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Probate Lending

ABSTRACT. One of the most controversial trends in American civil justice is litigation lending: corporations paying plaintiffs a lump sum in return for a stake in a pending lawsuit. Although causes of action were once inalienable, many jurisdictions have abandoned this bright-line prohibition, opening the door for businesses to invest in other parties' claims. Some courts, lawmakers, and scholars applaud litigation lenders for helping wronged individuals obtain relief, but others accuse them of exploiting low-income plaintiffs and increasing court congestion.

This Article reveals that a similar phenomenon has quietly emerged in the probate system. Recently, companies have started to make "probate loans": advancing funds to heirs or beneficiaries to be repaid from their interest in a court-supervised estate. The Article sheds light on this shadowy practice by analyzing 594 probate administrations from a major California county. It finds that probate lending is a lucrative business. It also concludes that some of the strongest rationales for banning the sale of causes of action—concerns about abusive transactions and the corrosive effect of outsiders on the judicial processes—apply to transfers of inheritance rights. The Article thus suggests several ways to regulate this nascent industry.

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INTRODUCTION

On December 28, 2007, Eva Bell died in Alameda County, California.[1] She did not create a trust, which meant that her assets should have passed through the court-supervised probate system to her children and grandchildren.[2] But shortly after the probate matter began, something happened that transformed the succession process. Eva's son assigned $26,100 of his expected payout from the estate to a company, Advance Inheritance, in return for $15,000.[3] In turn, by purchasing heirship rights, Advance Inheritance acquired standing as an "interested person" in Eva's probate case.[4] It capitalized on this privilege by successfully petitioning to become Eva's personal representative (the party responsible for managing her possessions).[5] It then evicted tenants from an apartment that Eva had owned, sold the building, and paid itself thousands of dollars in fees from the estate.[6]

Meanwhile, another firm, Inheritance Funding, entered into several contracts with Eva's other relatives, buying a $57,200 cut of the estate for a total of $39,000.[7] The final such deal—in which one of Eva's children sold $7,600 in

1. *See* Petition for Letters of Administration at 1, Estate of Bell, No. RP08389640 (Cal. Super. Ct. May 28, 2008).

2. *See id.* at 4 (listing decedent's relatives to whom assets should pass).

3. *See* Third Assignment of Beneficial Interest in Decedent's Estate at 1, Estate of Bell, No. RP08389640 (Cal. Super. Ct. Sept. 8, 2008); Second Assignment of Beneficial Interest in Decedent's Estate at 1, Estate of Bell, No. RP08389640 (Cal. Super. Ct. Aug. 27, 2008); Assignment of Beneficial Interest in Decedent's Estate at 1, Estate of Bell, No. RP08389640 (Cal. Super. Ct. July 1, 2008).

4. *See* CAL. PROB. CODE § 48(a)(1) (West 2016) (defining "interested person" to include "[a]n heir, . . . creditor, beneficiary, and any other person having a property right in or claim against . . . the estate of a decedent"). The Uniform Probate Code is identical. *See* UNIF. PROBATE CODE § 1-201(23) (amended 2010), 8 pt. 1 U.L.A. 48 (2013).

5. *See* Order Appointing Administrator at 1, Estate of Bell, No. RP08389640 (Cal. Super. Ct. June 11, 2009); Petition for Letters of Administration Filed by Advance Inheritance, LLC, at 1-5, Estate of Bell, No. RP08389640 (Cal. Super. Ct. Jan. 20, 2009).

6. *See* First & Final Account & Report of Administrator & Petition for Its Settlement at 6-7, Estate of Bell, No. RP08389640 (Cal. Super. Ct. Mar. 12, 2010).

7. *See* Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights at 4, Estate of Bell, No. RP08389640 (Cal. Super. Ct. Mar. 18, 2010) [hereinafter March 18 Assignment]; Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights at 4, Estate of Bell, No. RP08389640 (Cal. Super. Ct. Jan. 22, 2010); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights at 1, Estate of Bell, No. RP08389640 (Cal. Super. Ct. Jan. 8, 2010); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights at 4, Estate of Bell, No.

inheritance rights for $5,000—came just three weeks before the probate ended, and was the equivalent of a loan with an annualized interest rate of almost 1,000%.[8]

Firms like Advance Inheritance and Inheritance Funding lurk on the peripheries of one of the most divisive issues in American civil justice. For the last two decades, there has been a contentious debate over whether third parties should be allowed to purchase, invest in, or control legal claims.[9] The ancient

RP08389640 (Cal. Super. Ct. Dec. 17, 2009); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights at 1, Estate of Bell, No. RP08389640 (Cal. Super. Ct. Nov. 19, 2009); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights at 1, Estate of Bell, No. RP08389640 (Cal. Super. Ct. Nov. 13, 2009); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights at 1, Estate of Bell, No. RP08389640 (Cal. Super. Ct. June 22, 2009).

8. *See* March 18 Assignment, *supra* note 7, at 4; *see also* Minutes at 1, Estate of Bell, No. RP08389640 (Cal. Super. Ct. Apr. 7, 2010) (approving final distribution of the estate).

9. For overviews of the birth and evolution of the litigation-finance industry, see Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1275-86 (2011); Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 572-79 (2010); Mariel Rodak, Comment, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503, 504-08 (2006); Mattathias Schwartz, *Should You Be Allowed To Invest in a Lawsuit?*, N.Y. TIMES MAG. (Oct. 22, 2015), http://www.nytimes.com/2015/10/25/magazine/should-you-be-allowed-to-invest-in-a-lawsuit.html [http://perma.cc/XEE7-BMVA]. Commentary on the topic falls into two rough camps. One grapples with the overarching policy question of whether to allow plaintiffs to sell causes of action. *See, e.g.*, U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD PARTY LITIGATION FUNDING IN THE UNITED STATES (2009), http://www.instituteforlegalreform.com/uploads/sites/1/thirdpartylitigationfinancing.pdf [http://perma.cc/9JQM-JRTN] (offering a skeptical view of claim sales); Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 702 (2005) (arguing that a market in lawsuits is more problematic from an economic perspective than a deontological view); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 120-33 (2011) (challenging the conventional rationales for barring the assignment of pending causes of action); Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329, 334-41 (1987) (arguing that tort claims should be alienable); Teal E. Luthy, Comment, *Assigning Common Law Claims for Fraud*, 65 U. CHI. L. REV. 1001, 1021 (1998) (contending that fraud claims should be alienable). A second strand of scholarship focuses more tightly on the litigation-finance industry's ethical, legal, and pragmatic dimensions. *See, e.g.*, Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 634-46 (2007) (considering whether litigation-finance contracts are valid); Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 883-906 (2015) (engaging in a similar analysis); Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 749-72 (2014) (presenting a model contract for litigation-finance companies to use); Paul Bond, Comment, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297, 1319-28 (2002) (proposing that states supervise the sale of lawsuits doctrine of champerty once barred strangers from obtaining an interest in pending cases.[10] Likewise, although most rights are assignable—transferrable to others—medieval English judges refused to enforce assignments of complaints.[11] Nevertheless, these rules have eroded over the centuries, blurring the line between causes of action and other forms of property, which can be freely divided, alienated, and pledged as collateral.[12] Recently, venerable enterprises such as Credit Suisse and Allianz have poured money into other parties' lawsuits, and sophisticated litigation-investment boutiques have emerged.[13] These companies typically pay the lawyers' fees "on an interim basis" in exchange for a share of any future verdict or settlement.[14] In dozens of articles in newspapers and law journals, this business model has been praised for opening the court-

and establish "courts of champerty" for claim buyers); Ari Dobner, Comment, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1551-90 (1996) (explaining how lawsuit-purchasing companies can use choice-of-law and forum-selection clauses to their advantage).

10. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *134-35 (explaining that the practice of third parties injecting themselves into litigation is "an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression").

11. *See, e.g.*, W.S. Holdsworth, *The History of the Treatment of* Choses *in Action by the Common Law*, 33 HARV. L. REV. 997, 1003 (1920).

12. *See, e.g.*, Saladini v. Righellis, 687 N.E.2d 1224, 1226 (Mass. 1997) (describing the decline of champerty); Sebok, *supra* note 9, at 120 (noting that "the law concerning third-party investment in litigation has changed since the early common law, and that this change, while generally in a direction of liberalization, has been inconsistent").

13. *See, e.g.*, Steinitz, *supra* note 9, at 1277 (calling the surge in interest in buying claims "second-wave litigation funding"); Dobner, *supra* note 9, at 1529-30 (describing the rise of litigation-finance companies); William Alden, *Litigation Finance Firm Raises $260 Million for New Fund*, N.Y. TIMES: DEALBOOK (Jan. 12, 2014, 10:33 PM), http://dealbook.nytimes.com/2014/01/12/litigation-finance-firm-raises-260-million-for-new-fund [http://perma.cc/G9QF-CHKX].

14. *See, e.g.*, Steinitz, *supra* note 9, at 1276.

house doors to low-income plaintiffs[15] and condemned as a predatory lending practice[16] that subsidizes vexatious litigation.[17]

Yet despite the attention lavished on the litigation-finance industry, inheritance-purchasing companies have flown beneath the radar. No law review article has even mentioned the issue,[18] and only one state statute expressly regulates the practice.[19] To be sure, there are meaningful differences between assigning a pending civil claim and transferring inheritance rights. The former invites strangers into bare-knuckled adversarial proceedings, whereas the latter merely opens the door to the bureaucratic and normally non-contentious world of probate.[20] But as Eva Bell's estate illustrates, both transactions raise concerns

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15. *See, e.g.*, Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 630 (Fla. Dist. Ct. App. 2005) ("Grocery stores and home mortgage lenders do not wait for payment merely because a person is unable to work due to an automobile accident or other injury."); Steinitz, *supra* note 9, at 1276 ("[T]hird-party funding promotes access to justice by enabling plaintiffs who have meritorious cases to bring litigation they would otherwise be unable to bring and to avoid premature settlements at a discount due to the exhaustion of funds."); Binyamin Appelbaum, *Investors Put Money on Lawsuits To Get Payouts*, N.Y. TIMES (Nov. 14, 2010), http://www.nytimes.com/2010/11/15/business/15lawsuit.html [http://perma.cc/S3PR-U5GG] ("[T]he inflow of money is giving more people a day in court and arming them with well-paid experts and elaborate evidence.").

16. *See, e.g.*, Jean Xiao, Comment, *Heuristics, Biases, and Consumer Litigation Funding at the Bargaining Table*, 68 VAND. L. REV. 261, 268 (2015) (noting that there is concern "that financiers exploit consumers by charging exorbitant fees"); Appelbaum, *supra* note 15 (explaining that the practice of charging interest on a litigation loan can swallow a plaintiff's entire recovery).

17. *See, e.g.*, MNC Credit Corp. v. Sickels, 497 S.E.2d 331, 333 (Va. 1998) (reasoning that permitting assignments of legal malpractice claims "would encourage unjustified lawsuits against members of the legal profession" (quoting Goodley v. Wank & Wank, Inc., 133 Cal. Rptr. 83, 87 (Ct. App. 1976))); U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 9, at 4 ("Practices like third-party funding increase the overall litigation volume, including the number of non-meritorious cases filed, and thus effectively reduce (not increase) the level of justice.").

18. Even the related but discrete issue of heir-hunters—companies that try to sell information about a pending estate to the decedent's far-flung next-of-kin—has all but been ignored in the literature. The only exceptions of which we are aware are two pieces by student authors. *See* Allan Friedman, Note, *Heir-Hunting Agreements: Recommendations for the Extension of Probate Court Jurisdiction*, 6 CONN. PROB. L.J. 87 (1991); Frank C. Ingraham, Note, *Heir-Hunting—A Profession or a Racket?*, 7 VAND. L. REV. 104 (1953).

19. *See* CAL. PROB. CODE § 11604.5(b)(2) (West 2016). In addition, a New York law gives courts the power to review assignments of interests in an estate for fairness, although it was not designed to deal with probate lenders specifically. *See* N.Y. EST. POWERS & TRUSTS LAW § 13-2.3 (McKinney 2016).

20. *See, e.g.*, Richard V. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191, 191-92 (1969) (asserting that the close-knit relationship between heirs and beneficiaries means that probate is generally tranquil).

about consumer exploitation and the disruptive effect of outsiders on the judicial process. And, in any event, the chasm in our knowledge about probate lending is glaring. Because the death of the baby boom generation will funnel $59 trillion through the succession process in the next half-century—the largest wealth transfer in history[21]—probate lenders will only become more entrenched and powerful.

This Article brings the probate lending industry into sharp relief. It does so by analyzing every estate administration stemming from deaths that occurred during a year in a major California county. This originally collected dataset, which spans 594 cases, capitalizes on a state law that requires probate lenders to lodge their contracts with the court.[22] Thus, it offers insight into a variety of issues that would normally be private, such as the frequency of loans, their terms, their effective interest rates, and whether estates with loans are more likely to degenerate into litigation than their counterparts.

This trove of empirical evidence yields three main conclusions. First, probate loans are more common than one might expect. There are seventy-seven such deals in the files. Although probate lending may be more prevalent in California than elsewhere,[23] there are millions of probate matters throughout the nation each year, which suggests that there is a robust market for inheritance rights. Second, these transactions raise serious fairness concerns. Companies handed out a meager $808,500 in exchange for $1,378,786 in decedents' property.[24] Because these advances occurred, on average, 373 days before the lenders were repaid, the mean markup on the principal was a whopping sixty-nine percent per year.[25] Third, probate lenders are active litigants. They filed petitions or objections in nearly one-third of the matters in which they appeared. Thus, at least in this context, opening the courthouse door to third parties increases the volume of claims.

The Article then discusses the policy implications of these findings. It starts by considering whether probate loans are usurious. Usury statutes, the oldest form of consumer protection, prohibit creditors from charging excessive inter-

21. *See* Robert Frank, *$59 Trillion To Go to Heirs, Charity by 2061*, CNBC (May 28, 2014), http://www.cnbc.com/2014/05/28/greatest-wealth-transfer-in-history-underway-59-trillion-to-heirs-charity-by-2061.html [http://perma.cc/52T5-KBU9]; *see also* John J. Havens & Paul G. Schervish, *Why the $41 Trillion Wealth Transfer Estimate Is Still Valid: A Review of Challenges and Questions*, 7 J. GIFT PLAN. 11, 11 (2003).

22. *See* CAL. PROB. CODE § 11604.5(d)(1) (West 2016).

23. *See infra* Section I.B.

24. *See infra* Section II.B.1.

25. *See id.*

est rates.[26] Yet usury laws only govern advances that are "absolutely repayable."[27] Thus, most courts have exempted litigation loans from usury regulation, reasoning that firms will lose the money they have fronted if the plaintiff neither settles nor prevails at trial.[28] We prove that probate loans involve no such contingency. Indeed, the probate lenders in our dataset recouped the principal ninety-six percent of the time. Even more remarkably, all the probate loans in our dataset that were repaid surpass California's usury limit. Accordingly, these companies are violating the usury laws on a massive scale.

Next, the Article turns its attention to the Truth in Lending Act (TILA).[29] TILA, a federal statute, imposes strict liability upon creditors who violate its intricate disclosure mandates.[30] In the sole case involving probate loans, a federal court dismissed allegations that TILA applied to an assignment of inheritance rights, reasoning that the statute does not cover "non-recourse advance[s]."[31] But our data reveal that probate loans are not truly non-recourse. Indeed, lenders recover both the principal and interest in all but the most extraordinary circumstances. On top of this, we show that their disclosures routinely flout TILA's commands.

Finally, the Article analyzes whether probate loans violate the champerty doctrine. To be sure, unlike litigation loans, which often seek to facilitate claiming, probate loans are not usually made for the purpose of funding a lawsuit. Indeed, most estate administrations glide along without the heirs or beneficiaries filing a pleading or setting foot in court. Thus, at first blush, the presence of a third party among their ranks seems unlikely to affect the probate process. But when we excavate deeper, we find a surprisingly strong connection between loans and conflict. Our linear probability regression confirms that loans increase the odds of a contest far more than any other variable, including intestacies, holographic wills, and testators who disinherit family members. Nevertheless, we also uncover evidence that litigation filed by lenders may sometimes be in the best interests of the estate. We therefore recommend that courts and

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26. *See, e.g.*, J.B.C. MURRAY, THE HISTORY OF USURY: FROM THE EARLIEST PERIOD TO THE PRESENT TIME 15 (1866) (noting that the prohibition on usury "is of great antiquity").

27. Ghirardo v. Antonioli, 883 P.2d 960, 965 (Cal. 1994).

28. *See, e.g.*, Anglo-Dutch Petrol. Int'l, Inc. v. Haskell, 193 S.W.3d 87, 101 (Tex. App. 2006); *see also infra* Section III.A.

29. 15 U.S.C. §§ 1601-1693r (2012).

30. Brodo v. Bankers Tr. Co., 847 F. Supp. 353, 356 (E.D. Pa. 1994).

31. *See* Reed v. Val-Chris Invs., Inc., No. 11CV371 BEN (WMC), 2011 WL 6028001, at *2 (S.D. Cal. Dec. 5, 2011).

policymakers police probate loans through mechanisms other than the champerty doctrine.

The Article contains three Parts. Part I surveys the rules that govern the sale of rights that are rooted in the legal system. It shows that the expansion in the market for civil claims has spilled over into the realm of decedents' estates. Part II explains how we gathered our data and offers an overview of the probate lending industry. Part III uses insights from our study to outline ways in which courts and lawmakers can regulate probate lenders.

I. BORROWING AGAINST CLAIMS AND ESTATES

Plaintiffs with civil claims and individuals who expect to inherit from a probate estate possess property rights that depend on the outcome of a matter in court. Thus, it is not surprising that the rules that govern the transfer of these entitlements have developed in tandem. This Part describes this progression, focusing first on the divisive issue of litigation lending and then telling the neglected story of its probate counterpart.

A. Litigation Lending

Pending lawsuits were once inalienable: a plaintiff could neither borrow against her anticipated winnings nor sell the right to prosecute the complaint to a third party. Nevertheless, as this Section explains, these prohibitions have waned, spawning the litigation-lending industry and generating heated debate.

The common law frowned upon outsiders who injected themselves into cases. Maintenance, the act of "intermeddling in a [law]suit," was both a crime and a tort.[32] Medieval judges were particularly unkind to a species of maintenance known as champerty, which occurs when a third party provides financial support to a plaintiff in return for a share of her ultimate recovery.[33] In addition, courts refused to enforce attempted assignments of "*choses* in action," which are intangible property rights, such as pending claims.[34]

This hardline stance against the alienation of legal grievances reflected several concerns. First, claim sales had a checkered history. In Rome, where a market for lawsuits first developed, buyers repeatedly convinced plaintiffs to "part

32. BLACKSTONE, *supra* note 10, at *134-35.

33. *Id.*; *see, e.g.*, WILLIAM JOHN TAPP, AN INQUIRY INTO THE PRESENT STATE OF THE LAW OF MAINTENANCE AND CHAMPERTY PRINCIPALLY AS AFFECTING CONTRACTS 20-24 (1861).

34. *See* Walter Wheeler Cook, *The Alienability of Choses in Action*, 29 HARV. L. REV. 816, 816 (1916).

with their claims for sums far below their value."[35] Claim sales were so strongly associated with sharp practices that the word "champerty" derives from "champart," an arrangement that allowed wealthy landowners to exploit tenants without violating the usury laws.[36] Second, claim sales were thought to encourage litigation.[37] During the Middle Ages, invoking the judicial system—even for righteous reasons—was seen as manifesting "a quarrelsome and un-Christian spirit."[38] Permitting strangers to invest in cases seemed to incentivize an activity that was only grudgingly tolerated.[39] Third, society saw lawsuits as intrinsically personal and thus not capable of changing hands. As Max Radin puts it, the transfer of a complaint did violence to "the feeling always present in most communities that a controversy properly concerned only the persons actually involved in the original transaction."[40]

Gradually, however, the champerty and non-assignability rules began to decay. In the seventeenth century, courts became more receptive to the transfer of choses in action.[41] When sitting in equity, they began to enforce assignments of pending lawsuits for breach of contract and property damage, so long as the

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35. Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 55 (1936). Before Roman lawmakers banned claim sales, they attempted to regulate them by capping the amount of damages that the claim buyer could recover and "prohibit[ing] assignments to persons more powerful than the [plaintiff.]" Holdsworth, *supra* note 11, at 1006-07.

36. *See* Radin, *supra* note 35, at 60-62 (describing the etymology of the word "champerty"); *see also* Rice v. Stone, 83 Mass. (1 Allen) 566, 569 (1861) (noting that the doctrines of maintenance and champerty prevented "the rich and powerful [from] oppress[ing] the poor"); Thallhimer v. Brinckerhoff, 3 Cow. 623, 644 (N.Y. 1824) (tracing these rules to the need to check "[t]he power of great men, to whom rights of action were transferred").

37. *See, e.g.*, Lampet's Case (1612) 77 Eng. Rep. 994, 997, (K.B.) (reasoning that claim sales would "multiply[] . . . contentions and suits").

38. Radin, *supra* note 35, at 58 ("A trial was . . . a dangerous instrumentality. Even in a good cause it was well to forego resort to it.").

39. *See, e.g.*, BLACKSTONE, *supra* note 10, at *133-34 (explaining that third parties "exciting and stirring up suits" was an "offence against public justice").

40. Radin, *supra* note 35, at 54; *see also* Cook, *supra* note 34, at 817 ("[A] *chose* in action always presupposes a personal relation between two individuals. But a personal relation in the very nature of things cannot be assigned." (quoting JAMES BARR AMES, 3 SELECT ESSAYS IN ANGLO-AMERICAN HISTORY 580 (1909))); Holdsworth, *supra* note 11, at 1003 ("[I]t is clear that a personal action brought either on a contract or a tort is an essentially personal thing . . . . Therefore the assignment of such a right of action by the act of the two parties was unthinkable."). This view foreshadowed the modern theory of corrective justice, which conceptualizes damage in "bipolar" terms "that relate[] the doer of harm to the sufferer of that harm." ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 65 (1995).

