NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 12 SPECIAL ISSUE 2016 NUMBER 3

PANEL 3: LITIGATION FUNDING AS A TOOL FOR COLLECTIVE ACTIONS AND ARBITRATIONS

2015 CONFERENCE: LITIGATION FUNDING:
THE BASICS & BEYOND
NEW YORK UNIVERSITY SCHOOL OF LAW
FRIDAY, NOVEMBER 20, 2015

MODERATOR: *Samuel Issacharoff*
PANELISTS: *Brian Fitzpatrick, Catherine Piché, Anthony Sebok, Thomas Coyle*

MR. PETER ZIMROTH: So, welcome back, everybody. I hope you all had a good lunch. Our third panel is moderated by Sam Issacharoff, here on my right. Sam is one of the co-directors of the Center, and he's also the Reiss Professor of Constitutional Law here at NYU. Sam, I promised when everyone left for lunch that the afternoon panel was going to be as spectacular as the ones in the morning. So, you're on.

MR. SAMUEL ISSACHAROFF: Thank you. I want to start, actually, by taking a moment of privilege to say something about the Center, because I think that we can stand here quite proudly after the morning session as being a fascinating introduction into the world of litigation finance, at least for those of us who are not in that world. This is a very unusual academic enterprise. This was set up as, essentially, a joint venture of plaintiffs and defense firms who decided to put up a significant amount of money with a five-year commitment, and it has two unusual features, in terms of academic enterprises of this sort.

First, we are not naming anything after anyone, so this is not the—you pick—school of laws. Actually, for a certain price, that is available, you know. If you need it, we can talk

about it. Here is our fourth co-director who just walked in, Troy McKenzie, who just got fired from the Department of Justice—is that why you're here? [Laughter]

MR. TROY MCKENZIE: Playing hooky.

MR. ISSACHAROFF: Playing hooky. So, Troy is one of the founding co-directors. There's no honors given to anybody in particular for the significant contributions we have received. The other thing that is completely unusual about this is that more than half of our board of directors and the people who sustain this enterprise had no prior institutional affiliation with NYU. So, these are folks who gave of their time and their money, they come to our board meetings, and they sustain our activities despite the fact that this was not their institution. This is simply a commitment that there needed to be a place where we could have discussions like we will be having, and continuing to be having. This is a great achievement for us institution and we are very proud and very happy for the work of Peter and Linda, and for the support that we've had in this enterprise. So, let me introduce this panel.

My first exposure to the world of entrepreneurial financing of litigation as a distinct area of legal enterprise took place about five, six years ago. The first time I was lecturing in Australia, and I kept being introduced to this concept of litigation finance that was increasingly taking hold there, and playing a very significant role in shaping the kinds of cases that were viable under the Australian system, where there are not contingency fees, there are uplifts. But there is fee-shifting, so that somebody had to immunize the lead plaintiff, for example, in a securities class action.

The world of litigation finance had taken hold there. And now, all of a sudden, you had financiers coming in and essentially acquiring massive control rights in the litigation and turning the original lawyers who brought the case into hourly employees, and it shifted all the conceptions of risk, all the conceptions of how we want lawyers to be running cases. This was quite unlike anything I had seen. And one of the unfortunate problems of getting older is that whenever you see something that's new, you react. You say, well, that's bad, right? Because that's not what I'm used to. And that was my reaction. Well, this is just wrong; this is not the way we do it.

And then it made me think that there are three functions that we assign to lawyers in the United States, and basically

concentrate in the Bar. One is the selection of cases, particularly on the plaintiff side, particularly in contingent cases, but in all sorts of litigations, we let the lawyers screen. And in fact, Rule 11 and other such responsibilities require the lawyers to do the screenings of the cases.

Then, we assign to the lawyers the power to prosecute and defend the cases. Lawyers have a monopoly on the capacity to go to court on behalf of a client, so that's the second function that the lawyers perform.

