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Panel 2: Types of Litigation Funding

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PANEL 2: TYPES OF LITIGATION FUNDING

2015 CONFERENCE: LITIGATION FUNDING:
THE BASICS & BEYOND
NEW YORK UNIVERSITY SCHOOL OF LAW
FRIDAY, NOVEMBER 20, 2015

MODERATOR: *Geoffrey Miller*

PANELISTS: *Maya Steinitz, Joshua Schwadron, Bradley Wendel,
Michael Faure, Jef De Mot, Travis Lenkner*

MR. PETER ZIMROTH: Our second panel is moderated by Geoff Miller, who is sitting here on my right. Geoff is the Stuyvesant P. Comfort Professor of Law here at the NYU Law School, and one of the faculty co-directors of the Center on Civil Justice. I'll turn the mic over to Geoff.

MR. GEOFFREY MILLER: Well, it's a total pleasure to be here. I've got to say, I've been to many academic conferences, but this is really one of the most exciting I've ever been to, and it's for two reasons. One is that the topic, as you can see from the first panel, is truly cutting edge. Most of the conferences I go to, the edge has been cut, and has been cut a very long time ago. But this is truly cutting edge stuff. And the second is, most academic conferences, it's a bunch of academics talking to each other, which is great. But here we have people in the industry, people are actually working in the area, talking with themselves and with academics.

So, it's a true chance for dialogue, which I think is incredibly valuable. And we academics actually have more to learn from people in the industry, in my opinion, than they have to learn from us, but it's hopefully a process where we'll learn from each other.

The first panel was a terrific, wonderful, great introduction to the topic. So, today, this panel, we're going to try to deepen a little bit the discussion along the same lines.

We're going to have the same structure that Selwyn put down, which is eight minutes per speaker, and then hopefully we'll have a chance for the speakers both to comment on each other and for everyone here to comment. The bios, by the way, of everybody are available outside, so I'm not going to introduce everybody. You can read them, they're an incredibly distinguished group, but just look at them.

And our first speaker, we've changed the order a little bit, but our first speaker is Jef de Mot, and he has a paper with Michael Faure. Michael's not here, but Jef is going to start off.

MR. JEF DE MOT: Thank you very much, Geoffrey. Good morning, everybody.

So, the goal of our paper was to examine how third party financing influences the cost and the efforts in individual disputes. And we do this by focusing solely on one characteristic: the relaxation of budget constraints. The reason we are interested in this is because we felt basic intuition may be misleading. One may think when the plaintiff has more resources, he will spend more, which is obviously correct. But the question is, what is the defendant going to do?

So, when the plaintiff spends more effort, many may think that the defendant will have to follow, but we will argue that the interaction between the plaintiff's effort level and the defendant's effort level is often more complex than that. Don't be scared of this.

I'm sorry I have to put you through this, but this is a basic rent-seeking model of litigation. This is a classic model developed by Tullock, I believe, and this depicts the probability of a plaintiff victory. And it simply says the following thing: The probability that the plaintiff will win depends in the first place on the inherent quality of the case, which is here F . F is related to the level of fault of the defendant. If you take much lower than due care, then F will be very high. If you take almost due care, then F will be moderate.

But according to rent-seeking theory, the probability of a plaintiff victory also depends on the effort levels of the parties, X for the plaintiff, and Y for the defendant. And not so much on the absolute effort levels, but under relative effort levels.

When you know that the plaintiff spends \$1 million, maybe you do not know a lot, unless you know that the defendant also spends \$1 million, or \$5 million, or \$10 million. So it's the ratio between the effort levels that's important.

Once you have this, you have a simple optimization problem. What is the plaintiff trying to do? He wants to maximize the probability of winning, times the amount at stake, that's J here, minus total expenditures. And his expenditures are equal to his effort level, X .

For example, he lets his lawyer spend 500 hours on the case, times the unit costs of litigation, which could be the hourly fee of the lawyer, for example. So, for the defendant, it's exactly the same, but he tries to minimize his expected loss.

So, classic rent-seeking theory will find, from this simple formula, optimal effort levels, depending on the inherent quality of the case, depending on the amount at stake, depending on the unit costs. So, optimal effort levels, X^* and Y^* and from that, optimal expenditures, CP , so the unit costs, times XR , and the unit costs for the defendant times YXR .

What we now try to do is—what changes when the plaintiff has a budget constraint, when he's not able to spend CP times XR , when his funds are lower than that, what happens to his expenditures, and what happens to the defendant's expenditures as a reaction to the lower expenditure of the plaintiff?

So, obviously, the plaintiff has to spend less when he has no funds. And B is his budget that he has at his disposal, he would have to spend, that's obvious. But the big question is, what is the defendant going to do? And only when we know this can we know how total expenditures in individual cases are going to change with or without a third party funder.

So, here is the integration. Before I go to the graphs and the results, here is the simple intuition. We know the plaintiff with third party funding will spend more. Now, he can spend his ideal, or close to his ideal, expenditure.

But what the defendant is going to do depends on the strength of the case. And intuition is the following: When the plaintiff has a very strong case, and he was already the favorite in equilibrium. That means he had a larger than fifty percent chance to win.

Now, because of third party funding, he's going to spend even more on arguments, on evidence, so the case is moving

further away from the decision standard. It's becoming less close. It's moving further from the preponderance of the evidence standard.

So what does this mean for the defendant? Any argument now has less value for him, because the probability that it will turn the case around is smaller than before. When the case is less close, next to the argument it has just less value than before. So the defendant for a strong case is going to spend less, while the plaintiff spends more.

For a weaker claim, the situation is exactly the opposite. Once again, because of funding, the plaintiff spends more, and this means, now, the case is coming closer. The plaintiff originally had a weak case, spent more arguments, so the case is becoming closer, and the defendant has to become more watchful, because when the judge makes a small mistake, now, the plaintiff could win the case, even if it's fairly weak.

So the marginal value of an additional expenditure becomes larger, here, for the defendant. So, when we deployed our model, this is exactly what we found.

On the left side, you find the case of the strong case, F was equal to 0.7 on a scale of 0 to 1. And on the right side, you have a low case F is equal to 0.3. And what is relevant here is the dark green area on both sides. These are all the combinations of cases where total expenditures, so expenditures of plaintiffs and defendants together are lower with funding—so when there's more money available—than without funding.

So, you see two things: the dark green area is larger for strong claims, and it's especially situated where the relative unit costs of the plaintiff are fairly low.

Okay, I only have 30 seconds. Let me, then, briefly say, we asked ourselves another question. Which kind of claims are the firms interested in? Because we saw that perhaps in some cases, total expenditure may decrease, but we found that exactly for these claims, that there is interest from funders.

Strong cases with low unit costs for plaintiff relative to defendant's. And intuition is, for strong claims, plaintiff spends more, so his effort level goes up, defendant spends less. So in totality, this means that for these claims, the plaintiff's probability of victory goes up.

I'm out of time. Thank you very much.

MR. MILLER: So, although you're out of time, Jef, I just wanted to ask if you could clarify one point.

Does your research have any implications for social welfare? That is, is social welfare overall enhanced by the availability of litigation funding?

MR. DE MOT: Well, it depends, because in our model, F in the first place characterizes the strength of the case. So, I guess most of us are in favor that really strong cases are stimulated, that people get a chance to go to court and get their rights.

