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# Economics and the Evolution of Non-Party Litigation Funding in America: How Court Decisions, the Civil Justice Process, and Law Firm Structures Drive the Increasing Need and Demand for Capital

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PARTY LITIGATION FUNDING IN AMERICA:  
HOW COURT DECISIONS, THE CIVIL JUSTICE  
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DEMAND FOR CAPITAL

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### INTRODUCTION

Economic historians have said that "America is the Canaan of capitalism, its promised land" where the tendencies of western capitalism could find fullest expression.<sup>1</sup> One essential requirement for the continued success of American capitalism is a civil justice system that provides a fair and trusted forum for all parties seeking timely redress of economic disputes.

Beginning in kindergarten, American children start each day with a Pledge of Allegiance, ending with the words "with liberty and justice for all." The current economic reality is that civil justice in America has become a "pay to play" process. With few exceptions, it does not function fairly or effectively unless each side of a dispute has enough capital to pay the very substantial cost of full participation.

The United States is experiencing a high degree of wealth and resource inequality among its citizens. There can be no 'justice for all' unless each side of an economic dispute can aggregate the capital needed to 'play.' It is not surprising that those with the greatest concentration of wealth experience discomfort when natural economic forces generate funding solutions for their less affluent, potential adversaries enabling them equal access to the field of 'play.'

This paper views civil litigation initiated by a party seeking money damages through the lens of the underlying economics that impact the civil justice system's ability to achieve fair outcomes. It examines how access to capital has impacted the functioning of civil justice in the United States.

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1. William N. Parker, *Historiography of American Economic History*, in *ENCYCLOPEDIA OF AMERICAN ECONOMIC HISTORY*, 6 (Glenn Porter, ed., Scribner's 1980).

Participation and success in any endeavor seeking profit or economic gain in the American capitalist system requires a sufficient supply of the three basic economic elements: property, labor, and capital.<sup>2</sup> The evolution of each of these elements as applied to civil litigation and the parties and lawyers seeking gain or profit has brought us to the current state of justice in America. Just as horses and buggy whips have given way to engines and motors as major economic drivers, vast developments in our capitalistic society have served as catalysts for change in the U.S. common law legal system and reshaped the nature and interplay of the required resources of property, labor, and capital within that system.

The paper will demonstrate that non-party litigation funding is a natural and healthy capitalistic response to the changes that have occurred in the economy and in civil justice. We examine the historical development of the three economic elements, property, labor and capital, in the context of one economic endeavor, a lawsuit in which at least one party—and all of the lawyers—seek economic gain as the objective, and how the developments have increased the need for capital investment.

## I.

### PROPERTY—THE FIRST ECONOMIC ELEMENT

The first major economic element required to successfully engage in the civil justice system is property. Our system of civil justice has its underpinning in the ‘common law,’ created in England during the Middle Ages as an orderly system to adjudicate disputes. Integral to the development of the ‘common law’ was the creation of a new form of intangible property right named a ‘chose in action.’ The word ‘chose’ was taken from the French word, meaning ‘thing.’

This unique property right has evolved over time into discretely named segments but, in essence, the chose in action property right has remained a core element of the common law for over four hundred years. The founders of the United States embraced English common law and enshrined it, along

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2. See PAUL SAMUELSON, *ECONOMICS: AN INTRODUCTORY ANALYSIS* (19th ed. 2009). In 1970, Samuelson became the first American to win the Nobel Prize in Economic Science.

with the right to trial by jury, in the U.S. Constitution's Bill of Rights:

**Amendment VII**

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

The ownership rights of a chose in action are exercised by seeking legal redress to obtain money or property, economic gain or profit, through a system of civil justice.<sup>3</sup> It has evolved in the United States through the creation and reshaping of complex and structured sets of rules and processes and maintaining a forum for the exercise of this special property right, our courts.<sup>4</sup>

A. *Case Law and Legal Procedures Have Increased Risk and Cost in Exercising Chose in Action*

Over 150 years ago, the U.S. civil justice system began offering a standardized and simple format for asserting a chose in action and commencing a lawsuit; "Notice Pleading." In a series of decisions over the past twenty years, U.S. courts have imposed hurdles for the owners of a chose in action, i.e. plaintiffs, to assert and pursue claims at every stage of civil litigation. From the erosion of 'Notice Pleading,' to increased use of summary judgment, to heightened class action and expert witness admission requirements, it has become increasingly difficult and economically risky for owners of a chose in action to assert their property rights. These hurdles have increased the amount of capital required to mount a lawsuit and exercise a chose in action. Rather than enhancing "justice for all," these court decisions have closed the courthouse doors and reduced access to justice for those who are not the very wealthy in our society, unless they can find a source of capital willing to share the increased risk.

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3. See generally W.S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*, 33 HARV. L. REV. 997 (1920).

4. All states have adopted the English common law system, with the exception of Louisiana, which borrowed from the Roman civil law tradition to create analogous "litigious rights." LA. CIV. CODE ANN. art. 2652 (1995).

### 1. *Establishment and Erosion of Notice Pleading*

In 1848, the dawn of the industrial era in the United States, David Dudley Field created the first formal code of civil procedure. It was enacted in New York and later adopted by most states. The 'Field Code,' as it was known, established a uniform set of rules and procedures for asserting a chose in action. They begin with a written pleading to the court, called a 'complaint,' containing a simple, concise statement setting forth only the facts of the dispute. This paradigm of uniformity and simplification in asserting a chose in action became known as Notice Pleading.<sup>5</sup>

In 1938, the first Federal Rules of Civil Procedure were adopted in part "to lower barriers to filing lawsuits and pursuing discovery to support a claim in the federal court system."<sup>6</sup> Under the federal courts' version of 'Notice Pleading,' the newly adopted Federal Rules enabled the owner of a chose in action to pursue a lawsuit by alleging ultimate facts with no need for great specificity. Thus, the fleshing out of facts in the case was to be done during post-pleading discovery.

Notice Pleading in both the states' and federal civil justice systems ultimately ensured that plaintiffs could have their day in court. Under the prevailing rules, motions to dismiss a complaint, the claimant's articulation of the chose in action, would only be granted if it appeared "beyond doubt" that plaintiffs can prove "no set of facts" in support of their claims which would entitle them to relief.<sup>7</sup> The establishment of Notice Pleading made the exercise of chose in action property rights less complex, less labor intensive for the lawyer, less vulnerable to attack, and less costly.

