

Re-Re-Financing Civil Litigation: How Lawyer Lending Might Remake the American Litigation Landscape, Again



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ABSTRACT

Stephen Yeazell has long recognized that changes to case capitalization affect the nature and intensity of civil litigation. So too, writing back in 2001, Yeazell identified the next wave of capital with the capacity to alter the American litigation landscape: third-party litigation finance. In the ensuing decade, that industry, and specifically what I call the “lawyer lending” industry—comprised of lenders who extend capital to plaintiffs’ lawyers to finance personal injury litigation—has blossomed. Today, firms like Advocate Capital and Counsel Financial channel tens of millions of dollars to plaintiffs’ personal injury lawyers each year and seem poised for further expansion. Picking up where Yeazell left off, this Essay asks: How might the arrival of lawyer lending transform the capitalization, organization, and sophistication of plaintiff-side practice? And how might changes to plaintiff-side practice affect the quantum and character of personal injury litigation in the United States?

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TABLE OF CONTENTS

INTRODUCTION.....112

I. EVER MORE EXPENSIVE LITIGATION MET BY FOUR PHASES
OF FINANCING112

II. HOW MIGHT LAWYER LENDING ALTER THE AMERICAN
LEGAL LANDSCAPE?118

CONCLUSION124



INTRODUCTION

Stephen Yeazell has taught us that “changes in capitalization affect the outcome of cases, without regard to changes in procedural or substantive rules.”¹ Thus, he has called for academics to study not just formal law but also the ever-changing structures of law practice, as changes to lawyers’ financial, social, and business structures have the power to influence case outcomes just as surely as do statutory changes or procedural shifts.² This Essay in Yeazell’s honor responds to that call. In it, I first periodize the evolution of funding available to plaintiff-side personal injury (PI) firms to finance case development, calling attention to a new breed of specialized third-party lender, increasingly ready, willing, and able to lend capital to assist PI lawyers in case preparation. Then, having shown that change is afoot, I identify five ways in which these new “lawyer lenders” may alter the American litigation landscape, affecting the quantity, cost, and character of personal injury litigation in the United States.

I. EVERMORE EXPENSIVE LITIGATION MET BY FOUR PHASES OF FINANCING

Personal injury litigation requires significant—and, it appears, ever higher—out-of-pocket investment.³ According to the Federal Judicial Center, pursuing a civil action in federal court now costs plaintiffs a median of \$15,000, including attorneys’ fees.⁴ And, cases involving scientific evidence, such as suits alleging product defects or medical malpractice, frequently result in out-of-pocket expenditures (not counting attorneys’ fees) in the low six figures.⁵ Cash is needed to

1. Stephen C. Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183, 183 (2001).

2. *Id.* at 186.

3. For discussion of why litigation has grown more expensive, see *id.* at 193–98.

4. Unfortunately, as far as I can tell, no recent study has separately considered case expenditures without also considering legal fees. For the best recent study combining both fees and costs, see EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 35–36 (2009).

5. See Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 66 VAND. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2147915>; Stephen Daniels & Joanne Martin, “The Juice Simply Isn’t Worth the Squeeze in Those Cases Anymore:” *Damage Caps, Hidden Victims, and the Declining Interest in Medical Malpractice Cases* 28 (Am. Bar Found.

pay for simple things like court filing fees, medical exams, photocopying, travel, and the compensation of stenographers, investigators, videographers, and experts. Then, as cases become more complex, cash is required for more exotic things too. For example, expenses in the World Trade Center Disaster Site Litigation included everything from printing costs, to special masters' bills (to the tune of almost half a million dollars), to the creation and maintenance of the court's database system, to payments to lobbyists.⁶ Ultimately, nearly \$30 million was expended.⁷ Nor was that sum unprecedented. In other mass torts, too, case expenses can easily spiral to seven or even eight figures.⁸

Vanishingly few tort victims have enough cash on hand to begin to cover these amounts, so applicable rules of ethics have long permitted attorneys to front these litigation expenses on behalf of their clients.⁹ Even attorneys can be cash strapped, however, and fronting costs unless and until an award is made (typically years away) can be extremely burdensome. So, over the years, PI attorneys have developed different, and increasingly aggressive, modes of financing. This evolution of financing can be broken into four (overlapping) phases.

Traditionally, in what can be called the first phase of attorney financing, PI lawyers themselves bore the cost of case preparation. Thus, back in 1980, noted plaintiffs' lawyer Stuart Speiser lamented the fact that, though case costs could be enormous, tort lawyers had to "finance everything themselves."¹⁰ Denied outside funding, plaintiffs' lawyers would accept a diverse portfolio of cases and use last

Research Paper Series, Paper No. 09-01, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1357092 ("The expenses to appropriately prepare a medical malpractice case can approach \$100,000 or more if the case is especially complex.").