But there's another thing. F can also be linked to how the law already favors plaintiffs. F can be already, like, stronger or weaker standard of evidence, and when the law favors plaintiffs already, F will also be large. And so maybe it is not so interesting that a lot of funds go to these cases as well. So, there's a bit of a mix. Really strong cases will be funded, but also cases that may have survived well without funding.

MR. MILLER: Okay, thanks. Alright. So, our next speaker; Joshua, is going to tell us how we can empower plaintiffs through his business.

MR. JOSHUA SCHWADRON: Hello, everybody. Thank you, Geoff. I'll actually start by answering your question. It's undoubtedly true that some cases, some financings, enhance social welfare. And it's undoubtedly true that some financings don't. And what I'm proposing here today is a novel way of categorizing litigation finance.

Over the last three years, I have personally financed, or been involved in financing, over 1,000 cases in varying types; commercial cases, big and small; personal injury cases; patent cases. And these are the traditional ways that we categorize litigation finance. And we think of these as different from one another, but in fact, they're not. They're very similar to one another in a lot of key and important ways.

Really, the biggest difference between the categories are, what I am proposing here today, which there really should be two categories for litigation finance. There are financings that use law to make money. I call those market-driven financings. And then there are those that use money to make law more just. I call those justice-driven financings.

If we think about litigation finance in those two ways, everything else becomes much more clear. Our industry is under attack from the Chamber of Commerce. Regulators are starting to pay attention. Academics. We're having the 2nd annual conference here on this subject, and our framework is out of

whack. We compare personal injury to commercial, even though within commercial, the types of fundings vary widely.

I want to talk for a minute about what these two subcategories actually mean. Just this morning I published a paper that I'm going to circulate later today on Medium that calls for this paradigm shift, and strives to define these two new types of financing. I'll read you a small excerpt.

"Justice driven financing leverages money as the great equalizer. It invests in plaintiffs who have meritorious cases, but who lack the resources to put up a fair fight. Financing increases their bargaining power, and ensures that justice works the way it's intended. By helping the little guy, justice-driven financing effectively uses money to ensure the outcome of a case is not determined by which party has the most money.

Contrast that to market-driven financing, which is epitomized by this statement from a litigation finance CEO: 'We're fundamentally a capital provider. Forget this being about law or litigation. We're providing risk funding for an investment in the same way any other sector of the market.'" In other words, law is a good way to make money. Improving justice is just a positive side effect, is what Joanna Shepherd from Emory Law says.

Now, there's nothing wrong with market-driven financing, but it's quite different than justice-driven financing, and we need to have the debate about litigation finance talking about these things separately. Justice-driven financing wants to do well by doing good, whereas market-driven financing is concerned about just doing well.

Now, let me be clear. Both types of financing are profit-motivated, and equally so. People who want to do well by doing good, they believe that's actually better business. That's why my company exists. We believe that by doing well, by doing good, we're going to attract better employees, we are going to attract better investors, we're going to have customers want to use us.

Now, market-driven financing has a place, although that exact place is up for debate. But what's indisputable is that justice-driven financing is something that we should foster and support. Now, I'm a bit biased, but there's one part of the law that is predisposed to justice-driven financing, and that traditional subcategory is actually personal injury.

So, personal injury plaintiffs are individuals, they're not companies. Seventy-six percent of Americans live paycheck-to-paycheck, and when something bad happens to them, they are ill-positioned to fight behemoth insurance companies, who are professional defendants.

People lack money. They lack resources. They're onetime players going against professional defendants who do this for a living. A lot of people lose their houses. A lot of people lose their cars. A lot of people can't get the surgeries they need. It's an abomination.

There is a great disparity between people seeking justice in that case, and the insurance companies that are funding against them.

We must have a debate that focuses on these two types of financings. We shouldn't differentiate personal injury, from commercial, from patent. We should differentiate based on the intent, because intent is really meaningful, and it will help inform the framework for our discussion going forward. Thank you.

MR. MILLER: Okay. So, we're looking forward to the discussion going forward.

Our next speaker, Brad Wendel, is really one of the most thoughtful academic commentators and writers about issues of the legal profession and legal ethics. He's going to give us his take on our topic.

MR. BRADLEY WENDEL: Thanks, Geoff. That's a kind introduction. I'm sort of laughing at Peter Zimroth starting by saying we're all practical people here, and I'm about to give a wildly impractical paper. I like practical stuff. I am a legal ethics scholar, and Tony Sebok and I were the co-reporters to the ABA Ethics 2020 Commission study group on alternative litigation financing. And so I find this stuff very interesting. And I'll go deep in the weeds in this stuff if you all would like to, but I'm also trained as a philosopher and I like to ask philosophical questions.

This paper was prompted by a couple of things. One of them is the relentless public relations campaign by the Chamber of Commerce and The Institute for Legal Reform to really stigmatize litigation financing, and to put out these metaphors and imagery, like river boat gambling, and turning the courtroom into a casino, and all that. They just go on and on about this.

And into the fray this year comes Judge Posner, interestingly enough, who wrote this little throwaway line in an opinion which otherwise is kind of bizarre, in this weird little transaction, where he says—and this is the Posner quote: “[t]oday ‘trolldrom’—the seeking of financial advantage by buying or otherwise obtaining a legal claim (as distinct from filing a legal claim in order to seek redress for injury) thrives.”

All you funders out there, Posner is calling you litigation trolls. So, I wanted to know something about this. And so, what I’m trying to do in the paper is to try to figure out what it means for someone to be a litigation troll, given a couple of things that are just facts about causes of action.

One of them is that they are freely alienable, for the most part. There are a few exceptions, some anti-assignment rules, but in general, causes of action are freely alienable. Certainly, the proceeds of causes of action are freely alienable. Under the U.C.C. Article 9 they can be used as security for lending, and they can be bought and sold for transactions, and in fact, routinely are.

We are quite comfortable with the presence of certain strangers in the litigation system; in particular, liability insurers. We don’t have a problem with that. We have accommodated ourselves to a model of shared ownership of legal claims, both on the defense side, via liability insurance, and on the plaintiff side, via contingent fee financing. We don’t think there’s any real conceptual problem with sharing interest in legal claims, yet somehow litigation financiers are meant to be trolls.

I’m trying to ask the conceptual question, here, as distinct from asking an instrumental question. An instrumental question would simply be, what’s the effect of litigation financing on the rate of litigation, or the rate of non-meritorious litigation, or time, cost, efficiency. Those are all instrumental claims. They’re all perfectly interesting. One could also ask about the effect of litigation financing on the attorney-client relationship.

That’s really mostly what I do as a legal ethics scholar. But again, those are instrumental claims. I want to just query a little bit the conceptual claim that somehow there’s just something wrong with litigation financing, or somehow, that it blurs a boundary.

Tim Scrantom had that image earlier of the quarantine between law and commerce, and the great image of the barrister's little pouch where you can pay the barrister discreetly, and pretend that you're not actually paying, but rather just giving an honorarium. That's a very powerful image, and it's a conceptual claim that somehow law and justice ought to be separated from business and commerce.

So, that's what I really want to do in the paper, and I get at that by looking at a couple of analogous areas. One of them is a decision from the U.S. Supreme Court in the last term in a case called *Williams-Yulee* about judicial campaign finance regulation. It was an interesting case.

It came up as a First Amendment challenge to a Florida rule of judicial ethics, which prohibits judges from personally soliciting campaign contributions. Now, of course, we all know, with *Buckley v. Valeo*, and *Citizens United*, and this whole line of cases that campaign financing is treated as subject to really strong First Amendment protections, and most regulations on campaign finance will be struck down as a violation of First Amendment.

