Burford

Theory and Practice in Litigation Risk

About Burford

Burford is the world's largest provider of investment capital and risk solutions for litigation. We provide litigation-related corporate finance and insurance solutions to businesses and law firms.

Burford is a $300 million investment fund publicly traded on the London Stock Exchange, committing more than $150 million annually to a diversified portfolio of matters. Investment capital is available immediately. Burford also owns and operates the UK's leading litigation insurance provider.

Burford has worked with more than half of the AmLaw 50 (and most of the UK's leading law firms) and with a wide variety of businesses – from small start-ups to large public companies – all over the world.

Burford supplies corporate finance solutions to enable meritorious commercial cases to proceed with high quality counsel. Burford's capital can be used to pay some or all of the costs of litigation, to finance insurance arrangements or to monetize a claim to provide immediate capital for other business purposes.

Businesses use Burford's capital to alleviate liquidity or budget constraints, to assist with the accounting treatment of litigation matters, or simply for prudent financial or risk management. Law firms rely on Burford to facilitate alternative fee arrangements and other risk transfer solutions.

Jonathan Molot, Chief Investment Officer of Burford Group, Professor of Law, Georgetown University Law Center

Jonathan Molot co-founded Burford and serves as Chief Investment Officer and a director of Burford Group Limited.

Mr. Molot is an experienced litigator, an expert in the litigation finance field and former senior US government official. He is a Professor of Law at Georgetown University Law Center and has been a Visiting Professor at Harvard Law School.

Mr. Molot founded Litigation Risk Solutions, LLC, a business that assists hedge funds, private equity funds, investment banks, insurance companies and insurance brokers to develop litigation risk transfers where lawsuits threaten to interfere with M&A and private equity deals.

Mr. Molot is also an expert in litigation risk management and litigation finance and has taught courses on the subject at Harvard Law School, Georgetown University Law Center, and George Washington University Law School. He has published articles in the Yale Law Journal, the Stanford Law Review, the University of Chicago Law Review, the Columbia Law Review, the Georgetown Law Review, and the Virginia Law Review.

Mr. Molot served as counsel to the economic policy team on the Obama-Biden Presidential Transition Team and as a senior advisor in the Treasury Department at the start of the Obama Administration. He clerked for Justice Breyer on the U.S. Supreme Court and practiced law at Cleary, Gottlieb, Steen & Hamilton in New York, and at Kellogg, Huber, Hansen, Todd, Evans & Figel in Washington, D.C.

Mr. Molot graduated magna cum laude from Yale College and magna cum laude from Harvard Law School, where he was Articles Co-Chair of the Harvard Law Review and won the Sears Prize – awarded to two students with highest GPAs in a class of more than 500.

Theory and Practice in Litigation Risk

Jonathan T. Molot

After years of writing articles on procedure I eventually happened upon an idea that I believed was capable of practical implementation. Instead of continuing to write law review articles and teach classes on how the idea could be implemented, I took an unpaid leave of absence from teaching and tried to implement it myself. I am grateful to Georgetown for having allowed me to pursue the project – as it turns out in hindsight to have been the most important thing I have done in my scholarly career. The practical portion of my project not only helped me answer questions I had posed as an academic, but also raised new questions I had missed – questions that are equally important and worthy of additional scholarly attention.

My overarching project – both practical and scholarly – focuses on how risk preferences and financial resources can affect litigation outcomes. The basic idea is as follows: Litigation often involves disputes between litigants with unequal financial resources or risk preferences and these imbalances may affect litigation resolutions. It is self-evident that a one-time litigant that is risk averse and/or resource constrained may not be able to hold out and proceed to trial against a better-financed, repeat player litigant. The stronger party may drive the weaker party to settle (or drop a case), even if the weaker party would likely be better off holding out for a superior result at trial.

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In some cases, the party with the weaker bargaining position is the defendant – for example where a defendant to a large-dollar class action is engaged in a recapitalization and cannot risk going to trial against a well-financed group of plaintiffs' attorneys. In other cases, the party with the weaker bargaining position is the plaintiff – for example where a small, cash-strapped company has a claim against a larger company based on a failed joint venture that was essential to the plaintiff's business prospects but was only a minor transaction for the defendant. Either way, the case may settle based on bargaining imbalances that have nothing to do with the merits of the case. If a principal goal of our procedural system is to ensure accurate resolution of disputes – so that defendants pay and plaintiffs receive precisely what they should when one applies substantive law to the facts of their case – then these bargaining balances represent a serious problem.

Rather than look to procedural reform to correct bargaining imbalances, might we rely instead on the market to achieve that goal?

Like other civil procedure scholars, I think our system should be designed to resolve disputes based on their merits and to minimize the influence of non-merits factors. But it is not immediately obvious how procedural reform could help a litigant whose risk preferences or financial resources put it at a disadvantage vis-à-vis its opponent.

The question I therefore posed – first in scholarly articles and then in a business venture – was whether the problem I had identified was susceptible to a market solution.[1] Rather than look to procedural reform to correct bargaining imbalances, might we rely instead on the market to achieve that goal?

In law review articles and law school seminars, I asked whether a market mechanism might enable a cash-strapped or risk-averse litigant to shift some of the burdens and risks of litigation to a well-financed, repeat player and thereby level the playing field vis-à-vis its litigation adversary. In an article in the *University of Chicago Law Review*, I sketched out what such a market would look like on the defense side, proposing a form of "after-the-event" litigation insurance.[2] In an article in the *Georgetown Law Journal* I explored market mechanisms that could be utilized by plaintiffs, enabling those plaintiffs and their attorneys to obtain the financing they needed to pursue their claims effectively.[3] I also taught courses about defense and plaintiffs' side market mechanisms at George Washington, Georgetown, and Harvard Universities. I argued in the articles and I suggested to students that if the market could help level the playing field between litigants, in theory this should improve litigation accuracy and lead litigation outcomes more often to reflect litigation merits.[4] But, of course, that was in theory. My colleagues and my students naturally asked whether what I posited in theory could actually work in practice. If the market could help level the playing field between litigants, in theory this should improve litigation accuracy and lead litigation outcomes more often to reflect litigation merits.

Fortunately, I received an opportunity to find that out. Market participants and lawyers took notice of my articles and, when I was delivering a paper at a RAND/UCLA conference on litigation finance,[5] I was approached by lawyers who were interested in launching a litigation finance business. We formed the Burford Group and raised a fund, Burford Capital, that is dedicated to helping litigants and lawyers manage the financial burdens and risks of litigation. With the money raised, I then applied for an unpaid leave from teaching to devote myself full time to building the business.

From an academic's perspective, the project has been valuable in two ways. First, it helped to provide concrete answers to the theoretical questions I had posed. I had asked whether a market mechanism could level the playing field between litigants.[6] I had also identified a series of challenges to the development of a market mechanism – both business and regulatory challenges – and had suggested ways to surmount those obstacles.[7] By establishing Burford, I could finally begin to answer some of the questions I had raised in my scholarship and test whether my theoretical answers were indeed accurate. Second, and equally important, Burford showed me where I had asked the wrong questions.

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Practical experience has highlighted additional benefits to a litigation risk market that I had not explored and also raised unanticipated obstacles that needed to be overcome. For example, I had focused on how a market solution could benefit the plaintiff or defendant who is at a comparative *dis*advantage in a lawsuit. I had not considered the likely reaction of their litigation opponents – the litigant with a comparative *advantage* who does not want the playing field to be leveled. In public policy debates and in litigation itself, repeat-player litigants paint market solutions in a negative light – suggesting that the profit incentives of those who finance plaintiff's claims somehow taint the plaintiff's claims, even if the claims are meritorious and could not be pursued as effectively without financing.[8] Moreover, where I had focused on the benefits of a market solution to litigants and the litigation system, I had not spent as much time on the effects of a market on the economics of law practice.[9] I have learned that litigation finance is just as important to lawyers as to litigants. To some lawyers, it offers a way to take cases they otherwise could not. Litigation finance enables the top-flight lawyer at an hourly fee firm to represent a small plaintiff with a meritorious claim even if the client cannot afford his hourly bills and his firm refuses to agree to contingent fee arrangements. But to another lawyer, the opportunity to represent a small plaintiff who has obtained financing is not worth it if he has built his reputation representing large defendants and worries that his defendant clients would disapprove of his decision to work on a financed plaintiff's case.[10] Very often for a litigator, more important than the question of whether litigation finance is good for the legal system is whether it is good for the litigator's pocket book. I have learned that lawyers' attitudes toward litigation finance depend as much on their own personal financial interests as on their political preferences or policy views.[11]

The paper is organized as follows. Part I briefly describes the academic project, noting the questions I had raised and the answers I had offered before I helped to launch Burford. Part II then describes the practical project – how Burford evolved, the obstacles it faced, and where it fit within broader, albeit nascent, markets in litigation finance and litigation risk. Finally, Part III links the two projects, relying on the practical experience to provide answers to the questions I had asked earlier and to raise new questions I had not previously considered.

