# STRUCTURING A LEGAL CLAIMS MARKET TO OPTIMIZE DETERRENCE

Jack L. Millman*

*Jurisdictions have been liberalizing rules surrounding third-party litigation funding or the buying and selling of legal claims since the early twentieth century. Scholars have generally supported liberalization, seeing it as a way to expand access to courts and allow for the more efficient allocation of risk. Opponents have warned about a surge in frivolous litigation and strategic behavior by funders. But both sides have ignored how interrelated the rules governing third-party investment in litigation and the alienability of legal claims are, and how they interact to affect a legal claims market. The focus on reform should be to adjust these rules to create the optimal legal claims market. Instead, reform has increasingly focused on liberalizing third-party investment while keeping rules around alienability the same, or even barring investors from exercising control over the suit. This risks creating new problems without effectively solving many of the issues reform is meant to solve. This incremental approach comes with real costs, and may actually prevent a well-developed legal claims market from developing.*

Introduction .................................................. 497
I. Third-Party Investment, Alienability, and the Legal Claims Market .................................................. 500
A. *Terminology and Structure of the Legal Claims Market* .................................................. 500
B. *Normative Justifications for Reforming the Traditional Regime* .................................................. 502
C. *Defining the Legal Regimes that Could Cover a Legal Claims Market* .................................................. 505
II. Analyzing Different Legal Regimes .................................................. 510
A. *Comparing Legal Regimes* .................................................. 510
1. *Liquidity Constraint Problem* .................................................. 510
2. *Risk-Shifting* .................................................. 513
3. *Investor-Client-Lawyer Incentive Issues* .................................................. 516
4. *Monitoring* .................................................. 519
5. *Transaction Costs* .................................................. 519
B. *Objections Within the Framework* .................................................. 522
1. *The Market Will Not Work* .................................................. 522

* Copyright © 2016 by Jack L. Millman. J.D. Candidate, 2016, New York University School of Law. I would like to thank Professors Catherine Sharkey and David Kamin for assisting me throughout the note writing process, and Kevin Benish, Iris Hsiao, Kyle Lachmund, Joanna Langille, Susan Navarro Smelcer, Nathan Yaffe, and all of the unnamed members of the Furman Program for their thoughtful comments and helpful edits on earlier drafts. All errors are my own.

2. *Things Will Be Worse* .......................... 523
a. Frivolous Litigation Will Increase ........... 523
b. Litigation Will Increase—And That Is Bad .......................................... 526
c. Distorted Value Signaling Will Skew Deterrence ................................ 528
d. Predatory Financiers Will Flood the Market ...................................... 529
e. Path Manipulation .......................... 530
III. Assessing Current Reform .......................... 531
Conclusion ................................................ 533

## Introduction

Imagine a woman, Jane Doe, travels to Las Vegas for vacation and contracts a particularly bad case of food poisoning. There is no doubt as to the culpability of the restaurant; indeed, the health department quickly moves to shut it down for numerous violations. Meanwhile, Jane racks up expenses—a trip to the emergency room, a change in flight plans, work time missed, and so on. Like a majority of Americans, Jane has few liquid assets to draw upon.[1] However, she does have a legal claim against the restaurant. She goes to a lawyer to explore her options, needing money as quickly as possible. In many jurisdictions she will learn that her options are limited—she can attempt to settle or proceed on the slow path to trial.

Section I.A discusses how many jurisdictions had, and some still have, a set of legal rules limiting Jane's ability to monetize some or all of her claim's value. These jurisdictions bar businesses from making loans to her secured by the claim and prevent businesses from purchasing the legal claim. I refer to the legal regimes in these jurisdictions as the "Traditional Regime." Unfortunately, in a Traditional Regime settling seldom results in the full value of a claimant's legal claim being realized.[2] Defendants have an advantage in settlement negotiations for a variety of reasons, from facing less economic pressure to settle to being less risk averse.[3] Traditional Regime regulations

[1] *See* Jessica Dickler, *Most Americans Can't Afford a $1,000 Emergency Expense*, CNN (Aug. 11, 2011, 11:19 AM), http://money.cnn.com/2011/08/10/pf/emergency_fund/ (discussing how most Americans could not afford costly emergency expenses such as those hypothetically encumbering Jane Doe here).

[2] *See infra* Section II.A (discussing various reasons Traditional Regime results in suboptimal deterrence).

[3] *E.g.*, Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 Geo. L.J. 65, 84 n.54 (2010) (mentioning how time value of money and plaintiff being strapped for cash can impact settlement process). Litigation can be very slow—it took 19 years for much of the Exxon Oil Spill litigation to work its way through

create market failures by exacerbating the imbalance of power between claimants and tortfeasors, resulting in suboptimal deterrence because the full value of plaintiffs' legal claims is not realized.[4]

Section I.B then discusses how scholars have proposed, and some states have adopted, a variety of reforms that liberalize some or all of the rules governing the legal claims market. Some scholars have focused on the benefits provided by allowing more third-party investment,[5] also known as alternative litigation financing (ALF).[6] Under one proposed legal regime, ALF would be allowed, but investors would not be able to exercise any control over how the legal claim is pursued nor would alienability rules be allowed to be liberalized (an "ALF-Only Regime").[7] Other scholars have discussed how permitting legal claims to be freely alienable and allowing outside investment would create a well-developed legal claims market that would improve deterrence and otherwise benefit victims, the tort system, and society[8] (a "Free Market Regime").[9]

---

the federal court system. Exxon Shipping Co. v. Baker, 554 U.S. 471, 476 (2008) (discussing how accident occurred on March 24, 1989 and yet award of $2.5 billion was still being contested in 2008).

[4] *Infra* Section II.A.

[5] *E.g.*, Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1273 (2012) (arguing that outside financing removes lawyer's pressure to settle and allows him to focus on client, and encourages sophisticated stakeholder to monitor litigation); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry that Has a Place in the United States Market*, 53 VILL. L. REV. 83, 84–85 (2008) (describing how litigation financing can empower individuals to pursue legal claims).

[6] Alternative litigation financing, also known as "third-party financing," generally means any type of financing provided to support a lawsuit that does not come from the plaintiff or from the lawyer offering a contingent fee deal. Burch, *supra* note 5, at 1301 (describing ALF industry).

[7] A legal regime could exist that allows ALF and bans most forms of alienability, but still allows for claimants to engage in de facto sales by borrowing money and promising 100% of the proceeds in return, while handing over all control to the lender via contract. *See* Interview with Lee Drucker, Principal, Lake Whillans Litig. Fin. (Feb. 17, 2015) (discussing how in New York this type of de facto sale is permissible). However, for simplicity's sake, an ALF-Only Regime in this Note refers to a regime in which de facto and de jure sales of legal claims to third-party businesses is not allowed. *Infra* note 63–66 and accompanying text.

[8] *E.g.*, Peter Charles Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 YALE J. REG. 435, 443 (1995) (proposing "a market for the sale and exchange of tort claims" to solve various problems in tort system); Isaac Marcushamer, Note, *Selling Your Torts: Creating a Market for Tort Claims and Liability*, 33 HOFSTRA L. REV. 1543, 1544 (2006) ("This Note argues that allowing free assignability and creating primary and secondary markets consisting of current and future-contingent tort claims, will be more beneficial to nearly all parties involved in the current tort system."); Molot, *supra* note 3, at 89; Patrick T. Morgan, *Unbundling Our Tort Rights: Assignability for Personal Injury and Wrongful Death Claims*, 66 MO. L. REV. 683, 683 (2001) (discussing benefits of tort market); Marc J. Shukaitis, Note, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL

However, the rest of Part I argues that current scholarship too often ignores how interrelated the rules governing third-party investment and alienability are when it comes to creating the conditions under which a legal claims market operates. The focus should be on the effect adjusting these rules will have on the legal claims market. Part II will attempt to show that under either a welfare-maximizing framework or an access-to-justice framework, a Free Market Regime is significantly superior to an ALF-Only Regime. Yet, scholars have not compared the ALF-Only Regime to a Free Market Regime, nor have they considered the unintended costs and benefits of allowing more third-party investment without liberalizing alienability rules.[10]

Additionally, for reasons not clearly articulated, jurisdictions in the United States are moving towards an ALF-Only Regime. Part III argues that this can be explained by lingering deontological concerns regarding a robust legal claims market, the self-interest of lawyers, and a fear of encouraging frivolous suits. But this incremental approach comes with real costs, as an ALF-Only Regime may actually prevent a well-developed legal claims market from forming and cause new problems.[11]

---

STUDIES 329 (1987) (discussing benefits and drawbacks of market in personal injury tort claims); *see also* Lynn A. Baker, *Alienability of Mass Tort Claims*, 63 DEPAUL L. REV. 265, 265 (2014) (describing her article as focusing on arguments in favor of alienability of mass tort claims).

[9] A Free Market Regime would be a set of legal rules that allowed people to buy and sell legal claims on the open market, similar to how people can currently buy and sell securities. A Free Market Regime is one type of legal claims market—our current legal regime permits a very limited legal claims market to function. Molot, *supra* note 3, at 90 (discussing how limited litigation markets exist, but that they "are not nearly robust enough in their current form to address the problem of unequal bargaining power in a meaningful way"). One may notice that this terminology differs from articles that discuss creating a more robust market, which generally use the term "legal claims market." *E.g.*, *id*. I use a different term to distinguish a Free Market Regime from the current, restricted market that exists, which I refer to as the Traditional Regime. *See id.* (discussing limited markets that currently exist); *infra* Section I.A (describing different theoretical legal regimes and contrasting Free Market Regime against other types of legal claims markets).

[10] One recent article does discuss various reforms such as allowing full assignability or liberalizing third-party financing rules, but then lumps them together for purposes of analysis. Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL'Y 613, 621–23, 627 (2012) (discussing various regimes such as "full assignment" or "broad third-party financing" but then combining them into one category, "litigation financing," for purposes of analysis).

[11] *See infra* Sections II.A–B (discussing potential issues ALF-Only Regime may create).

# I
# THIRD-PARTY INVESTMENT, ALIENABILITY, AND THE LEGAL CLAIMS MARKET

## A. Terminology and Structure of the Legal Claims Market

Before proceeding, defining what a legal claims market is would be helpful. A legal claims market is the market that exists for individuals to monetize some or all of the value of their legal claims by engaging in one or more transactions.[12] For example, Jane selling her right to sue for $20,000 would be one transaction in this market. Which transactions are permitted is determined by the set of rules governing people's ability to monetize their mature legal claims[13] by selling part or all of those claims, using them as collateral, or selling the right to the future proceeds of these claims. A parallel would be the stock market, which operates under a set of rules to regulate transactions and allow individuals to monetize one or more shares of stock by borrowing against or selling those shares, be it in a formal exchange or in over-the-counter transactions.

Two key variables affect the robustness of a legal claims market: how alienable a legal claim is[14] and under what conditions another party can invest in a legal claim in exchange for some kind of interest, up to and including the entire claim.[15] These two variables are greatly affected by what rules govern them. Rules governing these variables overlap to some extent, but what separates one from the other is that the former involves transferring control in a sale, while the latter usually only grants the right to a certain amount of the proceeds for an investment.[16]

---

[12] Most scholars have defined a market in tort legal claims as the buying and selling of the entire claim. *See, e.g.*, Shukaitis, *supra* note 8, at 329 ("Allowing victims to sell their claims to third parties, that is, allowing a market in personal injury tort claims . . . ."). I use a broader definition of market that also includes claimants being able to buy and sell portions of a claim, use the claim as collateral, or otherwise create financial instruments that unlock the value of a claim, such as legal claims-backed securities. *See* Molot, *supra* note 3, at 101–04 (using term "litigation market" in broader sense of market that allows people to engage in variety of market transactions, monetizing part or all of their claim). Under this definition, monetizing a portion of one's claim in exchange for the free services of a lawyer would be a market transaction, and one that occurs frequently.

[13] Mature legal claims manifest once someone's rights have been violated and she has a claim. This is in contrast to the potential claims one may have in the future. *See* Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383, 383 (1989) (arguing that a pedestrian should be able to sell risk they get in an accident).

[14] Alienability refers to the "quality or attribute of being transferrable; *e.g.*, interest in property." BLACK'S LAW DICTIONARY 72 (10th ed. 2014).

[15] An example would be a nonrecourse loan secured by the value of the claim.

[16] *See, e.g.*, OHIO REV. CODE ANN. § 1349.55 (West 2015) (preventing financier from having a say in litigation or settlement decisions).