But yet here you have the Supreme Court and particularly Chief Justice Roberts saying, well, judges and politicians are different. It's one thing to have a candidate for legislative office seeking contributions, but judges are different somehow. And the case is a really fascinating exploration of the logic of conceptual analysis.

You have Justice Ginsburg saying judges are not politicians, and we don't want judges being turned into politicians, and then you have Justice Scalia saying, it would be great if judges were turned into politicians, because that would enhance the value of democratic accountability.

The logic of that case is really what I'm trying to explore, here. What is it about some feature of a practice, whether the wide open nature of financing or the restriction on that, that somehow threatens to blur a boundary or either to enforce a boundary.

The other area that I talked about in the paper, not surprisingly, is the claim of patent trolling. I see John Demarias there frowning at me. He's sometimes called a patent troll. There's a lot of really interesting scholarship trying to figure out what constitutes trolling, given a lot of facts about the patent system; namely, the free alienability of patents claims and

the myriad reasons why an entity might not seek to practice an invention, which is to say, to manufacture and sell products based on that technology.

There are lots and lots of perfectly reasonable, non-practicing entity practices, and so it's hard to draw what Mark Lemley calls the troll line. And trying to figure out where the troll line is located has led to some fairly interesting conceptual gymnastics.

Robert Merges has a paper where he says it's basically the same thing as blackmail. Patent trolling can be distinguished by asserting a patent for the wrong types of reasons, and this, you know, picks up my attention as a philosopher. What are the wrong types of reasons? And that's what I want to do here, is to think about what would be the wrong types of reasons for buying and selling legal claims.

I just want to end—I've got two minutes—with some possibilities based on the logic of conceptual analysis. Why should one care about this? There are a number of positions one could take about some practice, and some possible blurring of boundaries, and I just want to think about which of these is the right way to think about litigation financing. Now, we could deny that there ever was a separation. So, notwithstanding Tim's slide, we can say there really is no difference between law and business.

Lee Drucker had this provocative line where he said, from the point of view of finance, a legal claim is just a financial asset. It's just like a bond. There's no difference, right? So why are we worried about the blurring of the boundaries, when there never was a boundary? We could think that there might be blurring, but that the risks of blurring, such as they are, can be prevented by reasonable, tailored regulation.

This is actually what the majority did in the *Williams-Yulee* case. Chief Justice Roberts said, we can regulate judicial candidates so they don't personally solicit funds, although it's still possible to donate to judicial campaigns by a PAC or something like that. That's a reasonable, tailored regulation that seeks to avoid the danger of blurring the boundaries.

Or, we can go with the Chamber and say, the risk of blurring the boundaries is simply so great that we have to prohibit this practice altogether. I think the reason not to do that would be that we believe the institution and the practice is robust enough to resist any incursions from this other domain.

If we believe that the justice system has sufficiently robust protections, and the legal profession has sufficiently robust protections, we don't need to worry about this alleged blurring of the boundaries. In fact, one of the things I write about is something that was mentioned in the last panel, toward the end, which is the importance of lawyer's professional judgment. We rely on that a lot. There aren't a lot of disciplinary cases under Rule 2.1, but it nevertheless is an extremely important ideal.

Lawyers are subject to pressures all the time to act in ways that would not be in their clients' best interests, yet if we think professionalism means anything, it means that we trust lawyers to withstand those pressures, and to act independently. And I think that's a sufficient protection in this area. Thanks.

MR. MILLER: Okay, so our next speaker is Maya. She has an unbelievable resume and experience for someone so young, Maya, I must say. And as Selwyn mentioned, she is probably the leading academic commentator on the particular topic of this conference.

MS. MAYA STEINITZ: Well, now I have to say, thank you very much for that introduction and for inviting me. But I have to now cite a joke from Sarah Silverman, the comedienne. She has a little bit where she's a stage mom, and she's talking to her daughter, and she says, "Oh, you know, no, honey. I'm so proud of you. Now all you can do is make me un-proud." So after all of these introductions, I can only disappoint you. I'll try not to do that.

I'm going to talk about and present the main thesis in the paper that's in the package for this conference. It's called Incorporating Legal Claims. The thesis is simple, but hopefully profound, or important, interesting. I'm arguing that we need a paradigm shift in the way that we look at litigation funding from what I call the current paradigm, the ethics paradigm, to what I call the finance paradigm.

Another way to say the same thing is to say that we need to change the organizing idea in the discourse on litigation finance, from thinking of litigation finance as a form of champerty, even though it is a form of champerty, to thinking about litigation finance as finance. Okay? That's the main idea I want to convey today. What's the ethics paradigm, and then what's the finance paradigm, and what do we gain by shifting the lens?

Well, the ethics paradigm, I actually want to say what we gain from shifting the lens out of the gate. Under the current paradigm, the problem is that we have both overregulation and under-regulation of litigation finance. So, what's the ethics paradigm? The ethics paradigm is starting with an intuition that most people have the first time they hear about litigation finance. Oh, this is just like the contingency fee. If any of you have ever tried explaining litigation finance to anyone, they immediately say, oh, oh, it's just like the contingency fee, which is the other main form of champerty, or permissible champerty.

What do we worry about with the contingency fee? We worry about control and conflicts of interest between the funder, which is the attorney in that context, and the client. We also worry about commodification of legal claims. What form of regulation does the ethics paradigm entail? It entails champerty, that we heard about, and that's the bit that over-regulates, because champerty really focuses on who controls the litigation.

I'm simplifying a little bit, but whether or not a type of finance is champertous revolves to a large degree over who controls the litigation. And that over-regulates, because that prohibits sort of David and Goliath-type IP cases where a funder is funding the little guy, who's fighting against the industry incumbent who's infringing on their IP.

It also gives us the focus that we see in this area on legal ethics, and about how legal ethics is either inadequate or usually adequate, but really, we talk about the attorneys' duty of loyalty, and zeal, and independent judgment. But I always found that discussion very peculiar, because that's the regulation of lawyers. It's not the regulation of the financiers at all. It's important; we should regulate attorneys who are engaged in this kind of situation, but it actually leaves the funders completely unregulated.

What do I suggest by way of a finance paradigm? Well, first of all, conceptually, what I suggest is that we start thinking about litigation finance as finance. And then, by the way, speaking only about commercial litigation finance, not at all about the consumer personal claims.

It's a form of a joint venture. It's basically a funder and a claimholder entering into a business partnership. And the problems of conflicts of interest and who controls the litiga-

tion is nothing other than the classical problem of the separation of ownership and control. This is the problem that underlies all of business law.

Just to illustrate, I own Citibank—well, I co-own it, probably with a lot of you—and I have no control over Citibank whatsoever, and that's represented in the price that I pay for the stock. And we also have all kinds of ways of dealing with the problem that we as owners of Citibank do not control it; through corporate governance, predominantly, as well as other means.

I suggest that we start thinking about litigation finance as a joint venture. And the problems that we're so concerned about of control are problems that we're very familiar with—the problem of separation ownership and control. We actually have 200 years of very smart academic thinking and jurisprudence, and corporate practices on how to deal with and minimize conflicts of interest in the context of the separation of ownership and control, and the problems that it gives rise to. So what do we gain when we shift our perspective from the ethics paradigm to the finance paradigm?

First of all, we can conclude—and I'm of the position—that it's okay to let claimants sell part or all of their control over their case, and in return they should get a control premium. There's no reason, I think, in the commercial context not to allow the sale of control.