I. The Scholarly Project: A Market Solution to a Procedural Problem

For years, much of my academic work had focused on improving the accuracy of our procedural system. Like many other scholars I had noted how the very features of our system designed to ensure accuracy – the extensive pretrial practice and exhaustive discovery – could actually have the opposite of their intended effect.[12] By rendering litigation unduly expensive, time-consuming, and burdensome, the pretrial process could lead parties to forego their rights or settle cases based on expense and delay, rather than on the merits.[13] I explored ways to streamline litigation and accelerate the moment in the process when the application of law to fact occurs.[14] The very features of our system designed to ensure accuracy – the extensive pretrial practice and exhaustive discovery – could actually have the opposite of their intended effect. By rendering litigation unduly expensive, time-consuming, and burdensome, the pretrial process could lead parties to forego their rights or settle cases based on expense and delay, rather than on the merits.

Though interesting and potentially important, the ideas advanced in that body of scholarship were very difficult to test empirically. Scholars can advocate for ADR mechanisms designed to replicate the adjudicative process more efficiently (as I did).[15]

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They can embrace a more aggressive, earlier use of summary judgment as a way to weed out weak from strong claims and defenses (as I also have done).[16] But the implementation of any such reforms is extraordinarily difficult – as each proposed reform has potential adverse consequences and in the absence of a clear net benefit, the status quo is almost certain to prevail. But then I began to focus on a related problem that was susceptible of a solution that did not require procedural reform for its implementation. The problem was bargaining imbalances. Sometimes a lawsuit is a battle of equals. Consider a suit between two companies litigating over a failed business venture. If the companies are of equal size and the dollars at stake are manageable for plaintiff and defendant alike, then one would expect the suit to settle based on the merits. To be sure, both parties will complain about the litigation process – it is too expensive, time-consuming, and burdensome.[17] But given that they are equally well-suited to bear those burdens, one would expect them to settle based on their perceptions of the merits and their expectations for trial (or, at least, that is how the theory goes).[18]

However, what if one of the litigants is much smaller than the other? The failed business venture may have been central to one company's development – the core project on which it had pinned its hopes and to which it had devoted all of its financial resources. For the other company, the failed business venture might have been one of dozens it pursues each a year and the dollars at stake not at all significant to the company's financial health. A lawsuit between these two companies would present very different settlement dynamics from the lawsuit between two equal adversaries. The smaller company – very often the plaintiff – typically would not have the financial resources to hire top-flight hourly counsel to litigate the case. Having devoted so much capital to a business venture that failed, it would have hard time raising more to litigate over that failed project. The larger company, typically the defendant, would have no such difficulty. Indeed, faced with a lawsuit from the smaller company, the larger company might not only hire the best counsel money can buy, but might give its lawyers free reign to pursue a litigation strategy designed to drag out the process and inflict as much pain as possible on its adversary.

In that circumstance, even if the weaker of the two parties has a very strong case on the merits, it would have a difficult time turning down a low

settlement offer that would free it of the burdens of ongoing litigation. The ultimate resolution of the case would likely be influenced as much by the bargaining imbalances between the parties as by the underlying merits of the case. Without a credible threat of taking the case through trial (and appeal) – and lacking the resources needed to take full advantage of the process available to it – the weaker of the parties could not extract a settlement for the amount to which it is lawfully entitled.[19]

In other instances, it is the defendant who cannot credibly threaten taking a case to trial.[20] Consider the company faced with a nationwide class action. It may have ample resources to defend the case vigorously; indeed, its legal fees might even be covered by insurance. But the potential liability could far exceed any insurance coverage and significantly threaten its financial health. If the company is in the midst of a recapitalization or is otherwise concerned about how capital providers or investors perceive the pending suit, this may put extraordinary pressure on the defendant to dispose of the risk and settle the case. The plaintiffs' attorneys, in contrast, might view the suit as just one in their portfolio of cases – and if the case is big enough, they very likely will have spread the risk of losing any particular suit over a consortium of firms who would share in the burdens of the case and the benefits of any fee award.[21] As a result, the plaintiffs' attorneys might be better positioned to hold out for an attractive settlement than the defendant. Indeed, unable to proceed to trial and risk a catastrophic loss, the defendant may be induced to pay more for the suit than the merits alone would suggest is appropriate.

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In an article in the *University of Chicago Law Review*, I envisioned a market actor who would sell after-the-event litigation insurance to the risk averse defendant.[22] The litigation insurer would absorb a different risk from the property and casualty insurer: whereas conventional insurance protects against the occurrence of a litigation-triggering event, litigation insurance would be sold *after* the bad event has occurred and would be sold to protect against a worse-than-expected litigation outcome.[23] So long as an insurer is willing to accept the entire liability, without policy limits or with very high policy limits, it would enable the defendant team to proceed to trial. Able to threaten a trial, the defendant could not be coerced into an unduly high settlement.

In an article in the *Georgetown Law Journal* I sketched out how such a market mechanism would work for plaintiffs.[24] The small company suing the larger one would no longer have to search for a law firm willing to take its case on a contingency, knowing that it will face a better financed adversary. Instead, the small company could retain the best counsel for the case and would be able to ensure that its lawyers are as well-financed and as ready to fight as the defendant. By shifting some of the expense and risk of litigation to a financier, the small company would level the playing field in the litigation and improve settlement dynamics.[25]

In my articles, I explored not only the expected benefits of a market mechanism, but also potential obstacles to the development of such a market in litigation risk. I explored both regulatory obstacles (Would a defense-side risk-bearer be regulated as an "insurer"?[26] Would a plaintiffs'-side financier run into prohibitions on champerty and maintenance?[27]) and economic obstacles (how would any defense-side insurer be deep-pocketed enough to bear litigation risk in large cases without policy caps?[28]). I also explored potential obstacles internal to the litigation system that would affect both plaintiffs- and defense-side risk transfers (would information exchanges with third-party risk bearers be protected by attorney-client privilege and work product doctrine?).[29]

But the theoretical benefits and obstacles were just that – theoretical. When I wrote the articles I did not know for sure if a market mechanism really was feasible – and whether it could effectively level the playing field between unequal adversaries. To see if a market mechanism could work – and to understand its effect on litigation dynamics – one would have to examine some real world litigation risk transfers. Fortunately, I was soon to have that opportunity.

II. The Practical Project: Constructing a Market in Litigation Finance

In the course of my academic research on defense-side litigation risk transfers, I had spoken with a number of potential participants in such a market. There were very few law review articles and cases on point, so as part of my research I met with insurers and insurance brokers, investment banks and investment funds who had seen first-hand how litigation risk could affect business and had considered how risk transfers might help.[30] I learned that when companies that are defendants to litigation also are the target of a pending deal (a merger or acquisition, or a recapitalization or capital infusion) litigation risk can interfere with deal dynamics. Even if a corporate defendant is itself comfortable bearing the ongoing risk of the suit – and would be in no rush to settle absent a compelling business reason – a third-party capital provider or potential business partner may not be comfortable with the risk and may push the defendant to dispose of the risk.

