
ESSAY

PROBATE LENDING: DATA FROM SAN FRANCISCO

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Recently, “probate lenders” have started to advance cash to heirs and beneficiaries in return for part of their interest in a pending decedent’s estate. This Essay advances our understanding of this phenomenon by analyzing an original dataset of 1,119 probate matters from San Francisco. Capitalizing on a California statute that requires probate lenders to file their contracts in the court record, the Essay offers insights about the contours of the industry, why people borrow against their inheritances, and the fairness of these transactions. The Essay concludes that probate lending raises serious consumer protection concerns.

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INTRODUCTION

Suppose your grandfather dies and leaves you \$10,000 in his will. Before you can receive your inheritance, your grandfather’s property needs to go through probate. This court-supervised process is notoriously slow: indeed,

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studies find that even uncomplicated probate matters can take more than a year.¹ Thus, no matter whether you have urgent financial needs or you are merely impatient, you have to wait.

Recently, a little-noticed industry has emerged that allows heirs and beneficiaries to cash in early. Companies called “probate lenders” have started to advance money to borrowers in exchange for an assignment of part of their interest in a pending estate. For example, a probate lender might pay you \$5,000 for the right to collect \$7,500 of your inheritance when your grandfather’s probate case ends.

Probate lending tries to exploit a gaping loophole in consumer protection law. In most jurisdictions, usury statutes limit the annual interest rate (APR) that lenders can charge at roughly 10%.² However, usury statutes only apply to “loans,” which are advances that impose “an absolute obligation to repay the principal.”³ Thus, usury statutes do not apply if the creditor’s recovery hinges “upon [a] bona fide contingency.”⁴ Probate lenders have staked their entire business model on the premise that their products are not “loans.” Their transactions are non-recourse: if the heir or beneficiary recovers nothing at the end of the probate process, the lender also recovers nothing. In turn, because these businesses have no guarantee of recouping the money they advance, they assert that they do not make “loans” and are exempt from usury statutes.

This short Essay challenges this foundational assumption. It reports the results of a study of 1,119 probate matters that were filed in San Francisco County, California between 2014 and 2016. Lawmakers in the Golden State have enacted a unique statute, Probate Code § 11604.5, which requires probate lenders to file their contracts with heirs and beneficiaries in the probate court record.⁵ Thus, our dataset includes 143 probate loans and a wealth of information that would normally be private, such as these transactions’ repayment rates and effective APRs.

¹ See David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 648 (2015) (noting that the median case length for probate in Alameda County was 436 days, regardless of whether the estate was small or large).

² See CAL. CONST. art. XV, § 1(1) (capping the annual interest rate for loans at 10%); OKLA. CONST. art. XIV, § 2 (noting that no loan can have an annual interest rate higher than 10%); cf. 815 ILL. COMP. STAT. 205/4(1) (2008) (capping the general interest rate in written contracts at 9%).

³ *MacDonald v. Cashcall, Inc.*, 333 F.R.D. 331, 349 (D.N.J. 2019).

⁴ *Equity Serv. Corp. v. Agull*, 293 N.Y.S. 872, 875 (App. Div. 1937).

⁵ See CAL. PROB. CODE § 11604.5(d)(1) (West 2020) (“The executed written agreement is filed with the court not later than 30 days following the date of its execution or, if administration of the decedent’s estate has not commenced, then within 30 days of issuance of the letters of administration or letters testamentary, but in no event later than 15 days prior to the hearing on the petition for final distribution.”).

Building on work that one of us has previously published,⁶ we demonstrate that probate lending is usury incarnate. For one, even if probate loans are “contingently repayable” on paper, they are “absolutely repayable” in reality. Indeed, subject to minor caveats that we explore below, the lenders in our dataset recouped both the full amount of their advance *and* their additional fees on 143 out of 143 loans (100%). Moreover, the APRs on these transactions are astronomical, averaging 127%. Thus, we urge policymakers and courts to tighten the reins on this nascent industry.

The Essay contains three Parts. Part I provides background on probate lending. It sketches the history of the phenomenon and explains why it has become divisive. Part II reports our empirical results and Part III uses them to inform the debate over whether and how to regulate the inheritance-purchasing business.