Things began to change significantly in 2007 under the U.S. Supreme Court decision in *Bell Atlantic Corp. v. Twombly*. The Court in *Twombly* effectively overruled nearly fifty years of Notice Pleading under *Conley v. Gibson*, by requiring plaintiffs to plead "enough facts to state a claim to relief that is plausible on its face."<sup>8</sup> In 2009, the Court in *Ashcroft v. Iqbal* raised the

5. WEST'S ENCYCLOPEDIA OF AMERICAN LAW, (2d ed. 2008).

6. Jeffrey J. Rachlinski, *Why Heightened Pleading—Why Now?*, 114 PENN. ST. L. REV. 1247, 1249–50 (2010).

7. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), abrogated by *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

8. *Twombly*, 550 U.S. at 570.

bar again by allowing the court to disregard conclusory statements and focus solely on factual allegations.<sup>9</sup> Where Notice Pleading had once allowed plaintiffs to provide a “short and plain statement of the claim,”<sup>10</sup> plaintiffs are now required to allege specific facts that, oftentimes, are only learned later through discovery.<sup>11</sup> Indeed, plaintiffs may now have to forego their claims entirely under this new standard “either because they lack the resources to engage in extensive pre-filing investigation or because of informational asymmetries” between the parties.<sup>12</sup> The heightened pleading standard essentially functions as a “brick in the wall blocking access to civil justice and jury trial.”<sup>13</sup>

A recent study has found that *Iqbal*'s impact on federal pleading practice and asserting a chose in action is “undeniable.”<sup>14</sup> Those who do file suit face additional costs as they respond to increasingly successful Federal Rule 12(b)(6) motions to dismiss the case. The percentage of 12(b)(6) motions granted in full with leave to amend increased from 6% under *Conley*, to 9% under *Twombly*, to 21% under *Iqbal*. The percentage of motions denied fell from 26% under *Conley*, to 23%

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9. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

10. *Conley*, 355 U.S. at 47.

11. Sasha Nichols, Note, *Access to Cash, Access to Court: Unlocking the Courtroom Doors with Third-Party Litigation Finance*, 5 U.C. IRVINE L. REV. 197, 202 (2015).

12. *Whether the Supreme Court Has Limited Americans' Access to Court: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 16 (2009) [hereinafter *Americans' Access to Court*] (statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania) (“Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts.”); see also Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What's Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH. L. REV. 587, 596–97 (2011) (using an employment discrimination case to exemplify the problem of information asymmetry: “The plaintiff has been fired. One of the first rules of discharging someone is don't tell the employee why he or she is being fired. If facts must be pleaded to state a claim for discriminatory discharge or failure to promote or some other nefarious practice, how can the plaintiff surmount the newly minted pleading requirement? How does the plaintiff show discriminatory conduct let alone a pattern of discrimination-whether it's race, gender, age, or disability-without access to the history of the employer's conduct regarding other employees?”).

13. Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on Rule 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 652 (2012).

14. *Id.* at 609.

under *Twombly*, to 17% under *Iqbal*.<sup>15</sup> The study also found the type of claim impacted the likelihood of success: for constitutional civil rights claims, motions to dismiss with and without leave to amend were granted 41% of the time under *Conley*, compared to 64% of the time under *Iqbal*; for ERISA and FLSA claims, 37% were granted under *Conley*, compared to 60% under *Iqbal*; for consumer credit claims, 36% were granted under *Conley*, compared to 72% under *Iqbal*.<sup>16</sup> Interestingly, the study further found that class actions are almost four times more likely to be entirely dismissed than non-class actions, demonstrating the impact that the heightened pleading standard has on individuals whose only economically viable recourse is to pursue claims collectively.<sup>17</sup>

While there is conflicting data about whether plaintiffs and/or their counsel are now spending more money in conducting pre-filing background investigations to survive potential 12(b)(6) motions, there is little doubt that these motions create significant delay, raise the risk of initiating a successful case and increase the cost of pursuing a claim. In other words, the heightened pleading standard has increased the amount of needed capital and its risk-adjusted cost, as economists would predict. In addition, these changes in pleading standards, the potential success rate of motions to dismiss, and lawyer hourly billings generated by such work together have encouraged defendants and their lawyers, on both a legal and economic benefits basis, to make such motion practices routine. This practice undoubtedly generates increased workload and costs for the courts as well.

## 2. Increase in Summary Judgment Motions

The now seemingly inevitable summary judgment motion<sup>18</sup> has become a tool for defendants to “win without the

15. *Id.* at 614.

16. *Id.* at 626–27.

17. *Id.* at 626.

18. See Corina Gerety, *Trial Bench Views: Findings from a National Survey on Civil Procedure*, 2010 INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 40–41 (noting that two-thirds of federal judges agree that summary judgment motions are filed “in almost every case”); *Summary of Results of Federal Judicial Center Survey of NELA Members*, 2010 NAT’L EMP’T LAWYERS ASS’N. 7 [hereinafter NELA Survey] (showing survey respondents faced motions for summary judgment in nearly every case that they filed).



risk of losing.”<sup>19</sup> Summary judgment is used far more by defendants than plaintiffs, and judges routinely grant summary judgment motions for defendants, but not for plaintiffs.<sup>20</sup> Thus, a typical litigation strategy has emerged for defendants to go through pre-trial discovery in the hope of winning at the summary judgment phase, then settling immediately if summary judgment is not granted.<sup>21</sup> This strategy is economically beneficial to defense attorneys, as they typically bill by the hour for discovering the information necessary to bring the motion.<sup>22</sup> Given that these motions are successful less than half of the time,<sup>23</sup> a real strategic advantage for defendants can be seen in terms of increased cost to plaintiffs in opposing the motion, and from the resulting delay.<sup>24</sup> The longer the case goes on, the more it costs and the longer the plaintiffs’ economic damage underlying the chose in action remains unaddressed, the less likely it is that plaintiffs can pursue wor-

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19. John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 526 (2007) (arguing that the civil justice system will “enjoy a net benefit from abolishing summary judgment, in terms of both efficiency and fairness”).

20. See Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 AKRON L. REV. 1189, 1189 (noting that the original Advisory Committee envisioned that Rule 56 would “prove useful chiefly for plaintiffs seeking to collect debts”); Richard L. Steagall, *The Recent Explosion in Summary Judgments Entered by the Federal Courts Has Eliminated the Jury from the Judicial Power*, 33 S. ILL. U. L.J. 469, 470 (2009) (stating that 1.7% of federal civil cases were tried in 2005, a dramatic decrease from 19.9% at the time the Federal Rules were adopted).

21. Bronsteen, *supra* note 19, at 530.

22. Corina D. Gerety & Brittany K.T. Kauffman, *Summary of Empirical Research on the Civil Justice Process: 2008–2013*, 2014 INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 26 (stating that “[f]rom a revenue generation perspective, defense attorneys nationwide attributed half of their firm’s civil litigation practice to discovery (at the median)”).

23. See D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 901 (2006) (estimating from available empirical studies that the overall success rate for summary judgment motions ranged from 20% to 40%).

24. See NELA Survey, *supra* note 18, at 38 (showing 91.5% of respondents agreed that summary judgment motions are used as a tactical tool, 88.1% agreed that summary judgment motions increase cost and delay without proportionate benefit, and 70% agreed that judges routinely fail to rule on summary judgment motions); *Civil Case Processing in the Federal District Courts*, 2009 INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 51 (finding average time from filing to resolution of motions for summary judgment across eight districts to be 166 days, or approximately six months).

thy cases to their conclusion without a non-party source of capital.<sup>25</sup>

### 3. *Increasing Case Costs*

Case cost escalation is another hurdle to justice, and in many instances prevents attorneys from helping potential plaintiffs pursue meritorious claims.<sup>26</sup> In addition to the capital necessary to operate a law firm, capital is required to fund court fees, discovery costs, and expert witness fees.<sup>27</sup> For those attorneys who are financially able to take a case on a contingent or blended fee basis and also bear these costs, they are, in effect, loaning both the labor and the capital required to help plaintiffs pursue their economic rights. These costs have been on the rise, particularly with the advent of electronic discovery.<sup>28</sup> Cases involving requests for electronic data generate costs for collecting, reviewing, and producing data.<sup>29</sup> Of course, the cost of production depends not only on the type of case, but also on the amount of data collected. Before the advent of technology that created immense stores of electronic data, these costs and the means of mining the information for relevant case information did not exist. Over the last decade or so, the growth in the use of computers and other forms of electronic media has dramatically increased the amount of data generated and collected. One study from 2012 found that total costs of production ranged from \$17,000 in an intellectual property matter to \$27 million in a products liability case, with a median value of \$1.8 million dollars.<sup>30</sup>

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25. *Member Survey on Civil Practice: Full Report*, 2009 AM. BAR ASS'N SEC. LITIG., 2 [hereinafter ABA Survey].