The third function that the lawyers perform is that the lawyers, and only the lawyers, can be the outside financiers with an equity stake in the outcome of the litigation. So, the assumption that an American lawyer has going to Australia is that those three functions have to be integrated, and to the extent that they're present in any given case, in any given representation, they have to be carried out by the same person, the same institutional actor, the same group of lawyers.

The Australian response—and it was fascinating to confront this—was that each of these functions could be disaggregated, and that you can spin them off, and that the market could rearrange the rights and responsibilities across these functions in a way that is perhaps more efficient, in a way that is perhaps more transparent, in a way that is perhaps just plain different than the way we do things like that in the United States. And so for me, this was just completely eye-opening, and in several subsequent trips to Australia for other bodies of lectures and so forth, this has become a bigger and bigger part of what I've been fascinated by.

And the first entrant into the field, an outfit called IMF, was spectacularly successful initially, partially because, like any first-mover, they grabbed a lot of the low-lying fruit, and so they could do very well with relatively little risk. My sense of going to Australia was that the profits that the funders were making were outsized, because there just wasn't enough competition. There wasn't a deep enough capital bench. So, as I became more comfortable with this system, my reaction was, we need to get more of this in. Not that we need to restrict it in some way, but actually, this will be a much better-functioning system. There may be different regulations that we have to put in and all that, but this will be a better functioning system when there's competition within it.

And what we see in the United States is the paradox. As it comes here, we have a much deeper capital market, so it is quite likely that we will develop more competitive innovations than Australia, which is a much smaller country, even though we are a late arrival, here. And to say the obvious, the Australians then went and colonized, and they reverse-colonized England, and they took over Canada. So, this has become a dominant model.

The Australians are big movers in setting up litigation finance on the continent also, so that with the experience they have, the several years' head start they have has become an entryway into a lot of other markets. So, we should be paying attention in this country, in particular, to foreign innovations, which takes us to the panel for today.

So, this morning was basically about how we conceptualize the relationship between capital and law, and how we try to figure out what rules apply from each, and which ones can colonize the other. We're going to go a little bit further this afternoon. And this panel is about how we conceptualize the role of capital investments in litigation in ways that change the relationship of the actors in the case, in ways that are designed to change the relationship of the actors. So we have three papers.

The first one is by Catherine Piché. Catherine is a law professor at the University of Montreal who specializes in matters of litigation, class actions, big cases. Catherine is also an LLM of this institution, so we're very proud of the institutional affiliation. Catherine is going to talk about a Quebecois innovation in which public money is used to seed private litigation; that is, public money is used to help finance private class actions in areas of law that the Province of Quebec finds to be underserviced. That's a radical conception for us, using public funds for private litigants.

There is an article by Judith Resnik—one of our graduates, also—who argues that the class action is, in effect, a public subsidy for certain kinds of litigation because it lowers the transaction cost of creating the benefits of scale. This is going one step further.

Following Catherine, we have Tony Sebok. Tony is a professor at Cardozo. Some of you heard him speak here on the floor this morning. Tony is one of the real forces in examining the development of litigation finance. I know that he's not at

NYU, but he's just down the street at Cardozo. And I know that when I started getting in interested in this area, it was his work as much as anybody's that I turned to, to help guide me through it.

Tony's paper does the flip of Catherine's. So, Catherine is how public money can seed private litigation, and Tony's is on how private money can help seed public litigation. If you think about *parens patriae* suits as being a more natural form of aggregation that doesn't have the perversity of, you know, plaintiffs' lawyers running the show—well, the problem is that states are underfunded versus big, institutional defendants, and so maybe private resources could help to redress that balance.

The third paper is by Tom Coyle, and this is a point of particular privilege. Tom was a star student in a course on complex litigation I taught a couple years ago with Arthur Miller. Tom is a recent graduate of this law school, just last year. Works part time—only about, what, 300 hours a week—at this small firm called Wachtell, Lipton, Rosen & Katz. Lipton may have something to do with this room, I think. Tom wrote his third year paper for Troy McKenzie, and then when Troy left, I took over the supervision of it. And I read this paper, and I thought, this is just amazing. This is a complete breath of fresh air.

