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# Incorporating Legal Claims

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## Abstract

*Recent years have seen an explosion of interest in commercial litigation funding. Whereas the judicial, legislative, and scholarly treatment of litigation finance has regarded litigation finance first and foremost as a form of champerty and sought to regulate it through rules of legal professional responsibility (hereinafter, the "legal ethics paradigm"), this Article suggests that the problems created by litigation finance are all facets of the classic problems created by "the separation of ownership and control" that have been a focus of business law since the advent of the corporate form. Therefore, an "incorporation paradigm," offered here, is more appropriate. "Incorporating legal claims" means conceiving of the claim as an asset with an existence wholly separate from the plaintiff. This can be done by issuing securities tied to litigation proceed rights. Such securities can be issued with or without the use of various business entities. The incorporation paradigm also opens up the possibility of applying practices of corporate governance to litigation governance.*

*Indeed, in certain previously overlooked real-world deals, creative lawyers used securities tied to litigation proceed rights as well as corporate governance mechanisms. This Article analyzes and then expands upon such instances of financial-legal innovation, suggesting how various business entities can be used to deal with the core challenges presented by the separation of owner-*

*ship of and control over legal claims: specifically, the problems of (1) extreme agency problems; (2) extreme information asymmetries; (3) extreme uncertainty; and (4) commodification.*

*In addition, this Article discusses how incorporation of legal claims can reduce various costs that litigation imposes in other transactions, such as mergers and acquisitions.*

## Introduction

The law and economics movement has revolutionized our understanding of law by placing economic cost-benefit analysis at its center. One of the achievements of this movement, for better or worse, has been the conceptual commodification of legal claims. Currently, we are witnessing one of the most breathtaking consequences of this turn in the history of legal ideas: the rise of markets in legal claims, a phenomenon also known as "litigation finance." Legal claims are being commoditized in the literal sense of the word: they are being traded like other assets.

In recent years, legal scholars, regulators, and the media have focused intensely on the visible segment of this new market: new investment firms, such as Burford and Juridica, that invest in litigation by making capital contributions covering litigation costs in return for a share of the litigation proceeds, should any be awarded (private equity litigation funding or PELF). Indeed, it was the historically unprecedented going-public of Juridica and Burford[1] that launched the media frenzy,[2] academic interest,[3] and nationwide regulatory wave that has washed over the United States in recent years,[4]

1 Caroline Binham, *Juridica Attracts Investment as the First Specialist Litigation Fund to Float in UK*, The Lawyer (Jan. 14, 2008), http://www.thelawyer.com/juridica-attracts-investment-as-the-first-specialist-litigation-fund-to-float-in-uk/130705.article; Elisa Martinuzzi, *Burford Capital Amasses 80 Million Pounds in IPO (Update1)*, Bloomberg (Oct. 16, 2009, 5:20 AM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aM4f5weps7UQ.

2 *See, e.g.*, Mark Cobley, *Sparkling Return for Buford as Litigation Investment Comes of Age*, Fin. News (Jan. 11, 2014), http://www.efinancialnews.com/story/2013-01-24/burford-capital-results-2012; Jennifer Smith, *Litigation Investors Gain Ground in U.S.*, Wall St. J., Jan. 12, 2014, http://online.wsj.com/news/articles/SB1000142405270230381970457931662113153 5960.

3 *See, e.g.*, Symposium, *The Economics of Aggregate Litigation*, 66 Vand. L. Rev. 1641 (2013) (compiling articles that had previously been presented at a conference organized by the Institute for Law and Economic Policy); Geoffrey McGovern et al., *Third-Party Litigation Funding and Claim Transfer: Trends and Implications for the Civil Justice System*, UCLA-RAND Ctr. for Law & Pub. Policy (2009), *available at* http://www.rand.org/content/dam/rand/pubs/conf_proceedings/2010/RAND_CF272.pdf (recounting the proceedings of an academic conference discussing the implications of finance on civil justice); *Clifford Symposium "A Brave New World" Focuses on Litigation Finance*, DePaul Univ. Coll. of Law (Apr. 18, 2013, 9:54 AM), http://depaullaw.typepad.com/depaul_law_school/2013/04/clifford-symposium-a-brave-new-world-focuses-on-litigation-finance.html (noting that the 19th Annual Clifford Symposium on Tort Law & Social Policy will focus on litigation financing); *Northern Kentucky Law Review Symposium Focuses on Third-Party Litigation Finance*, N. Ky. Univ. (Feb. 2, 2011), http://nku.edu/display_news.php?ID=4307 (announcing the topic of a symposium focusing on "how [litigation] financing functions and its ethical implications").

4 *See infra* note 24 and accompanying text.

even though the trade in legal claims in the United States has been ongoing for more than two decades.

Unfortunately, because of path dependence, the academic and regulatory analysis has been trapped in what I call a "legal ethics paradigm": the view that litigation finance, where legal, is an extension of the contingency fee exception to the champerty doctrine (below) and the consequent regulation of litigation finance via the champerty doctrine and the rules of lawyers' professional responsibility. This Article offers an alternative theoretical and regulatory paradigm: the "incorporation paradigm," according to which litigation finance should be understood as a pocket of the finance industry rather than an extension of the contingency fee. According to this new paradigm, commercial legal claims can and should be "incorporated" (as defined in Section A below) in order to minimize or even resolve the concerns that both proponents and opponents of litigation finance are seeking to solve through the ethics paradigm. These concerns (detailed below in Section B) center on conflicts of interest, information asymmetries, risk, and commodification (collectively, the Funding Challenges). Indeed, perhaps the most revolutionary aspect of reframing the debate in this way is that it helps reconceive of the Funding Challenges—which occupy in some form or another most of the scholarship and public debate surrounding litigation finance—as an instance of the familiar problem of the separation of ownership and control, a problem at the heart of corporate law.[5] The problem of the separation of ownership and control is the problem of understanding the survival—or in our case, the emergence—"of organizations in which important decision agents do not bear a substantial share of the wealth effects of their decisions."[6] Indeed, decision agents may even seek to line their own pockets and engage in self-dealing at the expense of the owners. Since Adam Smith first raised the problem of the separation of ownership and control in *The Wealth of Nations*[7] more than two centuries ago, the practice and law of business entities has made great strides in understanding and controlling the associated problems (though certainly not eliminating them altogether).

The theoretical argument for a paradigm shift rests on a description and analysis of deals—that have heretofore been overlooked by scholars—in which creative merger and acquisition (M&A) lawyers have incorporated legal claims, and argues that this practice can replace existing practices

5 *See* REINIER R. KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW 21–71 (2004) (discussing agency problems in corporate law and the governance structure that aims to mitigate these problems); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 301 (1983) (seeking to explain the survival of organizations characterized by separation of ownership and control and characterizing that enigma as "a problem that has bothered students of corporations from Adam Smith to Berle and Means and Jensen and Meckling").

6 Fama & Jensen, *supra* note 5, at 301.

7 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed., Modern Library 1994) (1776).

through which ownership and control of legal claims are traded, in whole or in part, in the litigation finance context.

The incorporation paradigm also calls for extending financial regulations, not the regulation of attorneys, to regulate the litigation finance industry. By better solving the Funding Challenges, the incorporation paradigm should increase both acceptance of litigation finance and liquidity of legal claims, and in turn increase access to justice.

Finally, while the argument focuses on solving problems plaguing litigation finance, incorporating legal claims has important implications in the corporate context for three reasons. First, because it reduces what I call "hidden costs," sometimes prohibitive, that litigation imposes on mergers, acquisitions, and major equity investments in certain (uncommon but important) scenarios. Second, because spinning off large litigations into Special Purpose Vehicles (SPVs) can create accounting benefits for corporations. And third, because simplifying and reducing the costs of litigation finance of large commercial claims by incorporating them may encourage corporations and governments to pursue claims that currently go unprosecuted.

Part I describes the rise of litigation finance, the ethical concerns it raises, the ethical constraints currently imposed upon it through the legal ethics paradigm, and the economic inefficiencies caused by the simultaneous over- and under-regulation of litigation funding under the legal ethics paradigm. Part II presents a set of deals in which corporations have used business entities (Delaware statutory trusts) and various types of securities to reduce the hidden costs of litigation and facilitate corporate transactions, as well as two deals where incorporation presented itself in the litigation finance context. After describing these complex and innovative deals, Part III generalizes from the deals how incorporation can minimize (or exacerbate if misused) the Funding Challenges. It then outlines a broader vision of how corporate entities other than statutory trusts can be used to solve both the problems of the hidden costs of litigation and facilitate efficient and ethical trade in commercial claims. This Article concludes with some remarks on further implications of the incorporation paradigm that can be explored in future works such as the idea of "litigation governance," modeled on corporate governance, and the question of the proper regulation of litigation finance arrangements understood as securities and, more generally, as financial products.

### *A. The Legal Ethics Paradigm and Its Limitations*

Currently, liquidity of legal claims is greatly hampered by the fact that the mechanics of claim trading are placed in a straitjacket woven out of antiquated doctrines and rules (described below) that are aimed at regulating a relationship different in kind. This legal ethics paradigm rests on a flawed analogy between the contingency attorney-client relationship and the financier-financed relationship:

> Because the similarities between attorney funding and third-party funding are extensive, most of the discourse surrounding litigation funding is

> characterized by what some economists call an "attribute substitution": a cognitive bias whereby individuals who need to make a complex judgment—here, regarding the desirability of the novel phenomenon of litigation finance—substitute that complex judgment for a more easily calculated heuristic. In our case, the easiest calculation is the desirability of contingency fees. In other words, commentators simply apply their preconceived views of contingency fees to litigation finance.[8]

The substitution is understandable. As discussed below, there are indeed important similarities between the concerns that arise in the context of the contingency attorney-client relationship and that of the funder-plaintiff, including (1) extreme agency problems (conflicts of interests); (2) extreme information asymmetries; (3) extreme uncertainty; and (4) inappropriate commodification—namely, doing away with nonmonetary relief.[9] But while contingency lawyers do provide financing, they primarily provide lawyering services. They are officers of the court, with privileges conferred by the courts and by society at large and corresponding obligations to those constituencies, and are therefore subject to an elaborate regulatory regime embodied in the codes of professional responsibility.

Conversely, funders are financiers only. The current direct and indirect regulation of litigation finance, through common law doctrines such as champerty (direct) and legal ethics (indirect) should be radically revised to reflect economic reality.[10] That reality, as the deals described below exemplify, is that sophisticated plaintiffs and funders are best understood as co-venturers—or, in other words, as business partners (as the term "partners" is used colloquially). Consequently, they can adopt existing deal structures, use legal entities and the regulations that govern them, as well as contractual

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8 Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1293 (2011) (footnote omitted).

9 These problems as they present themselves in litigation finance have been discussed at length in Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455 (2012) (arguing that litigation finance is analogous to venture capital because it is similarly characterized by extreme agency costs, extreme information asymmetry, and extreme risk, for similar reasons, and that these problems can be minimized by adapting solutions from venture capital). A detailed discussion of the specific conflicts of interests created by the tripartite attorney-client-funder relationship is available in Steinitz, *supra* note 8, at 1294.

10 This, in turn, implies a normative argument that litigation finance is a positive development. For normative arguments favoring litigation finance, see, for example, Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2795 (2012) (arguing that "the time has come to rethink the U.S. legal profession's rules and structures that were designed to narrow exposure to, and influence by, lawyers"); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 668–696 (1995) (examining the costs and benefits of lawyer-funded and nonlawyer-funded litigation). Reasonable minds certainly differ, however. Views opposing litigation funding include, for example, John Beisner et al., *Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States*, U.S. CHAMBER FOR LEGAL REFORM, Oct. 2009, at 4–11, *available at* http://legaltimes.typepad.com/files/thirdpartylitigationfinancing.pdf (discussing "the problems inherent in third-party litigation financing").

mechanisms including corporate governance mechanisms developed through the practices and laws of business entities in order to avail themselves of built-in solutions to the Funding Challenges.

These can and should replace the ethics paradigm which both over- and under-regulates litigation finance. Legal ethics overregulates in that it leads to the prohibition of joint ventures (between plaintiffs and funders) that most would find inoffensive, indeed facilitative of access to justice as can most clearly be seen in "David v. Goliath" disputes between tech startups with no resources to pursue patent infringements, on the one hand, and established industry incumbents that infringe, on the other. Legal ethics underregulates in that it does nothing to deal with the problems of *finance*, e.g., by requiring that funders be adequately capitalized, registered, and licensed; mandating appropriate disclosures to the investors in PELF; controlling for the moral hazard that creating litigation-backed securities might create in the future; imposing fiduciary duties and duties to fund; and more.

In short, expanding the practice of incorporating commercial legal claims beyond the M&A context to the litigation finance context can help minimize or even solve some of the key problems identified by scholars of litigation finance. Once such problems are addressed, litigation finance—currently suspect by lawyers, judges, legislators, and investors—may face less resistance and consequently expand, allowing more meritorious claims to be litigated than otherwise would be and solving the problem of the value destruction caused to plaintiffs by meritorious claims that go unremedied. Corporations, which are generally conservative about suing, are currently experiencing value destruction in the form of unprosecuted claims. To the extent their claims are not prosecuted because of the difficulty in ascertaining value, the difficulty in ascertaining the likelihood of success in prosecuting meritorious claims, negative accounting treatment during claim conduct, unfavorable tax treatment, and because of the cost of the capital that would be used to prosecute a claim (including opportunity costs), a more vibrant and liquid litigation finance market may provide access to justice. Sovereigns, domestic as well as foreign, are another type of sophisticated owner of large-scale claims that face the same kind of analysis when deciding whether to pursue litigation. Additionally, in the case of sovereigns, such decisions are subject to public scrutiny and using public funds to pursue speculative litigation may not be a popular decision. Here, the value destroyed from having to forgo litigation is a foregone public resource.

Recognizing the full commodification of claims created by their incorporation and a liquid market in claims, I draw one major limit: I exclude from consideration the incorporation of noncommercial claims.[11] Commercial

11 American litigation finance serves two different markets. One is consumers bringing personal claims sounding, e.g., in torts, matrimonial, or workers' compensation law, who need bridge financing while their attorney delivers a settlement or judgment. The other is corporations, many repeat players, that want the money to pay the litigation's expenses so they can free up the capital for operations, or that are faced with a claim too big for them to bring without financing. The public policy concerns are quite different, in

claims, more than all others, involve damages that can be remedied through monetary compensation. When a claim's natural remedy is monetary, commodification does not distort justice. In all other instances, however, the drive toward commodification can distort justice. While this Article will identify ways to ameliorate this dynamic through deal structure at bottom, injuries that call for nonmonetary remedies need to be sheltered from commodification. Thus for the purposes of cleanly demarcating the incorporation of claims and its benefits, I exclude noncommercial claims.

### B. *Incorporation of Legal Claims*

The market in legal claims is much vaster and older than the discourse on commercial litigation finance recognizes. As this Article documents, long before the emergence of PELF, companies advised by creative lawyers have experimented with trading in legal claims by incorporating them. Specifically, by "incorporation" of a claim, I am referring to a practice of giving the claim a legal existence separate from the plaintiff, thus making it an asset that can be sold. There are two archetypical ways to incorporate claims, which I will call loose and strict.

"Loose incorporation" means embodying the value of the litigation in a security, which, until claim resolution, derives value solely from the expected value of the litigation and at claim resolution has a fixed value that is conveyed to the security holders. Placing the claim in the "corpus" of a security is "incorporation" in a loose, literary sense only. "Strict incorporation" involves creating an SPV to embody the claim and/or its proceeds and is a literal usage of "incorporation," though it is not intended to connote that corporations are the only or even most appropriate legal entities for this purpose. When strictly incorporating, the SPV may issue securities, but that is not a definitional constraint.

Claim incorporation can address the issues raised by separation of ownership and control in two basic ways: by contract and by the statutory and common law that come with the different forms of SPV. Regardless of which of the possible forms the incorporation takes, claim incorporation forces the transparent allocation of ownership and control as people will not buy a litigation-backed security without disclosure as to how the litigation will be managed. Even without a security, SPVs by their nature require structuring the funder-plaintiff-claim relationship.

Examples of both loose and strict incorporation are discussed in Part II. Nearly all of the examples are of deals done in the 1990s to solve merger-pricing problems created by litigation. In those deals the claims were so large and hard to value that the parties could not agree on what the target

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that consumers have less bargaining power and sophistication and therefore need more protection; personal claims are not always resolvable with cash alone, and the contracts involved are totally different. While consumers can enter form contracts, commercial claims are always negotiated deals. For a review of consumer lending literature, see *infra* note 18.

was worth. So the target spun off the value of the claim to its shareholders, and the deal priced without consideration for the claim. The spun-off securities traded on the NASDAQ[12] (for the most part), and thus the target's shareholders were able to realize immediate value and the pricing problem was solved by the market's pricing of the shares. That, in turn, allowed strangers to the claim to own the right to some claim proceeds. Claim incorporation was born.

While most of the deals arose in the M&A context, each explicitly contemplated the possibility of issuing additional securities to finance the litigation and their structures are well-suited for usage directly for litigation finance.[13] In addition, two other examples of strict incorporation come directly from the litigation finance context. One was contractually agreed to but apparently never created. The other came about in the legally distinctive bankruptcy context, and the claim's incorporation in that case was inadvertent rather than intentional. It is appropriate to speak of that claim as incorporated simply because the facts leading to the bankruptcy so stripped the company of value that its sole remaining asset was its multibillion dollar claim. Importantly, that litigation finance deal involved the formal allocation of ownership and control through the medium of both the plaintiff's corporate form and by contract.

## I. Litigation Finance as a Square Peg in a Round Hole and the Inhibition of Liquidity in Legal Claims

### A. *The Rise of Litigation Finance and the Liquidity in Legal Claims*

Recent years have seen an explosion of academic interest in commercial litigation funding, which is regarded as a new phenomenon in the United States.[14] The timing of the public awareness in academia and in the finan-

12 *See infra* Part III. In addition, some litigation finance firms are publically traded: the Australian IMF is traded on the Australian exchange, and Juridica and Burford are traded on London's AIM exchange. John O'Doherty, *Litigation Fund Poised for AIM Debut*, Fin. Times (London), Oct. 17, 2009, at 14. As such, conceptually, their shares are securities of pools of litigations. Interestingly, Professor Stephen Yeazell used the idea of a "NASDAQ for lawsuits" in his argument in favor of pricing transparency in the market of civil suits' settlements. Stephen C. Yeazell, *Transparency for Civil Settlements: NASDAQ for Lawsuits?, in* Confidentiality, Transparency, and the U.S. Civil Justice System 143 (Joseph W. Doherty et al. eds., 2012).

13 Whether it is possible to do an IPO, rather than a spinoff, of litigation proceed-backed securities is an open question, as underwriters may reject participating in such a deal. However, securities could still be privately placed. *See* Richard Painter, *The Model Contract and the Securities Laws, Parts I–IV*, A Model Litig. Fin. Contract (July 15–25, 2013), http://litigationfinancecontract.com/tag/richard-w-painter/.