26. *See id.*, at 9 (90% of plaintiffs' attorneys stated that their firms are likely to turn away cases that are not cost-effective).

27. *See Nichols, supra* note 11, at 207 (noting that the combination of these fees "has created what Judge Richard Posner termed 'a liquidity problem,' in which plaintiffs with potentially meritorious claims cannot afford to bring those claims to court due to capital constraints").

28. *See Electronic Discovery: A View from the Front Lines*, 2008 INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 3-4 (estimating e-discovery costs to be about \$3.5 million for a typical, mid-size lawsuit).

29. *See Nicholas M. Pace & Laura Zakaras, Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, 2012 RAND INST. FOR CIVIL JUSTICE 19-20 (estimating expenditures of \$40k per gigabyte of information produced and \$18k per gigabyte of information reviewed).

30. *Id.* at 17.

In addition, expert witness fees are on the rise. A recent survey of over one thousand experts found that 66% of experts had raised their rates in the previous five years.<sup>31</sup> The average hourly rate charged for case review and preparation was \$333. The average hourly rate for testifying in court was \$451.<sup>32</sup> Experts who testify on behalf of plaintiffs are significantly more likely to require an up-front retainer, often times at least partially non-refundable; the average retainer was \$3048, an increase of 17% from five years ago.<sup>33</sup> It is easy to see how unwieldy these costs can become, and why these fees influence settlement decisions,<sup>34</sup> many times to the economic detriment of a plaintiff (and the plaintiff's lawyer), who lack sufficient capital to see a case through to the finish line.

#### 4. *Heightened Class Action Requirements*

The class action lawsuit “was an invention of equity, mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs.”<sup>35</sup> The device that was once seen as a “salutary tool for the administration of justice” is now increasingly viewed with disfavor,<sup>36</sup> flying in the face of our national goal of “justice for all.” This disfavor has led to amendments to Federal Rule 23 and a series of court decisions that have undermined plaintiffs’ ability to bring and maintain collective exercise of rights in class action lawsuits.

The adoption of Federal Rule 23(f) in 1998, that permits immediate appeal of a federal trial court’s certification of a

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31. *Survey of Expert Witnesses, Aggregate Results*, 2014 SEAK, INC. (on file with authors) [hereinafter SEAK Survey].

32. *Id.*

33. *Id.*; see also *Expert Witness Fees: How Much Does an Expert Witness Cost?*, SEAK EXPERT WITNESS DIRECTORY, <http://blog.seakexperts.com/expert-witness-fees-how-much-does-an-expert-witness-cost/> (last visited Oct. 17, 2015).

34. See ABA Survey, *supra* note 25, at 158 (stating 85.1% of plaintiffs’ lawyers find expert witness costs important or very important to the ultimate decision to settle); NELA Survey, *supra* note 18, at 44 (stating 81.1% of plaintiff’s lawyers find these costs somewhat important or very important).

35. *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948).

36. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 732 (2013).

“class” at an early stage in the case, and the Class Action Fairness Act in 2005 “have altered the procedural landscape” in favor of defendants.<sup>37</sup> The majority of sizable class actions are now brought in federal court and more class certification decisions are being reviewed by appellate courts.<sup>38</sup> One scholar examined all Rule 23(f) appeals accepted over a fourteen-year period and found that 69% were appeals by defendants immediately after the grant of class certification, whereas only 31% were appeals by plaintiffs after the denial of class certification. Of those appeals, defendants were successful 70% of the time, compared with plaintiffs, who prevailed only 30% of the time.<sup>39</sup> If the class is unable to pass the certification hurdle, “it represents another way of destroying the economic viability of a litigation and effectively terminating it short of a merit adjudication.”<sup>40</sup>

With the increased number of appeals filed at the intermediate appellate and Supreme Court levels, new standards have emerged that, not unlike the heightened pleading standards, have raised evidentiary burdens for plaintiffs. For many years, most courts permitted plaintiffs to seek class certification based on the pleadings. When evaluating a motion for class certification, courts accepted all well-pleaded facts as true.<sup>41</sup> Indeed, numerous courts interpreted the Supreme Court’s decision in *Eisen v. Carlisle & Jacquelin*<sup>42</sup> to mean that courts did not have the authority to inquire into the merits of a suit to determine if the suit could be maintained as a class action.<sup>43</sup> Since 2001, several federal circuit courts and the Supreme Court have ultimately rejected this interpretation of *Eisen*, in favor of allowing an examination of evidence and resolution of conflicting evidence bearing on the merits at the early class certification stage of the case.<sup>44</sup>

Plaintiffs face additional procedural hurdles and costs at the class certification phase after the Supreme Court’s deci-

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37. *Id.* at 732–33.

38. *Id.* at 733.

39. *Id.* at 741.

40. Miller, *supra* note 12, at 593 (stating further “[t]he class certification motion thus has become yet another pretrial procedural stop sign!”).

41. Klonoff, *supra* note 36, at 747.

42. 417 U.S. 156 (1974).

43. *Id.* at 748.

44. *Id.* at 748–51.

sion in *Wal-Mart Stores, Inc. v. Dukes*, which heightened Federal Rule 23's class "commonality" requirement.<sup>45</sup> Prior to *Dukes*, commonality had been seen as relatively easy to satisfy, requiring each class member to assert claims that share legal or factual issues with one another.<sup>46</sup> Post *Dukes*, commonality requires that plaintiffs "have suffered the same injury," their claims must depend upon a "common contention," which "must be of such a nature that it is capable of class wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."<sup>47</sup>

It is too early to assess the full impact of *Dukes*. At the very least, the Court "turned a minimal requirement into one that could significantly impact class certification, especially in the (b)(2) context," in which the class is seeking to have the court grant the class members injunctive relief.<sup>48</sup> One scholar has argued that the decision casts "further doubt on the deterrent function of the class action."<sup>49</sup> Because *Dukes* has eliminated the possibility of combining injunctive relief with an individual award of damages in a single class action under (b)(2), the prospects for recovery of attorneys' fees will also diminish.<sup>50</sup>

Another risk to lawyers taking class action cases is the emergence of an objector class of lawyers, whose practice is to attack class action settlements by signing up a class member and filing objections. These objections rarely bear fruit for anyone but the objecting lawyers, who often extract payment (one might say a tax) from the plaintiffs' class counsel, as a condition for dropping objections and enabling the class members and their counsel to obtain the remaining economic benefit of the settlement. The decline in recoverable fees and the increased cost and risks have reduced the incentive for plaintiffs' attorneys to bring class actions,<sup>51</sup> and, unless a ro-

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45. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556–57 (2011).