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I learned that insurance brokers often receive inquiries from deal participants in these circumstances, asking whether an insurer will accept the risk that a lawsuit will result in a higher-than-expected judgment and cost the defendant more than expected. I also learned that most conventional liability insurers generally will not insure those risks – viewing such "after-the-event" litigation insurance as roughly equivalent to selling fire insurance for a home that is already on fire. Whereas conventional liability insurers can price risks by lumping together large groups of homogenous, undifferentiated policy holders who bear the risk of something unanticipated going wrong, after-the-event litigation insurance involves a highly differentiated, heterogeneous risk that can only be underwritten through careful diligence regarding the lawsuit.[31] Insurers worry that they will price the risk wrong and are unlikely to know as much about the risk as the policyholder.[32] This does not mean that no insurers will take after-the-event litigation risk – to the contrary, as noted below, I helped to finance one such deal in recent months[33] and in the UK after-the-event insurance for litigation fees is commonplace[34] – but most US insurers view pure litigation risk as something beyond their purview. Investment funds, in contrast, are happy to bet on litigation if the returns are large enough, although investment funds do not have the balance sheets that insurers have to absorb large risks for long periods of time.[35]

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In addition to writing about this problem, and sketching out how a litigation insurance market might work in theory, I set up a small company (Litigation Risk Solutions) to try to facilitate actual litigation risk transfers. The idea was to bring together the various parties and structure deals that would benefit all involved. Insurance brokers looking to shift litigation risk for their clients began to come to me. I would then examine the risks and bring potential deals to investment funds interested in absorbing those risks and profiting from them.

And, I would involve an insurer or investment bank with a large enough balance sheet that was willing to "front" for the investment fund (taking the credit risk associated with the investment fund not paying its obligations, but leaving the litigation risk to the investment fund).

Although my scholarship benefitted enormously from this practical project, it was very difficult to get a market mechanism up and running on a deal-by-deal basis. There were too many moving parts for the market to work, and without a dedicated pool of capital it was very difficult to get deals done. By the time I lined up the investment fund willing to absorb litigation risk from a litigation defendant and an insurance company or investment bank willing to front for the fund, the underlying business deal that gave rise to the need for the litigation risk transfer may have evolved in such a way as to render the risk transfer unnecessary. For litigation risk transfers to work – whether defense or plaintiffs' side – I became convinced that one would need a dedicated capital provider that had the capital and the knowledge-base to underwrite deals itself, without needing to bring in third parties. While my practical project helped me understand the contours of market demand, it would not enable me to see how risk-transfers actually work in practice, and how they affect litigation dynamics, unless I could create a dedicated provider of litigation finance.

Eventually, I got that opportunity. While presenting a paper at a RAND-UCLA Conference on litigation risk, I met some lawyers and business people who had read some of my scholarly work, heard about my practical project, and were interested in partnering with me to create a dedicated litigation funder. I agreed, and the Burford Group was formed to serve as investment advisor to Burford Capital, a dedicated litigation-finance provider that raised public capital on the London Stock Exchange.[36] Burford raised its money in London because investors in the UK were ahead of US investors in viewing litigation as a market opportunity. Whereas in the United States, plaintiffs who are short on funds have historically looked to contingent fee attorneys to finance their cases, in the UK contingent fee arrangements historically have been prohibited[37] and claimants therefore typically look to third party capital providers to finance their cases. UK investors therefore understood the model and thought that it would work just as well in the United States as in the United Kingdom – indeed, potentially better given the sheer size of the US market.

Burford has no control over litigation or settlement decisions and it does not interfere with the attorney client relationship.

When Burford was formed, I agreed to serve as chair of its investment committee. Several months later, after Georgetown agreed to grant me an unpaid leave, I agreed to expand my role in the venture and devote myself full-time to building the business. I have examined every deal that Burford has done – and have witnessed first-hand how the commercial dispute at stake was affected by Burford's capital. Of course, I have not done it alone. Burford has since hired an incredibly talented underwriting staff – litigators with decades of experience at top law firms and in senior in-house positions at major companies. Although I weigh in on each deal that Burford does, Burford has built a dedicated team of investment professionals who conduct extensive due diligence on each opportunity and who negotiate and document litigation risk transfers with Burford's counterparties. Litigants approach Burford Group's team of legal professionals asking whether their cases are financeable. Burford's legal team then conducts extensive diligence that includes an examination of the facts of the dispute, the governing law and forum, the quality of the legal team the litigant has hired or proposes to hire, and the credibility of potential witnesses. If the Burford legal team decides that a case is indeed financeable, the team then works to line up financing from Burford Capital on terms that meet both the litigant's needs and Burford Capital's return expectations.

Burford has no control over litigation or settlement decisions and it does not interfere with the attorney client relationship. Burford has committed more than $280 million in capital across more than 35 deals involving US commercial litigation, international arbitration, and most recently UK domestic matters. In each of these deals Burford has been a passive provider of financing. It has no control over litigation or settlement decisions and it does not interfere with the attorney client relationship, although clients and their lawyers have come to rely on Burford's experienced litigators to monitor cases and provide not only input on major litigation decisions but also input on the financial landscape as the case progresses. Some of these cases have come to Burford late in the litigation process. Indeed, in some cases a litigant paying an hourly fee law firm has run out of money just a few months before trial.

Without financing, the litigant knows that its law firm will have to withdraw and it will have to find substitute counsel willing to take the case on a contingent fee basis. Burford Capital in those cases has deposited enough funds in the law firm's client trust account to pay accumulated arrearages and to cover the budget for hourly fees going forward. In other cases, a business (or a law firm) may approach Burford at the outset of litigation when the client is choosing among law firms. In those cases, the client might prefer a firm or lawyer that works on an hourly fee basis but may not have sufficient funds available to cover the preferred lawyer's fees, or may have better uses for its capital. By obtaining financing from Burford, the client can retain the lawyer and firm of its choice and yet do so on a synthetic contingent fee basis, by granting Burford a share of the recovery in exchange for the cash needed up front to cover the law firm's fees. In still other cases, Burford has provided cash for a purpose other than enabling the litigant simply to pay its lawyers' bills. For example, Burford has worked with insurance companies so that part of Burford's investment pays the premium for an insurance policy – and Burford and the insurer together take a much larger band of risk than Burford could take alone. In such cases, Burford's offerings are designed not only to provide a business with much needed cash in the short term, but also to protect the business against a worse-than-expected litigation outcome down the road. Finally, Burford has provided financing to law firms, rather than litigants, in situations where lawyers and clients have agreed to straight contingent fee arrangements and law firms seek financing to ensure that they have the resources they need to represent their clients vigorously.

Because Burford's counterparties want to retain the confidentiality of the information they share with Burford – including the very fact that they have obtained financing – I am not able to identify their lawsuits or describe precisely how the availability of financing changed the dynamics of particular cases. There have been two instances in which reporters have discovered, and written about, Burford's financing and those I am free to say something about – one of which is a prototypical Burford investment and the other of which is an outlier. I am also able to provide a bit more detail about several matters that have concluded and been described in Burford's public releases.[38] Finally, I can speak about the dynamics in other cases, provided that I avoid details which would identify the party who obtained financing and the lawsuit in question. My discussion of some of the cases is set forth in Part III below.

Although Burford's capital has been used by different businesses for different purposes, as a general matter Burford's financing has enabled those businesses to retain higher-quality counsel and/or mount a more vigorous prosecution of a case than would have been possible without Burford financing. Each of the lawsuits that Burford financed likely would have been pursued in some form even without Burford financing – so Burford cannot take credit (or blame) for the existence of lawsuits. Each litigant that Burford financed at the outset is one that would have found some lawyer to handle its dispute if it had been unable to finance it, although that lawyer would not have had the experience, ability, or resources that the lawyer ultimately selected had.[39] Each case that Burford financed mid-stream, because the hourly firm was going to withdraw, would have been continued with a substitute law firm, but the quality of the representation (and in my view the outcome) would have changed. And where law firms have agreed to contingent fee arrangements, rather than hourly fee arrangements, and then have relied on Burford for financing, the law firms' deals with Burford have provided them with the resources they have needed to represent their corporate clients vigorously, though they would have pursued those cases in some fashion regardless. (Burford's financing likely enabled the law firms to resist the temptation to divert lawyer hours and firm resources from contingent fee matters to hourly fee matters in order to cover overhead and maintain their profits per partner).