14 *See, e.g.*, Steven Garber, *Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns*, RAND Inst. For Civil Justice (2010), http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf; Stephen Gillers, *Waiting for Good Dough: Litigation Funding Comes to Law*, 43 Akron L. Rev. 677 (2010); Deborah R. Hensler, *Financing Civil Litigation: the US Perspective*, *in* New Trends in Financing Civil

cial, trade, and general media is probably due to the launch of two publically traded litigation finance firms: Juridica in 2008 and Burford in 2009.[15] It appears, however, that some private entities have been funding commercial cases in the United States for at least a couple of decades, either ad hoc, in the case of certain hedge funds, or through specialized private firms that simply did not catch the eye of the financial media or the academy.[16] Since the high-profile launch of Juridica and Buford, a number of privately held litigation firms have emerged including Bantham Capital, BlackRobe Capital, Fulbrook Capital, Themis Capital, and Gerchen Keller Capital LLC to name a few.[17]

Moreover, the current commercial litigation funding industry, variously referred to as third-party funding, alternative litigation funding, litigation investment, and more, was preceded by a number of closely related practices. The first wave of litigation funding, broadly defined, included the law lending industry, also known as consumer litigation funding, and encompassed the financing of personal claims such as personal injury and workers' compensation.[18] Also included in this wave was the rise of the so-called "IP trolls";[19] a market in bankruptcy claims (corporate debt);[20] a market in International Centre for Settlement of Investment Disputes (ICSID) awards (sovereign debt);[21] and the rise of various forms of alternative funding—including that of class actions—in the pioneering jurisdictions of the United

LITIGATION IN EUROPE 149 (Mark Tuil & Louis Visscher eds., 2010); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 73 (2010).

15 *See* BURFORD CAPITAL, http://www.burfordcapital.com/ (last visited Dec. 31, 2014); JURIDICA ASSET MGMT., http://www.juridica.co.uk/about.php (last visited Dec. 31, 2014).

16 This is based on communications the author received in association with her web-based research project, A MODEL LITIGATION FINANCE CONTRACT, http://litigationfinancecontract.com.

17 *See* BENTHAM ASSET MGMT., http://www.benthamam.com.au (last visited Dec. 31, 2014); FULBROOK CAPITAL MGMT., LLC, http://www.fulbrookmanagement.com (last visited Dec. 31, 2014); GERCHEN KELLER CAPITAL, LLC, http://www.gerchenkeller.com (last visited Dec. 31, 2014); THEMIS LEGAL CAPITAL, http://www.themislc.com (last visited Dec. 31, 2014).

18 *See* Susan Lorde Martin, *Financing Plaintiffs' Lawsuits: An Increasingly Popular (and Legal) Business,* 33 U. MICH. J.L. REFORM 57, 79–83 (1999) (describing litigation support firms); Susan Lorde Martin*, Litigation Financing: Another Subprime Industry That Has a Place in the United States Market,* 53 VILL. L. REV. 83, 86–87 (2008) [hereinafter Martin, *Litigation Financing*] (giving background information about the litigation financing industry); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 67–68 (2004) (same); Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 618–24 (2007) (describing what litigation-funding companies are).

19 *See, e.g.*, Peter N. Detkin, *Leveling the Patent Playing Field*, 6 J. MARSHALL REV. INTELL. PROP. L. 636, 636 (2007) (discussing the market in patent claims).

20 Robert D. Drain & Elizabeth J. Schwartz, *Are Bankruptcy Claims Subject to the Federal Securities Laws?*, 10 AM. BANKR. INST. L. REV. 569, 571–75 (2002) (discussing the market in bankruptcy claims).

21 *See generally* PIA EBERHARDT ET AL., PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM (Helen Burley

Kingdom and Australia.[22] Lastly, related financial products such as litigation insurance for plaintiffs and after-the-event insurance for defendants have been available in foreign jurisdictions for some time including, respectively, Germany and the United Kingdom.[23]

The first wave of litigation finance has led to some regulatory efforts—with state-level legislation[24] and some investigations by state attorneys general[25]—as well as an expansion of the market. This expansion included new "asset classes" such as divorces[26] and the rise of dedicated commercial funders (including publically traded ones) described above.

With public awareness and attendant growing demand for litigation funding, as well as a lot of research and development of new financial products by existing and startup litigation funding firms, we are now witnessing a third wave of litigation funding in the United States. One development characteristic of this third wave is that commercial funders are emboldened to seek overt control and not mere influence over the litigations they invest in.[27] Under this revised business model, funders seek to enhance the value

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ed., 2012), *available at* http://www.tni.org/sites/www.tni.org/files/download/profitingfrominjustice.pdf (discussing the market in ICSID claims).

22 *See* Civil Justice Council, Improved access to justice—Funding Options & Proportionate Costs 53–66 (2007), *available at* http://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/costs-and-funding/ (describing the recent acceptance of third-party litigation funding in Australia and the United Kingdom). *See generally* Hensler, *supra* note 14 (providing a transatlantic perspective on financing civil litigation).

23 Marie Gryphon, *A Loser-Pays Model Would Make the Civil Courts System a Winner*, Manhattan Inst. (Dec. 5, 2008), http://www.manhattan-institute.org/html/miarticle.htm?id=3489#.VE3XEovF9CM.

24 Legislation to regulate at least some types of litigation funding is currently pending before three state legislatures—Indiana, Oklahoma, and Mississippi. S.B. 378, 2013 Gen. Assemb., Reg. Sess. (Ind. 2013); H.B. 503, 128th Leg., Reg. Sess. (Miss. 2013); S.B. 2378, 128th Leg., Reg. Sess. (Miss. 2013); S.B. 1016, 54th Leg., 1st Sess. (Okla. 2013). A 2010 Delaware House Bill passed out of committee, but went no further. H.B. 422, 145th Gen. Assemb. (Del. 2010). Three other states—Maine, Ohio, and Nebraska—have already passed legislation regulating litigation financing. Me. Rev. Stat. Ann. tit. 9-A, §§ 12-101 to -107 (2014); Ohio Rev. Code Ann. § 1349.55 (West 2014); Neb. Rev. Stat. Ann. §§ 25-3301 to -3309 (West 2014).

25 Several consumer financing companies doing business in New York have entered into a stipulation with the Attorney General of New York that requires the law lending firms that are members of the American Legal Finance Association to follow certain guidelines. *See* Assurance of Discontinuance Pursuant to Executive Law § 63(15) at 3, Att'y Gen. of the State of N.Y., *In re* Levine Leichtman Capital Partners, (Investigation No. 2009-124) (announcing agreement whereby Levine Leichtman vows to follow the Reform Code of Conduct stipulated by the Attorney General).

26 *See* Binyamin Appelbaum, *Taking Sides in a Divorce, Chasing Profit: Firms Cover Legal Cost for Cut of Winnings*, N.Y. Times, Dec. 5, 2010, at A1 (discussing the practice of funding divorce proceedings in exchange for a share of the winnings).

27 *See* Selvyn Seidel, *Time to Pass the Baton?*, Fullbrook Mgmt. (Nov./Dec. 2012), http://www.fulbrookmanagement.com/time-to-pass-the-baton (discussing the control doctrine in the context of third-party funding). Sean Coffey, the principal of the litigation funding firm BlackRobe Capital Partners (now dissolved) termed this "litigation 2.0." His

of their investment by actively managing them, as is done in more traditional asset classes. Another characteristic is that new market entrants have positioned themselves as providing methods of corporate finance for businesses that could otherwise afford to bring claims,[28] and incumbent market participants have added such products to their offerings.[29] Other new financial products include law firm financing[30] and defense financing.[31]

### B. *The Concerns Raised by Litigation Finance*

Most of the literature relating to litigation funding has focused on the ethical challenges and archaic regulations that stand in the way of litigation funding. Such regulations prohibit litigation funding in certain states, and in others, raise its costs and constrain its users into financial arrangements with convoluted structures that operate in a legal gray zone. Concern regarding litigation funding emanates, in part, from the historic perception that litigation is a necessary evil to address personal harms (termed "authentic claims").[32] The corollary to this perception is a historic distaste of officious intermeddling by nonparties, especially for a profit.[33] The broadest prohibi-

explanation for the shift is that when Juridica and Burford sought to go public, their deal advisors were unsure that funding which involves control of the litigation is permissible and so those entities sought a more conservative approach than the privately held entities that followed in their footsteps. Sean Coffey, Commentator, Black Robe Capital Partners, LLC, Address at the Institute for Law & Economic Policy 19th Annual Symposium, The Economics of Aggregate Litigation: Rights & Obligations in Alternative Litigation Financing (Apr. 12, 2013).

28 *See generally What We Do*, GERCHEN KELLER CAPITAL, http://www.gerchenkeller.com/what-we-do/overview/ (last visited Dec. 31, 2014) (stating that the company "provides strategic capital to sophisticated companies and the leading law firms that represent them"). For plaintiff services specifically, see *Benefits to Claimholders*, GERCHEN KELLER CAPITAL, http://www.gerchenkeller.com/what-we-do/benefits-to-sharehoders/ (last visited Dec. 31, 2014) (listing and describing benefits).

29 As this Article goes to print, an innovative form of funding, in which the funding firm provided a plaintiff with a conventional recourse loan with a contingent right to receive a portion of an arbitration award, was announced. The funds were spent on the plaintiff-corporation's business needs, rather than litigation costs. *See Burford Capital Receives $26 Million from Innovative Corporate Debt Facility Backed by Arbitration Claim*, BURFORD CAPITAL (June 3, 2014), http://www.burfordcapital.com/wp-content/uploads/2014/06/2014-06-03-BUR-Rurelec-press-release-Final.pdf; Jan Wolfe, *Burford Touts 73% Return on Arbitration Case*, THE LITIG. DAILY (June 3, 2014), http://www.litigationdaily.com/id=1202657892304/Burford-Touts-73-Return-on-Arbitration-Case?slreturn=20141030170316.

30 *For Law Firms*, BURFORD CAPITAL, http://www.burfordcapital.com/how-we-help/for-law-firms/ (last visited Dec. 31, 2014); *Services for Law Firms*, GERCHEN KELLER CAPITAL, http://www.gerchenkeller.com/what-we-do/service-for-law-firms/ (last visited Dec. 31, 2014).

31 Gerchen Keller Capital describes its defense products at *Solutions for Defendants*, GERCHEN KELLER CAPITAL, http://www.gerchenkeller.com/what-we-do/defense-side-solutions/ (last visited Dec. 31, 2014).

32 *See* Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 62–63 (2011).

33 *See, e.g.*, BLACK'S LAW DICTIONARY 262 (9th ed. 2009) (defining "champerty" as "[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the inter-

tion designed to avoid such intermeddling and to ensure that only authentic claims are brought to the courts is the doctrine of champerty, which bars profiting from financing lawsuits and related (though functionally different) prohibitions against claim assignment.[34] Champerty and assignment limits can apply regardless of claim type, serving to prohibit both commercial and consumer claims.[35]

Underlying this broad bar are concerns about claim ownership, which is reflected in a focus on whether the funder has received control of the litigation.[36] Much of legal ethics can be explained as creating safeguards that ensure that the client, not the lawyer (especially pertinent in the case of contingency lawyering), ultimately controls the claim. For example, the Model Rules of Professional Responsibility specifically carve out permission for attorneys to make day-to-day decisions;[37] this carve-out is necessary as a deviation from the rule that the client ultimately controls her case. In contrast, only the client can make key decisions, with the most privileged decision being the decision to settle, including the option to abandon the litigation.[38] Because litigation funding has generally been discussed as an extension of the contingency fee—the best known and the most important of the excep-

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meddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds").

34 *See* N.Y. Judiciary Law § 489 (2014) (prohibiting buying claims).

35 Each state's doctrine varies, and certain exceptions can be made. For example, New York allows the free assignment of claims that are sufficiently large or of certain types. *See* Anthony Sebok, *Incorporating the Claim*, A Model Litig. Fin. Contract (Feb. 4, 2013), http://litigationfinancecontract.com/incorporating-the-claim/ (describing the indirect way the New York statute defines permissible assignments).

36 A Texas appellate court listed factors potentially creating a problematic transfer of control: "[P]ermitting appellees to select counsel, direct trial strategy, or participate in settlement discussions, [or] . . . to look to . . . trial counsel directly for payment." Anglo-Dutch Petrol. Int'l v. Haskell, 193 S.W.3d 87, 104 (Tex. App. 2006). A Florida appeals court concluded a funder had so much control of the litigation that it was the real party in interest. Abu-Ghazaleh v. Chaul, 36 So. 3d 691, 693–94 (Fla. Dist. Ct. App. 2009); *see also* *Campbells Cash & Carry Pty. Ltd. v Fostif Pty. Ltd.* (2006) 229 CLR 386 (Austl.) (landmark Australian case in which the Australian High Court permitted the funder to have broad control); Arkin v. Borchard Lines Ltd., [2005] EWCA (Civ) 655 (Eng.) (equally groundbreaking English Court of Appeals decision, in which it established that third-party funding is acceptable, even desirable, to increase access to justice, but fell short of sanctioning the transfer of control to funders); N.Y.C. Bar Ass'n, Formal Opinion 2011-02: Third Party Litigation Financing (2011), *available at* http://www.nycbar.org/index.php/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02 [hereinafter N.Y.C. Bar Opinion] (noting that "a client may agree to permit a financing company to direct the strategy or other aspects of a lawsuit," including whether and for how much to settle, which similarly acknowledges the potential value of funder involvement but leaves it to private contracting rather than trying to interpret the law as allocating any control to the funder).

37 Model Rules of Prof'l Conduct r. 1.2(a) (2007) (authorizing the attorney in part to "take such action on behalf of the client as is impliedly authorized to carry out the representation").

38 *Id.* (saying in part that "[a] lawyer shall abide by a client's decision whether to settle a matter").

tions to champerty—there is a natural tendency to assume that funders should similarly have no control over the litigation generally and over settlement specifically (though influence is permissible).[39]

A related concern is conflicts of interest, as the introduction of a financier into the attorney-client relationship can produce conflicts or reinforce existing ones.[40] In addition to conflicts that are similar to those that exist between contingency fee lawyers and their clients—such as incentives to settle early in order to maximize profits across a portfolio rather than in a particular case, incentives to prioritize reputation over monetary relief, and incentives to prioritize monetary relief over nonmonetary relief[41]—interesting examples of conflicts unique to the funder-client relationship include those that may arise if a funder decides to securitize its pool of litigations[42] or to invest on both sides of the "v." Conflict concerns are often also concerns about control. Instead of overt control, like formal settlement authority or the right to dictate choice of counsel, conflicts can generate hidden forms of control. For example, any repeat-play relationship between funder and the litigation counsel gives funder informal but significant influence over the conduct of the case.

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39 ABA Comm'n on Ethics 20/20, White Paper on Alternative Litigation Financing 26 (2011) (drft.), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111019_draft_alf_white_paper_posting.authcheckdam.pdf [hereinafter ABA White Paper] (noting that lawyers should not allow alternative litigation funders to influence their professional judgment when it comes to litigation strategy); *see* N.Y.C. Bar Opinion, *supra* note 36 (noting that the company may not influence the judgment of a lawyer when it comes to litigation strategy but may have a say in settlement offers). *But cf.* Steinitz, *supra* note 9, at 509 (arguing that sophisticated plaintiffs in commercial cases should be allowed to sell control in exchange for a control premium).

40 *See* Steinitz, *supra* note 9, at 481–82 (noting the conflicts of interest that arise in the triangular attorney-client-funder relationship); Steinitz, *supra* note 8, at 1291–92, 1323–25 (noting that "conflicts between an attorney's interest to maximize fees and those of the financier to do the same" may arise). Specifically, see N.Y. Rules of Prof'l Conduct r. 1.2(d), 1.6(a), 1.7(a), 1.8(e), 1.8(f), 2.1, 2.2, 5.4(c) (2009) (various rules governing attorney-client relations, including rules about attorneys' compensation). *See generally* Model Rules of Prof'l Conduct r. 1.0(e) (informed consent); *id.* r. 1.6–1.11 (confidentiality of information; conflict of interest: current clients, specific rules; duties to former clients; imputation of conflicts of interest: general rules, special conflicts of interest for former and current government officers and employees); *id.* r. 2.1 (counsel as "advisor"); *id.* r. 2.3 (counsel's evaluation of a matter for use by a third party). These are the rules addressed in the New York City Bar's formal 2011 opinion on the ethics of third party litigation finance. *See* N.Y.C. Bar Opinion, *supra* note 36. The American Bar Association has issued a draft opinion on the ethics of third party litigation financing, discussing the practice in light of the model rules. *See* ABA White Paper, *supra* note 39.

41 Herbert M. Kritzer, Risks, Reputations, and Rewards 9–16 (2004) (applying modern portfolio theory to contingency fee practice and, among other things, analyzing the conflicts that a *portfolio* of contingency fee cases creates); Steinitz, *supra* note 8, at 1312–18 (analyzing the effects of portfolio management on litigation finance).

42 For an analysis of the conflicts that may arise if funders ever securitize litigation, see Steinitz, *supra* note 8, at 1312.

As is already implied, litigation funding both affects and is affected by attorneys' ethics. Therefore, attorneys' professional responsibility duties function as indirect regulation of litigation funding. Like authentic claim issues, one such duty is a broad bar: the prohibition on fee-splitting (that is, splitting the fee between a lawyer and a nonlawyer).[43] This prohibition prevents business models that make economic sense,[44] and it distorts contractual relationships among lawyers, plaintiffs, and funders. The same is true of the prohibitions on the unauthorized practice of law[45] and on multidisciplinary practices (i.e., the practice of law and other professions, such as accounting, in a single firm).[46] Each of these in isolation and in combination means, for example, that finance or accounting specialists cannot partner up with lawyers in a single firm that engages in the practice of law. (However, litigation finance firms are firms in which former attorneys partner up with such finance specialists. They must therefore be careful not to overstep the bounds and engage in the practice of law.)[47]

Another set of ethical regulations again relates to control: an attorneys' ethical duties to exercise independent judgment,[48] free from funder influence, and to zealously and loyally represent their clients even if it means being in conflict with the funder.[49] These obligations, combined with the fee-splitting prohibition, for example, limit a direct engagement between the funder and the attorney for the financing of litigation and require the funder to contract directly with the client. Finally, attorneys' ethical duties also limit or prohibit specific financial arrangements between the attorney and funder such as paying referral fees.[50]

In addition to industry-wide challenges such as champerty and attorney ethical duties, other doctrines challenge the terms of individual deals or deal

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43 Model Rules of Prof'l Conduct r. 5.4(a).

44 Victoria Shannon, *The Funder as Co-Counsel: A Glimpse into the Future of Law Firm Ownership*, A Model Litig. Fin. Contract (Mar. 11, 2013), http://litigationfinancecontract.com/the-funder-as-co-counsel-a-glimpse-into-the-future-of-law-firm-ownership/.