41. *See, e.g.*, Brashear v. West, 32 U.S. (7 Pet.) 608, 616 (1833) ("That *a chose in action* is assignable in equity, is not controverted."); Cook, *supra* note 34, at 822 (noting that courts once repeated the "familiar statement" that "a *chose* in action is assignable in equity but not at law").

terms were fair.[42] Conversely, they continued to ban the sale of grievances that were "personal"—tied to an individual plaintiff—such as torts that cause physical or mental harm.[43]

The philosophy or policy underlying this distinction was never clear. To be sure, unlike a broken promise or a smashed heirloom, a bodily injury is subjective, idiosyncratic, and harder to value.[44] Nevertheless, even "personal" torts often lead to demonstrable economic damages, such as medical bills and lost wages.[45] Likewise, courts sometimes opined that a third party, who had not experienced the allegations in the complaint firsthand, could not "urge them with any force."[46] But if this were true, it suggested that "personal" claims were a perilous investment, not that they should be inalienable. Finally, judges recoiled at the specter of "a profitable traffic in human pain and suffering."[47] Yet this fissure in the free market also had the undesirable consequence of roping off a potential path to relief for plaintiffs who could not afford to pursue the cases themselves.

Given this uncertainty about the normative underpinnings of the champerty and non-assignability rules, it is not surprising that several exceptions emerged over the course of the twentieth century. Courts and policymakers opened the door for contingent-fee lawyers to represent clients in return for a share of their winnings[48] and for insurers to engage in subrogation (suing a

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42. *See, e.g.*, Hopkins v. Hopkins, 23 S.C. Eq. 207, 216 (1850) (explaining that equity will not enforce an assignment "[i]f the object be to obtain an unconscientious advantage"); *see also* Cook, *supra* note 34, at 836-37.

43. *See, e.g.*, Comegys v. Vasse, 26 U.S. (1 Pet.) 193, 213 (1828) ("mere personal torts . . . are not capable of assignment"); Rice v. Stone, 83 Mass. (1 Allen) 566, 572 (1861) ("an assignment of a claim for a personal injury is void"); Wade v. Kalbfleisch, 15 Abb. Pr. (n.s.) 16, 20 (N.Y. Brooklyn City Ct. 1873) (holding that a claim for breach of a promise to marry is too "personal" to be assigned because the act merely causes "disappointed hopes, wounded pride, [and] humiliation"). Under what is known as the "equivalency principle," courts have often pegged the issue of whether a claim is assignable to whether the claim would survive the plaintiff's death. *See, e.g.*, *Comegys*, 26 U.S. (1 Pet.) at 213 (observing that "mere personal *torts*, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment").

44. *See, e.g.*, *Rice*, 83 Mass. (1 Allen) at 570 ("A claim to damages for a personal tort, before it is established by agreement or adjudication, has no value that can be so estimated as to form a proper consideration for a sale.").

45. *See, e.g.*, David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 584 (2014).

46. Bethlehem Fabricators, Inc. v. H.D. Watts Co., 190 N.E. 828, 834 (Mass. 1934) (quoting *Rice*, 83 Mass. (1 Allen) at 570).

47. S. Farm Bureau Cas. Ins. Co. v. Wright Oil Co., 454 S.W.2d 69, 70 (Ark. 1970).

48. *See, e.g.*, Wilhelm v. Rush, 63 P.2d 1158, 1160 (Cal. Dist. Ct. App. 1937) (stating that "contingent fees for attorneys are unquestionably valid"); Graham v. Dubuque Specialty Mach.

tortfeasor to recover sums that the company had previously paid to an injured policyholder).[49] Some states also began to allow plaintiffs to assign the proceeds of "personal" claims.[50] As the North Carolina Supreme Court opined, selling the fruits of a lawsuit—rather than the lawsuit itself—was tolerable because it preserved the plaintiff's stewardship of the case:

> The assignment of a claim gives the assignee control of the claim and promotes champerty. Such a contract is against public policy and void. The assignment of the proceeds of a claim does not give the assignee control of the case and there is no reason it should not be valid.[51]

Then, near the dawn of the new millennium, skepticism about champerty reached a fever pitch. In 1997, the Massachusetts Supreme Court abolished the rule in *Saladini v. Righellis*.[52] To finance a lawsuit, Righellis borrowed about $19,000 from Saladini in exchange for half of the recovery.[53] Righellis settled the complaint for $130,000 but refused to pay Saladini.[54] In the ensuing legal

Works, 114 N.W. 619, 621 (Iowa 1908) ("The validity of the employment of counsel on a contingent fee has long been recognized by this court . . . ."); Comment, *A Mere Quantum Meruit for Attorneys' Fees*, 30 YALE L.J. 514, 515 (1921) (noting that the Canons of Legal Ethics of the American Bar Association validated contingency fee arrangements "subject to the supervision of the court, in order that the client may be protected from unjust charges").

49. *See, e.g.*, Equitable Fire & Marine Ins. Co. v. Holland Banking Co., 262 S.W. 444, 446-47 (Mo. Ct. App. 1924) (recognizing the right of subrogation); Spencer L. Kimball & Don A. Davis, *The Extension of Insurance Subrogation,* 60 MICH. L. REV. 841, 843 (1962) (noting the expansion of insurance subrogation, particularly in the medical context).

50. *See, e.g.*, *In re* Musser, 24 B.R. 913, 920 (Bankr. W.D. Va. 1982) (noting that Virginia law "does not proscribe an equitable assignment of the proceeds to be recovered on a cause of action for personal injuries"); Herzog v. Irace, 594 A.2d 1106, 1109 (Me. 1991) ("In Maine, the transfer of a future right to *proceeds* from pending litigation has been recognized as a valid and enforceable equitable assignment."); Richard v. Nat'l Transp. Co., 285 N.Y.S. 870, 875 (N.Y. Mun. Ct. 1936) ("[A]n assignment of the proceeds or the judgment is not an assignment of an existing cause of action, but is an assignment of future property.").

51. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 455 S.E.2d 655, 657 (N.C. 1995) (citation omitted). Conversely, the same justices refused to allow the outright assignment of tort claims on the grounds that it "would wreak havoc by creating a market for claims of a personal nature." Inv'rs Title Ins. Co. v. Herzig, 413 S.E.2d 268, 272 (N.C. 1992); *see also* Scroggins v. Red Lobster, 325 S.W.3d 389, 392 (Mo. Ct. App. 2010) ("[A]llowing the assignment of claims would lead to a secondary market where speculators would profit off of the pain and suffering of others."). *But see* A. Unruh Chiropractic Clinic v. De Smet Ins. Co. of S.D., 782 N.W.2d 367, 374 (S.D. 2010) (striking down an attempt to assign the proceeds of a personal injury claim).

52. 687 N.E.2d 1224 (Mass. 1997).

53. *Id.* at 1224-25.

54. *See id.* at 1225.

dispute, a judge raised the issue of champerty, leading Righellis to oppose payment on the grounds that the contract was champertous.[55] The state justices agreed that the agreement was the very definition of champerty.[56] Nevertheless, they declined to apply the doctrine, reasoning that ethical regulation of lawyers and case-specific contract defenses such as unconscionability did a better job of preventing "frivolous lawsuits[] or financial overreaching by a party of superior bargaining position."[57] *Saladini* sparked a rash of decisions that cited similar grounds to abolish champerty.[58] However, it did not persuade everyone. Courts in Arizona, Minnesota, Ohio, and Pennsylvania rejected *Saladini*'s analysis, predicting that claim sales would lead to a spike in litigation and "pervert[] the remedial process of the law into an engine of oppression."[59]

As the non-assignment and champerty principles receded, entrepreneurs saw an opportunity. They began to make litigation loans: immediate cash payments to injured plaintiffs in exchange for a percentage of any future judg-

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55. *See id.*

56. *See id.* at 1226 ("[W]e have little doubt that the agreement between Saladini and Righellis would be champertous were we to continue to recognize the offense.").

57. *See id.* at 1226-27.

58. *See, e.g.*, Del Webb Cmtys., Inc. v. Partington, 652 F.3d 1145, 1156 (9th Cir. 2011) (refusing to extend the champerty doctrine under Nevada law and noting that "[t]he consistent trend across the country is toward limiting, not expanding, champerty's reach"); TMJ Haw., Inc. v. Nippon Tr. Bank, 153 P.3d 444, 449 (Haw. 2007) ("[T]his court has repeatedly rejected blind adherence to rules crafted to meet anachronistic societal demands . . . ."); Osprey, Inc. v. Cabana Ltd., 532 S.E.2d 269, 277 (S.C. 2000) ("[O]ther well-developed principles of law can more effectively accomplish the goals of preventing speculation in groundless lawsuits and the filing of frivolous suits . . . ."); *cf.* Kraft v. Mason, 668 So. 2d 679, 682 (Fla. Dist. Ct. App. 1996) (expressing doubts about the need for the common-law doctrine of champerty). This movement extended overseas, as high-profile cases in Australia and the United Kingdom also disavowed the non-assignability and champerty principles. *See Campbells Cash & Carry Proprietary Ltd. v. Fostif Proprietary Ltd.* (2006) 229 CLR 386, 413, 435-36 (Austl.) (allowing a third-party funder to obtain control over the litigation); Arkin v. Borchard Lines Ltd. [2005] EWCA (Civ) 655, [40] (Eng.) (permitting third-party funding provided that it "leave[s] the claimant . . . in control of the conduct of the litigation").

59. Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 220 (Ohio 2003) (quoting Key v. Vattier, 1 Ohio 132, 143 (1823)); *see* Lingel v. Olbin, 8 P.3d 1163, 1167-68 (Ariz. Ct. App. 2000) (citing champerty's role in preventing "multitudinous and useless litigation"); Johnson v. Wright, 682 N.W.2d 671, 679-80 (Minn. Ct. App. 2004) ("Although there are safeguards in place to alleviate the potential evils associated with champertous agreements, respondent fails to provide a compelling reason to completely abandon the doctrine."); Fleetwood Area Sch. Dist. v. Berks Cty. Bd. of Assessment Appeals, 821 A.2d 1268, 1273 (Pa. Commw. Ct. 2003) ("[C]hamperty has long been considered repugnant to public policy against profiteering and speculating in litigation and grounds for denying the aid of the court." (quoting Clark v. Cambria Cty. Bd. of Assessment Appeals, 747 A.2d 1242, 1245-46 (Pa. Commw. Ct. 2000))).

ment or settlement.[60] Despite their name, these arrangements were not technically "loans," because they did not always require the litigant to repay the company.[61] If the plaintiff lost, she kept the advancement, and the firm took nothing.[62] Because funders bore so much risk, they often insisted on taking an enormous slice of the plaintiff's ultimate recovery.[63] In addition, the nonrecourse nature of these advancements helped shield them from regulation. Although the law is slightly ambiguous, state usury statutes and TILA[64] arguably do not apply when repayment of a sum is contingent on future events.[65] Thus, as the rise of the internet made it easier for plaintiffs to find lenders and major financial institutions began to test the waters, litigation finance blossomed into a billion-dollar industry.[66] Today, many funders not only buy a

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60. *See* Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 55 (2004); McLaughlin, *supra* note 9, at 618-20; Steinitz, *supra* note 9, at 1276-77.

61. *See* McLaughlin, *supra* note 9, at 618 (noting that "[t]he word *loan* is a misnomer").

62. *See* Martin, *supra* note 60, at 55.

63. *See* Martin Merzer, *Cash-Now Promise of Lawsuit Loans Under Fire*, FOX BUS. (Apr. 19, 2013), http://www.foxbusiness.com/personal-finance/2013/03/29/cash-now-promise-lawsuit-loans-under-fire [http://perma.cc/6HTQ-SJV4] (reporting that litigation-finance companies often charge interest rates that exceed one hundred percent per year); *cf.* Rancman v. Interim Settlement Funding Corp., No. 20523, 2001 WL 1339487, at *2 (Ohio Ct. App. Oct. 31. 2001) (involving litigation funding contracts with interest rates of 180% and 280%); Dobner, *supra* note 9, at 1529 ("The potential returns, although highly speculative, are enormous.").

64. 15 U.S.C. §§ 1601-1693 (2012).

65. *See, e.g.*, Capela v. J.G. Wentworth, LLC, No. CV09-882, 2009 WL 3128003, at *10 (E.D.N.Y. Sept. 24, 2009) (deciding that a structured settlement is not a "loan" subject to TILA because the borrower "has no obligation at all to pay the settlement installments"); Anglo-Dutch Petrol. Int'l, Inc. v. Haskell, 193 S.W.3d 87, 96-97 (Tex. App. 2006) (holding that a litigation funding agreement was not usurious because the lender's ability to recover hinged entirely on the outcome of the lawsuit); Yifat Shaltiel & John Cofresi, *Litigation Lending for Personal Needs Act: A Regulatory Framework To Legitimatize Third Party Litigation Finance*, 58 CONSUMER FIN. L.Q. REP. 347, 348 (2004) (asserting that litigation lenders attempt to avoid TILA and state usury laws by framing the arrangements as "advances" rather than loans); *see also* Sheri P. Adler, Note, *Alternative Litigation Finance and the Usury Challenge: A Multi-Factor Approach*, 34 CARDOZO L. REV. 329, 334-35 (2012) (noting that the majority view is that litigation loans "are not subject to usury law because they are contingently, rather than absolutely, repayable").

66. *See* Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83, 83 (2008); Steinitz, *supra* note 9, at 1282-83 (explaining that funders are cultivating a secondary market for complaints, in which they go public and sell stock in themselves on major exchanges); Appelbaum, *supra* note 15.

stake in a pending case, but try to maximize the value of their investment by acquiring the power to select counsel and make strategic decisions.[67]

To put it mildly, these developments have been polarizing. Over the course of the last two decades, a chorus of voices has risen in opposition to litigation funding. These commentators accuse lenders of obscuring the terms of their agreements, including their skyscraping interest rates.[68] In addition, they assert that claim sales encourage baseless lawsuits and exacerbate the burden on the judiciary.[69] Conversely, many scholars support litigation funding. This group consists of an odd alliance of law-and-economics disciples, who are skeptical of limitations on the free market,[70] and pro-plaintiff tort scholars, who are eager to arm injured parties with new ammunition.[71] Members of this cohort see litigation loans as "merely one of a variety of subprime financial arrangements,

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67. *See* Maya Steinitz, *Incorporating Legal Claims*, 90 NOTRE DAME L. REV. 1155, 1165-66 (2015) (observing that "commercial funders are emboldened to seek overt control and not mere influence over the litigations they invest in").

68. *See, e.g.*, Courtney R. Barksdale, Note, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707, 731 (2007) ("Specific information regarding the cost of the loan, including interest rates, application fees, administrative fees, and other associated fees are largely unavailable on company websites."); Nicholas Beydler, Comment, *Risky Business: Examining Approaches to Regulating Consumer Litigation Funding*, 80 UMKC L. REV. 1159, 1166 (2012) ("[F]unders do not adequately inform borrowers of the true cost of the advance.").

69. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 9, at 5-7 (arguing that claim sales "promot[e] coercive settlement[s]" and thus "increase[] the profitability—and therefore the likelihood—of abusive litigation"); Joshua G. Richey, Comment, *Tilted Scales of Justice? The Consequences of Third-Party Financing of American Litigation*, 63 EMORY L.J. 489, 500 (2013) ("[T]hird-party litigation financing . . . encourages parties to file frivolous claims."). In addition, litigation funding can create messy ethical dilemmas. For example, companies sometimes refuse to make loans unless the plaintiff's counsel divulges information that is shielded by the work product or attorney-client privileges. *See* James M. Fischer, *Litigation Financing: A Real or Phantom Menace to Lawyer Professional Responsibility?*, 27 GEO. J. LEGAL ETHICS 191, 200 (2014); Andrew Hananel & David Staubitz, *The Ethics of Law Loans in the Post-*Rancman *Era*, 17 GEO. J. LEGAL ETHICS 795, 804-09 (2004). Even more starkly, when a business acquires dominion over the case, a lawyer is torn in two directions: she must honor her duties to the plaintiff in addition to the lender's contractual right to call the shots. *See* Fischer, *supra*, at 212; McLaughlin, *supra* note 9, at 650-51; Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 669-74 (2005).

70. *See, e.g.*, Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367 (2009) (arguing that the legal profession should create markets to spread legal risks); Shukaitis, *supra* note 9 (arguing that a market in personal injury tort claims would on balance be beneficial); *cf.* Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383 (1989) (expressing some doubt that a market in tort claims would lead to optimal outcomes).

71. *See, e.g.*, Sebok, *supra* note 9, at 67 (arguing that it is "a mistake to read into corrective justice an essential hostility to the free alienability of lawsuits").

such as home mortgages, payday loans, car-title loans and rent-to-own transactions, which can empower people without access to more traditional credit sources."[72] Moreover, they argue that abolishing the champerty and non-assignability rules helps poor plaintiffs obtain the cash they need to resist the siren song of low-ball settlement offers.[73]

These dueling views hinge on complex empirical questions about which we have little evidence. Only one study has attempted to gauge the effect of allowing third parties to acquire an interest in pending lawsuits.[74] David Abrams and Daniel Chen examined information from Australia, which, like the United States, consists of a patchwork of states that disagree about whether to retain the champerty rule.[75] Abrams and Chen collected data from each Australian jurisdiction's courts as well as from a major litigation funder known as IMF.[76] They used the volume of loans that IMF issued within a region as a proxy for the degree to which that region had relaxed the prohibition on champerty.[77] They determined that courts in states where IMF did the most business experienced several negative consequences, including "slower case processing, larger backlogs, and increased spending."[78] Yet they also found no statistically signifi-

72. Martin, *supra* note 66, at 84-85.

73. *See, e.g.*, Shukaitis, *supra* note 9, at 329 (noting that third-party funding would allow tort victims to "receive compensation at a market price closer to what they would expect from a court judgment"); Steinitz, *supra* note 9, at 1276 ("[T]hird-party funding promotes access to justice by enabling plaintiffs who have meritorious cases to bring litigation they would otherwise be unable to bring and to avoid premature settlements at a discount due to the exhaustion of funds."). In addition, because the non-assignability and champerty doctrines bar private transactions between competent adults, they implicate a rich non-economic literature on inalienability. *See, e.g.*, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1884-85 (1987) (arguing that certain things should not be salable because to commodify them would change their very nature); *see also* Abramowicz, *supra* note 9, at 703-11 (finding the non-commodification rationales unpersuasive when applied to legal claims); Sebok, *supra* note 9, at 136 (alluding to the difficulty of analyzing the transferability of causes of action under non-commodification theories).

74. David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075 (2013).

75. *See id.* at 1097-98.

76. *See id.* at 1094-97.

77. *See id.* at 1081.

78. *Id.* at 1102-03. Abrams and Chen also discovered that IMF-funded opinions cited more cases and were more cited themselves, and thus arguably contributed to the development of precedent. *See id.* at 1103-04.

cant relationship between IMF's activity and filing rates.[79] Thus, although their work is an important first step, it hardly provides definitive answers.

In addition, this fierce debate is incomplete in one respect: it has not addressed the related issue of assignments of inheritance rights. The next Section fills this void.

B. Probate Lending

Like civil plaintiffs with potential judgments, heirs and beneficiaries have also tried to trade their future inheritance rights for cash. When a decedent makes a will or dies intestate, any such assignment brings an outsider into the judicially-supervised probate system. Although the permissibility of this practice has long been unclear, third parties have become increasingly emboldened in their efforts to buy shares in an estate.

Traditionally, a person could not convey her interest in the estate of someone who was still alive. Courts cited the fact that the not-yet-deceased property owner was free to create a new will, or destroy or amend her existing will, and held that a naked expectancy was not even a form of property.[80] Accordingly, they nullified purported transfers of anticipated legacies or bequests under the maxim *qui non habet, ille non dat*: "he who has not, gives not."[81] Likewise, judges also observed that sales of future inheritances were especially prone to abuse.[82] Because these contracts featured a toxic cocktail of impetuous sellers

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79. *Id.* at 1102. Abrams and Chen used data on criminal filings and case processing as an attempt to control for the possibility that factors other than litigation lending were affecting the dynamics within an Australian state's court system. *See id.* at 1099.

80. *See, e.g.*, Dart v. Dart, 7 Conn. 250, 256 (1828) ("[T]he heirship of the heir is a contingent thing; for he may die in the life-time of his father."); McCall's Adm'r v. Hampton, 32 S.W. 406, 407 (Ky. 1895) ("A contract of bargain and sale is invalid unless there is a thing or subject-matter to be contracted for."); Jackson *ex dem.* Varick v. Waldron, 13 Wend. 178, 214 (N.Y. 1834) ("[T]he interest of the heir does not differ in its nature from that of an expectant devisee, which is an interest which every one may claim to have in every other's estate."); Hart v. Gregg, 32 Ohio St. 502, 511 (1877) ("No one is an heir to the living.").

81. *See, e.g.*, Jackson *ex dem.* Thurman v. Bradford, 4 Wend. 619 (N.Y. Sup. Ct. 1830).