It's only really if you sort of use the contingency fee analogy, and you think of the attorney as a fiduciary rather than a business partner, that control becomes the big problem that it's regarded in the discourse on litigation finance.

The other thing that we gain is that the whole field of corporate governance opens up to us to implement, by way of litigation management, or litigation governance. In the paper—I don't have time to get into any of this—I discuss a whole set of deals where basically parties entered into joint ventures, essentially, of co-owning litigations.

The deals are from the mergers and acquisitions context, not the litigation finance context, but it's essentially the same. It's basically spinning off litigations into special purpose entity and having a non-party co-own it together with a party.

And there's very interesting litigation management agreements that are publicly available, in the context of these deals where the parties contract *ex ante*, in a transparent manner,

into how they're going to deal with various types of conflicts of interest: very particular control mechanisms; board of directors with voting powers on different issues; different kinds of votes for different kinds of issues, and it's all applied to the litigation management context.

So, I recommend to those of you who sort of want to think about what does that mean in terms of nuts and bolts of this new paradigm.

Finally, the third thing we gain if we shift from an ethics paradigm to a finance paradigm, is to deal with the under-regulation aspect of things, and start thinking about okay, if litigation finance is just a pocket of the finance industry, how do we regulate it?

We have precedent, and we know how to regulate finance. For example, we know that it may be a good idea to have capitalization requirements. We know that it may be a good idea to require that funders keep skin in the game to avoid moral hazard, especially if they start selling various derivatives down the stream, and therefore may not have the same incentive to vet cases well. We know how to develop compensation schemes that align interests.

So, there's various ways in which we can, again, deal with the actual problems that we're worried about of conflicts of interest without actually throwing the baby together with the bathwater.

Thank you.

MR. MILLER: Thanks, Maya. Our next and last speaker, Travis Lenkner, is involved in the business. And a very interesting job, investing in legal and regulatory risk, or investing in investments where the features of those investments involve legal and regulatory risks. So, Travis?

MR. TRAVIS LENKNER: Thank you, Geoff.

I don't want to get in the business of giving a lot of early feedback on the panel and your operation of it. I agree it's more efficient to streamline the introductions, but participation here, I sort-of thought, was conditioned on all of the introductions being delivered in a somewhat sensational. . .we'll call it the "Selvyn style."

And I saw David Lat back there furiously typing at the beginning of Panel One, and I thought, "This is my breakout moment, this is really going to happen." And now it feels like

that might have passed. So, we can talk after, and maybe I can—

MR. MILLER: [interposing] It was impossible to ratchet up Selvyn's approach. I think it would be more effective being sort of more moderate.

MR. LENKNER: That is a consistent problem, I think. Well, thank you all for having me, and having our firm, and including us in the day and as part of this discussion.

As a commenter, and not someone who submitted a paper, my role was to read the papers. I know all of you did as well, but my role was to read them a couple of times.

So, I wanted to start by just kind of going down the line and picking out a comment or two from those papers that I thought, with respect to what we do at Gerchen Keller, either resonated more than maybe some other aspects, or were just fun and deserved mention.

Just going down the list, Jef and Michael's paper—it's in a footnote, but I actually wanted to just read Footnote 19, because it's this incredibly concise summary of modern litigation.

It just says, "Note that the result of a study [that they were citing] implies that discovery may produce efficiency and justice, since the plaintiff bases his discovery amount on the fundamentals of the case. At the same time, the fact that the defendant behaves without looking at the fundamentals of the case directly leads to social waste and injustice." Period. End of footnote. So, you can cite that in future works and credit them for that pithy observation.

To point you, in Josh's piece, more to a higher level point, which is true and maybe deserves some discussion by our group: It is the case that a lot of firms out there, including ours, provide financing both to smaller, less capitalized organizations, as well as to large companies and firms, and that in some cases, that funding results in what I would call an additional social good—maybe not the only social good—of providing access to justice when that access might not have been as readily available.

But it is true that funding is available on kind of all ends of the spectrum. As Maya noted, there's a healthy consumer industry. On the commercial side. I think all of the firms that say they work in that space would agree that we work in situations where access to justice might be apt as a description of

part of what is happening, but also in situations where we are a specialty finance tool for companies and law firms that are large and very sophisticated, and would be litigating anyway, and probably already were litigating anyway before the finance firm even got involved and came into the picture.

There's so much that's quotable in Brad's piece. I wanted to just note at the outset that having found and highlighted the Posner quote about how we're all trolls, and this is all obviously terrible. If you're keeping track at home, that means Justice Scalia now thinks this is awesome, just because Judge Posner thinks it isn't. So, we have one vote, and we just need four more, and this is all totally fine.

Two other quick things in Brad's piece, and we can talk—there was mention of the Chamber and the PR campaign that is ongoing, as everyone here knows. No one, least of all we, would accuse them of speaking in nuance or much context about the details that this group, in this room, is getting to today. The comment that it's probably not a good idea to attribute a metaphysical thesis to the Chamber when it is primarily fighting a public relations battle, I thought was an interesting way to put that, as well as later in the piece, a note that I think is possibly also worth this group's discussing, which is simply that it still is unexplained, and it's never been explained to me, why anyone in our part of this field would invest in a non-meritorious and therefore valueless lawsuit. That possibility is inherent in a lot of the criticism of litigation finance, but if it's possible or happening, it means that we are quite bad at it. If we are in the market today, we won't be for long.

And finally, Maya's piece. Hers is galleyed, so the exact page number is 1172—there are a couple of paragraphs there that I thought really capably and efficiently described the value proposition for large companies, and large law firms and organizations that are in the market for litigation finance—why there are corporate finance incentives, accounting incentives, public-versus-private company incentives and challenges that lead organizations and firms that you would not typically think of as consumers of litigation finance to actually be quite active in this space. We can certainly talk more about that as well.

Just a couple other very quick thoughts. One is that I and everyone else in the room who would call themselves a litigation funder, or whatever term we all agree someday to use, we

go to a lot of these panel discussions. And many have been at it much longer than we have. And it's still true that the premise of a lot of these panels and forums is that this is a very new thing and we should all get really interested in it because it's new, and changing, and a huge development in the law.

Every case is funded. That's been true since the beginning of litigation. It's either self-funded, it's funded through a contingent fee, it's funded through however the litigant is capitalized, and however the law firm is capitalized. And there are a host of incentives to settle, disincentives to settle, pushes and pulls on litigation conduct that are related to finance, and capitalization, and economics, and litigation finance does not introduce much new, or even really disturb, those age-old issues.

And as a side note, most of the other things that lead to the age-old issues aren't discoverable, and aren't things that we spend a lot of time talking about. It's just the way people involved in litigation, which is governed by a whole lot of rules already, conduct themselves.

And finally just a quick summary of us, to agree with Tim's comments, and some other comments on the first panel. We at Gerchen Keller take a broad view of litigation finance, as many here do. That means, in terms of context for any of my comments here or after, we have investments on behalf of plaintiffs and defendants, we have investments where we are paying some or all of the legal fees or costs, as well as investments where our capital is being used entirely for some other purpose unrelated to the litigation.

We have investments with small and large companies, we have investments with small and large law firms. We have investments where the underlying piece of litigation is a single case, as well as where it's a portfolio of a few, or several, or many cases. And we get involved and provide products and solutions for not only many kinds of commercial litigation, but also, at any stage of that case, from inception all the way through post-settlement, when the degree of risk and the cost of capital all can be very different.