46. A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 443 (2013).

47. *Dukes*, 131 S. Ct. at 2551.

48. Klonoff, *supra* note 36, at 780.

49. George Rutherglen, *Wal-Mart, AT&T Mobility, and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24, 24 (2012).

50. *Id.* at 26.

51. *Id.*

bust source of capital emerges, will significantly narrow the ranks of lawyers financially capable of taking them.

### 5. *Increased Cost and Challenges of Using Experts*

Expert testimony is critical to evaluating the merits of both individual and collective actions, and is required when the outcome of a case goes beyond the lay knowledge of the jury.<sup>52</sup> Experts are used in cases ranging from automobile accidents, to medical malpractice, to products liability, to intellectual property infringement, to accounting fraud. The admissibility of expert testimony, however, is increasingly unpredictable after the U.S. Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>53</sup> and *Kumho Tire Co. v. Carmichael*.<sup>54</sup> For sixty years prior to *Daubert*, scientific testimony needed to "be sufficiently established to have gained general acceptance" in its particular field.<sup>55</sup> After *Daubert*, courts must now determine "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."<sup>56</sup> The *Daubert* court provided a list of non-exclusive factors to assist in making this determination: (1) whether the theory can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) consideration of the known or potential rate of error; and (4) whether the methodology or technique has achieved "general acceptance" in the relevant scientific community.<sup>57</sup> The *Kumho* decision extended *Daubert's* reach to all expert testimony. The Court in *Kumho* cautioned trial courts "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."<sup>58</sup> Granting judges, learned in legal principles, wide discretion in evaluating complex scientific, technical and eco-

52. Kari Thorsvold, *Guarding the Gate to Expert Testimony: Kumho Tire Co. v. Carmichael and State v. Council*, 51 S.C. L. REV. 965, 965 (2000).

53. 509 U.S. 579 (1993).

54. 526 U.S. 137 (1999).

55. Richard T. Stilwell, *Kumho Tire: The Battle of the Experts Continues*, 19 REV. LITIG. 193, 195 (2000).

56. *Id.* at 196 (quoting *Daubert*, 509 U.S. at 592).

57. *Id.* at 196-97.

58. *Kumho Tire Co.*, 526 U.S. at 152.

conomic teachings and opinions, has increased unpredictability. “[T]he lack of an objective standard, combined with a minimum standard for the scientific proficiency of litigators and judges, defies a basic goal of the law, namely to make the outcome of a *Daubert* hearing predictable.”<sup>59</sup>

These decisions have turned the court into an assessor of evidentiary validity and a gatekeeper of evidence in fields of learning in which they are not schooled. Before testimony may be admitted, courts screen every expert, adding “another procedural obstacle, another motion, another hearing, and another way a plaintiff can get tripped up short of trial.”<sup>60</sup> As a practical matter, if a defendant is successful in eliminating a plaintiff’s expert, “a mortal blow has been struck,” positioning the case for summary judgment.<sup>61</sup>

As a matter of intellectual inquiry, one wonders whether the learned and well-meaning judges who erected these barriers for asserting a chose in action gave much thought to the economic impact their decisions would have on the plaintiffs seeking to exercise a chose in action and these plaintiffs’ access to the justice system. It would be surprising if the judges fully considered how the increased legal and economic risks would inevitably produce a source of needed capital to pursue a worthy chose in action and how the increased risk would inevitably drive up the cost of that capital as an added burden on obtaining justice.

## II.

### LABOR—THE SECOND ECONOMIC ELEMENT

#### A. *Law Firm Evolution and the Economy*

The second major economic element required to successfully engage in the civil justice system is labor. That means lawyers. Unless an owner of a chose in action is foolish enough to act as their own representative, our civil justice system has created an economic monopoly, requiring that only licensed lawyers be permitted to provide the labor component. The cost of paying a lawyer to pursue a civil case and a law firm’s overhead

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59. Thorsvold, *supra* note 52, at 975 (quoting Marilee M. Kapsa & Carl B. Meyer, *Scientific Experts: Making Their Testimony More Reliable*, 35 CAL. W. L. REV. 313, 331 (1999)).

60. Miller, *supra* note 12, at 592–93.

61. *Id.* at 593.

costs in handling a case are significant, thus requiring a source of ready capital. This key economic element, labor (the lawyers and the law firms), has evolved materially since the establishment of the chose in action in the Middle Ages. This evolution began to accelerate along with the rest of the U.S. economy at the dawn of the industrial era and has changed even faster with the creation of the digital economy and the globalization of the business markets that many lawyers serve.

The legal sector of the U.S. economy is impacted by the overall health and growth of the economy as a whole. Historically, lawyers in America were not employed by others or dependent on others for help providing legal services.<sup>62</sup> The evolution of the legal profession from the paradigm of the solo practitioners and the catalyst for the emergence and growth of the law firm, as an economic entity, can be traced to the end of the Civil War, the development of railroads in the United States, and the beginning of the industrialization of the United States economy.<sup>63</sup> It was not until the late 1800's that law firms existed in the United States at all.<sup>64</sup> As late as 1872 there were only fourteen law firms in the United States with more than four lawyers, three of which had as many as five lawyers and only one had six.<sup>65</sup> In 1880, at the dawn of the U.S. industrial economy, there were 64,000 lawyers in America.<sup>66</sup> By the end of World War II, seventy-five years later, that number had grown to 200,000. By 2015, seventy years after the end of World War II, the number of U.S. lawyers had grown to 1.3 million.<sup>67</sup>

Not surprisingly, the period since the end of World War II has seen the emergence of larger and larger law firms to meet the demands of growing U.S. national and global economic marketplaces. Though law practice is viewed as a profession, it must also work as a business.

As of 2000, U.S. lawyers had established over 47,500 law firms, with 1% of the profession practicing in law firms with

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62. *Legal Education and Professional Development—An Educational Continuum: Report of The Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 AM. BAR ASS'N SEC. LEGAL EDUC. AND ADMISSIONS, 29.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *National Lawyer Population Survey 1878–2015*, 2015 AM. BAR ASS'N.



more than 100 lawyers.<sup>68</sup> As of 2015, there were 400 law firms with 100 or more lawyers in the United States, and 88 law firms with more than 500 lawyers.<sup>69</sup> The evolution of ever-larger legal practice settings has produced enormous professional service businesses with unstable business assets and professionally-imposed constraints on capital raising that are not present in the industrial companies that they serve.

With the globalization of the economy, the legal profession has confronted dramatic market changes and enormous economic challenges that have driven law firms to consolidate.<sup>70</sup> The stresses of consolidation and the severe economic downturn in 2008 have conspired to make law firms less economically stable, riskier, and less creditworthy than ever before.<sup>71</sup> The high cost of forming and operating a law practice, together with the burden of large education loans, limits the opportunities for newly-minted lawyers to employ their legal skills.

The legal profession may be its own worst enemy in terms of achieving success in challenging economic times. It has been said that lawyers generally tend to be resistant to change and that their inherent conservatism presents a major threat to the success of the practice entities that they develop.<sup>72</sup> Added to this is lawyers' general lack of experience and expertise regarding how to operate a business.