82. *See, e.g.*, *In re* Strange's Estate, 300 N.Y.S. 23, 25 (Sur. Ct. 1937) (explaining that the inalienability of anticipated inheritances "protect[s] improvident children" from "money speculators"); Hite v. Hite, 166 N.E. 193, 196 (Ohio 1929) (reasoning that beneficiaries who sell contingent expectancies are "defenseless and exposed to the demands of the other [party] under the pressure of necessity"); Graef v. Kanouse, 238 N.W. 377, 379 (Wis. 1931) (reasoning that prospective sales of inheritances invariably have "vicious features" and are "burdensome and unfair").

and opportunistic buyers, they earned the nickname "catching bargains."[83] Finally, auctioning off shares in the estate to the highest bidder undermined a testator's wish to provide for her loved ones.[84] In the words of the Indiana Supreme Court, inheritance sales "operate[] as a fraud upon the ancestor, and divest[] h[er] bounty from the kin to a stranger."[85]

Eventually, these rules fell into disarray. As noted above, by the twentieth century, most states permitted the assignment of non-"personal" civil complaints.[86] This new rubric should have paved the way for sales of potential inheritances. Unlike claims for defamation or pain and suffering, which vindicate "wrongs done to the person, the reputation, or the feelings of the injured party,"[87] the privilege of receiving money from a decedent is external, economic, and easy to quantify. But this expansion in the market for claims did not dispel the cloud that hung over "catching bargains." Some jurisdictions clung to their tradition of refusing to honor these agreements.[88] Others presumed that these contracts were fraudulent unless the purchaser could "show that the transaction was a *bona fide* one, and based upon a full consideration."[89] And still others

83. Edler v. Frazier, 156 N.W. 182, 187 (Iowa 1916) (explaining that the phrase "catching bargain" was sometimes used to describe "unconscionable agreements in general with an expectant heir").

84. McClure v. Raben, 25 N.E. 179, 182 (Ind. 1890).

85. *Id.*; *see also* Boynton v. Hubbard, 7 Mass. (6 Tyng) 112, 119 (1810) (calling the assignment of a possible inheritance "a deceit on a father or other relation . . . so that they are influenced to leave their fortunes to be divided amongst a set of dangerous persons and common adventurers, in fact, although not in form"); 2 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 953 (1918) ("[D]ealings with expectant interests [are] . . . a virtual fraud upon their ancestors, life tenants, and other present owners.").

86. *See supra* text accompanying notes 48-49.

87. Meech v. Stoner, 19 N.Y. 26, 29 (1859); *see also* Rice v. Stone, 83 Mass. (1 Allen) 566, 572 (1861) ("[A]n assignment of a claim for a personal injury is void.").

88. *See, e.g.*, Flatt v. Flatt, 225 S.W. 1067, 1068 (Ky. 1920) ("[T]his court has uniformly held in many cases that a sale of a mere expectancy in land is against public policy."); *In re* Zimmerman's Will, 172 N.Y.S. 80, 89 (Sur. Ct. 1918) ("I have little doubt that in our law a voluntary assignment of a *spes successionis* would not be enforceable, even in equity."); Hart v. Gregg, 32 Ohio St. 502, 511 (1877) ("During the father's life, all that the son had was a mere naked possibility . . . which could not be released, assigned, or devised.").

89. *McClure*, 25 N.E. at 181; *see also In re* Wickersham's Estate, 70 P. 1076, 1077 (Cal. 1902) (upholding a contract for an expectancy that was "duly executed, without fraud, duress, or undue influence"); Casady v. Scott, 237 P. 415, 422 (Idaho 1924) (commenting that an assignment of an expectancy "will be upheld and enforced to the extent that it is fair and reasonable"); Gannon v. Graham, 231 N.W. 675, 676 (Iowa 1930) (observing that courts will "carefully scrutinize[]" an "assignment of . . . an expectancy"); Hoppiss v. Eskridge, 37 N.C. 54, 55 (1841).

distinguished between transfers between family members (which were valid)[90] and those featuring third parties (which were "not favored").[91] These conflicting approaches prompted the Ohio Supreme Court to observe in 1929 that "authority can be found supporting almost every conceivable angle of the subject."[92]

Compounding this uncertainty, courts were much more tolerant of assignments consummated *after* the decedent had passed away. Even jurisdictions that barred pre-death inheritance sales relaxed this restriction once the probate case had begun.[93] Judges in this camp observed that when the original owner dies, title vests immediately in her successors, subject only to the estate's debts, taxes, and legal fees.[94] Thus, the reasoning continued, the property being administered belonged to the heirs and beneficiaries, who were free to dispose of it as they wished.[95]

This formalistic logic ignored several problems with the alienability of pending estates. For one, these courts never explained why the dangers that animated their hostility to "catching bargains"—reckless sellers, ruthless buyers, and flouting the decedent's intent—vanished the instant the decedent's heart stopped beating.[96] In addition, they did not try to square their holdings with the champerty doctrine. Probate rules confer standing upon "interested per-

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90. *See, e.g.*, *In re* Garcelon's Estate, 38 P. 414, 418 (Cal. 1894) (observing that a family member may "relinquish to his ancestor all interest in the estate of the latter" under certain circumstances); Curtis v. Curtis, 40 Me. 24, 28 (1855) (upholding an assignment that "was a family arrangement, deliberately and understandingly entered into by the parties"); Keys v. Keys, 129 A. 504, 506 (Md. 1925) ("[W]here the assignor and assignee are members of the same family, and the transfer is in the nature of a family settlement, the courts in the absence of fraud or unfair dealing, are now practically unanimous in upholding the validity of the transaction.").

91. *See, e.g.*, *McClure*, 25 N.E. at 182; Graef v. Kanouse, 238 N.W. 377, 379 (Wis. 1931).

92. Hite v. Hite, 166 N.E. 193, 196 (Ohio 1929).

93. *Compare* Engle v. Walters, 140 S.W.2d 402, 403 (Ky. 1940) ("It is our rule that the conveyance of an expectancy is void."), *with* Haydon v. Eldred, 21 S.W.2d 457, 458 (Ky. 1929) (enforcing an assignment of a share of an estate in probate and commenting that "[t]he court does not understand why a fund in court may not be assigned, the same as any other fund, where it is in existence").

94. *See, e.g.*, *In re* Michels' Estate, 63 P.2d 333, 334 (Cal. Dist. Ct. App. 1936) ("The title of the decedent in and to the properties of his estate vested immediately upon his death in . . . his sole heir . . . [giving her] an absolute right to assign her interest in the estate . . . .").

95. *See, e.g.*, Phelan v. Elbin, 79 A. 187, 189 (Conn. 1911) ("The heir at law takes a vested interest in all the real estate of an intestate immediately upon the latter's death.").

96. *See supra* text accompanying notes 82-85.

son[s]": those whose rights might be affected by a judicial ruling.[97] As a result, when an outside party purchases a portion of the decedent's assets, she also obtains the power to file petitions and objections, to seek to remove the personal representative, and to sue for breach of fiduciary duty.[98] This result—which, as one court cautioned, allows third parties to "literally[] buy[] a law suit"[99]—seems incompatible with the idea that outsiders should not be able to commandeer a judicial proceeding.

In the early twentieth century, the practice of "heir hunting" exposed these simmering tensions. Heir hunters sift through probate records, which, like all court files, are available to the public, looking for wealthy intestate decedents who have no close family members.[100] They then trace the decedent's family

97. *See, e.g.*, CAL. PROB. CODE § 48(a)-(a)(1) (West 2015) ("'[I]nterested person' includes any of the following: . . . An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against . . . the estate of a decedent which may be affected by the proceeding."); FLA. STAT. § 731.201(23) (2015) ("'Interested person' means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved."); 755 ILL. COMP. STAT. 5/1-2.11 (2008) ("'Interested person' . . . means one who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved . . . .").

98. *See, e.g.*, *In re* Rankin's Estate, 127 P. 1034, 1035 (Cal. 1912) (holding that the assignee had standing to file petition to be appointed personal representative); *In re* Estate of Wurster, 409 N.W.2d 363, 365 (S.D. 1987) (finding that the assignee had standing to file an objection to the personal representative's accounting). Admittedly, a handful of courts have refused to permit assignees to challenge the validity of a will. *See, e.g.*, Poe v. Davis, 29 Ala. 676, 683 (1857) ("[D]isguise the transaction as we may, it is nothing less than the purchase on speculation of the chances of success in a pending law-suit . . . ."); *In re* Estate of Davis, 467 N.E.2d 402, 403-04 (Ill. App. Ct. 1984) ("[T]he assignment of [an] expectancy did not convey a sufficient property right to make the [assignee] an interested person under [the relevant Illinois statute]."); *cf.* Trevino v. Turcotte, 564 S.W.2d 682, 687 (Tex. 1978) (holding that the assignees lacked standing to object to a will when they had obtained their interest from a party who was estopped to pursue that claim himself). Nevertheless, most of the cases go the other way. *See, e.g.*, *In re* Clark's Estate, 271 P. 542, 545 (Cal. Dist. Ct. App. 1928) ("At the instant of his son's death Major Clark had a property right which he could assign or transfer or surrender for a consideration acceptable to him, and also the statutory right, which of itself is a property right, to contest his son's will."); Yingling v. Smith, 255 A.2d 64, 66 (Md. 1969) ("A majority of states hold that the right to contest a will is a property right, assignable and descendible."); Dickson v. Dickson, 5 S.W.2d 744, 746 (Tex. Comm'n App. 1928) ("[T]he better reasoning, as well as the weight of authority, supports the . . . idea to the effect that this right of action is assignable and is the subject of conveyance . . . .").

99. *In re Estate of Davis*, 467 N.E.2d at 403.

100. *See* Ingraham, *supra* note 18, at 104. Heir hunting apparently originated in England at the end of the nineteenth century. *See* Rees v. De Bernardy, [1896] 2 Ch 437. The first reported American case to mention heir hunting is *Horan v. Varian*, 268 P. 637, 637 (Cal. 1928).

tree, identify her next of kin, and sell them information about the probate matter in return for a generous cut of their inheritance.[101]

Initially, these opportunists received a cold reception. Courts in the District of Columbia, Kentucky, New Jersey, New York, Ohio, and Pennsylvania held that heir hunters were guilty of champerty.[102] According to these opinions, heir hunters usurp the personal representative's duty to locate the decedent's relatives:

> This Court is its own Clerk and has custody and jurisdiction over its files, papers, cases and records, and as such, does not intend to permit any *self*[-]*appointed person or organization* to operate in open competition with duly appointed fiduciaries. Such activity is against public policy and borders on 'ambulance chasing' when not solicited by the Administratrix or authorized by the Court.[103]

Similarly, in 1935, the New York legislature passed a statute giving probate courts broad authority to "fix and determine the validity and reasonableness of [an heir hunter's] compensation" and requiring assignments of interests in estates to be in writing.[104] Six years later, California lawmakers followed suit,

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101. *See* Ingraham, *supra* note 18, at 104.

102. *See* Merlaud v. Nat'l Metro. Bank of Wash., D.C., 84 F.2d 238, 240 (D.C. Cir. 1936); Skinner v. Morrow, 318 S.W.2d 419, 429 (Ky. 1958); *In re* Lynch's Estate, 276 N.Y.S. 939, 943-44 (Sur. Ct. 1935); *In re* Estate of Rice, 193 N.E.2d 566, 571 (Ohio Prob. Ct. 1963); *In re* McIlwain's Estate, 27 Pa. D. & C. 619, 624-25 (Pa. Orphans' Ct. 1936); *cf.* Carey v. Thieme, 64 A.2d 394, 399 (N.J. Super. Ct. Ch. Div. 1949) (reaching the same conclusion on public policy grounds).

103. *In re Estate of Rice*, 193 N.E.2d at 570. In addition, courts found that heir hunters who obtained both assignments and powers of attorney to act on the heir's behalf in probate court had engaged in the unauthorized practice of law. *See, e.g.*, *In re* Butler's Estate, 177 P.2d 16, 18 (Cal. 1947) (accusing an heir hunter of taking "complete control of litigation" and "intervening for profit in the conduct of legal proceedings"); *In re* Larson's Estate, 206 P.2d 852, 855 (Cal. Dist. Ct. App. 1949); *In re* Reilly's Estate, 184 P.2d 922 (Cal. Dist. Ct. App. 1947); Fla. Bar v. Heller, 247 So. 2d 434 (Fla. 1971); *In re* Root, 249 P.2d 628, 630 (Kan. 1952); Succession of Humes, 467 So. 2d 25, 29 (La. Ct. App. 1985); *In re* Wellington's Estate, 276 N.Y.S. 946, 949 (Sur. Ct. 1935); *In re Lynch's Estate*, 276 N.Y.S. at 944-45; *In re Estate of Rice*, 193 N.E.2d at 571; *In re* Atkinson's Estate, 20 Pa. D. & C.3d 700, 716 (Ct. Com. Pl. 1981), *aff'd sub nom. In re* Estate of Atkinson, 468 A.2d 841 (Pa. Super. Ct. 1983). Yet heir hunters soon found an easy way around this obstacle: they simply omitted from the contract "any reference to their control of the heir's claim." Ingraham, *supra* note 18, at 107.

104. N.Y. EST. POWERS & TRUSTS LAW § 13-2.3 (McKinney 2015); *see also In re* Devlin, 588 N.Y.S.2d 316, 319 (App. Div. 1992) (noting that lawmakers passed the statute to "address concerns about the business practices of corporations and persons who provided services for exorbitant fees under powers of attorney secured from foreign heirs of decedents").

empowering probate judges to strike down or rewrite heir-hunting contracts "upon such terms as [they] deem[] just and equitable."[105]

But these interventions did not stem the tide of heir hunting. For one, despite the spate of opinions that invoked the champerty doctrine, it was not clear that heir hunters actually "foment[] unnecessary litigation."[106] Heir hunting does not create lawsuits out of whole cloth; rather, it merely identifies the proper parties in a matter that has already been filed. This disconnect leaps to the fore when one reads the first wave of heir hunting decisions closely. In most of them, an individual or entity had secured an assignment from a distant but known relative of the decedent—usually one who resided overseas—mere days before the official notice of death arrived in the mail from the probate court.[107] Thus, because discovery of the rightful heirs "was inevitable," these heir hunters were blatant intermeddlers.[108] Yet not all heir hunters fit this mold. Sometimes, a decedent's line of consanguinity was tangled or her relatives had vanished, and an heir hunter solved these mysteries.[109] In these situations, heir hunting spared the personal representative an expensive and time-consuming search.

Near the dawn of the twenty-first century, judges became more attuned to these nuances, and heir hunting achieved a degree of legitimacy. Courts in Rhode Island, Texas, and Washington honored heir-hunting agreements, observing that they "may be beneficial rather than harmful in some cases."[110]

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105. *In re* Lund's Estate, 150 P.2d 211, 212 (Cal. Dist. Ct. App. 1944) (quoting CAL. PROB. CODE § 1020.1).

106. *In re McIlwain's Estate*, 27 Pa. D. & C. at 625.

107. *See, e.g.*, *In re Lynch's Estate*, 276 N.Y.S. at 943-44 (noting that an heir hunter's "expeditious method of solicitation by wireless and cable resulted in obtaining powers of attorney before the arrival of the ordinary mail notifying the legatee or next of kin of the death"); *In re Wellington's Estate*, 276 N.Y.S. at 947 (explaining that "the status and relationship of [the heir] as the sole next of kin would have been proven without the intervention of the [heir hunter]").

108. *In re McIlwain's Estate*, 27 Pa. D. & C. at 623; *see* Carey v. Thieme, 64 A.2d 394, 399 (N.J. Super. Ct. Ch. Div. 1949) ("The speedy solicitation of powers of attorney from 'known legatees' . . . is an exploitation unfavorable and adverse to public policy.").

109. *See, e.g.*, *In re* Estate of Wright, 108 Cal. Rptr. 2d 572, 575 (Ct. App. 2001) (involving an heir hunter who located an heir by "search[ing] computer data bases for telephone listings, voter records, real property records, driving records, and social security death records"); *In re Devlin*, 588 N.Y.S.2d at 317 (featuring an heir hunter who "conducted an extensive search of various public records, some dating back as much as 100 years," and found that the estate belonged to the children of the decedent's paternal cousin).

110. *See* Sparne v. Altshuler, 90 A.2d 919, 923 (R.I. 1952); Pelton v. Witcher, 319 S.W.2d 400, 403 (Tex. Civ. App. 1958); Nelson v. McGoldrick, 896 P.2d 1258, 1266 (Wash. 1995). Other state courts, however, refused to honor these agreements. *See, e.g.*, Landi v. Arkules, 835 P.2d 458, 465 (Ariz. Ct. App. 1992) (nullifying contract when heir hunters were not licensed private

Likewise, a Wisconsin appellate panel rejected the link between heir hunting and champerty, reasoning that routine probate proceedings are non-adversarial and therefore not "litigation":

> Heirship determination[s] . . . do[] not assume the spectre of a contest or litigation until an interested party, by way of counter-proof or motion, controverts the proof filed by the personal representative. Here, no heirship litigation ever pended in the trial court, none was contemplated, and the conclusiveness of the proof filed with the probate court makes it unlikely that any litigation will ever occur . . . . The proceeding would have followed the same course through probate, irrespective of [the heir hunter's] involvement.[111]

Finally, the New York and California legislation, which was animated by suspicion of heir hunting,[112] had the unintended consequence of normalizing it. Because these laws assumed that heir-hunting agreements were valid, and placed the burden on the decedent's relatives to prove otherwise, judges saw the laws as a tacit seal of approval.[113] Thus, in 2001, a California appellate court not only upheld an heir-hunting contract, but went so far as to opine that "it is not our province to regulate the business."[114]

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investigators); O & Y Old Bridge Dev. Corp. v. Cont'l Searchers, Inc., 577 A.2d 137, 139 (N.J. 1990) ("[W]e find no social value or contribution in the 'activities' of heir hunters . . . ." (quotation omitted)); Finders Diversified, Inc. v. Baugh, No. L-83-424, 1984 WL 7841, at *3 (Ohio Ct. App. Apr. 20, 1984) (holding that heir hunters commit champerty because they acquire an interest in an estate but "ha[ve] no independent claim to the recovery of the assets of the [decedent]"). There have been calls for legislative action. *See In re* Estate of Campbell, 742 A.2d 639, 640 (N.J. Super. Ct. Ch. Div. 1999) ("Whether heir hunters should be viewed as 'self-serving intermeddlers' or the providers of 'useful and necessary services' remains a matter of much dispute in the absence of legislative direction."); Friedman, *supra* note 18, at 110-13 (urging Connecticut lawmakers to pass legislation modeled on the New York heir hunting laws).

111. *In re* Estate of Katze-Miller, 463 N.W.2d 853, 860 (Wis. Ct. App. 1990).

112. *In re* Cohen's Estate, 152 P.2d 485, 489 (Cal. Dist. Ct. App. 1944) (noting that the California statute was designed to compensate for the fact that the state had "never adopted the common law doctrines of champerty and maintenance"); *In re Devlin*, 588 N.Y.S.2d at 319 (explaining that the New York law "was intended to protect distributees in the Surrogate's Court from practices which unduly diminish their undistributed interests in estates").

113. *See, e.g.*, *In re* Estate of Molino, 81 Cal. Rptr. 3d 512, 518 (Ct. App. 2008) (citing the California law for the proposition that "heirs may agree by contract to pay a percentage of their shares of an estate to an heir hunter"); *In re Devlin*, 588 N.Y.S.2d at 320 (describing an heir hunter's services as "clearly confer[ing] a substantial benefit upon the distributees"); *The Work of the 1941 Legislature*, 15 S. CAL. L. REV. 469, 472 (1942) (suggesting that the statute may have created a safe harbor for heir hunters).

114. *In re Estate of Wright*, 108 Cal. Rptr. 2d at 578.

Then, in 2004, articles in the *San Francisco Chronicle* described a new twist on heir hunting.[115] Thousands of people who were grieving the recent loss of loved ones had been approached by corporations offering to buy their interest in the estate.[116] These "probate lenders" were a hybrid of heir hunters and litigation financiers.[117] They harvested names of decedents' kin from unresolved probate cases and promised them cash in exchange for an assignment of their eventual inheritances.[118] Ostensibly, these transactions were non-recourse: at least on paper, recipients had no obligation to repay the company if the estate became mired in the courts or depleted by creditors or mismanagement.[119] In turn, because probate lenders were not certain to recoup the money they fronted, they charged high markups and argued that their contracts were too contingent to fall under federal and state consumer-protection statutes.[120] Representatives of these firms defended their methods, noting that probate can be agonizingly slow and that a decedent's relatives often cannot wait for bequests or legacies to trickle through the court system.[121] Yet the public reacted viscerally to the *Chronicle* stories, dubbing probate lenders "hearse chasers" (a riff on "ambulance chasers") and urging public officials to investigate the industry.[122]

California lawmakers soon began to debate regulating probate lenders. Rather than adopting a far-reaching measure that "treat[ed] a cash advance to a

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115. *See* David Lazarus, *Probate No Time for Preying*, S.F. CHRON. (Oct. 13, 2004, 4:00 AM), http://www.sfgate.com/business/article/Probate-no-time-for-preying-2717738.php [http://perma.cc/6YHM-G8SU] [hereinafter Lazarus, *Probate*]; David Lazarus, *Sorry for Your Loss—Would a Cash Advance Ease Your Pain?*, S.F. CHRON. (Oct. 8, 2004, 4:00 AM), http://www.sfgate.com/business/article/Sorry-for-your-loss-would-a-cash-advance-ease-2719166.php [http://perma.cc/73L6-DGU5] [hereinafter Lazarus, *Sorry for Your Loss*].

116. Lazarus, *Sorry for Your Loss*, *supra* note 115. Some of these letters were signed by an "employee" of the company who turned out not to exist. *Id.*

117. In addition, probate lenders were likely inspired by payday lenders, which issue small-dollar advances that must be repaid with high interest rates in a matter of weeks. *See, e.g.*, Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 2 (2002). Payday lenders are loosely regulated, in part because their transactions rarely involve more than $1,000. *See id.* at 10, 27-29; Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1123 (2008) ("A contemporary payday loan usually involves an initial balance of between $100 and $500, with $325 being typical.").

118. *See* Lazarus, *Sorry for Your Loss*, *supra* note 115.

119. *See id*.

120. *See id*.

121. *See id*.