6. See Plaintiffs' Memorandum Responding to the Court's Sua Sponte Order of August 4, 2010 at 10–11, *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH) (S.D.N.Y. Aug. 26, 2010) [hereinafter Plaintiffs' Memorandum]. To cover these costs, the plaintiffs' lawyers secured a \$35 million recourse loan from lender Counsel Financial. The litigation did not seek damages for those injured or killed on 9/11 itself, as those individuals were mostly compensated through the congressionally-created 9/11 Victim Compensation Fund. It instead sought damages for the many who were hurt (mostly by dust-borne toxins) while engaged in an intense rescue, recovery, and debris-removal effort in and around Ground Zero in the days and months following the attack. For more on this litigation, see generally Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127 (2012).
7. Plaintiffs' Memorandum, *supra* note 6, at 10.
8. See Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 7–8 (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2286307 (collecting examples).
9. The Model Code obligated even a defeated client to repay the advance. See MODEL CODE OF PROF'L RESPONSIBILITY DR 5-103(B) (1980). Liberalizing that restriction, Model Rule 1.8(e) now permits a lawyer to relieve the client of his obligation to repay if no recovery is obtained. See MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2012).
10. STUART M. SPEISER, LAWSUIT 560–61 (1980). Elsewhere, Speiser remarked: "There is no way of raising capital for such an organization except from the lawyers themselves." *Id.* at 568.

month's settlements and trial victories to cover this month's office overhead and case costs. Yet this method of financing was far from ideal. Lawyers might hit a dry patch where cases would not settle, experience a string of bad luck when the other side unexpectedly prevailed, or take on a case that met stiffer resistance and required more expensive inputs than they had reasonably anticipated.

Given the inherent risk and instability of individual attorney financing, in time, a second phase of financing developed. This second phase involved reliance on fellow PI lawyers and the formation of interfirm partnerships and/or loans from traditional lending institutions. As to reliance on fellow PI lawyers, over the past three decades, there have been a number of prominent examples in which lawyers, engaged in massive litigation efforts, sought and received funds from other, better-financed practitioners, who invested in the litigation in exchange for a cut of the ultimate contingent fee.

The Agent Orange litigation of the 1980s provides one case in point. A massive undertaking, the litigation involved 600 separate actions on behalf of some 2.4 million Vietnam veterans and their offspring seeking damages from two dozen defendants.¹¹ Not surprisingly, the lawyers prosecuting the case ran short on funds. Indeed, members of the Plaintiffs' Management Committee (PMC) ultimately became so depleted that they "lacked the financial capacity to continue the litigation."¹² After certain members of the PMC resigned and a new PMC was formed, the newly constituted PMC reached an agreement on financing: Six of the nine PMC members would fund general litigation expenses (contributing \$200,000 apiece), and for each dollar advanced, if the plaintiff class ultimately prevailed, these investor-attorneys would be repaid threefold, pocketing a treble return on their investment. Although the arrangement was subsequently amended, then invalidated,¹³ the point still holds: In the 1980s, when certain mass-tort lawyers ran short on cash, they sought assistance from their better-financed brethren.

Tobacco litigation offers another prominent example of lawyers' successful financial (and tactical) coordination. For four decades, from 1954 to 1994, indi-

11. Ultimately the two dozen defendants were pared down to seven. For more on the financing arrangement, see generally Vincent Robert Johnson, *Ethical Limitations on Creative Financing of Mass Tort Class Actions*, 54 BROOK. L. REV. 539 (1988). For more on the litigation itself, see generally PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1987).

12. W. John Moore, *Fee-Splitting Agreement Draws Attention of Agent Orange Judge*, LEGAL TIMES, Nov. 5, 1984, at 1, 7 (quoting plaintiffs' attorney Phillip B. Allen).

13. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1452, 1461 (E.D.N.Y. 1985), *rev'd*, 818 F.2d 216, 221 (2d Cir. 1987).

vidual plaintiffs and their “lone wolf” lawyers were crushed by big tobacco.¹⁴ Plaintiffs initiated more than 800 claims against the industry.¹⁵ Adopting a calculated strategy to bury individual plaintiffs’ lawyers in a never-ending stream of motions, denials, interrogatories, and depositions, the cigarette industry paid not a penny in return.¹⁶ Yet the industry’s long winning streak came to an abrupt halt in the early 1990s. The streak ended, not coincidentally, at the moment when a group of lawyers, dubbed the Castano group, joined forces, contributing significant capital (and know-how) to a common fund.¹⁷

More recent litigation involving the diet drug fen-phen against American Home Products (now Wyeth) offers another prominent example. In the midst of representing thousands of claimants, Dallas attorney Kip Petroff became financially depleted while waiting for funds from settled cases to start rolling in. To bridge the shortfall, he teamed up with experienced plaintiffs’ attorney (and “mass tort guru”) Vance Andrus. Andrus contributed roughly \$2 million to help fund the litigation in exchange for a 7.5 percent share of Petroff’s portion of the recovery. “When I needed money [in 2002], I went to a senior guy,” Petroff explained. “He not only loaned me the money I needed, he became my advisor and strategist.”¹⁸

Nor has interfirm coordination been confined to marquee cases. Even in routine cases, a practice has developed whereby, when PI law firms become over-extended, they forge co-counsel relationships with better-financed and more experienced lawyers, together shepherding difficult cases to trial.¹⁹

14. Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 858 (1992) (describing early tobacco plaintiffs’ lawyers as mostly “lone wolves”).

15. Howard M. Erichson, *The End of the Defendant Advantage in Tobacco Litigation*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 123, 126 (2001).