To demonstrate the economic fragility of law firms in recent years, one need only list the recent major law firm failures: Bingham McCutchen; Patton Boggs; Dewey LeBoeuf; Howrey; Thelen; Heller Erhman; Drier; Brobeck, Phleger and Harrison; Coudert Brothers; Finley Kumble. Each of these were large, venerable, long-established law firms, or combinations of venerable law firms, that failed as business enterprises

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68. *The 2000 Lawyer Statistical Report*, 2005 AM. BAR FOUND 15.

69. Jake Simpson, *Law360 Reveals 400 Largest US Firms*, LAW360 (Mar. 22, 2015, 4:00PM), <http://www.law360.com/articles/631981/law360-reveals-400-largest-us-firms>.

70. Jeff Day, *U.S. Law Firm Consolidation Accelerated in 2015*, BLOOMBERG BNA (Jan. 6, 2016) <https://bol.bna.com/u-s-law-firm-consolidation-accelerated-in-2015/>.

71. *See id.*

72. *2015 Report on the State of the Legal Market*, 2015 CTR. FOR THE STUDY OF THE LEGAL PROFESSION AT GEORGETOWN LAW & THOMSON REUTERS PEER MONITOR13.

to navigate the changes in the U.S. (and global) economy and the impact of these changes on the legal services business ecosystem. This lists only the most prominent failures, but demonstrates that a marquee name and a long operating history matters little in today's economic marketplace.

### B. *Business Characteristics of Law Firms*

Law firms, as enterprises, are professional-services businesses. Many in the hourly-rate dominated sector tend to be operated fundamentally based on a "cash and carry" economic model, with little accumulation of capital. The commercial assets of a law firm built on an hourly-billing model are simply the firm's current month's work in process and its ninety-day receivables list. In general, law firms do not retain significant earnings with which to weather downturns in the economy, but instead deploy their cash currently to pay salaries, partner draws, and current expenses.

The economic trend for these firms has not been robust. During the ten years from early 2005 to late 2014, average lawyer billing rates in the United States went from \$304 per hour to \$473 per hour, a modest increase of 3.6% per annum. In contrast, during this same period, law firm collection rates dropped precipitously from an average of 92.7% of fees billed to an average of 83%, representing a 10% drop in collection and leaving about one of every five hours worked unpaid for.<sup>73</sup>

In the face of these adverse economic indicators, since 2008 the demand for law firm litigation services defending or prosecuting chases in action has been soft.<sup>74</sup> During the years following the 2008 economic downturn, while law firm collections dropped 10%, to 83% of billed time, the number of civil cases filed in the fifty states', D.C. and Puerto Rico trial courts saw a decline of 8%. This combination has had a severe impact on many lawyers and law firms in the United States.<sup>75</sup>

Less clear is the economic state of lawyers who do not join large law firms. The historical tradition of lawyers as sole practitioners or practicing in small group settings is still the predominant model in the United States but practicing litigation

73. *Id.* at 5.

74. *Id.* at 8.

75. *Examining the Work of the State Courts, An Overview of State Court Caseloads*, 2013 COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS.

in the small law firm setting is becoming increasingly unappealing. Many small litigation practices serve the segment of the market that cannot pay the enormous sums required to pursue choses in action, and thus must adopt a contingent fee model. Contingent fee attorneys who also need to fund case costs, while at the same time make a profit, face hard choices. Borrowing from banks to support lawsuits at modest interest rates is, generally, no longer an option for them.<sup>76</sup> To the extent that traditional borrowing is available, it is limited in amount. From the standpoint of the lawyer, such borrowing is high-risk and unappealing because the lawyer is required to repay the loan whether the case is won or lost. Some lawyers, in an effort to stay solvent, are faced with the difficult choice of rejecting worthy clients who cannot pay hourly fees or seeking settlement of pending contingent fee cases in order to generate the revenue needed to remain afloat. In the long run, law firms that self-fund client cases have a limited financial ability to ensure access to justice, and therefore fall short of achieving the objective of "justice for all." In the context of worthy choses in action and the high costs and risks of civil justice, it was inevitable that natural forces in our free-market economy would eventually reveal the need for non-party litigation funding.

Some lawyers faced with the lack of capital to fund choses in action pursue careers outside of law practice, causing attrition in the legal profession and thereby further reducing the availability of representation and likelihood of attaining "justice for all." The financial pressure faced by many young attorneys can be observed in the rising rate of law school loan defaults.<sup>77</sup> In fact, for a significant portion of the nation's attorneys, operating a private practice means living in a condition

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76. See Jacqueline Palank, *Law Firms Are No Longer Seen as Safe Bet for Lenders* *American Lawyer Report: Law Firms Consolidating at Record Setting Pace*, WALL ST. J. (Apr. 30, 2012), <http://www.americanlawyer.com/id=1202731421434/Report-Law-Firms-Consolidating-at-Record-Setting-Pace>; Ashley Post, *INSIDE COUNSEL MAGAZINE, Banks increasingly wary of lending to law firms* <http://www.americanlawyer.com/id=1202731421434/Report-Law-Firms-Consolidating-at-Record-Setting-Pace> (Apr. 30, 2012).

77. See William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: How Long Will It Last if Law Grads Can't Pay Bills?* *ABA JOURNAL*, (Jan. 1, 2012) [http://www.abajournal.com/magazine/article/the\\_law\\_school\\_bubble\\_how\\_long\\_will\\_it\\_last\\_if\\_law\\_grads\\_cant\\_pay\\_bills](http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills);

of financial distress.<sup>78</sup> Students considering law as a profession can readily observe the conditions of financial strain on lawyers in private practice.<sup>79</sup> When considering whether to take on substantial debt to pay law school tuition, these potential law students would be remiss if they did not consider earning opportunities post-graduation and their own ability to repay the associated debt.<sup>80</sup> What will happen to the legal profession if the best and the brightest opt out of pursuing a legal career due to the lack of available capital needed to represent the vast majority of citizens who are unable to fund legal fees and costs for their cases?

### C. Lawyers as “Elevator Assets”

Lawyers themselves are the most precious and economically fragile of law firm assets. In essence, a law firm is a collection of what we will call “Elevator Assets.” Unless the lawyer gets in the elevator to the office each day and invests the time and intellect required to move a case forward, there is no asset. A lawsuit may potentially involve an enormous amount of money and fees, but unless the lawyers engage in the daily work of lawyering, the firm has no material assets.

Because of this “Elevator Asset” characteristic, a law firm (large or small) is nothing more than a collection of individuals who make up the law firm’s cadre of talent. All firm members must trust that their partners will join them in the elevator each day to produce economic value for the law firm and its clients. Unless that occurs, the law firm will surely fail.

During the past twenty years, a burgeoning industry of legal recruiters and law firm merger consultants has emerged. These businesses, as separate economic entities, generate revenue by enticing successful and experienced lawyers to leave their law firms for ostensibly greener pastures at a competing firm. At many firms, calls to successful lawyers from recruiters have become an annual ritual. Some lawyers heed the call each year, taking clients with them, as well as the personal en-

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78. *See id.*

79. *See id.*

80. *See* Elizabeth Olson, *Burdened with Debt, Law School Graduates Struggle in Job Market*, N.Y. TIMES (Apr. 26, 2015) <http://www.nytimes.com/2015/04/27/business/dealbook/burdened-with-debt-law-school-graduates-struggle-in-job-market.html>.

ergy and the intellect that the firm requires to maintain its stability. This phenomenon has reduced law firm cohesiveness and partner trust, and accounts in part for the list of long-established firms that have failed.