Many rules restrict what market transactions are allowed. Various legal doctrines impede the development of a well-functioning market in legal claims for public policy reasons, such as the common law doctrines of maintenance, champerty, and barratry,[17] and the ethical rules that forbid lawyers from advancing money to clients.[18] The rules that govern a legal claims market determine what type of "Regime" exists. As of 2010 most states had some prohibition on outside parties investing or buying a lawsuit.[19] However, many states allow the assignment of some claims (such as malpractice suits) while banning the assignment of other claims (such as personal injury claims).[20]

One potential regime would be a Traditional Regime.[21] Under this regime third-party investment would be greatly restricted, perhaps by prohibiting the use of legal claims as collateral or making nonrecourse loans secured by a legal claim unenforceable. Additionally, claims would be inalienable, except for narrow exceptions such as claims passing to an heir upon the death of the claimant.[22] No type of ALF or claim-buying business would exist.

In an ALF-Only Regime the market would consist almost entirely of claimants monetizing a portion of their legal claims by seeking out nonrecourse loans secured by the value of their legal claim and/or entering into a contingent fee arrangement.[23] Various forms of these businesses exist, including several publicly traded

---

[17] *See, e.g.*, Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269 (S.C. 2000) ("[M]aintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty." (quoting *In re* Primus, 436 U.S. 412, 424 n.15 (1978))). Champerty is a subset of the very broad doctrine of maintenance and the most direct attack on market transactions in legal claims in the common law. Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 107–08 (2011) (discussing "profit maintenance," also known as champerty, and how many states have outlawed it specifically).

[18] MODEL RULES OF PROF'L CONDUCT r. 1.8(e) (AM. BAR ASS'N 2013).

[19] *See* Sebok, *supra* note 17, at 98–99 ("Twenty-eight of fifty-one United States jurisdictions . . . explicitly permit champerty, albeit with varying limitations."). Almost all states permit some assignment of some classes of claims, but the rules vary. *Id.* at 74.

[20] *Id.* at 86–87.

[21] In the real world a variety of restrictions exist, many of them vague. For simplicity's sake, the Traditional Regime is a set of legal rules that would result in no ALF businesses and no claim-buying businesses by restricting alienability and third-party investment. It is not meant to exactly reflect the conditions in any particular state.

[22] *See infra* note 54 (describing how all fifty states overturned common law rule that tort claim did not survive its owner's death).

[23] *See* Molot, *supra* note 3, at 90–101 (discussing alternative litigation finance and contingent fee). There are three main types of ALF businesses: (1) consumer legal funding: contingent loans to plaintiffs that are secured by the value of their legal claims and only have to be paid back, plus interest, if the litigant receives money in a settlement or judgment; (2) law firm lending: third-party loans to law firms; and (3) commercial litigation lending: contingent loans directly to businesses to finance commercial, business-to-business disputes, in exchange for either a percentage or a multiple of winnings. *Id.*

companies based overseas.[24] A young industry, it did not begin to take hold in the United States until about twenty-five years ago.[25] Despite lingering legal barriers, the industry has grown rapidly, demonstrating demand for these kinds of transactions.[26]

A Free Market Regime would have few or no restrictions on alienability or outside investment, and would presumably see a wide variety of businesses engaged in profiting through the purchase of or investment in legal claims.[27] While a Free Market Regime might actually exist in some jurisdictions today, those trying to set up a claim-buying business would be in a much more uncertain position than one just wanting to engage in ALF.[28] Rules governing the buying and selling of legal claims are vague or nonexistent, but most jurisdictions have enacted a variety of rules that effectively prevent the large-scale buying and selling of legal claims.[29]

### B. *Normative Justifications for Reforming the Traditional Regime*

In the last thirty years, and particularly in the last fifteen, the Traditional Regime has come under attack in a flurry of articles by proponents of litigation finance reform.[30] Courts[31] and state

---

[24] These various businesses include companies such as Juridica. JURIDICA INVESTMENTS (last visited Aug. 11, 2015), http://www.juridicainvestments.com/. Another innovative company is Lexshares, a crowdsourcing litigation finance firm that allows accredited investors to invest in commercial and consumer legal claims and advertises past returns in excess of fifty percent. LEXSHARES (last visited Aug. 11, 2015), http://www.lexshares.com. Their motto is "Invest in Justice: Earn a return from litigation finance." *Id.*

[25] Martin, *supra* note 5, at 83.

[26] Burch, *supra* note 5, at 1301–04.

[27] This is based on the fact that even in an ALF-Only Regime, various types of businesses already exist. Molot, *supra* note 3, at 90–101 (discussing three main types of ALF businesses).

[28] Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 700 (2005) ("Businesses devoted to purchasing and prosecuting claims remain legally problematic at best."). At the time this article was written, no state had clearly authorized a business that could buy and sell entire legal claims. *Id.* at 701 ("[T]he future of alienability is uncertain."). Though this article is ten years old, it does not appear that such a business with the primary purpose of buying and selling entire legal claims exists in the United States at this time. *See* Interview with Lee Drucker, *supra* note 7 (discussing how occasional functional sale of an entire claim occurs when client monetizes 100% of the claim's value and also gives up control, but explaining that he knows of no business engaged in buying and selling of whole legal claims).

[29] Interview with Lee Drucker, *supra* note 7.

[30] Courts have referred to it as an ancient doctrine that no longer serves a purpose. *E.g.*, Saladini v. Righellis, 687 N.E.2d 1224, 1226–27 (Mass. 1997) (discussing how "ancient" common law prohibitions created by doctrines of champerty, maintenance, and barratry are no longer justified now that society has more positive view of litigation). Scholars have not been kind either. *E.g.*, Marcushamer, *supra* note 8, at 1544; Morgan, *supra* note 8, at 683.

[31] *E.g.*, *Saladini*, 687 N.E.2d at 1226–27 (allowing ALF).

legislatures[32] have followed by overturning old restrictions and moving away from the Traditional Regime. A 2014 DePaul Law Review symposium captured the current zeitgeist by publishing fifteen articles discussing the changing law, the rise of ALF, other potential reforms, and the consequences of moving away from a Traditional Regime.[33]

Many reformers have taken a pluralistic approach when discussing justifications for changing the legal rules to create an optimal legal regime.[34] Reformers argued that the Traditional Regime arose from a time when litigation was viewed with suspicion, whereas now people have a more positive view of litigation as a key way to protect rights and to be heard;[35] that it unfairly stacked the deck in favor of defendants;[36] and that it gave lawyers a monopoly and drove up legal fees.[37] Some recurring justifications are that reform would result in more optimal deterrence, increase compensation to victims, and increase access to justice.

Most pro-reform scholars argue in favor of liberalizing ALF rules, alienation rules, or creating a market, and they tend to focus on economic arguments.[38] For example, proponents of an ALF-Only Regime or a Free Market Regime point to the increased ability of parties to shift risk to those better able to bear it as a benefit.[39] They

---

[32] *E.g.*, OHIO REV. CODE ANN. § 1349.55 (West 2015) (overturning *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217 (Ohio 2003), an Ohio Supreme Court case that had prohibited ALF).

[33] *See* 63 DEPAUL L. REV. Issue 2, i, ii (2014) (listing the fifteen articles); Stephan Landsman, *Introduction*, 63 DEPAUL L. REV. 193, 193 (2014) ("The winds of change are blowing in the world of legal practice. . . . [M]oney is a key change agent. This year's Clifford Symposium seeks to examine the financing of litigation. . . . We purse [sic] normative and ethical questions associated with the alienation of claims and party funding of cases.").

[34] *See, e.g.*, Kidd, *supra* note 10, at 635 (arguing against adopting broad litigation-finance reforms for efficiency and justice reasons); Molot, *supra* note 3, at 89 (arguing that introducing market mechanism would result in more accurate deterrence and increase compensation plaintiffs receive); Andrea Pinna, *Financing Civil Litigation: The Case for the Assignment and Securitization of Liability Claims* 1 (Apr. 29, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1396682 (arguing that right for compensation is fundamental and current system impairs this right).

[35] *Saladini*, 687 N.E.2d at 1226–27 (discussing an American Bar Foundation report discussing this "fundamental change in society's view of litigation").

[36] *E.g.*, Molot, *supra* note 3, at 83 (discussing how plaintiff can be at a disadvantage in settlement process).

[37] Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65, 126 (2003) (arguing that one reason competitive market does not exist for legal fees is prohibition on buying and selling of legal claims).

[38] *E.g.*, Molot, *supra* note 3, at 65.

[39] *See, e.g.*, Burch, *supra* note 5, at 1307 (stating that plaintiffs may have tendencies to risk aversion that can be mitigated by ALF); Molot, *supra* note 3, at 83 (describing risk aversion as one of two key reasons many settlements do not reflect full value of the

argue that many claimants undervalue their legal claims because they are risk averse.[40] By trading their legal claim for either some money up front, or the entire value of the claim, the financial risk of the claim yielding significantly less than its expected value passes to a risk-neutral party.

The reformers' welfare-maximization argument is sometimes unstated, but it goes back to deterrence. By shifting the risk to neutral parties, the full value of the claim will more likely be pursued, since the risk-neutral party's perception of the claim's value will be more accurate than a risk-averse party. Another assumption is that the full value of the legal claim accurately represents the harm done,[41] and thus by forcing the defendant to settle for an amount closer to the claim's full value, the defendant is internalizing closer to 100% of the costs of her actions.[42]

While this Note focuses on which legal regime optimizes deterrence,[43] two other corollary goals, victim compensation and access-to-justice, are sometimes discussed. A corollary benefit of adopting a Free Market Regime is that claimants will receive more compensation on average and be better able to access the court system.[44] This Note

underlying legal claim); Morgan, *supra* note 8, at 705–06 (arguing that tort claims market would lower cost of legal access and allow risk-averse plaintiffs to seek legal remedies).

40 Morgan, *supra* note 8, at 705–06.

41 For this to be true, the expected value of a trial outcome has to be close to the actual harm caused by the tortfeasor—which is supported by some empirical research. *See* Abraham L. Wickelgren, *Law and Economics of Settlement*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 331–32, 332 n.5 (Jennifer Arlen ed., 2013) (discussing various studies showing that expected trial outcomes are "closely correlated with the actual harm").

42 *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 312 (1987) (arguing that tort rules "create[ ] incentives for parties to behave efficiently . . . ."); Molot, *supra* note 3, at 89 (assuming mean expected damage award at trial represents more accurate outcome). I accept this assumption for purposes of my argument, though it bears noting that many scholars would question this view. *Cf.* Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 381–82 (1994) (discussing various critics and their objection to "economists' claims about the deterrence capacity of tort law"). This Note also assumes that a risk-neutral party will settle a claim for its expected value. Molot, *supra* note 3, at 84 n.55.

43 For purposes of this Note, achieving optimal deterrence is assumed to be perfectly correlated with maximizing welfare. In theory, if a legal regime resulted in optimal deterrence but had some other adverse effect, it would not be welfare-maximizing. That is not an issue here. A free market usually beats another system in an efficiency framework, unless there is some compelling reason to believe in market failure. *See* Kenneth J. Arrow & Gerard Debreu, *Existence of an Equilibrium for a Competitive Economy*, 22 ECONOMETRICA 265, 265 (1954) ("[U]nder suitable assumptions . . . the allocation of resources in a competitive equilibrium is [Pareto Optimal] . . . ."). As I go on to argue, no major market failure problem exists.

44 *Infra* Section II.A.5.

does not delve into the long and rich debate on whether deterrence, compensation, victims' rights, or some other justification or combination of justifications underlies the tort system.[45]

### *C. Defining the Legal Regimes that Could Cover a Legal Claims Market*

Analyzing how changes in the rules governing alienability and outside investment[46] affect different legal regimes and deterrence requires conceptualizing the rules on a grid. Points on this grid represent the various legal regimes governing the legal claims market.

The rules governing alienability could range from not allowing any kind of resolution of a claim except for a trial—forbidding even settlement with a defendant—to allowing either party to transfer a legal claim (or potential liability) to a third party for any reason.[47] Figure 1 displays various elements of alienability on a line from being able to transfer a claim to those most involved in the litigation to those least involved in the litigation.[48] Also, a state could add myriad nuances, such as only allowing certain claims to be assigned. The last four hundred years have seen a gradual loosening of the restrictions on alienability, resulting in all Anglo-American jurisdictions moving from the left to the right side of the line.[49]

---

[45] *See, e.g.*, Mark A. Geistfeld, *Compensation as a Tort Norm*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW (John Oberdiek ed., Oxford U. Press 2014) (arguing that tort law can be justified by abstract norm of compensation based on theory of liberal egalitarianism); Schwartz, *supra* note 42, at 377–86 (discussing rise of economic analysis in tort law and how various scholars with other theories pushed back).