So, a quick summary of us, and just some thoughts on other papers, and I look forward to the rest of the comments. Thank you.

MR. MILLER: Thank you, Travis. We now have an opportunity for discussion, both among the panel, and with everyone here. I wanted to start a little bit by taking the privilege of the

moderator to ask a question. This question is not a challenging question about litigation finance, because I'm in favor of it. I think most people here are in favor of it. But nevertheless, I wanted to bring out the possibility of a case against it. And I do this because in my other world I'm involved in the area of banking, and I observed in the banking world the opposite trend as we're seeing here.

In banking, remember the financial crisis, the ready availability of finance, the ability to slice and dice property claims into very apparently efficient little units— mortgage-backed securities, CDOs, CDO-squareds.

In the view of many, this led to a very unhealthy and corrosive attitude on the part of the financial sector, of making a profit at all costs, thinking only about the short term, not taking the public interest into account, cutting corners wherever possible.

As a result of the disaster that happened in 2007 to 2009, the trend in finance has been absolutely in the other direction; that is, we need to instill in people in the financial world a culture of compliance, a cultural change, a tone at the top that emphasizes acting in the social welfare, not cutting corners, not making a profit is the be all and end all.

So here, in the world we are in, we see the opposite trend; that is, the legal profession has always traditionally at least had the view that we are professionals and that we are not driven by money alone. We're driven by other values.

Tim's example of the barrister's robe illustrated that money is important for lawyers. They won't work without it. But at the same time, it illustrated the discomfort that is associated with that fact, because the lawyer could not take the money directly. It had to be surreptitiously put in the robe as a kind of tip at the end. So, it's true that money is necessary, but there's always been a discomfort in that fact.

Dean Pound, a famous Harvard Law dean, had a very influential description of the role of the lawyers, in which he said the lawyer's job is to act in the public service. And then at the end he goes, "Even though, incidentally, it may be a means of livelihood." So, he meant that the lawyers making money is only incidental to their basic role in the justice system, and in society.

Well, now we're seeing a challenge to that, and this conference is a challenge to that. Maybe a means of livelihood is

what the practice of law is all about, and there's lots of good to that.

But the challenge—and I maybe would ask Maya and Brad in particular, because it relates to both of your presentations—the challenge is, are we losing something when we do that?

Do we degrade a culture of professionalism that lawyers have had? Do we create in the public mind the impression that law is simply a business, that complying with the law is simply a discretionary action which you can do if it's in your interest to do it, and otherwise not do it? And is this a healthy development for society as a whole?

So, that is not actually a view I personally endorse, but nevertheless I'm trying to present it in a strong way, because I do think it's a challenge that this current development is facing, and will face going forward. I would invite anybody in the panel to respond to that.

MR. WEDNEL: That's a great question, Geoff. Thanks for asking that. It really relates to what I do in general, not just work that I do in the litigation financing area.

I strongly endorse the view that lawyers have an obligation that's distinctive from that of making a profit, or being a businessperson. That's what I'm summing up as independent professional judgment that Geoff talked about, you know, it's just not about money or whatever.

I mean, I like, and read, and consume, and really respect Maya's work, but I want to disagree a little bit with the idea that it would be a good thing or an efficient thing if we could collapse the functions of financing, and management, and strategic consulting, and litigation advocacy into one thing.

I think there's something important about the lawyer being distinctive. Hey, it's inefficient, it adds transaction costs. That's okay.

There's a nice paper from a couple years go by Don Langevoort at Georgetown where he talks about within cultures, someone, an actor or a role, can be grease, or it can be grit. And sometimes it's a bad thing to have too much grease. You know?

The finance perspective, the economics perspective, is efficiency, efficiency, efficiency. The lawyer perspective sometimes is, hang on, slow down. And I'm okay with that. I'm okay with a little bit of grit.

What I think—and I've borrowed this image from Geoff Hazard's work on the insurance defense situation, that there's kind of a triangular relationship between a funder, and a claimant, and a lawyer. And the lawyer being there at one point on the triangle exerts a stabilizing influence on the relationship between the financier and the claimant, and I think that's a good thing.

I know it's a headache, and in some private advising work that I do I often interact with law firm general counsels, and they're a bit of a pain in the neck. And I'm glad for that, and I don't want to lose that, and I want to hang on to that.

I think it's possible that we can reach mutually beneficial solutions that are in everyone's economic interest while also taking care to slow down and make sure that we're acting in the interests of clients, which is what lawyers are really all about.

MS. STEINITZ: Yeah, I'd like to address that as well. I'm also concerned about what would happen if and when, after pooling litigations, litigation finance firms start creating derivatives and selling them, without keeping any of the risk themselves, which is how things went wrong in the mortgage industry.

I don't know that I want to say, to be prohibited, but I think it should be very strictly regulated. That is the scenario in which the incentive to only fund meritorious claims goes away, unless we require them to have skin in the game, and maybe claw-back profit, et cetera, and do all the things that we know, at least, from the literature that we can do. I think we're not there yet—which is, the banking industry may be pulling back from that. We haven't gotten there, but we should definitely think about that, and be cautious about that.

I want to emphasize that I am talking about regulating the financiers and allowing them to operate, et cetera, because regulating lawyers is not enough. But the lawyers should absolutely keep holding themselves to the ethical standards that we've always had.

I do think that we need to recognize the concern that there is repeat play between lawyers and specific funders, which is where the industry—if it's not already there, it's going there. I think it's already there.

I think it's very, very hard for lawyers to exercise independent judgment and be that buffer when there's repeat play.

And that's something that we as a society should be thinking of.

Finally, I want to say also, in respect to your vision, because I don't want to lose the justice aspect of what it is we do in the legal profession by any means—it would be actually quite ironic if I ended up being the person who stands for that—is that we now have B corporations, a new kind of entity, that allows doing well while doing good.

I think that that opens up a lot of exciting opportunities to be able to fund cases, but not for a high profit, necessarily, but also just because that's what justice calls for.

MR. MILLER: We had a number of people on the floor, but I wanted to give people in the panel a chance to comment, either on my question or anything else.

MR. SCHWADRON: I think your question, Geoff, is a good one, although I think it's missing a critical piece. So, traditional finance is certainly under attack, but it's only a segment of finance that's under attack.

It's the creative manipulation of finance that is really under attack, but there's a whole different trend of finance where FinTech companies like Prosper, like Lending Club, are empowering underbanked people in new and exciting ways. There's this dichotomy that's emerging, this bifurcation in some respects I'm talking about that's analogous in traditional finance, to litigation finance, where you have some finance that truly is providing this amazing social benefit, and enhancing social welfare.

Then there's other types of finance that are essentially moving paper around as a business to maximize profit. And the former, in terms of litigation finance, is something that we should be having a separate debate about, on how to foster it and support it. The latter, I think, still has a place. I'm not saying that there's not a place for it, but I think it's a separate debate about the role that that plays.

MR. LENKNER: I would just add a couple of points. I would describe our approach to the market and potential investments as certainly welcoming, and we have a nice front door through which people can enter, but most of them don't get all the way through the process.

I would not describe it as the ready availability of capital, in the way that we were encouraging people to buy homes who shouldn't have been buying homes. Sort-of to my point before,

we are not encouraging people to litigate who shouldn't be litigating, or who don't have meritorious claims. So, I think we are a long way from the dangers posed by an actual flood of capital into the marketplace.