I. PROBATE LENDING

Probate lending began in the 1990s when Inheritance Funding Company (IFC) opened its doors in San Francisco.⁷ IFC sought to capitalize on probate’s reputation for being “slow-as-molasses.”⁸ It advertised in newspapers and on the internet, offering to pay cash in exchange for an assignment of part of an expected inheritance.⁹ For example, IFC might advance a customer \$10,000 in return for \$15,000 payable whenever the probate court ordered final distribution of the estate. By the early 2000s, IFC was making roughly 500 loans and earning \$5 million in revenue each year.¹⁰ Soon copycat firms like Advance-Direct.com, Heir Buyout Company, and Inheritance Now were also buying stakes in pending probate matters.¹¹

These probate lenders were part of the “fringe” finance revolution. Near the end of the twentieth century, Americans began to borrow in record numbers. Household debt swelled from about \$650 billion in the late 1970s to

⁶ David Horton & Andrea Cann Chandrasekher, *Probate Lending*, 126 YALE L.J. 102 (2016); David Horton, *Borrowing in the Shadow of Death: Another Look at Probate Lending*, 59 WM. & MARY L. REV. 2447 (2018).

⁷ *About Us*, INHERITANCE FUNDING, <https://www.inheritancefunding.com/about-us>; Brigid McMenamin, *For Impatient Heirs*, FORBES (Aug. 7, 2000, 12:00 AM), <https://www.forbes.com/forbes/2000/0807/6604110a.html>.

⁸ McMenamin, *supra* note 7.

⁹ *See id.* (describing the process of heirs-in-waiting assigning IFC a portion of their expected inheritance for immediate cash).

¹⁰ David Lazarus, *Probate No Time for Preying*, S.F. GATE (Oct. 13, 2004, 4:00 AM), <http://www.sfgate.com/business/article/Probate-no-time-for-preying-2717738.php>.

¹¹ *Id.*; McMenamin, *supra* note 7.

\$5.6 trillion in 1998.¹² Although much of this activity involved established products like mortgages and credit cards, entrepreneurs also developed a range of “alternative” financial vehicles, such as payday loans, pension loans, auto-title loans, and tax refund anticipation loans. These devices are notorious for their high APRs. Fringe financiers argue, however, that they allow people who are shut out of traditional lending markets to bridge financial gaps and obtain funds in emergencies.¹³ Echoing this talking point, probate lenders sought to justify their services as necessary “to help people in desperate need.”¹⁴

Probate lenders also were inspired by the success of third-party litigation funders. In the 1990s, banks, hedge funds, and private equity firms started paying cash to plaintiffs with civil claims in return for a share of any future damages or settlement.¹⁵ This arrangement allowed firms to charge APRs that exceed the maximum specified in the usury statutes. As noted above, “[t]o be considered a usurious loan, [a borrower’s] repayment obligation must have been absolute, and not contingent.”¹⁶ Because litigation funders forfeit their investment if the plaintiff loses, they do not make “loans.” Like these companies, probate lenders take pains to make their advances to heirs and beneficiaries non-recourse. Indeed, their contracts expressly declare that even if creditors or mismanagement drain the estate, they “will not seek to recover any unpaid portion of the assigned amount from [the borrower] personally.”¹⁷

In 2006, a series of unflattering newspaper articles about inheritance-buying firms prompted the California legislature to pass the “first-of-its-kind attempt to regulate the probate purchase industry.”¹⁸ This legislation, which became Probate Code section 11604.5, requires lenders to file their assignments in the judicial record shortly after they are signed.¹⁹ In addition, it gives probate courts the power to invalidate or modify these contracts if

¹² Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today’s Society*, 51 S.C. L. REV. 589, 591-92 (2000).

¹³ See, e.g., Michael Kenneth, *Payday Lending: Can “Reputable” Banks End Cycles of Debt?*, 42 U.S.F. L. REV. 659, 665 (2008) (“The payday lending industry portrays its product as a ‘financial taxi’ that ushers its users though [sic] a rough financial stretch by providing immediate cash.”).

¹⁴ McMenamain, *supra* note 7.

¹⁵ See Joanna M. Shepherd & Judd E. Stone II, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919, 920 (2015).

¹⁶ *Hamadi Al Tamimi v. Burr*, No. MICV2015-03164, 2018 WL 9963869, at *7 (Mass. Super. Ct. Mar. 26, 2018).