[46] I use this term interchangeably with ALF, in the sense that both describe types and forms of outside investment that are allowed.

[47] One may be confused to see items such as settlement on the spectrum of alienability. In fact, all U.S. jurisdictions allow a claimant to sell their legal claim to at least one party. The right to settle a claim with a defendant goes back thousands of years in Western law. *Delict*, ENCYCLOPEDIA BRITANNICA (last visited Aug. 3, 2015), http://www.britannica.com/topic/delict (discussing how the Twelve Tables, the earliest codification of Roman law, allowed for settlement to be reached between parties).

[48] In some sense, this arrangement is arbitrary. A jurisdiction could adopt a set of legal rules that allow all kinds of alienability except settling with the defendant. However, as the liberalizing of the rules seems to have generally followed this conceptual framework, and the liberalization has generally been cumulative, it is a useful framework for analyzing the issue. This is especially true in my opinion because much of the concern around allowing full alienability is that it allows parties with a minimal relationship to the original litigation to become involved. Sebok, *supra* note 17, at 136–37 (discussing media unease "over bringing emotionally fraught disputes within the control of business entities that have no interest or empathy with the parties").

[49] Lemley v. Pizzica, 36 Pa. D. & C.2d 327, 330 (Ct. Com. Pl. 1964) ("The trend of judicial decisions as to the assignability of certain causes of action is to enlarge, rather than to restrict the causes that may be assigned."); *see also* Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 275 (2008) (discussing how prior to the 17th century English courts generally prohibited any assignment of legal claim); Saladini v. Righellis, 687 N.E.2d

FIGURE 1

No Alienability - Settlement Allowed - Devisable - Transfer With Property – Bankruptcy – Related Party Transfer – Full Alienability

Strong Relationship to Original Litigants (High Correlativity) ⟷ Minimal Relationship to Original Litigants (Low Correlativity)

The same logic applies to third-party investment. One could imagine a legal regime that required the claimant to use only his own resources to prosecute his claim—no contingent fees, no family gifts, no investors, no subrogation through insurance, and no nonrecourse loans.[50] Similar to alienability, Figure 2 arranges these elements along a line based upon the third party's relation to the claimant. The right to enter into a contingent fee relationship with an attorney reflects a limited right to solicit outside investment in one's legal claim.[51] A claimant exchanges the right to a certain percentage of the future value of his claim for something of value, and old cases found that "champerty . . . is nothing else than an agreement to aid in a suit, and then divide the thing recovered; and there is no doubt that this contract fully comes up to this definition."[52]

FIGURE 2

No Outside Investment - Gifts (CSR) - Contingent Fee - Nonrecourse Loans (No Control) - Any Financial Arrangement

Strong Relationship to Original Litigants (High Correlativity) ⟷ Minimal Relationship to Original Litigants (Low Correlativity)

Combining these two rules results in a grid of the potential legal regimes that could govern legal claims markets.

---

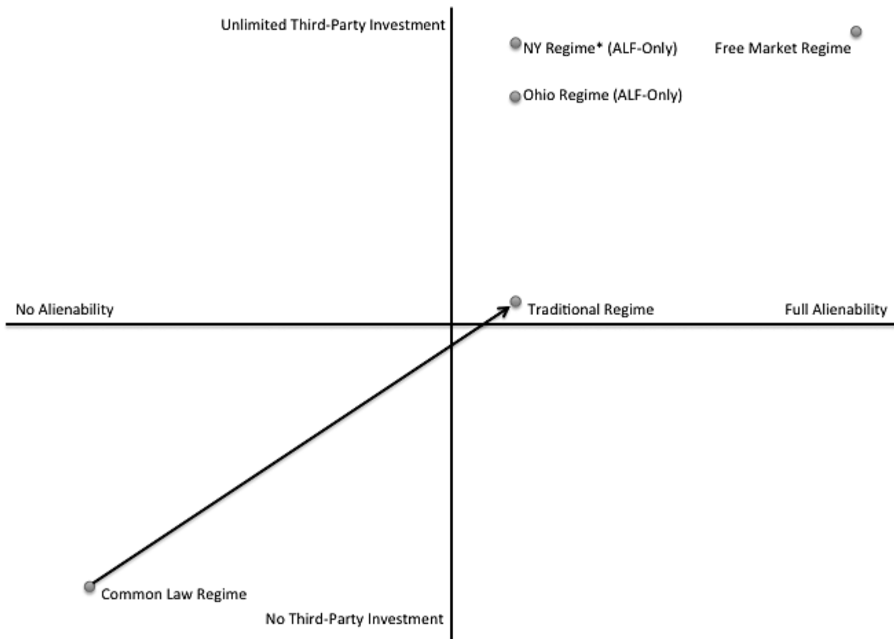
1224, 1225–26 (Mass. 1997) (describing how champerty did not take hold as much in the United States, and has been abandoned by several states).

[50] *See* Sebok, *supra* note 17, at 100–01 (discussing how absolute prohibitions on maintenance theoretically outlaw gifts from family members or moral support that encourages litigation). Even in cases of outside money given with nothing expected in return, courts have invoked maintenance if they sense malice. Kidd, *supra* note 10, at 639 ("Courts may not be as forgiving, however, in cases of 'malice maintenance,' where the collateral source contributes with the intent of harming the defendant by allowing the case to proceed. In malice maintenance cases, courts are far more likely to invoke antimaintenance rules and dismiss the claim.").

[51] For this reason, it has been attacked for many of the same reasons outside investment is attacked. *Compare* Arthur L. Kraut, *Contingent Fee: Champerty or Champion?*, 21 CLEV. ST. L. REV. 15, 15–16 (1972) (discussing how many objectors to contingent fee argue it creates speculation, harms client's interest, and turns lawyer into "ambulance chaser"), *with* Susan Lorde Martin, *Financing Plaintiffs' Lawsuits: An Increasingly Popular (and Legal) Business*, 33 U. MICH. J.L. REFORM 57, 58 (2000) ("Champerty is a practice in which one person, the champertor, agrees to support another in bringing a legal action, in exchange for part of the proceeds of the litigation. . . . [It] is based on longstanding fears that champertors will encourage frivolous litigation, harass defendants, increase damages, and resist settlement.").

[52] Rust v. Larue, 14 Ky. (4 Litt.) 411, 417 (1823).

FIGURE 3




In theory, a near infinite number of legal regimes governing a legal claims market could exist. For most of Anglo-American legal history, the law prevented almost any kind of market from existing—this was the "Common Law Regime."[53] Many claims did not survive death,[54] and one could not even enter into a contingent fee arrangement.[55] Gradually, the law shifted so that most jurisdictions moved

---

[53] *See* Webb v. Gittlen, 174 P.3d 275, 276 (Ariz. 2008) (describing how common law once prohibited assignment of any choses in action [legal claims], except to the crown, which was in accord with common law's negative view of litigation); Martin, *supra* note 51, at 58 (describing how arrangements in which one party supports another in legal action in exchange for part of the proceeds of the litigation was long banned by common law, statute, or public policy in the United States and the United Kingdom). Ironically, in ancient Rome a claimant could sell his claim to a third party. Choharis, *supra* note 8, at 461. The bans against assignment and outside investment really came out of Medieval English common and statutory law. *Id.* at 461–62.

[54] *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 385 (1970) (stating how under common law, personal cause of action in tort did not survive death of its possessor); *see also id.* at 380–90 (discussing history of common law allowing for recovery based on wrongful death and how "[i]n the United States, every State today has enacted a wrongful-death statute"); *Webb*, 174 P.3d at 276 (describing how almost all kinds of assignment were banned).

[55] *See, e.g.*, *Rust*, 14 Ky. (4 Litt.) at 417–18 (voiding contract containing contingent fee arrangement).

towards a Traditional Regime.[56] Under this regime, one could enter into a contingent fee arrangement,[57] alienate a claim in limited circumstances,[58] and occasionally even buy and sell a claim.

Returning to Figure 3 one may notice that all of the modern day debates concern legal regimes in the upper right quadrant, as a certain amount of outside investment and alienation is universally accepted. The idea that the claimant can settle with the defendant, enter into a contingent fee arrangement, and transfer a claim in limited circumstances is not contested in the United States.[59] The current debate concerns whether ALF rules should be liberalized so that third parties can invest in litigation,[60] and to a lesser extent whether alienability rules should be liberalized to allow third parties to purchase claims from the claimant.[61] This creates four possible (broad) types of "legal regimes" that United States jurisdictions could adopt.[62]

---

[56] *See Webb*, 174 P.3d at 276–77 (describing evolution of common law to more liberal assignment rules); Martin, *supra* note 51, at 72 (describing how various exceptions to champerty doctrine have developed, including contingent fee arrangement).

[57] *See* Martin, *supra* note 51, at 72 (discussing how "all states recognize" contingent fee arrangements).

[58] *See Webb*, 174 P.3d at 276–77 (detailing loosening of laws barring assignments of claims).

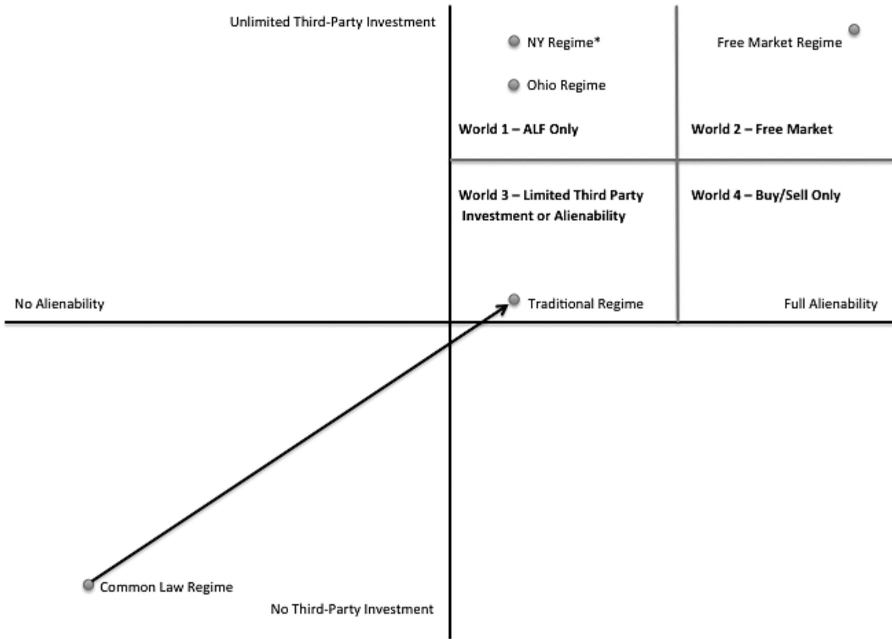
[59] It is not contested in the sense that all U.S. jurisdictions allow these arrangements to some degree. Kidd, *supra* note 10, at 636. The literature is not as settled. *See, e.g.*, Peter Melamed, Note, *An Alternative to the Contingent Fee? An Assessment of the Incentive Effects of the English Conditional Fee Arrangement*, 27 CARDOZO L. REV. 2433, 2434 (2006) (detailing various objections to contingent fees in literature, such as that lawyers reap windfall, they encourage settlement blackmail tactics and frivolous litigation, and they "diminish standards within the legal profession").

[60] *See supra* Sections I.A–B (defining conflicting regimes and presenting current arguments supporting reforms).

[61] *E.g.*, Baker, *supra* note 8, at 265.

[62] My descriptions of the various legal regimes and possible worlds are necessarily simplified for purposes of this Note. This is also true when I refer to a specific state's laws. Subtle variations between legal regimes can occur because of slight differences in statutes, common law, and judicial interpretation of statutes. *See, e.g.*, Molot, *supra* note 3, at 104–11 (discussing the various legal rules that hinder a legal market, such as ethics rules that restrict lawyers from acting as market participants and create prohibitions on maintenance and champerty). Additionally, the law is in a state of flux, and in many jurisdictions it is unclear which legal regime actually governs. For example, while Massachusetts allowed an agreement in which an individual sold off fifty percent of any net recovery (after legal claims) in a legal claim in exchange for cash and dismissed the concept of champerty, its Supreme Court noted in dicta that "[o]ur ruling today should not be interpreted to indicate our authorization of the syndication of lawsuits." Saladini v. Righellis, 687 N.E.2d 1224, 1227 n.7 (Mass. 1997). One would also have to consider which ethics rules govern, what the definition of a contingent loan is (and how that interacts with usury laws), and what a court will deem fair or reasonable. *See* Molot, *supra* note 3, at 94–96 (discussing potential regulatory dangers and general uncertainty facing those in litigation finance industry). These descriptions are meant to serve as theoretical models, and they do not perfectly describe the state of the law in any particular jurisdiction.

