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THE MYSTERIOUS MARKET FOR POST-SETTLEMENT LITIGANT FINANCE

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Litigant finance is a growing and increasingly controversial industry in which financial firms advance a plaintiff money in exchange for ownership rights in the proceeds of the legal claim on a nonrecourse basis: A plaintiff must repay the advance only if compensation is ultimately received for the legal claim. The nonrecourse nature of this funding exempts it from most states' consumer credit laws, enabling funders to charge higher interest and fees than would otherwise be permitted. When this funding involves ordinary consumers, critics of the industry contend that the uncapped interest rates exploit vulnerable litigants, while its defenders argue that the availability of these cash advances improves the welfare of consumers, especially those who have no other credit options.

This funding made headlines during the recent NFL Concussion litigation, with more than one thousand players reported to have received such cash advances and with class counsel raising concerns of "predatory lending." Because the industry has not been forthcoming with facts, the larger policy debate thus far has largely relied on anecdotes and speculation. In addition, the debate has ignored the important differences between pre- and post-settlement litigant funding.

This Article is the first to present systematic, large-scale data on consumer post-settlement litigant funding—the type of funding most NFL players reportedly received. We were given unrestricted access to the complete archive of sixteen years of funding applications and funding contracts from one of the largest consumer litigant funding companies in the United States. These data, which are robust and representative, enable

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us to make transparent the terms and true price to consumers of this formerly mysterious funding. We find that the Funder offers not only clearer contract terms but also better financial terms to post-settlement clients relative to pre-settlement clients. Yet these better terms do not come close to reflecting the virtually nonexistent litigation risk to the Funder. We therefore recommend that consumer post-settlement litigant funding be subject to the same regulations as conventional consumer credit and that a standardized, simple disclosure be required.

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INTRODUCTION

Every year, ordinary consumer-plaintiffs seek cash advances totaling hundreds of millions of dollars while their legal claims are being litigated or, later, while waiting to receive the proceeds of executed settlement agreements.¹ These consumer litigants commonly obtain the cash from a growing and increasingly controversial industry: litigant third-party funders. This funding is especially attractive to consumers who may not have other credit options such as credit cards, home equity loans, or payday loans, and because it does not depend on a review of one's credit rating. This funding is also attractive because it is nonrecourse, meaning that the consumers must repay the money (plus fees and interest) only if they ultimately receive compensation for their legal claims. Thus, by obtaining immediate cash advances from

¹ The litigant third-party funding industry recently has been estimated to include approximately \$2.3 billion in assets actively invested in the commercial sector alone. See Roy Strom, *Litigation Finance Transparency Push Instead Lets Opacity Shine*, BLOOMBERG L. (Nov. 21, 2019), <https://news.bloomberglaw.com/us-law-week/litigation-finance-transparency-push-instead-lets-opacity-shine> (reporting on findings of the 2019 Westfleet Advisors Litigation Finance Buyer's Guide). The consumer sector, which is the focus of this Article, is not followed as closely by financial institutions, so there are no reliable surveys of its size. However, to the extent that commercial litigant funding involves billions of dollars in the United States, we are comfortable estimating that consumer litigant funding involves at least hundreds of millions of dollars.

funders, consumers can transfer a portion of their litigation risk while also alleviating some of the financial burden from not being able to pay their bills.²

The nonrecourse nature of this funding is also a major focus of the controversy surrounding the litigant third-party funding (LTPF) industry. Non-recourse financing is exempt from most states' usury and other consumer credit laws, enabling funders to charge higher interest and fees than would be permitted if these were ordinary consumer loans. Critics of the industry thus contend that the cost of such funding to the consumer is simply too great and may leave even "winning" litigants with little or nothing from a settlement.³ In addition, critics argue that the terms of the financing are not presented to consumers in a way that is transparent and easily understood, suggesting that the consumers would not have sought the financing if they had understood the terms and true cost.⁴ Defenders of LTPF, however, assert that funders are offering consumers an entirely legal and valuable product that increases consumer choice and is especially important to those who have no other credit options. Relatedly, they argue, such funding may enable consumer litigants to decline lowball settlement offers, leveling the playing field somewhat against well-capitalized corporate defendants, especially in the forty states in which attorneys are prohibited from advancing funds to their clients for ordinary living expenses.⁵

This debate surrounding LTPF recently made headlines during the NFL Concussion class action, with more than one thousand players reported to have received such advances and with Class Counsel raising concerns of

² See Jef De Mot & Michael G. Faure, *Third-Party Financing and Litigation Expenditures*, 12 N.Y.U. J.L. & BUS. 751, 773–74 (2016) (explaining the net gains for litigants and funders); Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT'L & COMPAR. L. 343, 379 (2011) (describing welfare gain to plaintiff of transferring risk to funder).

³ See Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 CHI.-KENT L. REV. 11, 12 (2014) (noting that a plaintiff who obtains a recovery from their lawsuit may end up owing up to 280% more than the amount they were advanced by the funder).

⁴ See Jenna Wims Hashway, *Litigation Loansharks: A History of Litigation Lending and a Proposal to Bring Litigation Advances Within the Protection of Usury Laws*, 17 ROGER WILLIAMS U. L. REV. 750, 778 (2012) (discussing the lack of transparency in the litigation financing industry).

⁵ See Ronen Avraham, Lynn A. Baker & Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 REV. LITIG. 143, 184–85 & nn.79–80 (2021) (providing details of the ten states plus the District of Columbia that have relaxed the restriction on lawyers' ability ethically to provide financial assistance to their clients); see also Philip G. Schrag, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)*, 28 GEO. J. LEGAL ETHICS 39, 56 (2015) ("In addition to the District of Columbia, eight states have adopted more lenient versions of Rule 1.8(e)."); Cristina D. Lockwood, *Adhering to Professional Obligations: Amending ABA Model Rule of Professional Conduct 1.8(e) to Allow for Humanitarian Loans to Existing Clients*, 48 U.S.F. L. REV. 457, 490 (2014) ("[The] consumer financing industry has arisen due to the broad ban preventing lawyers from lending money to clients for living expenses.").

“predatory lending” to the Court.⁶ Policymakers and scholars echo these concerns as they call for regulation of the industry to protect vulnerable consumers. Any regulations, however, should be based on systematic data rather than good intentions or isolated anecdotes. But to date, the industry has not been forthcoming with facts. Indeed, even armed with an order from the federal judge in the NFL Concussion litigation, Class Counsel was not able to obtain any systematic information from the funders regarding the terms of their contracts with the players.⁷

What are the facts? What is the effective interest rate charged in LTPF? How much risk does the funder actually bear? That is, how often does the amount the consumer recovers in the eventual settlement not enable the funder to be repaid the full amount it is owed under the contract? How often do consumers who receive LTPF not recover anything for their legal claims, leaving them with apparent windfalls (the advances they have received from the funders) and leaving the funders with complete losses on their nonre-course funding?

These questions are particularly significant with regard to *post-settlement* LTPF, the type of funding most NFL players reportedly received.⁸ This funding is sought by consumers *after* their lawsuits have settled and while the consumers are waiting, sometimes many months, to receive their settlement proceeds. The funder would seem to bear no litigation risk in such funding, because the settlement has effectively converted the consumer’s once-speculative legal claim into an asset with a specific and certain value. And if there is only financial rather than litigation risk to the funder, what is the normative basis for exempting this category of LTPF from the laws that regulate ordinary consumer credit?

This Article begins to fill these important factual and normative voids. To date, there has been no empirical research on (or even focused scholarly

⁶ See *infra* notes 16–19 and accompanying text.

⁷ Class Counsel in the NFL Concussion litigation reported to Judge Brody that various funders known to have NFL Concussion class members as clients “refused to respond to discovery requests that were propounded upon them pursuant to the Court’s Order of July 19, 2017 . . . , such that Class Counsel has been unable to determine . . . the terms of the [funding] agreements.” Co-Lead Class Counsel’s Reply Memorandum in Further Support of Motion to (1) Direct Claims Administrator to Withhold Any Portions of Class Member Monetary Awards Purportedly Owed to Certain Third-Party Lenders and Claims Services Providers, and (2) Direct Disclosure to Claims Administrator of Existence of Class Member Agreements with All Third Parties at 3, *In re Nat’l Football League Players’ Concussion Inj. Litig.*, No. 12-md-02323 (E.D. Pa., Nov. 30, 2017), ECF No. 9113; see also *id.* at 4 n.3 (documenting the list of entities that failed to respond to discovery). Class Counsel was left to support its various claims about the problematic terms of class members’ funding contracts with evidence from a few contracts from five funders. *Id.* at 4 n.4 (summarizing the terms that four class members received from four different funders for advances on the NFL class settlement payments and noting that a fifth funder’s “terms and actual agreements are already part of the record before the Court”).

⁸ See *infra* notes 20–21 and accompanying text.

study of) *post*-settlement LTPF and only two major empirical studies of *pre*-settlement LTPF.⁹ Despite the increasing prevalence of both forms of LTPF, media reports and much legal scholarship are still dominated by accusations of usurious effective interest rates rooted in anecdotes.¹⁰ Moreover, these anecdotes never distinguish between these two importantly different types of LTPF.

We were given unique, unrestricted access to the complete archive of sixteen years of funding applications and funding contracts from one of the largest consumer litigant funding companies in the United States (the “Funder”). Considering how jealously funders guard their data, one might reasonably wonder why this one was willing to share its comprehensive raw data with us. The Funder felt that accurate data would be more beneficial to the industry than the anecdotes and speculation in media reports. In addition, the Funder had known and worked with one of us for many years and trusted us to be fair and not misuse the data. The Funder did not want and did not have any influence or control over our data analyses, statistical results, or the content of this publication. The only restrictions were that we maintain the anonymity of the Funder and not make the raw data public. These data, which are robust and representative, enable us to reveal for the first time the terms and true price to consumers of this formerly mysterious and increasingly popular funding. Although most of the Funder’s transactions were with consumers whose legal claims had not yet been resolved and whose ultimate value had therefore not yet been determined (*pre*-settlement funding), the Funder also frequently transacted with consumers whose lawsuits had settled and who were simply awaiting payment from the defendant (*post*-settlement cases).

We are the first to be able to examine empirically the anatomy of *post*-settlement funding in the United States, and we are further able to compare it to data from the same Funder regarding *pre*-settlement LTPF. As we elaborate below, *post*-settlement LTPF is very different from *pre*-settlement funding and deserves a different response from policymakers. Once a legal claim has been resolved, its litigation risk is zero, which means that the only risk assumed by the funder from the consumer is collection risk.

⁹ See Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer Litigant Funding*, 104 CORNELL L. REV. 1133 (2019); Avraham, Baker & Sebok, *supra* note 5. There are two other published empirical studies about the industry, but both involve data from Australia and only about 113 funded cases. See David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075 (2013); Daniel L. Chen, *Can Markets Stimulate Rights? On the Alienability of Legal Claims*, 46 RAND J. ECON. 23 (2015); see also Jean Y. Xiao, *An Empirical Examination of Consumer Litigation Funding* ch.3 (May 2017) (Ph.D. dissertation, Vanderbilt University) (on file with Vanderbilt University Institutional Repository) (examining 4,403 consumer litigation finance contracts resolved between 2002 and 2013).

¹⁰ See *infra* text accompanying notes 74–75.

Consequently, assuming all other variables are held constant, one might expect funders in those cases to offer consumers better terms than in cases still being litigated.