45 Model Rules of Prof'l Conduct r. 5.5.

46 *See* Shannon, *supra* note 44 (noting that only attorneys can own law firms).

47 The line can be blurred the more financiers seek to be active funders who monitor and actively seek to enhance the value of their investment. *Compare* Maya Steinitz, *Funders as Lawyers*, A Model Litig. Fin. Contract (Mar. 13, 2013), http://litigationfinancecontract.com/funders-as-lawyers/, *with* Edward A. Reilly Jr., *Funders as Lawyers: A Response*, A Model Litig. Fin. Contract (Mar. 18, 2013), http://litigationfinancecontract.com/funders-as-lawyers-a-response/, *and* Maya Steinitz, *Funders As Fiduciaries*, A Model Litig. Fin. Contract (Mar. 20, 2013), http://litigationfinancecontract.com/funders-as-fiduciaries/ (presenting a back-and-forth discussion between scholars on the role of lawyers as funders).

48 Model Rules of Prof'l Conduct r. 5.4.

49 *Id.* r. 1.3 cmt. 1.

50 *See* Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 Iowa L. Rev. 711, 736–37 (2014) (discussing referrals and repeat play between funders and attorneys).

types, namely the doctrines of usury,[51] unconscionability,[52] and abuse of process.[53] All but the last of these doctrines focus on potentially exploitative financing terms, and as a general matter are raised by consumers rather than plaintiffs involved in the large commercial deals conducted pursuant to bespoke contracts. Nonetheless, when a commercial plaintiff seeks to invalidate a deal because it does not like the financing terms in hindsight—after the claim has been resolved—such arguments have come up.[54]

A final set of concerns arising from litigation finance include the pressure to commodify claims by resolving them all with money, as opposed to resolution via injunctive or other nonmonetary relief.[55] Again, underlying the tension is the issue of claim control or influence; if the funder has none there is no pressure to commodify the claim. Claim commodification reflects perhaps the purest tension between the justice and economic/finance models of litigation and is the reason why financing of certain categories of claims, e.g., torts or claims arising under public international law, should proceed with great caution and may require different regulation than financing of commercial claims.

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In sum, path dependency—a path focused on avoiding champerty and influenced by the philosophy that there is something vaguely distasteful[56] about litigation funding—has obscured a simple fact. The fact is that some plaintiffs have come to regard their claims as assets they wish to monetize—

51 *See* Martin, *Litigation Financing*, *supra* note 18, at 86–87 (noting that the prohibition on usury "has an ancient history" and presents a pitfall for litigation financing firms).

52 Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 643 (2007) ("The contract defense of unconscionability provides another basis upon which to challenge the validity of [litigation loan] agreements.").

53 *See* LISA BENCH NIEUWVELD & VICTORIA SHANNON, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 41 (2012) (discussing the abuse of process doctrine).

54 S & T Oil Equip. & Mach., Ltd. v. Juridica Invs. Ltd., No. H-11-0542, 2011 WL 864837 (S.D. Tex. Mar. 10, 2011), is an example of a financed large commercial claim in which a remorseful buyer—the plaintiff—tried to invalidate the financing arrangement. *See* Anglo-Dutch Petroleum Int'l, Inc. v. Smith, 243 S.W.3d 776, 779 (Tex. App. 2007) (noting the arguments made by the plaintiff that the funding was a usurious loan, or an unregistered (and thus invalid) security, or void as against public policy); Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 95–105 (Tex. App. 2006) (analyzing usury, unregistered securities, and public policy arguments).

55 *See infra* Part III.

56 *See* Michael Herman, *Fear of Third Party Litigation Funding Is Groundless*, TIMES (London) (Oct. 25, 2007, 1:28 PM), http://www.thetimes.co.uk/tto/law/article2210239.ece ("Detractors [of third party litigation funding feel] . . . that there is something distasteful, some say unethical, about a third-party that has no involvement in a legal dispute being allowed to profit from it."). This is the notion underlying Sebok, *supra* note 32, at 62; *see also* W. Bradley Wendel, *Alternative Litigation Finance and Anti-Commodification Norms*, 63 DEPAUL L. REV. 655, 657 (2014) (theorizing the "'ick factor' that is often cited in discussions of [alternative litigation finance]").

i.e., sell in whole or in part.[57] To the extent that they wish to sell parts of the asset they are bringing in *business partners*. Business partners are a known beast: they are allowed to contract for control, they are allowed to participate in the management of their investment and the underlying asset, and in certain circumstances they owe and are owed fiduciary duties (if structured as a partnership) or at least a duty of good faith.[58] They must avoid self-dealing, are generally subject to the various laws and doctrines that address conflicts of interest, and they can request to review books and records, and more.[59]

In other words, there is an entire area of law, as law students learn as soon as they commence their legal education, that has evolved during modern times, since the advent of limited liability, to deal with these kinds of commercial relationships: the law of business entities. There is no good reason to prevent parties to litigation funding arrangements from availing themselves of the mechanisms, laws, and practices that have evolved in the law of corporations to deal with these very same problems. Some concrete examples are provided in Part III.

But first, the next Part demonstrates that these issues of ownership and control can be directly addressed when issuing securities tied to litigation proceeds, either directly or through an SPV, or when using an SPV to embody and distribute the value of the claim to the SPV's owners, rather than to litigation proceed-backed security holders. Understanding how control and conflicts were addressed in these deals will lay the foundation for bringing general principles of corporate law to bear.

## II. Claim Incorporation and Litigation Governance: Winstar, Information Resources, Crystallex, and Treca[60]

Legal claims are notoriously difficult to value.[61] Consequently, they are very difficult to account for on a corporation's books.[62] And when a claim is materially large relative to a plaintiff-company's value as a going concern, legal claims can, and have, become insurmountable obstacles to pricing a

57 As is recognized by the literature on claim assignment. *See generally* Michael Abramowicz, *On the Alienability of Legal Claims*, 114 Yale L.J. 697 (2005); Sebok, *supra* note 32.

58 *See* Anthony J. Sebok & W. Bradley Wendel, *Duty in the Litigation-Investment Agreement: The Choice Between Tort and Contract Norms When the Deal Breaks Down*, 66 Vand. L. Rev. 1831, 1836 (2013) (describing the rights and duties that arise in contract law including a duty of good faith).

59 *See infra* Part III.

60 I thank Abigail C. Field for her assistance with this section. Her many insights have been invaluable to its development.

61 *See* Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. Chi. L. Rev. 367, 380–85 (2009) (discussing the difficulties of pricing litigation risk); Maya Steinitz, *How Much Is That Lawsuit in the Window? Pricing Legal Claims*, 66 Vand. L. Rev. 1889, 1903–06 (2013).

62 A note on individual plaintiffs: individuals have an access to justice problem as well as difficulties valuing legal claims and receiving accounting and tax benefits on causes of action and pending litigation, as opposed to on damages they have received. While these are beyond the scope of this Article, I hope to see others investigate them.

merger, acquisition, or major equity investment. This hidden cost of litigation imposes major restrictions on a business simply because a large legal claim exists.[63] Importantly, when litigation causes difficulties in entering into mergers or acquisitions, transacting into large equity infusion, or affects the cost of capital, the hidden costs can dwarf the expense of pursuing a claim.

Additionally, corporations, which are generally conservative about suing, are experiencing value destruction in the form of unprosecuted claims. These too should be included in any analysis of the hidden costs of litigation, to the extent that claims are not prosecuted because of the difficulty in ascertaining value, the difficulty in ascertaining the likelihood of success prosecuting meritorious claims, negative accounting treatment during claim conduct, or unfavorable tax treatment. Potential corporate plaintiffs face a decision to dedicate significant sums to cover litigation fees and costs in return for an outcome that is uncertain.[64] The potential for a larger recovery is usually accompanied by higher costs in pursuing the litigation. And accompanying the higher costs are larger downside risks and opportunity costs. Often, the company can employ the funds required to pursue litigation on other activities, such as operations or marketing, with less risk.

Even where valuation is straightforward, accounting treatment can be unfavorable from the plaintiff-corporation's perspective, deterring the corporation from bring meritorious claims. For starters, all the costs of litigating are accounted for as expenses, a negative impact that particularly hurts earnings before interest, taxes, depreciation, and amortization (EBITDA) calculations.[65] Next, accounting rules do not allow recognition of the potential upside while the claim is pending. The Financial Accounting Standards

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63 Jonathan Molot introduced a similar idea in the defense context, dubbing it the "tertiary cost" of litigation, and concluded the solution was a market in legal *defenses*:

> [I]n some instances, litigation's largest expense may stem from the "tertiary" effects that pending litigation may have on litigant conduct. A $50 million lawsuit against a company can easily prevent that company from raising $250 million or even $500 million in debt or equity to finance new, productive business activities. At the very least, the uncertainty surrounding a significant potential liability may increase a company's cost of capital by depressing its stock price or increasing the interest rate it must pay on its debt. Where litigation risk interferes with an equity investment, a debt refinancing, or a merger or acquisition the tertiary costs of litigation can dwarf the primary costs.

Molot, *supra* note 61, at 374–75. For empirical work on the effects of litigation on a company's stock price, see David M. Cutler & Lawrence H. Summers, *The Costs of Conflict Resolution and Financial Distress: Evidence from the Texaco-Pennzoil Litigation*, 19 RAND J. ECON. 157, 169 (1988) (estimating that the Texaco-Pennzoil litigation had reduced the combined equity value of the two companies by about $2 billion and that further losses may have been incurred by Texaco's bondholders).

64 *See id.*

65 *See #7 Financial Acumen—Taking Litigation Off the Corporate Balance Sheet*, BURFORD CAPITAL, http://www.burfordcapital.com/casestudies/financial-acumen-taking-litigation-off-the-corporate-balance-sheet/#sthash.ppJmSBlw.dpuf (last visited Dec. 31, 2014) (noting that the accounting result of pursuing a successful claim can perversely be a permanent

Board (FASB) prohibits evaluating and listing a claim as an asset on a balance sheet.[66] In addition, as paradigmatic examples of gain contingency,[67] pending court cases and legal claims cannot be recognized in the income statement of a company until all contingencies have been resolved.[68] However, even when a claim is resolved favorably, the accounting is not helpful, particularly for EBITDA-based businesses, as the income must be listed as a nonrecurring item.[69]

The accounting difficulties are likely the reason why banks do not consider legal cases to be assets and why they do not lend based on the value of contingent fees, no matter how large the potential contingency:

> Most business can turn to banks for help, but law firms are often stuck. Banks don't consider legal cases to be assets and won't lend based on the value of "contingent fees" since there's no guarantee of getting them. So the only way to get a bank loan is for the partners to borrow money personally or use their credit cards.[70]

In addition, banks do not invest in litigation financing because it is financing provided upfront with no expected cash flow for an extended period of time.[71] Last but not least, funding litigation can pose business conflicts for banks. This problem on the plaintiff side is analogous to the difficulty that litigation poses to defendants' ability to raise debt and equity.

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reduction in EBITDA because legal fees paid reduce EBITDA but recoveries occur below the EBITDA line).

66 *See* Selvyn Seidel & Sandra Sherman, *Corporate Governance Issues Regarding "Stock Price Manipulation" and "Insider Trading" (and Other Matters) Are Coming to Third Party Financing*, A MODEL LITIG. FIN. CONTRACT (Mar. 25, 2013), http://litigationfinancecontract.com/corporate-governance-issues-regarding-stock-price-manipulation-and-insider-trading-and-other-matters-are-coming-to-third-party-financing/.

67 *See* FASB ACCOUNTING STANDARDS CODIFICATION TOPIC 450-30-20, CONTINGENCIES ("An existing condition, situation, or set of circumstances involving uncertainty as to possible gain [is referred to as a 'gain contingency'] to an enterprise that will ultimately be resolved when one or more future events occur or fail to occur.").

68 Disclosure of such gain contingencies can be made when the probability that it will be realized are high but "care shall be exercised to avoid misleading implications as to the likelihood of realization." *Id.* 450-30-50-1. Consequently, "gain [contingencies] usually should not be reflected in the financial statements." *Id.* 450-30-25-1.

69 *See supra* text accompanying note 65.

70 *See* 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, 12:01 AM), http://www.buffalonews.com/apps/pbcs.dll/article?AID=/20070930/BUSINESS/309309945; *see also* Ben Winograd, *Specialized Lenders Help Fill Financing Void for Law Firms*, AM. BANKER, Nov. 2, 2006, at 3, *available at* 2006 WLNR 19416119 ("No matter how large the potential verdict, banks generally will not make loans beyond the existing assets of a firm or its attorneys."). While relying on personal loans is costly and risky for partners, the partners also suffer because the interest on personal loans is not tax deductible as a business expense. "Also, until the case is finished, attorneys can't deduct the enormous legal case expenses that are incurred." Epstein, *supra*; *see also* Winograd, *supra*, at 3 ("Even if they ultimately win the case, it can take years before the lawyers recoup their costs.").

71 I thank Victor Goldberg for this comment.

The reconceptualization of legal claims as assets that the American legal world is currently undergoing, combined with (i) the newfound purchasing power of corporations and their consequent ability to lower their legal costs;[72] and (ii) a solution to the problem of the hidden costs, may all combine to form a new reality in which corporate and sovereign plaintiffs are able to monetize the value of all their meritorious legal claims, rather than forgo some of them.

While hard-to-value litigation actually threatening a merger or acquisition is an unusual situation, it arose several times in the 1990s, and some innovative lawyers correctly concluded that incorporating and trading in legal claims through the use of securities[73] would help their clients overcome the hidden costs. These are most of the deals described below.

There is some evidence that these deals are not sui generis. For example, preceding the Winstar deals described below were deals by banks that "had established trusts for shareholders, assigning them contingent rights in litigation."[74] All of these legal innovations operate in a similar legal gray zone as the financial innovation that is litigation finance, for the same under-

72 *See* Jonathan D. Glater, *Billable Hours Giving Ground at Law Firms*, N.Y. TIMES, Jan. 30, 2009, at A1, *available at* 2009 WLNR 1784153 ("Clients are more concerned about the budgets, more so than perhaps a year or two ago." (quoting Evan R. Chesler, presiding partner, Cravath, Swaine & Moore LLP)).

73 On issuing securities as a mechanism for litigation funding for reasons other than those discussed here, see generally Steinitz & Field, *supra* note 50, at 711. There, a coauthor and I suggested issuing "Litigation Proceed Rights," a kind of privately placed, heavily restricted security, in order to implement the idea that litigation finance can be modeled on venture capital. *Id.* at 728. In the venture capitalist context, startup companies issue securities that compensate the venture capitalists for their investment. We suggest, similarly, that securities can be used to effectuate staged funding which allows for minimizing the extreme uncertainty, information asymmetry, and agency costs that characterize litigation as an investment. *Id.* at 745–49. While we do not use the incorporation paradigm to describe the security, the deal we propose constitutes a "loose incorporation" of the claim. Professor Richard Painter has also commented on some of the securities laws implications of using such securities. *See* Richard Painter, *The Model Contract and the Securities Laws, Part I*, MODEL LITIG. FIN. CONTRACT (July 15, 2013), http://litigationfinancecontract.com/the-model-contract-and-the-securities-laws-part-1/.

74 *See* Margaret Cronin Fisk, *'Winstar' Litigants Bet on Future Damages Awards*, NAT'L L.J., Jan. 11, 1999, at A19 ("[T]his was rare, and you couldn't buy or sell these rights." (quoting Victor Lewkow, partner, Cleary Gottlieb Steen & Hamilton LLP)). Another early financial instrument tied to litigation proceeds were the tobacco settlement bonds. These bonds also implicated the issues of control and conflicts of interests. *See, e.g.*, Jody Sindelar & Tracy Falba, *Securitization of Tobacco Settlement Payments to Reduce States' Conflict of Interest*, 23 HEALTH AFF. 188, 188 (2004) ("[T]he issue [raised by securitization] is lack of commitment to tobacco control by states. Further, securitization can mitigate states' conflict of interest between keeping tobacco companies fiscally healthy to ensure their [Master Settlement Agreement] payments and reducing tobacco sales for health reasons. States should not align with tobacco companies with the common interest of keeping tobacco companies fiscally healthy.").

lying reasons. Consequently, these efficient and commonsensical market solutions seem to be very rarely used.[75]

This Section describes litigation proceed-backed securities tied to six claims, and then a litigation finance deal that involved regular corporate securities as part of a secured lending litigation finance deal for a bankrupt plaintiff. I classify the claim incorporation as "loose" or "strict" depending on whether the plaintiff issues a security directly (loose) or the claim/right to receive all proceeds of the claim is transferred to an SPV while the litigation is pending, or whether the SPV issues a litigation-backed security (strict). Each incorporation, whether loose or strict, is always coupled with a formal allocation of control and ownership of the claim, as well as a preemptive resolution of conflicts or a voting process by which such conflicts are resolved.

Specifically, below are (1) examples of both strict and loose incorporation arising from litigation against the federal government filed in the mid- and late-1990s by failed or nearly failed savings and loans, collectively known as the Winstar cases, after the case name in the U.S. Supreme Court decision determining the government's liability.[76] The merger-pricing problem arose in a non-Winstar context too. For example, Information Resources needed to spin off its antitrust claim in order to complete a deal in which it was to be acquired and taken private. (2) The Crystallex deal provides a second example, which involves that bankrupt company's massive arbitration claim against Venezuela. (3) A third example is of a trust contemplated in connection with the funding of transnational mass tort litigation, known as the Chevron-Ecuador litigation. The trust incorporation contemplated in this funding arrangement would have been a strict incorporation.

### A. *Loose and Strict Incorporation to Reduce Hidden Costs: The Winstar Savings & Loans Litigations and Information Resources*

In the 1980s, following the savings and loan (S&L) crisis, the federal government facilitated mergers between failing institutions and relatively healthier ones. A crucial deal point was regulators' blessing that "goodwill"

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75 The author was only able to identify the Treca, Winstar, Information Resources, and Crystallex examples. A special thanks to Abigail C. Field for bringing to my attention the Information Resources deal. In researching these deals, I have found no instances in which such transactions ended up being challenged through litigation on issues such as champerty. Two deals were involved in litigation, both while the plaintiff company was in bankruptcy. The creditor status attached to being a Dime warrants holder was litigated in Washington Mutual's bankruptcy, as discussed below, and in the debtor-in-possession financing deal for Crystallex, which was a litigation funding deal, which was challenged by dissident Crystallex bondholders who wanted the bankruptcy judge to accept their debtor-in-possession financing deal instead. Neither litigation sought to void the transactions on the basis of litigation finance concerns.

76 See United States v. Winstar Corp., 518 U.S. 839 (1996) (holding that the U.S. government had breached its contractual obligations when Congress substantially changed certain tax incentives for financial institutions that agreed to take over failing thrifts).

associated with the transactions could be counted as part of the merged S&L's required capital and written off over decades. In 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA)[77] that attempted to both prevent future S&L failures and facilitate accountability for the crisis that had happened. One part of FIRREA focused on making S&Ls sounder by forcing them to be better capitalized.[78] One capitalization-related change imposed by FIRREA was that the S&Ls were forced to write down the "supervisory goodwill" much faster, with an immediate and major impact on the balance sheets of the merged companies. Many such companies sued the federal government on both breach of contract and constitutional bases.