¹⁷ Assignment of Beneficial Interest in Decedent’s Estate; Declaration of Compliance: Proof of Service at 2, *In re Diles*, No. PES-15-298980 (Cal. Super. Ct. Mar. 17, 2016).

¹⁸ S. Judiciary Comm. Bill Analysis, S.B. 390, at 4 (Cal. 2005).

¹⁹ CAL. PROB. CODE § 11604.5(d) (West 2020).

“[t]he fees, charges, or consideration paid or agreed to be paid by the [heir or] beneficiary [a]re grossly unreasonable.”²⁰

A decade later, one of us capitalized on section 11604.5 to write two articles about the inheritance-purchasing industry: *Probate Lending* and *Borrowing in the Shadow of Death (Borrowing in the Shadow)*.²¹ Collectively, the papers analyzed 291 loans from probate court in Alameda County California in the late 2000s. They discovered that probate lending seemed to be both lucrative and expanding rapidly. Over the twenty-two-month research period, companies collected \$4,963,897 in return for \$3,033,400, implying that there is a multi-million-dollar market for inheritance rights.²² In addition, competition appeared to be ramping up. For example, *Probate Lending*, which was based on estates stemming from deaths in 2007, discovered six lenders, but *Borrowing in the Shadow*, which included cases from 2008 to 2010, unearthed ten companies.²³

In addition, *Probate Lending* and *Borrowing in the Shadow* determined that probate lenders routinely violate the usury laws. For one, the articles claimed that firms faced no legitimate risk of coming away empty-handed. Indeed, they recovered both the full amount of their advances *and* their additional fees in 97.5% of cases.²⁴ Accordingly, their advances are “absolutely repayable” and thus “loans.” Furthermore, 99% of these loans resulted in APRs that topped California’s usury ceiling of 10%.²⁵ In fact, more than a third had APRs above 100%, and a fifth were north of 200%.²⁶

Since the articles appeared, probate lenders and their allies have pushed back. First, they have amplified their claims that probate lending is valuable for heirs and beneficiaries “who have pressing financial needs,” like “debts, foreclosure, [and] rent payments.”²⁷ As probate lenders see it, there is

²⁰ *Id.* § 11604.5(h).

²¹ Horton & Chandrasekher, *supra* note 6; Horton, *supra* note 6.

²² Horton, *supra* note 6, at 2479.

²³ *Id.* at 2482.

²⁴ See Horton & Chandrasekher, *supra* note 6, at 143 (finding that lenders recovered the full amount of the principal and interest on seventy-four out of seventy-seven assignments); Horton, *supra* note 6, at 2488 (expanding *Probate Lending*’s dataset to include an additional twenty-two months of court files and concluding that lenders received the entire sum due on 278 out of 285 contracts).

²⁵ Horton & Chandrasekher, *supra* note 6, at 144-45; Horton, *supra* note 6, at 2488-89.

²⁶ See Horton & Chandrasekher, *supra* note 6, at 144-45 (noting that 45% of loans had rates that exceeded 100%); Horton, *supra* note 6, at 2488-89 (finding that 18.9% of probate loans featured rates surpassing 200%).

²⁷ Steven D. Schroeder, *Probate Funding: A Useful Option for So Many*, LITIG. FIN. J. (June 26, 2018), <https://litigationfinancejournal.com/probate-funding-useful-option-many>.

nothing predatory about catering to people who want to pay a premium for early access to their inheritance:

Whether the purpose of the funds is to prevent foreclosure, pay rent, pay medical bills, pay household debts or pay for continuing education, it makes simple economic sense that individuals would choose to minimize their risks by obtaining an advance now by assigning a fraction of their future and undetermined interest in an estate, rather than waiting for months or years to receive a distribution.²⁸

Second, probate lenders and their supporters in the legal academy vigorously insist that assignments of inheritance rights are not “loans.” For instance, in a critique of *Probate Lending*, Jeremy Kidd argues that the messiness of the probate system makes it unlikely that lenders routinely recoup their investment:

There are many reasons to believe the probate funding process is subject to significant uncertainties [A]n heir might receive little to nothing because the probate process drains the estate. Other contingencies that could lead to an heir’s not receiving the expected inheritance include unforeseen bills that the estate must pay or even the discovery of an unknown will that disinherits an heir that received funding. All of these possibilities reflect the reality that our legal system—even our probate system—is not merely a mechanistic process.²⁹

According to Kidd, “probate lenders” is a misnomer, and a more accurate name for these businesses would be “probate *funders*.”³⁰

To conclude, in the last few years, probate lending has emerged from obscurity to become a matter of heated discussion. In the next Part, we use an empirical study of more than a thousand probate cases to contribute to this discourse.