Indeed, our data show that while the Funder does offer slightly better terms to post-settlement clients, those better terms do not come close to reflecting the essentially nonexistent repayment risk presented by this category of cases. Even assuming that the risks faced by the Funder in the pre-settlement funding market justify a median gross profit of 55–60% annually,¹¹ the same risks do not exist in the post-settlement funding market and therefore such profit is harder to justify. Moreover, these fundings have a very low rate of default and of “haircuts” (where the amount the consumer pays back to the Funder is smaller than the total amount due). This means that this category of advance is “nonrecourse” on paper but not on the ground, and we see no normative basis on which to distinguish post-settlement LTPF from other types of consumer credit. We therefore recommend that it be regulated with an eye toward protecting consumers from deceptive and unconscionable contract terms, including illegal interest rates, in the same way that credit cards and other forms of consumer credit are regulated.

The remainder of this Article proceeds as follows. Part I provides an overview of consumer litigant third-party funding and recent litigation, elaborating upon the distinctions between pre- and post-settlement LTPF. Part II analyzes the data that we received from the Funder. Part III builds upon that analysis to offer our recommendations for how policymakers concerned with protecting consumers should begin to think about post-settlement LTPF.

I

CONSUMER LITIGANT THIRD-PARTY FUNDING

In the United States, LTPF is a growing industry in which financial corporations assist with plaintiffs’ economic needs, such as living expenses or litigation costs, by exchanging money for ownership rights in the proceeds of a legal dispute on a contingent or *nonrecourse* basis.¹² The commercial

¹¹ As is well understood in the business world, the risk of investments varies directly with the potential return, so that the more risk involved, the greater the potential return, and vice versa. This is called the risk-return tradeoff. See *Risk*, NASDAQ, <https://www.nasdaq.com/glossary/r/risk> (last visited May 21, 2021) (defining risk as the “[d]egree of uncertainty of return on an asset”); *Return*, NASDAQ, <https://www.nasdaq.com/glossary/r/return> (last visited May 21, 2021) (defining return as “[t]he change in the value of a portfolio over an evaluation period”). As we claim in the text, because the risk in post-settlement LTPF is nil, there is no economic justification for the very high returns we found. See also *infra* Section II.C.2.

¹² See *supra* notes 1–4 and accompanying text; see also Suneal Bedi & William C. Marra, *The Shadows of Litigation Finance*, 74 VAND. L. REV. 563, 565–66 (2021) (“Unheard of yesterday, [LTPF] is a mainstay today. Commercial litigation finance companies did not even exist in America until about 2006 Some estimate that billions of dollars of litigation finance investments are

sector of the LTPF industry provides funding to sophisticated corporate litigants to help pay their attorneys' fees and other costs in commercial disputes.¹³ Commercial litigation finance firms are active in both the pre-settlement and post-settlement markets.¹⁴ The consumer sector—which is the focus of this Article—provides both pre- and post-settlement funding directly to individuals, most of whom have no previous experience as a litigant and have retained their attorney on a contingent-fee basis.¹⁵ Thus, the funding is typically sought to help consumer-litigants pay living expenses and medical bills while awaiting the resolution of their lawsuits.

As consumer LTPF has become more common in the United States, it has drawn increasing attention from scholars, the media, policymakers, certain political groups, and the judiciary. This Part surveys criticisms and defenses of LTPF and underscores the need for empirical data on the subject. Using the recent NFL Concussion litigation as a case study, it illustrates the massive information gaps underlying public understanding of LTPF. It

committed each year. This number will quickly grow.”); Latif Zaman, *Growth of Litigation Funding in the Wake of COVID-19*, HUDSON COOK (Apr. 30, 2020), <https://www.hudsoncook.com/article/growth-of-litigation-funding-in-the-wake-of-covid-19> (noting that consumer LTPF industry has experienced rapid growth over the past decade). Courts, too, have begun to embrace litigation finance, even in the face of contrary precedent. *See, e.g.*, *Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235, 238 (Minn. 2020) (reversing a 120-year-old precedent and holding that litigation finance, where a “stranger to the lawsuit” provides “financial support . . . in exchange for a right to recover from the proceeds of the settlement of [the] lawsuit,” is not against public policy).

¹³ *See generally* STEVEN GARBER, RAND INST. FOR CIV. JUST., LAW, FIN., & CAP. MKTS. PROGRAM, *ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWN, AND UNKNOWN* (2010) (providing a comprehensive review of the market for third-party litigation finance); Austin T. Popp, Note, *Federal Regulation of Third-Party Litigation Finance*, 72 VAND. L. REV. 727, 735–40 (2019) (distinguishing consumer and commercial litigation financing). Financing for plaintiffs' law firms is yet another sector in some countries but is currently largely limited in the United States by ethics rules regulating fee sharing. *See, e.g.*, W. Hunter Huffman, *A Great and Profitable Clause: Why the New York City Bar Association Says It Is Time to Pay Attention to Investors Behind the Curtain*, 98 N.C. L. REV. 973, 984–88 (2020) (describing the evolution of American Bar Association ethics rules governing fee sharing).

¹⁴ Some major commercial litigation finance firms participate in the post-settlement market. *See, e.g.*, BURFORD CAP., BURFORD CAPITAL 2020 ANNUAL REPORT 30, 54 (2020), <https://www.burfordcapital.com/media/2080/fy-2020-report.pdf> (reporting \$168 million of cash proceeds from post-settlement finance in 2020 and \$254 million in 2019). One of us (Sebok) has been informed by a leading funder that it estimates the global commercial post-settlement market to be at least \$500 million. This article makes claims and observations only about the consumer post-settlement market in the United States.

¹⁵ Personal injury cases, which comprise almost all of the cases in the data set, involve plaintiffs who are classic “one shotters.” *See* Charles Penrod & Matthew Crow, *The Biggest “Have” of Them All: Wal-Mart and Its Litigation Outcomes in Slip-and-Fall Cases*, 55 AM. BUS. L.J. 223, 224 (2018) (citing Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974)); *see also* Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1277 (2011) (noting that the LTPF market “was traditionally [comprised of] individual plaintiffs who resorted to third-party funding, often in personal injury cases”).

argues that this dearth of information makes it challenging for policymakers and commentators to evaluate the true costs and benefits of LTPF.

Criticisms unique to consumer LTPF fall into two broad categories.¹⁶ One is that the cost of such funding to the consumer is simply too high. The contention is that the effective interest rate charged to consumers is often usurious and may leave even plaintiffs who successfully resolve their legal claims with little or nothing by the time of the settlement.¹⁷ The suggested

¹⁶ In addition to the two categories of criticisms discussed in this Part, there are other criticisms of litigation funding which are not unique to consumer LTPF—and are potentially more relevant to commercial third-party funding—or which are readily managed or rebutted. These criticisms include: (1) that third-party funding increases the amount of frivolous litigation; (2) that funders may seek to have improper influence over litigation decisions and strategy; and (3) that communications between attorneys and funders may result in problematic waivers of attorney-client privilege or attorney work product protection. For discussions of these criticisms, see, for example, Popp, *supra* note 13, at 740–44 (discussing “[c]ommon [o]bjections” to litigation funding); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 72–74 (2011) (discussing the modern trend in favor of assignability of legal claims and away from doctrines of champerty and maintenance); Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding—A Signaling Model*, 63 DEPAUL L. REV. 233, 235 (2014) (portraying the decision of a funder to advance funds to a plaintiff as creating a credible signal that the claim has merit); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 381 (2009) (“[W]ork product and privilege issues [] must be addressed if information is to be shared with a third party seeking to price and assume litigation risk from a defendant.”); Jonathan T. Molot, *The Feasibility of Litigation Markets*, 89 IND. L.J. 171, 186 (2014) (contending that “most of the information that a third-party funder will need to evaluate a lawsuit is factual information of the sort that is discoverable by the adversary in any event”); David Tyler Adams, Note, *Laissez Fair: The Case for Alternative Litigation Funding and Assignment of Lawsuit Proceeds in Georgia*, 49 GA. L. REV. 1121, 1148–49 (2015) (explaining why funding companies are unlikely to fund frivolous claims); Roni Elias, *Mythbusting: Why the Critics of Litigation Finance Are Wrong*, 13 FLA. A&M U. L. REV. 111 (2017) (rebutting various criticisms of litigation funding); Lynn A. Baker, *Alienability of Mass Tort Claims*, 63 DEPAUL L. REV. 265, 285–86 (2014) (discussing the potentially incentive-shifting implications of “advanced funding” loans for mass tort claimants who receive a settlement offer); N.Y.C. BAR ASS’N, REPORT TO THE PRESIDENT BY THE NEW YORK CITY BAR ASSOCIATION WORKING GROUP ON LITIGATION FUNDING (2020), http://documents.nycbar.org/files/Report_to_the_President_by_Litigation_Funding_Working_Group.pdf (discussing the current state of third-party litigation funding and recommending rule changes to address these funding arrangements).

¹⁷ Ironically, these criticisms often come from business-funded “tort reform” groups such as the U.S. Chamber of Commerce and the Lawsuit Reform Alliance of New York, entities not known for their great concern for consumer plaintiffs. The Institute for Legal Reform of the U.S. Chamber of Commerce has authored several lengthy reports critical of litigation finance. See, e.g., JOHN H. BEISNER, JESSICA D. MILLER & JORDAN M. SCHWARTZ, U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING MORE LAWSUITS, BUYING MORE TROUBLE: THIRD PARTY LITIGATION FUNDING A DECADE LATER (2020), https://instituteforlegalreform.com/wp-content/uploads/2020/01/Still_Selling_Lawsuits_-_Third_Party_Litigation_Funding_A_Decade_Later.pdf; JOHN H. BEISNER & GARY A. RUBIN, U.S. CHAMBER INST. FOR LEGAL REFORM, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION (2012), https://instituteforlegalreform.com/wp-content/uploads/media/TPLF_Solutions.pdf; JOHN BEISNER, JESSICA MILLER & GARY RUBIN, U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES (2009). The Lawsuit Reform Alliance of New York states that one of its “core issues” is “lawsuit lending,” and it “supports the prohibition of lawsuit lending or strict regulation under consumer

remedies have included limits on the rate of return to the funder under a LTPF contract.¹⁸ Such legislation, however, has at least once caused funders to leave a state.¹⁹

A second common criticism is that the terms of LTPF may not be presented to consumers in a way that is transparent and readily understood. Thus, in previous work, we have called on legislatures to ban various complex contractual provisions, such as “interest buckets” and minimum interest periods, which prevent even savvy consumers from being able to calculate easily or accurately the true cost of the financing.²⁰

Much of the roiling controversy surrounding LTPF might be resolved if policymakers had facts. But the industry has not been eager to make its practices and profits transparent. As a result, to date there have been virtually no reliable empirical data available regarding the operation of the LTPF industry from which policymakers could seek to determine its consequences for consumers, defendants, or the larger legal system. For example, the recent class settlement in the NFL Concussion litigation was marked by two

protection laws.” *Core Issues – Lawsuit Reform Alliance of New York*, LRANY, <https://lrany.org/issues> (last visited May 28, 2021); *see also* LAWSUIT CASH ADVANCES: THE REAL STORIES, LRANY, <https://lrany.org/wp-content/uploads/2017/11/Victims-of-Lawsuit-Lending-2017.pdf> (last visited May 28, 2021) (reporting excessive interest rates charged by lawsuit cash advance firms).