We are taught to think of the practice of law as a profession—and indeed, it should be thought of this way. Whether large or small, law firms are businesses. To thrive, a law practice must generate revenue that exceeds its expenses. Due to the economic factors that have been discussed (and others), it is increasingly necessary to understand principles of business and basic accounting to avoid failure in the practice of law. Sadly, while some law schools prepare students to deal with business operations, many lawyers lack this kind of expertise. This phenomenon is increasingly concerning now, when the average law student graduates with a debt-load of \$140,000, and has fewer and fewer opportunities to earn enough money to repay this debt and enjoy a standard of living that justifies their investment of time and money.<sup>81</sup>

### III.

#### CAPITAL—THE THIRD ECONOMIC ELEMENT

The third major economic element required to successfully maintain a chose in action in the civil justice system is capital. What is the magnitude of the U.S. legal services market today? It is estimated that the 1.3 million lawyers in the U.S. generate a total of \$400 billion in economic value annually.<sup>82</sup> By comparison, the entire CPA profession generates approximately \$90–\$95 billion per annum from all its activities,<sup>83</sup> and the U.S. restaurant industry generates \$709 billion per annum in revenue.<sup>84</sup>

Of the \$400 billion of legal sector economic activity, approximately \$250–275 billion is generated by private practice

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81. See Editorial, *The Law School Debt Crisis*, N.Y. TIMES (Oct 24, 2015), [http://www.nytimes.com/2015/10/25/opinion/sunday/the-law-school-debt-crisis.html?\\_r=0](http://www.nytimes.com/2015/10/25/opinion/sunday/the-law-school-debt-crisis.html?_r=0); Olson, *supra* note 80.

82. Joshua Kubicki, *Make That \$400 Billion for U.S. Legal Market Size*, Legal Transformation Institute (Feb. 24, 2015), <http://legaltransformationinstitute.com/blog/2014/2/22/make-that-400-billion-for-us>.

83. *Accounting Services in the US: Market Research Report*, 2015 IBISWORLD; Statista.com November 2015.

84. NATIONAL RESTAURANT ASSOCIATION, <http://www.restaurant.org>, (last viewed Oct. 30, 2015).

law firms, and roughly 18% of all law firm lawyers are engaged in litigation.<sup>85</sup> If we add to that figure sole practitioners and, conservatively, round up the percentage to 20%, that would make litigation a \$60 billion annual market. If we add another 10% to cover experts and outside costs, a reasonable ballpark for the cost of pursuing litigation alone is closer to \$70 billion per annum.<sup>86</sup> By any measure, the magnitude of capital flowing through private law practices makes it a significant economic sector and the dollars allocated specifically to fund litigation are enormous. Yet this sum falls well short of the amount of capital the market requires to operate a fully functional and fair civil litigation system capable of offering “justice for all.”

Despite the enormous scale of the litigation market today, the fees and costs required to maintain a lawsuit make civil justice unattainable for ordinary citizens. Today, in significant commercial litigation, costs of \$100,000 per month are commonplace and bills of \$1 million per month are not rare. Although it is not easy to find data on attorneys’ fees in private litigation matters, the data we cite is based upon actual case information that we have had access to in the course of litigation funding. Publicly available data supports these findings. The litigation seeking personal injury damages for first responders and cleanup personnel after the 9/11 World Trade Center attacks generated defendants’ attorneys’ fees of over \$200 million for hourly-rate attorneys, and similar sums for the contingent fee plaintiffs attorneys.<sup>87</sup> The attorneys’ fees award for the Securities, Derivative and ERISA claims for *In re Enron Corp.* was \$688 million. In August 2012, the Delaware Supreme Court awarded \$300 million in attorneys’ fees for a law firm that successfully pursued a shareholder derivative suit.<sup>88</sup> While not often a matter of public record, it is most likely that the fees paid on an hourly basis to defendants’ lawyers in cases such as this can approach the boxcar numbers being awarded

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85. Kubicki, *supra* note 82.

86. *Law Firms in the US: Market Research Report*, 2015 IBISWORLD; *Legal Services Industry Profile*, FIRST RESEARCH 8/10/2015; Joshua Kubicki, *Report 2/24/2014*, 2014 LEGAL TRANSFORMATION INSTITUTE.

87. *In re World Trade Ctr. Disaster Site Litigation*, 514 F. Supp. 2d 556 (S.D.N.Y. 2007).

88. *Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

plaintiffs' counsel in very large class action, securities and mass tort cases.

Though engaging in the civil justice system is a capital-intensive endeavor, when law firms earn profits they generally do not retain them to build up capital. For most businesses, a common means of raising needed capital is selling equity and sharing revenue with a financier. Rules 5.4(b) and (d) of the ABA Model Rules of Professional Conduct, which have been adopted in similar form in all fifty states, prohibit ownership of law firms by non-lawyers and fee-sharing with non-lawyers.<sup>89</sup> One limited exception is the District of Columbia, which permits non-lawyers to become equity owners if they work in the law firm in support of the law firm's business.<sup>90</sup> These self-imposed professional constraints on capital acquisition present an institutional impediment for law firms that want to raise capital from external sources.

Unsurprisingly, the U.S. capitalist marketplace has generated a variety of partial solutions to the capital constraints facing owners of choses in action and their lawyers.<sup>91</sup> Some of these solutions have become commonplace.

#### A. *The Contingent Fee*

The initial acceptance and persistence of the contingent fee was and remains founded upon four principles:

To the extent that lawyers are sufficiently capitalized to fund their law practices and lawsuits over the long, slow process of civil litigation in the United States, the contingent fee provides access to the legal system for clients who have good claims but who are unable to pay the many thousands (or millions) of dollars in required legal fees and case costs. The obvious limitation of the contingent fee as a capital source is the

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89. MODEL RULES OF PROF'L CONDUCT *rr.* 5.4(b) & (d) (AM. BAR ASS'N 2013).

90. *Rules of Professional Conduct: Rule 5.4—Professional Independence of a Lawyer*, D.C. BAR <https://www.dcbar.org/bar-resources/legal-ethics/amen-ded-rules/rule5-04.cfm> (Apr. 17, 2016).

91. The increasing capital requirements of civil litigation are made worse by the manner in which legal expenses are treated in the United States. Litigants in the United States are ultimately liable for the costs they incur, even if they win, absent a specific statutory or contractual cost-shifting provision. In contrast, under the "English Rule," prevailing parties are entitled to recover legal expenses from their adversaries.

limited capacity of most qualified lawyers to offer this option to many clients.

For young lawyers, who, as noted, may have emerged from law school with \$140,000 in education loans, amassing the capital needed to offer clients a contingent fee option without themselves going deeper into debt is out of the question. It takes many years for most trial lawyers to be in the financial position to offer contingent fee options, if ever, except for the simplest small-ticket cases. This economic need is starting to be addressed by the capitalist system, as specialty funding companies have begun to emerge. These companies are willing to offer law firm financing secured by the estimated value of a lawyer's portfolio of contingent fee cases.