FIGURE 4




A World 1 (ALF-Only) jurisdiction would allow more third-party investment but would retain restrictions on buying and selling legal claims, or on giving up any kind of control. In theory, a World 1 regime could allow an ALF investor to contract for the right to exercise control over key elements of a claimant's lawsuit, resulting in functional sale contracts being possible.[63] New York laws provide a good example of this.[64] In contrast, Ohio forbids an outside investor from exercising control.[65] References to an ALF-Only Regime in this Note refer to an Ohio-type regime, not a New York-type regime.[66]

A World 2 (Free Market Regime) jurisdiction would allow claimants to alienate *some or all* of their legal claim and would have liberal

---

[63] Someone such as Jane Doe could effectively sell her entire claim by obtaining a nonrecourse loan equivalent to the claim's sale value, and then signing a separate contract handing over control of the conduct of the litigation and settlement talks to the financier. This in effect turns the jurisdiction into a World 2 jurisdiction. The only difference with an actual World 2 jurisdiction is that de facto sales are allowed, but de jure sales are not.

[64] *See* Interview with Lee Drucker, *supra* note 7 (discussing how de facto sales are permissible); N.Y. JUD. LAW § 489 (McKinney 2006) (banning de jure sales).

[65] OHIO REV. CODE ANN. § 1349.55 (West 2015) (legalizing "nonrecourse civil litigation advance[s]" on condition that financier have no control over conduct of underlying legal claim or settlement negotiations).

[66] Though one might be able to construct plausible arguments for why a regime would want to allow de facto sales but not de jure sales, those arguments, and potential counterarguments, are not addressed in this Note.

outside investment rules. Major anti-Free Market Regime rules currently in existence include ethical prohibitions against lawyers advancing cash to their clients or sharing fees with nonlawyers[67] and address lingering uncertainty about the common law doctrines of maintenance, champerty, and barratry.[68]

A World 3 (Traditional Regime) jurisdiction might allow the occasional private sale from one litigant to a third party, but it would prevent any kind of ALF business or claim-purchasing business from developing. Jane could obtain a lawyer without spending any money by monetizing a portion of her legal claim via a contingent fee arrangement, but in order to receive any cash she would have to enter into an informal loan agreement, settle the claim, or wait until a judgment is entered.

Finally, a World 4 jurisdiction would be one in which the alienation of legal claims is liberalized even further, but outside investment would stay restricted, and perhaps formal claim-buying businesses would also be banned. A World 4 legal regime makes little sense, as the right to set up a business-purchasing claim, and the right to alienate a claim however one would like, is effectively useless without more outside investment being allowed.

## II
## Analyzing Different Legal Regimes

### *A. Comparing Legal Regimes*

Part II analyzes the potential legal regimes and how they affect a variety of policy concerns. Several assumptions are made throughout the analysis. I assume trial results roughly correlate with actual harm caused by the defendants to the suing plaintiffs.[69] I also assume that a Free Market Regime would result in a relatively thick market.

#### *1. Liquidity Constraint Problem*

A liquidity constraint problem arises in a Traditional Regime because many victims who need money can only cash in on a large portion of their claim's value quickly by settling with the defendant. This liquidity constraint, similar to most liquidity constraint situations, leads to inefficiency because claimants are unable to pursue the

---

[67] *See* Molot, *supra* note 3, at 109 (citing to the Model Rules of Prof'l Conduct r. 1.8(e), 5.4(a) (Am. Bar Ass'n 2013), which ban each practice except in limited circumstances).

[68] *See supra* notes 17–19 and accompanying text (discussing these restrictions).

[69] *See supra* note 41 (discussing empirical support for this proposition).

expected value of their claim.[70] Even if someone such as Jane knows her claim has an expected present discounted value[71] of $30,000, she might settle for $15,000 in order to obtain the money she needs now to cover expenses.

Imagine Jane talks to a lawyer and comes away with the following: Ten percent of the time she will receive nothing—perhaps there are some minor weaknesses in her case or a small chance the restaurant goes bankrupt—and ninety percent of the time she will receive between $30,000 and $40,000. Thus, the expected value of her claim, discounted at the market rate, is $30,000.

The restaurant offers her $15,000. Jane needs $13,000 or more soon or she will incur a loss of $20,000. In a functioning market, Jane could wait. In this hypothetical, she understands the expected value of the legal claim exceeds the current settlement offer, and she can always sell the claim to a third party or borrow against it if the defendant does not raise his offer. The defendant would know that Jane could sell the claim at any time for a higher amount (or borrow), and thus has to make an offer closer to the expected value of the claim.

A victim's risk preference may be affected by her liquidity constraint, causing her to be more risk averse than she otherwise would be.[72] A liquidity problem affects one's risk preference if the consequences of not recovering a certain amount would be catastrophic. Imagine that if Jane does not receive at least $10,000, she suffers a loss of $50,000. The expected value of going to trial is still higher than a settlement offer of $15,000,[73] but the threat of the large loss makes Jane more risk averse and she chooses to settle anyway and avoid having to wait months or years to receive money.[74] For many people facing cash flow problems after being harmed, settling quickly is a better option than trying to pursue the claim to obtain its real value.

---

[70] *See* Burch, *supra* note 5, at 1328 (arguing that liberalizing third-party investing restrictions in lawsuits improves "the likelihood that settlements will reflect a given claim's merit, as opposed to economic pressures").

[71] This is the market discount rate for an asset of comparable riskiness, as Jane's personal discount rate is much higher because she needs money more than the average person.

[72] *See* Molot, *supra* note 3, at 85–86 ("[T]he second factor that can lead risk imbalances to skew settlements [is] the nature of the parties involved. Personal injury lawsuits typically pit cash-strapped, one-time plaintiffs against larger entities . . . .").

[73] The expected value of going to trial would be: .9(25,000) + .1(-50,000) = $17,500.

[74] Her personal discount rate is much higher, and this explains why many claimants in her position are willing to accept such high interest rates when taking out ALF loans. *See* Baker, *supra* note 8, at 284 (discussing how victims are willing to accept interest rates of three to five percent a month, or an APR of up to sixty percent, to obtain a settlement advance loan).

A real world example is the Deepwater Horizon oil spill, in which many people harmed by the spill were business owners who needed money right away.[75] They took a final payout offer from BP rather than hold out for more, which eventually came in the form of a generous class action settlement,[76] even though BP's liability was never really in doubt.[77] Well-funded plaintiffs' lawyers existed who were willing to pursue the case, but this did not solve the plaintiffs' liquidity problems. A similar problem can occur when law firms lack the financing to effectively prosecute a case.[78] The classic response to a liquidity constraint situation is access to capital markets, and that remains the correct response here.[79]

Under the Traditional Regime, a defendant has a monopoly on purchasing a victim's entire claim, and like any monopolist, a defendant has every incentive to charge the highest price possible, knowing there will not be any competing offers to keep him honest.[80] While capitalized plaintiffs' firms and the contingent fee system mitigate this issue, victims can still quickly convert a significant portion of their claim to cash only by settling with the defendants. A well-capitalized plaintiffs' bar ensures there are always good lawyers willing to take cases on contingency, but it does not allow for cash to be transferred to claimants.[81]

---

[75] *Cf.* Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 401 (2014) (describing how BP set up Gulf Coast Claims Facility to facilitate quick payouts to those harmed in order to mitigate post-spill economic damage).

[76] *Id.* at 402 (highlighting higher payments claimants were to see from class action settlement, as opposed to on their own).

[77] BP was designated as a "Responsible Party" by the Coast Guard and made more than 127,000 payments to claimants within the first four months after the oil spill. BDO CONSULTING, BDO USA, LLP, INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY: REPORT OF FINDINGS & OBSERVATIONS TO THE U.S. DEPARTMENT OF JUSTICE 11–12 (2012), http://www.justice.gov/sites/default/files/opa/legacy/2012/06/06/gccf-rpt-find-obs.pdf.

[78] *See* Molot, *supra* note 3, at 91–92 (discussing negative consequences for plaintiffs when their litigating firm lacks resources).

[79] *See, e.g.*, Barrett Kirwan, *Economic Support for Agriculture*, *in* 1 PUBLIC ECONOMICS IN THE UNITED STATES: HOW THE FEDERAL GOVERNMENT ANALYZES AND INFLUENCES THE ECONOMY 35, 55 (Steven Payson ed., 2014) (describing how some scholars argue that agricultural subsidies are justified because farmers deal with imperfect capital markets and "government payments help farmers overcome liquidity constraints to exploit increasing returns to scale" and maximize efficiency).

[80] Litigants can always pursue the "full value" of their claims through the court system, but this can be a slow and painful process they may not be able to afford.

[81] *See* MODEL RULES OF PROF'L CONDUCT r. 1.8(e) (AM. BAR ASS'N 2013) ("A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation . . . .").

Under a Free Market Regime, liberal third-party investment rules combined with laws allowing for the full assignability of legal claims would ensure enough capital entered the market so that it was liquid and thus competitive. People could sell their claims to the highest bidder, greatly mitigating the liquidity problem. Defendants, such as the restaurant that harmed Jane, would have to offer a higher amount than market competitors in order to successfully settle legal claims with victims.[82] The reduction in transaction costs discussed later will allow claimants to receive even more money through a sale.[83]

Additionally, the defendant has an added incentive to settle with Jane as soon as the value of the claim can be reasonably ascertained. This is because the tactical benefits of stalling will have been eliminated, and waiting will only increase transaction costs for the defendant as legal fees accumulate. Jane may still settle for slightly less than the value of the claim because a sale to a third party would likely be a little lower to account for the transaction costs of selling and the buyer's need to make a profit, but a buyer will have even more incentive to hold out for the full value of the claim.

An ALF-Only Regime only partially solves this problem. Jane may be able to take out a loan to alleviate economic pressure, but she could not monetize anything close to the full value of her claim since she cannot give up control of the claim. A lender would have to make sure she keeps enough "skin in the game" to prevent strategic behavior, and would also have to account for contingent fee costs and risk. Additionally, the high interest rate further limits how much money can be loaned, and, in fact, it might create pressure for someone like Jane to settle quickly to minimize the interest expense.

### 2. *Risk-Shifting*

Another argument in favor of reform is that it allows risk-averse parties to shift some or all of the financial risks inherent in a claim to another party better able to bear that risk.[84] Under a Traditional Regime, the only party that can totally eliminate the risk for a risk-averse claimant is the defendant, which results in settlements that average less than their expected value if, on average, claimants are

[82] *See* Molot, *supra* note 3, at 89–90 (arguing that free market in litigation claims would eliminate plaintiffs' poor bargaining positions and allow claimants to shop their claims around for the best price).

[83] *See infra* Section II.A.5 (discussing how moving towards Free Market Regime will reduce transaction costs).

[84] *See, e.g.*, Molot, *supra* note 3, at 89 (arguing that if an entity could aggregate interests of collective group of plaintiffs, their risk profile would be very similar to the usually more risk-neutral defendants).

more risk averse than defendants, as evidence suggests.[85] By shifting the financial risk to a more risk-neutral party, those pursuing the lawsuit will be more likely to pursue the claim's full value and correct a potential suboptimal deterrence problem.[86]

Some parties have a declining marginal utility when it comes to how much money they could receive in a settlement or judgment, and they tend to be risk averse for a few reasons. As discussed in the previous subsection, some parties to a lawsuit may be risk averse because they face a liquidity constraint.[87] Some people might just naturally be risk averse.[88] In some situations, such as class actions involving small individual claims, the reverse might be true because the defendant may face the risk of catastrophic liability, while the claimants are relatively indifferent to the small award they might receive.[89] Many repeat players know this and exploit it.[90] To go back to Jane, she might be naturally risk averse, and take the reduced settlement offer from the defendant even though it is "irrational."[91]

Some parties are in a better position to bear risk, and thus behave in a risk-neutral manner when dealing with uncertainty. If these parties were prosecuting a legal claim, they would hold out during settlement negotiations and be willing to go to trial for the expected value of the claim (adjusting for how trial costs would impact both parties' calculations). These parties may be more risk-neutral because they are better able to diversify risk than the typical claimant and do not have

---

[85] *See id.* at 70 ("[W]e would thus expect the imbalance in the parties' risk preferences to favor the defendant and produce settlements below the mean damages award.").