¹⁸ In recent years, Arkansas, Indiana, Nevada, Tennessee, and West Virginia have passed laws that cap the premium that may be charged to a consumer under a LTPF contract. *See* ARK. CODE ANN. § 4-57-109(b)(1) (2021) (cross-referencing ARK. CODE ANN. § 4-57-104, which sets the maximum rate of interest at 17% per annum according to ARK. CONST. amend. 89, § 3); IND. CODE 24-12-4.5-2(a)(1)(A) (2020) (setting a maximum rate of 36% plus certain defined fees); NEV. REV. STAT. § 604C.310 (2019) (setting a maximum rate of 40% per annum); TENN. CODE ANN. § 47-16-110 (2021) (setting a maximum rate of 36% per annum for a maximum term of three years plus allowable fees); W. VA. CODE § 46A-6N-9 (2021) (setting a maximum rate of 18% per annum). Other states have regulated LTPF contracts by requiring straightforward disclosures of the total amounts that will be owed to the financier to prevent obfuscation but without instating financial caps. *See* ME. REV. STAT. ANN. tit. 9-A, § 12-104 (2020); NEB. REV. STAT. § 25-3303(A) (2010); OHIO REV. CODE ANN. § 1349.55(B) (West 2008); OKLA. STAT. tit. 14A, § 3-801 (2013); UTAH CODE ANN. § 13-57-301 (West 2020); VT. STAT. ANN. tit. 8, § 2253 (2021). Maryland requires litigation financiers to be formally licensed as lenders, and Colorado similarly considers the funds to be loans subject to the state’s usury cap. Brandon Lowrey, *How Litigation Funding Can Save, and Doom, Poor Plaintiffs*, LAW360 (May 13, 2019), <https://www.law360.com/articles/1157455/how-litigation-funding-can-save-and-doom-poor-plaintiffs>. Similarly, South Carolina and Kansas consider the funds to be loans, subject to such relevant regulations. ANDREW PAULEY & PAUL TETRAULT, NAT’L ASS’N MUT. INS. COS., CURBING A QUESTIONABLE PRACTICE: A SURVEY OF PUBLIC POLICY MEASURES TO ADDRESS CONCERNS SURROUNDING LITIGATION FUNDING 11 (2019), https://www.namic.org/pdf/publicpolicy/190128_Litigation-LendingUpdate.pdf.

¹⁹ In Tennessee, for example, one of the nation’s largest funders announced that it was leaving that market the day legislation went into effect which capped interest. Andrew G. Simpson, *Litigation Financing Firm Exits Tennessee as New Law Goes into Effect*, INS. J. (July 3, 2014), <https://www.insurancejournal.com/news/southeast/2014/07/03/333772.htm>.

²⁰ *See, e.g.*, Avraham, Baker & Sebok, *supra* note 5, at 183–84; Avraham & Sebok, *supra* note 9, at 1172–75.

years of satellite litigation surrounding the LTPF contracts many plaintiffs signed with various funders to receive cash advances on their expected settlement proceeds.²¹ The LTPF agreements were attacked as unconscionable by class counsel, the Consumer Finance Protection Bureau, and the New York State Attorney General. All three expressed concern that the funders took advantage of the plaintiffs—many of whom were cognitively impaired, in desperate financial straits, or both—by offering them “predatory” loans, and argued that these cash advances should be subject to usury laws.²² The funders offered a variety of defenses against these attacks—but no data—noting that they were participating in an entirely legal and rapidly growing market for LTPF which, they asserted, provides concrete benefits to both the consumer-plaintiffs and society.²³ The funders also cited case law in which courts refused to treat LTPF as ordinary loans subject to usury laws.²⁴

Although the critics of LTPF in the NFL Concussion litigation received a sympathetic hearing from every court before which they argued, the effort to force the funders to rescind their contracts with the players went nowhere.²⁵ The allegations about the LTPF industry, if true, are nonetheless serious and disturbing. One concern, raised by the State of New York, was that the funders were passing off one thing—post-settlement funding—for another—pre-settlement funding—and charging the players an effective

²¹ See, e.g., Ken Belson, *Widespread Deceptive Practices May Reduce Payouts in N.F.L. Concussion Settlement*, N.Y. TIMES (Sept. 19, 2017), <https://www.nytimes.com/2017/09/19/sports/football/nfl-concussion-settlement.html> (“In a hearing in federal court [in Philadelphia], Christopher Seeger, a lawyer for the retired players who sued the N.F.L., said nearly 1,000 ex-players had signed dubious contracts with lenders and lawyers.”). Although the \$1 billion settlement negotiated between the NFL and the players was approved by Judge Brody in 2015, *In re Nat’l Football League Players’ Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2015 WL 12827803 (E.D. Pa. May 8, 2015), litigation regarding the validity of the funding agreements entered into by more than 1,000 settling players continued through 2019. See *In re Nat’l Football League Players’ Concussion Injury Litig.*, 923 F.3d 96, 101 (3d Cir. 2019) (consolidating appeals by three groups of litigation funders from Judge Brody’s final order).

²² See Brief for Class Plaintiffs-Appellees at 1, *In re Nat’l Football League Players’ Concussion Injury Litig.*, 923 F.3d 96 (Nos. 18-1040 & 18-1482), 2018 WL 2393985, at *1 (describing the funders as “predatory lenders offering quick money at exorbitant interest rates”); Complaint at 7, *Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729 (S.D.N.Y. 2018) (No. 17-CV-890), 2017 WL 525930 (asserting that the amount repaid by a class member to the funders would equal an annual interest rate as high as 250% per annum).

²³ See Memorandum of Law in Support of Defendants’ Motion to Dismiss at 28–29, *Consumer Fin. Prot. Bureau*, 332 F. Supp. 3d 729 (No. 17-CV-890), 2017 WL 10543541.

²⁴ See, e.g., *id.* at 27 (citing *Lynx Strategies, LLC v. Ferreira*, 957 N.Y.S.2d 636, 636 (N.Y. Sup. Ct. 2010)) (noting that New York allows a party to exchange a “non-recourse advance” to fund legal action for ownership interest in proceeds of a claim).

²⁵ The Third Circuit noted that the concerns were “well-taken.” *In re Nat’l Football League Players’ Concussion Injury Litig.*, 923 F.3d at 112. It accepted that “[t]here may also be issues of unconscionability, fraud, or usury based on the high effective interest rates in the agreements and arguments . . . that the agreements are disguised predatory loans, rather than true assignments” but then noted that “these are all questions beyond the scope of the appeal before us.” *Id.*

annual rate of interest that could not be justified.²⁶ Put differently, under the guise of *pre-settlement* LTPF with its litigation risk-based rationale for exemption from state usury laws, the funders were reportedly making *post-settlement* cash advances and therefore bearing no more risk than ordinary consumer lenders who are subject to interest caps.²⁷ The failure of the courts to pursue such significant allegations reflects not only the limitations of judicial fora as agents of consumer protection, but also a failure of the various stakeholders in the debate over LTPF to clearly define the various forms it can take and to reveal how the costs of these various forms of funding are calculated. Such clarification would allow consumers and policymakers to usefully compare the true costs and benefits of LTPF with those of rival forms of financing.

In sum, notwithstanding the “all or nothing” form of the LTPF debate to date, it is critical that policy decisions regarding consumer LTPF distinguish between pre- and post-settlement funding. In this Article, we compare the practical legal and financial differences between pre- and post-settlement LTPF for consumers. In theory, post-settlement advances (which were at issue in the NFL Concussion controversy) and pre-settlement advances (which have been the focus of virtually all previous litigation and scholarship) share the common feature that both involve contracts between litigants and third parties where the former promises to pay the latter a sum of money contingent on proceeds received from the former’s legal claim.²⁸ In that respect,

²⁶ See Response & Reply Brief for the State of New York at 38–39, *Consumer Fin. Prot. Bureau*, 332 F. Supp. 3d 729 (No. 17-CV-890), 2019 WL 3815096 (arguing that the funders “assumed little to no practical risk under the agreements because there was almost no prospect that consumers would not receive their awards. . . . [T]he possibility that consumers would not receive payment from either fund was remote”). The Consumer Financial Protection Bureau shared these concerns, arguing that “RD [a funder to NFL players] mischaracterizes these transactions as ‘assignments,’ [when] they are in fact offers to extend credit or extensions of credit As a result of RD’s mischaracterizations, consumers are unable to compare the cost of RD’s products to alternatives.” Complaint at 2, *Consumer Fin. Prot. Bureau*, 332 F. Supp. 3d 729 (No. 17-CV-890), 2017 WL 525930.

²⁷ Although the funders to the NFL players defended against charges of misrepresentation by arguing that there is no difference between an assignment of proceeds before and after settlement, the American Lawsuit Finance Association (ALFA), a trade group representing many of the largest pre-settlement litigant third-party funders in the United States, filed a brief arguing that post-settlement funding was not LTPF. ALFA asserted that there were “critical differences” between the transactions in the NFL case and pre-settlement LTPF such that the interest charged in the latter could be justified even if the interest charged in the former could not. See Memorandum of Law of Amicus Curiae Am. Legal Fin. Ass’n in Support of Plaintiff Consumer Fin. Prot. Bureau at 11, *Consumer Fin. Prot. Bureau*, 332 F. Supp. 3d 729 (No. 17-CV-890), 2017 WL 10543542. It should be noted that one court has, in essence, endorsed the position urged by ALFA in a parallel proceeding. *New York v. RD Legal Funding, LLC*, No. 452091/2018, 2020 WL 2510494, at *6 (N.Y. Sup. Ct. 2020) (“The two categories of awards underlying the agreements are dramatically different from one another.”).

²⁸ See Radek Goral, *Justice Dealers: The Ecosystem of American Litigation Finance*, 21 STAN. J.L. BUS. & FIN. 98, 127–31 (2015) (discussing the different stages of litigation funding).

pre-settlement funding does look like post-settlement funding; one might thus argue that because the former is usually not subject to consumer credit laws, the latter similarly should not be. However, the two types of LTPF differ significantly with regard to the procedural posture of the litigant's claim at the time of the funding transaction. In post-settlement fundings, the once-speculative legal claim has become an asset with a certain and specific value.²⁹ And if post-settlement funding involves no litigation risk, then such funding looks like an ordinary consumer loan and potentially should be subject to ordinary consumer credit laws.³⁰

In the next Part, we take the first step towards resolving the mystery around the similarities and differences between pre- and post-settlement LTPF as they play out on the ground.

II DATA ANALYSIS

In this part we open the black box of consumer LTPF and reveal how the Funder operates. In Part A, we describe in detail the funding applications received by the Funder, both the funded and unfunded requests. The data are very comprehensive and include various details about the consumer, the underlying legal case, and the terms of the transaction with the Funder. Part B surveys the Funder's review and underwriting process. The data portray a speedy but rigorous underwriting process, especially for pre-settlement funding. In Part C, we explore the funding terms, detailing the similarities and differences between pre- and post-settlement consumer LTPF. Among the most significant differences we find are that: the median amount funded post-settlement is three times larger than that funded pre-settlement; the period from funding to repayment is significantly shorter for post-settlement fundings; the Funder charges interest entirely differently in the two types of fundings; and although post-settlement LTPF presents virtually no risk of repayment to the Funder, it yields a much larger profit for the Funder than pre-settlement LTPF.

