waiver of privilege and the consequences that could have for the client's case; disclosing no more information to the funder than the lawyer deems necessary; and ensuring that the funder's contract with the client does not seek to dictate the course or strategy of the litigation.[88]

At the back end of the LTPF process, the consumer's lawyer may also have a potential role to play. At present, there is no obligation for an attorney to advocate for the client in connection with the client's dealings with a funder, unless the attorney-client retainer agreement specifies otherwise.[89] We have seen, however, that a significant

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contingent-fee agreement is not enforceable against the client. *See* Mandell & Wright v. Thomas, 441 S.W.2d 841, 847 (Tex. 1969) ("In Texas, when the client, without good cause, discharges an attorney before he has completed his work, the [contingent fee] attorney may recover on the contract for the amount of his compensation.").

87. MODEL RULES OF PROF'L. CONDUCT r. 2.1 (AM. BAR ASS'N 2020).

88. New York City Bar Ass'n, Formal Op. 2011-12, 1, 4, 6–7 (2011). An Ohio statute explicitly imposes additional obligations on attorneys. *See* Ohio Sup. Ct. Bd. Of Comm'rs on Grievances & Discipline, Op. 2012-3, 8 (2012) (noting that an Ohio statute, R.C. 1349.55, "requires a written acknowledgment by the lawyer stating that he or she has reviewed the contract and determined that all costs and fees have been disclosed [to the funding client] including the annualized rate of return," and concluding that "[g]iven this acknowledgment and the lawyer's ethical duties to advise and communicate, the contract review must incorporate a frank discussion with the client about the contract terms and the true cost of the advance.").

89. *See* Francis v. Mirman, 29993/10, NYLJ 1202583703771 (N.Y., Jan. 3, 2013), https://www.law.com/newyorklawjournal/almID/1202583703771/Francis-v-Mirman-2999310/. In *Francis*, the New York Supreme Court held that "[a] review of the retainer agreement utilized by the defendants [lawyers] for their representation of the plaintiff in the underlying personal injury action reveals that, although it fails to address loans from third parties, it is clearly confined to representation of the plaintiff for injuries sustained as a result of an accident that occurred on September 1, 2007." In light of that fact, the Court went on to hold that "[t]he fact that the defendants signed off on the loan agreement contracts . . . constitutes nothing more than an acknowledgment by the defendants that the loan company was holding a lien against the proceeds of the plaintiff's underlying personal injury action, and it was

proportion of consumers who receive LTPF do not pay the funder the full amount due at the end of the funding period. One might reasonably expect that the consumer's tort lawyer plays a role in negotiating the haircut that these consumers receive. As discussed above, in some instances, the client who has received a LTPF advance may decline to accept a settlement offer because the client may receive a smaller-than-she-hoped portion of the gross recovery after she pays attorneys' fees, litigation costs, the LTPF amount due, and any medical liens. In these situations, the lawyer is likely eager to negotiate a haircut of the amount due the client's funder in order to make the settlement offer more attractive to the client. After all, both the contingent-fee lawyer and the funder receive nothing unless and until the client's case is resolved. This situation, however, does not seem to present any conflict between the interests of the lawyer and the client.

But does the known willingness of funders to negotiate haircuts create an obligation on the attorney to attempt to obtain a haircut for each of her clients, regardless of the narrower obligations created by the attorney-client contract? At present, no court or state bar has held such an obligation to exist.[90] However, one wonders if an attorney

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not an agreement to represent the plaintiff for any purposes in connection with the loan agreements that the plaintiff entered into with non-party funding companies."

90. Avraham and Sebok have suggested that such an obligation might exist. Avraham & Sebok, *supra* note 7, at 1177–78. They derive the obligation in part from the lawyer's fiduciary obligations regarding the handling of the client's settlement proceeds and in part from Rule 5.7 regarding "law-related" services. They contend that "[t]he 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 obligated 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)." They go on to contend that:

> 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 they typical client would "fail[] to understand that the services [securing hair cuts] may not carry with [it] the protections normally afforded as part of the client-lawyer relationship." We think this condition is *potentially* satisfied when the lawyer negotiates on behalf of any client with a funder. 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.

might be determined to have breached a fiduciary obligation to a client with LTPF if she does not try to negotiate a haircut for that client, particularly if she has ever done so for another client. And, given the discussion above, it seems likely that many plaintiffs' attorneys will have attempted to negotiate a haircut for at least one previous client.

The ethical obligations of the attorney are even more complicated if the client with an LTPF advance is receiving her settlement offer as part of the aggregate settlement of a mass tort. As with an individual representation, no court or state bar has yet held the attorney to have an obligation to negotiate a haircut with the funder on behalf of a mass tort client. If the attorney chooses to do so for a client, however, she faces two potential issues. First, if multiple clients in a settlement group have obtained LTPF, does the attorney have an ethical obligation to attempt to negotiate a haircut for each of these clients, whether or not they ask her to do so, if she attempts to negotiate a haircut for any one of them? No state bar ethics rule or opinion currently requires an attorney to take such an all-or-nothing approach. But it seems possible that an attorney might be found to have breached a fiduciary obligation to a client with LTPF if she does not try to negotiate a haircut for that client, particularly if she does so for any other clients in the same group settlement. On this issue, an attorney might do well to include in her attorney–client retainer agreement a statement along these lines:

> The Client acknowledges and agrees that: (a) the Attorney will have no obligation to assist the Client in obtaining, or negotiating the resolution of, any pre- or post-settlement advances the Client might obtain, or seek to obtain, from funders during the representation; and (b) the Attorney nonetheless may ultimately assist other clients in doing so.[91]

Avraham & Sebok, *supra* note 7, at 1177–78.