As much as we talk about the growth of this industry, if you will, it still is such a minute percentage of—even if you're just looking at the dollars and cents that are spent every year on legal fees in this country, we're less than a single-digit percentage. And if you start talking about finance arrangements where the money is not being spent on legal fees, and so the market size is really just the size of judgments and settlements in the United States in any given year, I haven't seen a reliable study that would come in at less than ten figures or more, and that's just the ones that are publicly reported.

I think the size of this is still relatively small, and that a lot of those dangers aren't present. It's also true that—again, to differentiate the consumer space from more of the commercial space—in every one of our transactions, we're dealing with a sophisticated counterparty on the other side, whether it's a small or a large organization.

To a point earlier, it's usually or almost always someone who's represented not just by litigation counsel, but also by independent counsel in connection with the investment. And in terms of a culture of compliance and how we operate, those sophisticated parties are coming to us because they know that we actually have capital under management that's in our discretion.

They know that we're a registered investment adviser with the Securities and Exchange Commission. Our largest competitors in the space, by and large, are publicly traded. So there actually is a lot that's disclosed and out there in a compliance and counterparty-friendly way, if it is real, commercial litigation finance that we're talking about.

MR. MILLER: Okay. Great. You had a question?

MR. ANTHONY SEBOK: Okay. So, there's some papers. And I apologize in advance—this is not really a question as much as it's an extension of an argument made by Brad and by Maya, which suggests something to Brad's analysis and borrows from Maya's. Maya's, right and I think there's these two models, the ethics model and finance model. And Maya's paper talked about this sector. And what's interesting is that Brad's paper is really about very small and unusual piece of this sector. It's the

idea of a complete alienation of a thing not a partial ownership of the thing.

But, what's interesting about what Brad has pointed out, is that the resistance to trolling, resistance to the idea of a stranger could be able to completely take over another claim highlights the ethics problem. And the ethics problem is not really about the ethics [avoidance].

I want to suggest the ethics model that is in the minds either pretextually or genuinely of the Chamber of Commerce. Which they dredge up. Is an ethics of victims which is the idea why, what are the reasons why a victim of a wrong should be allowed to go to court. And at one time, I say this as teacher of tort law and as a scholar of the history tort law. At one time there was this idea that there was no point having a claim for the redress of wrongs, unless you could actually redress the wrong of the victim.

And in fact, as we know, until the 19th century the tort claim died with the victim. Right? Because it was statutory amendment to the common law that allowed wrongful death. Before that, there was no wrong to correct if the victim was gone. Now, we don't live in that era any more. What do we live in? We live in an era where the question is not what's the right reason for the victim to enjoy a redress.

Now we live in an era where the question is, what's the right reason to inflict upon the wrongdoer cost? Now, that's a different purpose of private lawsuits. I, personally am not going to endorse or disagree with one or another vision but what I am suggesting is that we move past this ethics business, the ethics of victims, that would explain the kind of resistance to trollism that Brad was talking about.

We live in an era now where the larger question is, what's happening to the wrongdoer, not what's happening to the victim. Once you recognize that, I think you see that the arguments for the finance model and the arguments for litigation investment as partial ownership are very compelling, and the arguments against it, I would describe as anachronistic. And that's it.

MR. MILLER: So, we're moving from compensation to deterrents as our overall value, in a way. And I think that's happening less in Europe than in the United States, but maybe elsewhere as well. Do you guys have any thoughts?

MR. WENDEL: I won't take much time, Tony. I guess you and I have another paper we can write. But I do want to say, the flipside of the changing vision of private law from corrective justice to efficiency is a changing conception of the purpose of the civil justice system.

One of the things I cite in the paper is this idea of the erosion of the public realm, and Owen Fiss against settlement, and all that. And that maybe also something the Chamber is trading on, that a lawsuit is not a purely private commodity that can be freely alienated. It has a public purpose.

It's about enunciating public values and allowing others to see what the law says about their conduct. And Fiss says that settlement, alternative dispute resolution (ADR) erodes that. Well, the trouble with that argument is that ship sailed a long time ago, and we now have pervasive ADR.

We now have judges ordering settlement. There's a judge in this room who ordered my client to go to settlement when I was in law practice, to go to mediation to try to settle the case. We have the free enforceability of arbitration agreements.

We've privatized the civil justice system to a very great extent. The sky has not fallen; the Chamber is not running around denouncing ADR. So, that argument doesn't work, either. I'm suspicious, I guess the bottom line of my paper is—I'm suspicious about these pure, conceptual claims about the litigation system really is about all this or that.

But Tony's right, too, and his paper on the inauthentic claim is really helpful in seeing that it's the reasons for bringing a lawsuit that really make the difference in some early champerty and maintenance cases in which whether something is considered impermissible champerty or maintenance, or is considered permissible insurance, or contingent fee financing, or whatever.

MR. MILLER: Thank you, Tony, for that interesting question.

MALE VOICE 1: [inaudible] .

MR. MILLER: Excuse me. Could everybody hear the questions? Everybody speak up a little bit.

MALE VOICE 1: I have a general question and I have no idea what the answer is. What is the effect of litigation funding on the current civil litigation model which is essentially all one -- nothing goes to trial, years of depositions, discovery and motion practice, [inaudible] and the legal fees on both sides are

tremendous? And I'm trying in my own mind to understand what effect does litigation funding have on that whole pre-trial process that is about 95% of the game?

MR. MILLER: So, what effect does litigation funding have on the way litigation is conducted today? I think everyone on the panel will have a thought about that. It's a very important question.

Go ahead. Do you want to start?

MR. SCHWADRON: Sure. So, I think the answer depends on the type of litigation. I also think it depends on the facts of the case, and how in dispute they are.

I know that in the personal injury space, a lot of litigation takes a long time, and the reason is not because there are facts in dispute. It's because one party has a lot more money than the other, and they think they can use that advantage of time, of resources, to get the other party—obviously the plaintiffs in this case—to take a lower settlement.

And I believe passionately that litigation finance the availability of it will drastically reduce the time to settlement, and the litigation time. Because when insurance companies realize that they don't have a financial advantage, there's no reason to drag out the litigation and force plaintiffs to settle for pennies on the dollar.

I think that when there are cases where there are questions of fact, it potentially has the risk of elongating it, but that's a good thing because the alternative was that somebody was settling early because they didn't have the financial means to get through, and we want them to seek redress in a proper way.

MR. MILLER: Is another part of the answer that if you have litigation funders in place, they're going to monitor the attorneys more carefully, and make sure they don't run up the hours with a lot of unnecessary depositions?

MR. SCHWADRON: I certainly think there's an efficiency that litigation finance brings. I think it's different, again, for each case.

I know that a lot of litigation finance does not get involved in the case, or doesn't even have control over that sort of thing. I know in the consumer space that that's true. But yes, I think the answer generally is yes.

MR. MILLER. Thanks, Josh. Yeah?

MALE VOICE 2: [inaudible].

MR. WENDEL: We already let finance people make those decisions. I just taught damages and contingency fees in torts yesterday before I came down here. And I said to the students, this is the tail wagging the dog. This is what determines what cases get litigated.

My standard joke on this is, dental malpractice is under deterred. Why? Because the damages aren't that high, so it's not worth anyone's while to bring.

So, there are feedback loops already in place because of the screening and the gatekeeping function performed by plaintiffs' lawyers. Why should we let those folks make these decisions? We do. So, it's a great question, but it's not a new question.