II. DATA FROM SAN FRANCISCO

This Part reports the results of our empirical study of probate lending. It first details our research methodology and then discusses our findings.

²⁸ *Id.*

²⁹ Jeremy Kidd, *Clarifying the “Probate Lending” Debate: A Response to Professors Horton and Chandrasekher*, 93 NOTRE DAME L. REV. ONLINE 149, 151 (2018) (footnote omitted).

³⁰ *See id.* at 150, 152 (emphasis added) (noting that “probate lender” is biased, and that a more neutral term should have been selected); Jeremy Kidd, *Probate Funding and the Litigation Funding Debate*, 76 WASH. & LEE L. REV. 261, 283 (2019) (“[P]robate . . . funding [contracts] are not carefully disguised loans but something else.”).

A. Data Collection

We gathered our data from the San Francisco Superior Court’s website. Using the “search by date” function, research assistants collected every matter that appeared on the probate calendar between January 1, 2014 and December 31, 2016.³¹ This resulted in a universe of 1,349 testate and intestate administrations. We then dropped 230 matters that involved “pour over” wills. Pour over wills leave property to a trust, rather than to specific people. Because there is no individual heir or beneficiary who can borrow, pour over wills are almost certain not to contain probate loans. That adjustment left us with 1,119 estates: 676 intestacies (60%) and 443 testacies (40%).

We then created two datasets. One dataset contained about thirty variables from all of the probate administrations, including when the case opened and closed, whether the decedent made a will or died intestate, the estate’s value, and whether litigation erupted. The other dataset zoomed in on the estates that contained loans. From these lending-specific cases, we noted factors such the borrower’s state of residence, the relationship between the borrower and the decedent, the date and amount of the loan, and if and when repayment occurred. Finally, we calculated the effective APR on each transaction. We did so by using the following formula, where A is the sum received by the lender, B is the advance received by the borrower, and C is days between the loan and repayment:

$$\frac{\left(\frac{A-B}{C}\right) \times 365}{B}$$

To illustrate, suppose a borrower received \$20,000 and the company pocketed \$30,000 when the case closed 400 days later. We took raw markup (\$30,000 – \$20,000 = \$10,000), divided it by the number of days until repayment (400), which equals the daily amount of interest (here, \$25). Multiplying that by 365 gives the raw yearly markup (\$9,125). Finally, dividing that result by the amount of the advance expresses it as a percentage of the original loan (here, 9,125/20,000 = 0.46, or 46%).

³¹ See *Case Calendar*, THE SUPER. CT. OF SAN FRANCISCO, <https://webapps.sftc.org/cc/CaseCalendar.dll?=&SessionID=234265FB7A045EF3B4DD02F420AB8711094F2C46> (showing the San Francisco Superior Court website search page). We have also used this dataset to examine the phenomenon of “heir hunting”: companies that track down a decedent’s relatives and offer to inform them of their inheritance rights in return for a share of the estate. See generally David Horton & Reid Kress Weisbord, *Heir Hunting*, 169 U. PA. L. REV. 383 (2021).

B. General Results

Thirty-seven of 1,119 probate matters (3.3%) contained loans. However, 23 of these estates (62%) contained multiple assignments. Thus, the total number of loans in our data is much higher: 143.

Overall, lenders advanced \$1,969,000 (an average of \$13,769 per loan) and pocketed \$2,966,347 (an average of \$21,188 per loan). Because the mean number of days between the contract and repayment was only 293, the collective APR on these transactions was 63%.