A. General

We received from one of the largest consumer litigation financing firms

²⁹ *Id.* at 130–31 (“The post-settlement model involves little uncertainty, because the quality and value of legal claims has already been ascertained at this stage.”); *see also id.* at 130 (“[Post-settlement LTPF addresses] the gap between the time of a lawsuit’s resolution and the time when the amount of recovery is actually disbursed to the plaintiff or her lawyer.”).

³⁰ This is the logic that led the court to conclude that advances made by funders to the parties who had been approved to receive federal funds under the James Zadroga 9/11 Health and Compensation Act of 2010 were subject to New York’s consumer credit laws. *See RD Legal Funding, LLC*, 2020 WL 2510494, at *6 (“Unlike the risk presented in [pre-settlement] litigation-funding . . . here there is no reason to doubt that the government-approved awards were a done deal.”).

in the United States a unique data set which contains approximately 225,552 requests for funding from 2001 throughout 2016.³¹ These requests come from 123,102 different clients who brought 130,866 different cases (a small minority of clients brought more than one case).³² We believe the Funder is a good representative of the larger consumer LTPF sector. To begin, the Funder is relatively large compared to the other funders competing in the consumer LTPF space. While it would be best to sample data from multiple funders across the whole consumer sector, that is not a realistic possibility. As noted above, each funder jealously guards its data, even declining to comply with court orders requiring their production.³³ And we were extremely fortunate to be given unrestricted access to the comprehensive data of one major funder.³⁴ While we cannot state the precise share of the existing consumer LTPF market represented by the Funder in this study, we believe it is significant. Though there have been recent efforts by private consultants to measure the size of and identify the leading firms in the *commercial* LTPF space, there have been no similar efforts regarding the *consumer* LTPF sector.³⁵ Some academic studies have tried to define the scope and size of the consumer LTPF sector, but these efforts are qualitative, not quantitative.³⁶ In addition, the relatively large size of the Funder and the breadth of its geographic reach (its clients come from every single state in the United States) give us confidence that its distribution of case-types should be correlated with the distribution of legal claims that comprise the general market for consumer LTPF. Consumers who seek out LTPF are typically personal injury claimants, especially those involved in motor vehicle and slip-and-fall

³¹ This is an updated, and therefore somewhat larger, data set than that discussed in Avraham & Sebok, *supra* note 9, which included only 203,307 funding requests. The same Funder is the source of both data sets.

³² Thus, for example, a client with two different types of claims, such as a car accident and a Vioxx claim, would have two different “cases” in our data set. And each such “case” might also include more than one funding request (and grant/denial of funding).

³³ See *supra* note 7. All consumer funders in the United States are privately held investment corporations or partnerships. The data used in this Article, to which we were given unique and unrestricted access, are not publicly available, not even in the few states that mandate some form of reporting to state regulators. See, e.g., ME. STAT. tit. 9-A, § 12-107(4) (codifying “An Act to Regulate Presettlement Lawsuit Funding” which calls for the administrator to prepare and submit to the Insurance and Financial Services Committee an annual report that includes aggregate funding information reported by those companies registered to conduct business in Maine).

³⁴ See *supra* Introduction.

³⁵ See, e.g., *\$2.3 Billion of Capital Deployed Over 12-Month Period Across U.S. Commercial Litigation Finance Industry, According to First-of-Its-Kind Study*, BUSINESSWIRE (Nov. 19, 2019), <https://www.businesswire.com/news/home/20191119005098/en/2.3-Billion-of-Capital-Deployed-Over-12-Month-Period-Across-U.S.-Commercial-Litigation-Finance-Industry-According-to-First-of-Its-Kind-Study> (reviewing the “first reliable calculation of the size of the U.S. litigation finance industry,” the Westfleet Advisors Litigation Finance Buyer’s Guide).

³⁶ See Goral, *supra* note 27, at 137, tbl.1 (listing the major consumer litigation funders in the United States). The Funder whose data are studied here appears on this table.

accidents.³⁷ Less typical are individuals litigating labor law, Jones Act, assault, or police brutality claims who together comprise only a very small portion of applicants for consumer LTPF.³⁸

Because we have unrestricted access to all the funding applications received by the Funder, we are able to study both the funded and unfunded requests. The data are very comprehensive and include, among other things, the name and address of the individual seeking funding, the name and state of the law firm (if any) representing them, where the applicant's lawsuit has been filed (if filed),³⁹ a brief description of the underlying legal case, the date of the incident at the center of the legal claim, the amount of funding requested by the applicant, and the date of the funding request. Additional information is provided for applications that the Funder seriously considers, and may include: police, medical, and insurance reports on the incident at the center of the claim; information on any liens that might be attached to an applicant's recovery; and, sometimes, whether the applicant has ever filed for bankruptcy.⁴⁰ Finally, for requests ultimately funded, the data include the amount funded, the date of funding, the monthly interest rate, the fees assessed, the amount due the Funder at the time the underlying case settles, the amount ultimately collected by the Funder, and the date of repayment (if any).

We decided to work at the case level, and therefore consolidated multiple funding requests related to the same underlying legal claim into one line.⁴¹ After some cleaning, we were left with 125,945 cases, from 118,565

³⁷ See *infra* note 41; see also Avraham & Sebok, *supra* note 9, at 1147, chart 3 (finding “Motor Vehicle Accident” and “Slip / Trip and Fall” to be the most prevalent subject matters underlying cases in the article’s dataset for investigating LTPF); *Pelvic Mesh Lawsuit Funding Firm, Fair Rate Funding, Reports Johnson and Johnson Settlement Offer for Over 2,000 Mesh Lawsuits*, P.R. NEWSWIRE (Jan. 28, 2016), <https://www.prnewswire.com/news-releases/pelvic-mesh-lawsuit-funding-firm-fair-rate-funding-reports-johnson-and-johnson-settlement-offer-for-over-2000-mesh-lawsuits-300211623.html> (describing funder Fair Rate Funding, which “specializes in advancing cash now for plaintiffs who are involved in personal injury lawsuits,” and its loans to plaintiffs suing Johnson & Johnson for pelvic mesh products that allegedly cause organ damage, incontinence, inability to have sexual relations, and constant pain).

³⁸ See *infra* note 41; see also Avraham & Sebok, *supra* note 9, at 1147, chart 3 (finding “Labor Law / Jones Act” and “Assault / Police Brutality” to be the least and second least prevalent subject matters, respectively, underlying cases in the article’s dataset for investigating LTPF).

³⁹ The Funder tells us that “[w]hile a vast majority of the cases have already been filed, not all cases are. Notwithstanding, every client must have already retained counsel.” E-mail from Funder to Ronen Avraham (Sept. 9, 2019, 16:27 CDT) (on file with author).

⁴⁰ According to the Funder, “[i]f the injury occurs after the bankruptcy filing, we will fund the case. Conversely, if the injury occurs before the bankruptcy, then we will not fund the case since the pending lawsuit would be considered part of the bankruptcy estate.” E-mail from Funder to Ronen Avraham (Sept. 11, 2019, 16:45 CDT) (on file with author).

⁴¹ The vast majority of individuals with motor vehicle (MVA) claims brought only one case, and in that case, the majority brought only one funding request. Specifically, 95.67% of MVA claimants brought just one case, and of those, 74.45% made only one funding request in connection with their claim.

clients. More than 96% of these cases (120,562) are pre-settlement funding claims. Less than 4% (the remaining 5,383 cases) are post-settlement claims. The pre-settlement funding claims in our data set involve a wide range of underlying legal claims. By far, the most common type of claim (59.54%) is motor vehicle accidents (MVA), comprising 71,782 cases.⁴²

In order to explore the comparatively small number of post-settlement claims most reliably, we focus our analysis on a group of 4,654 post-settlement cases in which the Funder categorized the client's underlying legal claim as "*Other*."⁴³ We compare these *Other* post-settlement cases to our main group of MVA pre-settlement cases.⁴⁴

Our decision to compare the Funder's pre-settlement MVA cases with its post-settlement *Other* cases is based on our judgement that the salient common feature in the former group was injury type (MVA, as opposed to other types of personal injury claims), while the salient feature in the latter group was simply whether the underlying legal claim, regardless of injury type, was settled or not. This judgment is based on the following assumption: although the Funder might vary the financial terms of the contract with the plaintiff in systematically measurable ways based on injury type (given differences in the required proof of causation or damages between, for example, MVA and product liability mass tort claims), these differences would be irrelevant in the calculation of the financial terms of post-settlement contracts, where the most salient consideration to the Funder would be client's net settlement amount. This calculation in post-settlement fundings might also include certain counterparty risk, such as the risk that the plaintiff has medical or other liens that take priority over the Funder's lien or, very rarely, the risk that the judgment debtor in the underlying claim defaults.⁴⁵

Given that the Funder likely learns (or could easily learn) the exact underlying category of lawsuit at the time the client applies for funding in these 4,656 post-settlement cases, it is significant that the Funder does not bother to code this information in its own records. This reinforces our assumption above that, in contrast to pre-settlement funding, the exact category of the client's underlying lawsuit is not important to the Funder in applications for post-settlement funding. The reason is probably that because the client's

⁴² The number of cases for MVA include both pre- and post-settlement cases. The other most common types of claims at the center of a funding request are: slip-and-fall claims (14,753), mass tort (8,536), premises liability (7,533), medical malpractice (4,312), assault/police brutality (3,386), and labor law/Jones Act/Federal Employers Liability Act (2,277).

⁴³ Of these post-settlement *Other* cases, 3,267 were "completed." For a definition of a "completed" case, see the description of the Funder's underwriting process *infra* Section II.B.

⁴⁴ Whenever relevant, we also provide a more granular analysis than we did on the additional post-settlement cases in which the funder categorized the client's underlying claims as MVA (426 cases, with 363 completed). See *infra* note 56.

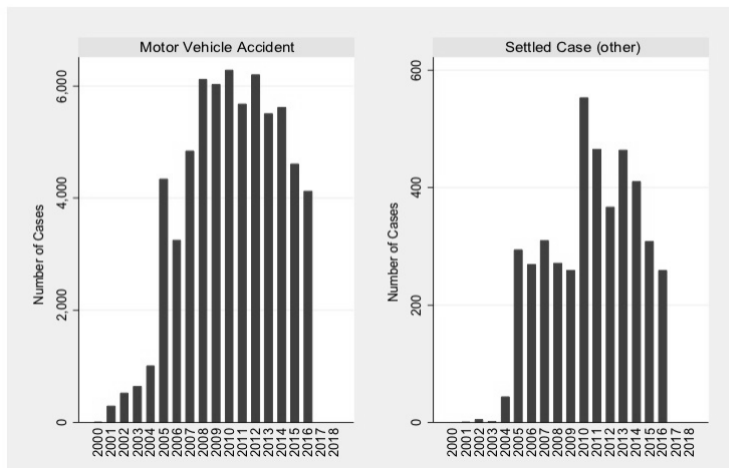
⁴⁵ See Goral, *supra* note 27, at 130–31 (noting that in post-settlement fundings, "the funder assumes the risk of the obligor's (the losing litigant's) default").

underlying lawsuit has been resolved, the Funder need not make any determination of the legal risk beyond learning from the client's lawyer the amount of the client's expected net recovery and, perhaps, the name of the judgment debtor. In essence, the Funder treats these post-settlement cases like security interests or collateral. We will return to this important fact when we discuss the policy implications of our research.⁴⁶

The pre-settlement MVA claimants live in every state in the U.S. and the District of Columbia, but more than 50% of them live in three states: New York (33%), New Jersey (10%), and Florida (10%).