16. *See id.*; *see, e.g.*, Henry J. Reske, *Cigarette Suit Dropped*, 79 A.B.A. J. 30, 30 (1993) (noting that Marc Edell reported that his firm decided to drop Rose Cipollone’s lawsuit against the tobacco industry just months before a scheduled retrial because “the litigation simply had cost too much”). *See generally* William E. Townsley & Dale K. Hanks, *The Trial Court’s Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 CAL. W. L. REV. 275 (1989).

17. *See* Erichson, *supra* note 15, at 127–28. The Castano group was a loose collection of over sixty prominent law firms brought together in 1994 by Wendell Gauthier. *See id.* at 131. Each pledging \$100,000 a year to the effort, the members created a war chest of nearly \$6 million. *See id.* For more on the Castano group, *see* PETER PRINGLE, CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE 42–43 (1998) and Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation, in REGULATING TOBACCO* 181 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

18. Telephone Interview with Kip Petroff (Jan. 30, 2013); *see also* KIP PETROFF WITH SUZI ZIMMERMAN PETROFF, BATTLING GOLIATH: INSIDE A \$22 BILLION LEGAL SCANDAL 105 (2011).

19. *See* RICK FRIEDMAN, ON BECOMING A TRIAL LAWYER 185 (2008) (“More and more often, sole practitioners and small law firms band together to handle cases. This trend is borne of necessity, as cases become more complex and expensive. Neither of us may be able to competently handle a particular case alone, but when we aggregate our knowledge, skill, and resources, we can be

At the same time, starting perhaps thirty years ago, some traditional banks started to extend financing to plaintiff-side firms. Specifically, these banks opened up lines of credit on which attorneys could draw, secured not by the PI lawyer's case inventory, but typically by his personal assets.²⁰ So, for example, in 1989, legendary PI lawyer Philip Corboy reported that his firm had access to a \$1 million bank line of credit that could be repaid every ten to eleven months.²¹ And readers of *A Civil Action* will recall that in the 1980s, "Uncle Pete" (George Kennedy Briggs II) of the Bank of Boston's Private Banking Group extended loans of \$1 million to Jan Schlichtmann and his law partners as they represented families in Woburn, Massachusetts, battling W.R. Grace & Co. and Beatrice Foods.²²

Then, in the mid-1990s, a third phase of lawyer lending dawned: Free-standing lawyer lenders (examples include Counsel Financial, Advocate Capital, and Amicus Capital Services) opened their doors.²³ These third-phase lenders are more streamlined and specialized. Some are also equipped—it appears for the first time—to track loans, and interest on loans, to expenditures on particular cases and thereby facilitate the transfer of a loan's cost from the lawyer (who traditionally bore the burden of financing) to the client.²⁴ Beyond the ability to track

formidable."); Tom Vesper & Ben A. Goff, *Manage Costs Strategically to Escape Case Cost Crunch; Outpouring of Cash Can Become a Serious Handicap—For a Litigation and for the Firm as a Whole*, N.J. L.J., Sept. 15, 2003, at 27, 27 ("The most common way for plaintiff trial lawyers to obtain outside funding is by joint venturing, that is, by sharing cases—and fees—with other law firms.").

20. See SPEISER, *supra* note 10, at 568 (stating, as of 1980, that "[n]o bank will lend money to a tort lawyer beyond the personal assets that the lawyer can put up as security").
21. Andrew Blum, *Big Bucks, But... Five Prominent 'PI' Lawyers Talk About Money*, NAT'L L.J., Apr. 3, 1989, at 1, 46.
22. JONATHAN HARR, *A CIVIL ACTION* 212, 215, 275, 277, 348 (1996). Collateral on these loans included—among other things—the deeds to two partners' houses. Even with these loans, expenditures mounted to the point where the financial position of Schlichtmann's team became "precarious in the extreme." *Id.* at 405.
23. See ADVOC. CAPITAL, <http://www.advocatecapital.com> (last visited July 3, 2013); AMICUS CAPITAL SERVICES, <http://www.amicuscapitalservices.com/litigation-finance/law-firm-loans/> (last visited July 3, 2013); COUNS. FIN., <http://attorneylending.com> (last visited July 3, 2013). For a list of additional third-phase funders in operation as of early 2010, see STEVEN GARBER, *ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWN, AND UNKNOWN* 14 tbl.2 (2010).
24. So far, state ethics committees and the ABA Commission on Ethics 20/20 White Paper on Alternative Litigation Finance have suggested that lawyers may deduct interest on these loans from client recoveries as an additional "expense" of litigation. For an extended analysis and critique of these deductions, see generally Engstrom, *supra* note 8. Not all lenders have accepted the invitation. See, e.g., Lucian T. Pera & Brian S. Faughnan, *Response of Augusta Capital, LLC to Request for Comment: Issues Paper Concerning Lawyer's Involvement in Alternative Litigation Financing*, in *ALTERNATIVE LITIGATION FINANCING WORKING GROUP ISSUES PAPER: "ISSUES PAPER CONCERNING LAWYER'S INVOLVEMENT IN ALTERNATIVE LITIGATION FINANCING"* 19, 20–21 (2011) [hereinafter *Augusta Letter*], available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/comments_on_alternative_litigation_financing_issues_paper.authcheckkda