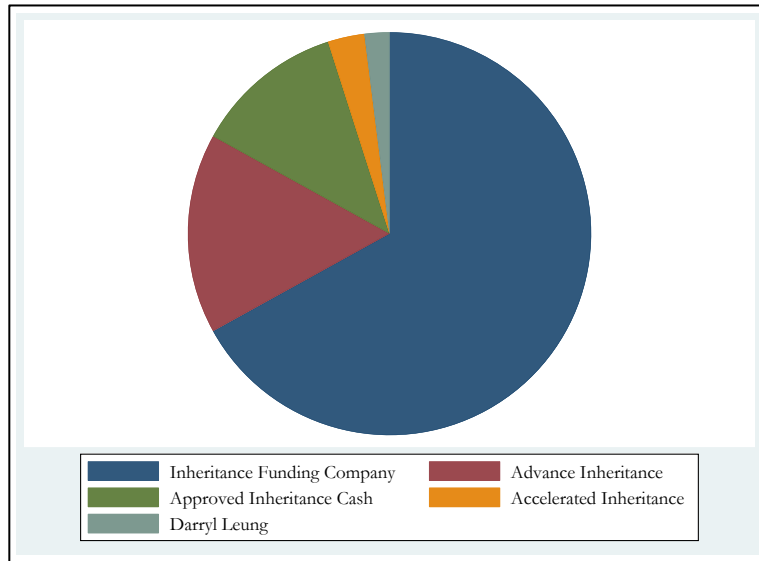
Table 1: Probate Lending Descriptive Statistics

	Mean (Standard Deviation)	Median	Min	Max	N
Amount Borrower Received	\$13,769 (\$16,775)	\$10,000	\$2,000	\$100,000	143
Amount Company Received	\$21,188 (\$23,134)	\$15,700	\$3,500	\$155,300	140
Days from Loan Until Estate Closing	293 (198)	244	27	1098	140

Note: In one estate with three loans, lenders took a lien on real property instead of a cash distribution. Because we do not know when the companies were able to collect their share—which will occur when the land is sold—we excluded them from our repayment data.

IFC—which, as noted, pioneered probate lending—continues to dominate the industry. It issued 96 of the 143 loans (67%) in the San Francisco files. Other probate lenders include Approved Inheritance Cash (19 loans, 13%), Advance Inheritance (18 loans, 13%), Accelerated Inheritance (7 loans, 5%), Inheritance Loan Company (2 loans, 1%) and an individual named Darryl Leung (1 loan, <1%).

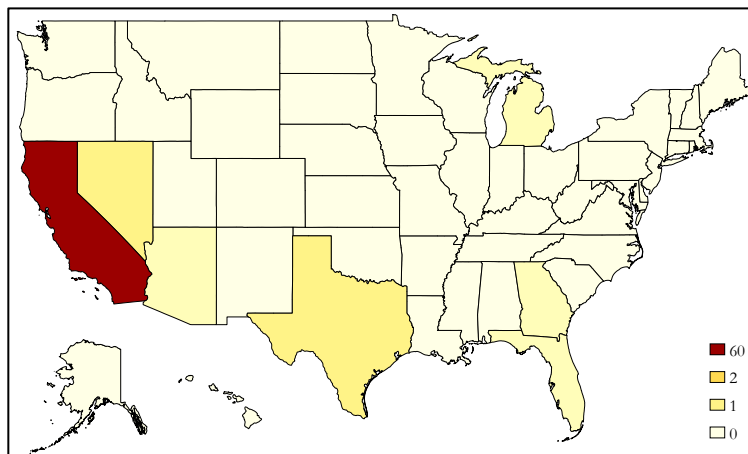
Figure 1: Market Share by Dollars Recovered



A few facts leap out about the borrowers in our data. First, many heirs and beneficiaries take out multiple loans. In fact, the 143 assignments in the San Francisco files stem from just 69 individuals.