This is the idea that sometimes private conglomeration of claims can be superior to public, and that is when we get to the question of *Italian Colors*, and the prohibition on class actions, maybe the market can be there instead of the public sector in terms of creating the economies of scale necessary to prosecute some of these cases. So, it's very exciting for me to be able to have Tom here, and unheard of that he got a day off from Wachtell to be here with us.

And then, the commentator will be Brian Fitzpatrick. Brian is a Professor of Law at Vanderbilt. Brian has an institutional affiliation with us. He was an Olin fellow here for a year, before he went into fulltime teaching. Brian is as shrewd a commentator on the structures of legal representation, as you will find, and it's always a pleasure. He was here at our conference last year. It's always a pleasure to have him here.

So with that, Catherine, why don't you begin?

Ms. Catherine Piché: Well, thank you. Good afternoon. I am delighted to be here today, and I thank the organizers for having invited me. It's quite a thrill to be talking about litiga-

tion finance, a topic that is, from my perspective as a Canadian, largely misunderstood and largely under-discussed. So, I find this really, really great.

I am a professor at the University of Montreal, as Professor Issacharoff mentioned. So, Montreal is in the province of Quebec, and as most of you, if not all of you, know, it is a civil law system with very strong common law influences, and a mixed procedural law system.

So, importantly, it also has a class action, and in fact, Quebec was the first Canadian province to enact class action legislation, based on Federal Rule 23 back in 1979. And it was at a very social time, so you will understand, and you will feel, and you will see the social flair and in the social culture piercing from, perhaps, the model itself, the model I'll be discussing today. Part of the uniqueness of this system was that it provided for a Quebec Ministry of Justice fund, an assistance fund for class action litigation. So that is principally what I'll be talking about in the few minutes I have.

I do want to say that third party funding exists in Canada and is prevalent. It is a largely underground and secretive practice, which means that we don't have all the information. What we know is that all the big players are there—the Lexfund and Therium, and all these big financiers are there. What we know as well is that the courts are quite receptive to these agreements. They have approved a few financing agreements.

What is important to know is that most of Canada has adverse costs that are quite astronomical, and so there's a real problem there in terms of access to justice. So, the larger cases are funded through third party funding and class plaintiff firms extending the money. So that's for, kind of, the rest of Canada. And in terms of Quebec, we don't have adverse costs. We have tacked adverse costs, so that's not really the issue. The issue is the attorney fees, obviously, and the experts' costs.

What I'll be talking about is—and what I've talked about in my essay—is this public fund, assistance fund. It's the Fonds d'aide aux recours collectifs, and I'll call it the Fund, for our purposes. My argument is that is an effective, obviously financing, mechanism, but it also has this oversight function that should be underscored and that should be made clearer. I think this oversight function is beneficial to the whole system, in that in contributes to class actions in Quebec—well to the

flourishing system that we have, to this positively active system that we have, a system that is often characterized as a class action haven.

So in short—and that is a more social perspective, but I do think that successful cases should help finance unsuccessful ones, and I do think current cases should help finance future ones. And on top of that, I believe that assistance should be provided to legitimate and promising cases, from entities that have the proper motivations. I do think that the Quebec Fund has these proper motivations.

This fund has a two-parted objective. The first one, obviously, is to finance class litigation, essentially, in terms of bringing those actions in for assistance. And throughout the litigation, you can keep applying for further financing, all the way through appeals. The second function is an informational objective, and essentially, it means disseminating information about class actions, which also is very important, in my view, in terms of transparency, notably. So, the fund, significantly, in terms of statistics, has made close to 800 decisions in the last ten years and has funded one third of those applications.