interest, loans offered by these third-phase lenders have four key characteristics. First, the loans are recourse loans (that is, noncontingent), so the obligation to repay is untethered to case success. Second, these loans are broadly secured, sometimes by all of the law firm's assets, including future fees and real property, and sometimes (like traditional bank loans) even by the lawyer's personal assets. Third, the cost of this capital appears to be higher than capital from traditional banks but lower than the nonrecourse (fourth-phase) loans described below—on the order of 15 percent to 20 percent per year.²⁵ And fourth, these lenders appear to offer larger sums than banks would previously provide. For example, Amicus Capital reports that it can make available “four to five times the amount of money that a traditional bank will offer,”²⁶ with typical loans on the order of \$2 million to \$3 million.²⁷ Likewise, Counsel Financial explains that its “average line of credit is \$1.5 million, but can be as little as \$50,000 and as much as \$25 million.”²⁸

Completing the evolution, the fourth phase of lawyer lending has emerged in the form of nonrecourse lending. This latest breed of lender (Augusta Capital²⁹ and Excalibur³⁰ are a couple apparent examples) extends nonrecourse loans to plaintiffs' lawyers to fund particular cases. For these lenders, then, loans are case specific (x loan will fund y case), and repayment is contingent on case success (if y case is not successful, x loan need not be repaid).³¹ Fees on these loans are

m.pdf (stating that Augusta Capital requires “that the lawyer, and not the lawyer's client, bear[] full responsibility for repayment of funding”).

25. See, e.g., Ben Winograd, *Specialized Lenders Help Fill Financing Void for Law Firms*, AM. BANKER, Nov. 2, 2006, at 3 (quoting Counsel Financial CEO Michael Callahan as stating that the “standard lending rate is 18%”); *Typical Law Firm Line of Credit Program Summary*, AMICUS CAPITAL SERVICES, <http://www.amicuscapitalservices.com/litigation-finance/law-firm-loans/typical-law-firm-line-of-credit-program-summary/> (“Interest accrues on each case at a competitive rate of interest that has varied between 17% and 20% per annum since the inception of the program.”); Telephone Interview with Michael J. Swanson, President and CEO of Advocate Capital (Apr. 30, 2013) (“The overall effective annual rate for Advocate Capital's Case Expense Product is between 13.5 percent and 15 percent.”).
26. Press Release, Amicus Capital Servs., Amicus Capital Services Continues to Help Trial Lawyers Fight for Justice While Increasing Their Bottom Line (Aug. 10, 2010), available at http://consumerattorneyresource.com/?page_id=304.
27. Alexa Hyland, *Firms Make Case for Legal Loans*, L.A. BUS. J., Apr. 21, 2008, <http://labusinessjournal.com/news/2008/apr/21/firms-make-case-for-legal-loans/>.
28. Jonathan D. Epstein, *An Unusual Financial Niche: Lending Money to Lawyers, Small Law Firms Turn to an Amherst Company When They Need Money to Finance Big Cases*, BUFFALO NEWS, Sept. 30, 2007, <http://www.buffalonews.com/apps/pbcs.dll/article?AID=/20070930/BUSINESS/309309945>.
29. Augusta Letter, *supra* note 24, at 19 (stating that Augusta Capital is “a business engaged in providing litigation funding on a contingently-repayable basis directly to lawyers”).
30. *Attorney Funding*, EXCALIBUR LEGAL, <http://www.excaliburlegal.com/AttorneyPricing.html> (last visited July 3, 2013) (“Funding is non-recourse.”).
31. Nonrecourse loans are not permitted in every state, as some state ethics committees have found that they violate Model Rule 5.4(a), which prohibits fee sharing with nonlawyers. See Engstrom, *supra* note 8, at 15 n.67 (collecting ethics committee decisions).

substantial. Augusta Capital, for example, reports: “Typically, in a case involving complex litigation that resolves successfully three years after Augusta began providing funding, Augusta’s fee equals approximately \$1 for every \$1 of funding to be repaid to Augusta Capital.”³²

In sum, in the world today, many PI lawyers, and perhaps most PI lawyers, continue to go it alone—as either solo practitioners or operating within small law firms. These lawyers continue to juggle a portfolio of cases, using yesterday’s payday to fund tomorrow’s payout.³³ Likewise, in complex cases, PI lawyers still join forces and pool resources to battle a common foe. And many lawyers continue to rely on personally secured lines of credit from traditional banks.³⁴ But increasingly, funding from specialized third-party financiers is available—and while it still is not ubiquitous, reliance on it is becoming quite commonplace. For example, public records from one state, New York, show that between 2000 and 2010, more than 250 law firms borrowed on pending cases, sometimes repeatedly.³⁵ Information from one lender, Counsel Financial, indicates that, as of 2010, it had “more than \$200 million” in loans outstanding.³⁶ And, information from another lender, Advocate Capital, indicates that it has funded nearly 150,000 cases over its thirteen-year existence.³⁷

II. HOW MIGHT LAWYER LENDING ALTER THE AMERICAN LEGAL LANDSCAPE?

Having shown that lawyer lending—comprised of both recourse and non-recourse loans by specialized lenders to plaintiff-side lawyers to finance PI litiga-

32. Augusta Letter, *supra* note 24, at 20; *see also* Augusta Capital, LLC v. Reich & Binstock, LLP, No. 3:09-CV-0103, 2009 WL 2065555, at *1 (M.D. Tenn. July 10, 2009) (“In a successful case, R & B agreed to pay back not only the funded litigation expenses, but also a stipulated funding fee which ranged from 75% to 125% of the funded amount.”).