122. *Id*. *See* Lazarus, *Probate*, *supra* note 115 (describing the "sharp reaction[s]" to the stories about probate lenders and the consensus that the practice "appears to cross an ethical line").

beneficiary of an estate as a consumer loan" and therefore triggered the usury statutes and TILA, they chose a softer tactic.[123] They enacted Probate Code section 11604.5, which requires probate lenders to file their contracts in the probate record within thirty days after they are signed,[124] and permits judges to refuse to honor these deals if they "[a]re grossly unreasonable."[125]

Yet section 11604.5 has made little difference in the decade since it kicked in. Despite the statute's disclosure requirements, we know virtually nothing about probate lenders. Policymakers have ignored the fledgling industry, and no article in a newspaper or law journal has even mentioned it in passing. Likewise, despite section 11604.5's invitation for judges to scrutinize the terms of probate loans, only one reported case has addressed the topic. In *Reed v. Val-Chris Investments, Inc.*, the plaintiff received $35,000 in exchange for assigning $50,000 of his father's estate to a company called Advance Inheritance (AI).[126] He then sought to rescind the deal on the grounds that AI had violated TILA's disclosure mandates.[127] A federal district court dismissed the complaint, reasoning that the contract between AI and the plaintiff was non-recourse and thus was not subject to TILA:

> As evident by both parties' lack of citation to authority on this issue, the Court acknowledges the absence of case law addressing whether such a transaction is subject to TILA. However, the Court finds that the transaction between Plaintiff and AI was not a loan because Plaintiff had no obligation to pay AI anything if the Estate did not satisfy the amount Plaintiff assigned to AI.[128]

Meanwhile, probate lending appears to have blossomed into a thriving business. More than two dozen of these firms maintain active web presences,

123. LEORA GERSHENZON, BILL ANALYSIS, S.B. 390, Assemb., 2005-06 Reg. Sess., at 4 (Cal. Aug. 31, 2005).

124. CAL. PROB. CODE § 11604.5(d)(1) (West 2016). The statute governs individuals or entities who "regularly engage[] in the purchase of beneficial interest in estates for consideration." *Id.* § 11604.5(b)(2). The statute excludes assignments made to heir hunters, to the decedent's family or domestic partner, or to individuals who already stand to inherit under the decedent's estate. *See id.* § 11604.5(c)(1)-(4). The law requires probate loans to be in at least ten-point font and include the sum paid to the heir or beneficiary, a description of the transferred interest, and the total fees and costs charged by the company. *Id.* § 11604.5(d)-(e).

125. *Id.* § 11604.5(h)(1).

126. No. 11cv371 BEN (WMC), 2011 WL 6028001, at *1 (S.D. Cal. Dec. 5, 2011).

127. *See id.* at *2.

128. *Id.*

including AI,[129] A.I.C.,[130] Approved Cash Advance,[131] Cash Flow Investment Partners,[132] Crutcher Loan Company,[133] First Probate Loans[134] HBS Finance,[135] Heir Advance Company,[136] Inheritance Advance,[137] Inheritance Funding Company,[138] Inheritance Loan Company, LLC,[139] Inheritance Now,[140] J.G. Wentworth,[141] Key National Funding,[142] PB Financial Group Corporation,[143] Probate and Estate Financing,[144] ProbateLoan.com,[145] ProbateLoan.net,[146] The Suburban Group,[147] Texas Cash Advance Loans,[148] Westar Lending Group,[149]

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129. *Why Should We Need To Hire an Inheritance Funding Company?*, ADVANCE INHERITANCE, LLC, http://advanceinheritance.blogspot.com/2015/03/why-should-we-need-to-hire-inheritance.html [http://perma.cc/FT8U-5R6P].

130. A.I.C., http://probateinheritancecash.com [http://perma.cc/7K9Y-XZRC].

131. APPROVED CASH ADVANCE, http://www.manta.com/c/mrnq8ro/approved-cash-advance [http://perma.cc/2ZDA-SUXU].

132. *Advances for Inheritances*, CASH FLOW INV. PARTNERS LLC, http://www.lumpsum-settlement.com/inheritance.php [http://perma.cc/EQ8Z-7U8T].

133. *Inheritance Advance*, CRUTCHER LOAN COMPANY, http://www.cruloans.com/flexinheritance.htm [http://perma.cc/27B9-FHUX].

134. FIRST PROB. LOANS, http://fastprobateloans.com [http://perma.cc/PFK3-B9SM].

135. HBS FIN., http://www.probateestateloans.com [http://perma.cc/7WDE-VUR2].

136. HEIR ADVANCE COMPANY, http://www.heiradvance.com [http://perma.cc/4AF3-DL7Y].

137. INHERITANCE*ADVANCE*.COM, http://www.inheritanceadvance.com [http://perma.cc/RB2R-RWAE].

138. INHERITANCE FUNDING COMPANY, http://www.inheritancefunding.com [http://perma.cc/9NEV-V22T].

139. INHERITANCE LOAN COMPANY, http://www.inheritanceloan.com [http://perma.cc/WY35-29GL].

140. INHERITANCENOW.COM, http://www.inheritancenow.com [http://perma.cc/2Z6H-E9DP].

141. *Other J.G. Wentworth Products—More Ways To Get You Cash*, J.G. WENTWORTH, http://www.jgwentworth.com/en/structured-settlements/other-products [http://perma.cc/R8ZY-2RBS].

142. KEY NAT'L FUNDING, LLC, http://www.inheritancemoney.com [http://perma.cc/TKN9-HBP8].

143. PB FIN. GROUP CORP., http://www.calhardmoney.com [http://perma.cc/9LJN-BXMK].

144. PROB. & EST. FINANCING, http://probateandestatefinancing.com [http://perma.cc/N6QT-RJTC].

145. PROB. LOANS, http://www.probateloan.com [http://perma.cc/9NTC-R5XV].

146. PROB. LOAN, http://www.probateloan.net [http://perma.cc/T4XF-W5PL].

147. *Inheritance Cash Advance*, CLOSEPROBATE.COM, http://dev.closeprobate.com/inheritance-advances [http://perma.cc/QJC9-9QVJ].

Worldmine Financial Associates, LLC,[150] and VET Worldwide Solutions.[151] These companies run the gamut from one-person shops[152] to organizations that have handled over $100 million in transactions.[153] Although most were founded in the mid-2000s,[154] a healthy plurality of these companies have opened their doors within the last five years.[155]

Admittedly, probate lending appears to be more established in California than elsewhere. This may be because it originated there. Alternatively, it could stem from section 11604.5, which, like the heir-hunting legislation before it, may have inadvertently legitimized the practice it sought to regulate.[156] Indeed, section 11604.5 can be seen as creating a safe harbor for firms that wish to engage in these transactions: as long as they jump through the statute's hoops, they seem to have the legislature's blessing. Finally, lenders may have been emboldened by the fact that California is one of a handful of jurisdictions that

148. TEX. CASH ADVANCE LOANS, http://texas-cash-advance-loans.blogspot.com [http://perma.cc/7JBX-U76E].

149. *Probate Financing*, WESTAR LENDING GROUP, http://www.westarlending.com/probate-loans [http://perma.cc/KKM4-HA62].

150. *Inheritance Cash Advance*, WORLDMINE FIN. ASSOCIATES, http://www.worldminefin.com/inheritance-cash-advance.html [http://perma.cc/Y79J-3HV4].

151. *Inheritance Advances*, VET WORLDWIDE SOLUTIONS, http://www.vetworldwidesolutions.com/inheritanceadvance.htm [http://perma.cc/WCE8-CNPF].

152. *See, e.g.*, *About Inheritance Loan Company, LLC*, INHERITANCE LOAN COMPANY, http://www.inheritanceloan.com/about-me/3567361 [http://perma.cc/PU2B-9PSB].

153. *See, e.g.*, *Who We Are*, INHERITANCE FUNDING COMPANY, http://www.inheritancefunding.com/who-we-are [http://perma.cc/M7CR-X73M] (describing a "dedicated staff" with "over 120 years of collective experience in inheritance cash advances").

154. *See, e.g.*, *Advance Inheritance, LLC*, BBB BUS. REV., http://www.bbb.org/losangelessiliconvalley/business-reviews/attorneys/advance-inheritance-in-canoga-park-ca-100025000 [http://perma.cc/BZW7-V2M2] (noting that the company was founded in 2004); *Heir Advance Company Inc.*, BBB BUS. REV., http://www.bbb.org/sdoc/business-reviews/financial-services/heir-advance-company-inc-in-laguna-niguel-ca-13093897 [http://perma.cc/6FN5-LHGE].

155. *See, e.g.*, APPROVED CASH ADVANCE, *supra* note 131 (stating that the company was founded in 2008 and started making probate and trust advances in 2010); CASH FLOW INV. PARTNERS, http://www.manta.com/c/mxf99ll/cash-flow-investment-partners [http://perma.cc/SGX2-DDN3] (stating that the company was founded in 2011); *About Inheritance Loan Company, LLC*, *supra* note 152 (stating that the company was founded in 2011).

156. *See supra* text accompanying notes 112-114.

have never recognized the champerty doctrine.[157] Perhaps for these reasons, most probate lenders are headquartered in the Golden State.[158]

Yet there is also evidence that the business is expanding. Probate lenders have emerged in Florida,[159] Kentucky,[160] and Texas.[161] Some of the larger California firms trumpet their ability to "[o]perate in all 50 states."[162] They maintain unique web pages for each jurisdiction[163] and feature testimonials from far-flung clients throughout the nation.[164] Finally, some litigation lenders have apparently started to test the probate waters by offering "inheritance advances"[165]—a trend that could cause probate lending to grow along with the market for civil claims.

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157. *See, e.g.*, Mathewson v. Fitch, 22 Cal. 86, 95 (1863). For other such jurisdictions, see *Fastenau v. Engel*, 240 P.2d 1173, 1174 (Colo. 1952); *Grant v. Stecker & Huff, Inc.*, 1 N.W.2d 500, 501 (Mich. 1942); and *Bentinck v. Franklin*, 38 Tex. 458, 472-73 (1873).

158. *See, e.g.*, *About Us*, HEIR ADVANCE COMPANY, http://www.heiradvance.com/probate_and_trust_cash_advances_about_us.php [http://perma.cc/EXD9-DWCD] [hereinafter HEIR ADVANCE COMPANY]; INHERITANCE FUNDING COMPANY, *supra* note 153.

159. *Open Your Vault*, FACEBOOK, http://www.facebook.com/openyourvault [http://perma.cc/9TZ8-SNGS]; WORLDMINE FIN. ASSOCIATES, *supra* note 150.

160. *Contact Us*, CRUTCHER LOAN COMPANY, http://www.cruloans.com/flexcontact.htm [http://perma.cc/3CNC-4FSR].

161. *Contact Us*, VET WORLDWIDE SOLUTIONS, http://www.vetworldwidesolutions.com/contactus.htm [http://perma.cc/CTN5-P8PB].

162. *See* INHERITANCE FUNDING COMPANY, *supra* note 138. Likewise, Heir Advance Company states that it "provides [i]nheritance [a]dvances and [p]robate [l]oans . . . to [h]eirs in Canada and nationwide throughout the USA (with the exception of [p]robate [l]oans in Ohio, . . . and [i]nheritance [l]oans for both [p]robates & [t]rusts in Puerto Rico)." HEIR ADVANCE COMPANY, *supra* note 158. The exclusion of Ohio may flow from wariness about the state supreme court's high-profile opinion in *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 220-21 (Ohio 2003), which held that litigation lending was champerty. The carve-out for Puerto Rico likely reflects the territory's idiosyncratic view that because a will "is absolutely a personal act," heirs and beneficiaries cannot assign their inheritance rights. P.R. LAWS ANN. tit. 31, § 2124 (2013); *see also* Seda de Ortiz v. Dist. Court, 64 P.R. 409, 414 (1945) (finding that the testator's heir "could not assign" her rights as heir).

163. *See, e.g.*, *Arizona Probate*, INHERITANCE FUNDING COMPANY, http://www.inheritancefunding.com/arizona-probate [http://perma.cc/W5JE-EHEZ]; *Probate by State: Arizona*, HEIR ADVANCE COMPANY, http://www.heiradvance.com/probate_by_state.php [http://perma.cc/LS2W-2575].

164. *Client Testimonials*, INHERITANCE FUNDING COMPANY, http://www.inheritancefunding.com/testimonials [http://perma.cc/Y3RV-9URY] (containing blurbs from borrowers in Arkansas, Idaho, Maine, and New York). A federal district court opinion also details a transaction between a probate lender and a resident of South Carolina. Inheritance Funding Co. v. Chatman, No. 3:12-cv-1308-JFA, 2013 WL 3946237, at *1 (D.S.C. July 31, 2013).

165. *See, e.g.*, *Financial Solutions and Services*, AM. ASSET FIN., LLC, http://amasset.com/financial.html [http://perma.cc/2QFU-9XMA]; LAWSON CAP. FUNDING, http://www

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Rights that are bound up in the legal system have gradually become easier to transfer. One product of this movement, litigation lending, has received sustained scholarly attention. In sharp contrast, the related topic of probate lending remains shrouded in mystery. Thus, in the next Part, we report the results of an empirical study that fills this gap.

II. EMPIRICALLY ASSESSING PROBATE LOANS

This Part reports the Article's empirical findings about probate loans. It begins by describing the data collection and cleaning process, and then discusses the empirical analysis and results.

A. Data Description

Recall that California Probate Code section 11604.5 requires probate lenders to file their contracts in the judicial record.[166] As a result, these agreements, which would normally be private, are included in the state's court files.

To assess this burgeoning industry, we turned to a survey that one of us had previously conducted of every probate matter stemming from deaths that occurred in Alameda County, California, during 2007.[167] Alameda County, which sits just east of San Francisco, is a racially and economically diverse region with a population of about 1.6 million.[168] It includes wealthy enclaves near the University of California, Berkeley campus, industrial suburbs such as San Leandro, and urban sections of Oakland. The dataset was culled from the county's online case filing system, DomainWeb, and includes every probate estate that appeared on the calendar between January 1, 2008, and March 1,

.lawsoncf.com [http://perma.cc/HWS3-Y2DN]; *Lawsuit Funding*, COM. CAP. WORLDWIDE FUNDING, INC., http://www.kwikcashsolution.com/lawsuit-funding.html [http://perma.cc/LQH2-MKKK].

166. *See* CAL. PROB. CODE § 11604.5(d) (West 2016); *see also supra* text accompanying note 124.

167. For previous articles based on this data, see David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605 (2015) [hereinafter Horton, *Probate*]; and David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094 (2015) [hereinafter Horton, *Wills Law*].

168. *See Alameda County, California*, U.S. CENSUS BUREAU: QUICKFACTS, http://quickfacts.census.gov/qfd/states/06/06001.html [http://perma.cc/K8F9-9ECN]. Although the county's median household income is over $50,000, 14.8% of its residents are below the poverty line. *See id.*

2009.[169] It consists of 668 testate and intestate administrations that arose from individuals who had passed away in 2007.[170]

From this sample, we cut 74 cases in which a decedent left property primarily to a trust.[171] These administrations featured what are known as "pour over" wills, which are unlikely to involve assignments of inheritance rights.[172]

For the remaining 594 cases, we pulled the following variables from the case record: the date of any will, the date of decedent's death, the dates that the probate case opened and closed, the gross value of the estate, the identities of any creditors who sought to collect debts from the estate, information on personal representative and attorneys' fees, and whether litigation occurred. For matters that involved probate loans, we additionally captured the following variables: the date of the loan, the amount of the loan, whether the lender was repaid, the repayment date (if the loan was repaid), the value of the lender's interest, the effective annual interest rate,[173] and whether the lender initiated litigation.

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169. DOMAINWEB, http://www.alameda.courts.ca.gov/pages.aspx/domainweb [http://perma.cc/4WZC-MB5J]. During our initial research pass, DomainWeb was free; however, it later began to charge about $1 per page for downloads. *See How This Site Works*, DOMAINWEB, http://publicrecords.alameda.courts.ca.gov/PRS/Home/HowThisSiteWorks [http://perma.cc/ETD2-BK7E].

170. Testate cases involve decedents who have made a will; intestacies occur when there is no governing estate-planning document. Probate courts also handle other kinds of cases, such as guardianships and conservatorships. Because these matters do not pertain to the inheritance process, we excluded them.

171. *Cf.* Horton, *Wills Law*, *supra* note 167, at 1121 (omitting sixty-seven matters with pour over wills). For the present Article, we classified seven additional cases as involving pour over wills. These matters featured wills that left nominal amounts of property to beneficiaries other than the trustee. We ultimately decided that the mere presence of other beneficiaries did not alter the fundamental purpose of these wills, which was to funnel assets into a trust.

172. Only assets that a person owns in her individual capacity when she dies pass through probate. *See id*. Thus, people often try to avoid probate by creating a trust—a kind of personal mini-corporation—and transferring all of their possessions into it. *See id.* Also, well-counseled settlors typically execute a will that "pours" the rest of their wealth into their trust to ensure that anything that they failed to retitle during their lives ultimately passes under the terms of the trust. *See id.* Because the trust—not any individual—is the beneficiary of a pour over will, it is hard to imagine how a pour over will could lead to a probate loan.

173. The effective annual interest rate is a variable that we computed using the amount of the loan, the amount that was repaid to the lender, and the number of days between the loan and the repayment. See *infra* note 245 for more details on this calculation.

B. Results

1. Overview

Loans are a visible part of the probate landscape. To be sure, only 30 of the 594 cases (5%) feature loans. But these contracts cluster together.[174] Because nineteen estates involve multiple loans—including one that contained ten separate transactions[175]—there is a grand total of seventy-seven loans in the data.[176]

It is hard to know whether this ratio is representative of the national market.[177] On the one hand, as noted, California appears to be the epicenter of probate lending. That suggests that borrowing against an estate may be less common in other regions. Yet our research may also understate the current incidence of probate loans. Only six lenders were named in the Alameda County files.[178] Because many inheritance-purchasing firms have opened their doors recently,[179] the market may have expanded since 2009, when our sample period ends.

174. Eleven cases have just one loan and nineteen cases have two or more loans. Many of these multi-loan estates involve repeated transactions between the same heir or beneficiary and the same company. This phenomenon of "rollover" loans is well-documented among payday lenders. *See, e.g.*, Karen E. Francis, Note, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Payday-Loan Industry*, 88 TEX. L. REV. 611, 617 (2010); Press Release, Consumer Fin. Prot. Bureau, CFPB Finds Four Out of Five Payday Loans Are Rolled Over or Renewed (Mar. 25, 2014), http://www.consumerfinance.gov/newsroom/cfpb-finds-four-out-of-five-payday-loans-are-rolled-over-or-renewed [http://perma.cc/5V5P-SF4U].

175. *See* First & Final Account & Report of Administrator & Petition for Its Settlement; Petition for Allowance of Statutory Administrator's & Attorney's Compensation; for Allowance of Extraordinary Administrator's & Attorney's Compensation & for Final Distribution at 9, Estate of Bell, No. RP08389640 (Cal. Super. Ct. Mar. 12, 2010). Although this pleading claims that this estate contained nine loans, our review of the files indicates that there were actually ten. *See* sources cited *supra* notes 3, 6-7.

176. In a previous article using the same information, one of us observed in a footnote that we had found fifty-one assignments of inheritance rights in thirty-one cases for about $1.1 million. *See* Horton, *Probate*, *supra* note 167, at 650 n.303. This figure is lower than the results in this Article because it overlooked the fact that several cases involved multiple contracts between the same lender and the same beneficiary.

177. The ratio of cases with loans to total cases is 30/594 (5%). The ratio of total loans to total cases is 77/594 (13%).

178. The lenders in our study are Accelerated Inheritance (nine loans), Advance Inheritance (twelve loans), Heir Buyout Company (ten loans), Inheritance Funding (thirty-five loans), Jon Freeman (six loans), and Key National Funding, LLC (five loans).

179. *See supra* text accompanying note 155.

Creditors paid $808,500 and collected $1,378,786 in inheritance rights. As Table 1 reveals, the amount borrowed per agreement ranged from $2,000 to $74,000, and repayment amounts were anywhere between $0 and $162,944.[180]

TABLE 1.

PROBATE LOAN DESCRIPTIVE STATISTICS

	Mean (σ)	Median	Min	Max	*N*
Days from Estate Opening Until Loan	273.4 (184.6)	220	15	757	77
Days from Estate Opening Until Case Closing	684.5 (312.4)	656	203	1,737	76
Amount that Borrower Received (Principal)	$10,500 ($10,887.4)	$7,250	$2,000	$74,000	77
Amount that Company Received (Principal Plus Interest)	$17,906.3 ($21,565.5)	$12,000	$0	$162,944	77

Note. σ = standard deviation. One estate was still open at the time that our data collection ended, and thus had no close date.

Lenders follow the same basic template. They usually enter the picture about halfway through the administrative process, after the personal representative has submitted the Inventory and Appraisal (I&A). The I&A is a mandatory filing that sets forth the value of all of the decedent's assets. Once the I&A has been lodged, lenders can calculate the dollar value of each party's eventual inheritance and thus confirm that they are likely to be repaid. Nevertheless, every contract we uncovered takes pains to declare that it is nonrecourse.[181] Rather than using the term "loan,"[182] these arrangements are stylized as "[a]ssignment[s],"[183] "money advanced . . . on [a] beneficial inter-

180. Many probate loans offer a discount of about ten percent of the lender's markup if the estate closes within a set time frame. *See, e.g.*, Addendum, Assignment of Interest in Estate & Declaration Pursuant to Probate Code § 11604.5, Estate of Blakeney, No. RP07336253 (Cal. Super. Ct. Dec. 10, 2007) (offering to reduce the amount due to the lender from $8,400 to $7,700 if the estate is distributed within nine months).

181. *See, e.g.*, *id.*

182. In fact, some lenders require their clients to sign statements that "this transaction constitutes an outright sale, and not a loan, and in no way do I consider it a loan." Partial Assignment of Beneficial Interest of Samuel Davis at 5, Estate of Davis, No. RP07347450 (Cal. Super. Ct. Nov. 7, 2007).