Most of Burford's investments have not yet concluded, but of those that have, four settled, three went to verdict, one completed an appeal, and two have been arbitrated and the parties are awaiting arbitrators' rulings. Of the settlements, three were quite favorable, resulting in profits to Burford. (One involved the return of Burford's capital with a time-value-of-money adjustment plus 40% of the net recovery after a lawyer uplift. The other two involved a time-based rate of return that produced an attractive return for Burford but ended up costing the counterparty a smaller portion of its recovery because the matters resolved relatively quickly.) A fourth settlement resulted in Burford receiving its money back but no more. This lower-than-hoped settlement suggests that although financing may counter risk-aversion

in most cases, there are limits to that salutary effect – as the plaintiffs' risk aversion led it to settle for an amount well below its entitlement, despite its having financed the case. (Then again, before it obtained financing it had indicated a willingness to settle for still less, so one could say that financing had its intended effect.) The appeal was successful, providing an attractive return for Burford and a large recovery for the litigant, which was happy to pay Burford a share of the recovery given that Burford's capital had enabled the company to finance operations and stay alive while it waited for the appellate result. Of the three verdicts, two were quite favorable, resulting in big wins for the plaintiff and large profits for Burford (on the order of a 3x return based on roughly a 40% share of the recovery). The third resulted in a loss. Although the party backed by Burford had the stronger legal position in that case, the trier of fact took a strong dislike to that party's principal witness (who performed terribly) and chose to rescind a contract and strip the party of the contractual rights upon which it had sued. This loss highlights what every litigator knows – one cannot evaluate a lawsuit without considering the extra-legal, personal element. Sometimes, a party's personal appeal may be as important as his legal rights. This intangible element of course makes it much more difficult for a litigation finance company like Burford to underwrite litigation risk. Hiring smart, careful lawyers is not enough to ensure success.

In its short existence, Burford has become a participant not only in the litigation finance market, but also in public policy discussions. Various professional, academic, and bar-related organizations have taken an interest in litigation finance and have organized conferences and projects on the topic. The ABA and the New York City Bar have studied the subject, each concluding that litigation finance is perfectly acceptable, though cautioning lawyers to be mindful of their responsibilities to clients, and not just their own finances, when they advise clients on the topic.[40] RAND, UCLA, and Northwestern have held conferences (with RAND having held multiple conferences on the topic) all of which involved productive discussion of the economics of litigation finance, the effects on litigation dynamics, and the role that lawyers should play in counseling their clients on the topic.

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George Washington University has a conference scheduled for this spring, in which I have agreed to participate as a moderator. The only conference I have attended that was not as intellectually honest and open was organized by the U.S. Chamber of Commerce, which took an uninformed, negative view of the industry – as one more driver of litigation in our country.

III. Practical Lessons for the Scholarly Project

When I examine the deals Burford has done and the public discourse it has participated in, I have found support for the conclusions I had reached in my earlier academic work and also have confronted new issues that I had not before considered.

A. Practical Reinforcement for the Scholarly Project

Burford's basic business proposition is the academic theory I had propounded in my earlier work: a market mechanism can help level the playing field between unequal adversaries and help the weaker party to obtain the merits resolution to which it is entitled, either by enabling it to proceed to trial or (more likely) by enabling it to negotiate a fair settlement because it is able to afford a trial. I have seen that premise proven true in a number of cases. Confidentiality obligations prevent me from describing litigation dynamics in so much detail as to identify the parties to the dispute, but I can describe a few examples to provide color.

In one case (which an enterprising American Lawyer Reporter was able to discover)[41] Burford provided financing to a multi-million dollar real estate developer engaged in a business dispute with an even larger real estate developer. The smaller developer had the right to build a specified number of residential units on a piece of land it had purchased at auction from the State of Arizona as part of a large planned community. The larger developer, which served as master developer for the broader project, did everything in its power to prevent the smaller developer from proceeding (most likely because it had a competing residential development of its own across the street). The larger developer succeeded in shutting down the smaller developer's project, causing it to lose the land and all of its sunk development costs. The smaller developer sued, and had the foresight to hire one of the best lawyers at one of the best law firms in the country to litigate its high-stakes, complicated business dispute. (The litigator, Barry Ostrager of Simpson Thacher, was consistently rated in the top ten nationally by various ranking organizations.)[42] As the case progressed however, the plaintiff ran out of money – the real estate collapse in 2008 rendered it asset-rich but cash poor. With summary judgment briefing due in a month and trial scheduled for six months later, the law firm was going to have to withdraw at the end of 2009, as the client had accumulated more than a million dollars in arrears and was facing as much as five million more if the case went all the way through trial. The client recognized that if it had to find another law firm to take the case at that late stage, it would risk losing the positive momentum it had accumulated and would likely dramatically sacrifice the quality of its counsel. Rather than seek substitute counsel, the client sought out a deal with Burford, under which Burford advanced $5 million (later increased to more than $6 million) to cover the arrearages and the costs of the litigation through trial. Burford saw a strong case on the merits – one in which both the governing legal documents and the equities favored the plaintiff. There was a risk that a jury might misunderstand those legal documents (which were rather complicated) and an even greater risk that the jury would discount the plaintiff's damages (or award no damages at all) based on the subsequent collapse in the real estate market. Although the real estate decline happened well after the events in question – and the plaintiff's damages were properly calculated based on the damage it suffered at the time of the defendant's actions – there was the risk that a jury would nonetheless devalue the plaintiff's claim because subsequent events may have rendered it less valuable. Burford took the risk, advancing the funds in exchange for a share of the recovery.

The law firm stayed on and litigated the case to conclusion – attempting unsuccessfully on numerous occasions to settle the case (because the parties were just too far apart on damages numbers). The jury returned a $110 million verdict, holding the defendant accountable for its conduct and awarding the plaintiff its due. Following the verdict, the parties ultimately settled the case – agreeing upon a resolution which discounted the jury verdict based on appellate and enforcement risk, but which left the plaintiff, and Burford, with an attractive outcome. (Burford was entitled to its money back plus 40% of the net recovery, after a law firm uplift, would provide Burford with its investment back plus roughly a 2x return on that invested capital.) Without Burford's funding, I am confident that the result would have been different.

Two other cases are almost identical to the first in important respects – meritorious claims in a business dispute (i.e., claims that Burford's underwriting team believed were entitled to win on the merits), plaintiff runs out of money, law firm threatens to withdraw. In those other two cases, however, the plaintiff did not come to Burford until *after* the law firm had already withdrawn. In one, the plaintiff had switched to a new firm willing to take the case on a contingent fee and then sought funding from Burford for expenses. In the other, the plaintiff sought Burford's help in lining up substitute hourly fee counsel and took enough funding from Burford to fund the entire case. The plaintiff that obtained help in selecting substitute counsel obtained just as happy a result as in the example above: a verdict for tens of millions of dollars that it could never have obtained without counsel of the caliber it chose. The client, the law firm, and Burford were all of course thrilled with the result. The plaintiff that switched firms before coming to Burford for expenses did not do quite so well. The new law firm staffed the contingent fee matter with less experienced lawyers and did not litigate the case as effectively as it predecessor. Moreover, the plaintiff's risk aversion remained strong, despite having passed off the costs of litigation to Burford and the law firm. The plaintiff ultimately accepted a settlement offer that was well beneath the value of its claim – one that covered the contingent fee firm's opportunity cost, returned Burford's investment, and provided only modest compensation to the plaintiff for the harm it had suffered at the hands of the defendant.

When one examines these three cases, one sees how financing can provide a business claimant with the resources it needs to retain top-flight counsel and increase its chances of collecting that to which it is legally entitled. But whether a plaintiff actually takes advantage of this boost to its position depends upon the client and the decisions it makes. Burford does not pick counsel for the client and it does not control litigation or settlement decisions.[43] A risk averse plaintiff may benefit from financing, but it may remain risk averse even with funding in place.

In some cases, litigants have looked to Burford even though they do not need cash to pay legal fees for the law firm of their choice. In one matter, a plaintiff won a large verdict using an AmLaw 100 law firm entirely on a contingent fee basis. Because the law firm was obligated to handle the appeal on a contingent fee basis, the client did not need financing to pay legal fees. It looked to Burford instead (1) to finance its operations, (2) to absorb some of the risk of a reversal on appeal, and (3) to finance the purchase of an insurance policy that would provide excess coverage beyond the risk taken by Burford. Burford put up $10 million, some of which was used by the plaintiff to finance operations while it waited for the judgment to be paid and some of which was used to finance a $30 million insurance policy which would pay out if the verdict was overturned.