[86] *See* Burch, *supra* note 5, at 1309 (explaining that risk-averse plaintiff accepting settlement reflecting her risk tolerance rather than merits of claim might underdeter defendant).

[87] *Supra* Section II.A.1.

[88] *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 265–66 (1979) (showing how individuals are risk averse when facing choice between certain gain and second option with higher expected value but risk of receiving nothing). This is a person who, when offered $90 or a fifty percent chance to win $200, always takes the $90, because her fear of receiving nothing outweighs the higher expected value of the wager, even if she does not face a liquidity constraint. In a Free Market Regime, someone can just pay $90 for the wager since its expected value is $100, correcting this problem.

[89] *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299–1300 (7th Cir. 1995) (discussing how in many class actions plaintiffs do not care about small amount at stake, whereas defendants might be facing ruinous judgment and be susceptible to settlement blackmail).

[90] *See* Molot, *supra* note 3, at 87–89 (discussing how settlement negotiations "pitting a one-time, risk-averse plaintiff against a repeat-player, risk-neutral defendant" stack the deck in favor of the defendant).

[91] *See* Burch, *supra* note 5, at 1307 ("Plaintiffs may not act rationally when deciding whether and under what terms to settle. . . . [P]laintiffs may fall prey to (1) contrast bias, (2) tendencies towards risk aversion . . . .").

personal feelings about the claim beyond making money. A typical risk-neutral party may hold an interest in a variety of legal claims, and she may have diversified her holdings enough that the success or failure of one claim does not have a huge impact.

Empirical and theoretical literature supports the assumption that the claimant is often more risk averse than the defendant.[92] The defendant has insurance more often than the plaintiff, and insurance companies almost always have a diverse portfolio of investments designed to spread risk. This affords them the opportunity to be more often risk-neutral because the outcome of one case does not have a dramatic impact on their financial situation. Class action lawsuits involving negative value claims can flip the risk preference dynamic, however.[93]

In a Traditional Regime, a claimant can only shift a limited amount of risk to a lawyer via a contingent fee (the cost of legal services). In contrast, under a Free Market Regime a claimant would be able to shift as much risk as they desired to other parties.[94] Businesses could hold thousands of claims and diversify their holdings. Additionally, these legal claims would probably represent just one type of investment in a diversified portfolio for many outside investors, further reducing the variance. Eventually, the market should settle out so that most legal claims driven primarily by financial reasons end up in

---

[92] *See, e.g.*, Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1594 n.119 (2004) (citing to "literature on law and behavioral economics" while describing under which situations claimants experience risk aversion); Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435, 1439–40 (2004) (discussing why future claimants in mass tort bankruptcies are likely to be risk averse); Helen I. Doerpinghaus et al., Risk Aversion, Negotiation, and Claims Settlement Strategies 3–5 (June 23, 2004) (unpublished manuscript), http://ssrn.com/abstract=690121 (finding that female and youthful claimants receive less in payments after controls, and attributing this to "higher negotiating cost[s] and greater relative risk aversion"). *But see* W. Kip Viscusi, *Product Liability Litigation with Risk Aversion*, 17 J. LEGAL STUD. 101, 103 (1988) (finding that "the risk aversion of claimants is greater than that of defendants" but "it is the expected rewards variable that is dominant, which suggests that risk aversion does not play an overwhelming role in modifying claimants' behavior").

[93] In these cases, plaintiffs do not care about the small amount at stake, whereas defendants might be facing a ruinous judgment—hence the fear of settlement blackmail. *See supra* note 89 (discussing this phenomenon). *But see* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1357–60 (2003) (concluding that "the 'blackmail' analogy is inapt" and "judges should stop making blackmail claims").

[94] Parties with a lower risk tolerance could offload the risk of uncertain claims or damages to parties with a higher risk tolerance and gain closure. *See* Marcushamer, *supra* note 8, at 1572–75 (explaining claimants' options under such regime).

the hands of risk-neutral parties, as too optimistic investors fail and risk-neutral investors outbid risk-averse investors.

Once again, the ALF-Only Regime's inability to allow for more than partial monetization hampers its effectiveness. No strong conceptual reason exists for why risk shifting should be arbitrarily limited. Some scholars have raised the concern that if a claimant can give up his entire claim, he will no longer be motivated to testify or otherwise cooperate with the new claim holder.[95] But, contracts in a Free Market Regime could be adjusted to deal with this problem. Perhaps the contracts would require payments based on milestones, not monetize the full value of the claim, or include amplified penalties for breach of contract. By allowing a thick market to develop, risk-neutral parties could compete against each other, innovate, and tailor contracts based on the type of plaintiff, the type of tort, and any other relevant concerns.

### 3. *Investor-Client-Lawyer Incentive Issues*

Much literature has been devoted to describing the principal-agent problems inherent in the legal services industry.[96] A brief summary follows. When it comes to an hourly fee arrangement, the lawyer has an incentive to take longer than necessary in resolving disputes. This might include unnecessary motions, spending more time than needed in completing litigation-related tasks, or not accepting a reasonable settlement offer right away in order to bill more hours.[97]

The contingent fee attempts to solve this problem by aligning the incentives of the claimant and the victim.[98] The problem with the contingent fee is that it aligns imperfectly.[99] Imagine that Jane's claim has a present discounted expected value of $30,000. If she goes to trial there is a 75% chance she receives $40,000 and a 25% chance she receives nothing. She hires a lawyer on a 33% contingent fee arrangement. This lawyer values his time at $300 an hour. After just a few

---

[95] *E.g.*, Abramowicz, *supra* note 28, at 751; Molot, *supra* note 3, at 108.

[96] *See, e.g.*, Murray L. Schwartz & Daniel J. B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125, 1126 (1970) (concluding that contingent fee arrangement does not perfectly align lawyer-client interests).

[97] *See* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 103 (Erwin Chemerinsky et al. eds., 10th ed. 2015) ("Some [clients and lawyers] protest that hourly billing encourages inefficiency, even dishonesty."). This problem is compounded by the fact that similar to the medical field, a typical client lacks the expertise to evaluate what is or is not necessary. *See* Kidd, *supra* note 10, at 634 ("[L]awyers are highly trained and clients are not . . . .").

[98] *See* Schwartz & Mitchell, *supra* note 96, at 1125 (listing one justification for contingent fee as giving "the lawyer a direct incentive to work in his client's interest").

[99] *See supra* note 96 (discussing this incentive misalignment).

hours of work, the restaurant offers to settle for $20,000. The lawyer estimates that to reject the offer and go to trial would consume twenty hours of his time. Despite the fact that the client would benefit from going to trial by receiving $6667 more, the lawyer would only be making $3333 for twenty hours more of work ($167/hour) which would be below how much he values his time. So he accepts the offer and moves on to the next case.[100]

The Traditional Regime generally accepts that this kind of problem cannot be fully eliminated and allows for parties to contract in more creative ways, such as by using a combination of hours and multipliers, in an attempt to mitigate this issue.[101] When it comes to personal injury torts, however, the overwhelming majority of claimants who hire a lawyer enter into a standard contingent fee arrangement.[102] The Traditional Regime also includes a variety of ethical rules designed to prevent lawyers from behaving strategically.[103] But ethical rules, even in abundance, can only go so far in solving a market problem because of the difficulty of enforcement when faced with the subjective nature of a lawyer's work.

The ALF-Only Regime creates a new problem, while not effectively solving the old problems. Under an ALF-Only Regime, a third-party investor comes into the attorney-client relationship bearing a significant amount of financial risk, but cannot exert any control.[104] Additionally, the third party is generally more sophisticated than the client who retains control. Investment without control creates

---

[100] A similar example can be found in GILLERS, *supra* note 97, at 115.

[101] *See* John A. Case Jr., *Hybrid Flat-Fee and Contingency Fee*, CASEWEBLAW (Nov. 28, 2010), https://caseweblaw.wordpress.com/2010/11/28/hybrid-flat-fee-and-contingency-fee/ (describing how hybrid of contingent fee and flat fee may better motivate business lawyer except in unusual cases).

[102] *See* David A. Hyman et al., *The Economics of Plaintiff-Side Personal Injury Practice* 2–3 (Univ. of Ill. Law, Behavior, and Soc. Scis. Research Paper No. LBSS13-28, 2014) (discussing several studies relating to contingent fee arrangements, including a 1991 RAND study that found 87% of claimants with personal injury claim entered into contingent fee arrangement with their attorney). There is often a lack of competition among contingent fee rates, even though the risk profile of many cases varies greatly. *See infra* notes 113–15 (noting empirical evidence of relative uniformity of contingent fee rates and reasons for lack of competitive market in contingent fees).

[103] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.5(a) (AM. BAR ASS'N 2013) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.").

[104] *See* OHIO REV. CODE ANN. § 1349.55 (West 2015) (preventing financier from having a say in litigation or settlement decisions); Kidd, *supra* note 10, at 634–35 (describing how financier will have a stake in outcome but no control, leaving him unable to control costs and society will be either no better or even worse off).

principal-agent problems beyond the traditional lawyer-client issues and limits the ability of a well-functioning market to develop.[105]

For example, there is a danger that plaintiffs who have mortgaged out a large portion of their claim but still have control may behave strategically and reject reasonable settlement offers to gamble on a trial.[106] Imagine that Jane mortgages out one-third of her recovery for a contingent fee arrangement and an additional $10,000 of her claim for an advance, based on an expected claim value of $30,000. As the case develops, the expected value of the claim drops to $15,000. Meanwhile, the interest on the loan is accumulating. It makes no sense for Jane to accept a settlement offer for $15,000. Instead she is better off gambling on a trial, despite the higher transaction costs and the risk of a follow-up lawsuit by the financier or lawyer.[107] To quote from one case where things went wrong, "[i]n a twist perhaps unique in law, a court loss resulting in no award of damages was better for the client than a million dollar settlement."[108]

A Free Market Regime would be able to vest ownership in claims in the same law firm that is prosecuting those claims, eliminating principal-agent fee and principal-agent-financier problems. The owner and the service provider would become the same person, and thus perfectly aligned. This does not remove other problems, such as the fact that salaried lawyers in the law firm will not have incentives perfectly aligned with the firm owners. Yet, those are problems that already exist now. A Free Market Regime should mitigate the problems an unsophisticated one-time claimant faces when trying to monitor a lawyer dealing with a fee arrangement that incentivizes strategic behavior and the principal-agent-financier problem.

---

[105] *See* Baker, *supra* note 8, at 270–73 (showing how victims may have no incentive to settle even if that is the best outcome for investor and lawyer, because they would not net anything after paying back investor).

[106] *See* Burch, *supra* note 5, at 1313–14 (discussing risk that plaintiffs may behave strategically if they owe so much money there is no point in accepting reasonable settlement offer).

[107] One case discussed by Burch involved a plaintiff who borrowed $200,000 from a litigation financing company in exchange for promising to repay $600,000 plus a large percentage of the recovery without telling her lawyer. *Id.* (discussing *Weaver, Bennett & Bland, P.A. v. Speedy Bucks, Inc.*, 162 F. Supp. 2d 448, 451 (W.D.N.C. 2001)). She had also entered into a contingent fee arrangement with her lawyer. *Speedy Bucks*, 162 F. Supp. 2d at 452. Despite the other side proposing settlement offers up to $1,000,000, offers that the judge and her lawyers found reasonable, she refused to settle, calculating that a settlement for anything less than $1,200,000 would cost her money. *Id.* at 451. The case went to trial, and the plaintiff lost. *Id.* Her attorney sued. *Id.*

[108] *Speedy Bucks*, 162 F. Supp. 2d at 451.

### 4. *Monitoring*

An argument advanced in favor of ALF is that investors, who are generally repeat players, can act as another check against the lawyer's self-interest and provide a level of monitoring that plaintiffs are unable to do on their own.[109] By allowing the lawyer to act as just an agent, and not an agent and a financier (under a contingent fee arrangement), a conflict between the lawyer's self-interest and his duty to the client will be avoided.[110] The third-party financier would then be able to monitor litigation costs and attorneys' fees and prevent abuses such as cram-down or collusive settlements.[111] While this is a benefit of an ALF-Only Regime, it comes with additional costs and cannot align incentives as well as a Free Market Regime would.