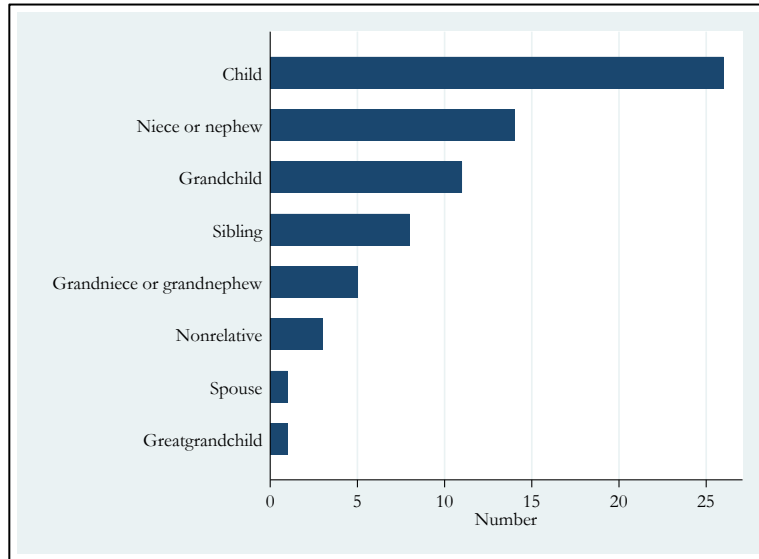
Second, these people were overwhelmingly from California. Indeed, sixty (87%) hailed from the Golden State. Other represented jurisdictions included Nevada and Texas (2 each, 3%), and Arizona, Florida, Georgia, Michigan, and the Philippines (each 1, 1%).

Figure 2: Borrowers' Residences (U.S. Only)



Third, borrowers' relationship to the decedent varied widely. Twenty-six (38%) were children, fourteen (20%) were nieces or nephews, eleven (16%) were grandchildren, eight (12%) were siblings, five (7%) were grandnieces or grandnephews, three (4%) were not related, and one (1%) was either a spouse or greatgrandchild.

Figure 3: Relationship Between Borrower and Decedent



III. POLICY IMPLICATIONS

This Part relates our data to the probate lending controversy. It begins by explaining that it is unclear whether probate lending is socially beneficial. It then argues that probate loans are indeed “loans” that violate the usury statutes on an epic scale.

A. *Why People Borrow*

One of the most important questions about probate lending is *why* heirs and beneficiaries sell their inheritances for pennies on the dollar. Arguably, probate lenders tempt heirs and beneficiaries to act against their long-term self-interest with the allure of instant cash. However, probate lenders claim that

their clients are rational people who are frustrated with the probate process.³² As this section explains, our data render a mixed verdict on this theory.

At first blush, we unearthed some evidence that complications during probate spur people to sell their inheritance rights. Table 2 conducts a simple bivariate comparison of estates with loans to cases where no borrowing occurred. It reveals that the mean length of matters with loans (637) is longer than those without loans (538) by a statistically significant margin ($p = 0.018$). Likewise, 32% of estates with loans devolved into litigation, whereas the rate of disputes in other cases is only 12% ($p = 0.000$). The common thread here is that heirs and beneficiaries borrow when the probate process goes off the rails.

Table 2: Estate Characteristics

	Estates With Loans	Estates Without Loans
Intestacy	65%	60%
Average Case Length (Days)	637*	538
Average Estate Value	\$1,112,267	\$1,267,519
Estate Contains Land	43%	45%
Litigation	32%***	12%
Decedent Married	3%	14%
Creditor's Claim Asserted by Bank	22%	11%
Other Creditor's Claim Asserted	24%	21%
Total	37	1,082

Notes:

1) Some cases are missing variables.

2) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

However, the picture clouds slightly when we perform a linear probability regression analysis. Only two variables exert a statistically relevant effect on the likelihood that an estate will contain a probate loan. First, the fact that the decedent was married at death is linked to a four percentage-point decrease in the likelihood of a loan ($p = 0.001$). This could be because surviving spouses, who likely inherit the bulk of the estate, are either (1) more

³² See Kidd, *supra* note 30, at 269 (claiming that because probate can drag on for months, it only makes sense “that individuals choose to mitigate their risks and satisfy their time preference”).

financially stable than other heirs or beneficiaries or (2) emotionally averse to selling their former husband or wife's assets at a steep discount. Second, litigation is correlated with a ten percentage-point increase in the probability of a loan ($p = 0.009$). Again, this indicates that the decision to enter into a loan might stem from impatience with a slow-moving and contentious probate administration.

Table 3: Correlates of Probate Loans Linear Probability Model
(Robust Standard Errors in Parentheses)

Intestacy	0.01 (0.01)
Case Length (Days)	0.00 (0.00)
Estate Value	-0.00 (0.00)
Estate Contains Land	0.00 (0.01)
Litigation	0.10** (0.04)
Decedent Married	-0.04** (0.01)
Creditor's Claim by Bank	0.03 (0.03)
Other Creditor's Claim	0.00 (0.02)
Constant	0.01 (0.02)
<i>N</i>	878
adj. R^2	0.03

Notes:

1) * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

2) The regression sample is smaller than the overall sample because some cases are missing data.