Figure 1 below shows the number of MVA and post-settlement *Other* cases per year for 2001 through 2016. Each year, there are about ten times more pre-settlement MVA cases than post-settlement *Other* cases. There was a substantial increase in both categories of cases in 2005, and the number of cases per year in both categories has remained well above the 2004 levels ever since.⁴⁷

FIGURE 1. NUMBER OF CASES PER YEAR PER CLAIM TYPE



B. The Review and Underwriting Process

Each funding request undergoes a review process in which the Funder examines all the available data and speaks with the lawyer representing the client in the underlying legal claim. The results of this process are depicted in Figure 2 below. Ultimately, the Funder rejects fewer requests for funding

⁴⁶ See *infra* Section III.

⁴⁷ We do not know why the number of cases in each category is lower in recent years. Perhaps it is because competition within the industry has increased. The data do not suggest it is because the Funder received more requests for funding involving other categories of claims. In fact, the total number of cases handled by the Funder in recent years has also declined.

in post-settlement cases (23%) than in pre-settlement cases (46%).⁴⁸ This difference is not surprising given that the Funder in post-settlement cases knows the exact amount of the client's net settlement and can precisely calibrate the amount funded and the terms of the contract to reduce the risk of any haircut at the time of repayment. Essentially, there is no risk of default.

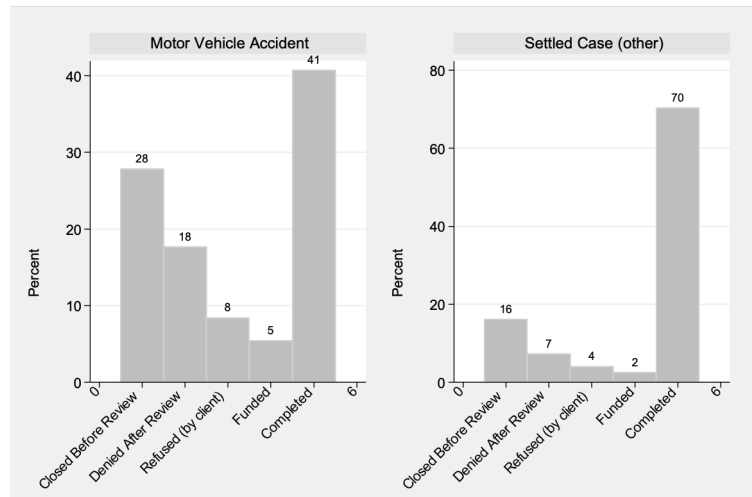
Most of the approved cases in each category were "executed," meaning that they went through the entire underwriting process (were not "closed before review" or "denied after review"); money was offered to the client; and funding was not "refused by client."⁴⁹ The executed cases are either "funded" or "completed." The "funded" cases are ones in which the obligation to the funder is still outstanding because the underlying lawsuit has not yet settled or otherwise been resolved. The vast majority of the executed cases, however, are "completed," meaning that the underlying lawsuit was resolved and the funder was paid. In our data set, completed cases account for 89% of executed MVA cases and 97% of executed post-settlement cases. The difference reflects the fact that the client's underlying legal claim is paid more quickly in post-settlement cases than in pre-settlement cases, and the Funder is correspondingly paid faster.⁵⁰

⁴⁸ The first category, "closed before review," means that the funding application was denied outright and did not proceed further through the underwriting process. This occurred in 28% of MVA cases and 16% of Settled Cases. The second category, "denied after review," means that the application underwent a full underwriting process but was ultimately not approved for funding. This was the result in 18% of MVA cases and 7% of Settled Cases.

⁴⁹ Interestingly, not all applicants whose cases completed the underwriting process and were approved for funding ultimately accepted the funding. Only half as many post-settlement clients as MVA pre-settlement clients declined their funding offer: 4% for post-settlement and 8% for pre-settlement MVA. One possible explanation is that clients seeking post-settlement funding may feel an even greater need for it than clients seeking pre-settlement funding. Another possibility is that clients seeking post-settlement funding may be deterred by the Funder's interest rates and fees less often since they expect, perhaps optimistically, that they will repay the Funder within a few weeks or months.

⁵⁰ See discussion *infra* Section II.C.1.

FIGURE 2. STATUS OF FUNDING REQUESTS
(PRE- VS. POST-SETTLEMENT CASES)



C. The Completed Cases

1. The Funding Timeframe and Amount

What about the duration of funding and the amount funded? Table 1 below shows the various stages and amounts of funding for completed pre-settlement MVA and post-settlement *Other* cases. Table 1 reveals large differences between the pre- and post-settlement cases (all differences are significant at the 1% level). Not surprisingly, the median number of days between the accident (or incident) at issue in the underlying legal claim and the client contacting the Funder is greater for post-settlement than pre-settlement fundings (Table 1, Row 1). However, and again not surprisingly, the median number of days from funding to repayment (completion) is significantly shorter for post-settlement than pre-settlement claims, with a pre-settlement median of 401 days (MVA) and a post-settlement median of 75 days (Table 1, Row 3). Both pairs of results reflect the fact that the underlying legal case has been resolved at the time the client seeks post-settlement funding.

TABLE 1. STAGES AND AMOUNT OF COMPLETED FUNDING
(PRE- VS. POST-SETTLEMENT)⁵¹

			Pre-Settlement (MVA)	Post-Settlement
1	Number of days between Accident and Enter	Median	241	361
		Average	391	756
2	Number of days between Enter and Funding	Median	9	1
		Average	21	16
3	Number of days between Funding and Completion	Median	401	75
		Average	567	198
4	Estimated Gross Case Value	Median	\$25,000	\$50,000
		Average	\$98,255	\$323,970
5	Amount Funded	Median	\$2,000	\$6,000
		Average	\$5,227	\$20,840

As one might expect, the respective median and mean processing times (Table 1, Row 2) for post-settlement cases are much shorter than those for pre-settlement cases: one and sixteen days compared to nine and twenty-one days. Perhaps more surprising is the substantially higher median estimated gross case value of post-settlement cases compared to pre-settlement MVA cases: \$50,000 versus \$25,000 (Table 1, Row 4). This difference could be a product of an exogenous factor affecting which plaintiffs seek out the Funder. But it more likely—or additionally—reflects the fact that the Funder’s primary concern when considering a post-settlement funding application would rationally be whether the applicant’s *net* recovery will be large enough to render the amount funded entirely riskless for the Funder, including payment of all interest and fees ultimately due the Funder.⁵² Thus, the Funder has no need to know from the client’s lawyer the other details of the client’s expected gross settlement amount (before any deductions) or net recovery (after deductions for attorneys’ fees, litigation costs, and any medical or

⁵¹ Table 1 includes 3,271 post-settlement and 29,056 pre-settlement (MVA) observations.

⁵² This is consistent with our review of the Funder’s contemporaneous informal notes on post-settlement funding applications, which frequently stated something like, “Applicant requests \$3,000. Attorney says client will net at least \$6,000,” with no other information about the applicant’s net or gross settlement amount being noted. The type and amount of information about post-settlement cases recorded by the Funder suggests that its primary concern is simply ensuring that it advances no more than 50% of the client’s expected net recovery.

other liens).⁵³

Consistent with the previous explanation, we find that in the post-settlement cases, the Funder is willing to extend funds in an amount that is three times the amount it extends in the pre-settlement MVA cases, a median of \$6,000 compared to \$2,000 (Table 1, Row 5). This might be due to the lower risk the Funder faces in the post-settlement cases, or the larger median estimated gross value of the post-settlement cases. The latter explanation is consistent with the fact that the Funder advances less than 10% of the gross estimated case value in both post-settlement cases and pre-settlement MVA cases (Table 1, Rows 4 and 5).⁵⁴

2. *The Return on the Funder's Investment*

a. The Contractual Aspired Profit

To best understand the Funder's return on its investment, we examine both its contractual *aspired* profit and its *actual* profit. The aspired profit is the amount the Funder would net if its funding contracts were all fully performed as written with every client's underlying legal claim resulting in a recovery sufficiently large for the client to repay the Funder the full amount advanced plus all associated contractual fees and interest. The Funder's actual profit, in contrast, is the amount the Funder ultimately nets after various client defaults and negotiated haircuts.

We begin by comparing the Funder's contractual interest type and rate in post- versus pre-settlement cases. Table 2 below provides information on how post- and pre-settlement contracts are each funded. Whereas the interest rate on the vast majority (87%) of pre-settlement cases is compounded

⁵³ All of this suggests that the Funder's contemporaneous notes about the post-settlement client's "expected settlement amount" may often understate the net value of the client's legal claim since the Funder's concern is solely whether the client's net recovery will be at least two times the amount being advanced. In contrast, the Funder's determination of pre-settlement funding amounts typically will be calculated based largely on the client's expected gross recovery. The Funder must then estimate, aided by the client's attorney, how much the client's expected gross recovery will be reduced by attorneys' fees, litigation costs, and any medical or other liens. The degree to which the Funder cannot be certain about these potential deductions—especially the client's medical liens—poses a risk to the funder of securing full payment from the client. This information is typically known with greater certainty when the Funder decides whether, and under what terms, to offer a client post-settlement funding compared to pre-settlement funding.

⁵⁴ Interestingly, the Funder's contemporaneous informal notes reveal that it funds about 20–25%, and rarely as much as 50%, of the client's net recovery. Funder, Contemporaneous Informal Notes on Post-Settlement Funding Applications (on file with authors). Given the short funding period for post-settlement cases and the lack of any default or haircut risk, *see infra* Section II.C.2.b & tbl.5, one may wonder why the Funder extends only a relatively small fraction of the total gross settlement amount to the post-settlement client. One possibility, consistent with the Funder's contemporaneous informal notes, is that the post-settlement client only requests a relatively small amount from the Funder, perhaps because the client expects the total settlement proceeds to soon be arriving.

monthly (Table 2, Row 3), most (85%) post-settlement cases are charged interest through the “Fixed Amount” method (Table 2, Row 1).

Unlike a monthly interest rate, which is a percentage amount of interest charged monthly and added to the compounded principal, Fixed Amount interest is a fixed lump sum charged in advance, stated in dollars, and added to the principal when the funding contract is signed. As can be seen in Table 2, Rows 6 and 7, the contracted monthly interest rate was a median of 3.2% and a mean of 3.1% for pre-settlement MVA cases, while the Fixed Amount for post-settlement cases was a median of \$492 and a mean of \$2,951. This Fixed Amount is a median of 8.2% (\$6,000) and a mean of 14.2% (\$20,840) of the principal funded for the entire post-settlement funding period (Table 1, Row 5).⁵⁵

TABLE 2. THE COMPONENTS OF A FUNDING CONTRACT
(PRE- VS. POST-SETTLEMENT)⁵⁶

			MVA	Settled
1	Percentage of	Fixed Amount	0%	85%
2	Claims with This	Compounded Annually	9%	1%
3	Type of Interest	Compounded Monthly	87%	6%
4		Simple	4%	8%
5			100%	100%
6	Posted Monthly Interest Rate or Fixed Amount	Median	3.2%	\$492
7		Average	3.1%	\$2,951
8	Processing Fees	Accrued Fee	\$250	\$0
9	(Medians)	Non-Accrued Fee	\$31	\$250

How does the effective annual interest rate in the two types of funding compare? As Table 3, Row 3 shows, the Funder aspires to an annual median profit of 87% and mean profit of 115% on MVA pre-settlement cases,

⁵⁵ In addition to interest, the Funder’s contracts include fees, as noted in Table 2, Rows 8 and 9. The median Accrued Processing Fee for the settled cases is \$0 compared to \$250 in the pre-settlement MVA cases (Table 2, Row 8). The \$0 fee for post-settlement funding is not surprising given that the Fixed Amount is the dominant scheme of charging interest in those cases, and it replaces the compounded monthly interest which comes with accrued fees. But the Funder still charges a fee in addition to the Fixed Amount interest charged in the post-settlement cases; it is a flat, Non-Accrued \$250 fee that is added to the total amount owed the Funder when the claimant pays the Funder its share of the settlement proceeds (Table 2, Row 9).