Lender monitoring complicates the principal-agent problem as discussed in the preceding section, rather than eliminating it. Under a Free Market Regime, the entity pursuing the claim could own 100% of the lawsuit and have their incentives perfectly aligned. Instead of allowing claim alienation to align incentives, the ALF-Only Regime relies on even more regulations and monitoring via a three-way split in control. This risks one of the parties behaving strategically because of misaligned incentives.[112] This "solution" rests on another layer of regulations to correct a market failure created by a prior set of regulations, rather than just reforming the regulations that created the initial market failure.

### 5. *Transaction Costs*

Transaction costs currently consume a large portion of the value of a typical victim's legal claim, which can skew settlement negotiations. The sources of transaction costs include lawyers' fees, expenses related to investigating a case (such as expert witnesses), and court fees. For a claimant pursuing a tort claim, the largest transaction cost they face will almost always be their lawyer's fee. When pursuing an

---

[109] *E.g.*, Burch, *supra* note 5, at 1315–38 (2012).

[110] *Id.* at 1334–35 ("By unbundling an attorney's duty as an agent from that of a financier, we can alleviate a principal incentive to engage in unethical behavior.").

[111] *Id.* at 1293–94, 1296–97, 1335–36.

[112] For example, a client may decline a reasonable settlement offer and waste everyone's time and money if she has already mortgaged out a large percentage of the claim. *See supra* note 107 (describing one such case). A financier has a strong incentive to illegally interfere with the direction of a lawsuit. *See* Burch, *supra* note 5, at 1324 (describing how financiers already exercise some control, albeit not illegally). Financiers who loan money at high interest rates may try to delay a settlement to increase how much they earn. *Id.* at 1311. The attorney would still have an incentive to overbill or push for a quick settlement depending on if she is compensated by an hourly rate or through a contingent fee arrangement.

individual personal injury claim, it consistently averages thirty percent or more of the total value of that claim.[113] Some scholars believe that the current contingent fee system is not competitive, which leads to uniform (and high) rates.[114] These fees exist even when lawyers bear almost no risk of recovering a low amount or nothing.[115] This potentially induces victims to accept a reduced settlement to avoid the noncompetitive fee. A Free Market Regime would create price competition and mitigate this problem better than an ALF-Only Regime.

The Deepwater Horizon oil spill illustrates this problem. Shortly after the oil spill, BP set up a settlement fund and offered final payouts to victims of the spill. In addition to being able to receive a large amount of money immediately, some argued that claimants could actually receive more from the fund even if they accepted less than the expected value of their claim than if they hired a lawyer and had to pay one-third or more of their recovery in a fee.[116] Had transaction costs been lower, BP would have had to offer more.[117]

Lester Brickman, a scholar who advocates for liberalizing alienation rules, argues that current lawyers cannot effectively compete on price for various reasons, including the fact that lower prices are seen as a sign of inferior quality.[118] If lawyers (or any business) could offer

---

[113] Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L. Q. 653, 657–60, 659 n.11 (2003) (discussing various empirical evidence that suggests the prevailing rate for all personal injury litigation ranges from thirty percent to fifty percent across various jurisdictions, and almost never goes below thirty percent).

[114] *E.g.*, Brickman, *supra* note 37, at 126–27 (arguing that competitive market does not exist because of search costs, lower prices being seen as sign of inferior quality, high barriers to entry, and *prohibition on the buying and selling of entire legal claims*).

[115] Brickman, *supra* note 113, at 660 n.14.

[116] *See, e.g.*, Byron G. Stier, *The Gulf Coast Claims Facility as Quasi-Public Fund: Transparency and Independence in Claim Administrator Compensation*, 30 MISS. C. L. REV. 255, 256 (2011) (describing how if claimants trust fund to fairly value their claims, they "may also save money by not having to pay a plaintiff lawyer's fee, which often could amount to one-third or more of the total recovery"); Andrew Longstreth, *Analysis: Legal Fees in Gulf Oil Spill Deal Stir Conflict*, REUTERS (Mar. 9, 2012, 3:21 PM), http://www.reuters.com/article/us-bp-fees-idUSBRE82817R20120309 ("The point [of setting up the BP Gulf Coast Claims Facility] was to allow victims to settle claims quickly without the costs and risks associated with litigation."). *But see* Issacharoff & Rave, *supra* note 75, at 403 (arguing that despite lower transaction costs of BP Gulf Coast Claims Facility, most plaintiffs received more on net through class action mechanism for various reasons, including BP paying "peace premium").

[117] This would be true even if the "peace premium" discussed by Issacharoff & Rave, *supra* note 75, existed, as long as the market is able to aggregate claims.

[118] Brickman, *supra* note 113, at 705 ("Lawyers are induced not to undercut standard pricing out of concern that they . . . will be seen as of inferior quality by claimants who have been led to believe that all qualified lawyers change [sic] the standard one-third (or higher) fee."). He also gives search costs, high barriers to entry, and the prohibition on

cash for a claim, claimants would focus on who could offer them the best deal and perceived quality of representation would no longer be relevant. These firms could then push the costs of labor down by paying their employees hourly rates, or using a lower percentage of recovery calculation than the prevailing noncompetitive rate. Even lawyers who want to represent claimants and not purchase claims would have to reduce the fees they charge to compete. More of the claim's value will pass to the claimant, meaning defendants will be forced to offer a higher initial settlement amount if they want to prevent the claimant from selling the claim or pursuing the case.

Additionally, a Free Market Regime should also result in economy-of-scale savings, as capital floods the market and claim-purchasing businesses are formed. Larger businesses will not only be able to diversify risk, but they will likely accelerate the trend of consolidation and lower pay for entry-level lawyers and contract lawyers performing routine tasks such as document review.[119] These firms will then be able to offer clients more money, putting pressure on other lawyers to further reduce fees. From a deterrence standpoint, minimizing transaction costs leads towards more accuracy because defendants will have to offer larger settlement amounts initially. Yet, the negative impact on the profession could lead to a backlash from lawyers whose livelihoods and compensation suffer.[120]

---

buying and selling of entire legal claims as reasons for the lack of effective price competition. *Id.* at 664. I believe that the prohibition on alienation is the cause, search costs are a symptom, and that high barriers to entry are not a problem because the market has no shortage of lawyers. *See, e.g.*, Eric Posner, *The Real Problem with Law Schools: They Train Too Many Lawyers*, SLATE (Apr. 2, 2013, 2:50 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/04/the_real_problem_with_law_schools_too_many_lawyers.html (discussing various studies and statistics indicating that supply of lawyers currently exceeds demand for legal services).

[119] While claimants will benefit from increased payouts (the equivalent to lower fees), lawyers could find themselves the latest victim of a "winner-take-all economy" that rewards a few at the top while paying out a declining share of an industry's profits to those in the middle. *See* Alan B. Krueger, Chairman, Council of Econ. Advisers, Remarks at the Rock and Roll Hall of Fame: Land of Hope and Dreams: Rock and Roll, Economics, and Rebuilding the Middle Class (June 12, 2013), https://www.whitehouse.gov/sites/default/files/docs/hope_and_dreams_-_final.pdf (describing how over the last twenty-five years America has increasingly become a "winner-take-all economy" where top performers in industry "have been doing better and better, while the vast majority has struggled to keep up"); *see also* N. Gregory Mankiw, *Defending the One Percent*, 27 J. ECON. PERSPECTIVES, no. 3, 2013, at 21, 21–22, 29–33 (describing the same phenomenon of the top .01% reaping huge gains relative to the bottom 99%, but arguing that increased redistribution may not be the right answer).

[120] This relates to the deontological fears that the sacred nature of the lawyering profession will be corporatized, and many lawyers will become low-paid and fungible widgets. *See* MP McQueen, *The Big Boys Make $10 Million—How About You?*, THE AMERICAN LAWYER (Jan. 5, 2015), https://advance.lexis.com/api/permalink/a29bcc5d-3229-4e3b-847c-a1741c96841e/?context=1000516 (discussing one reason for increasing pay

### *B. Objections Within the Framework*

Many economic objections to a Free Market Regime or an ALF-Only Regime have been made. These objections generally fall into two categories: (1) the market will not work, or (2) the market will make things worse. A failed market would probably not make things worse than a Traditional Regime. Claimants would have the same options as before, and for this reason I will not spend much time on this category of objections.[121] The arguments that a Free Market Regime would create a market with systematic failures that could result in less optimal deterrence pose a more serious threat here. While a functioning market would be a better alternative, this does not change the fact that there would be flaws, some of which could be quite significant.

In fact, some of the adverse consequences opponents raise are likely to materialize, at least in part, but it should be noted that many of these arguments apply against both a Free Market Regime and an ALF-Only Regime. Other objections or potential adverse consequences, such as fears of a bubble, are common to any free market, and to save space are not discussed.[122]

#### *1. The Market Will Not Work*

Some opponents to reform argue that certain issues will cause a market to fail or never develop. Objections include adverse selection,[123] claimants failing to appear,[124] or higher transaction costs

---

stratification within legal community as being a focus on business of law instead of profession of law). In some ways, this is already occurring. *Id.* (describing how big law partners at the top are earning more money than ever, while many other lawyers face shrinking pay, including contract jobs paying less than twenty dollars per hour).

[121] Also, even if a Free Market Regime failed, presumably some of the ALF businesses that have been successful would continue.

[122] That is not to say that a bubble will not form or that moving to a market system will not create losers. Rather, these objections are not specific to a legal-claim market and space is limited. These objections will be made by some; the recent fiasco around the Ecuador judgment against Chevron contains a litigation finance element that has been used to paint movement towards a market as a bad idea. Paul Barrett, *Litigation Finance Takes Another Hit in Chevron Pollution Case*, BLOOMBERG.COM (May 5, 2015, 1:03 PM), http://www.bloomberg.com/news/articles/2015-05-05/litigation-finance-takes-another-hit-in-chevron-pollution-case ("A British-based litigation-finance firm has pulled out of a controversial oil pollution case against Chevron, again raising questions about a new market in which outside investors seek to share in lawsuit recoveries. . . . [B]usiness advocates have condemned the spreading practice as likely to encourage frivolous litigation . . . ."). However, any free market system is prone to speculation, bubbles, and outright fraud.

[123] Abramowicz, *supra* note 28, at 743–45 (noting legal-claim market will likely face adverse selection problem).

[124] *Id.* at 751 (stating the simplest argument against liberalizing alienability rules is that claimant would have little incentive to cooperate after he alienated his claim); Shukaitis,

because of the need for an additional lawyer to represent the claimant selling their legal claim. The response to all of these objections is that, even if they are correct and the market fails, society will be no worse than it is under a Traditional Regime. Additionally, the success of the ALF industry indicates that many of these objections are overstated.[125]

As an example, one argument is that adopting a Free Market Regime risks triggering an adverse selection problem.[126] Eventually buyers will then reduce their offers to account for this, leading to the highest quality claims being pulled from the market, leading to further buyer discounts, and so on until the market is significantly or totally impaired.[127] Yet, if the market does not work under a Free Market Regime, society is not worse off than under a Traditional or ALF-Only Regime. If the market works but is limited, or only supports ALF, then it will evolve in that direction and overall welfare will still increase relative to a Traditional Regime.

### 2. *Things Will Be Worse*

#### a. Frivolous Litigation Will Increase

Opponents of liberalizing alienability and third-party investment rules argue that liberalizing these rules will lead to a surge in frivolous

---

*supra* note 8, at 340 (arguing that as long as original claimant and purchaser have adequate stake in the matter they will cooperate with each other).

125 *See supra* notes 25–26 and accompanying text (discussing rapid growth of ALF industry).