33. MICHAEL J. SWANSON, HOW DAVID BEATS GOLIATH: ACCESS TO CAPITAL FOR CONTINGENT-FEE LAW FIRMS 89 (2011) (“Covering case expenses and general overhead with partners’ cash is by far the most common way contingent-fee [lawyers] finance their practices.”).

34. *Id.* at 101 (“Outside of partners’ cash, the bank line of credit is surely the second-most common method law firms use to fund case expenses.”).

35. Binyamin Appelbaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. TIMES, Nov. 14, 2010, <http://www.nytimes.com/2010/11/15/business/15lawsuit.html>.

36. *Id.*

37. Telephone Interview with Michael J. Swanson, President and CEO of Advocate Capital (Apr. 24, 2013) (indicating that, as of April 2013, Advocate Capital had funded 149,272 cases). For more information on lawyer lending’s prevalence, see Engstrom, *supra* note 8, at 16–18.

tion—is a burgeoning field, I now sketch five possible implications of this development.³⁸

The first and most obvious way that lawyer lending may alter the American litigation landscape is that it will inject more resources into PI litigation on the plaintiffs' side. It will thus facilitate additional investment in case preparation, likely permitting plaintiffs' lawyers to retain additional and higher-caliber experts, construct more elaborate demonstratives, and conduct more comprehensive pre-trial discovery.³⁹ As Yeazell has recognized, these investments will likely, at least in the short run, help to “level[] the playing field” between plaintiffs and their traditionally better-financed foes.⁴⁰ But because litigation investments tend to be roughly symmetrical—as depositions must be defended, interrogatories must be answered, exhibits beget exhibits, and experts beget experts—increased plaintiffs' spending will likely be matched, perhaps even raised, by defendants over time.⁴¹ This means that increased plaintiff spending may, in time, cause transaction costs on both sides of the “*v.*” to escalate, ultimately raising the cost and burden of tort litigation.

Second, by giving individual firms the resources to litigate cases alone, lawyer lending may deter the formation of interfirm partnerships. Here, recall that over the past few decades, plaintiffs' lawyers have often succeeded when they have pooled resources and coordinated their attack. The Castano group, which helped turn the tide on tobacco litigation, is a well-known exemplar; as noted, everyday examples also abound. Lawyer lending, however, seems likely to discourage these

38. Of course, I do not suggest that these are the *only* possible consequences, and as I emphasize below, all predictions are necessarily tentative.

39. See Appelbaum, *supra* note 35 (“A review by *The New York Times* and the Center for Public Integrity shows that the inflow of money is . . . arming [more plaintiffs] with well-paid experts and elaborate evidence.”). Lenders appear to see this as a major selling point. See, e.g., *Litigation Funding: Law Firm Loans*, EXCALIBUR LEGAL, <http://www.excaliburlegal.com/AttorneyLawFirmLoans.html> (last visited July 3, 2013) (“Attorney funding or a law firm loan can give you the latitude to obtain the best quality expert witnesses, time to conduct breakthrough discovery and the ability to hire the personnel needed to manage litigation.”); Testimonial for Advocate Capital by Phillip Miller of Phillip Miller & Associates, ADVOC. CAPITAL, <http://www.advocatecapital.com/testimonials.html> (last visited July 3, 2013) (“Through Advocate Capital, we are able to . . . provide each case with the best experts and doctors, no matter what the cost may be.”).

40. Appelbaum, *supra* note 35 (quoting Stephen Yeazell). For a discussion of defendants' traditional (but rapidly eroding) resource advantage, see Stephen C. Yeazell, *Getting What We Asked for, Getting What We Paid for, and Not Liking What We Got: The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 954–65 (2004).

41. See Yeazell, *supra* note 40, at 952; see also David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 77 (1983) (“Litigation is an interactive process and one side's investment is likely to be influenced by the other side's actual or expected expenditure.”).

relationships.⁴² For example, Excalibur explains on its website: “A law firm loan or attorney funding . . . eliminates the need to partner with a larger legal firm on major cases.”⁴³ Given that interfirm partnerships have traditionally encouraged lawyers to share capital *and* know-how, deterring their creation may have detrimental effects.⁴⁴

Third, especially to the extent nonrecourse loans (which, recall, don’t have to be paid back in the event of a loss) become commonplace, increased lending activity may result in less rigorous case screening. As it stands, most PI lawyers screen cases carefully—rejecting the majority or vast majority of prospective clients who call seeking legal representation.⁴⁵ Moreover, this screening is thought to have a salutary role; screening, some say, is “the first line of defense against frivolous litigation.”⁴⁶ Importantly, though, nonrecourse lending has the capacity to weaken screening incentives. In accepting a client, a contingency-fee lawyer backed by a nonrecourse lender will continue to gamble her time; she will still forfeit the value of her professional services if the case disappoints. But she will no longer gamble her money; the lender will assume that role. Accepting cases will be somewhat less risky, and thus, it seems probable that additional longshot cases will be initiated. Whether these dynamics take hold depends, of course, on *lenders’* risk tolerance and the screening mechanisms they employ.⁴⁷ But however it shakes out, a change to the screening calculus seems probable, and this change will have ripple effects—changing litigation’s volume and also the relative merit of cases brought.