⁵⁶ Table 2 includes 3,271 settled and 29,056 pre-settlement MVA observations.

compared with an annual median profit of 92% and mean profit of 131% on post-settlement cases.⁵⁷ This means that the effective interest rate embedded in the Fixed Amount charged in the post-settlement cases is actually larger than the contractual interest rate in the pre-settlement cases, even though there is virtually no litigation risk to the Funder in post-settlement cases.

What about the Funder's actual profit? As revealed in earlier research, the pre-settlement consumer LTPF market is characterized by a surprising frequency of renegotiations at the time of repayment in which the Funder voluntarily accepts less from the plaintiff than it is due to receive under the contract.⁵⁸ The reasons for this are potentially various: the plaintiff may simply have lost the case or accepted a voluntary dismissal, or existing liens against the plaintiff may have exhausted part or all of the anticipated return. In other words, circumstances force the Funder to take what we refer to as a haircut off the contractual, Aspired Profit, resulting in a lower Actual Profit.⁵⁹ Table 3 shows what we by now expected, which is that there are very few haircuts in post-settlement fundings: the median and average amount repaid (Table 3, Row 4) reflect a very small haircut relative to the amount due (Table 3, Row 2). The average unconditional haircut in pre-settlement MVA cases is 20%. In post-settlement cases the haircut is about 3%.⁶⁰ All this suggests that, as expected, funders can anticipate a low risk of default in post-settlement cases, and lawyers for clients with post-settlement funding rarely negotiate a haircut at the time of repayment, despite the high effective interest rate their clients are charged.

⁵⁷ In a more granular analysis, we find that both the median and average annual aspired profit is substantially larger for the *Other* post-settlement cases than for the MVA *post*-settlement cases, as is the weighted average aspired profit. We have no particularly good explanation for this difference between the *Other* and MVA sub-categories of post-settlement cases. One possibility is that the lawyers for the MVA post-settlement clients are more often repeat players with the Funder than the lawyers for the clients in the *Other* category. If true, this may cause the Funder both to trust the information from the MVA clients' lawyers more and to be more willing (eager, even) to offer those lawyers' clients "good" (i.e., competitive) funding terms. Another possibility is that the post-settlement MVA cases had their underlying claim category coded by the Funder because they started as pre-settlement cases. Therefore, they may have been charged lower interest, which may reflect the better knowledge the Funder believes it has regarding the client's case.

⁵⁸ See Avraham & Sebok, *supra* note 9, at 1157; Avraham, Baker & Sebok, *supra* note 5, at 175–79.

⁵⁹ See *id.* at 1157–60.

⁶⁰ By an *unconditional* haircut we mean the aggregate haircut across a set of cases the Funder has a stake in, taking into account the fact that not every case will present the circumstances that force a haircut. In contrast, a *conditional* haircut is the size of the haircut in an individual case where the Funder actually takes a loss. For example, suppose the amount due to the Funder is \$10,000. If the Funder agrees to a haircut of \$1,000, it means that *conditional on there being a haircut*, the Funder's haircut is 10%. But the Funder may expect that not every case will require a haircut. If this 10% *conditional* haircut occurs in only 10% of the cases, then the Funder is deemed to face a 1% *unconditional* haircut ($.10 \times .10$). This means that, in assessing the risk presented by an individual case, the Funder can plan on having a \$100 (1%) unconditional haircut in any given \$10,000 funding case.

The relatively few haircuts secured by consumers in post-settlement fundings are notable in two respects. First, while anticipated (and significant) discounts in the value of the underlying legal claim resulting from settlement negotiations can explain the Funder's incentive to hedge with high Aspired Profit in the pre-settlement market, there are no such anticipated discounts once a claim has settled that would explain the high Aspired Profit in the post-settlement market. The relative haircut rates certainly cannot explain the fact that the Funder's Aspired Profit in the post-settlement market is actually higher than in the pre-settlement market (Table 3, Row 3).

Second, it may be that the haircuts observed in the pre-settlement fundings occur in claims in which either the client's net recovery in the underlying lawsuit simply was not large enough to pay the Funder the full amount due, or the client would not agree to accept a settlement offer for the underlying legal claim unless the Funder reduced the amount due, thereby increasing the client's share of the recovery. While these haircuts in pre-settlement fundings are effectively forced on the Funder, the situation is very different in post-settlement fundings. A client who receives post-settlement funding has settled his case prior to requesting the funding and therefore has no credible threat that he (or his lawyer) can make to the Funder that the client will decline the settlement offer (resulting in no payment to the Funder) if the Funder doesn't agree to a haircut.⁶¹ This fact, too, lowers the ex ante risk to the Funder in post-settlement cases.

⁶¹ Indeed, in post-settlement fundings the client's lawyer has very little incentive to negotiate a haircut with the Funder on the client's behalf. Unlike in pre-settlement fundings in which the lawyer will not receive her contingent fee (and the Funder will not receive any payment) if the client simply declines the settlement offer, the lawyer's fee is not at risk in post-settlement fundings because the client's case settled, and the lawyer's entitlement to her fee on that settlement vested before the client requested the funding. It should be noted that whether the post-settlement client (or his lawyer) has any leverage to negotiate a haircut with the Funder will depend on the details of the settlement and the status of the client's claim. The Court's approval of a class settlement, for example, does not mean that a particular claimant's case has settled. If the class settlement requires each class member to establish their personal entitlement by submitting their information on a claim form, the funding client could threaten not to submit the form unless the Funder reduces the total amount due to the Funder.

TABLE 3. POTENTIAL RETURN ON INVESTMENT: PRE- VS. POST-SETTLEMENT
(MOTOR VEHICLE ACCIDENTS)⁶²

			Pre-Settlement	Post-Settlement
1	Amount Funded	Median	\$2,000	\$6,000
		Average	\$5,227	\$20,453
2	Amount Due	Median	\$3,961	\$7,098
		Average	\$13,515	\$25,837
3	Annual Aspired Profit	Median	87%	92%
		Average	115%	131%
		Weighted Average	70%	87%
4	Amount Paid Back	Median	\$2,839	\$6,800
		Average	\$7,891	\$24,057
5	Annual Actual Profit	Median	60%	68%
		Average	77%	110%
		Weighted Average	43%	46%

We mentioned above that although the Funder uses the Fixed Amount interest method for post-settlement cases, its main way of charging interest in *pre*-settlement cases is the “Compounded Monthly” method. To better appreciate the profit generated by the latter, one needs to compare it to a “simple” interest rate. For example, with a “simple” interest rate of 3% a month, the Funder will receive less than 40% profit for the median funding period of about 13 months (401 days) for MVA (Table 1, Row 3).⁶³

Interest compounded monthly, in contrast, means that every month the accrued interest is added to the principal and (together with the principal) is subject to each future month’s interest rate. Whereas with a simple interest rate the principal grows linearly, with compounded interest it grows exponentially.⁶⁴ Table 4 below shows that 86% of pre-settlement MVA claims are funded in this way (Table 4, Row 2). This adds about 8% a year to the baseline annual interest with a compounded rather than simple interest rate of 3%.⁶⁵

⁶² There are 3,271 settled and 29,056 pre-settlement MVA observations.

⁶³ $13 \times 3.0\% = 39\%$.

⁶⁴ See Eyal Zamir & Doron Teichman, *Mathematics, Psychology, and Law: The Legal Ramifications of the Exponential Growth Bias* 4–6 (Hebrew Univ. of Jerusalem Legal Stud. Rsch. Paper Series No. 21-11, 2021), https://www.researchgate.net/publication/350374495_MATHEMATICS_PSYCHOLOGY_AND_LAW_THE_LEGAL_RAMIFICATIONS_OF_THE_EXPONENTIAL_GROWTH_BIAS.

⁶⁵ 13 months of compounded interest of 3.1% yields a total interest of 48.7%, [$100 \times (1.031^{13} - 1) = 48.7$], which is 8.4 percentage points higher than the simple interest rate of 40.3% ($13 \times 3.1\% = 40.3$).

TABLE 4. THE COMPONENTS OF THE MVA PRE-SETTLEMENT FUNDING CONTRACT⁶⁶

1	Percentage of Claims with This Type of Interest Rate	Compounded Annually	9%
2		Compounded Monthly	86%
3		Simple	4%
4	Buckets	MIP (Months)	3
5		IB (Months)	4
6	Fees	Accrued Fee	\$250
7		Non-Accrued Fee	\$31

Another feature of the pre-settlement funding contract is that the client cannot pay back the amount due whenever she wants without paying a penalty of sorts. Rather, most of these contracts include “exit stops” every several months. For example, if a contract has an exit stop every six months and the client misses that stop by one day, she will have to pay interest (compounded monthly) for another six months. The Funder distinguishes between the first such stop, called the Minimum Interest Period (MIP), and all subsequent stops, called Interest Buckets (IB). Table 4 above shows that for pre-settlement MVA cases, the median MIP is three months (Row 4) whereas the median IB is four months (Row 5). Together these add an annual interest rate of about 9% on top of the simple interest rate.⁶⁷

In addition to the interest discussed above, pre-settlement funding clients pay two types of fees for processing their claims with the Funder: Non-Accrued Fees and Accrued Fees. Both types of fees are charged on a non-recourse basis, which means that the clients do not pay any fees when they accept their funding and will not owe the Funder any fees if there is no recovery in the client’s underlying lawsuit. The Non-Accrued Fees reimburse the Funder for expenses such as snail-mailing documents. For pre-settlement cases this is not a lot of money—about \$31—while for post-settlement cases this fee is a much larger \$250 (Table 2, Row 9).⁶⁸ These Non-Accrued Fees are simply added to the total ultimately due by the client in the event of a recovery for the client’s underlying legal claim. Pre-settlement (but not post-settlement) funding clients also pay an Accrued Fee for processing their

⁶⁶ There are 29,056 pre-settlement MVA observations.

⁶⁷ Even though the median length of funding is about 13 months, the buckets require the client to pay for about 15 months. Therefore, instead of paying 48.7% the client needs to pay about 58.1% (1.031^{15}), which is 9.4 percentage points higher.

⁶⁸ Why are the Non-Accrued Fees so much larger for post-settlement than pre-settlement fundings? One explanation is that the Funder charges no other processing fees in post-settlement cases while it charges pre-settlement clients an additional \$250 Accrued Fee. See *supra* note 54.

funding claims.⁶⁹ This means that the fee is subject to compounded monthly interest and buckets. Table 4, Row 6 shows that the median Accrued Fee is \$250 for MVA claims. Given the \$2,000 median amount funded in pre-settlement MVA cases (Table 3, Row 1), the combined \$281 in nonrecourse processing fees adds another 14% to the Funder's profit.