126 *See* Abramowicz, *supra* note 28, at 742–50 (arguing that a legal claims market will likely "be beset by an adverse selection or 'lemons' problem"). Michael Abramowicz argued the original parties to a legal dispute have more access to information about the value of the claim than a potential buyer and parties that choose to sell their claims will disproportionately consist of persons who think the buyers will pay too much for the claim relative to its actual value. *Id.* at 743. Buyers will quickly recognize that claims being sold will be of "lower quality than other claims, just as used-car buyers recognize that used cars being sold are generally worse than those not being sold." *Id.* Buyers will struggle to accurately evaluate the value of the claim because they lack access to information and will reduce their offers to account for this. *Id.*

127 Abramowicz created a model demonstrating how adverse selection could thwart the market, and also points to the lack of a functioning market when it comes to the alienation of claims by defendants. *Id.* at 748 ("In principle, a company could sell insurance on a particular claim, thus allowing the defendant to reduce the risk of litigation by transferring it onto a relatively risk-neutral party, but such transactions seem rare."). However, the economic model built by Abramowicz ignores the risk preferences of victims, the liquidity constraint issue, and the artificially inflated transaction costs. All of these factors increase the amount of arbitrage opportunity available to third-party investors, meaning that even though some money must be spent on due diligence, a profit can still be made. *See supra* notes 25–26 and accompanying text (discussing rapid growth of ALF).

litigation[128] that clogs the court system[129] and results in companies settling even when not responsible.[130] This is a common objection against liberalizing alienability or third-party investment, and in fact, was one of the major objections against allowing contingent fee arrangements.[131]

An increase in frivolous litigation would be bad for several reasons. Some of these frivolous lawsuits result in erroneous victories, and others result in settlements because the defendants feel pressure to settle even if the suit lacks merit.[132] This could lead to higher product and service costs because companies may be overdeterred and forced to pass costs along. Beneficial products may never make it to the market.

A Free Market Regime would increase claimants' ability to bring suits, and this may lead to an increase in frivolous suits if the market breaks down.[133] There are two main counterarguments: (1) that courts have plenty of tools to deter frivolous litigation and would be able to do so, and (2) regulatory solutions exist. At times, it can be hard to separate this objection from the fear that more litigation of any kind is a negative because it as an inefficient way to resolve a dispute, but the focus here is on meritless lawsuits.[134]

---

[128] Frivolous suits are defined as those suits that have little or no merit. *See* Michael Abramowicz, *Litigation Finance and the Problem of Frivolous Litigation*, 63 DEPAUL L. REV. 195, 202 (2014) ("This Article's concern is thus with cases in which the plaintiff is expected to have a low probability of winning."). If all factual and legal information relating to the suit were perfectly known, no one's rights would have been violated and the fact finder would decide for the plaintiffs almost every time. *Id.* at 202 (stating that various conflicting definitions of "frivolous" have been proposed, but for this article "the normative premise is that it is generally beneficial to discourage plaintiffs from pursuing cases that the defendants will probably win").

[129] Kidd, *supra* note 10, at 628 ("If litigation finance results in an increase in case filings without a corresponding increase in judicial funding, the screening process will become more prone to mistakes. . . . The greater the amount of financing . . . the greater the chance that the courts' screening procedures would be swamped and fail.").

[130] *E.g.*, W. Bradley Wendel, *Alternative Litigation Finance and Anti-Commodification Norms*, 63 DEPAUL L. REV. 655, 664–65 (2014) (describing U.S. Chamber of Commerce's fear that third-party litigation financing would result in increase in nonmeritorious claims); Barrett, *supra* note 122 ("The U.S. Chamber of Commerce and other business advocates have condemned [litigation finance] as likely to encourage frivolous litigation against corporate defendants.").

[131] *See supra* note 51 (discussing this line of attack against contingent fee arrangement).

[132] *See* Richard A. Epstein, *The Costly Freedom to Sue*, N.Y. TIMES (Mar. 3, 2011, 4:29 PM), http://www.nytimes.com/roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit/the-costly-freedom-to-sue (questioning whether expansion of litigation finance will force more defendants to settle cases on disadvantageous terms).

[133] For example, if blackmail settlements are a real thing, they might increase. *See supra* note 93 (discussing this potential problem).

[134] *See infra* Section II.B.2.b.

Focusing on frivolous litigation, it should be noted that this has been a long-running problem in Anglo-American courts and many doctrines have evolved to fight it.[135] Courts would still have the power to impose sanctions for frivolous litigation, and laws such as the Private Securities Litigation Reform Act would still exist.[136] Ethics rules also prohibit pursuing meritless lawsuits.[137] Finally, states could adopt tort-reform statutes if the need arose.

Several potential regulatory solutions have been proposed should the rules be liberalized and the traditional tools of the court fail.[138] These include things such as caps on the rate of return, increased penalties for filing frivolous lawsuits, shifting to a loser-pays system, and so on.[139] If frivolous litigation increased to the point that it posed a threat to American business, various interest groups would mobilize to push back as they did in the 1970s through the 1990s during the "tort reform" movement.[140] The number of reforms that could be instituted is limited only by the creativity of those seeking to limit frivolous lawsuits.[141] Additionally, those engaging in ALF or claim-buying businesses have a strong reputational interest in avoiding an increase in frivolous claims that may result in a backlash.[142]

Frivolous litigation will always be a problem, but under a Free Market Regime, scholars would want to pay close attention to the empirical data. Should the problem materialize, potential solutions such as fee caps, fee shifting, increased sanctions, or other reforms may have to be adopted. The same objection has been raised to

---

135 *See, e.g.*, Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. Rev. 571, 594–95 (2010) (describing various state and federal laws designed to deter frivolous litigation).

136 15 U.S.C. § 78u-4 (2012) (imposing new rules on securities class action lawsuits designed to deter frivolous litigation).

137 *E.g.*, Model Rules of Prof'l Conduct r. 3.1 (Am. Bar Ass'n 2013) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . .").

138 *E.g.*, Abramowicz, *supra* note 128, at 199–200 (discussing several types of fee limitation regulations and other adjustments to mitigate potential frivolous litigation problems).

139 *E.g.*, *id.* at 198–99 (describing a proposed rule to screen out claims with low probability of success from being financed).

140 *E.g.*, F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 Hofstra L. Rev. 437, 469–70 (2006) (discussing how businesses were able to use the "crisis" of large increases in medical malpractice and product liability insurance premiums to push through a variety of reforms).

141 *See id.* at 484 (describing various tort-reforms business advocates pushed for, including: "punitive damages, joint and several liability, prejudgment interest, collateral source rule, noneconomic damages, product liability, class action reform, attorney retention sunshine, appeal bond reform, and jury service reform").

142 *See* Lyon, *supra* note 135, at 595 (describing scholarship on lost litigation bargaining power from damaged reputation).

contingent fees[143] and litigation financing.[144] While frivolous litigation may have increased after adopting both those reforms, the legal system has accepted this policy change and adjusted while reaping the benefits.

#### b. Litigation Will Increase—And That Is Bad

Those who believe that any increase in litigation harms society would not want either a Free Market Regime or an ALF-Only Regime if they increased litigation,[145] which they probably would.[146] Opponents argue litigation is an inefficient way to enforce rights and regulate many industries, and transaction costs outweigh any benefits.[147] If there is already too much litigation, liberalizing the rules may make things worse by increasing the volume of litigation.[148] Scholars are conflicted about whether we have too much or too little litigation, rendering this a difficult objection to address.[149] If one believes that

---

143 Amy Farmer & Paul Pecorino, *A Reputation for Being a Nuisance: Frivolous Lawsuits and Fee Shifting in a Repeated Play Game*, 18 INT'L REV. L. & ECON. 147, 157 (1998) ("[T]he use of contingency fees may make it easier for attorneys to pursue nuisance suits, thus providing one possible explanation for the prevalence of these compensation schemes.").

144 *Supra* notes 129–30.

145 *See* Paul H. Rubin, *More Money into Bad Suits*, N.Y. TIMES (Nov. 16, 2010, 4:44 PM), http://www.nytimes.com/roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit/more-money-into-bad-suits ("American tort law . . . is actually harmful on the margin. This would indicate that anything that increases the amount of litigation is likely to be harmful to society. The main effect of allowing third party finance is to increase the number of lawsuits.").

146 It makes intuitive sense that these regimes would both increase litigation, since the point is to allow people to continue litigation they otherwise could not pursue. Empirical evidence also provides support that litigation finance increases total litigation. 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, 1081 (2013) ("We find that third-party funding does appear to be associated with increased expense to the courts, an increased backlog, and an increase in average case duration."). It is possible that claimants filed their suits in jurisdictions where funding was legal to monetize their claim, and total claims filed did not increase.

147 Rubin, *supra* note 145 ("American tort law has passed the point of diminishing returns, and is actually harmful on the margin.").

148 The impact, however, might manifest more in allowing people to continue a lawsuit rather than settle. *See* Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 220 (Ohio 2003) (outlining math leading to party's disincentive to settle); *supra* Section II.A (comparing legal regimes and exploring their implications in practice). *But see* Lyon, *supra* note 135, at 595–96 (disagreeing with the court in *Rancman* and notion that an outside funder's presence is likely to prolong litigation because "it wrongly assumes that a claim . . . has no inherent value").

149 *Compare* Rubin, *supra* note 145 (arguing that there is too much tort litigation in the United States), *with* Susan Lorde Martin, *Leveling the Playing Field*, N.Y. TIMES (Nov. 15, 2010), http://www.nytimes.com/roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit/leveling-the-playing-field ("[A]s a practical matter courthouse doors are not

nonfrivolous litigation has merit and claimants should have a right to bring suit, then they would probably support reform. If not, then the tort system itself is the problem, and the objection is outside the scope of this Note.

A related potential objection might be that courts and government have compensated for the current difficulty in bringing lawsuits by awarding punitive damages, treble damages, and otherwise adjusting the system. If, suddenly, millions of previously negative-value suits could be brought, and many people bringing suits that previously would have settled for less than their full value will now hold out for their full value, the current equilibrium would be destroyed. The result would be massive overdeterrence until the system could be brought back into line, and the resulting backlash may lead us to be no better off than now. However, as discussed in the previous subsection, business interests are not helpless. If such a problem developed, plenty of interest groups would be ready to push back.

Keeping the Traditional Regime is a very imprecise and arbitrary way to deal with an excessive litigation problem, and may result in the underdeterrence of torts committed against the least well off. If one believes that most litigation harms society, then any way to restrict litigation likely increases societal welfare. But if someone believes that most litigation adds value from a deterrence perspective, and society has gone just a little too far, then the Traditional Regime makes less sense. In essence, the worst off are forced to pay for either too many laws or an inefficient justice system.

Additionally, systematically weakening the worst off from realizing the full value of their legal claims may result in certain tortfeasors being overdeterred, but those who mostly target the worst off would actually still be underdeterred. The Traditional Regime "solution" does not change the fact that a loss has occurred, it simply changes who bears it—in this case, poorer individuals.[150] This regressive redistribution likely lowers overall social utility because of the

sufficiently open to poor plaintiffs with meritorious claims against well-financed defendants and their insurance companies.").

[150] This analysis excludes frivolous litigation, which was covered in the previous Section. *See supra* Section II.B.2.a. One could argue that claimants often have not actually suffered a loss, that there are just too many laws, or that litigation has such high transaction costs that society is better off if lawsuits are not filed. *See supra* Section II.B.2.b (discussing these concerns); *supra* notes 147–48 (specifically covering transaction costs and the idea that there are too many laws).

diminishing marginal utility of wealth—those bearing the loss suffer greater losses in social utility than if the loss were spread.[151]

c. Distorted Value Signaling Will Skew Deterrence

A problem currently exists when a judge is certifying a class action settlement and trying to analyze whether it is fair and reasonable, because plaintiffs' attorneys' incentives may align more with the defendant than the claimants they represent.[152] Valuing small individual class action claims can be very challenging, but small changes in an individual claim's value can make a huge difference in the aggregate total. The buying and selling of claims on an open market may be able to provide information to the judge that would better allow her to assess the legitimacy of a proposed settlement.[153] If third-party aggregators were buying individual claims for a significantly higher amount than they were actually worth in hopes of inflating their holdings, this could lead to overdeterrence.

For example, hedge funds might push up the value of individual BP oil spill claims by overpaying for them, in hopes of creating pressure on BP to settle. Plaintiffs' lawyers negotiating with BP could point to these claims to demand more money, and BP may give in rather than risk "bet-the-company" litigation. Additionally, these inflated claims may even be used at trial as evidence of the real value of damage, further distorting assessments of the damage, and thus further distorting deterrence.

However, while a Free Market Regime would likely have some speculation problems, the focus should be to compare the current system (the Traditional Regime) with any system that would replace it. Some scholars argue that in a Traditional Regime there is a "reverse auction" problem that causes lawyers to settle claims for pennies on the dollar in hopes of getting paid.[154] In that case, a Free Market Regime might actually lead to more accurate deterrence, since investors could buy undervalued claims en masse and then bargain harder, forcing defendants to pay out an amount closer to the actual harm caused.

---

[151] *See, e.g.*, Joshua Greene & Jonathan Baron, *Intuitions About Declining Marginal Utility*, 14 J. BEHAV. DECISION MAKING 243, 243–45 (2001) (discussing diminishing marginal utility of wealth and how it can justify risk aversion and redistribution).