In its July 1996 decision upholding the government's liability on the breach of contract claims,[79] the U.S. Supreme Court gave this recitation of the history:

> The impact of FIRREA's new capital requirements upon institutions that had acquired failed thrifts in exchange for supervisory goodwill was swift and severe. . . . Despite the statute's limited exception intended to moderate transitional pains, many institutions immediately fell out of compliance with regulatory capital requirements, making them subject to seizure by thrift regulators.[80]

Three S&Ls were involved in that case, and the claim of one of them, Glendale Federal Bank, became the focus of one of the litigation securities discussed herein. As the Court noted:

> Respondents Glendale Federal Bank, FSB, Winstar Corporation, and The Statesman Group, Inc., acquired failed thrifts in 1981, 1984, and 1988, respectively. After the passage of FIRREA, federal regulators seized and liquidated the Winstar and Statesman thrifts for failure to meet the new capital requirements. Although the Glendale thrift also fell out of regulatory capital compliance as a result of the new rules, it managed to avoid seizure through a massive private recapitalization.[81]

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77 Pub. L. No. 103-73, 103 Stat. 183 (1989).

78 *See Winstar*, 518 U.S. at 857 (discussing the requirements of FIRREA in regards to capital structure).

79 Glendale filed its suit in 1990 and won its partial summary judgment motion on the contract claims in 1992. *See Glendale Federal Awarded Damages in Supervisory Goodwill Suit vs. U.S. Government*, BUS. WIRE, Apr. 9, 1999, *available at* LEXIS, News and Business, Individual Publications, Business Wire. The government won its appeal to the Federal Circuit, but Glendale won the en banc rehearing in August 1995. Winstar Corp. v. United States, 64 F.3d 1531 (Fed. Cir. 1995) (en banc), *aff'd*, 518 U.S. 839 (1996).

80 *Winstar*, 518 U.S. at 857–58.

81 *Id.* at 858. With regard to Glendale, it agreed to take over a failed Florida thrift in 1981 and regulators allowed it to offset bad loans with "supervisory goodwill" that it would then write off over the next forty years. When FIRREA passed, Glendale Federal still had $565 million in supervisory goodwill remaining. To compensate for the FIRREA requirements, Glendale said it was forced to decrease its assets by more than $10 billion. *See* Deborah Adamson, *Glenfed Parent Announces Earnings Up, Trading Plan*, DAILY NEWS, Oct. 29, 1997, *available at* 1997 WLNR 1581419.

Importantly, while *Winstar* established the idea that the government could be liable—and was liable to Glendale, whose parent Golden State Bancorp eventually issued securities tied to that litigation—the various S&L deals involved different language and facts, and thus liability could not be assumed in all S&L cases. Thus, when California Federal Bank (Cal Fed), Dime, and Coast Federal issued litigation proceeds-based securities, as discussed below,[82] liability in those cases had not been determined. Only Golden State's security issuance was founded on established liability.[83] In fact, when Cal Fed issued its securities, the *Winstar* Supreme Court decision quoted above had not yet been issued. These deals thus highlight that the tremendous risk inherent in litigation, particularly early stage litigation, is not itself a bar to issuing securities, even ones that trade on public markets.

Because Cal Fed was the first issuer, I begin with its deal.

### 1. Loose Incorporation in the Cal Fed Litigation: Participation Right Certificates

The Cal Fed case arose from its acquisition of four thrifts in 1982 and 1983.[84] Cal Fed filed suit in 1992, but its case was stayed while the *Winstar* cases were litigated. In July 1995, prior to the Supreme Court decision in *Winstar*, Cal Fed issued the first of two securities (called Participation Right Certificates) related to its supervisory goodwill claim.[85] These Participation Right Certificates entitled holders to a share of approximately 25% of the net proceeds if ever realized,[86] and were issued directly by Cal Fed, with Cal Fed retaining control of the claim. Thus, the Participation Right Certificates represent a partial, and "loose," incorporation of Cal Fed's claim.

The first Cal Fed issuance was not done to solve a hidden cost problem; some speculated it was done purely to line the pockets of the executives and directors at the expense of shareholders.[87] Nonetheless, the market price of

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82 *See infra* subsections II.A.1–4.

83 *See* Coast Fed. Litig. Contingent Payment Rights Trust, Registration Statement (Form S-4), at 17 (Jan. 13, 1998), *available at* http://www.sec.gov/Archives/edgar/data/1052801/0000950150-98-000043.txt [hereinafter Coast Fed. Litig., Contingent Payment Rights Trust (Form S-4)].

84 *U.S. Court of Appeals Rules Golden State Bancorp May Seek Damages for Lost Profits in Cal Fed Supervisory Goodwill Case*, Bus. Wire, Apr. 3, 2001, *available at* LEXIS, News and Business, Individual Publications, Business Wire.

85 *California Federal Bank Goodwill Participation Securities Declared Effective; Record Date Set*, PR Newswire, June 28, 1995, *available at* LEXIS, News and Business, Individual Publications, PR Newswire.

86 *Id.*

87 Kurt Eichenwald, *No Toasters at This Bank. It's Giving Away a Lawsuit*, N.Y. Times, Mar. 26, 1995, at F6; *see also id.* ("[If] markets work the way they should, for every penny the shareholders receive in this new security, they should lose a like amount in their Cal Fed shares. . . . Some Cal Fed executives say they don't buy that. Instead, they assert that, by shedding 25 percent of a potential asset, the share price of the company could actually go up. The way the logic goes, creating the new security could force the market to come to grips with the possible value of a lawsuit once kissed off as negligible.").

that first security was used to value the claim when Cal Fed entered a merger agreement with First Nationwide Holdings, and the second litigation security was issued as part of the terms of that merger to resolve the hidden cost problem.[88] That second security was similar to the first, in that holders were entitled to a fraction of any net cash recovery after other claims, such as those of the first security's holders, had been paid. Because both securities were redeemable for cash, they had negative tax consequences for the shareholders who initially received them.[89] Both securities traded on the NASDAQ.

From both a champerty and privilege waiver perspective, it is nigh impossible to see an issue created by Cal Fed's approach. From the champerty perspective, shareholders were only given something they were always entitled to—the right to receive the value of the claim. True, by trading the certificates to people who were not shareholders of Cal Fed, investors who were "strangers" to the litigation stood to profit if the litigation was successful. Nonetheless, they had not actually financed the litigation; Cal Fed did not receive payment in those transactions. Finally, no claim transfer occurred; the plaintiff retained full control of its litigation. From a privilege perspective, the company simply did not reveal any privileged information to shareholders or certificate holders, and no funder or other party was inserted into the attorney-client relationship.[90]

The Cal Fed-First Nationwide merger closed in January 1997. Later that year Cal Fed began merger talks with Golden State, setting in motion that S&L's spinoff of its Winstar litigation, discussed below.[91] Cal Fed was the surviving company in that transaction, which closed in 1998. That year Cal Fed's litigation securities were trading as high as $16 to $17.[92] In April 1999

88 For the valuation of the suit using the first security's trading value, see First Nationwide Holdings Inc., Amended and Restated Agreement and Plan of Merger (Form 8-K), ex. 2.1 (Jan. 16, 1997), *available at* http://www.sec.gov/Archives/edgar/data/928358/0000950136-97-000047.txt (showing the unaudited pro forma financial data reflecting the financial condition of the proposed merged company). For a discussion of the secondary security issued as part of the merger, see Article I of the Merger Agreement. *Id.* at A-1.

89 *See* Nantahala Capital Partners v. Wash. Mut., Inc. (*In re* Wash. Mut., Inc.), 464 B.R. 656, 661 (Bankr. D. Del. 2012) (discussing the development of litigation tracking warrants to avoid the taxation issue posed by certificates that could be redeemed for cash); *see also* Ferve Ozturk, Nantahala*: Litigation Tracking Warrants Are Debt, Not Equity*, AM. BANKR. INST. J., May 2012, at 22–23, 70–71 (same).

90 Disclosure is one of the interesting challenges regarding claim-based securities. While these deals suggest the securities laws' command to disclose material information can be met without disclosing privileged information, it is possible to imagine a claim that involves privileged information that investors would find material if they knew it to exist. On the possible operation of securities regulation, see generally Wendy Gerwick Couture, *Securities Regulation of Alternative Litigation Finance*, 42 SEC. REG. L.J. 5, 14 (2014).

91 *See infra* subsection II.A.2.

92 Paul Sweeney, *How to Win Big in Court and Never See a Lawyer*, N.Y. TIMES, Nov. 1, 1998, at BU 10 (noting that at the time of the article, the first issuance traded at $16.125 and the second one traded at $17.75).

the court awarded Cal Fed a mere $23 million, and the certificates plummeted in value.[93]

In 2002, Citigroup acquired Cal Fed, and thus it absorbed both Cal Fed's goodwill claim and Golden State's, and their related securities obligations.[94] In October 2005 the $23 million Cal Fed judgment became final when the U.S. Supreme Court denied certiorari. As a result, Citigroup notified the Cal Fed certificate holders they would get nothing.[95]

2. Loose Incorporation by Golden State: Litigation Tracking Warrants

In 1997 Glendale Federal's parent, Golden State Bancorp, announced its intention to merge with Cal Fed Bancorp. In October 1997, while negotiations were ongoing, Golden State declared that it would issue Litigation Tracking Warrants (warrants, LTWs, or Golden LTWs) tied to the Glendale claim. The Golden LTWs were a "loose incorporation" of the Glendale claim because they were issued by Golden State instead of a SPV. Control of the litigation remained with Golden State. If the Glendale claim ever resulted in proceeds, the warrants allowed holders to purchase shares of Golden State common stock with an aggregate value pegged to the value of the proceeds received. The spinoff of the Glendale claim was done this way instead of via Cal Fed-like certificates that could be redeemed for cash to avoid the income tax consequences of the Cal Fed approach.[96]

The warrants were issued to solve the hidden cost problem. Golden State asserted the claim's value was $1.5 billion, a number that would be material in many deals even today.[97] The chairman of Cal Fed explained that the "two sides had been unable to agree on how much Glendale is really worth once the anticipated damages on its goodwill suit against the federal government are factored out of its stock price."[98] The warrants gave the companies a "market mechanism" to resolve the dispute, namely a "collar."[99] Specifically, if "Glendale's stock is worth $32 or less in a specified period after

93 Richard B. Schmitt, *Investors Betting on Judgment for Thrift Take a Hit in* California Federal *Ruling*, WALL ST. J., Apr. 20, 1999, at B11, *available at* LEXIS, News and Business, Individual Publications, Wall Street Journal.

94 Laura Mandaro, *In Brief: Citi Closes Purchase of California Federal*, AM. BANKER, Nov. 15, 2002, *available at* 2002 WLNR 3143216.

95 *Citibank (West), FSB, Announces Supreme Court Action in* California Federal Bank v. United States, BUS. WIRE, Oct. 4, 2005, *available at* LEXIS, News and Business, Individual Publications, Business Wire.

96 *See* Nantahala Capital Partners v. Wash. Mut., Inc. *(In re* Wash. Mut., Inc.), 464 B.R. 656, 665 (Bankr. D. Del. 2012) (discussing the tax problem that LTWs solved); *see also* Ozturk, *supra* note 89, at 22 (stating the tax difference between LPCs and LTWs).

97 In its pleadings, Glendale asserted damages of $1.5 billion, and indeed publicized its offer to settle for that amount a month after announcing its intention to issue the warrants. Brad Finkelstein & Brian Collins, *Glendale Offers to Settle Its Goodwill Lawsuit*, NAT'L MORTG. NEWS, Dec. 1, 1997, at 17.

98 Snigdha Prakash, *Despite Deal's Complexities, CalFed Really Is the Buyer*, AM. BANKER (Feb. 12, 1998), www.americanbanker.com/issues/163_30/-94413-1.html.

99 *Id.*

the goodwill litigation tracking warrants have been issued, its shareholders get 55% of the combined company. At $33 or more, they get 58% of the company."[100] Market analysts reacted favorably:

> [According to analysts], the warrants make it easier for the thrift to be taken over since it separates the company's legal claims against the government from the company's core business.
>
> "It certainly removes a major stumbling block" in the event of an acquisition . . . . "Now we can value it on its earnings and franchise."[101]

The LTWs were issued in May 1998 to holders of Golden State common stock on a "one share, one LTW basis."[102] If a "triggering event" occurred, meaning, if sufficient litigation proceeds were received, warrant holders were entitled to purchase Golden State common stock for $1 per share up to an aggregate value of 85% of the net proceeds. The remaining 15% was to be retained by Golden State. The warrants came without voting rights, liquidation preferences, dividend or other distribution entitlements,[103] and were freely tradable, being registered on the NASDAQ.[104] If Golden State underwent future mergers, the LTWs would be exercisable against the surviving company's common stock on the same terms.[105]

How many shares could be purchased upon a triggering event could only be determined at the time such an event occurred as there were two unknowns—first, the amount of net proceeds received, and second, the market price of Golden State stock.[106]

The prospectus made clear that Golden State owned and controlled the litigation:

> [Golden State] will retain sole and exclusive control of the Litigation and will retain 100% of the proceeds of any recovery from the Litigation. The Litigation will remain an asset of [Golden State] and [Golden State] intends to pursue the Litigation with the same vigor as it has in the past.

100 *Id.*

101 Adamson, *supra* note 81, at 2 (quoting Charlotte Chamberlain, Vice President, Jefferies & Co.).

102 Golden State Bancorp Inc., Current Report (Form 8-K) (May 5, 1998), *available at* http://www.sec.gov/Archives/edgar/data/1019508/0000898430-98-001724.txt; *see* Golden State Bancorp Inc., Current Report (Form 8-K), ex. 99B (Apr. 23, 1998), *available at* http://www.secinfo.com/drdbh.71wj.c.htm#1stPage. Golden State's LTWs were also held in reserve to be distributed to those who had the right to Golden State common stock via convertible securities but had not yet exercised that right as of the record date. No other LTWs were to be issued. *See* Golden State Bancorp Inc., Warrant Agreement (Form 8-A), ex. 3, § 2.1 (Apr. 22, 1998), *available at* http://www.sec.gov/Archives/edgar/data/1019508/0000898430-98-001506.txt [hereinafter Golden State Bancorp Inc., Warrant Agreement (Form 8-A)].

103 Golden State Bancorp Inc., Warrant Agreement (Form 8-A), *supra* note 102, at 9.

104 *Id.* at 4.

105 *Id.*

106 The formula is described in Golden State Bancorp Inc., Amendment No. 1 to Form S-3 Registration Statement (Form S-3/A), at 8 (Apr. 22, 1998), *available at* http://www.sec.gov/Archives/edgar/data/1019508/0000898430-98-001504.txt.

> [Golden State] reserves the right, however, to terminate the Litigation in any manner it deems appropriate to serve [Golden State's] best interest.[107]

Golden State was similarly clear that the resulting conflict between it and the LTW holders was resolved in its favor:

> The LTW[TM] Holders will not have any rights against the Company or the Bank for any decision regarding the conduct of the Litigation or disposition of the Litigation for an amount less than the amount it has claimed in damages in the ongoing trial in the Claims Court, regardless of the effect on the value of the LTW[TM]s. Although the Bank currently intends to continue prosecuting the Litigation and to seek a cash recovery in the amount claimed, there can be no assurance that the Bank will not make a different determination in the future.[108]

Perhaps to reassure LTW holders that the claim conduct would be managed well, Golden State and Cal Fed entered a "litigation management agreement" to govern the conduct of the two goodwill claims—Golden State's claim and Cal Fed's claim.[109] The litigation management agreement created two committees, one for each of the Glendale (Golden State) and Cal Fed cases, and vested in those committees the full power of the board of directors of the merged company in each committee with regard to the respective litigation. The litigation management agreement further provided that two Golden State executives, knowledgeable of the underlying facts, would be employed by the company as "Litigation Managers" for both cases, reporting to both committees.[110] Subject only to the ultimate authority of the committees, the Litigation Managers could retain or fire counsel, hire agents, and take all steps appropriate relating to both litigations and the associated litigation securities.[111]

Even though the Litigation Managers were to be employees of the merged company (Executive Vice Presidents) reporting to committees of the boards of directors, and even though the company owned the litigation and stood to receive substantial financial benefit from a successful conclusion of both cases (including expense reimbursement and 15% of the value of the proceeds), the litigation management agreement imposed a duty to cooperate on the merged company.[112] The litigation management agreement further provided that the company would not merge or otherwise effect a

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107 *Id.*

108 *Id.*

109 Golden State Bancorp Inc., Current Report (Form 8-K), at 3 (Feb. 17, 1998), *available at* http://www.sec.gov/Archives/edgar/data/1019508/0000898822-98-000214.txt.

110 First Nationwide Holdings Inc., Litigation Management Agreement (Form 8-K), ex. 99.2, art. I, at 2 (Feb. 17, 1998), *available at* http://www.sec.gov/Archives/edgar/data/928358/0000950136-98-000311.txt [hereinafter First Nationwide Holdings Inc., Litigation Management Agreement (Form 8-K)]. The Cal Fed committee had the power to reduce the litigation managers' control of that case, but the litigation managers would still be paid as if they were managing that case.

111 *Id.* art. II, § 2.1, at 4.

112 *Id.* § 2.2, at 9–10.

change of control unless the rights of both the Litigation Managers and the LTW holders were unaffected.[113]

Just as with the Cal Fed security, this loose incorporation approach poses no problems from either a champerty or privilege waiver perspective. Indeed, with the LTWs the distance from champerty is even greater, as the litigation proceeds are simply a reference number, like LIBOR, and do not have a direct connection to the securities. Golden State retains the claim and 100% of its proceeds.

Because the legal claim was now reified—incorporated in the sense of having a legal identity separate from the plaintiff—the LTWs not only solved the merger pricing problem but also forced a change in the accounting of a second merger,[114] had a role in the mechanics of a third merger,[115] and were part of the consideration of the redemption of some preferred securities,[116] all of which occurred before the Cal Fed deal closed. The merger between Golden State and Cal Fed closed in September 1998.[117] Ultimately, Citigroup, as part of its November 2002 merger with Cal Fed, assumed the litigation and the warrants tracking it.[118] As a result, Golden LTWs became exercisable for shares in Citi if a triggering event occurred, which it did in 2005.

On March 15, 2005, the government paid Citi $381,538,695 to satisfy damage and costs judgments in the Golden State/Glendale litigation.[119] Those proceeds, after netting, resulted in an adjusted litigation recovery of $153,776,991.[120] The impact of costs and taxes is clear: 85% of the gross proceeds would have been $324,307,890.75, more than double the amount the LTW holders were entitled to. In the end, each LTW was exercisable for a 0.02302 share of common stock of Citigroup and $0.6725 in cash, with the result that Citi would distribute up to 1,944,415 shares of Citigroup common stock and $56,802,378, depending on how many LTWs were redeemed.[121]

113 *Id.* § 3.1(a), at 11–13.