Unlike the hourly rate model, the contingency fee attorney-client arrangement aligns the economic incentives of both the lawyer and the client. As in any economic venture for gain or profit, aligning the interests of the principal and agent makes for more rational decisions. By comparison, a law firm billing by the hour has a rational economic incentive to make more money by doing more work and charging higher fees, regardless of whether all of the work benefits the client. This misalignment is eliminated with a contingency fee. Misalignment is also a reason why clients are more frequently insisting on a blended fee agreement, in which an hourly fee that is significantly lower than the firm's normal rate is paid, but an incentive fee is available to the lawyer for achieving agreed-upon targets in the outcome of the litigation.

The lawyer agreeing to take a case on a full or partial contingency serves a gatekeeper function for the civil justice system. Contingency fees tend to eliminate the pursuit of claims that are not economically significant or that lack clear merit because the lawyer will not take on a case that is not anticipated to be economically successful.

Permitting a contingency fee is a healthy economic option for the successful functioning of a capitalist marketplace. Freedom to contract is an essential element in achieving the most efficient economic outcome.

### B. *The Advent of Liability Insurance*

Another answer to the increasing demand for capital in the growing industrial economy after the Civil War was the development of liability insurance in the civil justice system. Non-



existent in the United States prior to the first employer policy issued in 1886,<sup>92</sup> liability insurance has rapidly grown in prevalence and is now tightly woven into the legal and economic fabric of our culture and our civil justice system. Not unlike the contingent fee contract and other non-party litigation funding, the common law's acceptance of the negligence insurance policy was controversial and occurred only after significant judicial debate. In addition to the historic prohibition under the doctrine of maintenance, the debate largely centered on theories of whether insurance, by removing the threat of liability and actual liability for the defendant's actions, frustrated the tort law goals of deterrence (by eroding the likelihood of penalty for dangerous behavior) and fairness (by re-allocating losses away from the actual negligent party).<sup>93</sup>

The Missouri Supreme Court fully articulated the debate in *Breeden v. Frankfort Marine, Accident & Plate Glass Insurance Company*.<sup>94</sup> In that case, the defendant insurance company had issued a liability policy to plaintiff Breeden's employer, the Big Circle Mining Company. Breeden injured himself while at work, and sued Big Circle for \$5000 in damages. Frankfort defended the suit per the terms of its contract with Big Circle. Breeden obtained a judgment in the amount of \$2500, Frankfort/Big Circle appealed, and a new trial was ordered. After the second trial, Breeden obtained a \$3500 judgment, but during the intervening appeal and retrial, Big Circle had become insolvent. Frankfort ended up buying the judgment for \$1000. Breeden then sued Frankfort for wrongfully maintaining Big Circle in the personal injury suit.<sup>95</sup>

Regarding the validity of the insurance contract, the two-judge "minority"<sup>96</sup> view would have refused to enforce the agreement, and vigorously asserted the dire consequences of

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92. Gary T. Schwartz, *Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 314 (1990) (citing C. ARTHUR WILLIAMS, JR., INSURANCE ARRANGEMENTS UNDER WORKMEN'S COMPENSATION 3-4 (1969)).

93. *See id.* at 314-15.

94. *Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 119 S.W. 576 (Mo. 1909).

95. *Id.* at 576-78.

96. Interestingly, *Breeden* is often cited in support of the enforceability of tort liability insurance contracts, even though the suit was actually resolved in the insurer's favor on the basis of the ultimate settlement for \$1000 between it and the plaintiff. *Id.* at 605.

removing liability from the negligent party. It analogized to the duties of a carrier to a passenger, and reasoned that to any extent an insurance fund is essentially “substituted for the like sum” of the insured, “the financial responsibility of the carrier is reduced to the same extent, and the corresponding degree of care required of him to be exercised in favor of the passenger is likewise reduced to the same degree.”<sup>97</sup>

The five-judge majority noted the need for limiting the scope of maintenance in order to “adapt to the new order of things in the present highly progressive and commercial age,”<sup>98</sup> and concluded that “the interference of defendant [insurance company] in the litigation between Breeden and the mining company was not maintenance as that term is used in the law.”<sup>99</sup> In addition, the contract was determined to not affect the ultimate placement of liability, and hence did not disturb the aims of tort law:

“Such insurance does not lessen the employer’s liability or responsibility, but increases his means of meeting both . . . [and] despite such [an] indemnity contract, the liability of the master to the servant, and the carrier to the passenger or shipper, for negligence, is neither directly or by implication impugned, impaired, abridged, or whittled away, but remains in full flower and vigor precisely as it was before the insurance.”<sup>100</sup>

The arguments articulated by the seven justices in *Breeden* are reflective of a judicial system coming to grips with a capitalist economy’s novel solution—defendant-side liability insurance contracts—to a growing impediment to business. And to a large degree, it mirrors the debate surrounding today’s novel solutions—various forms of plaintiff-side litigation funding—to the growing impediment to court access. In that debate, assertions abound over the effect these new sources of capital for plaintiffs and plaintiffs’ lawyers will have.

Some critics have asserted that non-party litigation contracts impugn the sanctity of the attorney-client relationship, a bedrock of the civil justice system.<sup>101</sup> To assess how non-party

97. *Id.* at 582.

98. *Id.* at 606.

99. *Id.* at 608.

100. *Id.*

101. See, e.g., John H. Beisner & Gary A. Rubin, *Stopping the Sale on Law-suits: A Proposal to Regulate Non-Party Investments In Litigation*, 2012 U.S. CHAM-

litigation funding can affect the attorney-client relationship, it is instructive to compare and contrast its typical manifestation in the case of liability insurance. Similarities include the triangle relationship amongst the parties to these funding mechanisms (plaintiff, counsel and insurer/funder) as well as their shared *raison d'être* (insurer protects from loss; funder aids in recovery of loss).<sup>102</sup> However, an important difference between liability insurers and plaintiff-side funders includes the role that each may play in the litigation. Insurers typically have complete control through a right and duty to defend, and that control extends to the choice of counsel and complete dominion over settlement decisions within policy limits.<sup>103</sup> Significantly, the insurer's control can encompass access to privileged information.<sup>104</sup> Judicial sanction of the insured's complete alienation of control in litigation has roots as far back as the sanction of the tort liability contract,<sup>105</sup> and has become even more entrenched since.<sup>106</sup>

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BER INSTITUTE FOR LEGAL REFORM 1–2, [http://www.instituteforlegalreform.com/uploads/sites/1/TPLF\\_Solutions.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf) (asserting that non-party litigation funding “undercuts plaintiff and lawyer control over litigation” and will “diminish the professional independence of attorneys”).

102. *Bentham IMF Litigation Funding Roundtable: Key Issues and Best Practices*, 2014 BENTHAM IMF 8, available at <http://www.benthamimf.com/docs/default-source/default-document-library/bentham-report-final-10-01-14.pdf?sfvrsn=2> [hereinafter *Bentham IMF*] (describing a mirror relationship between liability insurance and plaintiff side litigation funding).