[152] John C. Coffee, Jr., *Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 851–52 (1995) (describing how defendants have begun to use settlement of class actions to lock in low-cost and collusive settlements with plaintiffs' attorneys).

[153] *See* Baker, *supra* note 8, at 287–90 (discussing how increased availability of information would allow claimants to more accurately value their claims).

[154] *E.g.*, Coffee, *supra* note 152, at 853.

Conversely, others argue that class actions actually overdeter because of how expensive discovery can be, which creates the pressures of "blackmail settlements" and leads to frivolous claims being paid out.[155] This is the reverse of the risk-aversion problem discussed earlier: Claimants will not care about their small individual claim and be either risk-neutral or even risk-seeking, but companies will be risk averse because of the threat of a massive judgment destroying them. However, scholars have questioned whether this phenomenon is actually a serious problem.[156]

Second, a competitive market and an influx of capital would allow reinsurance markets to push back against overpriced claims by entering into a reverse contingency arrangement with the defendant, similar to how one can short a stock. This would push back against the risk of speculators trying to inflate the value of legal claims and the settlement blackmail problem.

d. Predatory Financiers Will Flood the Market

Another fear of liberalizing alienability and outside financing rules is that predatory financiers and claim purchasers will flood the market and exploit vulnerable claimants. It would only take a couple stories of poor victims selling their claims for what turns out to be pennies on the dollar for public opinion to turn. Similar problems have plagued industries such as payday lenders.[157] This could quickly lead to serious legitimacy problems and eventually distort deterrence by keeping certain classes of claimants out of the market. In many states, outrage about payday loan practices has led to the industry being effectively banned.[158] This objection straddles the line between economic and deontological, but if not properly regulated it could cause serious problems. People would object not to the market failure,

---

[155] *E.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298–99 (7th Cir. 1995) (discussing this phenomenon).

[156] *See, e.g.*, Silver, *supra* note 93, at 1357–60 (concluding that "blackmail settlements" problem is not actual problem).

[157] *See, e.g.*, Jacob Davidson, *Payday Loans Are Even Worse than You Thought*, TIME (Apr. 1, 2015), http://time.com/money/3767120/payday-loans-study-debt-default/ ("We already know a lot about the terrible impact payday loans have on borrowers."); Sanjay Sanghoee, *The Bad Business of Payday Loans*, CHRISTIAN SCI. MONITOR (Dec. 7, 2013), http://www.csmonitor.com/Business/new-economy/2013/1207/The-bad-business-of-payday-loans (describing how deposit advance loans, similar to payday loans, cause problems for poor consumers and banks).

[158] *See* Consumer Fed'n of Am., *Legal Status of Payday Loans by State*, PAYDAY LOAN CONSUMER INFO. (last visited Jan. 18, 2016), http://www.paydayloaninfo.org/state-information (describing how eighteen states and the District of Columbia effectively prohibit payday lending).

but to the perceived injustice of a victim receiving very little of the damages awarded for harm done to her.

One reform that might mitigate, or even eliminate, this problem would be to cap the rate of return that any holder of a claim could recover, based on the original purchase price of the claim.[159] For example, one rule might state that any return (from a settlement or judgment) in excess of ten times the original sale price must have fifty percent of that return go back to the original claimant.[160] Another solution might be to cap only the rate of return for certain kinds of cases (such as those dealing with natural persons worth less than a certain amount) that would most likely create a perception problem if the lawyer or investor reaped most of the return.

e. Path Manipulation

Path manipulation has been defined as "the conscious effort to impact the evolution of precedent in order to achieve some goal."[161] Another objection relates to the changed political dynamic that will occur if legal claims can be bought and sold. Litigants may strategically purchase claims to manipulate precedent.[162] Businesses holding interests in legal claims would have a strong incentive to move the law in a direction that increased the value of their other holdings.[163] This might result in the law becoming ever more profitable for rent-seeking claimants, but actually harmful to society overall.[164] However, American society often pits various interest groups against each other, and plenty of other organizations have and will continue to push back against expanding liability.[165] Additionally, many impact-litigation entities have used this strategy to further welfare-maximizing policy

---

159 *See* Abramowicz, *supra* note 128, at 199–200 (describing various types of fee limitation regulations, often combined with other adjustments, that might mitigate frivolous litigation problems caused by liberalizing rules around litigation finance).

160 This would restrict the right of claimants to enter into certain arrangements, but would be justified for reasons similar to why payday lending is restricted, which is primarily outrage at exploitation. *See supra* note 157 (discussing negatives of payday lending).

161 Kidd, *supra* note 10, at 629.

162 *See* Abramowicz, *supra* note 28, at 753 ("If interest groups can determine which lawsuits are brought, they may be able to manipulate the path of the law . . . .").

163 Kidd, *supra* note 10, at 629 (arguing that after stare decisis took hold lawyers had incentive to "engage in rent-seeking behavior" by shaping precedent).

164 *Id.* at 629–33 (detailing many dangers of path manipulation by litigation financing advocates).

165 The U.S. Chamber of Commerce is not going anywhere. For example, pro-business advocates were able to limit liability in many areas of tort law in the 1980s as a reaction to perceived plaintiff attorney excesses. W. Kip Viscusi, et al., *The Effect of 1980s Tort Reform Legislation on General Liability and Medical Malpractice Insurance*, 6 J. RISK & UNCERTAINTY 165, 167–71 (1993).

goals,[166] and the increased transparency of a Free Market Regime may render it easier to analyze costs and benefits of litigation.

## III
## Assessing Current Reform

More of the recent literature has focused on ALF reform exclusive to reforming outside investment and alienability rules together.[167] Much of this ALF-centric literature does not recognize the large role that rules concerning alienability have on a legal claims market.[168] This risks scholars, lawmakers, and judges ignoring the dramatically different results an ALF-Only Regime would achieve relative to a Free Market Regime because of the current focus on ALF.[169] An ALF-Only Regime creates new problems and fails to solve others nearly as well as a Free Market Regime. This drift also threatens to embolden objectors to liberalization by enabling them to point out the failures of an ALF-Only Regime and attribute them to liberalization in general.[170]

An ALF-Only Regime creates principal-agent problems beyond traditional lawyer-client issues because of the separation of control and residual profit, needlessly creating more conflicts and limiting the ability of a functioning market to develop.[171] It does not as effectively solve many of the other problems caused by the Traditional Regime,

166 As even one opponent of reform acknowledged, many public interest groups have pursued "noble and just goals." Kidd, *supra* note 10, at 631.

167 The vast majority of articles on this topic in the last five years have focused on alternative litigation finance rather than reforming alienability and outside investment rules, perhaps because of the booming alternative litigation finance industry. *See, e.g.*, Burch, *supra* note 5, at 1301 (discussing ALF industry and its potential benefits); Lyon, *supra* note 135, at 571 (covering ALF "revolution" and generally endorsing it for providing access to courts).

168 For example, even an article focusing specifically on second-best solutions regarding litigation-finance reform treats an ALF-Only Regime and a Free Market Regime as relatively interchangeable. Kidd, *supra* note 10, at 617 (describing these proposed regimes as "first-best solutions" under a single category of "Broad Litigation Financing"). The article later goes on to discuss principal-agent problems also discussed in this Note, but does not distinguish between an ALF-Only Regime and a Free Market Regime. *Compare infra* Section II.A.3 (describing how different regimes affect potential principal-agent problems), *with* Kidd, *supra* note 10, at 634–35 (arguing that "[s]hifting to a third-party financing regime appears to promise the worst of both worlds, at least in the short run" without ever describing potential benefits of Free Market Regime over ALF-Only Regime).

169 *See infra* Part II (discussing differences between the two regimes).

170 *See infra* Part II (discussing how ALF-Only Regime is worse relative to Free Market Regime in many ways).

171 *See* Baker, *supra* note 8, at 285 (showing how victims may have no incentive to settle even if that is the best outcome for investor and lawyer, because they would not net anything after paying back investor).

such as risk-shifting or liquidity constraints.[172] Instead, an ALF-Only Regime risks not solving these issues at all, while still raising many of the concerns raised by objectors to liberalization, such as an increase in frivolous litigation, the risk of exploiting claimants, and unseemly speculation. Enacting an ALF-Only Regime may result in a well-functioning market being killed before it can ever develop.

Some states are moving towards an ALF-Only Regime anyway.[173] Ohio is a good example. Its laws prevent both the actual sale of claims to third parties and the functional sale of claims to third parties.[174] It prevents functional sales by forbidding investors to gain control of the lawsuit through contractual means. The Ohio statute governing ALF states:

> The contract shall contain the following statement . . . : "THE COMPANY AGREES THAT IT SHALL HAVE NO RIGHT TO AND WILL NOT MAKE ANY DECISIONS WITH RESPECT TO THE CONDUCT OF THE UNDERLYING CIVIL ACTION OR CLAIM OR ANY SETTLEMENT OR RESOLUTION THEREOF AND THAT THE RIGHT TO MAKE THOSE DECISIONS REMAINS SOLELY WITH YOU AND YOUR ATTORNEY IN THE CIVIL ACTION OR CLAIM."[175]

Under this ALF-Only Regime a claimant would be unable to sell their claim, and instead would only be able to monetize a portion of the claim by securing a nonrecourse loan.

Why would the law stop halfway? The evidence suggests it is because of some kind of deontological concern that buying and selling legal claims is just not right,[176] combined with lawyers' self-interest[177]

---

[172] *See infra* Part II (discussing these issues).

[173] *E.g.*, OHIO REV. CODE ANN. § 1349.55 (West 2015) (legalizing "non-recourse civil litigation advance[s]" on condition that financier have no control over conduct of underlying legal claim or settlement negotiations); ME. REV. STAT. ANN. tit. 9-A, § 12-104(7) (2009) (legalizing litigation financing but using language similar to Ohio barring financier from having control); NEB. REV. STAT. § 25-3303 (Supp. 2014) (using language very similar to Ohio).

[174] OHIO REV. CODE ANN. § 1349.55.

[175] *Id.* § 1349.55(B)(3).

[176] Various noneconomic objections have been raised to litigation-finance reform. Major recurring objections are that liberalizing alienability and third-party investor rules: (1) commodify something that should not be commodified, (2) violate corrective justice norms, and (3) negatively impact the professional or ethical nature of the legal profession. Anticommodification arguments see the unbridled capitalism as poisoning the nonmarket good of justice. *See, e.g.*, Wendel, *supra* note 130, at 657 (arguing ALF is inherently wrong because of "its transformation of a nonmarket good, namely civil justice" into a market good and discussing two key objections raised against ALF by tort reform organizations: "(1) 'ALF—particularly third-party litigation investment—seeks to commoditize justice by creating a market for investing in litigation'; and (2) 'ALF transforms courtrooms into a stock exchange and litigation into a commodity.'"). Corrective justice concerns center on whether the relationship between the plaintiff and the defendant is being compromised.

and a fear of frivolous lawsuits.[178] To the extent these concerns are motivating a movement towards the ALF-Only Regime rather than the Free Market Regime, they come with a very real cost to many Americans. While this Note focuses on deterrence, those most likely to be harmed by alienability restrictions are poorer victims facing a liquidity constraint, or holders of negative value claims whose rights have been violated but who lack the ability to seek redress through the court system. This is not just about efficiency versus some abstract notion of what the legal system should be or once was,[179] it is about the safety and broader well-being of Americans being harmed by these deontological concerns.

## Conclusion

For all of the reasons discussed, the law should adopt a Free Market Regime, rather than drift towards an ALF-Only Regime. Proponents of liberalization should ensure that, whether reform is incremental or comprehensive, it is thought out. Changes to ALF rules should keep in mind the effect of changing or not changing related alienability rules, and vice versa. The current legal trend toward a claims market governed by rules that only allow ALF without control and limited assignability could result in a backlash by a variety of harmed interests, or the general public, if the market fails. While the benefits of a more well-developed legal claims market are real, they are by no means inevitable.

---

Abramowicz, *supra* note 28, at 712 (discussing this concern and how it might undermine the "correlativity" between the two parties). The professional and ethical concerns reflect a belief that lawyers are something more than just capitalists trying to maximize their profit, and a fear that liberalization will corrupt the profession by eliminating that sacred professional element. *See supra* note 120 (discussing this fear).

[177] *See supra* Section II.A.5 (discussing how lawyers could lose a large portion of their fees in competitive market).

[178] *Supra* Section II.B.2.a.

[179] *See supra* note 176 (discussing these concerns).