183. *Id.*

est,"[184] and sales of "the right to receive a distribution of a fixed amount of . . . [an] estate."[185]

Firms regularly try to recoup their investment as soon as possible. The California Probate Code permits preliminary distributions of up to half of the decedent's assets under certain circumstances.[186] Lenders invoked this procedure in seven of the thirty-three estates (21%), cashing out an average of eight months before the case terminated with the final disbursement of the decedent's property.

2. *Correlates of Loans*

What motivates people to borrow against their inheritances? To investigate this question, we ran a linear probability regression where the dependent variable was whether an estate contained one or more loans.[187] We controlled for several factors in the regression: the length of the probate case, whether a bank or credit card company sought to be reimbursed for a debt incurred by the decedent, the gross value of the estate, whether the decedent made a will (and if so, when), the number of times attorneys were hailed before the probate court, and the decedent's marital status.

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184. Partial Assignment of Beneficial Interest of Gerald W. Troupe at 1, Estate of Troupe, No. RP07344385 (Cal. Super. Ct. Feb. 13, 2008).

185. Assignment of Interest in Estate & Declaration Pursuant to Probate Code § 11604.5 at 1, Estate of Rios, No. HP07327103 (Cal. Super. Ct. Dec. 28, 2007) (exhibit A).

186. CAL. PROB. CODE §§ 11620-21 (West 2015) (allowing preliminary distributions if two months have passed since the personal representative has been appointed and the payments will not cause "loss to creditors or injury to the estate or any interested person").

187. The linear probability model uses the ordinary least squares estimation method (OLS) to explain variation in a dependent variable that takes on only two values. Here our dependent variable was 1 if the estate generated one or more loans and 0 otherwise. The advantage of using the linear probability model is that any given coefficient is straightforwardly interpretable as the change in the probability of a loan occurring for a one unit change in the independent variable. So, for example, the coefficient on the Bank Claim Filed variable (0.06) means that the probability of an heir or beneficiary taking out a probate loan is 6 percentage points higher, on average, when a commercial creditor seeks to collect a debt from the decedent's estate relative to when it does not. The main disadvantage to using the linear probability model is that the loan probabilities predicted by the model can sometimes be unrealistic—either falling below zero or exceeding the value of one. An alternative way of modeling loan probabilities is with a probit (or logit) regression model, which would constrain the loan probabilities to lie between 0 and 1 (inclusive), but yields regression coefficients that are more difficult to interpret. We thus opted for the linear probability model. For completeness, though, we repeated our loan probability analysis using a probit regression model and, in all respects, our results were equivalent or even stronger. These results are available from the authors upon request.

We first evaluated probate lenders' argument that their services are beneficial because their customers cannot afford to wait for the snail-like probate process to conclude.[188] We did not discover strong support for this assertion. Indeed, as Table 2 demonstrates, we found that probate loans were not more likely to occur in estates with longer disposition times. Thus, it does not seem that heirs and beneficiaries assign their inheritance rights out of frustration with probate's notorious delays.[189]

In addition, the evidence is mixed on whether individuals enter into loans due to financial necessity. Unfortunately, we are not privy to the economic status of any heir or beneficiary. Yet the size of the estate could be a relevant proxy, on the theory that less affluent decedents have heirs who are also lower on the income ladder. If probate lenders truly bridge a gap for clients who are "hard-pressed for money,"[190] we would expect to see that higher loan probabilities were associated with lower estate values. Nevertheless, we unearthed no such connection. On the other hand, the likelihood of an assignment is six percentage points higher, on average, for heirs of people who owed money to a bank or a commercial lender ($p<0.05$). This might hint at a "[c]ulture of [d]ebt," in which people who borrow have friends and relatives who also do so.[191] In addition, because the poor are more likely to accumulate credit card liability,[192] it could suggest a tie between pecuniary need and probate lending—although additional research would be required to substantiate it.[193]

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188. *See* Lazarus, *Sorry for Your Loss*, *supra* note 115.

189. On the other hand, the probability of a loan increased slightly with the number of times attorneys were required to appear before the court ($p<0.05$). One might be initially concerned that the Number of Attorney Appearances variable is just picking up the relationship between estate duration and loan probability. However, as is discussed in the text, estate duration was explicitly controlled for in the regression—and furthermore has no statistically significant correlation with loan probability. Overall, this evidence suggests that lawyer appearances are more common in estates with loans—independent of estate duration. We return to this topic in Section III.C, where we discuss the link between loans and litigation.

190. *See* Lazarus, *Sorry for Your Loss*, *supra* note 115.

191. *See, e.g.*, David Brooks, Opinion, *The Culture of Debt*, N.Y. TIMES (July 22, 2008), http://www.nytimes.com/2008/07/22/opinion/22brooks.html [http://perma.cc/88X4-52KK] (arguing that people absorb norms about borrowing "from parents and neighbors").

192. *See, e.g.*, Tamara Draut & Javier Silva, *Borrowing To Make Ends Meet: The Growth of Credit Card Debt in the 90s*, DĒMOS 10 (Sept. 2003), http://www.aecf.org/m/resourcedoc/aecf-BorrowingMakeEndsMeetGrowthCreditCardDebt90s-2013.pdf [http://perma.cc/XS45-H36S].

193. As a normative matter, it is unclear which way this cuts. On the one hand, probate lenders would arguably provide more social value if, as they claim, they cater to low-income heirs and beneficiaries who need cash badly. On the other hand, given the high markups that

Finally, the probability of a loan was ten percentage points lower in testacies than in intestacies ($p<0.05$). Recall that courts once viewed "catching bargain[s]" as a kind of "deceit" that subverts a property owner's desire to provide for her loved ones.[194] Testate beneficiaries, who have been singled out in the decedent's will, may share this sentiment and feel that a loan is a betrayal of the bequest.[195] But intestate heirs have not been honored in the same way. They may see their interests as fungible—not expressions of a decedent's affection, but merely another income stream at their disposal.[196]

these companies charge, proof that borrowers are disproportionately poor might make assignments of inheritance rights seem even more troubling.

194. *See, e.g.*, Boynton v. Hubbard, 7 Mass. 112, 119 (1810); *see also supra* text accompanying notes 83-85.

195. *See, e.g.*, David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 85-89 (2012) (discussing ways in which testamentary decisions are both intended and perceived to be statements).

196. Loans are also less likely among decedents who left a spouse, although this effect is not statistically significant at the five-percent level ($p=0.07$). In addition, one should not read too much into this result because our data suffers from selection bias with respect to the decedent's marital status. California allows surviving husbands and wives to inherit their share of the couple's community property outside of the probate process by filing a spousal property petition. *See* CAL. PROB. CODE § 13500 (West 1991). Because the first spouse to die often will not appear in the probate records, our research oversamples single decedents and thus is not representative of all decedents.

TABLE 2.

CORRELATES OF PROBATE LOANS
LINEAR PROBABILITY MODEL[197]
(ROBUST STANDARD ERRORS IN PARENTHESES)

Number of Days from Case	-0.00
Opening Until Case Closing	(0.00)
Bank Claim Filed[198]	0.06* (0.03)
Value of Decedent's Estate (in $1000s)	0.00 (0.00)
Testate[199]	-0.10* (0.05)
Will Dated Before 1990[200]	0.09 (0.05)
Will Dated Between 1990 and 1999	0.08 (0.05)
Will Dated 2000 or After	0.09 (0.05)
Number of Attorney Appearances	0.01* (0.01)
Decedent Married[201]	-0.03 (0.02)
Constant	0.03 (0.02)
N	544
adj. R^2	0.039

Note. * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$.

197. We used a linear probability model where the dependent variable is equal to 1 if the estate contained one or more probate loans and 0 otherwise.

198. The Bank Claim Filed variable is a dummy variable equal to 1 if a bank or credit card company sought to collect a debt from the estate and 0 otherwise.

199. The Testate variable is a dummy variable equal to 1 if the decedent left a valid will and 0 otherwise. This is just 1 minus the Intestate variable used in Tables 4 and 5.

200. The three will variables (Will Dated Before 1990, Will Dated Between 1990 and 1999, and Will Dated 2000 or After) are dummy variables equal to 1 if the decedent's will was dated in the indicated time frame and 0 otherwise. The omitted category is intestacies.

201. The Decedent Married variable is a dummy variable equal to 1 if the decedent was married at the time of his/her death and 0 otherwise. The omitted category includes decedents who were never married, as well as decedents who were divorced or widowed at the time of death.

3. *Judicial Intervention*

Recall that California Probate Code section 11604.5 allows judges to strike down "grossly unreasonable" probate loans or "order distribution on any terms that [they] . . . consider[] equitable."[202] We did not unearth a single instance of a court exercising this prerogative. Instead, the norm—at least in Alameda County, during the period under study—appears to have been to rubber stamp probate loans. As we explain next, courts and policymakers should recognize that these transactions are, in fact, quite problematic for borrowers and the legal system.

III. POLICY IMPLICATIONS

This Part prescribes policy based on our empirical findings. It first explains why most probate loans violate the usury statutes and TILA. It then considers the more difficult issue of whether assignments of inheritance rights to firms are consistent with the champerty doctrine.

A. *Usury*

In the *San Francisco Chronicle*'s stories on probate lenders, experts opined that these firms seem to be an ingenious effort to evade the usury laws.[203] Although this accusation has also been levied against litigation lenders, most courts have held that litigation loans are immune from usury regulation. But in this Section, we explain why the result should be different for probate loans.

Usury statutes limit the amount of interest that creditors can charge on a loan.[204] These laws are notoriously complex: they vary wildly between states and are riddled with exceptions and idiosyncratic rules for particular institutions and transactions.[205] There is also no uniform maximum rate, although

202. CAL. PROB. CODE § 11604.5(h)(1) (West 1991).

203. *See* Lazarus, *Probate*, *supra* note 115; Lazarus, *Sorry for Your Loss*, *supra* note 115.

204. These laws have an ancient pedigree; in fact, during the Middle Ages, usury was seen as "a very high offence." Lloyd v. Scott, 29 U.S. 205, 224 (1830).

205. For instance, California, the locus of our study, exempts some loans made by pawnbrokers and licensed real estate agents, as well as loans used to buy, construct, or improve real property. *See* CAL. CONST. art. XV, § 1; CAL. CIV. CODE § 1916.1 (West 2010); CAL. FIN. CODE § 21000 (West 2015). Similar carve-outs are ubiquitous. *See, e.g.*, N.J. STAT. ANN. § 31:1-1(e)(1) (West 1990) (excluding loans of $50,000 or more, except for those secured by a first lien on mostly residential real property); WASH. REV. CODE ANN. § 63.14.010(8) (West 2005) (exempting "retail installment contracts," such as credit cards). Finally, the National the ceiling for consumer loans[206] in most jurisdictions is around ten percent annual simple interest.[207] In California, Florida, Michigan, Ohio, Pennsylvania, New Jersey, New York, and Texas—which have large elderly populations and are potential hubs for probate loans[208]—caps range from six to eighteen percent.[209] Sanctions for usury violations can be severe, and include disgorgement of profits, punitive damages, and even criminal liability.[210]

However, usury laws only govern advances that saddle the borrower with "an absolute obligation to repay the principal."[211] As a result, usury statutes do

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Banking Act, 12 U.S.C. § 85 (2012), preempts usury statutes and allows large financial institutions to charge interest rates that exceed a particular state's limits in some cases. *See* Smiley v. Citibank, 517 U.S. 735, 744 (1996); Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 313-14 (1978).

206. In general, consumer loans are those where the borrower uses the funds "primarily for personal, family, or household purposes." CAL. CONST. art. XV, § 1(1); *see, e.g.*, Bakeir v. Capital City Mortg. Corp., 926 F. Supp. 2d 320, 334 (D.D.C. 2013); *see also* Pacesetter Real Estate, Inc. v. Fasules, 767 P.2d 961, 966 (Wash. Ct. App. 1989). Unfortunately, we could not determine what heirs and beneficiaries did with the proceeds of their probate loans. It is entirely possible that some borrowers funneled the money into business ventures or investments, thus exempting their loans from the usury laws.

207. *See, e.g.*, OKLA. CONST. art. XIV, § 2 (10%); ALA. CODE § 8-8-1 (2002) (8%); ALASKA STAT. § 45.45.010 (2014) (10.5%); COLO. REV. STAT. § 5-2-201 (2002) (12%); 815 ILL. COMP. STAT. 205/4(1) (2008) (9%); MINN. STAT. § 334.01 (2011) (8%); MISS. CODE. ANN. § 75-17-1 (2009) (10%); MO. REV. STAT. § 408.030 (2011) (10%); WASH. REV. CODE § 19.52.020 (2013) (12%). A handful of states have repealed their usury laws for consumer loans. *See, e.g.*, NEV. REV. STAT. § 99.050 (2013); S.D. CODIFIED LAWS § 54-3-1.1 (2004); UTAH CODE ANN. § 15-1-1 (LexisNexis 2013).

208. See Econ. & Statistics Admin., *Sixty-Five Plus in the United States*, U.S. DEP'T COMMERCE, http://www.census.gov/population/socdemo/statbriefs/agebrief.html [http://perma.cc/KX7C-TRU6] (listing these states as having sizable numbers of senior citizens).

209. *See, e.g.*, CAL. CONST. art. XV, § 1 (10%); FLA. STAT. § 687.02 (2015) (18%); MICH. COMP. LAWS § 438.31 (2001) (7%); N.J. STAT. ANN. § 31:1-1 (West 1990) (16%)); N.Y. GEN. OBLIG. LAW § 5-501 (McKinney 2001) (6%); OHIO REV. CODE ANN. § 1343.01 (LexisNexis 2012) (8%); 41 PA. STAT. AND CONS. STAT. ANN. §§ 201, 202 (West 2014) (6%); TEX. FIN. CODE ANN. § 342.004 (West 2006) (10%).

210. *See, e.g.*, CAL. CIV. CODE § 1916-3 (West 2010) (providing for treble damages and making willful violation of the usury laws a felony); FLA. STAT. § 687.04 (2015) (allowing debtors to recover twice the amount of interest they have paid); MICH. COMP. LAWS § 438.41 (2001) (imposing criminal penalties on lenders who knowingly charge more than 25% simple interest per year); TEX. FIN. CODE ANN. § 305.002 (West 2006) (requiring companies that collect more than twice the maximum amount to surrender both the principal and interest collected).

211. Walker & Assocs. Surveying v. Roberts, 306 S.W.3d 839, 850 (Tex. Ct. App. 2010) (quoting First Bank v. Tony's Tortilla Factory, Inc., 877 S.W.2d 285, 287 (Tex. 1994)). Courts sometimes reach this conclusion by reasoning that the usury statutes only apply to loans, where not apply to transactions where the creditor's recovery of the fronted money hinges "upon a bona fide contingency."[212] As the Arizona Supreme Court put it, "An example of a debt 'contingently repayable' is posed by this situation: Borrower says to lender: Lend me $10 to bet on a horse race, and if the horse wins, I promise to pay you $15 tomorrow; if the horse loses, you get nothing."[213] This logic has spurred many courts to exempt litigation loans from usury regulation.[214] Litigation lenders forfeit their investment if the plaintiff does not settle or prevail on the merits; thus, they face the realistic possibility of coming away empty-handed.[215]

Anglo-Dutch Petroleum International, Inc. v. Haskell illustrates this line of authority.[216] Anglo-Dutch, an oil company, sued two rivals for misappropriating trade secrets and breaching a confidentiality agreement.[217] Because Anglo-Dutch needed cash to stay afloat, it sold $560,000 of its potential damages to a variety of litigation funders.[218] But when a jury issued a verdict of $81 million, Anglo-Dutch refused to honor these assignments, contending that they were not enforceable on the grounds of usury.[219] Anglo-Dutch supported this theory with evidence that some of the litigation funders had admitted that "success in

"[t]he hallmark of a loan is the *absolute* right to repayment." Blackwell Ford, Inc. v. Calhoun, 555 N.W.2d 856, 859 (Mich. Ct. App. 1996).

212. Stuback v. Sussman, 8 N.Y.S.2d 141, 142 (Sup. Ct. 1938).

213. Britz v. Kinsvater, 351 P.2d 986, 991 (Ariz. 1960).

214. *See, e.g.*, MoneyForLawsuits V LP v. Rowe, No. 10–CV–11537, 2012 WL 1068760, at *5 (E.D. Mich. Mar. 29, 2012); Dopp v. Yari, 927 F. Supp. 814, 823 (D.N.J. 1996); *In re* Transcapital Fin. Corp., 433 B.R. 900, 910 (Bankr. S.D. Fla. 2010); Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 628-29 (Fla. Dist. Ct. App. 2005); Kraft v. Mason, 668 So. 2d 679, 684 (Fla. Dist. Ct. App. 1996); Aldrich v. Aldrich, 260 Ill. App. 333, 361 (App. Ct. 1931); Nyquist v. Nyquist, 841 P.2d 515, 518 (Mont. 1992); Anglo-Dutch Petrol. Int'l, Inc. v. Haskell, 193 S.W.3d 87, 98 (Tex. App. 2006).

215. *See, e.g.*, *Rowe*, 2012 WL 1068760, at *5 ("Michigan law . . . requires an absolute obligation-to-repay to trigger application of Michigan's usury statute."); *Dopp*, 927 F. Supp. at 823 ("[T]he collection of interest in excess of the lawful rate is not usurious if collection of the entire interest is at risk and depends upon a contingent event . . . ."); *Aldrich*, 260 Ill. App. at 361 (holding that a creditor who had acquired an interest in a lawsuit "takes the chance . . . of losing his principal [and] is not held to be guilty of usury"); *Nyquist*, 841 P.2d at 518 ("No certainty ever existed that the plaintiffs in that litigation would prevail and receive a damage award."); Adler, *supra* note 65, at 335 (noting the "traditional view" that litigation-finance "advances are not subject to usury law because they are contingently, rather than absolutely, repayable").

216. 193 S.W.3d at 90.

217. *See id.*

218. *See id.* at 91.

219. *See id.*

the . . . lawsuit was certain" and there was "no risk whatsoever."[220] A Texas appellate court rejected this argument, reasoning that mere optimism about the trial did not prove that the money was going to be repaid.[221] Instead, the court explained, Anglo-Dutch needed to demonstrate that, at the time it signed the deals, it had "obtained 'incontrovertible evidence' of its claims."[222]

Critically, though, not all contingencies are the same. As the *Restatement (First) of Contracts* provides, lenders cannot shield usurious transactions by predicating their recovery on conditions that are unlikely to occur:

> A creditor who takes the chance of losing all or part of the sum to which he would be entitled if he bargained for the return of his money with the highest permissible rate of interest is allowed to contract for greater profit. On the other hand it is not permissible to use this form of contract as a device for obtaining usurious profit. *If the probability of the occurrence of the contingency on which diminished payment is promised is remote*, . . . the transaction is presumably usurious.[223]

Courts apply this test functionally rather than formally, considering all the facts and circumstances "to determine whether the lender's profits are exposed to the requisite risk."[224] The odds that the lender will get burned "must be sub-

220. *Id.* at 98.

221. *See id.* at 97.

222. *Id.* at 98.

223. RESTATEMENT (FIRST) OF CONTRACTS § 527 cmt. a (AM. LAW INST. 1932) (emphasis added). The Restatement (Second) of Contracts has no provision on usury; thus, contemporary courts continue to cite the initial version. *See, e.g.*, WRI Opportunity Loans II LLC v. Cooper, 65 Cal. Rptr. 3d 205, 212 (Ct. App. 2007). This practice of ignoring "pretended contingencies," Vee Bee Serv. Co. v. Household Fin. Corp., 51 N.Y.S.2d 590, 600 (Sup. Ct. 1944), governs two different kinds of conditions: those that might cause the lender to forfeit its entire investment and those that merely imperil the lender's ability to collect interest. *See, e.g.*, Thomassen v. Carr, 58 Cal. Rptr. 297, 301 (Ct. App. 1967) (noting that the rule spans "cases in which the principal is repayable only on contingency" as well as those "where payment of interest only is contingent"); Walton Guano Co. v. Copelan, 37 S.E. 411, 413-14 (Ga. 1900) (explaining that even when "the principal is placed in jeopardy by the terms of the agreement," the creditor must assume more than the "mere color of a risk"); Steptoe's Adm'rs v. Harvey's Ex'rs, 34 Va. (7 Leigh) 501, 522 (1836) (observing that "only a slight contingency" is not enough to defeat the usury statute even if "there is a hazard that the principal sum lent may be lost").

224. *WRI Opportunity Loans II*, 65 Cal. Rptr. 3d at 213.

stantial, . . . for a mere colorable hazard will not prevent the charge from being usurious."[225]

A corollary of this principle is that litigation loans fall under the usury laws if unusual circumstances suggest that the plaintiff—and thus the lender—will likely be made whole. For instance, in *Echeverria v. Estate of Lindner*, a day laborer fell from a scaffold on a jobsite and filed a worker's compensation claim against his employer.[226] A company called LawCash advanced him $25,000 to be repaid from his damages, with interest compounding every month at 3.85%.[227] A New York trial court held that the agreement was usurious.[228] The court noted that because the legal standard in the underlying tort matter was strict liability, "there was a very low probability that judgment would not be in favor of the plaintiff."[229]

Likewise, in *Lawsuit Financial, LLC v. Curry*, a Michigan appellate court held that several litigation loans were usurious.[230] Mary Curry brought a tort claim after being injured in a car crash.[231] At trial, the defendants in Curry's personal injury lawsuit admitted that they were at fault, and the jury—tasked only with calculating damages—awarded Curry $27 million.[232] The defendants challenged this verdict with a salvo of post-trial motions.[233] Before the judge ruled on these motions, Curry signed three agreements with a litigation lender, one of which pledged the greater of $887,500 or ten percent of her winnings, in return for $177,500.[234] The appellate judges noted that Curry was clearly destined to recover *something* from her tort lawsuit at the time the agreements were consummated:

> [B]efore the advances were made, the defendants in the personal injury lawsuit had already admitted liability, the jury had already returned a $27 million verdict in [Curry]'s favor, an order of judgment had already

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225. Olwine v. Torrens, 344 A.2d 665, 667 (Pa. Super. Ct. 1975); *see also* Bistro Exec., Inc. v. Rewards Network, Inc., No. CV 04-4640 CBM MCX, 2006 WL 6849825, at *11 (C.D. Cal. July 19, 2006) (holding that when a lender's recovery depends on "contingencies [that] are only remotely likely," the usury statutes apply).