103. *Id.*

104. Generally, courts recognize an exception to the waiver of privilege based on non-party disclosure where the interests of the insured and insurer align. *See, e.g.,* *Glacier Gen. Assurance Co. v. Superior Court. of L.A. Cty.*, 95 Cal. App. 3d 838, 842 (1979) (stating “when an insurer, as required by its contract of insurance, employs counsel to defend its insured, any communication with the lawyer concerning the handling of the claim against the insured, is necessarily a matter of common interest to both the insured and the insurer”). Accordingly, the disclosure of privileged information in the circumstance where the insurer accepts a tendered defense without a reservation of rights does not constitute a waiver of the privilege.

105. *See, e.g., Breeden*, 119 S.W. at 608 (endorsing the proposition that “the clause in the policy of insurance permitting the insurer to have charge of a case in court, and forbidding a settlement at the initiative of the insured, relates only to the liability of the insurance company to the insured, and in no way forbids a settlement with the injured party, if the insured desires to take such course independently of his contract”).

106. *See, e.g., In re Allstate Ins. Co.*, 722 S.W.2d 947, 952 (Mo. 1987) (en banc) (stating how the insurer has the right to “evaluate claims and decide

Non-party, plaintiff-side litigation funders do not typically contract for such control over the litigation in which they invest.<sup>107</sup> In fact, refraining from “intermeddling” in litigation is generally a required condition for exception from champerty,<sup>108</sup> and litigation funders, for both practical and commercial reasons, do not typically seek control.<sup>109</sup> Moreover, litigation funders do not generally (and, in the view of the authors, should not) have access to privileged information,<sup>110</sup> and, therefore, do not typically seek it.<sup>111</sup>

These apparent “double standards” applied to liability insurers and non-party plaintiff-side litigation funders have led Professor Anthony Sebok to ask the following question: should we be so concerned about the possible alienation or assign-

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whether to settle,” “make economic decisions without the assent of the insured,” and “decide what to spend in defense, what discovery is to be had, and what experts to hire”); *Hurwitz v. St. Paul Fire & Marine Ins. Co.*, 109 Cal. App. 4th 918 (2003) (dismissing an action against an insurer who entered a global settlement over the insured’s objection, that included tendered claims as well as claim for which insurer did not provide an attorney to insured).

107. Bentham IMF, *supra* note 102, at 8.

108. Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 109–12 (2011). See also *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 725 (contrasting “officious intermeddling” with a funder “sought out by a cash-strapped litigant embroiled in bitterly contested litigation”).

109. See, e.g., *LFG Code of Ethics*, LAW FINANCE GRP., <http://www.lawfinance.com/about-us/social-purpose/> (last visited Feb. 26, 2015) (stating “[w]e ensure that the attorney and client retain complete control of their case.”); Letter from Juridica Capital Mgmt. Inc. to Am. Bar Ass’n Comm. on Ethics 20/20 (Feb. 17, 2011), in COMMENTS: ALTERNATIVE LITIGATION FINANCING WORKING GROUP ISSUES PAPER, 66–72, [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/ethics\\_2020/comments\\_on\\_alternative\\_litigation\\_financing\\_issues\\_paper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/comments_on_alternative_litigation_financing_issues_paper.authcheckdam.pdf) (stating “[w]e do not seek to control any of the decisions regarding the conduct of any litigation that we finance, nor are we aware of any other funder in this market segment that does”).

110. See *Caterpillar*, 17 F. Supp. 3d at 732 (holding that common interest doctrine does not except disclosure to non-party funder from waiver of the attorney-client privilege because a shared “rooting” interest in the outcome of the case is not a shared legal interest).

111. Significantly, the lack of access to privileged communications exacerbates the information gap that disadvantages singular plaintiffs and their counsel with respect to corporate defendants and insurance companies that have a data bank of similar claims from which to draw important lessons and successful strategies.

ment of control to litigation funders?<sup>112</sup> Raising this question illuminates the evolution of non-party, plaintiff-side litigation funding as a more widely-accepted means of surmounting the lack of capital in our justice system.

C. *The Capitalist Economic Marketplace as Source of Litigation Funding*

Given the U.S. civil justice system's voracious appetite for capital, various types of players have offered risk capital in the economic marketplace. Despite recent publicity identifying non-party litigation funding as a new phenomenon, it has been in existence in the U.S. for many years. Syndication of litigation claims were pursued at least thirty years ago, when a group of investors formed Micro/Vest, a partnership to pursue litigation to enforce a contract against ComputerLand Corporation. Later, a group of investors formed NTP to enforce patent claims against RIM Corporation.

Over the past twenty years, specialty finance businesses have begun to emerge, seeking to address the unmet need for funding of choses in action. They have offered loans to law firms secured by contingency cases, loans to lawyers secured by delayed settlement payments, investments in judgments on appeal, and loans to clients providing funds to pay hourly rate legal fees, among others. It remains a dynamic and increasingly competitive marketplace, though it still has not achieved maturity and economic efficiency. As in any emerging market in a capitalist economy, it is most likely to achieve the capital needs of owners of choses in action and the legal profession if allowed to mature without unnecessary outside constraints. That is not to suggest that legal issues, such as case control and protection of attorney-client privilege, should not be addressed. It does suggest, however, that to the extent market forces of the U.S. capitalist economy are free to work, the benefits to the functioning of the civil justice system will be enhanced.

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112. Anthony Sebok, *Private Dollars for Public Litigation: An Introduction*, 12 N.Y.U. J.L. & Bus. — (Special Issue 2016).

## CONCLUSION AND COMMENTS

Due to the current high cost of the civil justice system and the lack of sufficient capital, the guaranteed right to trial by jury and chose in action property rights are on the road to becoming an anachronism. If the United States wishes to maximize economic success and to live its pledge of "justice for all," it must acknowledge the economic requirement of capital and enable the capitalist economy to develop the funding sources needed to afford equal access to justice. Non-party litigation funding is nothing more or less than the U.S. economic system at work producing a solution to an economic shortage.

It is understandable that those players in the economy who control large concentrations of wealth and power are not cheerleaders for the developments in litigation finance that are the capitalist economy's response to the financial imbalance affecting access to civil justice. Clearly, the threat of enabling all owners of choses in action access to justice has moved some to pursue efforts intended to prevent or limit plaintiffs from attaining economic parity in a civil justice contest. What is interesting is that many of this group, having achieved great wealth as a financial reward for success in our capitalist economy, are very unhappy when that same economy offers equal access to those wishing to compete with them in resolving an economic dispute.

Given the inherent fragility of the legal profession as a business and its enormous scale in the overall U.S. economy, the development of capital sources specializing in funding lawyers and law firms should be encouraged by the legal profession. One is struck by the duality of the legal profession, particularly in the litigation context. For every lawyer pursuing a case in the civil justice system on behalf of a plaintiff there is at least one, and maybe more than one, lawyer engaged to defend that same case. To the extent that access to justice is constrained and fewer cases are filed or maintained to their conclusion due to a lack of capital on the plaintiffs' side, the adverse economic impact is equal or greater on those lawyers who earn a living defending against such claims. This systemic, symbiotic relationship between the lawyers on each side of a legal dispute seems to be lost on many of the lawyers who are directly affected by it. One wonders why all lawyers, whether traditionally plaintiff-oriented or defendant-oriented, are not

loud voices in a choir singing the benefits of assuring necessary capital is available to each side of the dispute to pursue civil justice for choses in action.