In another case, the litigant could afford to pay its AmLaw 100 firm – as it had been doing for more than a year – but it was concerned that this ongoing expense would depress its earnings during a period when it was contemplating a recapitalization or reorganization. Under the accounting rules, money spent on legal fees are treated as an ordinary expense, which reduces earnings, but a large litigation award is treated as an extraordinary, one-time event, which does not increase earnings. The company preferred to finance the litigation and put an end to the ongoing drain on its earnings. The case – a business dispute between adversaries of comparable size – ultimately settled for a reasonable amount and Burford earned an attractive return.

Burford has also improved litigation dynamics through deals with law firms, sometimes covering a portfolio of business claims that the law firm has agreed to handle on a contingent fee basis. The law firms and cases have varied considerably. In some instances, the law firm and the clients are both enormous players – including AmLaw 100 firms representing Fortune 100 companies. In such a scenario, a business with strong meritorious claims had a responsibility to shareholders to pursue those claims but did not want to invest millions of dollars in legal fees to pursue the claims and the law firm was happy to proceed on a contingent fee basis, but the investment was simply too large for firm management to accept entirely on its own. Burford provided sufficient capital to reduce the law firm's exposure to an acceptable level and enable to the firm to proceed on the fee basis that the client preferred.

In other instances, the lawyers and matters are smaller in scale. A common example is where a practice group at a large firm finds itself under pressure from firm management either to shed its contingent fee matters or devote more work to hourly fee business, which would interfere with its ability to represent its contingent fee clients diligently. The practice groups have sought financing in an effort either to bring in enough cash to satisfy firm management or, where firm management preferred a clean break, to facilitate a departure from the large firm by enabling the practice group to cover expenses and overhead upon starting a new, smaller firm. In either case, Burford financing has enabled lawyers to provide their clients with the quality representation that the client deserved.

B. Surmounting Potential Obstacles

The three principal obstacles I envisioned in my scholarly work were: 1) regulatory regimes that might prohibit or restrict the implementation of a market in litigation risk, 2) work product and privilege issues that would arise when litigants shared information with third party financing or insurance sources, and 3) business obstacles that might interfere with plaintiff- or defense-side risk transfers.

1) Regulatory Regimes

When it comes to the financing of business claims and/or the lawyers who litigate them, government regulation does not pose a meaningful obstacle to market transactions. The common law doctrines of champerty and maintenance that long ago stood in the way of third-party financing, have been abandoned in the vast majority of states[44] and even where the doctrines continue to place restrictions on the financing of personal claims, they generally have no application to business disputes.[45]

The three principal obstacles I envisioned in my scholarly work were: 1) regulatory regimes that might prohibit or restrict the implementation of a market in litigation risk, 2) work product and privilege issues that would arise when litigants shared information with third party financing or insurance sources, and 3) business obstacles that might interfere with plaintiff- or defense-side risk transfers.

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There are some narrow exceptions in which uncertainty remains. For example, although business claims are financeable virtually everywhere, in the states that have retained restrictions on the financing of personal claims, there may be a subset of seemingly commercial claims that are capable of being characterized as personal and, therefore, subject to the old champerty and maintenance doctrines. For example, although one would think that a business suing its former transactional lawyers for an obvious mistake that cost the business tens of millions of dollars would be characterized as a commercial, or business claim, in a couple of states (Virginia and Colorado), there is the possibility (though by no means certainty) that a court might characterize it as a personal claim, not susceptible to financing. When faced with a claim that presents such a risk, Burford has declined to provide financing rather than to test the boundaries of applicable law.[46] Such an example is quite rare, however, and businesses that seek financing for commercial disputes generally are not prevented from doing so by any governing law.

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Law firms that seek financing likewise can do so without regulatory risk, though in some cases the terms of a financing deal may have to be structured to take into account prohibitions against fee splitting. Every state bar except for the District of Columbia prevents lawyers from sharing fees with non-lawyers. The purpose of these prohibitions is to prevent the unauthorized practice of law – and DC has carved out an exception from the prohibition to enable lawyers and other professionals (e.g., accountants) to offer professional services side-by-side in a single firm and share profits.

Law firms have long been permitted to obtain financing, however, and most of the top law firms in the Nation have at least some sort of credit line from major banks, which is secured by the fees

they earn from their clients. Indeed, in my work at Burford I have seen instances in which a major financial institution holds a security interest in the contingent fee entitlement of a major law firm in a major piece of litigation. As long as the financier's interest in the litigation outcome is entirely financial, and the capital provider has no power to influence the law firm's representation of its client or to interfere in the attorney-client relationship, then the financing of law firms does not pose a problem.[47] Jurisdictions like Australia and the UK have gone several steps further, permitting non-lawyers to own and control law firms and even allowing law firms to become publicly traded.

In the US, in contrast, non-lawyers who provide financing to a lawyer must remain passive providers of financing, rather than active managers of the lawyer's practice. The ABA recently issued a report confirming that a lawyer can comply with his professional obligations while litigating a financed case[48] but made clear that existing rules permitted lawyers to litigate financed cases and that there was no need for any revision of those rules.[49]

The ABA working paper on the subject advised lawyers to be careful to ensure that they do not let their own financial interests trump those of their clients.

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2) Privilege and Work Product Protection

An additional obstacle to litigation finance I have written about is the risk that litigants seeking financing might fear that any information they turn over to a potential third-party funder might end up in the hands of their adversary.[50] In practice, this is a risk that can be managed easily with a bit of care. For one thing, 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. Although it might be useful for a third party funder to be privy to an attorney's analysis of the case – and this is common practice in the UK – a good funder will have to analyze the merits on its own and will not rely on the analysis offered by the litigant or his attorney, who of course have strong incentives to paint as rosy a picture of the merits as possible.

Information exchanges between litigants and funders can be structured so as to warrant work product protection and common-interest privilege protection.[51] As a policy matter, the arguments for protecting communications with funders are quite strong. First, the very reason that a litigant might seek funding – to level the playing field against a better-financed adversary – counsels against penalizing the party for seeking that funding. Why should a party who pays his attorneys by the hour obtain a different level of protection from a party who cannot.

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Likewise, why should communications between a defendant and its insurer receive different treatment from communications between a plaintiff and a funder? Second, communications between a litigant or his lawyer and a potential funder are just the sort of core work-product that should not be shared with an adversary. A funder deciding whether to fund a case will want to hear about the lawyer's strategy for litigating it and the litigant and/or lawyer's settlement expectations – matters that should not be turned over to the other side. Indeed, there is no legitimate reason why a litigation adversary would want to see such communications – only the illegitimate desire to pick the other side's brain and anticipate its strategy.

The doctrinal support for work product protection of materials shared with funders is equally strong. Work product doctrine protects "materials prepared in anticipation of litigation by or for a party or the party's representative," and to the extent that a litigant's attorney prepares a memo about a case, there is no doubt that this memo would be protected as work product.[52] The only question, then, is whether sharing such a memo

with a litigation financer would serve to waive that work product protection. For a party's disclosure to waive work-product protection (in contrast to attorney-client privilege), the litigant must effectively provide access to the litigant's adversary.[53] Disclosure pursuant to a confidentiality agreement to someone who is not a litigation adversary, but rather a potential source of financing for the litigation, does not increase the risk of exposure to an adversary and does not waive the protection.[54]

Provided they approach the question carefully, litigants, lawyers and funders can structure their relationships so as to fit squarely within the applicable doctrines and ensure that the doctrinal result matches the policy underlying the relevant doctrines and protects against disclosure.

Where a litigant seeks funding, it ideally should have its lawyer retain a potential source of funding (whether a funder or an intermediary such as a broker) as a consultant to answer the question of whether the case is "financeable." Just as a litigator might retain a technology consultant at the outset of a patent case to better understand the patented technology in question, so too may a litigator retain a consultant to decide if a case is financeable and to provide feedback on the terms that would likely attach to such financing. Once a third party funder says yes, the case is financeable, then of course there will be a negotiation between the funder and the litigant, and so the funder will have to make clear that in responding to an initial inquiry it is not providing the litigant with its undivided loyalty.