226. 801 N.Y.S.2d 233, 2005 WL 1083704 (Sup. Ct. Mar. 2, 2005) (unpublished table decision).

227. *Id.* at *1.

228. *Id.* at *8.

229. *Id.*

230. 683 N.W.2d 233, 240 (Mich. Ct. App. 2004).

231. *Id.* at 236.

232. *Id.* at 239.

233. *Id.* at 237.

234. *Id.* at 236.

> been entered, and the only remaining issue was the amount of recovery . . . . Because liability had already been admitted when plaintiff advanced the funds, the fact that . . . Curry would recover some damages for her injuries was already known.[235]

Like the litigation loans in these cases, probate loans are "absolutely repayable."[236] Seventy-four of the seventy-seven advances (96%) in our dataset were fully reimbursed. The remaining three loans resulted in lender losses: one lender recovered $13,229 of a $20,000 payment,[237] and another took home just $9,800 from an outlay of $16,800.[238] Even more starkly, one company lost its entire investment when the personal representative stole the decedent's assets and then disappeared.[239] Yet these matters were highly unusual. In the first two, the lenders unwisely entered into assignments before the I&A was filed, thus exposing themselves to the danger that the estate would be worth less than assumed.[240] In the third, the company had advanced funds even though the personal representative had not taken out a surety bond to insure all stake-

235. *Id.* at 239; *see also* Falconpoint Unlimited, LLC v. Senn, No. 14-cv-02342 NC, 2015 WL 5188811, at *5 (N.D. Cal. Sept. 4, 2015) (refusing to hold that litigation loans were not usurious at the summary judgment stage in light of allegations that the lender had thoroughly vetted the plaintiffs' tort complaint and determined that they "were nearly certain to be successful"); Rancman v. Interim Settlement Funding Corp., No. 20523, 2001 WL 1339487, at *3 (Ohio Ct. App. Oct. 31, 2001) ("The evidence presented at trial demonstrated that the contracts were loans because no real probability existed that non-payment would occur.").

236. *See infra* note 256.

237. *Compare* Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights at 4, Estate of Mouzon, No. RP07322619 (Cal. Super. Ct. Apr. 8, 2008) [hereinafter Mouzon, April 8 Assignment], *with* Receipt on Distribution at 1-2, Estate of Mouzon, No. RP07322619 (Cal. Super. Ct. Aug. 27, 2009).

238. *Compare* Assignment of Interest in Estate & Declaration Pursuant to Probate Code § 11604.5 at 3, Estate of Blakeney, No. RP07336253 (Cal. Super. Ct. Dec. 10, 2007) [hereinafter Blakeney, December 10 Assignment], *and* Assignment of Interest in Estate & Declaration Pursuant to Probate Code § 11604.5 at 3, Estate of Blakeney, No. RP07336253 (Cal. Super. Ct. Sept. 11, 2007) [hereinafter Blakeney, September 11 Assignment], *with* Order Approving First & Final Account & Report & Authorizing Payment of Statutory & Extraordinary Fees & Decree of Final Distribution at 3-4, No. RP07336253 (Cal. Super. Ct. Feb. 23, 2010).

239. *See* Final Distribution, Alameda County Probate Examiner's Checklist at 1, Estate of Littleton, No. RP07-329280 (Cal. Super. Ct. Aug. 18, 2009).

240. *See* Mouzon, April 8 Assignment, *supra* note 237; Inventory & Appraisal at 4, Estate of Mouzon, No. RP07322619 (Cal. Super. Ct. Apr. 22, 2008); Blakeney, December 10 Assignment, *supra* note 237; Blakeney, September 11 Assignment, *supra* note 237; Inventory & Appraisal at 4, Estate of Blakeney, No. RP07336253 (Cal. Super. Ct. Dec. 12, 2007).

holders against fraud and embezzlement.[241] The fact that firms can easily take steps to avoid repeating these kinds of mistakes suggests that they are not likely to recur. Thus, like litigation financiers who bought a stake in *Echeverria*'s strict liability claim or *Curry*'s unopposed negligence allegations, probate lenders are "almost guaranteed to recover" and face "low, if any risk."[242]

But even if the usury statutes apply, it does not necessarily follow that probate lenders are defying them. Unlike traditional loans, these transactions neither have a set rate nor a fixed term.[243] In fact, the annual percentage of a firm's markup depends on a fact that is unknown at the time of contracting: the number of days until the estate closes. Thus, the status of probate loans under the usury statutes depends on a second contingency: not *whether* the creditor will be repaid, but *when*. Theoretically, a case could persist for so long in the system that the company's rate of return would be minimal.

Again, though, this turns out to be a phantom condition. We were able to determine the effective annual simple interest rates for the seventy-four loans that were fully repaid.[244] Strikingly, all of them exceeded California's usury threshold of 10%.[245] In fact, as Table 3 reveals, fifty-three (72%) featured rates

241. *See* Petition for Probate, Alameda County Probate Examiner Checklist at 3, Estate of Littleton, No. RP07329280 (Cal. Super. Ct. Aug. 18, 2009) (noting that the heirs had agreed to waive bond). Probate bonding companies charge a small fee in return for promising to reimburse the estate if the personal representative steals funds. *See, e.g.*, Beverly Bird, *How To Get a Surety Bond for Probate Court*, LEGAL ZOOM, http://info.legalzoom.com/surety-bond-probate-court-25890.html [http://perma.cc/RDW4-U2C6]. In our data, seventeen of the thirty matters with loans were bonded.

242. Echeverria v. Estate of Lindner, 801 N.Y.S.2d 233, 2005 WL 1083704, at *8 (Sup. Ct. Mar. 2, 2005) (unpublished table decision).

243. Probate lenders take pains to call their markups "fees" and not "interest." Yet judges "condemn disguised usury." Arneill Ranch v. Petit, 134 Cal. Rptr. 456, 463 (Ct. App. 1976) (citations omitted). Accordingly, courts define "interest" broadly to "include[] all amounts received by the lender under any other name as compensation for his own services." *Ex parte* Fuller, 102 P.2d 321, 327 (Cal. 1940).

244. We employed two simplifying assumptions. First, because lenders file their contracts with the court very shortly after they are consummated, we used the date they were logged into the probate records as the beginning of the loan period. Second, in two cases that featured a total of nine loans, lenders received an interest in real estate rather than cash. Although we do not have access to information about the final sales price of the property, we treated these matters as though the lenders recovered the full amount to which they were entitled.

245. We used the following formula to calculate simple annual interest rates: $((A-B)/C \times 365)/B$, where A is the amount ultimately received by the lender, B is the amount of the advance, and C is the number of days between the loan and the repayment. To illustrate, suppose an heir or beneficiary received $15,000 and repaid the lender $25,000 when the estate closed 400 days later. We take the raw markup ($25,000 - $15,000 = $10,000) and divide it by the number of days until repayment (400), which equals the daily amount of interest that acof more than 50%, and thirty-four (46%) topped 100%.[246] Thus, probate lenders are all but assured of usurious returns.[247]

TABLE 3.

EFFECTIVE INTEREST RATES

Range	Number of Loans
0-10%	0
11-20%	4
21-30%	4
31-40%	4
41-50%	9
51-60%	8
61-70%	5
71-80%	2
81-90%	3
91-100%	1
>100%	34
Total	74

To conform to the usury statutes, probate lenders could experiment with "usury savings clauses," which resurrect invalid loans by reducing the interest rate to the maximum permissible amount. Admittedly, some courts refuse to enforce these provisions, reasoning that they encourage lenders to charge all their customers astronomical rates and then merely "refund . . . the usurious

crued (here, $25). Multiplying that by 365 gives the raw yearly markup ($9,125). Finally, dividing that result by the amount of the advance expresses it as a percentage of the original loan (here, 9,125/15,000 = 0.61, or 61%).

246. The range was from 13% to 949%.

247. As we mention above, a loan is not usurious if the amount of the lender's recovery depends on the occurrence of some event about which there is genuine uncertainty. *See supra* text accompanying notes 219-225. Arguably, the date that the probate matter will end does not qualify as a condition, because it impacts the lender's rate of return, not its profit. *Compare* Oregrund Ltd. P'ship v. Sheive, 873 So. 2d 451, 458 (Fla. Dist. Ct. App. 2004) (reasoning that the usury laws apply even if a loan's "'due' date cannot be determined"), *with* Kaplan v. Tiffany Dev. Corp., 69 S.W.3d 212, 219 (Tex. Ct. App. 2001) ("[A] contract is usurious if there is any mode or contingency by which the lender could receive more than the maximum rate of interest allowed by law."). Yet even if uncertainty about the duration of the case does count as a contingency, our analysis shows that it poses little real risk to lenders.

amounts" to "the few debtors who complain."[248] Yet judges are more hospitable to usury savings clauses when they seem less like attempts to launder patently illegal transactions and more like the product of genuine uncertainty about whether a loan *will* be usurious. Indeed, as the Florida Court of Appeals explained, a savings clause may be appropriate "where the transaction is not clearly usurious at the outset but only becomes usurious upon the happening of a future contingency."[249] Given the fact that the returns on a probate loan depend on when the estate closes—and is thus impossible to predict ex ante—courts might be willing to enforce savings clauses in this context. In turn, this ceiling on interest rates would go a long way in ameliorating the seeming unfairness of these contracts.

In sum, reaping a usurious profit from a probate loan is "not a gamble, but a 'sure thing.'"[250] In addition, as we discuss next, the fact that probate loans are "absolutely repayable" subjects them to federal consumer protection efforts.[251]

B. The Truth in Lending Act

Because probate lenders are virtually guaranteed to recover their advances, they also must comply with the Truth in Lending Act. As this section explains, their current efforts are insufficient.

Congress enacted TILA in 1968 to standardize the information that lenders furnish and thereby allow potential customers "to compare more readily the various credit terms available."[252] The statute penalizes companies that fail to

248. C & K Invs. v. Fiesta Grp., Inc., 248 S.W.3d 234, 244 (Tex. App. 2007); *see also* Swindell v. Fed. Nat'l Mortg. Ass'n, 409 S.E.2d 892, 896 (N.C. 1991) ("A lender cannot charge usurious rates with impunity by making that rate conditional upon its legality and relying upon the illegal rate's automatic rescission when discovered and challenged by the borrower."); NV One, LLC v. Potomac Realty Capital, LLC, 84 A.3d 800, 810 (R.I. 2014) ("[G]iving effect to usury savings clauses would rest the burden of ensuring compliance squarely on the shoulders of the borrower.").

249. Jersey Palm-Gross, Inc. v. Paper, 639 So. 2d 664, 671 (Fla. Dist. Ct. App. 1994); *see also* Saypo Cattle Co. v. RMF Deep Creek, LLC, 901 F. Supp. 2d 1267, 1282 (D. Mont. 2012) ("In this case, the interest rate under the Promissory Note is not fixed but fluctuates according to the actions of the parties at various points in time."); First State Bank v. Dorst, 843 S.W.2d 790, 793 (Tex. App. 1992) ("[A] savings clause may cure an open-ended contingency provision the operation of which may or may not result in a charge of usurious interest.").

250. Echeverria v. Estate of Lindner, 801 N.Y.S.2d 233, 2005 WL 1083704, at *8 (Sup. Ct. Mar. 2, 2005) (unpublished table opinion).

251. *See infra* note 256.

252. 15 U.S.C. § 1601(a) (2012). The statute delegated responsibility for promulgating regulations to the Federal Reserve Board. *See* 15 U.S.C. § 1604(a) (2012). The Federal Reserve's follow its byzantine provisions, "even if the violation is technical and unintended."[253] It applies to "credit transaction[s],"[254] which occur when a borrower incurs "debt."[255] Although TILA does not define "debt," it is generally understood as the transfer of value "to someone who is obligated to pay it back."[256] Thus, as with the usury statutes, scholars have assumed TILA does not govern litigation loans.[257] Moreover, recall that in *Reed v. Val-Chris Investments, Inc.*, a federal district court exempted a probate loan from TILA because the company "had no recourse against [the beneficiary] if his potential inheritance was not sufficient to cover his assignment."[258]

most prominent exercise of rulemaking power is known as Regulation Z. *See* Mourning v. Family Pub. Serv., Inc., 411 U.S. 356, 362 (1973); 12 C.F.R. § 226.1 (2016). In 2010, Congress transferred regulatory authority under TILA to the Consumer Financial Protection Bureau. *See* 15 U.S.C. § 1604(a).

253. Brodo v. Bankers Tr. Co., 847 F. Supp. 353, 356 (E.D. Pa. 1994).

254. 15 U.S.C. § 1602(i) (2012). Like the usury laws, TILA applies to loans used "primarily for personal, family, or household purposes." *Id.* Thus, heirs or beneficiaries who intend to use the payout from a probate loan to achieve other objectives could not invoke the statute. *See supra* note 206 and accompanying text.

255. 15 U.S.C. § 1602(f). TILA governs "credit," defined as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." *Id.*

256. Capela v. J.G. Wentworth, LLC, No. CV09-882, 2009 WL 3128003, at *9 (E.D.N.Y. Sept. 24, 2009) (holding that structured settlement was not "debt" under TILA). *But see* Wiley v. Earl's Pawn & Jewelry, Inc., 950 F. Supp. 1108, 1112 (S.D. Ala. 1997) (rejecting the argument "that a debt [under TILA] must be accompanied by an obligation to repay"); BLACK'S LAW DICTIONARY 432 (8th ed. 2004) (defining "debt" to mean both "[a] fixed and certain obligation to pay money" and "any duty to respond to another in money, labor, or service"). In fact, courts disagree about whether to borrow the meaning of "debt" from state law or analogous federal statutes. *Compare* Billings v. Propel Fin. Servs., LLC, No. 5:14-CA-00764-OLG, 2014 WL 7448248, at *2 (W.D. Tex. Nov. 28, 2014) ("TILA does not define debt, so the term takes on the definition given to it by state law or contract."), *and* 12 C.F.R. § 1026.2(b)(3) (instructing courts to look to state law or contract to fill gaps in TILA), *with* Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 400 (3d Cir. 2000) (construing "debt" under TILA as it is defined under the Fair Debt Collection Practices Act, as "'any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services . . . are primarily for personal, family, or household purposes'" (quoting 15 U.S.C. § 1692a(5))). We will assume that "debt" must be "absolutely repayable," because that is the least friendly reading to our claim that probate lenders must comply with TILA.

257. *See, e.g.*, Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 CHI.-KENT L. REV. 11, 36 (2014); Martin, *supra* note 60, at 69-70; Lauren J. Grous, Note, *Causes of Action for Sale: The New Trend of Legal Gambling*, 61 U. MIAMI L. REV. 203, 231 (2006).

258. Reed v. Val-Chris Invs., Inc., No. 11cv371 BEN (WMC), 2011 WL 6028001, at *2 (S.D. Cal. Dec. 5, 2011).

This analysis would be persuasive if probate loans truly were non-recourse. However, TILA requires courts to "focus on the substance, not the form, of credit-extending transactions."[259] In reality, probate loans seem to be consistently repaid. Thus, no matter what these contracts say about being contingent on the outcome of the probate matter, they involve no authentic risk for lenders, and thus create "debt."

TILA also exempts certain loans for more than a specified sum. During the period covered by our study, the statute did not apply to "[c]redit transactions, other than those in which a security interest is or will be acquired in real property . . . in which the total amount financed exceeds $25,000."[260] In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which broadened TILA's scope by raising the cap to $50,000 and indexing it to inflation.[261] However, we unearthed just four contracts in which the borrowers received more than $25,000, and just one that was north of $50,000. Thus, this carve-out is unlikely to affect more than a slender minority of probate loans.

TILA classifies consumer loans that require a single payment, such as probate loans, as "closed-end" loans.[262] TILA's rules for "closed-end" credit plans such as probate loans fall into two categories. First, section 1638(a) governs the content of disclosures. It instructs lenders to inform borrowers of "[t]he 'amount financed', using that term,"[263] "[t]he 'finance charge', . . . using that term,"[264] and "[t]he finance charge expressed as an 'annual percentage rate', us-

259. Turner v. E-Z Check Cashing, Inc., 35 F. Supp. 2d 1042, 1047 (M.D. Tenn. 1999) (citing Meyers v. Clearview Dodge Sales, Inc., 384 F. Supp. 722, 728 (E.D. La. 1974)).

260. 15 U.S.C. § 1603(3) (2006) (amended 2008 and 2010).

261. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 1100E, 124 Stat. 1376, 2111 (2010).

262. *See* Brown v. Payday Check Advance, Inc., 202 F.3d 987, 989 (7th Cir. 2000) (asserting that 15 U.S.C. § 1638 "addresses all consumer loans other than open-end credit plans"); *see also In re* Ferrell, 358 B.R. 777, 783 (B.A.P. 9th Cir. 2006) (quoting Thomas A. Wilson, *The Availability of Statutory Damages Under TILA To Remedy the Sharp Practice of Payday Lenders*, 7 N.C. BANKING INST. 339, 344 (2003) (explaining that TILA considers "closed-end" loans as "a type of loan that requires a single payment or succession of payments")). Conversely, "open-end" plans, such as credit cards, are "plan[s] under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance." 15 U.S.C. § 1602(j) (2012); *cf.* 12 C.F.R. § 226.2(a)(10) (2016) ("Closed-end credit means consumer credit other than 'open-end credit' as defined in this section.").

263. 15 U.S.C. § 1638(a)(2)(A) (2012).

264. *Id.* § 1638(a)(3).

ing that term."[265] Second, section 1632(a) controls the form of disclosures. The statute and Regulation Z task companies with highlighting "[t]he terms 'annual percentage rate' and 'finance charge' . . . more conspicuously than other terms,"[266] segregating disclosures from other paperwork,[267] and ensuring that disclosures do not contain extraneous text.[268]

The probate lenders in our dataset do not satisfy these "hypertechnical" mandates.[269] As Figures 1 through 4 reveal, these firms violate section 1638(a)(2)(A) by failing to use the magic words "amount financed" (although they do list the "[a]dvance [a]mount" or "[a]mount [p]aid" to the borrower). Even more starkly, they contravene sections 1638(a)(3), 1638(a)(4), and 1632(a) by failing to mention—let alone estimate or highlight—the "finance charge" and the "annual percentage rate." Likewise, a surefire way to violate section 1632(a) is to convey contradictory or inaccurate information.[270] Some probate lenders, such as Inheritance Funding (Figure 2), have internally inconsistent documents that state one sum ($9,000 in Figure 2) as the "[a]dvance [a]mount" and a slightly different calculation ($9,042 in Figure 2) as the "[n]et [c]heck [a]mount." Finally, rather than separating their disclosures from the terms of the loan, most probate lenders, like Key National Funding (Figure 3) and Accelerated Inheritance (Figure 4), shoehorn the entire transaction into a single document.[271]

265. *Id.* § 1638(a)(4).

266. 15 U.S.C. § 1632(a) (2012); *see* 12 C.F.R. § 226.17(a)(2) (2016).

267. *See* 12 C.F.R. § 226.17(a)(1).

268. *See id.*

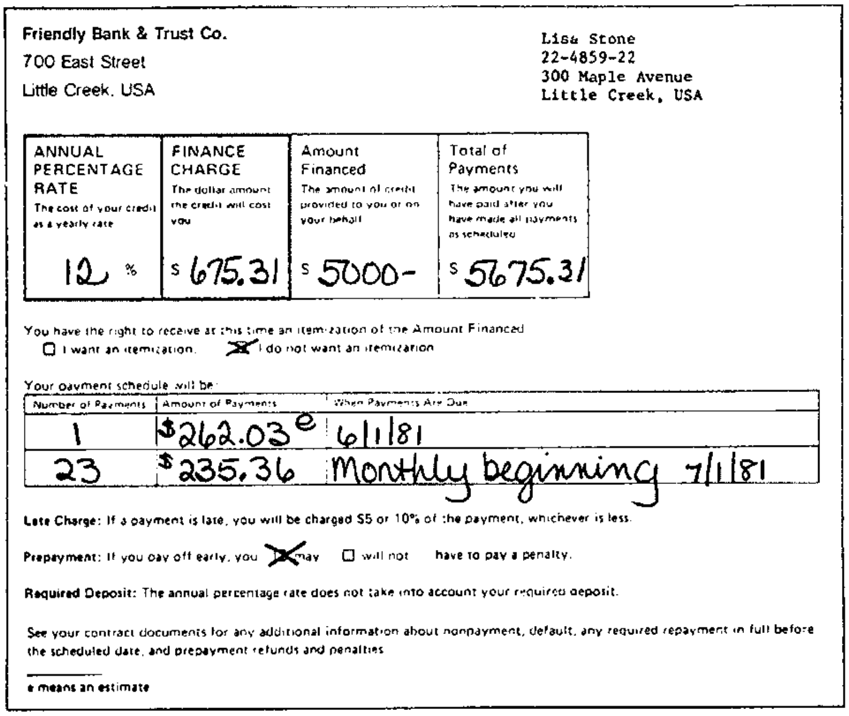
269. Brown v. Payday Check Advance, Inc., 202 F.3d 987, 989 (7th Cir. 2000).