MS. STEINITZ: I teach civil procedure and I tell my students that you can understand all the policy debates in civil procedure to be questions of, you know, different parts of the process in which we control the flow—whether there's going to be more or less litigation, how much discovery, pleading standards, summary judgment. All of it is different phases in the process where we can tinker with procedure to allow cases to go forward or not. And I think it's all legitimate debates around those various procedural steps.

You know, should we let a case go forward, yes or no, at that stage. What I think is not legitimate is to say, all other things being equal, two otherwise equal cases, the question whether they would move forward, yes or no, should be determined on whether the plaintiff has funding.

That's actually not a just system, and that's I think not a legitimate policy concern.

MALE VOICE 3: In terms of the incentive on—no incentives on frivolous litigation, in my mind there's the possibility that an asset like a lawsuit is directly tied to, negatively to another asset, which is the stock price of the corporation.

So, if you have an evaluation of 100 litigations that's really high, so would there be sort of an incentive to bring a litigation based on that? So, it's sort of like corporate arbitrage or something like that?

MS. STEINITZ: So is the question, for example, whether a competitor may want to bring litigation in order to depress the stock price of. . .

MALE VOICE 3: A competitor, or something like that.

Ms. STEINITZ: I don't know. I mean, is that a real world problem, where a corporation would start a litigation that it's ultimately going to lose just in order to depress the stock price of a competitor?

I mean, it's conceptually possible, but I don't think that that's really the characteristic situation that we're looking at.

MALE VOICE 3: Yes. So, unlike, other assets you'd be thinking of a lawsuit or a claim as a commodity as strictly assets not any different from other assets that you directly tie to another asset. So if you value this one asset then necessarily you're valuing another asset less with opportunity cost.

Ms. STEINITZ: Yeah, I actually don't think litigation is just like every other asset. And I've written about the ways in which it's actually a very specific type of asset, and one of the issues that we should be thinking about is when we want plaintiffs to be able to pursue injunctive relief.

For example, antitrust cases or environmental cases, there's actually a negative externality if we create a situation where the incentives are just to commodify and just go for damages, as opposed to going for injunctive relief.

I do think that litigation is actually a very unique kind of an asset. I mean, assets are of different kinds, right? Art is not like a house or real estate. And litigation is more like art than it is like houses.

So, I think there's a lot more nuance to what kind of an asset this is, including the fact that we're using the justice system that is publicly funded and that is publicly funded in order to create precedent, resolve disputes, and generate justice. So, I don't think we should lose, sort of, view of that.

MR. MILLER: Travis?

MR. LENKNER: Just a couple—one a practical, and one a more theoretical response to that. As a practical matter, I think even if one could envision a situation where that might be a strategy that someone would employ, it's actually difficult to look at publicly traded companies and find that small set of companies where a particular claim that satisfies Rule 11 pleading requirements is material to the stock price of the defendant company from inception.

So, it's actually pretty difficult to think of the claims that are large enough, and the set of companies that are small enough, that those lines intersect. It's not just that filing litigation against, for example, a publicly traded company automati-

cally affects the share price. It's quite often that it's a blip on the radar screen, and things really have to develop for a long time, which of course goes back to independent professional judgment of lawyers, and the incentive of companies and financiers to pay for these efforts while they're going on. So, that's maybe the practical.

The more theoretical limit, I think, on something like that would be—neither panel has touched very much on the underwriting process that a litigation finance firm goes through in terms of what sorts of questions are asked, and what things are important to someone, or to a firm, that would be investing where litigation is the underlying value.

Many of the questions relate to the relationship between the parties, the reason for the litigation, the incentives to settle. And so I think most investors in our seat would be loath to invest in something where the express strategy was one that you described, and would be hoping to run an underwriting process where, even if that is the undisclosed reason that the plaintiff is interested in litigating, that that would out at some point during the underwriting of whether it was possibly a good investment for the firm to make.

MR. MILLER: Travis, would you ever imagine a situation where a lawyer brings a highly publicized case, and the day before shorts the security of the defendant, towards the stock of the defendant?

MR. LENKNER: Interesting. No. I mean, I think it would be interesting as a hypothetical matter—let's be very clear—to think about the intersection of the attorney's ethical obligations and the securities laws regarding market manipulation.

It certainly, at the very least under Rule 11 and lots of things the SEC could tell you about, requires a pretty strong good faith belief that even if you are shorting the stock to take some economic gain from the announcement of the litigation, you believe very strongly in the merits of the claim that you're about to bring.

MR. MILLER: I saw Brian and a bunch of other questions, but Brian was first, yeah.

MR. BRIAN FITZPATRICK: I wanted to ask the same question that you did Geoff, it seems implausible that a competitor would fund a lawsuit. But what about a short seller? Short sellers have become very aggressive now, why wouldn't a short seller fund some plaintiff to bring some type of a lawsuit [inau-

dible]. It doesn't seem quite as implausible. It would seem the way to stop that would be some sort of disclosure requirements [inaudible].

MR. MILLER: Did you have comment on that point?

MR. SELVYN SEIDEL: There's a lot of concern. What it is, it's called the SEC in the U.S., The fact is that funding is as subject to the SEC requirements as anything else. So if you're going to short stock or manipulate the price, you can be sure, that there's going to be, at one point, the SEC knocking on your door. In fact, there was and is a U.K. case where there was an investor, very good investor, in a public company that announced the funding and the stock went crazy – the stock went way up. And then on the way down, and there was an investigation that showed some sort of stock manipulation and it was subject to the SEC. While there is no real specific regulation relating to funding, they have to comply with the general law. One other thing, on the other side, I think the U.S. Chamber of Commerce has a point when it says this industry may cause some real problems because they fund bad cases. Now we always hear that funders, the good funders, like Gerchen Keller, like Arrowhead, they'll say we only fund good cases, and they're right. But there have also been some funders that funded strike suits. For the same reason that a lawyer will take that case – because they want a quick settlement – the funders will do the same. One case I'm talking about in Florida, the funder got caught, the lawyer got caught and they both got sanctioned. But, it does go on and that's a real concern, but subject to the same laws.

MR. JOHN DESMARIAS: Two things. One, right now Kyle Bass, who runs a hedge fund, invests in public pharmaceutical companies and then he attacks which is essentially starting unlawful distribution. SO his hedge fund makes money by attacking patents after he's invested in the company. So it is going on right now.

MR. SEIDEL: It's going on right now, and there's a whole bunch of funders out there who are funding strike suits pseudo legitimately.

MR. DESMARIAS: That's the second thing I wanted to talk about. It came up on the panel, why would industrious finance --. When you look at what's going on, because civil litigations have gotten so expensive. It takes millions of dollars, Tens of millions of dollars to litigate them? It is the case that plaintiffs

file lawsuits against big defendants for - - millions of dollars - give me a million and I'll go away. This happens all the time in the patent space, there is this opportunity for-

MR. MILLER: That's the classic strike suit.

MR. DESMARIAS: Exactly. It's interesting because if you actually think about it, because we've let civil cases get so expensive. [inaudible] And two, these lawsuits that are essentially just playing [inaudible]. If we target the discovery expense and drive the expenses down, we take away the incentives to file frivolous lawsuits.

MR. MILLER: So, I don't normally do this, but I see my friend Ed Roch is here. And Ed knows more than anyone as to whether it's a violation of the SEC's rules to short a security in anticipation of filing a case.

So, without meaning to put you on the spot, what do you think the answer would be?

MALE VOICE 7: I don't know the answer to that question. On the theory, I share the other's intuition that this sounds suspect.