Together, these three features of the funding contract—interest compounded monthly, interest buckets/periods, and nonrecourse fees—help explain why the Funder's Aspired Profit in pre-settlement fundings is so much greater than if only simple interest were charged.

b. The Actual Profit

On which type of cases does the Funder make more money? Interestingly, the Funder's annual Actual Profit is larger for the post-settlement cases than for the pre-settlement cases: a median of 68% and mean of 110%, compared to a median of 60% and a mean of 77% (Table 3, Row 5). The annual Actual Profit in the post-settlement cases is striking given that the Funder faces essentially no risk of default or haircuts in these cases. Although the Funder seeks, through different means, a very similar Aspired Profit in both types of fundings, the rate of default in post-settlement cases is half that in pre-settlement cases, and the Funder more frequently agrees at the time of repayment to haircuts (that are typically also larger) in pre-settlement fundings.

Table 5 below shows that the risk of a default or a haircut, as expected, is very small in post-settlement fundings. Specifically, whereas in pre-settlement MVA cases the Funder receives the total amount due in only 37% of the cases, in post-settlement cases it does so in 72% of cases (numbers added from Rows 4 and 5). Similarly, the client defaults in more pre-settlement cases than post-settlement cases: 9% compared to 1% (Row 1). Haircuts occur in 27% of post-settlement cases compared to 54% of pre-settlement cases (numbers added from Rows 2 and 3), and the median haircut in post-settlement cases is only 8% of the total amount due, compared to 12% in pre-settlement cases (Row 3).⁷⁰ While the frequency of post-settlement haircuts is low, it is surprising that one sees any haircuts in those cases at all, given that the only uncertainty at the time of funding is when the client will receive her settlement funds and repay the Funder.⁷¹ The data alone do not suggest a

⁶⁹ Post-settlement funding clients likely are not charged this Accrued Fee because they are charged essentially the same amount as a Non-Accrued Fee.

⁷⁰ In the 1% of post-settlement fundings and 2% of pre-settlement fundings in which the client pays back less than the amount originally funded, the median haircut is 52% and 80%, respectively (Table 5, Row 2).

⁷¹ In theory, there is also counterparty risk, but that is extremely remote in consumer fundings. See Goral, *supra* note 27, at 130 (comparing post-settlement funding to traditional factoring of receivables).

satisfactory explanation.⁷²

Importantly, Table 5 also shows that the Funder makes money even in the small number of post-settlement cases in which it agrees to a haircut (Row 3). Table 5, Row 6 compares the Actual Profit for the funding period, which is substantially shorter for post-settlement cases than for pre-settlement cases.⁷³ Thus, the 52% and 17% profits for pre- and post-settlement fundings, respectively, translate to a median *annual* Actual Profit of 60% and 68% (see Table 3, Row 5 above).

TABLE 5. MEDIAN HAIRCUTS AND PROFIT IN COMPLETED CASES FOR ENTIRE FUNDING PERIOD (PRE- VS. POST-SETTLEMENT)⁷⁴

		MVA (Pre)					Settled (Post)			
		Percentage of cases	Average number of days	Interest Rate	Haircut	Actual Profit	Percentage of cases	Average number of days	Haircut	Actual Profit
1	Paid Back (PB)=0	9%	1194	3.25%	100%	-100%	1%	1299	100%	-100%
2	PB<Funded	2%	908	3.25%	80%	-43%	1%	1155	52%	-40%
3	PB<Due	52%	617	3.2%	12%	60%	26%	255	8%	9%
4	PB=Due	33%	318	3.1%	0%	60%	67%	129	0%	19%
5	PB>Due	4%	294	3.35%	-3%	60%	5%	493	-6%	32%
6	Total	100%	568	3.15%	2%	52%	100%	198	0%	17%

D. Summary

The data reveal many similarities, but also some stark differences, between pre- and post-settlement consumer LTPF. The most surprising difference is the larger profit earned by the Funder in post-settlement LTPF despite those fundings presenting virtually no risk of repayment to the Funder. The data regarding *pre*-settlement consumer LTPF portray an industry with a rigorous underwriting process, with only 55% of MVA pre-settlement cases

⁷² We note that both pre- and post-settlement cases receiving haircuts have a longer time to completion. However, in post-settlement cases this longer duration of the funding should not increase the total amount of fees and interest due because, as noted in Section II.C.2.1 above, most post-settlement clients are charged interest under the Fixed Amount method.

⁷³ As noted on Table 1, Row 3, the median and mean time from Funding to Completion is 401 and 567 days, respectively, for pre-settlement MVA cases compared to 75 and 198 days, respectively, for post-settlement cases.

⁷⁴ There are 3,271 settled and 29,056 pre-settlement MVA observations.

ultimately approved for funding. The underwriting process moves quickly, taking a median of only nine days from the date the client first contacts the Funder until the date of funding. MVA claimants apply for funding at a median of 241 days after an accident. The Funder extends funds that amount to less than 10% of the estimated gross value of the client's underlying legal claim; the median funding claim is completed and the Funder repaid a little over a year later. MVA pre-settlement claimants agree to pay an annual interest rate of approximately 38%. Due to monthly compounding, interest buckets, and fees charged at the front end, however, the Funder's median annual *Aspired Profit* is 87% for MVA pre-settlement claims and its median annual *Actual Profit* is 60%. We found substantial adjustment of the funding terms at the time of repayment, which explains the difference between the Funder's Actual and Aspired Profit.

The Funder's handling of *post*-settlement fundings is very different in many respects. In about 90% of post-settlement fundings the Funder does not appear concerned with the type of underlying legal claim. The underwriting process is much quicker than for pre-settlement fundings, taking only one day (median). The Funder rejects only half as many post-settlement as pre-settlement funding requests. And a much higher percentage of post-settlement funding cases are executed: 73% versus 46%. The median amount funded post-settlement is three times larger than pre-settlement, and the period from funding to repayment is significantly shorter for post-settlement fundings (a median of 75 days versus 401 days). Unlike in pre-settlement fundings, the Funder charges consumers for post-settlement advances using a Fixed Amount interest method—the method most commonly seen in commercial LTPF. The Funder's median annual *Aspired Profit* in the post-settlement cases is a little bit higher than in the pre-settlement cases (a median of 92% versus 87%).

Haircuts at the time of repayment are very few and very small in post-settlement cases: On average they amount to 3% of the amount due in the post-settlement cases compared to 20% in the MVA pre-settlement cases. Haircuts are also very rare in post-settlement cases: They occur in about one-quarter of the post-settlement cases, compared to almost two-thirds of the MVA pre-settlement cases. Thus, the Funder's median annual *Actual Profit* in the post-settlement cases was 68%, which is higher than the 60% *Actual Profit* in the pre-settlement MVA cases. This is a remarkable finding given that the Funder faces virtually no risk of default or haircuts in the post-settlement cases. The next Section discusses the implications of all these findings and considers how policymakers might respond.

III

IMPLICATIONS FOR CONSUMER PROTECTION: SOME INITIAL THOUGHTS

Our data analyses may offer reassurances about certain alleged “abuses” in the LTPF industry while heightening awareness of others. The data analyzed in the previous Part suggest that concerns which led to the extraordinary scrutiny of the post-settlement fundings in the NFL Concussion case were justified, and that future efforts to protect consumer-litigants seeking post-settlement funding may be warranted. In particular, our data on pre-settlement and post-settlement LTPF raise different concerns which suggest a need for reforms carefully tailored to each of these sectors of the LTPF market. In this Part, we discuss where these reforms should begin: with the pricing methods and contract terms used in post-settlement LTPF.

But first, some reassurances. Many scholars and policymakers have expressed concern about the claimed costs to consumers of LTPF but have had no systematic, large-scale data at hand.⁷⁵ Thus, the debate to date regarding consumer LTPF has been based solely on anecdotes and speculation, with reported annual interest rates as high as an eye-popping 435%.⁷⁶ Our data suggest that these reports have presented a highly inaccurate caricature of the market. When one takes into account the defaults, haircuts, and the large variation in the size of the amount funded (which prompts the need to calculate the weighted average interest rate), the actual (weighted) average annual interest rate borne by the Funder’s clients in pre-settlement cases is a much more modest 43%.⁷⁷

On the other hand, the effective interest rate cost to the consumer of post-settlement LTPF provides much more cause for concern. Post-settlement funding poses very little risk to the Funder, and one would expect the

⁷⁵ See *supra* notes 9–10 and accompanying text.

⁷⁶ See Yifat Shaltiel & John Cofresi, *Litigation Lending for Personal Needs Act: A Regulatory Framework to Legitimize Third Party Litigation Finance*, 58 CONSUMER FIN. L.Q. REP. 347, 348 (2004) (likening the rates charged by litigation financiers to those charged by payday lenders); see also, e.g., Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 68 (2004) (describing an interest rate of 180%). A 2014 law review article reported that “it is not atypical for [a LTPF provider] to charge 80% interest in the first year of a loan and up to 280% of the total loan amount.” Cain, *supra* note 3, at 12. The media has further disseminated these rumors, with the *New York Times*, for example, recently reporting LTPF interest rates of “as high as” 100%. See Matthew Goldstein & Jessica Silver-Greenberg, *How the Finance Industry Is Trying to Cash in on #MeToo*, N.Y. TIMES (Jan. 28, 2018) <https://www.nytimes.com/2018/01/28/business/metoo-finance-law-suits-harassment.html>.

⁷⁷ Contrary to claims by some LTPF critics, we also found no evidence that post-settlement LTPF leaves clients with too little or nothing by the time they receive their settlement funds. Rather, the Funder was consistently careful to advance no more than half of the client’s predicted net settlement amount. The client defaulted or ultimately paid less than the amount funded in only 1–2% of cases, and haircuts were relatively small—a median unconditional haircut of only 3% of the total amount due to the Funder.

(lack of) litigation risk to be a large component of the effective interest rate in LTPF cases. We found, however, that the Funder's annual Aspired Profit was a weighted average of 87% in post-settlement cases compared to 70% in pre-settlement cases. And, not surprisingly, we found that the annual Actual Profit to the Funder was also *more* for post-settlement than for pre-settlement fundings: weighted averages of 46% versus 43%.