114 *Golden State Bancorp Announces Change in Accounting for Acquisition of CENFED Financial Corp.*, BUS. WIRE, Jan. 27, 1998.

115 *See Golden State Bancorp Plans Stock Buyback*, L.A. TIMES, May 20, 1998, http://articles.latimes.com/1998/may/20/business/fi-51586.

116 *Golden State Bancorp to Redeem Series A Preferred Stock*, BUS. WIRE, Aug. 19, 1998, *available at* LEXIS, News and Business, Individual Publications, Business Wire.

117 *California Federal Bank and Glendale Federal Bank Complete Merger*, BUS. WIRE, Sept. 11, 1998, *available at* LEXIS, News and Business, Individual Publications, Business Wire.

118 Laura Mandaro, *In Brief: Citi Closes Purchase of California Federal*, AM. BANKER (Nov. 15, 2002), http://bi.galegroup.com.proxy.library.nd.edu/essentials/article/GALE—A94250671/0eb3c98459403ce11561881df8be8191?u=nd_ref.

119 Citigroup Inc., Prospectus Supplement (Form S-3/A) (Aug. 31, 2004), *available at* http://www.sec.gov/Archives/edgar/data/831001/000104746905009106/a2154892z424b3.htm [hereinafter Citigroup Inc., Prospectus Supplement, (Form S-3/A)].

120 *Id.*

121 *Citigroup Announces That the 60-Day Exercise Period for Its Litigation Tracking Warrants Commenced Today*, BUS. WIRE (Apr. 5, 2005, 6:00 AM), http://www.businesswire.com/news/home/20050405005343/en/Citigroup-Announces-60-Day-Exercise-Period-Litigation-Tracking#.VFVaJ75X_ww.

The total cash value of each LTW on the day the distribution was determined was $1.7931,[122] which compares favorably with the $1.38 to $1.75 trading range of the LTWs in the first quarter of 2005.[123] However, that amount was well below the $6 and 11/16 valuation on the close of the first day of trading after issuance.[124] The initial, much higher valuation in 1998 and the very close to accurate valuation in 2005 demonstrate the impact of information challenges on litigation valuation. Early in the litigation—but after an initial liability determination—the market price wildly overstated the securities' value. But when sufficient information was revealed—by the quarter prior to claim resolution—the litigation was more accurately valued through a market mechanism.

3. Loose Incorporation in the Dime/Anchor Savings Litigation: Litigation Tracking Warrants

Anchor Savings' claim was based on eight acquisitions of failing S&Ls from 1982 to 1985, four of which were facilitated by regulators.[125] When FIRREA was enacted in 1989, Anchor's books still carried over $500 million of related capital, including the goodwill. As a result, Anchor claimed it faced severe limitations on its activities and was forced to liquidate valuable assets at fire-sale prices.[126] In 1994, Anchor and Dime Savings Bank agreed to merge. In January of 1995 Anchor filed the suit against the government. Shortly thereafter the merger closed, and, as a result of the merger, Dime became entitled to the proceeds.[127] Because filing the claim did not disrupt the merger pricing previously negotiated by Anchor and Dime, Anchor had no motivation to issue litigation securities at that point. However, a later deal did face the pricing problem.

In early 2000, North Fork Bank attempted a hostile takeover of Dime. Dime found a white knight in Warburg Pincus. As Dime and Warburg did not agree on the value of the litigation, that major equity investment faced the hidden cost issue. As a result, Dime issued LTWs on December 29, 2000.[128] Again, because these were issued directly by Dime they represent a "loose" incorporation. Dime retained control of the litigation. The Anchor/

122 Citigroup Inc., Prospectus Supplement (Form S-3/A), *supra* note 119, at S-6.

123 *Id.* at S-3.

124 *In Brief: Warrants Fall*, DAILY NEWS (L.A.), May 6, 1998, at 1.

125 *WASHINGTON MUTUAL: Goodwill Lawsuit over 4 Acquisitions Pending*, LLOYD'S CORP. LITIG. REP., Oct. 3, 2008.

126 *WASHINGTON MUTUAL: Broadbill Asserts Claim over Breach of Contract*, 14 TROUBLED CO. REP., May 28, 2010.

127 *Id.*

128 *See* Randi Feigenbaum & Tami Luhby, *Dime's Move May Quash Rival's Bid*, NEWSDAY, July 7, 2000, at A55; *Dime Announces Distribution of Litigation Tracking Warrants*, BUS. WIRE, Dec. 18, 2000, *available at* LEXIS, News and Business, Individual Publications, Business Wire; *Dime Announces Major Investment by Warburg Pincus*, PR NEWSWIRE (July 6, 2000), http://www.thefreelibrary.com/
Dime+Announces+Major+Investment£y+Warburg+Pincus.-a063179730.

Dime LTWs were conceptually similar to the Golden State LTWs and were similarly worth stock representing 85% of the net recovery. Also like the Golden State LTWs, the Dime LTWs traded on the NASDAQ and, because of the merger, were ultimately redeemable for shares in a different company than Dime.

In 2001 Dime announced its intention to merge with Washington Mutual (WaMu), and that deal closed in 2002.[129] Not much happened until 2008, when the trial court awarded $356 million in damages.[130] The decision was appealed.[131] Later in 2008, regulators seized WaMu and sold most of its assets to JPMorgan Chase.[132] The hollowed-out parent company filed for bankruptcy the next day.[133] In 2010 the appeals court remanded for further damage calculations, suggesting the damages should be $63 million more.[134]

Shortly thereafter LTW holders began negotiating with the WaMu estate. One group decided to settle and received some cash, some stock in a reorganized WaMu, and some "Run-off Notes."[135] Other LTW holders sued, seeking a declaration of their rights and creditor status above equity holders. In 2012, the court ruled the LTWs were equity, and the litigating LTW holders were assigned such status and their related claims subordinated.[136] As a result of that decision, $337 million in proceeds were released into the estate.[137]

#### 4. Strict Incorporation in the Coast Savings litigation: Trust Certificates

Coast Savings Financial took over the failed Central Savings and Loan Association from regulators in 1987, in a deal that involved a $298 million "capital credit" that was wiped out by FIRREA in 1989.[138] Coast filed its goodwill claim in July 1992.[139] The litigation was stayed (while the Glen-

129 *See Washington Mutual Completes Acquisition of Dime Bancorp*, Bus. Wire, Jan. 7, 2002, *available at* LEXIS, News and Business, Individual Publications, Business Wire; *Washington Mutual to Extend National Banking Franchise with $5.2 Billion Merger with Dime Bancorp*, Bus. Wire, June 25, 2001, *available at* LEXIS, News and Business, Individual Publications, Business Wire.

130 *See* 16 Troubled Co. Rep., Feb. 9, 2012.

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*

135 L. John Bird, *Decision in Washington Mutual, Inc. Holds That Litigation Tracking Warrants Are Equity Instruments*, Lexology (Feb. 23, 2012), http://www.lexology.com/library/detail.aspx?g=3f6bcffd-8198-492c-9677-4ea62b7434e8.

136 Nantahala Capital Partners v. Washington Mut., Inc. (*In re* Wash. Mut., Inc.), 464 B.R. 656, 660–61 (Bankr. D. Del. 2012).

137 Steven Church, *WaMu Wins Approval to Settle Dispute with Warrant Holders*, Bloomberg (Feb. 1, 2012, 3:25 PM), http://www.bloomberg.com/news/2012-02-01/wamu-wins-approval-to-settle-dispute-with-holders-of-litigation-warrants.html.

138 Coast Federal Litig., Contingent Payment Rights Trust, *supra* note 83.

139 *Id.* at 7.

dale/*Winstar* litigation worked its way to the Supreme Court), and the case was not scheduled to be tried until 1999 at the earliest.[140] However, in 1997 Coast began negotiating merger terms with H. F. Ahmanson & Co.

Again, the litigation's valuation difficulty created hidden costs. As part of the merger agreement executed in October 1997, Coast Savings announced it would spin off the value of its claim immediately pre-merger. Coast effectuated its claim spinoff via a "strict" incorporation approach: it created a trust to receive the value of the claim, the trustees of which controlled the litigation, and then the trust issued contingent payment right certificates to Coast's pre-merger shareholders.

The basic structure of the deal was as follows. A trust was formed with certain powers, approximately $20 million (earmarked for litigation expenses), and an asset called "the Commitment." Securities embodying the right to receive part of the payments made pursuant to the Commitment were issued to existing Coast Savings shareholders. Coast Savings merged into H. F. Ahmanson and Ahmanson, as successor to Coast Savings, owned the claim and the right to receive the proceeds. If proceeds were ever received, Ahmanson would be required by the Commitment to give them to the trust. Monies received by the trust were to be paid to certificate holders, net of certain costs.

More specifically, on January 8, 1998, the Coast Federal Litigation Contingent Payment Rights Trust (CPR Trust) was created, with the powers and limitations conferred upon it by an Amended and Restated Declaration of Trust signed by Coast Savings (as sponsor), Bankers Trust Company (as trustee),[141] and the CPR Trust (through its four Litigation Trustees). On January 13, 1998, the CPR Trust registered Contingent Payment Rights Certificates (CPR Certificates) with the Securities and Exchange Commission.[142] On February 13, 1998, moments before the merger closed, Ahmanson entered a commitment agreement with the CPR Trust, contributed approximately $20 million to the CPR Trust to fund the litigation, and the CPR Trust issued the CPR Certificates to Coast shareholders.[143]

This transaction is the purest strict incorporation of a claim I have found (although the Treca Trust (discussed below) would be equally pure if it were

140 *Id.* at 12 (explaining that other cases with similar claims were scheduled for trial before Coast Federal's case was likely to go to trial).

141 Because the CPR Trust is a Delaware Statutory Trust, Banker's Trust wears two trustee hats: "Institutional Trustee" and "Delaware Trustee." Banker's Trust's real power comes from its Institutional Trustee status. For simplicity I simply speak of "trustee."

142 Coast Federal Litig., Contingent Payment Rights Trust, *supra* note 83 (registering 20,703,817 contingent payment right certificate securities).

143 *See id.* at 3; *see also Coast Litigation Trust Announces Judge's Entry of Order Regarding Government Liability*, PR NEWSWIRE (Mar. 25, 1998), http://www.prnewswire.com/news-releases/coast-litigation-trust-announces-judges-entry-of-order-regarding-government-liability-77233167.html. While innovative in being used for litigation, contingent payment rights, as a financial instrument, are old; a U.S. Supreme Court case ruled on the correct tax treatment for a contingent payment right in 1931. *See* David Hasen, *Financial Options in the Real World: An Economic and Tax Analysis*, 37 FLA. ST. U. L. REV. 789, 797 (2010).

ever created). This is because the Litigation Trustees were given complete control over the claim; Ahmanson, which nominally owned the claim and showed it on its books, had none.[144] Moreover, the trustees' primary loyalty was to the CPR Trust, that is, to certificate holders, even at the expense of Ahmanson, the claim owner.[145] Thus in every sense except the most formal, the CPR Trust embodied the claim.

While it is true that the Litigation Trustees were former executives of Coast with knowledge of the litigation's facts, putting them in charge of the litigation in this manner, rather than via a management agreement like Golden State entered, creates unnecessary issues under the legal ethics paradigm.

From an ethics perspective, the Coast Savings deal created ambiguity as to whom litigation counsel represents: the trustees, who controlled the litigation and who had duties to maximize the claim's monetary value on behalf of certificate holders, or Ahmanson, which nominally owned it? Similarly unclear are the implications of the answer to the latter question to the application of the attorney-client privilege. Also, do the CPR Trust and Ahmanson share a common legal interest that protects privilege regardless of who the client actually is?[146] And how should this structure be viewed from the champerty perspective?

Ultimately, the Court of Claims entered a judgment of no damages in 2001, so the CPR Certificates were worthless.[147] The CPR Trust appealed and won at the Federal Circuit in 2002,[148] but then the Government sought and won a rehearing en banc.[149] In 2003 the full court upheld the Court of

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144 *See* Coast Federal Litig., Contingent Payment Rights Trust, *supra* note 83, at 7. A more detailed list of the Litigation Trustees' power to control the litigation is in the Trust Agreement appended to the prospectus. *See generally id.* app. B, § 6.1 (detailing the Litigation Trustees' various powers).

145 The Trust Declaration states:

> *[A]ny attorneys*, experts, advisors, consultants and investigators retained by or at the direction of the Litigation Trustees . . . *shall be authorized* by this Declaration *to accept directions from the Litigation Trustees* with respect to the Litigation, *notwithstanding any conflict of interest that may arise* by reason of such directions *with the interests of any party* to this Declaration. *The Litigation Trustees shall have no duty to [Coast/Ahmanson] to consider any interest [such entity] may have with respect to the Litigation.*

*Id.* app. B, § 6.2(a) (emphasis added).

146 The Trust Declaration clearly states that communications among the trustees, Ahmanson and counsel are privileged, *id.*, but parties cannot create privilege by agreement where the law does not afford it.

147 *Coast Litigation Trust Announces Claims Court Entry of Judgment for Government*, PR NEWSWIRE, Oct. 29, 2001, *available at* http://www.thefreelibrary.com/Coast+Litigation+Trust+Announces+Claims+Court+Entry+of+Judgment+for. . .-a079509737.

148 *Coast Litigation Trust Announces Appellate Court Decision in Favor of Coast Federal Bank*, PR NEWSWIRE, Oct. 9, 2002, *available at* http://www.thefreelibrary.com/Coast+Litigation+Trust+Announces+Appellate+Court+Decision+in+Favor+of. . .-a0132324006.

149 *Coast Litigation Trust Announces Order Granting Government Petition for Rehearing of Appellate Court Decision*, PR NEWSWIRE, Feb. 15, 2003, http://www.prnewswire.com/news-

Claims' judgment of no damages,[150] and the CPR Trust decided not to appeal to the U.S. Supreme Court.[151] The CPR Trust terminated, and the CPR Certificates were de-listed on May 23, 2003.[152]

### 5. Strict Incorporation in the Information Resources Antitrust Litigation: Contingent Value Rights

In July of 1996 Information Resources sued Dun & Bradstreet, Inc. and others, alleging antitrust claims. Information Resources alleged damages exceeding $350 million, prior to trebling.[153] The suit came nearly three months after the European Union had begun formal proceedings against the defendant for abusive practices. Three months after the suit was filed, the defendant entered into an agreement with the European Union to end its abusive practices.[154] A trial was scheduled for September 2004.[155] However, in 2003 Information Resources was negotiating a merger with Gingko Corporation, and the litigation posed a hidden cost problem.

To solve the problem, Information Resources formed a special purpose (statutory) trust, which issued "Rights Certificates" tied to the proceeds of the antitrust claim. Unlike the Coast deal, however, Information Resources did not transfer control of the claim to the trust. As a result, it is more accurate to say the trust received the monetary value of the claim rather than the claim itself. In some jurisdictions, the distinctions between (a) transferring the value of the claim versus the claim itself and/or (b) transferring control over the claim versus the value of the claim differentiated between a void champertous transaction and a valid non-champertous transaction.[156] Instead, a separate contract governed the conduct of the claim. Under that

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releases/coast-litigation-trust-announces-order-granting-government-petition-for-rehearing-of-appellate-court-decision-74366207.html.

150 *Coast Litigation Trust Announces Appellate Court En Banc Decision in Favor of Government*, PR NEWSWIRE, Mar. 25, 2003, *available at* http://www.prnewswire.com/news-releases/coast-litigation-trust-announces-appellate-court-en-banc-decision-in-favor-of-government-74762602.html.

151 *Coast Litigation Trust Announces Decision Not to Seek Supreme Court Review and Termination of Litigation*, PR NEWSWIRE, Apr. 24, 2003, http://www.prnewswire.com/news-releases/coast-litigation-trust-announces-decision-not-to-seek-supreme-court-review-and-termination-of-litigation-70909392.html.

152 *Coast Litigation Trust Announces Termination of Designation of CPR Certificates for Trading on NASDAQ and Termination of the Trust*, PR NEWSWIRE, May 23, 2003, http://www.prnewswire.com/news-releases/coast-litigation-trust-announces-termination-of-designation-of-cpr-certificates-for-trading-on-nasdaq-and-termination-of-the-trust-55742192.html.

153 *See* Info. Res., Inc. Litig. Contingent Payment Rights Trust, Prospectus of Information Resources, Inc. Litigation Contingent Payment Rights Trust (Form S-4/A3), at 2 (Oct. 30, 2003), *available at* http://www.sec.gov/Archives/edgar/data/1260946/000104746903034778/a2119115zs-4a.htm [hereinafter Info. Res., Prospectus (Form S-4/A3)].

154 *Id.* at 17.

155 *Id.* at 2.

156 For example, New York distinguishes, at least to some extent, between claim transfer and claim proceed transfer. Steinitz & Field, *supra* note 50, at 727 n.68 (discussing New York's distinction between claim transfer and proceed transfer).

contract the company that survived the merger (and thus owned the claim) retained control of the settlement decision as well as influence over major strategic choices. Nonetheless, executives from the pre-merger claim owner retained significant influence over major strategic decisions.

The Information Resources transaction was a more complicated deal overall than the CPR Trust, largely because several investors/companies were coming together to form a company that would merge into the publicly traded Information Resources and take it private. Thus, there were more parties and more steps to the overall transaction. In addition, the privately held status of the surviving company and the newness of the trust created in the deal meant that the certificates it issued could not be listed on the NASDAQ, although they were tradable over the counter.[157] (Complicating the discussion of the deal further, the surviving entity retained the name "Information Resources," while becoming a wholly owned subsidiary of Gingko. To facilitate this discussion, when speaking of the post-merger entity, I use the term "pmIR"; for pre-merger, it is simply "IR"; and because the trust was created and certificates issued pre-merger, they are the "IR Trust" and the "IR Rights Certificates.")

The most important aspect of the IR deal, for purposes of expanding the analysis of how claim incorporation can address the ethical issues raised by litigation finance, is how the deal addressed control of the litigation. Thus, the agreement laying out those terms will be the focus of the discussion below.

Within our narrow focus, certain core elements of the deal are the same: a Delaware statutory trust was created via declaration (IR Trust Agreement) among the acquirer, target, trust, and three trustee types—litigation, institutional, and Delaware. The main asset of the trust was the merged company's parent's contractual commitment to pay proceeds of the litigation. The trust was given an initial endowment by the acquiring company to fund the litigation, after which the trust had to raise funds on its own by selling certificates or borrowing funds.[158] The litigation itself was "owned" by the acquiring company and appeared on its books as a contingent asset.[159] The trust issued the certificates immediately before the merger closed; the certificates were tradable but highly speculative and came with very limited rights. And, if the claim was successful, the certificates could be redeemed for cash based on the amount of net proceeds received.[160]

However, the control of the litigation is crucially different than in the Coast deal. Under Coast Savings, the Litigation Trustees controlled the litigation, and conflicts with the claim owner were resolved in favor of the trust. In contrast, the IR Litigation Trustees were only empowered to raise funds

157 *See SEC Declares Registration Statement for CVRs Effective; CVRS to Be Quoted on OTC Bulletin Board on Completion of the Offer for Information Resources, Inc. by Gingko Acquisition Corp.*, PR NEWSWIRE, Oct. 30, 2003.