42. Some lawyers are apt to prefer loans from lenders over partnerships with co-counsel because they can shift the cost of the former, but not the latter, onto their clients. When initiating interfirm partnerships, that is, lawyers typically cede to co-counsel a portion of their contingency fee. By contrast, when a lawyer lender is enlisted to contribute capital, lawyers can typically shift the cost of capital to the client by deducting interest charges from the client’s portion of the recovery. *See supra* note 24 and accompanying text.

43. *Litigation Funding: Law Firm Loans*, *supra* note 39.

44. *See* SWANSON, *supra* note 33, at 57 (“Sometimes, the deep-pocketed firm that is brought in to fund the case and share the fee will contribute legal expertise and perhaps the labors of its support staff.”); *see, e.g.*, Telephone Interview with Kip Petroff, *supra* note 18 (stating that the “counseling” he received from Vance Andrus in the course of litigating fen-phen was “extremely valuable” and recalling, “If all Andrus had done was give me the money, I still would have been a guy who was way over my head”). Of course, though, these partnerships are sometimes a mixed bag, as some are beset by conflicts, clashing egos, shirking, and infighting. *See, e.g.*, MICHAEL D. GREEN, BENEDICTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION 122 (1996).

45. *See* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 67–95 (2004) (describing screening practices).

46. Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865, 889 (1992).

47. Because lenders are likely to be large and wealthy entities, they may be more tolerant of risk than individual lawyers and, thus, somewhat more likely to invest in longshot but potentially lucrative cases. For more on lenders’ screening mechanisms, *see infra* note 65.

Fourth, by upping plaintiffs' reservation price,⁴⁸ ensuring plaintiffs' lawyers have enough cash on hand to take cases to trial when necessary, and (when loans are nonrecourse) reducing the blow of defeat, lawyer lending might actually help to resurrect the "vanishing trial."⁴⁹ To illustrate: Suppose a case is funded with a nonrecourse loan from a fourth-phase lender. Suppose as well that its preparation has been pricey; \$100,000 has been spent on experts, exhibits, investigators, consultants, and medical exams, while an additional \$140,000 in interest has accrued.⁵⁰ For a client obligated to pay a standard 33 percent contingency fee plus \$240,000 for the above, a settlement offer of even \$500,000 will be unpalatable; the client will now (but might not in the absence of the \$140,000 interest charge) reject the offer out of hand. Furthermore, while causing the client to hold out for a higher settlement offer, the loan itself will ensure that the client's lawyer does not push for settlement because of cash constraints—and also will give a trial-bound plaintiff less to lose. That is, a defense verdict would erase the *entire* \$240,000 debt (from client and lawyer both), rendering the worst-case scenario (defeat at trial) far less frightening.

The final—and arguably most significant—way lawyer lending seems poised to transform the civil litigation environment is by unsettling hierarchies within the plaintiffs' bar, and specifically, by decoupling a firm's access to capital from its reservoir of expertise.

Over the past few decades within the PI bar, expertise and financial resources have typically grown together, as lawyers both sharpen their skills and accumulate capital via each win.⁵¹ Yet, to the extent lenders are willing to fund less established practitioners, lawyer lending has the potential to decouple these advantages. In such a world, a lawyer would not need to *earn* capital; he could simply *borrow* capital, putting more money in less experienced lawyers' hands. Ripple effects from this change could be profound.

The broader distribution of capital may first disrupt practitioner referral networks. As it stands, via practitioner referral networks, complex cases often work their way up the food chain to more expert (and better financed) practitioners. Part of what fuels these referral networks, it seems, is a recognition on the

48. A civil plaintiff's "reservation price" is the minimum amount that he would accept to forego trial and settle the outstanding claim.

49. This analysis assumes that nonrecourse lenders, once they have invested in a particular case, resist the temptation to influence litigation strategy (as they insist they do). For insight on the "vanishing trial," see generally Yeazell, *supra* note 40.

50. This \$140,000 fee on a loan of \$100,000 reflects the advertised cost of a loan by Excalibur for a term of 12 to 18 months. See *Attorney Funding*, *supra* note 30.