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However, if the negotiation is successful and the funder ends up financing the case, then the litigant and funder might receive protection not only under the work-product doctrine that would apply to their initial communications, but also under common interest privilege.[55] Upon concluding a deal they would indeed have a common legal interest because the funder would in fact be directly entitled to a portion of the proceeds received from any suit, as opposed to simply having an indirect interest in the business benefits that would flow from the litigant's victory.

Although some people view litigation as unpredictable, and therefore not an appropriate asset class in which to invest, in fact litigation risk is no harder to manage than many other types of investment risk.

3) Business Obstacles

A third set of obstacles I considered in my scholarship were business obstacles. They fell into two categories, one that was common to plaintiff- and defense- side risk transfers and the other unique to the defense side. First, common to both, was the question of whether capital providers really would be willing to invest in litigation risk. I argued in articles that although some people view litigation as unpredictable, and therefore not an appropriate asset class in which to invest, in fact litigation risk is no harder to manage than many other types of investment risk.[56] Provided that investors had confidence in the team of lawyer-investors charged with evaluating legal risk, I posited that many investors seeking high returns, uncorrelated with market fluctuations, would be willing to invest in litigation risk. My instinct has been proven true to some extent, as Burford has raised $300 million in public markets in London, a competitor named Juridica raised nearly $200 million in the same markets, and a number of private English funds have raised more than another $200 million among them. This is not to say that raising capital for investments in litigation is easy. While Burford, Juridica, and several others have succeeded in raising capital, many others have tried and failed. But this may be as much a reflection of the difficulty associated with raising a new fund in turbulent market conditions as a reflection of any inherent difficulty with raising capital to invest in litigation.

The other business obstacle I described was specific to defense-side risk transfers. I posited in my scholarship that even if one were able to raise enough money to fund legal fees for plaintiffs (as companies like Burford have done), it would require capital of a different magnitude to be able to accept the risk on the defense side of a large

adverse legal judgment. Investing in plaintiffs' claims is a bit like purchasing call options – one invests pennies (or dimes) in the hope of earning dollars. Backing defendants, in contrast, is like selling insurance – one must risk dollars in order to make pennies (or perhaps dimes). Insurance companies take in premiums that represent only a small fraction of the total amount they theoretically could lose. Indeed, any insurance company would go bankrupt many times over if all of its policyholders filed claims at the same time. But insurers know that all policies will not result in claims – and indeed, that only a small portion of them will trigger claims. Successful insurance companies take in enough premiums to cover claims and expenses, while leaving a little bit for profit (and earning investment interest on the premiums while the policies are outstanding).

For an insurer to be successful, it must take in premiums from a large enough customer base that a loss or claim on any particular policy will not have a meaningful effect on the insurer's financial health. Given that an insurer's balance sheet must be many times larger than the largest claim it expects to face, dedicated litigation funders like Burford are not in a position to accept very large defense-side risks. Raising hundreds of millions of dollars in equity may be enough to fund dozens of plaintiffs' claims, but it is not enough to insure an equal number of defendants, unless one uses that equity to purchase an insurance company with a much larger, existing balance sheet which can take on per-case risk that is many times larger than the legal fees involved. The key to building a defense-side business is to start with an insurer with a large enough non-litigation business that is willing to take on some litigation-specific policies.

Fortunately, Burford has found at least one such insurer that is willing to work with it to take on litigation risk. Although Burford initially launched its business with a focus on commercial plaintiffs – precisely because it lacked the capacity to insure large, defense-side risks – Burford recently closed its first insurance-related deal, one which opens up endless possibilities for defendants who seek protection against a worse-than-expected litigation outcome. Burford invested $10 million in a case where a commercial plaintiff had already won a $50+ million jury award. Under the terms of its deal, Burford will receive back its investment and a return on that investment if the jury verdict is affirmed, will receive back a portion of the investment if the jury verdict is scaled back considerably by the appellate court, and will receive nothing if the plaintiff receives nothing. The plaintiff used roughly one-third of Burford's $10 million to purchase an insurance policy from an insurer that guaranteed the plaintiff at least a $30 million recovery (a level at which Burford would receive back some, but not all of its $10 million). Because the insurers in question write policies for many things other than litigation risk, the insurers were able to accept $30 million in risk over-and-above Burford's $10 million, making it possible for Burford to offer a litigant nearly $40 million in protection, which is far beyond what a $300 million fund could do for a single case.

This is not to say that defense-side deals are as easy to structure and close as plaintiffs-side deals. When the risk to be transferred involves tens, or perhaps hundreds, of millions of dollars in potential liability, as opposed to legal fees in the single digits or low teens, a risk-transfer is much more difficult to accomplish. But my early experience with one such deal suggests that a defense-side market is indeed possible.

C. Challenges Not Anticipated in the Scholarship

Although my practical experience at Burford has generally reinforced the views I formed as a scholar – about the value of litigation markets and their ability to surmount both regulatory and business obstacles – my experience at Burford has highlighted two aspects of litigation finance and litigation risk transfers that I neglected in my prior academic work. My experience has not only provided some answers to the questions I posed as a scholar, but also revealed new questions that I had not anticipated.

I had not considered that those who naturally benefit from an uneven playing field would cling to that advantage and seek to attack litigation funding.

1) Opposition from Institutional Beneficiaries of Risk Imbalances

First, while I had examined the benefits of litigation risk transfers *both* for plaintiffs *and* for defendants – and indeed had begun the project with a focus on defendants – I had focused entirely on the benefits to the weaker party of leveling the playing field. I had not considered that those who naturally benefit from an uneven playing field would cling to that advantage and seek to attack litigation funding.

A corporate defendant able to afford the most expensive firm's hourly bills has a natural advantage in litigation because it can outspend its opponent, drag out the litigation process, and induce the plaintiff to settle for less than it otherwise would so as to avoid the ongoing costs and risks of litigation. Sometimes the defendant will be up against an impressive hourly fee firm that is on a short leash because of budgetary concerns and may therefore advise its client to settle if it does not want to bear the expense of ongoing litigation. Sometimes, the plaintiff will be represented by a contingent fee firm that lacks the will and/or resources to match the efforts of a large, well-funded hourly fee defense firm. Either way, an imbalance in resources and risk preferences works to the defendant's advantage. And to the extent that financing levels the playing field, it effects an unwelcome change in litigation dynamics. If the defendant can paint litigation finance in a sinister light – and seek discovery of funding arrangements and communications with funders – it will do so. Anything the defendant can do to offset the effects of financing – and turn financing into a liability for the plaintiff rather than an asset – it may well choose to do. Indeed, when defending against a strong claim on the merits, it will often be in the interests of the defendant to focus discovery on a side-issue that derails the litigation and interferes with the plaintiffs' litigation strategy. Given that Burford invests in disputes between businesses, Burford is just as likely to invest on the side of a business that is a member of the Chamber as on the side of a business that is not.

Defendants have sought to undermine the salutary effects of litigation finance not only through litigation tactics, but also by participating in public policy discussions on the topic.

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The Chamber of Commerce has come out in opposition to litigation finance because it perceives (incorrectly) that its members are most likely to be in the pitted against beneficiaries of litigation funding. Given that Burford invests in disputes between businesses, Burford is just as likely to invest on the side of a business that is a member of the Chamber as on the side of a business that is not.

The Chamber makes the additional mistake of lumping all litigation together, refusing to acknowledge that the vigorous pursuit of a meritorious business claim is a markedly different thing from the pursuit of a meritless one. To the extent that the Chamber acknowledges a distinction between meritorious and meritless suits, it also fails to recognize what is self-evident to litigation funders: Investors can only make money if they fund meritorious suits. Funding meritless suits is a sure way to lose money. Indeed it is potentially more costly for a litigation funder than for a contingent fee attorney.

A contingent fee attorney who realizes over time that his suit is weaker than he had first thought can mitigate his loss by spending less time on the case and devoting more resources to other matters.

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A litigation funder – which has invested cash, rather than just opportunity cost – may not have the same flexibility to mitigate its losses (though that may depend upon the terms of the funding agreement and how much of the funding is invested at the outset). To the extent that funders support only suits they believe to be meritorious and to the extent that they fund disputes between businesses, the Chamber's arguments against funding seem facially unsupportable. When one cuts through these arguments, the Chamber's essential problem with litigation finance is with litigation finance's core virtue: that it tends to level the playing field between unequal adversaries. The Chamber's most influential supporters are often the stronger, rather than the weaker, party in litigation. Even though the weaker party is often a small business that is also a member of the Chamber of Commerce, those smaller constituencies do not carry the same weight at the Chamber as a much larger business – a business that stands to benefit from imbalances in bargaining leverage when it is sued by a smaller business.