91. Avraham and Sebok suggest that the "pattern of haircut negotiations uncovered in [their] study indicates a conflict of interest with regard to both other clients and the lawyer." Avraham & Sebok, *supra* note 7, at 1178. at 1178. They state that "[i]f 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." *Id.* In the present study, we found no evidence that the decision by the lawyer to secure a haircut for one client adversely affected the lawyer's ability to obtain a haircut for a different client. To be sure, many clients received no haircut and repaid the Funder the full amount due. And the attorneys for some of those clients might have attempted unsuccessfully to obtain a haircut for the client. But our data suggest that the major determinant of whether a funding client received a haircut—and likely also whether the client's lawyer sought to negotiate a

Second, the mandatory disclosure documents provided by the lawyers to the relevant clients in connection with the mass tort settlement will include a statement regarding the attorneys' fees to be charged to all of the clients eligible to participate in the settlement.[92] That disclosure regarding attorneys' fees will typically state that all of the clients eligible to participate in the group settlement will be charged the attorneys' fees specified in their attorney–client contract.[93] If the attorney ultimately negotiates on behalf of a client a haircut with a funder that also includes a reduction of the attorney's own fees, that initial disclosure to all the clients in the settlement group is no longer accurate. This problem does not arise if the attorney's "haircut" negotiations with the funder on the client's behalf do not include any reduction in the attorney's contractual fees.

VI. CONCLUSION

Consumer-litigant third-party funding is an increasingly popular and controversial part of American litigation. As is true for many other financial services, a consumer can now easily apply online for an advance from LTPF companies (and even have the companies bid on one's case[94]). Policy makers, scholars, attorneys, and the media all express concern about the potentially predatory nature of LTPF, and some have advocated for more regulation. But the absence of facts about the consumer LTPF industry has hampered meaningful reform. This Article takes an important first step toward truly informed reform by being the first to provide and analyze large-scale data on the fastest growing sector of consumer LTPF: funding for individuals with mass tort claims.

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haircut—is whether the client could credibly threaten to decline her settlement offer if the amount due the Funder was not reduced.

92. *See, e.g.*, Lynn A. Baker, *Aggregate Settlements and Attorney Liability: The Evolving Landscape*, 44 HOFSTRA L. REV. 291, 293-98, 312-15 (2015) (discussing the "aggregate settlement" disclosures mandated by ABA Model Rule 1.8(g) and ABA Formal Ethics Opinion 06-438); Baker, *supra* note 14, at 310–15.

93. This disclosure regarding fees might state either that "all clients will be charged fees of xx% of their gross settlement amount" or that "all clients will be charged the attorneys' fees specified in their attorney-client contract."

94. *See, e.g.*, *Platform*, CERAMIC, https://ceramicgroup.com/services/#platform (last visited May 18, 2021) (providing application for litigation funding). One can also invest money in the legal claims of others with just a mouse click. *See e.g.*, *A new way to diversify your portfolio*, LEXSHARES, https://www.lexshares.com/invest (last visited May 18, 2021).

Our findings cause us to recommend that no restrictions be directly imposed on the availability or cost to consumers of either of the categories of LTPF we studied. Rather, we recommend that existing market competition be enhanced through the adoption of laws that would ensure greater simplicity, transparency, and consistency across funders with regard to the pre-funding disclosures made to all LTPF clients. We also propose enhancing competition in the LTPF market by removing the prohibitions that most states' Rules of Professional Responsibility currently impose on lawyers' ability to provide financial assistance to their clients.

The dataset that informs our recommendations is large and comprehensive, involving 225,593 requests for funding over 16 years. That these data are from a single funder should not diminish the importance of our findings or the validity of our proposals for reform. An examination of the handful of contracts from various funders that were made public during the NFL concussion litigation suggests that our Funder's terms and practices are substantially representative of those in the larger industry.[95] In addition, having comprehensive data from a single funder is an important initial step in understanding how this growing, but highly secretive, industry operates so that any proposed reforms can be based on facts rather than anecdotes or good intentions.

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95. *See Co-Lead Class Counsel's Reply Memorandum*, *supra* note 39, at 4–5 & n.4 (summarizing the terms of the contracts that four class members entered into with four different funders for advances on the NFL class settlement payments and noting that a fifth funder's "terms and actual agreements are already part of the record before the Court"). Among the many respects in which those contracts appear to be consistent with the findings discussed in this Article are: the complexity of the funding terms, including the use of interest compounded monthly; the use of minimum interest periods and interest buckets; the charging of substantial "fees" of 13.6% to 18% in addition to claimed effective annual interest rates of 39% to 58%; and the complexity of the funding contracts, which make it difficult for a client to understand the actual amount due at various points in time or the true, effective annual interest rate being charged.

The one significant respect in which our Funder appears to be unique is in its charging of Fixed Amount interest in post-settlement fundings. *See* Avraham, Baker & Sebok, *supra* note 7. This form of interest was not seen in any of the funding contracts made available in the NFL concussion litigation, each of which was arguably post-settlement in that it was entered into after the District Court formally approved the proposed settlement (which had been filed with the court on Feb. 13, 2015) and entered its Amended Final Order and Judgment, *In re* NFL Players' Concussion Injury Litig., MDL No. 2323, 2015 WL 12827803 (E.D. Pa., May 8, 2015).