51. See KRITZER, *supra* note 45, at 246 ("The firms that are well endowed with resources almost invariably also have the expertise to handle complex or difficult cases.").

part of lower-echelon practitioners that they cannot afford to invest in complex cases at necessary levels.⁵² Researchers Stephen Daniels and Joanne Martin, for example, have interviewed a Texas lawyer who routinely refers medical malpractice cases to more experienced practitioners. He explained:

We don't take any medical malpractice cases Number one, they are way too technical for our expertise. . . . They are also very, very expensive to handle. Easily you can spend \$100,000 without blinking on those kinds of cases and typically we don't have that kind of cash lying around⁵³

The intriguing question is: If lenders start to shoulder the financial burden of medical malpractice litigation, might this lawyer decide to *develop* medical malpractice expertise in order to keep these technical and costly, but potentially lucrative, claims in-house? Might, in other words, more low-echelon lawyers cling to complex claims, rather than handing them off to higher-echelon providers?⁵⁴ Interestingly, some lenders seem to have considered this possibility—and now affirmatively make it a selling point. For example, Counsel Financial's CEO has been quoted as saying: "We're there now, so they don't have to refer out and lose 60 percent to 80 percent of their fees."⁵⁵ And an attorney testimonial on the lender's website similarly provides: "With a line from Counsel Financial, I never have to worry about referring large cases. . . . I have the financial power to stay in charge of all my cases and receive the entire fee."⁵⁶

The status quo also involves the concentration of certain complex cases in experienced lawyers' hands. By 1985, for example, ten law firms accounted for one-quarter of all asbestos claims. A decade later, by 1996, the top ten firms had tightened their grip, accounting for three-quarters of all new asbestos claims then filed.⁵⁷ Even more recently, in 2001, Herbert Kritzer observed that "[t]he plaintiffs' firms with large bankrolls have a capability to dominate the market for profitable

52. See Sara Parikh, *Professionalism and Its Discontents: A Study of Social Networks in the Plaintiff's Personal Injury Bar 79* (May 10, 2001) (unpublished Ph.D. thesis, University of Illinois at Chicago) (suggesting that many low-echelon practitioners refer medical malpractice cases to others because the cases are too expensive to litigate in-house).

53. Daniels & Martin, *supra* note 5, at 28 (second alteration in original).

54. To be sure, even in the absence of lawyer lending, some low-echelon lawyers refuse to relinquish complex claims. See Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 862–65 (2011).

55. Epstein, *supra* note 28 (internal quotation marks omitted).

56. Testimonial for Counsel Financial by Robert C. Sullivan of Sullivan, Morgan, and Chronic, Kansas City, Missouri, COUNS. FIN., <http://attorneylending.com/endorsements/testimonials> (last visited July 3, 2013).

57. STEPHEN J. CARROLL ET AL., *ASBESTOS LITIGATION* 24 tbl.3.1 (2005).

cases in a way that was not previously possible.”⁵⁸ Yet if lenders fund less-proven players, new sources of capital may jeopardize preeminent firms’ dominance; we might see more players equipped to handle complex cases on the plaintiffs’ side.⁵⁹

Assuming the above predictions are correct, what then? How might fewer referrals and less concentration affect the PI marketplace? Many outcomes are possible, but two seem most likely: We might, somewhat paradoxically, witness expanded access to justice but a negative effect on the evolution of substantive law.

In terms of expanding access, we know that elite lawyers turn down the vast majority of prospective clients who approach them seeking legal representation.⁶⁰ We also know that this selectivity makes it difficult for some accident victims (and particularly those injured by negligent healthcare providers or defective products) to find competent counsel and initiate even meritorious claims.⁶¹ If lawyer lending encourages more attorneys to accept complex cases, however, the legal access problem that plagues certain segments of the tort marketplace might be ameliorated.

Prospects for substantive law development appear less bright. As noted, traditionally, plaintiffs’ lawyers are able to finance complex cases only after notching a number of victories. The lawyer lending industry may change that. It may give even inexperienced lawyers the wherewithal to take complex cases to court. Once there, these inexperienced lawyers may be more apt to stumble. And these stumbles can be problematic. They obviously will hurt the lawyer’s instant client. Additionally but less obviously, because inept lawyering may create unfavorable precedent, and because a low trial verdict is apt to depress settlements forged in

58. Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs’ Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 233 (2001); see also Erichson, *supra* note 15, at 129 (“There has been a concentration of power within the mass tort plaintiffs’ bar.”).

59. See GEOFFREY MCGOVERN ET AL., RAND CTR. FOR PUB. LAW & POL’Y, THIRD-PARTY LITIGATION FUNDING AND CLAIM TRANSFER: TRENDS AND IMPLICATIONS FOR THE CIVIL JUSTICE SYSTEM 19 (2010), http://www.rand.org/content/dam/rand/pubs/conf_proceedings/2010/RAND_CF272.pdf (summary of remarks by Stephen Yeazell) (“Third-party funding has the potential to make some smaller firms contenders for large cases, which may, in turn, cause increased competition with larger firms.”). It is also possible that this democratization of mass tort management is already underway—and that, when it comes to concentration, the period around 2000 was a high-water mark. See *In re Vioxx Prod. Liab. Litig.*, 802 F. Supp. 2d 740, 774–826 (E.D. La. 2011) (indicating that over ninety firms performed common benefit work in the Vioxx litigation); Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883, 924 (2007) (“[D]ozens of plaintiff firms have played at least some role in recent mass toxic torts—and scores more are seeking to do so in the future.”).

60. See Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs’ Practice in Texas*, 80 TEX. L. REV. 1781, 1789 tbl.4 (2002).