158 Info. Res., Prospectus (Form S-4/A3), *supra* note 153, at 3.

159 *Id.* at 15.

160 *See id.* at 1.

for the litigation by selling more certificates or borrowing money, enforce the Contingent Value Rights Agreement (Rights Agreement) and the IR Trust Agreement, ensure the IR Trust's compliance with the securities laws, and undertake various trust/certificates related tasks.[161] To manage the litigation, the parties entered into the Rights Agreement that both governed the conduct of the litigation and contained Ginkgo's promise to pay the trust when/if litigation proceeds came in.[162]

The Rights Agreement provided that five rights agents would manage the litigation.[163] Two would be appointed by IR (the CVR Rights Agents), two by Gingko (the Parent Rights Agents), and one chosen by the other four (the Independent Rights Agent). The Rights Agreement explains the breadth of the control granted:

> The Rights Agents shall have the sole power and duty to direct and supervise all matters involving the Litigation (including trial strategy and planning and settlement strategy) on behalf of Parent, the Company, the Company Subsidiaries and their Affiliates; provided that all decisions and determinations with respect to the Litigation (including, without limitation, any Settlement Decision or Strategic Decision) shall be made in accordance with Section 3.1(d) hereof.[164]

The Rights Agreement also explains that as a general matter, the appointees of IR—the original, pre-merger plaintiff—will have day-to-day litigation management:

> Either one or both of the CVR Rights Agents (as they may mutually decide in their discretion) shall have primary responsibility for the day-to-day direction and supervision of the Litigation and may, without the approval of any of Parent, the Company, the Company Subsidiaries[,] or any of the other Rights Agents, make decisions and determinations in accordance with Section 3.1(d) hereof with respect to the day-to-day conduct of the Litigation and such decisions shall be deemed to made on behalf of all of the Rights Agents.[165]

Nonetheless, the Rights Agreement explained, the two IR appointees/CVR Rights Agents' power was not unlimited because certain decisions required the approval of at least three of the five rights agents:

> Notwithstanding the foregoing, (i) the approval of a majority of the Rights Agents (including the Independent Rights Agent) shall be required for any Strategic Decision and (ii) the approval of a majority of the Rights Agents (other than the Independent Rights Agent) shall be required for any Settlement Decision.[166]

That is, for "Strategic Decisions," either the Independent or Parent Rights Agents could provide the third vote, but for settlement decisions, the

161 *See id.* at A-13 to -14.
162 *See id.* at 20–23.
163 *Id.* at 20.
164 *Id.* ex. B, art. III, § 3.1(c) (emphasis omitted).
165 *Id.*
166 *Id.*

Parent Rights Agents had to agree. Through this majoritarian provision, the claim owner—the parent company—retains ultimate control of the litigation. This delegation of authority is akin to the way legal ethics allow attorneys to make day-to-day decisions for their clients, but unlike legal ethics—and like business entities—it creates a voting mechanism for resolving conflict between the parties and tailors the voting mechanism to allocate influence and control much more finely than attorney ethics does.

In fact, the Rights Agreement contained a further constraint on the rights agents' discretion by dictating what they had to consider in making litigation decisions of any kind:

> [T]he Rights Agents shall act in good faith with a view to maximizing the present value of the Litigation Proceeds to the Company, the Company Subsidiaries and the CVR Trust. Without limiting the generality of the foregoing, in connection with any Settlement Decision, the Rights Agents shall consider:
>
> (A) the aggregate amount of After-Tax Litigation Proceeds to be received in connection with the proposed settlement;
>
> (B) the benefit to the Company and the Company Subsidiaries of any agreements, commitments or undertakings to be made in connection with such settlement that restrict future anti-competitive or allegedly anti-competitive conduct by one or more parties to the Litigation;
>
> [and the potential value of a future settlement if the current offer is rejected, discounted to reflect the time value of money.][167]

The criterion in (B) is striking and reflects the fact that while the IR certificate holders would prefer (A) to be the only consideration—that is, maximum cash—the antitrust nature of the litigation means that any remedy of type (B) could be far more valuable to pm-IR. (B) is a contractual requirement to put the interests of pm-IR ahead of the certificate holders. This allocation of power and preference to pm-IR/Gingko is further underscored by the settlement veto the parent has per the provisions discussed above. Combined, they illustrate how the commodification of claims that seems at first blush inescapable can actually be avoided, through preemptively and transparently resolving the conflict of interest through both (B) and the settlement veto.

The prospectus makes this dynamic explicit and counsels potential IR Certificate purchasers that:

> The interests of Gingko Corporation in any settlement of the antitrust litigation will not necessarily be aligned with the interests of the rights certificate holders. For example, *Gingko Corporation may prefer a settlement that includes*, in addition to cash payments, *agreements by the defendants to refrain from future unlawful anti-competitive conduct over an alternative settlement that includes no such agreements, even if the alternative settlement offers higher cash payments*. On the other hand, the *rights certificate holders . . . presumably would prefer the alternative settlement offering higher cash payments*, which would result in

167 *Id.* § 3.1(d)(A)–(B).

> correspondingly higher payments on the rights certificates. In those circumstances, however, the rights agents appointed by Gingko Corporation would be able to veto the alternative settlement, and any veto of that settlement alternative would be final and binding . . . .[168]

On other key strategic issues, Gingko lacks a veto but gains influence because three of the five rights agents must agree, and Gingko has two of the five, and those two have equal say in a third. Those key strategic issues in which the merged corporation (successor to the claim) retains influence—though not control—are:

> [T]he appeal of any aspect of the antitrust litigation . . . the addition of any claim or party; *changing legal counsel or the basis for payment of attorneys' fees*; any admission of liability with respect to any claim against Information Resources in the antitrust litigation; or, any other proposed decision or determination that . . . would represent a material change or development in strategy . . . and result in a substantial likelihood that the recovery or receipt of any amount of antitrust litigation proceeds . . . will be delayed.[169]

Because the selection of counsel and the retainer agreement is one of the aspects of the litigation that the claim owner (Gingko) no longer controls, champerty and attorney ethics may be implicated. Regardless, the situation is not as extreme as the CPR deal because of the retained influence on those decisions and because of the claim owner's relationship to the entity it shares control with. Unlike the CPR deal, the trust is not the source of Gingko's loss of control. Instead, it is the way the IR deal attempts to preserve the corporate DNA of pre-merger IR: Gingko split control with the ghost of a company that was now its subsidiary. Champerty and attorney ethics concerns seem very distant in this situation.

The issue of preventing privilege waiver is also simplified in the IR scenario. Since the litigation managing rights agents are not beholden to the trust, "[t]he Rights Agents shall be deemed to be agents of [Gingko] and [IR/pm-IR] for all purposes relating to evidentiary privileges, including attorney-client privileges."[170]

The IR litigation settled on February 16, 2006 for $55 million. On May 16, 2006, the IR Trust announced the net share to be received by the Trust and disbursed to certificate holders at $23,051,687, and stated that payment would begin on June 15. Each Rights Certificate was worth $0.7152.[171]

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168 *Id.* at 11 (emphasis added).

169 *Id.* at 20 (emphasis added).

170 *Id.* ex. B, § 3.1(i).

171 Press Release, Info. Res., Inc. Litig. Contingent Payments Rights Trust, Info. Res., Inc. Litig. Contingent Payment Rights Trust Announces Commencement of Distribution Process for Holders of Contingent Value Rights Certificates (May 16, 2006), *available at* http://www.sec.gov/Archives/edgar/data/1260946/000110465906035301/a06-12014_1ex99d1.htm.

### B. *Inadvertent Incorporation: Crystallex*

*Crystallex International Corp.*[172] is an example of a strictly incorporated claim that is striking in many respects, not least of which is its inadvertent nature. Crystallex is a gold mining company currently in bankruptcy in the Canadian court system because Venezuela voided its rights to operate a massive mine in that country. As a result of Venezuela's action, Crystallex's single major asset is a multibillion dollar international arbitration claim against Venezuela.[173] The claim *is* the company.

As part of the bankruptcy process, Crystallex received debtor-in-possession financing. Normally such financing is intended to enable a company to restructure itself and emerge from bankruptcy. In this situation, however, nearly all of it served as litigation funding.[174] The money came from a specialized investment fund that agreed to provide four tranches of capital, tied to milestones (some of which were pegged to litigation developments),[175] in exchange for control rights, a commitment to repay principal and interest,[176] and a substantial slice of any eventual arbitral proceeds. The Senior Secured Credit Agreement[177] gave control rights to the funder through two vehicles: issuance of a special class of stock that empowered the funder to nominate directors of the company, and contractual requirements to get the assent of the funders' directors to certain steps within the litigation.

Specifically, the funder was issued 100 Class A preference shares, Series 1. Upon the trigger—drawing the second tranche—the funder had the right to nominate two of the company's five directors,[178] and to co-nominate a third director who was given "sole and ultimate authority" over the bankruptcy proceedings, the rights of the parties under the funding agreement, the management incentive plan, and the retention of professionals for any of

172 Crystallex Int'l Corp. v. Bolivarian Rep. of Venez., ICSID Case No. ARB(AF)/11/2 (Mar. 9, 2011).

173 *See* Tenth Report of the Monitor ¶¶ 59–60, *In re* A Plan of Compromise or Arrangement of Crystallex Int'l Corp., No. CV-11-9532-00CL (Ont. Super. Ct. of Justice June 4, 2013), *available at* http://documentcentre.eycan.com/eycm_library/Project%20Gem/English/Monitor's%20Reports/Final%20Crystallex%20-%20Tenth%20Report%20of%20the%20Monitor.pdf (calling the arbitration the company's "main asset" and noting that other than "minimal surplus processing equipment," the company has no assets other than the arbitration).

174 *See id.* ¶¶ 7–10 (describing what the debtor-in-possession budget was based on: funding the arbitration, covering the costs of the bankruptcy proceedings (including litigation and negotiation with bondholders), paying the lender's expenses, and revenue from selling excess mining equipment).

175 *See id.*

176 *See* Redacted Motion Record, *In re* A Plan of Compromise or Arrangement of Crystallex Int'l Corp., No. CV-11-9532-00CL, ex. D (Form of Notice of Borrowing), at 78, 90 (Ont. Super. Ct. of Justice May 31, 2013), *available at* http://documentcentre.eycan.com/eycm_library/Project%20Gem/English/Motion%20Materials/CCAA/Redacted%20Motion%20Record%20returnable%20June%205,%202013.pdf.

177 *See id.*ex. D.

178 *Id.* ex. D, § 6.13(a)(1), at 31.

those purposes.[179] While this power generally gave the funder significant influence over the company, more specific powers were conferred as well. For example, the assent of a funder-appointed director was necessary for board approval of transactions involving affiliates, certain types of executive pay, retention of certain advisors, and a redacted term.[180] Further, at least one of the two funder directors had to agree before the company could remove the arbitration counsel.[181] In addition to those powers, at least one funder appointee's assent is needed for the company to take actions or decisions described in several redacted provisions.[182]

Beyond the indirect control of the claim the funder gained by having significant influence and control over the company itself, the funder gained certain direct control and influence over the conduct of the arbitration. For example, the credit agreement requires the company to get the funder's written consent before it decides not to follow any material advice of its arbitration counsel, and before it agrees to settle for so little that the proceeds would be insufficient to repay the funder its principal and interest.[183] While the various redacted terms make it impossible to fully assess how Crystallex and its financier allocated control of the company and the claim, certain terms—needing funder permission to reject counsel's advice, change arbitration counsel, or accept a small settlement—are problematic under the current legal ethics paradigm perspective.

A final set of financing provisions applied only if the arbitration was successful and were designed to give the funder flexibility with respect to how it received its payout. One approach involved direct payments, but these were limited in amount each year to avoid criminal usury; the alternative would allow the funder to convert its right to proceeds into equity in Crystallex special shares with voting, and dividend and preference rights.[184]

As of this writing, the Crystallex arbitration is ongoing.

### C. *The Treca Litigation Financing: Litigation Proceeds Trust*

In October 2010, Burford Capital (Burford) invested in the so-called Chevron-Ecuador dispute[185] (the Burford Ecuadorian deal),[186] an ongoing

179 *See id.* ex. D, § 6.14–.15, at 32–34.

180 *Id.* ex. D, § 6.16, at 34.

181 *Id.* ex. D, § 6.16(b)(iii), at 35.

182 *See id.* ex. D, § 6.16(a)(iv), at 34, (b)(i)–(ii), at 35, (b)(v), at 35 (all of which are redacted).

183 *See id.* ex. D, § 7.16(a)–(b), at 39.

184 *See id.* ex. G.

185 Aguinda v. ChevronTexaco Corp., No. 2011-0106 (Sucumbios Provincial Ct. of Justice of Nueva Loja App. Div. Jan. 3, 2012) (Ecuador), *available at* http://chevrontoxico.com/assets/docs/2012-01-03-appeal-decision-english.pdf.

186 This deal, and specifically the underlying contract, is discussed in great detail in *The Litigation Finance Contract*. Steinitz, *supra* note 9. The financing contract was by and between Treca Financial Solutions and Claimants (including Friends of the Defense of the Amazon), dated October 31, 2010. *See* Treca Financial Solutions and Claimants Funding Agreement (Oct. 31, 2010), *available at* http://theamazonpost.com/wp-content/uploads/

mass-tort litigation brought by Ecuadorians against Chevron over oil drilling-related pollution. Two facets of this deal are relevant to the incorporation discussion.

First, Burford made use of a number of SPVs and received partial control over the conduct of the claim; however, Burford's investment did not constitute claim incorporation under my taxonomy. These SPVs were not devices created by the plaintiff to embody the claim (in whole or in part) but simply were created and used by the funder to further the funder's financing objectives. This function can be seen in both the investment mechanism, which was indifferent to whether the funder was Burford or the SPV,[187] and in the funder's partial control, i.e., influence over counsel,[188] which would also have been the same regardless of whether the funder was Burford or the SPV.[189] Given that the powers granted the contracting SPV were not differ-

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Mastro-declaration-Exs-1-10-05jul11.pdf [hereinafter Treca Agreement]. Treca was created solely to invest in the litigation. *See* Settlement Agreement, § 4(a)(vi), at 6, *available at* https://lettersblogatory.com/wp-content/uploads/2013/04/Burford-settlement.pdf [hereinafter Burford Settlement Agreement]. The Settlement Agreement was entered into by and among Chevron, the Burford Parties (Burford Capital and related entities), and Ecuadorian Ventures, LLC. In addition to Treca, the Burford Ecuadorian deal involved other SPVs. One is a Guernsey company called Nugent Investments Limited (Nugent), which is Treca's largest shareholder, and until December 30, 2010, was its only shareholder. *See id.* at 2. On that date Nugent sold four of the fifteen shares of Treca that it owned to Ecuadorian Ventures, LLC, an Illinois limited liability company. *Id.*; *id.* § 4(a)(v), at 6, (b)(iv), at 7. Through Treca, Burford was the major funder of the litigation, although a number of other funders participated as well. Steinitz, *supra* note 9, at 470.

187 For example, the financing contract called upon the funder to invest $4 million immediately, and tentatively committed it to invest another $11 million split evenly into two more tranches. *See* Steinitz, *supra* note 9, at 467. Burford itself could have simply given the initial $4 million to the Ecuadorian plaintiffs; its use of an SPV to do so related to its own purposes, not the plaintiff's financing needs.

188 Burford gained partial control by installing Patton Boggs, a firm with close ties to Burford, as an "Active Lawyer" shaping the litigation and as the "Nominated Lawyers" who controlled the purse strings. Going forward, the plaintiffs could replace Active Lawyers as they wished, but replacing the Nominated Lawyers would require the SPV/Burford approval. Regarding the relationship between the firms, see PATTON BOGGS, INVICTUS MEMORANDUM, PATH FORWARD: SECURING AND ENFORCING JUDGMENT AND REACHING SETTLEMENT, *available at* http://www.earthrights.org/sites/default/files/documents/Invictus-memo.pdf (last visited Dec. 31, 2014) (report authored by plaintiffs' counsel, setting out the details of their enforcement strategies); *see also* Steinitz, *supra* note 9, at 497–98 & n.182–88. Regarding the role of the Active and Nominated Lawyers and how they could be replaced, see Treca Agreement, *supra* note 186, §§ 2.3 at 4, 3.1–.2, at 5, 5.1–.2, at 6–7, 5.4–.5, at 7, 6.1, at 7, 7.6–.7, at 9, 7.9, at 9, 8.5(c), at 13; *id.* § 10.2, at 15 (treating disclosure to the Nominated Lawyers as equivalent to disclosure to the Funder/Burford); *id.* § 13.1, at 20, 13.5, at 21; *id.* sched. 1, sched. 3 (including a definition of "Nominated Lawyers").

189 Burford invested several months after the law firm of Patten Boggs began advising the Ecuadorian plaintiffs; absent Patten Boggs's involvement, Burford would not have invested. As a result, it is hard to imagine Burford would have negotiated different terms regarding the Nominated and Active Lawyers had Burford been directly investing. *See* Roger Parloff, *Litigation Finance Firm in Chevron Case Says It Was Duped by Patton Boggs*, FOR-

ent than those that Burford would have negotiated for itself directly, the SPV approach was presumably used because doing so gave Burford tax, accounting, or other advantages unrelated to its relationship with the Ecuadorian plaintiffs or their counsel.

Second, the financing contract contemplated a later, strict incorporation of the claim. Specifically, the parties agreed that a trust would be created and that the claim and any value due or received for it would belong to the trust.[190] Until such time, the trustee would have the sole right to control the conduct of the claim and the enforcement of any judgment, except that the trustee would itself be controlled, either by the plaintiffs' lawyers or by a "board of managers," a term which was not defined.[191] It is possible that a trust was contemplated because the Ecuadorian judgment required that any funds paid by defendants would be placed into a trust. The judicially contemplated trust, in turn, appears to be a solution devised to deal, at least in part, with agency problems which may emerge when nonmonetary relief (remediation, in that case) is involved. The Ecuadorian judgment ordered that a trust be established for the benefit of an NGO purporting to act on behalf of the class (the Amazon Defense Front, or ADF), or those the ADF designates, and that Chevron pay the damages awarded to that trust. The judgment further "directed that the trust's board of directors be made up of the 'representatives of the Defense Front' . . . and provided that the board would choose the contractors who would perform the remediation."[192] (This kind of litigation governance through the use of legal entities, especially common law trusts, may be expanded to structured settlements, but I leave an elaboration of this idea for another day.)