MR. MILLER: But I don't think it would violate insider trading rules, because you're not violating any duty to anyone but yourself.

And you're not trying to manipulate the stock, really, if you're just filing a legitimate lawsuit. So, interesting. You could ask it on your next exam in your securities class.

Okay. I don't want to leave anybody out, so I had some other—yeah, go ahead. Oh, sorry, in the back.

MALE VOICE 8: I was going to ask and you laughed off the topic. Everyone says good funders only fund meritorious lawsuits. And as an attorney, I can't represent different sides of the same issue. My job is to represent my client. My understanding is that the financier's job is to help finance the litigation, but also make some money for themselves. What's in place to stop that conflict of interest?

What's to stop funding both sides of an issue? It could be completely separate cases. Your client's would never know. The attorneys would never know that you are now backing a completely different side and you're going to probably win one of them and make some money. It could be a different case, a similar issue or same issue, obviously not the same case, your actual [inaudible].

MR. LENKNER: So the two short responses to that are, first, that one of the express assumptions or premises of the question is that the clients or the attorneys in that situation would never know. I would not want to take that chance. It's not sound business, first of all, and there is the chance in cases that our role is discovered, sometimes through discovery, sometimes because, as was mentioned earlier, a plaintiff in particular sees a strategic advantage to discovering the fact that there's funding. So, it would certainly be wading into a situation unnecessarily for us to be in that sort of position.

But an implicit premise or assumption is that there's a ready market, and I can go to aisle four and grab a defense side of the same case, and marry them together, and then I've hedged my risk and I walk off to the next opportunity. Unlike a lot of other areas of finance, we also have to source these investments, and the people who are receiving the capital have to want it, and need it, and see a value proposition for it, and be willing to pay the cost of it.

So, both the odds against that scenario actually ever coming true, as well as the business risk alone to a funder that would take such a position—I'm not going to claim it's theoretically impossible, but I think the likelihood of that on the list of problems or concerns that people might want to raise is, to my mind, lower on the list than some other things.

MR. MILLER: You had a—weren't you? Yes.

MS. MARIA GLOVER: My question is for all of you. Same question, but also to [inaudible]. Why would you want the funder being the one to make the decision [inaudible]. To me, I don't see this huge separation between the funder and the attorney representing the client and I am wondering to what extent the the attorneys value their fees, it's fitting into [inaudible], it's fitting into [inaudible].

It's fitting into [inaudible] assets [inaudible]. And it's [inaudible] a matter of legal analysis [inaudible] under [inaudible]. Or is there really a big separation such that there is kind of arrangement in which the claims get [inaudible]. And in ways that might chance the dynamic [inaudible].

MR. DE MOT: We show that the largest profits can be made for the strongest cases. I didn't get time to go to this slide, but what we examine is, how does the expected value of a plaintiff's claim increase with funding?

Then, we looked at the inherent merits of the case, ranging from zero to one. Then, we looked at, okay, for which type of claims does the expected value increase to 25% of the amount at stake? So, if you have a claim of \$1 million, which type of claims progress with \$250,000. And then we checked which types of claims progress with 40% of the amount at stake, so \$400,000.

MS. MARIA GLOVER: When you say “we” do you mean you the funder or [inaudible] ?

MR. DE MOT: In your question, I mean the funder and the litigant together. So, we took the lawyer outside of the game, and we look at one plaintiff and one funder. And so from that joint perspective, we looked at how does the total value increase, taking both of their interests into account.

So, we didn’t look at principal-agent problems between the two. We just looked at, okay, for what kind of claim does everything together advance the most, and so for what kind of claim in advance *ex ante* can they both make from their point of view, the optimal contract. So, for which type of claim is the increase in the share of the pie greatest?

Then, we see that it’s for the really strongest cases. The stronger the case, the lower the unit cost to the plaintiff, which just means for those cases in which access to justice, access to evidence, access to good arguments, is easiest for the parties. In those cases, the most profits can be made.

MR. WENDEL: I just wanted to say really quick, there’s a lot of variation in the structure of these transactions, but in a lot of the big, commercial litigation financing deals I’m familiar with, there may actually be due diligence counsel hired by the funder to conduct due diligence on the claim before deciding whether to fund.

These interesting hypotheticals are fun to think about—you know, what if someone’s shorting the stock, or whatever. But in the mine run of cases, there’s actually a positive signaling effect to having financing, which is a signal to the other side that this claim has been gone over pretty carefully by a disinterested third party and deemed meritorious and therefore is a signal that it likely is a good claim.

MS. STEINITZ: I want to say that if we start saying as a social matter that we have a problem of funders pushing certain categories of cases, or rushing into them, there’s some public engineering that can happen through imposing treble damages, or

changing the amount of the treble damages or other punitive damages that are allowed, because that tends to push funders and contingency fee lawyers into those spaces.

MR. MILLER: Yeah?

MALE VOICE 9: If you have sophisticated litigants and there would be a restrictive covenant. It doesn't seem possible that there would be this issue.

MR. MILLER: What is the covenant you're thinking about? What was the—

MR. WENDEL: In the financing agreement.

MR. LENKNER: Yeah. A covenant that says if we're funding you, we can't fund your adversary. Right.

MALE VOICE 9: [inaudible].

MR. MILLER: Right.

MR. WENDEL: That's probably in a lot of finance covenants.

MALE VOICE 9: [inaudible].

MR. MILLER: It will be now.

MR. WENDEL: It will be now.

MR. SCHWADRON: Right. But—go ahead.

MS. STEINITZ: I'll just speak to that. I co-authored a paper called *The Model Litigation Finance Contract* with Abigail Field, and we actually suggested all kinds of representations and warranties, and actually an absence of conflict of interest was a representation that we suggested plaintiffs can bargain into.

MALE VOICE 9: Is that being used right now?

MS. STEINITZ: I doubt—the industry insiders need to speak to that.

MR. WENDEL: Unfortunately, good academic papers don't always find their way into the law.

MALE VOICE 10: [inaudible].

MR. WENDEL: Well, the simple, sort of banal answer is that, that triggers all sorts of adverse consequences that lawyers don't want. The possibility of the funding being deemed champerty, you know, invalid under state champerty laws, problems with Rule 2.1, independent judgment.

Australia is a very different situation. There's a case called *Fostif* in Australia where the high court permitted an extent of control by litigation financiers that's just breathtaking. And as far as I know, the sky hasn't fallen in Australia. Now, there's different judicial oversight in Australia. I don't know Australia

so well, but I know New Zealand pretty well. New Zealand has litigation funding with control being permissible, but it's all got to be disclosed to the judge, and the judge supervising the litigation has to say, okay, I don't think this creates any big problems for the conduct of litigation; I'm going to bless this. So, to get more control, funders here might have to give something up. They may have to reveal the terms of the financing, and get judicial permission. It works fine in New Zealand. It works fine in Australia.

Under existing law—and Maya's doing really interesting stuff on, kind of, "what if?" What if we treated this like a joint venture? That's a great "what if" question, but under existing law, there are just way too many minefields.

MR. MILLER: Okay, Peter. What were you saying? Okay. So, there are a number of other questions, and I really wish we had time to get them. I'm sure they're all great.

But we are having a lunch break, and anyone who had a question and didn't get it answered, our panelists will be here. And Peter has an announcement.

MR. ZIMROTH: Just to remind you that we're starting at—I think it's 1:45 sharp. And I just want to make a promise that the last two panels will be every bit as interesting as these first two, and so please come back and enjoy it.