These findings regarding post-settlement fundings are both intriguing and troubling. They suggest that the Funder is excellent at obtaining a very similar annual actual return on its financing investments, whether they are pre- or post-settlement, and notwithstanding the systematic differences in funding terms and risk between the two types of funding. As a matter of social policy, however, it is not clear why post-settlement LTPF, which presents virtually no risk of repayment to a funder, should be treated the same as pre-settlement LTPF, which is generally exempt from state consumer credit laws. Indeed, courts have begun to consider whether LTPF in which repayment is essentially guaranteed should be reclassified as a "loan."⁷⁸ In a recent case involving NFL concussion claimants, for example, Judge Preska of the U.S. District Court for the Southern District of New York distinguished post-settlement LTPF from pre-settlement funding, holding the former, but not the latter, to be "loans" subject to the New York civil usury statute and its maximum permissible annual interest rate of 16%.⁷⁹

Informed by the data presented above, we recommend that post-settlement consumer LTPF be treated like ordinary loans, with interest rates subject to applicable state consumer credit regulations. Post-settlement LTPF

⁷⁸ See, e.g., *Echeverria v. Estate of Lindner*, 7 Misc. 3d 1019(A), No. 018666/2002, 2005 WL 1083704, at *8 (N.Y. Sup. Ct. Mar. 2, 2005) (holding that an LTPF contract was a "loan," and thus subject to usury laws, because the recovery was a "sure thing" and "almost guaranteed"). The court in *Echeverria* enforced the funding agreement at the maximum statutory rate for loans of 16% annual interest. See *id.* at *8, *10. Similarly, the Michigan Court of Appeals in *Lawsuit Financial, L.L.C. v. Curry* held that funding agreements entered into after "the defendants in the personal injury lawsuit had already admitted liability, the jury had already returned a \$27 million verdict in [the client's] favor, [and] an order of judgment had already been entered" were loans subject to usury laws rather than "contingent advances." 683 N.W.2d 233, 239–40 (Mich. App. 2004); see also *Fast Trak Inv. Co. v. Sax*, 962 F.3d 455, 469 (9th Cir. 2020) (certifying to the New York Court of Appeals the question of whether "litigation financing agreement[s] may qualify as a 'loan' or a 'cover for usury' where the obligation of repayment arises not only . . . from the client's recovery . . . [in the] litigation but also . . . from the attorney's fees the client's lawyer may recover in unrelated litigation"), *certified question accepted sub nom.* *Fast Trak Inv. Co. v. Sax*, 35 N.Y.3d 997 (N.Y. 2020) (accepting the Ninth Circuit request to provide guidance on this certified question).

⁷⁹ *Consumer Fin. Prot. Bureau v. RD Legal Funding*, 332 F. Supp. 3d 729, 766–67, 780 (S.D.N.Y. 2018). Judge Preska noted that "pre-settlement legal funding agreements are entered into before the claim is resolved" and the funder's "right to repayment is contingent on the consumer's ultimate success on his or her claim." *Id.* at 766. She said that the transactions in the NFL case, however "present no such risk of loss because, as a prerequisite, the RD Entities require Consumers to have a settlement award letter stating the amount to which they are entitled from their respective settlement fund." *Id.* Thus, the Court concluded that "the transactions at issue here functioned as extensions of 'credit' in practice." *Id.*

seems to be “funding of last resort” for the clients who seek it, and the median amounts funded are relatively small, if somewhat larger than pre-settlement fundings: \$6,000 versus \$2,000. The fact that even fewer clients turn down the post-settlement funding than the pre-settlement funding—4% versus 8%, respectively—seems to underscore the direness of these clients’ need, their lack of alternatives, and therefore also their need for regulatory protection.⁸⁰ Subjecting post-settlement fundings to state consumer credit laws would, in theory, provide these clients some protection by capping—and therefore reducing—the total amount they must pay for such funding.

It is not easy to predict, however, the effect of this proposal on the availability of post-settlement funding. Perhaps such funding will be no less available, with funders willing to take the reduced, but still significant, revenue for these short-term loans that entail no risk. Yet it is also possible that the current funders will choose to exit this sector of the market.⁸¹ Or, given our data above regarding the Funder’s seemingly careful calibration of funding terms to obtain the same rate of return on its pre- and post-settlement investments, some funders may continue to offer post-settlement funding but attempt to increase the rates charged for pre-settlement funding in order to obtain the current average annual rate of return across all its investments. Competition in the market for pre-settlement funding, however, may prevent such cross-subsidization.

Another option, which could work in tandem with the regulations proposed above, is for states to increase competition in the post-settlement LTPF market by reducing any existing regulatory or bureaucratic barriers to entry. An increase in the number of vendor options is likely to reduce the cost to consumers of post-settlement LTPF. Market competition can also be enhanced by ensuring that the consumers who seek post-settlement LTPF are fully informed about its financial terms and true cost. We therefore also recommend the adoption of laws that would ensure greater simplicity, transparency, and consistency across funders with regard to the disclosures made to clients.

To begin, we believe compounded interest should be prohibited to aid consumer understanding of the true cost of LTPF. We applaud the seemingly greater transparency of the Funder’s use of Fixed Amount interest in post-settlement funding contracts rather than a monthly compounded or other interest rate with complicated buckets and Accrued Fees. The little anecdotal

⁸⁰ It is also possible that consumers seek post-settlement LTPF not because of dire need, but because they (irrationally) consider the cost to be very low, given that they (optimistically) anticipate receiving their settlement funds within a few weeks or months after receiving the LTPF advance. Of course, the duration of the post-settlement funding rarely affects the total amount due at the time of repayment. *See supra* Section II.C.1 (discussing the impact of post-settlement funding on the total amount due at the time of repayment).

⁸¹ *See supra* note 18 and accompanying text.

evidence available regarding the funding contracts of the NFL Concussion litigants suggests that some post-settlement contracts include compounded interest.⁸² The problem with compounded interest is not merely a lack of transparency. As has been shown in multiple peer reviewed studies, the human brain cannot accurately process exponential growth (which is the effect of compounded interest on money borrowed), a phenomenon called “exponential growth bias.”⁸³ It would therefore seem imperative to use Fixed Amount interest, which enables the post-settlement client to more easily understand her total amount due to the Funder at any given point in time and therefore make a better informed decision about whether to contract for the funding at all. At whatever time the client repays the Funder, the total amount due is simply the sum of the amount funded, the predetermined (non-accrued) processing fees (usually \$250), and the pre-determined, non-accrued fixed interest amount.

Although this change would make relevant information clearer and more straightforward, it would not alone readily enable the consumer to compare the cost of post-settlement LTPF with the cost of other forms of consumer credit, which commonly are priced by effective annual interest rates. Thus, to further enhance market competition, we recommend that regulators mandate a standardized, simple disclosure format for post-settlement consumer LTPF fundings that would include the following:

- The amount of cash advanced to the client and the date of the advance;
- The total amount due to the funder after one month, six months, one year, and after each additional month and year up to three total years;
- The effective annual interest rate being charged, including all compounding and all fees (application and processing) charged to the consumer by the funder; and
- A clear statement by the funder, requiring a separate signed acknowledgment by the consumer, that the financial service provided by the LTPF agreement is similar to other consumer credit products on the marketplace, such as credit cards.

We recognize that some of the information we recommend be disclosed is already provided in some LTPF vendors’ post-settlement funding contracts with consumers. In the NFL Concussion settlement, for example, a few of the post-settlement funding contracts that became public stated the

⁸² See Declaration of Gene Locks Pursuant to the Court’s Order Dated March 28, 2018, at 4, *In re Nat’l Football League Players’ Concussion Inj. Litig.*, No. 12-md-02323 (E.D. Pa. May 1, 2018), ECF No. 20 (providing litigation finance agreements of 33 clients).

⁸³ See generally Zamir & Teichman, *supra* note 63 (exploring the exponential growth bias in legal scholarship and highlighting numerous examples in which the law interacts with exponential processes, and examining the normative and policy implications of a systematic human tendency to underestimate exponential growth).

amount advanced and provided a schedule that illustrated for the player how much he would have to pay the funder at various points in time, up to thirty-six months from the date of the funding contract.⁸⁴ We think this form of putative disclosure proves our point. Those LTPF contracts did not enable the consumer to understand that the money on which he was paying interest included a variety of fees, nor did it explicitly state the cost of the advance as an annualized interest rate. We believe that the latter is particularly important when, as was true in those contracts, the interest is compounded monthly (or even daily).⁸⁵

Clear information and the standardization of its presentation would enable the consumer to better understand the true cost of the LTPF over various periods of time and to comparison shop more easily and accurately among LTPF vendors. In addition, mandatory disclosure of the effective annual interest rate being charged would better enable the potential LTPF client to compare the true cost of post-settlement LTPF with the cost of other potentially available sources and types of consumer credit. At least two states, Maine and Nebraska, already require disclosures along these lines.⁸⁶

CONCLUSION

Litigant third-party funding is an increasingly popular and controversial part of American litigation. As is true for many other consumer financial services, one can now easily apply online for an advance from LTPF companies (and even have the companies bid on one's case).⁸⁷ Scholars, policy-makers, attorneys, and the media have all expressed concern about the

⁸⁴ See Locks Law Firm Player Exhibit A at 6, *In re Nat'l Football League Players' Concussion Inj. Litig.*, No. 18-md-02323, ECF No. 20-3 (providing an example of one such agreement organized through three-month tranches and obligations for the debtor on that basis).

⁸⁵ For example, one NFL player's contract stated that he was obliged to pay 2.79% monthly interest (plus a "one-time Minimum Return Fee" of \$3,250) on an advance of \$20,000 and provided a schedule of repayment amounts. The stated monthly interest rate, if not compounded, would have meant an annual interest rate of 33.48%. But the monthly interest is in fact compounded and, indeed, compounded daily—a highly dubious practice in consumer credit and a fact disclosed only in small print. Thus, were the consumer to receive his settlement 12 months after the advance, he would pay an effective annual interest rate of approximately 61%, nearly 5.1% per month. Declaration of Gene Locks Pursuant to the Court's Order Dated March 28, 2018, Locks Law Firm Player Exhibit R at 3, 8, *In re Nat'l Football League Players' Concussion Inj. Litig.*, No. 18-md-02323, ECF No. 20-20.

⁸⁶ See ME. REV. STAT. ANN. tit. 9-A, § 12-104(2) (2021) (requiring funders to include a disclosure form in their consumer contracts setting forth the amount of funding received, itemized fees, the annual rate of return, and the total amount to be repaid at various intervals); NEB. REV. STAT. § 25-3303(1)(a)(iii) (2021) (requiring disclosures of "[t]he total dollar amount to be repaid by the consumer, in six-month intervals for thirty-six months, and including all fees").

⁸⁷ See, e.g., *Ceramic Group Services*, CERAMIC GRP., <https://ceramicgroup.com/services/#platform> (last visited May 19, 2021). One can also invest money in the legal claims of others with just a mouse click. See, e.g., *Litigation Finance Investment Platform*, LEXSHARES, <https://www.lexshares.com/invest> (last visited May 19, 2021).

potentially predatory nature of consumer LTPF and have repeatedly advocated for reform. But little is known about how this industry operates. In previous work, we provided initial data on the general market for pre-settlement consumer LTPF;⁸⁸ indeed, pre-settlement fundings have been the focus to date of nearly all the media and scholarly attention. This Article, however, is the first to present data on the market for *post*-settlement funding. As the NFL Concussion litigation made clear, post-settlement funding is an especially important sector of the LTPF market that has not been discussed by scholars. We conclude that while pre- and post-settlement consumer LTPF have certain superficial similarities and may initially appear alike from consumers' point of view, they present very different risks to the Funder and require separate attention by policymakers.

Although one can argue that the litigation risks faced by the Funder justify a gross profit of 55 to 60% annually in *pre*-settlement funding cases, the same justification does not exist for *post*-settlement funding. Indeed, our data show that the effective interest rate charged, and the profit to the Funder, is even greater for post-settlement fundings, despite the fact that they present virtually no litigation risk for the Funder. We therefore propose that post-settlement LTPF be treated like ordinary loans, with the interest rates subject to applicable state consumer credit regulations. We further recommend that regulators enhance market competition by requiring a standardized, simple disclosure format for post-settlement consumer LTPF fundings that would include the effective annual interest rate being charged.

⁸⁸ See generally Avraham & Sebok, *supra* note 9.