Regardless of whether the claim was ultimately incorporated, this investment has not gone well. At first, it looked like a winner: an Ecuadorian judge awarded the plaintiffs a $19 billion USD judgment for compensatory and punitive damages in February 2011.[193] However, Chevron contends that the judgment was fraudulently obtained and is currently fighting its enforcement on that basis. As of this writing, the judgment is subject to an appeal in Ecuador, an ICSID arbitration, an anti-enforcement injunction in the United States, and numerous enforcement actions around the globe.[194] In addition,

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TUNE (Apr. 17, 2013, 5:16 PM), http://fortune.com/2013/04/17/litigation-finance-firm-in-chevron-case-says-it-was-duped-by-patton-boggs/; Jan Wolfe, *Patton Boggs Accuses Burford of Betrayal in Chevron Case*, LITIG. DAILY (June 21, 2013), http://www.litigationdaily.com/id=1202607991795/Patton-Boggs-Accuses-Burford-of-Betrayal-in-Chevron-Case?slreturn=20140926125213.

190 *See* Treca Agreement, *supra* note 186, § 8.1(a), at 10.

191 *See id.* § 8.1(b), at 10.

192 Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 481 (S.D.N.Y. 2014).

193 *See* Roger Parloff, *No-show Judge Bolsters Chevron's Attack on $19 Billion Judgment*, FORTUNE (May 17, 2013, 4:10 PM), http://features.blogs.fortune.cnn.com/2013/05/17/judge-chevron-ecuador-2/.

194 All of these actions are discussed in Manuel A. Gómez, *The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador*, 1 STAN. J. COMPLEX LITIG. 429, 430 (2013).

Chevron has sued the lead plaintiffs' lawyers alleging RICO and other violations in connection with alleged fraud and corruption through which the judgment was allegedly obtained. It has recently won the action (which is subject to an appeal).[195] Patton Boggs was named as a "co-conspirator" but not a defendant in that suit and has settled it.[196] In April 2013, Burford, Chevron, and others entered a settlement agreement under which Burford renounced its right to receive any proceeds of the litigation, and Chevron and Burford agreed to release each other from any claims relating to the Chevron/Ecuador litigation.[197] Burford also agreed as part of the settlement to dissolve the primary SPV, Treca Financial Solutions, through which the funding was effectuated.[198]

Beyond illustrating funder financing tactics and a possible form of claim incorporation, this deal illustrates the very features of litigation finance that render bringing in corporate law and practices, especially corporate governance practices, obviously beneficial for both funder and funded. First, it exposes the high degree of risk funders face. Burford may very well have been defrauded by the plaintiffs and the controlling lawyers it selected. The jury on that is, quite literally, still out.[199] But even if it was not defrauded, Burford has faced great cost and reputational harm for having made this particular investment. And since it has become, de facto if not de jure, a real party in interest to the Chevron/Ecuador litigation through its investment, it has gotten enmeshed as a (potential) party in the underlying litigation. Second, it exposes the extreme information asymmetry characterizing litigation

195 *See generally Chevron Corp.*, 974 F. Supp. 2d 362.

196 *See* Roger Parloff, *Chevron Seeks to Sue Patton Boggs for Fraud and Deceit*, FORTUNE (May 13, 2013, 10:16 AM), http://features.blogs.fortune.cnn.com/2013/05/13/chevron-seeks-to-sue-patton-boggs-for-fraud-and-deceit.

197 *See* Burford Settlement Agreement, *supra* note 186. Burford, through Treca, initially invested $4 million and thereby purchased the right to receive 5.545% of the proceeds. *See* Treca Agreement, *supra* note 186, sched. 1, § 3(e), 3(h). Although it refused to make further investments and later terminated the funding contract, it retained the right to that percentage until renouncing it in the settlement. *See* Burford Settlement Agreement, *supra* note 186, § 1, at 3; Treca Agreement, *supra* note 186, § 7, at 7, 11.3, at 18.

198 Although Burford's settlement agreement with Chevron is not explicit on this point, it appears that Nugent (Treca's largest shareholder, and, originally, sole shareholder) exists for reasons beyond the Chevron/Ecuador investment because the agreement does not require Burford to dissolve Nugent, though it does require Burford to dissolve Treca. *See* Burford Settlement Agreement, *supra* note 186, § 4(a)(vi), at 6. Similarly suggestive but unclear is the Settlement Agreement's reference to other companies as part of the "Burford Parties," namely, Litigation Risk Solutions, a Delaware LLC, and a company identified only as "Glenavy." Glenavy is defined in the introductory paragraph of the agreement as one of the Burford Parties and is identified in one of the recitals as having received a subpoena from Chevron as part of its RICO suit against the Ecuadorian plaintiffs, but otherwise Glenavy does not appear in the document. *See* Burford Settlement Agreement, *supra* note 186, pmbl. ("Settlement Agreement" and "Recitals"). Nor is there any indication of where it was formed or whether Glenavy is its full name. *See generally* Burford Settlement Agreement, *supra* note 186.

199 *See Chevron Corp.*, 974 F. Supp. 2d at 478–79.

funding deals. And, third, in Burford's re-alignment with Chevron and denouncement of the plaintiffs, while an unusual scenario, we find an illustration of the types of conflicts to which these arrangements may give rise.[200]

## III. The Incorporation Paradigm: Using Legal Entities to Eliminate the Hidden Costs and Govern Litigation

### A. *The Problems Solved and the Problems Created in the Real-world Examples*

As discussed at the outset, the use of securities tied to litigation proceeds, the use of an SPV, and at times both, is a single mechanism that can both resolve certain hidden costs of litigation and assist in managing the ethical challenges implicated by litigation finance. The following paragraphs generalize and elaborate on how they do so beyond the deal-specific analysis in the previous Part.

#### 1. Corporate Deal-Making and Corporate Finance

##### a. Reducing the Hidden Costs of Litigation in Certain Mergers, Acquisitions, and Large Equity Investments

As illustrated by the discussion of the deals above, both loose and strict incorporations can and have been used to solve company valuation problems when a claim's value is material relative to the value of the company, but not so large that the claim becomes the company, and the company wants to merge, be acquired, or receive a large equity investment. Without incorporation of the claim, the difficulties in valuation have made it very difficult or even impossible to undertake such transactions, creating the problem of the hidden cost of litigation. This cost may well dwarf the apparent costs of litigation, namely attorneys' fees and legal expenses.

##### b. Monetizing Claims that Currently Go Unremedied and Litigation Finance as Corporate Finance

The ability to cabin off litigation in an SPV, the liquidity that can be provided by embodying litigation in a security (with or without an SPV),[201] and the ability to raise funds directly for the pursuit of a litigation and do so on an ongoing basis (by issuing additional securities) may induce corporations, governments, and other sophisticated actors to pursue legal claims that currently go unremedied. As the risk of incurring the hidden costs of litigation is reduced, the incentive to commence and pursue (as opposed to settle,

200 *See generally* Steinitz, *supra* note 9 (discussing extreme information asymmetry, extreme risk, and extreme agency costs (conflicts of interests) as characteristics of litigation as an asset).

201 On the significance of the possibility of a market in shares as a significant upside of organizational law generally, see, e.g., Henry Hansmann et al., *Law and the Rise of the Firm*, 119 Harv. L. Rev. 1333, 1335 (2006).

at a discount) meritorious claims increases (depending on one's view of the desired level of litigation in society this is either a benefit or a detriment).[202]

### 2. Litigation Finance

#### a. Control and Conflicts of Interests

As discussed above, the primary concern raised by both critics and proponents of litigation finance is that funders may obtain control of the claim and use it to further their own interests at the expense of the interests of the authentic owners of the claim, the plaintiffs. As also discussed, this is the familiar problem of the separation of ownership and control. Shareholders often have little control over how their companies are managed. Shareholders have little ability to propose alternative directors,[203] shape executive compensation,[204] and otherwise govern their agents. Because this problem is both profound and old, corporate law has developed multiple responses:

> [F]ive legal strategies [are identified] that the law employs to address [agency] problems. . . . Some legal strategies are "regulatory" insofar as they directly constrain the actions of corporate actors: for example, a standard of behavior such as a director's duty of loyalty and care. Other legal strategies are "governance-based" insofar as they channel the distribution of power and payoffs within companies to reduce opportunism. For example, the law may accord direct decision rights to a vulnerable corporate constituency, as when it requires shareholder approval of mergers. Alternatively, the law may assign appointment rights over top managers to a vulnerable constituency, as when it accords shareholders—or in some jurisdictions, employees—the power to select corporate directors.[205]

Let us illustrate how to apply these strategies to the incorporation of legal claims. Among the most fundamental mechanisms are the fiduciary duties that directors and officers owe shareholders, namely the duty of care

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202 *See* Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997); Steven Shavell, *The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement*, 19 INT'L REV. L. & ECON. 99 (1999) (arguing that the privately determined level of litigation can depart from the socially optimal level in either direction because litigants do not take into account either the negative or positive externalities that their litigation creates—thus, corrective social policy may help to remedy the divergence).

203 *See Key Issues: Proxy Access*, PRICEWATERHOUSECOOPER, http://www.pwc.com/us/en/corporate-governance/proxy-access.jhtml (last visited Dec. 31, 2014).

204 Jesse Eisinger, *In Shareholder Say-On-Pay Votes, More Whispers than Shouts*, N.Y. TIMES, June 26, 2013, http://dealbook.nytimes.com/2013/06/26/in-shareholder-say-on-pay-votes-more-whispers-than-shouts/?_r=0.

205 John Armour et al., Abstract, *Agency Problems, Legal Strategies and Enforcement* (European Corp. Governance Inst., Working Paper No. 135/2009, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1436555. The authors detail ten strategies that generally comprise the law's methods of dealing with agency problems, four regulatory and six related to governance. *See id.* at 23. Since these are general strategies, all can be applied to the regulation and governance of incorporated legal claims. *See id.*

and the duty of loyalty.[206] These duties aim to prevent self-dealing, bad faith, and actions against the corporation's and shareholders' best interest. Under certain structures, the use of an SPV could mean that funders become officers, with fiduciary duties, and not only owners.

Further examples of how corporate governance principles can inspire litigation governance can be gleaned by turning to the area of incentive alignment through executive compensation.[207] For example, compensating executives with options has become a popular practice on the theory that it aligns the managers' interests with those of the owners. As the limitations of this method became evident, it has been refined.[208] For example, some corporations require executives to hold on to some or all of their options and have "skin in the game" to discourage short-termism. Another option is clawbacks: contractual rights to have compensation returned in case of underperformance in the long run.[209] Similarly, funders can be required to hold on to some or all of their litigation proceed rights until the litigation is concluded.[210]

There are other efforts to address agency problems that tend to be embedded in corporate practices and are executed via contracts rather than statutes. In two of the deals, potential agency problems were resolved via contracts that specified principles of litigation governance in detail. As part of the Golden State-Cal Fed merger, both the Golden State LTWs and the Cal Fed participation rights were governed by the Litigation Management Agreement, which demarcated precisely how the litigation would be managed. That contract also spelled out whom the agents reported to, and how

206 *See, e.g.*, A.L.I. PRINCIPLES OF CORPORATE GOVERNANCE § 4.01 (1994) (concerning the duty of care of directors and officers, the business judgment rule, as well as principles of corporate governance); *id.* § 5.01 (concerning the duty of fair dealing of directors, senior executives, and controlling shareholders, as well as principles of corporate governance); Robert Rosenberg, *Fiduciary Duties and Potential Liabilities of Directors and Officers of Financially Distressed Corporations*, LATHAM & WATKINS (2003), *available at* http://www.iiiglobal.org/component/jdownloads/finish/393/1422.html; *see also* Sebok & Wendel, *supra* note 58, at 1836 (arguing for good faith rather than fiduciary duties).

207 For a review of various approaches to aligning executive compensation with the interests of the corporation, see Wulf A. Kaal, *Contingent Capital in Executive Compensation*, 69 WASH. & LEE L. REV. 1821, 1821 (2012).

208 On the promise of using restricted stock options, see Sanjai Bhagat & Roberta Romano, *Reforming Executive Compensation: Focusing and Committing to the Long-term*, 26 YALE J. ON REG. 359, 363 (2009). On the shortcomings of using options and other equity approaches to compensate executives, see Lucian A. Bebchuk et al., *The Wages of Failure: Executive Compensation at Bear Stearns and Lehman 2000–2008*, 27 YALE J. ON REG. 257, 260 (2010); Kaal, *supra* note 207, at 1822–24, 1828–29 (citing Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L.J. 247, 249 (2010)).

209 *See* Lucian A. Bebchuk & Jesse M. Fried, *Pay Without Performance: Overview of the Issues*, 17 J. APPLIED CORP. FIN. 8, 9 (2005) (proposing solutions to pay structure flaws that de-link compensation from performance).

210 Indeed, the Coast Litigation Trustees had to retain at least 50% of their certificates during their tenure as Litigation Trustees. *See* Coast Fed. Litig., Contingent Payment Rights Trust (Form S-4), *supra* note 83, app. B, § 3.7(b), at 50.

the agents could be removed.[211] The IR deal similarly involved a litigation management contract that allocated control of the litigation, giving some of it to the pre-merger company, and some—including settlement—to the post-merger parent company.[212] Litigation governance contracts like these, which specify who has how much power to take which decisions, are perhaps the most direct way to resolve the agency issues.

Where an SPV is used, the constitutional documents of the entity can also be used to define the purpose of the entity and the obligations of its officers in a manner that minimizes conflicts. Thus, a single SPV may be used for multiple litigations should a plaintiff and funder choose to join forces on more than one suit. In such a case, the SPV would reduce the transaction costs of negotiating a separate contract for each litigation.[213]

Using an SPV can also help clarify the duties of the attorney in the attorney-client-funder triumvirate, thus resolving or minimizing the set of conflicts between the client and its attorney that are created when a third party, the funder, pays the attorneys' bill—especially if that funder-attorney relationship is a repeat-play relationship.[214] Now, the SPV can be the client of the attorney and, so long as the funder is either a director or officer of the SPV and thus owes it fiduciary duties, those conflicts can be regulated. Using an SPV to manage funder-funded conflicts would fail, however, if the funder does not have such a duty to the SPV.

The continuum described in Part III—of transferring no control, some control, or total control of the claim when incorporating it—represent different modalities of dealing with the agency problems that arise once ownership and control are separated in the context of a financed or spun-off litigation. Loose incorporation always resolves these tensions by contract. In the con-

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211 *See* Golden State Bancorp Inc., Current Report (Form 8-K) (Sept. 11, 1998), *available at* http://www.sec.gov/Archives/edgar/data/1019508/0000950136-98-001646.txt. The Litigation Management Agreement was by and among Golden State Bancorp Inc., Glendale Federal Bank, Federal Savings Bank, California Federal Bank, A Federal Savings Bank, Stephen J. Trafton and Richard A. Fink. Trafton and Fink were the designated litigation managers for each case, who reported to committees of the board of directors specifically create for each case and were vested with the power of the board as regards the litigation, including rights to remove the litigation managers for cause. *See* First Nationwide Holdings Inc., Litigation Management Agreement (Form 8-K), *supra* note 110, arts. I, II, at 2–11.

212 *See generally* Coast Fed. Litig., Contingent Payment Rights Trust (Form S-4), *supra* note 83, § 3.7, at B-11 to -12; *id.* ex. B, at B-41.

213 The question of what legal entities add to mere contracts, given that at core they can be understood as standard contracts, is an important question when selecting between loose and strict incorporation and a question that has received substantial treatment in corporate legal theory but a full treatment of it is beyond the scope of this Article. For some answers to this question, see Henry Hansmann, *Corporation and Contract*, 8 AM. L. ECON. REV. 1 (2006) (explaining why publically traded corporations rarely deviate from the default terms of state corporation law in their charters); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000).

214 *See* VICKI WAYE, TRADING IN LEGAL CLAIMS (2008); Steinitz, *supra* note 8, at 1280; ABA WHITE PAPER, *supra* note 39; N.Y.C. BAR OPINION, *supra* note 36.

text of a publicly issued security, whether as a spinoff or, if an underwriter were willing, through a litigation-funding IPO, control stays with the original plaintiff. The claim ownership rights embodied in the security are too fragmented for a security holder to be given any control, and in any case, the security holders only enter the transaction after its terms are set. If the security were done via private placement to a single funder or a very small number of funders, one could imagine them contracting for partial or full control transfer. Middle ground is possible, where a plaintiff sets the terms of its security and then markets its private placement via a road show to a much larger number of qualified investors. Such investors need not be PELF investors and may not seek much control.[215]

The legal ethics paradigm treats these permutations differently because of its focus on the degree of control transfer, and would be more approving of a funding IPO than the arms-length negotiated deal with a PELF. A close examination, however, reveals that this approach is suboptimal in terms of promoting public policies. If underwriters were willing to issue litigation funding IPOs, such originate-and-distribute deals could create a moral hazard (investing other peoples' money and shifting the risk to buyers of the securities) and, consequently, a risk to the court system by flooding it with nonmeritorious claims.[216] This is much less socially desirable than a PELF deal even though the separation of ownership and control is greater in the latter. The incorporation paradigm in contrast, allows us to clearly see that such a preference for an IPO over a PELF deal would be undesirable.

If securities are involved, the potential for tension between ownership and control is greatest with the strict incorporation approach, as evidenced by the Coast Savings example. But that tension need not exist if ownership of the claim as well as control of it is transferred to the SPV. If the entire claim is transferred to the SPV—Coast Federal without Ahmanson's continued claim of ownership and accounting for the claim, or the Treca trust, if created—then not only is the tension absent, but by structuring ownership, the bylaws and roles within the SPV, control can be allocated among the parties however they wish without necessarily raising any agency issues. The Crystallex deal illustrates some of the possibilities. The Board of Managers envisioned by the Treca Agreement would perhaps have been another such vehicle. One can envision such Board of Managers as including plaintiff representatives analogous to lead plaintiffs in class action, as well as their litigation counsel and a funder representative. The Board of Managers' membership, like the IR rights agents, could have voting powers that give a settlement veto to the plaintiffs, but nonetheless give funders a vote and thus influence. The IR deal itself reflects the overall flexibility of the incorporation paradigm. The trust features that made its issuance of the proceed right

215 *See* Painter, *supra* note 10, at 638; Maya Steinitz & Abigail C. Field, *The Model and the Securities Laws, Coda*, A Model Litig. Fin. Contract (July 29, 2013), http://litigationfinancecontract.com/the-model-and-the-securities-laws-coda/.

216 *See* Steinitz, *supra* note 8, at 1321 (discussing the prospect of securitizing legal claims and the potential attendant dangers).

certificates more deal-appropriate than having pm-IR or the new parent, Gingko, issue them could be realized, but control transfer could be finely customized by contract. Again, the legal ethics paradigm approaches these deal structures differently, but its touchstone—claim control—seems to be simply one of the central, negotiated deal points, rather than the sine qua non deal point excluded from negotiation amongst sophisticated actors by operation of bar association regulation.[217] An incorporation paradigm more appropriately assesses the deal as a business transaction. The judgment of these deals should use the standards for dealmaking and decisionmaking developed in the business law context.

b. Information Asymmetry and the Attorney-Client Privilege

The funder-funded relationship is characterized by information barriers, predominantly the fear of waiving attorney-client privilege by communicating with the funder,[218] and extreme information asymmetry due to the fact that the plaintiff has better, private information. Funders may also have material private information.