Nevertheless, some borrowers also do not seem to act rationally. For example, fourteen loans (10%) occurred within the first month of the probate matter. These heirs and beneficiaries rushed headlong into the transaction before any unexpected event could have bogged down the case. Likewise, seventeen people entered into successive loans less than one month apart. This also seems impulsive rather than the product of a clear-eyed cost-benefit calculation.

In sum, there are glimmers that both sides in the probate lending debate may be correct about borrowers' motivations. Although some use loans as a shortcut to the meandering path of probate, others may be acting rashly.

B. “Loans”

The multi-million-dollar question is whether probate lending is usurious. This section explains why our data strongly suggests that it is.

As noted, usury statutes do not apply where the creditor’s recovery depends on future events. However, as the Restatement (First) of Contracts explains, “[i]f the probability of the occurrence of the contingency . . . is remote, . . . the transaction is presumably usurious.”³³

We find that probate lenders are virtually guaranteed to recoup their advances. One hundred and thirty-seven of 143 loans (96%) were fully repaid. Yet probate lenders also profited handsomely on the remaining six loans. On three loans (2%), a company collected all the principal and just \$384 less than the prescribed amount of interest, taking home a total of \$14,116 rather than \$14,500. Finally, in one matter that also featured three loans (2%), lenders accepted a lien on the decedent’s real property for the full value of their interests, rather than cash. Thus, no probate lender suffered a loss or merely broke even.

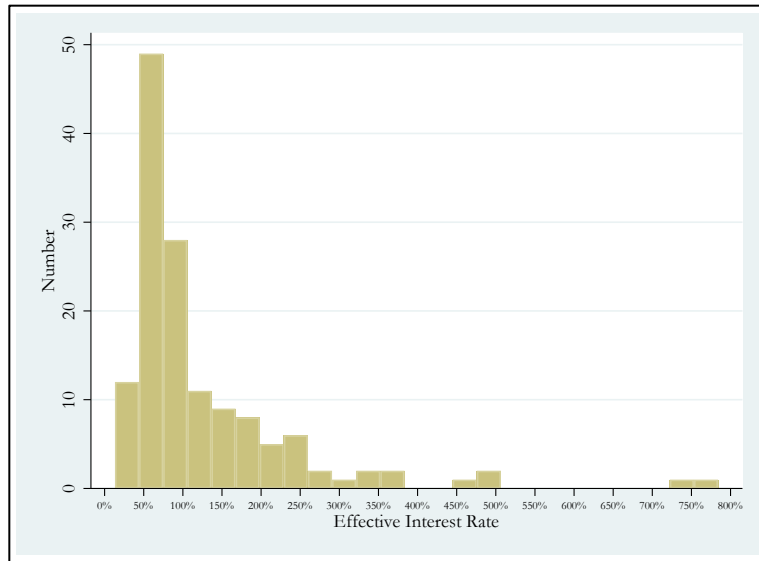
Table 4: Repayment Rates (All 143 Loans)

	N	Percent
Fully Repaid (Principal Plus Interest)	137	96%
Partially Repaid (Lender Gain)	3	2%
Repaid Through Lien on Real Property	3	2%
Total	143	100%

Finally, the APRs in our dataset are remarkable. Even the lowest APR, 13%, exceeds California’s usury limit of 10%. In fact, 119 loans (86%) have APRs above 50%, 56 (40%) clock in at more than 100%, and 23 (17%) top 200%. As a result, the average APR across all loans is 127%, with a median of 78%. Accordingly, probate lenders do not merely violate the usury statutes; rather, they smash the usury statutes to smithereens.

³³ RESTATEMENT (FIRST) OF CONTRACTS § 527 cmt. a (AM. L. INST. 1932).

Figure 3: APRs



CONCLUSION

Probate lending is the newest and least-understood form of fringe finance. This Essay has provided empirical evidence about the prevalence, terms, and timing of sales of inheritance rights. Its marquee finding is that these transactions are both subject to usury statutes and regularly violate them. Probate lenders should either lower their APRs or policymakers and courts should force them to.