Fortunately, the Chamber's suspicion of litigation finance may not be long lived.

To the extent that misperceptions of litigation finance are driven by an aversion to plaintiffs' claims, and a sympathy for the defendant, those misperceptions may begin to fade if defense-side litigation risk transfers become broadly available to corporate defendants.

The public policy discourse surrounding litigation risk transfers has, to date, focused on financing plaintiffs' claims. This is true in large part because plaintiffs-side risk transfers are more easily achieved and therefore becoming more common.[57]

To the extent that misperceptions of litigation finance are driven by an aversion to plaintiffs' claims, and a sympathy for the defendant, those misperceptions may begin to fade if defense-side litigation risk transfers become broadly available to corporate defendants.

As a result, it is not surprising that the industry would be viewed favorably by commercial plaintiffs and their lawyers and less favorably by corporate defendants and their attorneys. However, as noted above, Burford has begun to establish relationships with insurers that may finally make defense-side risk transfers feasible for defendants. To the extent that Burford is helping a business defend itself against a class action – or helping a business to mitigate defense-side risk that would otherwise interfere with a recapitalization or merger – the Chamber is likely to be entirely supportive.

2) Effects on Law Firm Economics

A second issue I had not anticipated in my scholarship, but have confronted at Burford, is just how much perceptions of litigation finance are driven by the economics of law practice. For some lawyers, litigation finance offers an attractive path to an expanded practice. Consider the law firm partner whose corporate client wants a contingent fee arrangement but whose management committee does not. By introducing a finance company to intermediate between law firm and client, the law firm partner can satisfy both, as the financier would pay the firm's hourly bills in exchange for a share of the recovery.

For that law firm partner, financing offers a way to take on a case he could otherwise not. He can offer clients the fee arrangement they desire and thereby win additional business.

But the law firm partner who has built a practice representing large defendants may fear that if he takes a funded case for a small plaintiff (assuming he has no formal conflict of interest), he will be perceived to have aligned himself with a litigation funder and lose stature with his regular base of defense clients. Indeed, the law firm partner who finds himself in this defense-oriented camp may well be the one whom clients retain not only for specific representations, but also to participate in policy debates, pushing tort reform and other litigation-reducing public policy initiatives.

The fact that a subset lawyers is less likely to litigate financed cases is not a significant impediment to the growth of litigation finance. In the absence of financing, clients that do not want to pay hourly fees must find a lawyer willing to proceed on a contingent fee basis. If the availability of financing expands the universe of lawyers that clients can choose some, this is a positive, even if that universe does not extent to every lawyer at every firm.

What is more significant about the legal profession's reaction to litigation funding is what it says about the legal profession's evolving approach toward the traditional hourly fee model.

Litigation funding is simply one manifestation of a much broader shift in the legal profession's self-conception. There has been a fair bit written about the transformation of law from a profession to a business – both embracing it and lamenting it.[58] Large law firms today seek to emulate other money-making ventures, with an emphasis on marketing, cost-cutting, and managing and motivating their employees.

Litigation funding is simply one manifestation of a much broader shift in the legal profession's self-conception. There has been a fair bit written about the transformation of law from a profession to a business

But the lawyers at those firms continue to conceive of themselves as professionals, rather than business people, who are duty-bound to serve their clients.

Litigation finance highlights that when lawyers agree to alternative billing arrangements, they are providing their clients with two distinct offerings: 1) legal services, and 2) financing and/or financial risk management. When a litigation funder enters the scene, it effectively separates these two functions, leaving the lawyers to focus on providing legal services and the financial investors to provide the financial risk management and financing.

To most lawyers who confront the question, this arrangement is ideal: these hourly fee lawyers recognize their clients' need for financial risk management and are happy to leave that offering to someone other than the lawyers.

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To some, risk-embracing lawyers, the separation of offerings is unnecessary: these contingent fee lawyers prefer to offer financing themselves and to reap the returns associated with absorbing litigation risk and expense from their clients. Yet, to a third, smaller group of lawyers, the separation of offerings only serves to highlight an aspect to law practice that they would rather not consider. These lawyers not only refuse to provide financing or bear risk themselves, but they do not even want to have to think about a client's need for risk management and financing. They not only are uncomfortable litigating funded cases, but they are reluctant to acknowledge, let alone embrace, the changes in the nature of law practice and litigation that so occupy their managing partners.

The different attitudes toward risk exhibited by hourly fee and contingent fee lawyers have long been prominent, in large part because they have historically found themselves on the opposite sides of cases. But what is newer to the legal profession in the last couple of decades is the divide among hourly fee lawyers between those who understand that litigation decisions are business decisions for their clients and those who cling to old conceptions of the legal profession; and between those who view law practice itself as a business and those who resist such a changed self-conception. My practical project in litigation finance has taught me that a broader inquiry is needed into lawyer attitudes toward the business of law practice – an inquiry that goes well beyond the question of litigation finance. This inquiry would consider such questions as the shift of work from junior associates to staff attorneys and the outsourcing of document review to non-lawyers or foreign lawyers, the wisdom of a partnership track for associates in contrast to traditional corporate advancement schemes that include options and other forms of incentive pay, the growth of two tier partnerships (with equity and non-equity partners), the reliance of law firms on banks for credit lines, and the value of partnerships between lawyers and other professionals, like accountants – just to name a few. Lawyers' attitudes toward litigation finance offer a glimpse into the rapid changes the legal profession is undergoing and the intense debates that are ranging within law firms about these changes.

Conclusion

In earlier academic work I had posited that a thriving market in litigation finance could level the playing field in commercial litigation and thereby help to promote litigation accuracy. But that was only in theory. Whether my theoretical model could work in practice was something I would not know until I tried. Having now helped to construct an active litigation finance business I am pleased to find that what I posited in theory is indeed feasible. My practical project has reinforced the arguments I advanced as a scholar.

That said, the practical experience also has highlighted questions I had missed as a scholar and provided fodder for additional scholarly inquiry. In particular, the introduction and growth of litigation finance helps to bring into sharper focus a broader change in the legal profession's self-conception and serves to highlight marked differences in lawyers' attitudes toward the profession's evolution. My hope is that lawyers and scholars will pay careful attention to the ways in which litigation finance bears upon these broader changes. Litigation finance is likely to wbe just one evolution of many in the business of litigation and in the economics of law practice and the lessons learned from litigation finance may prove useful to the profession during a period of rapid transformation.

References

1 Of course, I was not the first to look at litigation resolutions as market transactions. See, for example, Miller, 80 TEX L REV at 2115 (cited in note 8) ("A lawsuit is essentially a sale. The defendant buys a valuable asset from the plaintiff, in the form of a release of claims if the case is settled, or a verdict with *res judicata* effect if the case goes to a verdict."); Rubenstein, 89 GEORGETOWN L J at 372 (cited in note 3) ("In complex class actions, defendants purchase a commodity— finality. They buy from the plaintiffs' representative the plaintiffs' rights to sue."); Robert H. Mnookin and Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding* Pennzoil v. Texaco, 75 VA L REV 295, 295 (1989) ("It is through negotiation, not adjudication, that legal conflict is typically resolved."). But see Owen M. Fiss, *Against Settlement*, 93 YALE L J 1073, 1085 (1984) ("To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying.").

2 Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367-440 (2009).

3 Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65-115 (2010).

4 Molot, *Market Solution*, at 73. Of course, a market approach need not be the exclusive approach. One could combine a market solution with other procedural forms intended to elevate the importance of the merits in litigation. *See* Molot, *Market, supra* note 2, at 367-440, Molot, *Litigation Finance, supra* note 3, at 65-115.

5 *See* Third Party Litigation Funding and Claim Transfer: Trends and Implications for the Civil Justice System, Presented by RAND Institute for Civil Justice and UCLA School of Law (June 2, 2009) (http://www.rand.org/events/2009/06/02.html).