61. See Engstrom, *supra* note 8, at 41–43 (collecting sources).

that verdict's dim shadow, having inexperienced lawyers handle complex cases might disadvantage other plaintiffs as well.⁶²

CONCLUSION

Above, I speculate on a variety of changes that could follow from the expansion of lawyer lending. In conclusion, I highlight three broad insights that follow from the foregoing analysis.

First, the analysis shows that when considering lawyer lending's possible consequences (much less the consequences of alternative litigation finance in all its guises), painting with a broad brush is apt to create a distorted picture. Details matter: Will recourse or nonrecourse loans be favored?⁶³ Which lawyers will utilize these loans?⁶⁴ How carefully will lenders evaluate cases—and counsel—before investing in litigation?⁶⁵ Will lenders resist the impulse to influence lawyer decisionmaking, or will they steer cases to settlement? Will lawyers really be able to offload the cost of this capital onto their clients? Much turns on the answers to these questions. To accurately forecast lawyer lending's influence, we need more

62. For more on these dynamics, see Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1452–54 (1993) and Marc Galanter, *The Radiating Effects of Courts*, in EMPIRICAL THEORIES ABOUT COURTS 117, 121 (Keith O. Boyum & Lynn Mather eds., 1983).

63. Currently, those within the industry suggest that the nonrecourse market segment is small and probably shrinking. See Telephone Interview with Michael J. Swanson, President and CEO of Advocate Capital, *supra* note 37 (“There are very few people doing nonrecourse lending anymore. A few have tried it, but there were some folks who took big, big losses.”); see also Telephone Interview with Harvey R. Hirschfeld, President and Director of LawCash (May 16, 2013) (stating that, though LawCash used to provide nonrecourse loans to lawyers, it has discontinued the practice and further observing that participants in the nonrecourse lawyer lending market “are few and far between”).

64. My best guess is that loans will not be utilized by truly elite lawyers at the top of the professional hierarchy, as those lawyers already have adequate capital amassed from past wins. Nor will they be utilized by lawyers at the very bottom of the professional hierarchy, as the cases processed by those firms tend to be straightforward and require little in the way of out-of-pocket investment. Thus, lawyer loans are most likely to be utilized by middle-tier advocates. Accord Telephone Interview with Michael J. Swanson, President and CEO of Advocate Capital, *supra* note 37 (“Our typical client is a typical plaintiffs’ firm, so a small firm. They have one or two partners, with fewer than ten employees. They might be grossing a million and a half a year.”).

65. One could imagine a market in which recourse loans are widely available but nonrecourse loans are only available to proven practitioners. Compare Vesper & Goff, *supra* note 19, at 27 (“[C]ontingency lenders are careful about the cases they handle and the lawyers with whom they work.”), and SWANSON, *supra* note 33, at 63 (stating that contingent lenders typically “carefully evaluate the expected case value using [their] own legal counsel and will attempt to judge the odds of success, along with the anticipated timing of payout”), with Winograd, *supra* note 25 (quoting Paul B. Myers of Advocate Capital (a recourse lender) as stating that he employs no lawyers to review cases and “I underwrite like a banker would”).

information on how lenders will operate and how clients, lawyers, and lenders will interact.

The second insight follows from the first: While some have heralded the arrival of third-party litigation finance as an unqualified boon to plaintiffs, such pronouncements are premature.⁶⁶ Lawyer lending is a development that presents to plaintiffs risks, as well as benefits. Whether it will, on balance, be advantageous or disadvantageous remains to be seen.⁶⁷

The final insight returns us to Stephen Yeazell. In his influential 2001 piece, Yeazell traced how changes to the capitalization of the plaintiffs' bar had quietly "transformed civil litigation."⁶⁸ Yeazell's observation, and the foregoing analysis, both underscore the following crucial point: Seemingly small changes to actors' resources and incentives can spark profound changes in our dynamic and interconnected civil litigation environment. These changes will affect not just *how* cases are litigated but also litigation's quality and quantity—and ultimately, its direction and success.

66. See, e.g., *Comments for Panel Discussion on Moderate Stakes Litigation by Burton LeBlanc, Baron & Budd, P.C.*, ALTERNATIVE LITIG. FUNDING: A ROUNDTABLE DISCUSSION AMONG EXPERTS 1 (George Washington University Law School, May 2, 2012), available at <http://www.law.gwu.edu/News/20112012events/Documents/LeBlanc%20Submission.pdf> (“[I]t is vital to protect the right of clients and law firms of all sizes to receive third party funding. Without this vehicle, Americans cannot get the same access to justice as big corporations who have insurance companies to cover their lawsuits.”).

67. Two significant risks to plaintiffs are that lawyer lending might encourage inexperienced lawyers to litigate complex claims solo and might also be a backdoor way to increase attorney compensation at client expense. On the latter point, many lawyers may start to deduct interest from the client's share of the recovery, whereas previously, most lawyers shouldered the burden of financing. If lawyers who deduct interest do not reduce their contingency fees to account for the fact that they have shed a service they previously provided, lawyers' effective compensation is apt to rise. For more on this dynamic, see Engstrom, *supra* note 8, at 29–37.

68. Yeazell, *supra* note 1, at 217.