270. *See, e.g.*, *In re* Ralls, 230 B.R. 508, 516-17 (Bankr. E.D. Pa. 1999) (finding liability under TILA where the creditor's disclosure statement "was inconsistent with several of the material terms set forth in certain of the significant loan documents"); *see also* Rendler v. Corus Bank, 272 F.3d 992, 996 (7th Cir. 2001) ("Needless to say, all TILA disclosures must be accurate.").

271. The California Probate Code also forces probate lenders to make particular disclosures in a specific format. *See supra* note 124. To the extent that these requirements clash with TILA, they are preempted. *See, e.g.*, Peel v. BrooksAmerica Mortg. Corp., 788 F. Supp. 2d 1149, 1159 (C.D. Cal. 2011) (quoting Newbeck v. Wash. Mutual Bank, No. 09-1599, 2010 WL 291821, at *3 (N.D. Cal. Jan. 19, 2010)) ("TILA preempts all state law provisions to the extent 'that the "terms and forms" mandated by the state are "inconsistent" with those required by TILA.'"); *see also* 12 C.F.R. § 226.28(a)(1) (2015) ("A State law is inconsistent if it requires a creditor to make disclosures or take actions that contradict the requirements of the Federal law.").

FIGURE 1.

MODEL TILA CONSUMER CREDIT DISCLOSURE[272]



Friendly Bank & Trust Co.
700 East Street
Little Creek. USA

Lisa Stone
22-4859-22
300 Maple Avenue
Little Creek, USA

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate	FINANCE CHARGE The dollar amount the credit will cost you	Amount Financed The amount of credit provided to you or on your behalf	Total of Payments The amount you will have paid after you have made all payments as scheduled
12 %	$ 675.31	$ 5000-	$ 5675.31

You have the right to receive at this time an itemization of the Amount Financed
☐ I want an itemization. ☒ I do not want an itemization

Your payment schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due
1	$262.03^e	6/1/81
23	$235.36	Monthly beginning 7/1/81

Late Charge: If a payment is late, you will be charged $5 or 10% of the payment, whichever is less.

Prepayment: If you pay off early, you ☒ may ☐ will not have to pay a penalty.

Required Deposit: The annual percentage rate does not take into account your required deposit.

See your contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties

e means an estimate

272. *Appendix H to Part 1026—Closed-End Model Forms and Clauses*, CONSUMER FIN. PROTECTION BUREAU (July 18, 2015), http://www.consumerfinance.gov/eregulations/1026-H/2013-30108_20150718 [http://perma.cc/R5RL-KJN4].

FIGURE 2.

INHERITANCE FUNDING DISCLOSURE[273]

Exhibit A

The transaction selected by SELLER is as follows:

Advance Amount	$9,000.00
Assignment to IFC	$16,400.00
Reduced Net Assignment (after Rebate) if paid within 12 months	$14,800.00

SELLER's net check is estimated at this time as follows (actual costs and check amount may vary somewhat, but not materially, from this estimate):

Purchase Price	$11,045.00
Less:	
Transaction Fee	$675.00
Processing Fee	$600.00
Underwriting Fee	$400.00
Probate Document Retrieval Cost	$0.00
Credit Report	$18.00
Title Report(s)	$0.00
Due Diligence Attorney	$250.00
Court Filing Fees	$10.00
Courier Charges	$30.00
Bank Wire Costs	$20.00
Other #1	$0.00
Other #2	$0.00
Net Check Amount (Estimated)	$9,042.00

4

L.C

Seller's Initials

273. Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights at 4, *In re* Estate of Craig, No. RP07338809 (Cal. Super. Ct. Jan. 7, 2008).

FIGURE 3.

KEY NATIONAL FUNDING DISCLOSURE[274]

Superior Court of California
County of Alameda

In the matter of the Estate of	**Case No. HP07348076**
Edna Annis Shipley-Conner,	**AGREEMENT FOR SALE AND TRANSFER OF BENEFICIAL INTEREST; ASSIGNMENT; and WAIVER OF DISCLAIMER RIGHTS OF KEVIN C. CONNER**
deceased on 06/10/2007	

This agreement is made and entered into on the date last executed between **Kevin C. Conner**, an individual (hereinafter referred to as "SELLER") and **Key National Funding, LLC**, 12919 Alcosta Blvd, Suite 1A, San Ramon, CA 94583 (hereinafter "BUYER").

A. DISCLOSURE INFORMATION PURSUANT TO CALIFORNIA PROBATE CODE SECTION 11604.5 (e)

Amount Paid to SELLER	Amount Assigned and Transferred to BUYER	Amount Assigned and Transferred to BUYER after Discount, if applicable (see section B. 3. below)	Discount to SELLER if BUYER receives the Assigned Amount within the Discount Period (see section B. 3. below)	Total Costs and Fees Charged to SELLER (see sect. B.5. below)
$18,000.00	$26,460.00	$24,300.00	$2,160.00	$0.00

B. AGREEMENT FOR SALE AND TRANSFER OF BENEFICIAL INTEREST and ASSIGNMENT

1. **Assignment:** In consideration of the Purchase Price set forth below, SELLER, hereby assigns, sells, and transfers to BUYER, seller's beneficial interest as heir, beneficiary, legatee, devisee or otherwise in the **Estate of Edna Annis Shipley-Conner**, decedent in the probate proceedings referred to above, in the amount and to the extent of the **first $26,460.00** ("Assigned Amount") of SELLER'S interest in the Decedent's Estate reserving to SELLER the remaining beneficial interest.

AGREEMENT FOR SALE AND ASSIGNMENT OF BENEFICIAL INTEREST **Page 1 of 8**

APPROVAL OF SELLER (initials): KC Date signed by SELLER: NOV 12, 08

274. Agreement for Sale & Transfer of Beneficial Interest at 1, *In re* Estate of Shipley-Conner, No. HP07348076 (Cal. Super. Ct. Nov. 18, 2008).

FIGURE 4.

ACCELERATED INHERITANCE DISCLOSURE[275]

ACCELERATED INHERITANCE, LLC
1957 Carson Street, Ste 101
Torrance, CA 90501
Telephone: (310) 328-4080

FILED
ALAMEDA COUNTY
NOV 0 7 2007
CLERK OF THE SUPERIOR COURT
By ______ Deputy

ORIGINAL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

In re the Estate of: EVELYN ESTELLE DAVIS Decedent.	Case No.: RP07347450 PARTIAL ASSIGNMENT OF BENEFICIAL INTEREST OF SAMUEL DAVIS

1. For good and valuable consideration of money advanced to me on my beneficial interest, receipt of which is hereby acknowledged, I, SAMUEL DAVIS ("Assignor"), an heir of the decedent's estate herein, do hereby irrevocably assign, sell and transfer to ACCELERATED INHERITANCE, LLC ("Assignee"), a first and prior interest to the extent of TWENTY FIVE THOUSAND TWO HUNDRED Dollars ($25,200.00) of my beneficial interest in the Estate of EVELYN ESTELLE DAVIS including any commissions to which I may be entitled in the above captioned Estate if acting in a representative capacity, including the above captioned estate which is pending in the Superior Court of the State of California, County of ALAMEDA and any ancillary proceedings.

2. Assignor irrevocably authorizes, requests and directs any and all personal representatives of the Estate, including their attorneys and agents, to pay, transfer and distribute directly to ACCELERATED INHERITANCE, LLC, TWENTY FIVE THOUSAND TWO HUNDRED Dollars ($25,200.00) from Assignor's commissions for acting in a representative capacity and or share of the estate prior to making any payment or distribution to Assignor.

PARTIAL ASSIGNMENT OF BENEFICIAL INTEREST OF SAMUEL DAVIS
1

Accelerated Inheritance, LLC
1957 Carson Street, Ste 101
Torrance, CA 90501
Tel: (310) 328-4080

275. Partial Assignment of Beneficial Interest at 1, *In re* Estate of Davis, No. RP07347450 (Cal. Super. Ct. Nov. 7, 2007).

One might wonder how companies could communicate the "finance charge" and "annual percentage rate" when those variables are unknown at the time of contracting. The answer is that Regulation Z allows creditors to deal with uncertainty about the terms of a loan by disclosing "the best information reasonably available" provided that they "state clearly that the disclosure is an estimate."[276] Lenders likely have a vast reservoir of historical information from which they could derive educated guesses about what any particular loan's effective interest rate is likely to be. Indeed, although they cannot know for certain how many days will pass between the time of the agreement and the conclusion of the case, their own promotional materials reveal that the process follows certain patterns.[277]

For these reasons, unless probate lenders have revised their disclosures since our study, they could face a wave of TILA claims.[278] Congress has sweetened the pot for TILA plaintiffs in two important ways. First, in class actions, section 1640 allows damages in "such [an] amount as the court may allow," up to the lesser of $1,000,000 or 1% of the defendant's net worth.[279] Second, borrowers who prevail on any TILA theory may recoup their attorneys' fees and costs.[280] These incentives could make probate lenders tempting targets for the plaintiffs' bar.[281]

In addition, when an individual litigant (rather than a class member) prevails in a lawsuit for violations of the subsections of Section 1638 we have mentioned above, section 1640 entitles her to statutory damages of twice the amount of the finance charge, up to $2,000.[282] Because no probate loan in our

276. 12 C.F.R. § 226.17(c)(2)(i) (2016).

277. *See, e.g.*, *Probate Process Timeline*, INHERITANCE FUNDING, http://www.inheritancefunding.com/timeline [http://perma.cc/LG5A-6JF2].

278. Because TILA has a one-year statute of limitations for damages actions, the transgressions we discovered in our research are likely time-barred. *See* 15 U.S.C. § 1640(e) (2012); Salois v. Dime Sav. Bank, 128 F.3d 20, 24-25 (1st Cir. 1997) (holding that the statute of limitations begins to run once the loan is signed if that was the time of the plaintiff's injury).

279. 15 U.S.C. § 1640(a)(2)(B) (2012).

280. *See id.* § 1640(a)(3).

281. If private enforcement actions prove ineffective, governmental intervention is also possible. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 empowers the Consumer Financial Protection Bureau to promulgate regulations and sue to redress TILA violations. *See* 12 U.S.C. § 5581(b)(5)(B); 15 U.S.C. § 1607(a)(6).

282. *See* 15 U.S.C. § 1640(a)(2)(A)(i). On its face, only Section 1640(a)(2)(A)(i) does not contain any damage ceiling. However, courts have uniformly held that the cap imposed by Section 1640(a)(2)(A)(ii) also applies to Section 1640(a)(2)(A)(i). *See, e.g.*, Strange v. Monogram Credit Card Bank of Ga., 129 F.3d 943, 947 (7th Cir. 1997) (applying a previous verdataset had a finance charge of less than $1,000, each one would have triggered the maximum amount of liability.

Finally, creditors that violate section 1632(a) are liable for actual damages for "proven injury or loss."[283] To obtain relief, a plaintiff must demonstrate that "(1) [s]he read the TILA disclosure statement; (2) [s]he understood the charges being disclosed; (3) had the disclosure statement been accurate, [s]he would have sought a lower price; and (4) [s]he would have obtained a lower price."[284] Admittedly, debtors are often unable to link a company's inadequate disclosures under section 1632(a) to concrete harm.[285] Nevertheless, these cases usually involve trivial deviations from the statute's blueprint, which makes it hard for a borrower to prove that she noticed the flaw—let alone that it prompted her to forgo a better deal.[286] Because the deficiencies in probate lenders' disclosures are so flagrant, it may be easier for heirs and beneficiaries to demonstrate causation. For example, in our research, the markups on a $10,000 advance ranged from $5,200 to $8,600. But the fact that lenders do not spotlight these charges makes it difficult for prospective clients to shop among competing firms.

Accordingly, probate lenders routinely violate TILA. In addition, as we discuss next, their transactions may suffer from an even greater infirmity: champerty.

C. Champerty

The champerty doctrine has been a formidable obstacle for litigation financiers and heir hunters. Similarly, in jurisdictions that continue to follow the an-

version of TILA that limited damages to $1,000); *cf.* Hummel v. Hall, 868 F. Supp. 2d 543, 549-50 (W.D. Va. 2012) (applying the current $2,000 maximum).

283. Peters v. Jim Lupient Oldsmobile Co., 220 F.3d 915, 916 (8th Cir. 2000) (emphasis and citation omitted). Statutory damages are not available for violations of Section 1632. *See, e.g.*, Brown v. Payday Check Advance, Inc., 202 F.3d 987, 991 (7th Cir. 2000); Kelen v. World Fin. Network Nat'l Bank, 763 F. Supp. 2d 391, 393 (S.D.N.Y. 2011).

284. *Cf. Peters*, 220 F.3d at 917 (discussing a violation of Section 1638(a)(2)(B)(iii)).

285. *See, e.g.*, *In re* Ferrell, 539 F.3d 1186, 1192 (9th Cir. 2008); *Brown*, 202 F.3d at 990. In fact, "Congress provided for statutory damages *because* actual damages in most cases would be nonexistent or extremely difficult to prove." H.R. REP. NO. 104-193, at 99 (1995) (emphasis added).

286. *See, e.g.*, *In re Ferrell*, 539 F.3d at 1188 (involving a creditor that simply failed to highlight the terms "finance charge," "annual percentage rate," "amount financed," and "total of payments"); *Brown*, 202 F.3d at 990 ("[T]he phrases 'finance charge' and 'annual percentage rate' are in the same typeface as 'amount financed' and 'total of payments.'").

cient rule,[287] champerty is a bet-the-company issue for probate lenders. Unlike the usury statutes, which force creditors to lower their interest rates, or TILA, which impacts how lenders convey information to prospective customers, champerty has the potential to ban certain transactions entirely. This Section explains that, although there is a colorable argument that probate lending is champterous, courts and policymakers should police the industry through other means.

At first blush, probate lending seems manifestly different than litigation lending and heir hunting. The contrast with litigation lending is particularly acute. Litigation loans are associated with conflict for a simple reason: they seek to enable a lawsuit. But probate loans do not. Heirs and beneficiaries rarely, if ever, funnel the money they receive from probate lenders back into an adversarial proceeding.

Similarly, probate lending seems less like champerty than heir hunting. In the typical heir hunting scenario, someone dies without an estate plan or any known family. Because the decedent's closest relatives will be "laughing heirs"—far-flung and distant kin—the heir hunter must substantiate their inheritance rights by filing an heirship petition.[288] Even if this pleading is not contested, the court must adjudicate it, and, as a result, there is at least some systematic connection between heir hunting and burdens on the judiciary.[289] Yet there is no reason to expect probate lending to have a similar effect. When probate functions smoothly, the heirs and beneficiaries sit on the sidelines, waiting for title to be cleared and the decedent's debts to be paid. The fact that

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287. As noted above, courts and scholars are hopelessly divided over champerty's viability. *See supra* text accompanying notes 68-79. *Compare* Brief for Plaintiffs-Appellants Cross-Appellees at 41, Berman v. Linnane, 679 N.E.2d 174 (Mass. 1997) (No. SJC-07227) (calling champerty so "anachronistic" that it is "fossilized"), *and* TMJ Haw., Inc. v. Nippon Tr. Bank, 153 P.3d 444, 449 (Haw. 2007) (declaring that champerty was "crafted to meet anachronistic societal demands"), *and* Sebok, *supra* note 9, at 70 ("[T]he prohibition against champerty . . . [is] based on empirical conditions that even the courts that uphold the prohibition today admit are anachronistic."), *with* Lingel v. Olbin, 8 P.3d 1163, 1167-68 (Ariz. Ct. App. 2000) (calling champerty a safeguard against "multitudinous and useless litigation"), *and* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 9, at 2 (arguing that the decline of champerty will generate "frivolous and abusive litigation").

288. A "laughing heir" is an heir "who is so loosely linked to his ancestor as to suffer no sense of bereavement at his loss." David F. Cavers, *Change in the American Family and the "Laughing Heir*,*"* 20 IOWA L. REV. 203, 208 (1935).

289. *But see In re* Katze-Miller, 463 N.W.2d 853, 860 (Wis. Ct. App. 1990) (rejecting the argument that unopposed heirship petitions are "litigation" for the purposes of the champerty doctrine). In fact, adjudicating heirship petitions may be less laborious for probate courts than the alternative of administering unclaimed property. *See, e.g.*, Taylor v. Yee, 780 F.3d 928, 931-32 (9th Cir. 2015) (describing the process by which assets escheat to the state).

one of these individuals has assigned a cut of the estate to a company should merely add another passive party to the case, changing nothing. Therefore, we did not expect to find any correlation between probate lending and probate litigation.

To test this intuition, we ran a linear probability regression using "litigation"—defined as a request for relief that sparks an objection from an adverse party—as the dependent variable.[290] Our marquee independent variable was whether or not an estate contained a probate loan. Our other independent variables were factors that have long been suspected to cause conflict during estate administration: whether or not the case involved a decedent who (1) died intestate,[291] (2) executed handwritten wills,[292] (3) divided property unequally among similarly situated relatives, (4) named personal representatives who served pro se (rather than hiring a lawyer),[293] (5) owned real property that

290. For a more detailed explanation of the linear probability model, see *supra* note 187. Defining probate "litigation" is harder than it might sound. Parties sometimes ask the court to interpret a confusing will or rule that a third party holds property that belongs to the estate. *See, e.g.*, Horton, *Probate*, *supra* note 167, at 633-34. Even when no stakeholder contests the petition, judges often push back or deny the remedy sought. Thus, these petitions straddle the boundary between litigation and routine interactions between the personal representative and the court, such as requests to probate a will or make a final distribution. By focusing only on filings that generate objections, we chose to be conservative and exclude quasi-adversarial matters.

291. Intestate decedents, unlike their counterparts who create wills, never get the opportunity to name a personal representative. In turn, this can lead to contentious battles among siblings or other relatives about who gets to serve in this capacity. *See, e.g.*, Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 896 (2012).

292. Because holographic wills are usually drafted without the aid of legal advice, they "present a range of chronic and unnecessary problems." Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 95 (2006); *cf.* Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 46-51 (2008) (studying two years of probate files from Pittsburgh, Pennsylvania and finding that holographic wills often fail to name executors or contain residuary clauses). In particular, statutes in many states validate handwritten but unattested wills only if they are either largely or entirely in the testator's handwriting. *See, e.g.*, UNIF. PROBATE CODE § 2-502(b) (amended 2010), 8 pt. 1 U.L.A. 138-39 (2013). Accordingly, there is supposedly "a large and ugly case law voiding wills which contained some innocuous printed matter." John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 519 (1975). *But see* Horton, *Wills Law*, *supra* note 167, at 1134-35 (examining 332 estate administrations and concluding that a more common problem than stray typewriting is uncertainty about whether a decedent actually intended a handwritten document to be a will).

293. The challenge of being at the helm of a probate estate has prompted commentators to note that personal representatives hire lawyers "in virtually every estate administration" and will needed to be sold during the probate matter, and (6) experienced a major change of circumstances after executing the will, such as leaving assets to beneficiaries who passed away (triggering the doctrine of lapse)[294] or making specific bequests of items they did not own at death (raising issues of ademption).[295] Finally, we added dummy variables to control for other, less obvious sources of friction, including the decedent's gender and marital status, the courthouse where the case was lodged, the fact that creditors emerged from the woodwork, and the value of the estate.

Surprisingly, we discovered that probate loans are more strongly correlated with disputes than any other characteristic. Indeed, as Table 4 elucidates, a lender's involvement increased the odds of conflict by twenty-eight percentage points.[296] Thus, there is a statistically significant relationship between probate loans and full-fledged litigation.

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likely continue to do so. Robert A. Stein & Ian G. Fierstein, *The Role of the Attorney in Estate Administration*, 68 MINN. L. REV. 1107, 1225 (1984).

294. Under the common law, when a beneficiary passes away before the testator, the beneficiary's gift lapses and passes on to a new taker. *See, e.g.*, LEWIS M. SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS § 80 (2d ed. 1966). However, every state with the exception of Louisiana has enacted an anti-lapse statute, which redistributes lapsed bequests to the dead beneficiary's family if the beneficiary has a certain, specified relationship to the testator. *See, e.g.*, CAL. PROB. CODE § 21110 (West 2003); UNIF. PROBATE CODE § 2-603 (amended 2010), 8 U.L.A. 241 (2013). Because testators can generally draft around anti-lapse statutes by expressing their desire to leave assets to the beneficiary only if she is still alive at the time of the testator's death—for instance, writing "to X, if she survives me"—lapse can raise thorny interpretation problems. *See* CAL. PROB. CODE § 21110(b) (stating that the anti-lapse statute does not apply "if the instrument expresses a contrary intention or a substitute disposition"); *see also* Susan F. French, *Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335, 346-62 (1985) (canvassing the tangled caselaw).

295. The "identity theory" of ademption by extinction, which California follows, provides that the recipient of a specific bequest (such as an heirloom) takes nothing if the testator turns out not to own that piece of property when she dies. *See, e.g.*, CAL. PROB. CODE §§ 21131-33 (West 2015). However, in some circumstances, the disappointed beneficiary can recover a substitute gift in lieu of the missing possession. *See id.* § 21333 (permitting beneficiaries to obtain the remainder of the purchase price stemming from the sale of the item, any eminent domain award, or insurance proceeds). Thus, ademption can open the door to competing claims between the would-be recipient of a thwarted specific bequest and the residuary beneficiaries (who would take the vestiges of the vanished asset if the exceptions to ademption did not apply). *Cf.* Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 643-47 (1993) (criticizing the movement to broaden the exceptions to the ademption doctrine as "an invitation to litigation that resembles legalized gambling").

296. Other variables that increased the likelihood of litigation by a statistically significant margin were (1) intestacies, (2) testators who divided property unequally among similarly situated relatives, (3) creditor's claims, and (4) holographic wills.

TABLE 4.