Information barriers and asymmetry can be addressed using securities structures, whether loose or strict, to the same extent they can be in the more typical non-recourse loan scenario, so long as the securities issuance is an arms-length private placement. That is, so long as it is practical to enter confidentiality agreements that preserve work product protection information, asymmetry about the facts of the case can be minimized.[219] However, if a publicly traded security is used, information asymmetry becomes reinforced rather than mitigated. That is, the plaintiff will not want to publicly disclose any information that would result in work product or privilege waiver. Instead, the disclosures will resemble those of the CPR (Coast) Trust's, namely, announcements of case developments otherwise in the public record.

If a strict incorporation approach is used, positioning both the funder and the plaintiff as officers of the SPV, privilege issues for communications between them would evaporate as they would be co-representatives of the SPV client for all dealings with counsel. Privilege issues could also be resolved under loose incorporation structures if the funder's litigation managers were subject to sufficient control by the plaintiff, as in the Golden State example. Whether a funder would agree to such control is a different question. Also unclear is whether entering a litigation management agreement of

217 *See* Anthony J. Sebok, *Should the Law Preserve Party Control? Litigation Investment, Insurance Law and Double Standards*, 56 WM. & MARY L. REV. (forthcoming 2015) (manuscript at 1), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271762.

218 Though in at least some U.S. jurisdictions that risk is greatly minimized through the operation of the attorney work-product doctrine. For a discussion of both, see Steinitz & Field, *supra* note 50, at 730–34.

219 *Id.* at 733–34 (analyzing the extent to which the work product doctrine can be preserved despite the introduction of a funder and the extent to which it overlaps, in its scope of protection, with the attorney-client privilege).

the type used in the IR example would preserve privilege when the parties are not parties to a merger but are instead engaging in a joint venture, which is the essence of claim incorporation in the litigation finance, rather than hidden costs, context. Perhaps the agreement could serve to demonstrate the common legal interest necessary to preserve privilege.[220]

#### c. Uncertainty, Pricing, and Transparency

By embodying the value of a litigation in a security which is capable of trading, litigation—notoriously difficult to value because of the nonmonotonic and discontinuous nature of settlement values[221], and because of the absence of comparables and of a transparent market[222]—becomes subject to pricing via markets. Furthermore, the ability to issue additional shares in the future allows plaintiffs to avoid overselling (i.e., selling a larger portion of the claim than they have to) at the outset and/or selling at a steep discount when their bargaining position is the weakest.[223] Instead, as more information is revealed about the value of the litigation through the litigation process, risk is reduced, and additional shares can be priced accordingly. If a robust market develops, the accumulation of transparent pricing data, currently absent with respect to legal settlements, can reduce pricing problems across deals. Finally, by avoiding uncertainty as to whether any given deal is champertous or not, a risk factor that is currently raising the cost of financing for plaintiffs will be removed.

#### d. Commodification

Embodying a claim in a security, whether in connection to a strict or loose form of incorporation, is commodification in its purest form. However,

220 An exception to the doctrine that disclosure to a third party waives attorney-client privilege is called the common interest doctrine. The contours of the doctrine vary by state, and can be incoherent even within a state. Importantly, while parties must agree that the common legal interest exists, their agreement alone cannot give rise to such an interest because the parties cannot create privilege by agreement when it otherwise does not exist. A challenge normally for funder-funded relationships is that a common commercial interest is easy to establish, but a common legal one is not. *See* Steinitz & Field, *supra* note 50, at 730. However, if the parties are contractually agreeing to co-manage a litigation for a common purpose as defined in the litigation management agreement—the IR agreement, e.g., lays out how settlement offers are to be evaluated—then their relationship seems much closer than simply that of codefendants agreeing to cooperate in their defense, which is the situation the common interest doctrine arose from. Thus a privilege preserving common legal interest would plausibly exist. The idea is simply too novel, however, for any on-point precedent.

221 *See* Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1272–73 (2006); Robert J. Rhee, *The Effect of Risk on Legal Valuation*, 78 U. COLO. L. REV. 193, 193 (2007).

222 *See* Yeazell, *supra* note 12, at 143–44 (explaining that while there are numerous legal settlements, the legal claims market is unusual in that there is no available information about their values because most settlements tend to be confidential).

223 *See* Steinitz & Field, *supra* note 50, at 741–44 (discussing "hold-up").

steps can be taken to mitigate the implications. The most potent is the approach taken in the IR deal, namely to provide explicit direction requiring certain types of nonmonetary relief to be sought and prioritized even at the expense of a reduced monetary award, coupled with a disclosure of this arrangement to the proceed rights holders. One can imagine a litigation finance contract that funded an antitrust claim containing similar language. That said, the commodification inherent in reducing claims to securities, tradable or not, is the reason this approach is inappropriate to claim types other than commercial claims owned by corporations, wealthy individuals, or, in certain cases, sovereigns.

e. Transaction Costs

The transaction costs of doing a private placement of securities need not be materially larger than negotiating a more typical funding contract, unless it is a private placement involving a formal offering memorandum and a road show. Then the costs are much higher. However, if retaining full control of the claim is a crucial deal point and the claim is large enough that litigating it will be so costly that financing is attractive, these costs may be justified. Similarly, if a claim is embodied in a publicly traded security, the costs are high. These are all the costs of drafting and registering the prospectus and ongoing compliance costs.[224] These costs are even higher if a trust or other SPV is used in conjunction with the public security, because then there are the additional costs of creating the SPV, its own compliance costs, and the compensation of the SPV's directors, officers, or trustees.

f. Investor Protection

Currently, there is a lack of clarity as to whether (some or all) litigation finance contracts are securities.[225] By following well-recognized deal patterns, whether and what kind of security is involved and what kind of securities regulation applies becomes much easier to discern.

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In sum, incorporating legal claims is a practice that holds the potential of significantly minimizing the Funding Challenges and carries additional benefits such as improving investor protection.

### *B. Trusts and Beyond: Using Various Legal Entities for Financed or Spun-off Claims*

Accepting the idea that the funding of a commercial claim is a joint venture brings to stark relief at least two key features of litigation finance. One is the key difference between the funder-plaintiff relationship—which is

224 *See* Painter, *supra* note 10, at 634–35.
225 *See* Couture, *supra* note 90, at 5.

that of co-venturers—and the contingency lawyer-client relationship—which is an attorney-client relationship. What follows from this difference is that while allocating control over key decisions to an attorney may not be appropriate, allocating control to a co-owner is appropriate in certain circumstances. The other, related difference is the fact that conflicts of interest run both ways in the funder-plaintiff relationship. While the funder may be tempted to maximize its profits at the expense of its JV partner, the claimant, the latter may also try to take advantage of its JV partner, the funder. Yes, the funder may push for an early settlement in order to reinvest in other litigations in its portfolio.[226] But the claimant may push to overinvest in its case either because it is heavily concentrated in it or because the claimant may be more emotional about it.[227]

These conflicts of interest are a direct result of the separation of the ownership and control of the claim. Business law has developed (partial) solutions to these problems over the years.[228] These solutions are embodied in (1) the different types of business entities, understood as sets of organizational choices which have evolved over time to produce internal coherence,[229] and (2) principles of corporate governance.

The rest of this Section looks at a few illustrative examples of business entities, with an emphasis on the different forms of corporate governance they offer, to see how they might address the separation of ownership and control in the context of litigation finance and litigation governance. The Section compares them along a few dimensions, including relative complexity and formality, access to capital, and ease of transfer of interests. This Section seeks only to illustrate how choice of entity can influence issues implicated by the separation of ownership and control. It is not intended to be an exhaustive survey of either the entities that can be used nor of the important dimensions of entity selection analysis.[230] It is also important to

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226 For an elaborate discussion of the conflicts created by the fact that funders invest in portfolios of litigations, see Steinitz & Field, *supra* note 50, at 735–41.

227 Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 Tex. L. Rev. 77, 79–81 (1997) ("Litigants litigate not just for money, but to attain vindication; to establish precedent; to express their feelings . . . . [T]heir decisions to settle or litigate may be affected by . . . [their] self-serving biases concerning the fairness of their position, habit, unyielding conceptions of justice, and myriad other factors." (footnotes omitted) (quoting another source) (internal quotation marks omitted)).

228 *See* Lee A. Harris, Cases and Materials on Corporations and Other Business Entities 2 (2011) ("[A]gency [law] is in many ways the real back-story [of] . . . organizational form[s]. In fact, . . . doctrines[ ] like partnership law and corporate law[ ] are merely an outgrowth of agency principles.").

229 *See generally* Larry E. Ribstein, The Rise Of the Uncorporation (2010).

230 For an in-depth analysis of the considerations that go into entity selection, see generally *id.*; *see also* Henry Hansmann, *Ownership and Organizational Form*, *in* The Handbook of Organizational Economics 891, 891–917 (Robert Gibbons & John Roberts eds., 2013); Henry Hansmann et al., *The New Business Entities in Evolutionary Perspective*, 8 Eur. Bus. Org. L. Rev. 59, 60 (2007); Larry E. Ribstein, *Why Corporations?*, 1 Berkeley Bus. L.J. 183, 186–223 (2004).

note that from a deal-specific perspective, additional and possibly idiosyncratic considerations may come into play. For example, key deal-specific considerations as to which legal entity to use are likely to be the tax and accounting consequences of the structure in the context of the claim and claimant. Such deal-specific considerations are also outside the scope of this Article.

### 1. Statutory Trusts

Two of the spinoff deals discussed used statutory trusts as security-issuing entities to which claim proceeds and perhaps control were transferred. Among the various available forms, these entities have certain advantages. They are rigid, passive, and well understood. Simultaneously, their rigidity does not eliminate flexibility, in that the powers of the trustee, the corpus of the trust, and the terms of the securities can be customized. In addition, they are routinely used for financing and security issuance. Access to capital is limited solely by the attractiveness of the terms of the certificates the trust issues, and transferability of the certificates can be customized within the bounds of the securities laws.

To leverage trust doctrine to minimize or resolve the conflicts of interest between the funder and the funded, defining the trustees' powers is key. The IR and Coast Federal deals show the tension; the certificate holders want maximum financial return, which may or may not be what the plaintiff wants. IR resolved the conflict by retaining control of the litigation, so it could pursue nonmonetary relief freely, and simply told certificate holders that the conflict was resolved against them. Coast Federal resolved the conflict in favor of the certificate holders, and informed Ahmanson (the claim owner) accordingly.

One could imagine the optimal use of a trust to finance a claim and resolve conflicts of interest would be a deal in which the plaintiff and funder(s) were both trustees and certificate holders, the claim involved only monetary remedies, the trust corpus was the right to receive the net proceeds of the claim, and the trustees controlled the litigation. This approach would impose fiduciary duties on both the funder and plaintiff, binding them to the same commercial goal (maximizing the net proceeds). Funders are unlikely to find the fiduciary duty attractive, but it is possible to imagine that allocating decisional power among the trustees would give the funder comfort that the fiduciary duty would not force it to act too strongly against its own interest. In addition, the ability to raise additional funds by issuing certificates to other funders without making those second-wave funders trustees could be quite appealing. Similarly, to the extent a funder could sell some or all of its certificates while retaining (or even relinquishing) trustee status/litigation control, a funder might find the trust attractive.

### 2. Partnerships

Perhaps the oldest and simplest business form is the partnership. Partnerships resolve mutual conflicts of interest by imposing a reciprocal fiduciary duty,[231] do not separate ownership and management, and allocate management responsibility laterally by agreement. Unlike with corporations, management is not stratified into a board of directors and an officer tier.[232]

The greatest downside of partnerships—liability for other partners' acts—is a relatively minor issue in the litigation finance context because most actions of the partnership are not directed toward external clients/customers the way most businesses are. The simplicity of partnerships and the relatively low liability risk makes this arrangement theoretically the most effective, efficient way to resolve the funder-funded conflicts. However, the general historical trend has been away from the partnership form due to the restrictive nature of both the fiduciary duty and joint and several liability. For the same reasons, it is likely that both funders and clients may wish to restrict their reciprocal duties and limit their liability.[233]

A final consideration is that partnerships' ability to raise capital is limited to the partners' assets and borrowing ability, i.e., they draw on a limited reservoir.[234] This issue is less pressing in the litigation finance context because most funders take on cases assuming they will fund the case themselves, or through syndicates they have put in place, and thus presumably could bring sufficient capital to the table. Finally, partnership interests are difficult to transfer. One can imagine that funders may lean in favor of ease of transfer while plaintiffs may be better served by requiring funders to maintain "skin in the game." A notable consideration is that heavily restricted securities do not lend themselves to the originate-and-distribute model, a restriction that is beneficial for plaintiffs. However, some funders express the opposite concern, wanting to ensure plaintiffs have skin in the game in the form of retained ownership.

### 3. Corporations

Most corporations are entities that involve a complete separation of ownership and control for most decisions. While shareholders have the last word on certain points, for the most part, control is vested in a board of directors and in officers (who may also be shareholders). The exception to this basic structure is the "close corporation," a privately held entity that can give shareholders or third parties topic-specific director or executive level powers (and

231 For a discussion of fiduciary duties in partnerships, see Michael Haynes, *Partners Owe to One Another a Duty of the Finest Loyalty . . . . or Do They? An Analysis of the Extent to Which Partners May Limit Their Duty of Loyalty to One Another*, 37 TEX. TECH L. REV. 433, 434 (2005).

232 HARRIS, *supra* note 228, at 69, 188.

233 On the historical shift away from partnerships towards corporations and uncorporations and, within the latter category, especially towards the LLC, see, e.g., RIBSTEIN, *supra* note 229, at 59–60.

234 *See id.* at 43–44.

duties), and can eliminate the board of directors entirely, effectively incorporating a partnership.[235] Like partnerships, however, close corporations have been trending down.

Corporate law has long recognized the conflicts of interest created by separating ownership and control, and has used both statutory and common law fiduciary duties and governance doctrines to minimize them. Managers must be loyal and avoid self-dealing, while pursuing the company's—shareholders'—best interests. Governance theories have involved aligning financial incentives through compensation structures, easing accountability by making directorships all expire at the same time, increasing transparency and accountability by having independent directors and compensation and audit committees, and similar efforts. Finally, Congress and regulators have taken some steps to increase shareholder power versus management.[236] All that said, corporate misconduct continues to make headlines and trigger shareholder suits, demonstrating that all these measures simply reduce rather than eliminate the problems created by separating ownership and control. So while a corporate structure could be used to impose various duties, and director and officer roles could be allocated among funder and claimant to structure decisionmaking power and authority to minimize conflicts, unless the funder and the claimant held all or essentially all the shares of the corporation, the conflict minimization would be imperfect at best.

### 4. Limited Liability Companies

These entities are far newer and far more flexible than corporations. The flexibility extends to the degree of separation of ownership and control. Flexibility in LLCs also means that intra-company relationships can be structured relatively free from significant statutory and caselaw-imposed fiduciary duties and other requirements. The de facto deregulatory effects of the LLC form account for its popularity in recent years.[237] The great flexibility to embrace or reject the conflict-minimizing duties and doctrines that come with more traditional business forms, however, places in doubt the likely effectiveness of this form in minimizing the problems created by the separation of ownership and control beyond what sheer bargaining power already affords contracting parties.

While the rise of the LLC and the high likelihood that this business form will be popular in this context—as it has increasingly been in others—raises questions about the effectiveness of business entities to minimize problems

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235 *See* George J. Siedel, *Close Corporation Law: Michigan, Delaware and the Model Act*, 11 Del. J. Corp. L. 383, 395–96 (1986). A corporation with such few shareholders could be best styled as a close corporation because of the flexibility gained. Further, a close corporation could flatten management by eliminating the board of directors, increasing efficiency. In these ways close corporations could mimic the advantages of partnerships while adding the benefit of limited liability. *See id.*

236 *See supra* text accompanying note 24.

237 On the rise of the LLC, see Ribstein, *supra* note 229, at 119–25. On the LLC's deregulatory effects as a main reason for this rising tide, see *id.* at 119–23, 143–47.

arising from the separation of ownership and control, it is important to note that the type of entities used and their internal governance arrangements in the litigation finance context can be dictated or at least affected by court orders as to the form of settlement structure where a settlement is court-supervised. Court supervision, in turn, is likely to play an increasingly important role as defendants and judges become more aware of litigation finance and seek, respectively, to bring the fact of financing to light and to submit finance arrangements to court scrutiny.

## Conclusion

The legal ethics paradigm, while superficially very attractive given certain similarities between contingency attorneys and funders, proves, upon closer consideration, to fall woefully short in explaining and addressing the economic reality of litigation finance. Consequently, it leads to both over- and under-regulation of the practice and falls short in recognizing and addressing the problem of the separation of ownership and control of legal claims. The legal ethics paradigm also masks the full spectrum of possible deal structures that market players are already experimenting with in the marketplace that is the focus of this Article: commercial claims brought by sophisticated plaintiffs such as corporations, sovereigns, and wealthy individuals.

A better view would replace litigation-finance-as-champerty as the organizing idea in the literature and jurisprudence with litigation-finance-as-finance as the organizing idea. What follows, dubbed here "the incorporation paradigm," better fits the realities of deals actually undertaken by various market participants and brings a centuries-old paradigm of thought on how to address, i.e., minimize or even solve (but if mismanaged, exacerbate), each and every problem that stems from what is now reframed as the problem of the separation of ownership and control of legal claims. These problems are, in a nutshell: (1) extreme conflicts of interests; (2) extreme information asymmetries; (3) extreme uncertainty; and (4) inappropriate commodification. In addition, the incorporation paradigm simplifies the analysis of the application of securities regulation to litigation finance arrangements.

In addition to this transformation of litigation finance scholarship and practice, the discussion of incorporation of legal claims contributes to the scholarship on corporate law. As we have seen, most of the claim incorporation deals have taken place in the context of mergers, acquisitions, or large equity investments. In those cases, claim incorporations have been undertaken in order to resolve the hidden cost of litigation—the barriers that pricing legal claims can place on such transactions because of the difficulty in valuing legal claims. These hidden costs, where they apply, dwarf the visible costs of litigation, i.e., attorneys' fees and legal expenses. Finally, incorporating legal claims may also provide accounting benefits and may play a role in corporate finance by allowing corporations (or governments) to monetize claims that currently go unprosecuted.

Fully commodifying commercial legal claims and providing for enhanced liquidity through public trading of securities in the open market on security exchanges can open up additional horizons beyond those this Article explores or those alluded to in the preceding paragraph. More analysis can be done on the accounting and tax implications of the use of different types of business entities and securities and on how different legal entities may lend themselves to different forms of corporate governance *cum* litigation governance. The full implications of understanding litigation finance contracts as financial products and spun-off litigation from a regulatory perspective is a rich field to mine, and there can be little doubt that the analysis herein will launch experimentation by market players and create new scenarios for courts to opine on.