6 Molot, *Market Solution*, at 83.

7 Molot, *Market in Litigation Risk*, at 378-80.

8 *See* U.S. Chamber of Commerce, Institute for Legal Reform, "Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States" (October 2009) (http://www.instituteforlegalreform.com/sites/default/files/thirdpartylitigationfinancing.pdf).

9 I did consider the effects of a market solution on lawyers and their professional roles. Molot, *Market in Litigation Risk*, at 433.

[10] A lawyer at a large, defense-oriented firm might also be unable to accept such a case because of a conflict of interest.

[11] Having seen litigants' and lawyers' financial interests affect their policy views, I have had to look inward and ask the same questions about myself, once I took the leap from the scholarly to the practical and worked to build a business that implemented my scholarly model.

[12] *See* Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 994-95 (1998); Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L. REV. 59, 61-62 (1997).

[13] *See* Molot, *Changes*, at 995; Molot, *Incentives*, at 62.

[14] *See* Molot, *Changes*, at 1026-50; Molot, *Incentives*, at 108-16; *see also* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L. J. 26, 110-18 (2003).

[15] *See, e.g.,* Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y 37, 51–54 (2002) (describing mediation building processes which involve, among other things, any identifiable interested parties, experts, and neutral facilitators); Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements,* 46 STAN. L. REV. 1339-91 (1994); Molot, *Old Judicial Role, supra* note 20, at 91, Molot, *Market Solution*, at 80.

[16] *See* Geoffrey P. Miller, Preliminary Judgments 21-22 (N.Y.U. Ctr. for Law, Econ. and Org., Working Paper No. 08-29, 2008), available at http:// ssrn.com/abstract=1144030; Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 320 (1986); Molot, *Changes, supra* note 4, at 1030–32; Molot, *A Market Solution, supra* note 3, at 77; Michael J. Davidson, *A Modest Proposal: Permit Interlocutory Appeals of Summary Judgment Denials,* 147 MIL. L. REV. 145, 206-16 (1995) (exploring the possibility of making denials of summary judgment appealable). But cf. Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 92 (1990) (survey of 140 contested summary judgment motions found that 122 were made by defendants and only 18 were made by plaintiffs).

[17] Molot, *How US Procedure, supra* note 12, at 61

[18] *See* Shavell, *supra* note 15.

[19] *See* Molot, *Market Solution, supra* note 3 at 84.

[20] See Molot, *Market in Litigation Risk, supra* note 2, at 389-90.

[21] The enormous risk and cost associated with class action litigation for both sides helps explain the evolution of a well-capitalized plaintiffs' bar for at least certain types of cases.

[22] Molot, *Market in Litigation Risk, supra* note 2.

[23] *Id.* at 381-82.

[24] Molot, *Market Solution, supra* note 3.

[25] *Id.* at 88.

[26] Molot, *Market in Litigation Risk, supra* note 2.

[27] Molot, *Market Solution, supra* note 4.

[28] Molot, *Market Solution, supra* note 4.

[29] Molot, *Market Solution, supra* note 4; Molot, *Market in Litigation Risk, supra* note 2.

[30] Molot, *Market in Litigation Risk, supra* note 2.

[31] Molot, *Market in Litigation Risk, supra* note 2.

[32] Molot, *Market in Litigation Risk, supra* note 2.

[33] *See infra* at 15.

[34] *See infra* at 7.

[35] Molot, *Market in Litigation Risk, supra* note 2.

[36] http://www.londonstockexchange.com/exchange/prices-and-markets/stocks/summary/company-summary.html?fourWayKey=GG00B4L84979GGGBXASQ1

[37] English solicitors can work for "conditional fees" which involve a discount off of their hourly fees and a comparable uplift in the event of success. But they cannot work for a percentage of the recovery.

[38] *See* http://www.burfordfinance.com/docs/default-document-library/burford-capital-fy11-rns-final.pdf at 13-14.

[39] I cannot say for sure that the converse is true: i.e., that every business or lawyer Burford declined to finance nonetheless proceeded with its claims. I do know that in many instances, the businesses that approach Burford have a number of options for pursuing their claims. A decision by Burford not to fund in these instances merely eliminates one of those options, and leaves the plaintiff free to proceed with a law firm on a contingent fee basis.

[40] *See* American Bar Association, Commission on Ethics 20/20, *Informational Report to the House of Delegates*; http://www.abcny.org/media-aamp-publications/press-releases/press-archives-2011/1160-third-party-litigation-financing-a-new-york-city-bar-formal-ethics-opinion

[41] Andrew Longstreth, *Litigation Finance Firm Backs Big Winner in Arizona Dispute*, The Am. Lawyer, (July 30, 2010) http://www.law.com/jsp/article.jsp?id=1202464037477&slreturn=1

[42] Chambers USA, Legal 500, IFLR's Guide to the World's Leading Lawyers.

[43] Although, as an economic matter, one could imagine why Burford would want to do both of these things, its business model is premised upon respecting client autonomy and the attorney-client relationship and so it does not require the client to choose a particular lawyer or to agree in advance to accept a particular settlement. It can – and does – decline to fund a case where the client has chosen inadequate counsel or where the client's settlement expectations are unrealistic.

[44] *See* Del Webb Communities, Inc. v. Partington, 652 F.3d 1145, 1156 (9th Cir. 2011) (citing cases) (noting that champerty is a "medieval doctrine," and there is a well-recognized and "consistent trend across the country [of] limiting, not expanding, champerty's reach"); Anthony J. Sebok, *The Inauthentic Claim*, 64 Vand. L. Rev. 61 (2011).

[45] *See* Sebok, *supra* note 44.

[46] Given the discussion below regarding lawyers' attitudes toward financing, one can understand why a litigation funder like Burford, which depends upon law firms for referrals and opportunities, would choose not to invest in a meritorious legal malpractice claim regardless of the governing law.

[47] *See* Restatement (Third) of The Law Governing Lawyers § 10, Comment b (2011) (stating that the rule against fee-splitting "should be construed so as to prevent nonlawyer control over lawyers' services, *not* to implement other goals such as preventing new and useful ways of providing legal services or making sure that nonlawyers do not profit indirectly from legal services in circumstances and under arrangements presenting no significant risk of harm to clients or third persons"); D. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 676-77 (2005) (analyzing and rejecting arguments that litigation financing involves fee splitting with non-lawyers).

[48] *See* American Bar Association, Commission on Ethics 20/20, Informational Report to the House of Delegates.

[49] *Id.*

[50] *See* Molot, *Market Solution, supra* note 4 at 112 n.143; Molot, *Market in Litigation Risk, supra* note 2, at 381.

[51] *See* Mondis Tech., Ltd. v. LG Elecs., Inc., Nos. 2:07-CV-565-TJW-CE et al., 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011) (protecting as work product documents prepared "with the intention of coordinating potential investors to aid in future possible litigation"); Molot, *Market in Litigation Risk, supra* note 2, at 381.

[52] *See* Fed. R. Civ. Pro. 26(b)(3).

[53] *See Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991) ("must enable an adversary to gain access to the information").

[54] Litigants and funders may also rely on common interest privilege, which protects communications between parties with a common "legal" interest in a case – including communications with an insurer, though they have to be careful to follow formalities to ensure that they receive the protection. *Cf.* Leader Techs., Inc. v. Facebook, Inc., 719 F. Supp. 2d 373, 376-77 (D. Del. 2010) (rejecting common-interest privilege because plaintiff and litigation financing companies did not assert a common-interest agreement).

[55] *See supra* at 13-14. Indeed, provided that they execute a common interest agreement at the outset, common interest protection should attach even before they execute an actual funding agreement, just as it would to a potential business acquirer in the course of its diligence on a target company.

[56] Molot, *Market in Litigation Risk, supra* note 2, at 380-85.

[57] *See supra* note 2 and accompanying text.

[58] *See*, e.g., David B. Wilkins and G. Mitu Gulati, *What Law Students Think They Know about Law Firms*, 69 U CIN L REV 1213, 1213 (2001) ("Although the majority of legal scholarship continues to focus on law, a number of academics have begun to investigate the norms, institutions, and practices of lawyers."); *cf.* David B. Wilkins, *The Professional Responsibility of Professional Schools to Teach about the Profession*, 49 J LEGAL EDUC 76, 76 (1999) (lamenting "the law school's systematic and pervasive failure to study and to teach about the profession").

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