CORRELATES OF PROBATE LITIGATION LINEAR PROBABILITY MODEL[297] (ROBUST STANDARD ERRORS IN PARENTHESES)

Probate Loan[298]	0.28** (0.09)
Intestate[299]	0.10*** (0.02)
Will Divides Unequally[300]	0.09** (0.03)
Creditor Claim Filed[301]	0.11*** (0.03)
Handwritten Will	0.13* (0.06)
No Spouse[302]	-0.04 (0.03)
Male	0.01 (0.02)
Real Property Sale[303]	-0.01 (0.03)
Value of Decedent's Estate (in $1000s)	0.00 (0.00)
Pro Se [304]	-0.02 (0.04)

297. We used a linear probability model where the dependent variable is equal to 1 if the estate involved litigation and 0 otherwise.

298. The Probate Loan variable is a dummy variable equal to 1 if the estate contained one or more loans and 0 otherwise.

299. The Intestate variable is a dummy variable equal to 1 if the decedent did not have a valid will and 0 otherwise.

300. The Will Divides Unequally variable is a dummy variable equal to 1 if the will divided the estate unequally among similarly situated relatives and 0 otherwise. The omitted category includes wills that did divide the estate equally and intestacies.

301. The Creditor Claim Filed variable is a dummy variable equal to 1 if any creditor (bank, collection agency, government, medical, or other) sought to collect a debt from the estate and 0 otherwise.

302. The No Spouse variable is a dummy variable equal to 1 if the decedent was divorced or never married and 0 otherwise. The omitted category includes decedents who were either married or widowed at the time of their death.

303. The Real Property Sale variable is a dummy variable equal to 1 if the decedent owned real property that was sold during the probate process and 0 otherwise.

304. The Pro Se variable is a dummy variable equal to 1 if the decedent named a personal representative who served pro se rather than hiring a lawyer and 0 otherwise.

Fremont Courthouse[305]	0.01 (0.04)
Hayward Courthouse	0.03 (0.03)
Lapse/ Ademption[306]	0.01 (0.03)
Case Opened After 2007	0.00 (0.03)
Old Will (Before 1979)	-0.01 (0.05)
Constant	-0.03 (0.03)
N	572
Adj. R^2	0.087

Note. $^{*}\ p < 0.05$, $^{**}\ p < 0.01$, $^{***}\ p < 0.001$.

Of course, these results only prove so much. Rather than establishing that loans lead to litigation, they could point in the other direction: that litigation causes loans. Perhaps heirs and beneficiaries engage the services of a lender because a lawsuit has already derailed the probate process. Similarly, because we defined "litigation" so broadly—as any contested petition—we have swept up claims that may be only tenuously related to the presence of a lender. For instance, as mentioned, firms usually do not invest in an estate until after the personal representative has filed the I&A.[307] Some disputes, such as challenges to a will's validity and heirship petitions, occur at the beginning of the probate process, and thus likely occur before any loan.

Nevertheless, when we investigated further, we found little mystery about the link between loans and claims. In two-thirds of these cases, the petition or objection was initiated by the lender itself. Probate lending thus introduces litigious third parties into the court system.

Ultimately, though, we are not persuaded that the practice is champterous. Courts generally do not apply the doctrine to parties who first acquire an inter-

305. The two courthouse variables (Fremont Courthouse and Hayward Courthouse) are dummy variables equal to 1 if the probate case was heard in the indicated courthouse and 0 otherwise. The omitted category includes cases that were heard in the Oakland Courthouse.

306. The Lapse/Ademption variable is a dummy variable equal to 1 if lapse or ademption issues were raised in the probate case and 0 otherwise.

307. *See supra* Section II.B.

est in property and then bring a cause of action related to that property.[308] This is an apt description of probate lenders, who buy inheritance rights and subsequently (sometimes) sue. In fact, even when a purchaser knew that litigation involving an asset "would be inevitable," judges only deem the sale to be champterous when "'stirring up litigation' was [its] sole or primary purpose."[309] As far as we can tell, probate lenders do not buy shares of a decedent's estate in order to file claims. Instead, they litigate when necessary to further their prime directive of turning a profit.

In addition, our other proposals diminish the need for champerty. Indeed, champerty's policy foundations partially overlap with those that underlie the usury laws and TILA. One of champerty's core purposes is to preclude "financial overreaching by a party of superior bargaining position."[310] Requiring probate loans to comply with state and federal consumer protection statutes would address this concern directly by capping interest rates, compelling enhanced disclosures, and facilitating consumer choice. These measures are better tailored to the problem than the blunderbuss champerty doctrine.

And although champerty also serves the discrete objective of preventing "useless litigation,"[311] it is not clear that extending the rule to probate lending would accomplish this goal. It is tempting to see lawsuits filed by faceless entities in a grim light, but the truth is more nuanced. Most of the probate lenders' petitions or objections sought either to remove the personal representative or recover for the personal representative's breach of fiduciary duty. Notably, if these allegations were well-founded, then they would benefit not only the

308. *See, e.g.*, RESTATEMENT (FIRST) OF CONTRACTS § 543 (AM. LAW INST. 1932) ("A bargain by one who already has, or who reasonably believes that he has an interest recognized by law in a claim, to pay the expense of enforcing it and to receive as compensation an increased share in the proceeds is not illegal.").

309. MVB Collision v. Allstate Ins. Co., 900 N.Y.S.2d 631, 634 (Dist. Ct. 2010); *see also* Papageorge v. Banks, 81 A.3d 311, 320 (D.C. 2013) ("Unless an exception applies, an agreement to finance litigation at one's own expense in exchange for a share of the proceeds is champertous where it is made for the purpose of stirring up and inducing litigation which otherwise would not be commenced."); Hayes v. Marshall, 501 S.W.2d 269, 270 (Ky. 1973) ("[T]he mere fact that property is involved in litigation does not render a purchase of that property champertous, and . . . the subsequent prosecution of the litigation by the purchaser does not constitute maintenance."), *overruled on other grounds by* Elliott v. Jefferson Cty. Fiscal Court, 657 S.W.2d 237 (Ky. 1983); *cf.* RESTATEMENT (FIRST) OF CONTRACTS § 543.

310. Saladini v. Righellis, 687 N.E.2d 1224, 1226 (Mass. 1997); *see also supra* text accompanying notes 35-36.

311. Lingel v. Olbin, 8 P.3d 1163, 1167 (Ariz. Ct. App. 2000); *see also* Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 278 (S.C. 2000) (abolishing champerty as a defense but retaining its principle that "officious intermeddler[s]" should be kept from "stirring up strife or continuing a frivolous lawsuit").

company, but the heirs and beneficiaries. After all, a personal representative who is lazy or has exhibited poor judgment may imperil the value of the estate.[312] When a probate lender sues to protect its investment, it also vindicates the rights of the other recipients of the decedent's bounty. Thus, applying champerty to probate lending would ignore the fact that claiming can be socially valuable.[313]

We acknowledge that there are defensible counterarguments. First, some courts and scholars argue that champerty seeks to "categorically deter even *meritorious* litigation."[314] This broader understanding is captured in the expression that the law should not encourage parties "to enforce those rights which others are not disposed to enforce."[315] Seen this way, it is irrelevant that there may be a silver lining to some lawsuits initiated by firms. The glowing thing is that they litigate when no one else wishes to do so, and therefore engage in inefficient hypervigilance. Second, not every pleading filed by a probate lender furthers the interests of the heirs and beneficiaries. Some, such as petitions to be appointed as a personal representative, to obtain a preliminary distribution, or to force the personal representative to sell real property, stem from rank self-interest.[316] Third, even if probate lending does not meet the technical elements of champerty, courts have traditionally not shied away from extending the doctrine "by analogy."[317]

Yet two other factors militate against an inexorable bar on probate loans. For one, lawsuits filed by lenders seem to be less damaging than other species

312. Lenders do not have strong incentives to micromanage the personal representative. They obtain assignments of specified sums, rather than percentages of a party's inheritance. Thus, they should only sue when they fear that the personal representative's conduct seriously jeopardizes the value of the estate, rather than merely threatens to reduce its value.

313. Proponents of litigation lending often make similar arguments, noting that lawsuits generate precedent and deter wrongdoing. *See, e.g.*, Michael Abramowicz, *Litigation Finance and the Problem of Frivolous Litigation*, 63 DEPAUL L. REV. 195, 196 (2014) (stating that litigation funding "should thus reduce legal error and help achieve the legal system's goals, including both compensation and deterrence of negligent of wrongful acts"). But in the probate lending context, the virtues of claiming are much more concrete: rather than incurring to the public, they flow directly to the other parties involved in the specific case.

314. Rodak, *supra* note 9, at 510 (emphasis added); *see also* Pritzker v. Yari, 42 F.3d 53, 66 (1st Cir. 1994) (explaining that the champerty statute in question attempts "to discourage financial speculation in litigation" (internal quotations omitted)); Great W. Land Mgmt., Inc. v. Slusher, 939 S.W.2d 865, 869 (Ky. 1996) (reasoning that "[t]he champerty statute is designed to discourage litigation").

315. Graham v. R.R. Co., 102 U.S. 148, 156 (1880).

316. *Cf. supra* text accompanying notes 4-6 (detailing a probate lender's successful effort to be appointed as the personal representative).

317. Norton v. Tuttle, 60 Ill. 130, 135 (1871).

of litigation. We ran additional regressions designed to detect whether the incidence of probate loans is correlated with factors that are commonly believed to burden the court or harm the other parties. We started with case length, which we report in the first column of Table 5. We discovered no statistically significant relationship between the fact that an estate contained a loan and the number of days of the probate matter.[318] Conversely, four other variables did increase disposition times in a meaningful way: intestacies; wills that divide property unequally among similarly situated relatives; the fact that a creditor asserted a claim against the decedent; and a real property sale. Notably, as the first column of Table 4 reports, three of these variables—intestacies, lopsided wills, and creditors' claims—also raise the likelihood of litigation.[319] The fact that probate loans increase the probability of conflict but do not enlarge disposition times suggests that petitions filed by lenders are resolved more quickly than other allegations.[320]

Also, although probate litigation is notorious for allowing attorneys and personal representatives to bleed the estate dry,[321] we did not uncover evidence of this propensity in connection with probate loans. At the outset, we acknowledge that this result may be specific to the way that California compensates attorneys and personal representatives. Unlike other jurisdictions, which give the court discretion to award "reasonable" fees,[322] California provides lawyers and fiduciaries with a fixed percentage of the gross value of the estate,[323]

318. The lack of a relationship between case length and the incidence of a probate loan was not surprising given that our previous regression on the correlates of probate loans (Table 2) also detected no correlation. *See supra* Section II.B.

319. Both the resolution of a creditor's claim and real property sales necessitate additional steps in the probate process. When a creditor seeks to collect money owed by the decedent, the personal representative must decide whether to pay or reject the demand. Real property sales not only involve the sometimes languorous business of selling real property, but often require the personal representative to seek court approval. Thus, it is not surprising that these variables are linked to longer case duration.

320. This might be because probate lenders are more eager to settle. It could also reflect the fact that the kind of claims brought by lenders, which invariably center on the personal representative, are more amenable to being resolved on the pleadings than other allegations.

321. *See, e.g.*, Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 REAL PROP. PROB. & TR. J. 601, 603 (2000) ("Frequently these disputes lead to litigation that results in substantial tangible costs to the estate . . . ."); John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2041 (1994) (book review).

322. *See, e.g.*, UNIF. PROBATE CODE §§ 3-715(18)-(21), 3-719 (amended 2010), 8 pt. 2 U.L.A. 210, 219 (2013); Horton, *Probate*, *supra* note 167, at 622 n.154 (collecting various state statutes).

323. California allows attorneys and personal representatives to recover fixed percentages of the estate in decreasing tiers. *See* CAL. PROB. CODE § 10810 (West 2016) (allowing attorneys and with the chance to earn more through an award of "extraordinary" fees.[324] Subject to this caveat, Table 5 shows no statistically significant tie between probate loans and increased administrative costs. Indeed, loans are neither associated with (1) higher amounts of attorneys' and personal representatives' fees (column 2) nor (2) whether or not the court exercised its discretion to supplement the baseline fee award with extraordinary fees (columns 3 and 4). Gauged by these criteria, then, litigation filed by probate lenders is comparatively benign.[325]

TABLE 5.

CORRELATES OF PROBATE LITIGATION[326]
(ROBUST STANDARD ERRORS IN PARENTHESES)

	1. Length of Probate (in Days)	2. Total Fees	3. Extraordinary Attorneys' Fees?	4. Extraordinary Fiduciaries' Fees?
Probate Loan[327]	81.84 (48.89)	3554.35 (2382.91)	0.04 (0.08)	0.11 (0.07)
Intestate[328]	69.79** (26.34)	316.12 (1210.26)	-0.00 (0.04)	0.04 (0.02)

personal representatives each to recover 4% of the first $100,000 in the estate, 3% of the next $100,000, 2% of the next $800,000, 1% of the next $9,000,000, and 0.5% of the next $15,000,000). California also permits "reasonable" fees for amounts in estates over $25 million. *See id.*

324. If a case proves particularly difficult, probate courts "may allow additional compensation for extraordinary services by the attorney for the personal representative in an amount the court determines is just and reasonable." *Id.* § 10811(a).

325. Interestingly, with the exception of creditors' claims, none of the other variables that made litigation more likely also increased the likelihood of the court awarding extraordinary fees. This could be because probate judges are generally hesitant to award these fees. *Cf.* Horton, *Wills Law*, *supra* note 167, at 1128-29 (citing this fact to argue that probate litigation "may be less harmful than assumed").

326. Columns 1 and 2 use an ordinary least squares regression model with length of probate and total fees as the dependent variables, respectively. Columns 3 and 4 use a linear probability model. In Column 3, the dependent variable is equal to 1 if the estate generated extraordinary attorneys' fees and 0 otherwise. In column 4, the dependent variable is equal to 1 if the estate generated extraordinary fiduciaries' fees and 0 otherwise.

327. The Probate Loan variable is a dummy variable equal to 1 if the estate contained one or more loans.

328. The Intestate variable is a dummy variable equal to 1 if the decedent did not have a will and 0 otherwise.

Will Divides Unequally[329]	85.54* (33.42)	5451.60*** (1327.24)	0.02 (0.04)	0.02 (0.02)
Creditor Claim Filed[330]	133.84*** (26.78)	1038.23 (1078.06)	0.07* (0.03)	0.02 (0.02)
Handwritten Will	-16.22 (52.07)	1964.55 (1858.70)	-0.02 (0.06)	0.03 (0.04)
No Spouse[331]	-40.23 (26.80)	-473.81 (1042.68)	-0.01 (0.03)	0.00 (0.02)
Male	13.87 (24.65)	-52.42 (1030.18)	0.03 (0.03)	-0.01 (0.02)
Real Property Sale[332]	131.84*** (27.23)	5363.91*** (1132.36)	0.32*** (0.04)	0.10*** (0.02)
Value Estate (in $1000s)	0.02 (0.02)	18.24*** (1.37)	-0.00* (0.00)	-0.00 (0.00)
Pro Se[333]	0.48 (32.13)	-9963.97*** (1198.53)	-0.14*** (0.03)	-0.01 (0.03)
Fremont Courthouse[334]	54.04 (35.44)	117.37 (1611.07)	-0.04 (0.05)	-0.05* (0.02)
Hayward Courthouse	3.10 (34.82)	-1430.38 (1012.95)	0.03 (0.04)	-0.04** (0.01)

329. The Will Divides Unequally variable is a dummy variable equal to 1 if the will divided the estate unequally among similarly situated relatives and 0 otherwise. The omitted category includes wills that did divide the estate equally and intestacies.

330. The Creditor Claim Filed variable is a dummy variable equal to 1 if any creditor (bank, collection agency, government, medical, or other) sought to collect a debt from the estate and 0 otherwise.

331. The No Spouse variable is a dummy variable equal to 1 if the decedent was divorced or never married and 0 otherwise. The omitted category includes decedents who were either married or widowed at the time of their death.

332. The Real Property Sale variable is a dummy variable equal to 1 if the decedent owned real property that was sold during the estate and 0 otherwise.

333. The Pro Se variable is a dummy variable equal to 1 if the decedent named a personal representative who served pro se rather than hiring a lawyer and 0 otherwise.

334. The two courthouse variables (Fremont Courthouse and Hayward Courthouse) are dummy variables equal to 1 if the probate case was heard in the indicated courthouse and 0 otherwise. The omitted category includes cases that were heard in the Oakland Courthouse.

Lapse/ Ademption[335]	12.23 (35.85)	1956.87 (1514.89)	-0.01 (0.05)	-0.01 (0.02)
Case Opened After 2007	8.11 (29.44)	-3199.72** (1053.77)	0.01 (0.03)	0.03 (0.02)
Old Will (Before 1979)	-72.15 (53.79)	-2498.59 (2625.80)	0.02 (0.08)	-0.03 (0.02)
Constant	349.46*** (30.73)	4714.21*** (1421.97)	0.06 (0.03)	-0.01 (0.02)
N	539	565	572	572
Adj. R^2	0.127	0.701	0.177	0.078

Note. * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$.

Finally, rather than the nuclear option of the champerty doctrine, modest steps could contain litigation filed by probate lenders. For starters, probate judges might keep companies in check by liberally exercising their discretion to resolve disputes on the pleadings. In many states, the rules of civil procedure only govern probate matters if they are consistent with the probate code.[336] One difference between the two spheres is the status of dispositive motions. In civil practice, the parties must wade through discovery before seeking summary judgment.[337] However, probate judges enjoy wide leeway to rule on the pa-

335. The Lapse/Ademption variable is a dummy variable equal to 1 if lapse or ademption issues were raised in the probate case and 0 otherwise.

336. *See, e.g.*, CAL. PROB. CODE § 1000 (West 2016) ("Except to the extent that this code provides applicable rules, the rules of practice applicable to civil actions [govern] . . . ."); Helena Reg'l Med. Ctr. v. Wilson, 207 S.W.3d 541, 546 (Ark. 2005) ("It is well settled that probate proceedings are not governed exclusively by the rules of civil procedure."); *In re* Estate of McClarty, 421 So. 2d 811, 812 (Fla. Dist. Ct. App. 1982) (holding that an "[a]ction to remove the personal representative of an estate is not an adversary proceeding to which the [r]ules of [c]ivil [p]rocedure are made applicable"); *cf. In re* Hermence's Estate, 15 N.W.2d 905, 908 (Iowa 1944) ("[S]o-called pleadings in probate matters are usually quite informal and are not generally subject to the strict rules of pleading that govern in law and equity cases.").

337. *See, e.g.*, CAL. CIV. PROC. CODE § 437(c)(a)(1)-(2) (West 2016) (stating that parties cannot move for summary judgment until sixty days after their opponent appears and then cannot calendar a hearing for an additional seventy-five days); Brandauer v. Publix Super Mkts., Inc., 657 So. 2d 932, 933 (Fla. Dist. Ct. App. 1995) ("Summary judgment should not be granted until the facts have been sufficiently developed for the court to be reasonably certain that no genuine issue of material fact exists.").

pers.[338] Thus, if a petition or objection brought by a firm is not in the best interests of the estate, the probate court can abruptly reject it, sparing the other participants the cost and hassle of responding.

Meanwhile, testators could insert anti-assignment provisions in their wills. Trusts frequently contain similar devices, which are called "spendthrift clauses."[339] Owners use trusts rather than outright gifts to create a pool of assets that provides their loved ones with a guaranteed stream of income for many years. Spendthrift clauses facilitate this goal by preventing irresponsible, cash-hungry beneficiaries from selling their rights to these regular distributions.[340] Yet because wills involve a one-time transfer of property, rather than an enduring corpus, they do not usually include spendthrift language. The growth of probate lending should cause estate planners and their clients—particularly those who are conflict-adverse—to rethink this conventional wisdom. In turn, allowing testators to forbid assignments would be an elegant solution to the problems we have described.

CONCLUSION

This Article has identified the phenomenon of probate lending: the practice whereby firms buy interests in a pending estate. Like litigation lending, probate lending takes place against a backdrop of festering uncertainty about the alienability of rights that are tied to the court system. So far, the few judges and policymakers who have encountered probate lending have been forced to guess

338. For instance, in California, a party is entitled to an evidentiary hearing to resolve a contested factual issue in a probate matter. *See, e.g.*, *In re* Estate of Lensch, 99 Cal. Rptr. 3d 246, 254 (Ct. App. 2009). However, this rule does not apply in the common circumstance that the parties choose to rely on affidavits or verified pleadings, rather than live testimony. *See, e.g.*, *In re* Estate of Bennett, 78 Cal. Rptr. 3d 435, 441 (Ct. App. 2008). Other jurisdictions also give probate judges the power to resolve disputes quickly and informally. *See, e.g.*, Sheridan v. Harbison, 655 N.E.2d 256, 260 (Ohio Ct. App. 1995) (holding that a probate court "did not commit prejudicial error in declining to conduct an evidentiary hearing on a motion it apparently determined to be without merit").

339. *See, e.g.*, UNIF. TRUST CODE § 503 (UNIF. LAW COMM'N 2006); RESTATEMENT (SECOND) OF TRUSTS § 157 (AM. LAW INST. 1959).

340. Spendthrift clauses in trusts are controversial because they prohibit both voluntary and involuntary alienation, and therefore prevent certain creditors from reaching the beneficiary's interest in the trust. *See, e.g.*, Young v. McCoy, 54 Cal. Rptr. 3d 847, 855 n.13 (Ct. App. 2007) (discussing divergent views on whether tort victims with judgments against a beneficiary are precluded from recovering directly from a trust that contains a spendthrift clause). However, spendthrift provisions in wills are unlikely to raise these concerns. Once the probate case ends, the court distributes the property outright to the beneficiary, allowing the creditor to attach it.

about its contours and key characteristics. This Article has attempted to use an empirical analysis of a unique dataset to bring these issues into the light. It concludes that probate loans often violate usury statutes and TILA, and are hard to square with the champerty doctrine. The time has arrived to regulate the "catching bargains" of the twenty-first century.