On a yearly basis the market is, obviously, much smaller, but we have about 500 active cases per year, and the Fund finances one third of these cases. The Fund also has a big surplus of close to CAD 14 million, which could help finance more and more cases. When the Fund grants assistance, it will pay expert fees outright, and it will help with attorney fees as well.

Now, a big caveat there, the attorney fees are not market rate. We're talking about $100 an hour for senior lawyers, which is quite insignificant, but it's still there, and the idea is there. And so they pay for legal fees, costs, and this without charging interest fees. Also, and importantly, you will only reimburse in cases of success, which means that the Fund essentially assumes the risk of litigation. So, it is well-capitalized with yearly provincial subsidies and warranties. And importantly, it is almost entirely self-sustainable through these subsidies, that are essentially a couple hundred thousand dollars a year. But importantly, it does recuperate a percentage of all recoveries, in all cases, whether funded or not, which means that all cases help contribute to the fund, and all current cases help contribute future cases, and to the bringing of future cases. Essentially, the argument here is that the Fund should work, obvi-

ously, as an oversight mechanism. It already does *de facto*, but I think its role should be redefined and a specific notion in the law should be placed there, to have a much clearer role.

Of course, one argument is that it brings transparency to the system, right? With additional information, statistics, data, claims rates data, comes I think better law and better cases. The screening mechanism gives, of course, incentives—even if implicitly—to bring better cases forward, right? It's kind of a natural tendency to bring worthwhile cases, as when the case is funded, there's a note in the docket and there's a signal sent that this case may just be more worthwhile.

Also, an incentive to be continuously competent in terms of counsel, as you can keep applying for further assistance throughout the litigation. So, that's significant as well. It would bring more legitimacy to the Fund in terms of an actor of change. The Fund has intervened and made representations in a number of cases, in order, notably, to have this percentage regulation applied more clearly, and so it has changed the law in certain instances, and that has been significant.

Very briefly, the agency costs argument, which isn't mine—it's mainly Professor Burch and Professor Issacharoff. But I really do think there's something there to be said, because the fact of having the fund there helps distinguish the roles of the attorneys, and the attorneys then become better advisers. Also, the Fund becomes this super stakeholder, right? It's an entity that really will recuperate some moneys, but it will be moneys to fund back future cases, so the incentives are not to be compensated. They're very much a fresh voice. They're very much neutral.

One last thing, I guess, is also—we've talked about ethics, and I think having the third entity there really does help in that sense, and lessens the potential for unethical behaviors. Perhaps as a conclusion, I would say, I do believe in that entity. It's quite effective and it really does help in terms of the amounts of cases that are worthwhile, the numbers of trials. We have the highest number of trials throughout Canada, and we have a lot of case law. And we're very, very active. So, it is a very important entity.

It could do much more, and you could even think, possibly, for the future, of having more lawyers working under the Fund and bringing cases forward that would be financed, per-

haps on contingency. You could have these lawyers as a part of the entity. Thank you very much.

MR. ISSACHAROFF: Before you sit down, could you give us a 30-second synopsis of what the criteria are for the Fund selection of cases? Is it consumer cases, is it negative value cases? What's the market failure that this is designed to cure?

MS. PICHÉ: Well, I'm not sure it's that detailed. There is something in the regulation, and it goes along, looking at the case and its chances of success. It doesn't look at the certification criteria. It looks at the need for financing. It's very plain criteria, and then the decisions are confidential, so we don't really know more about that.

The Fund has financed worthwhile cases and cases that have not really gone that much ahead. So they haven't financed all good cases, but there you go. Thank you.

MR. ISSACHAROFF: Thank you. You know, the American reaction to government bodies holding large amounts of money, meeting in secret, and giving it out, might be not quite as charitable as the Canadian, but we can leave that to the side for the moment. Tony?

MR. ANTHONY SEBOK: Speaking of governments in the United States holding large amounts of money and not knowing what to do with it. . .I am going to speak about what I call litigation investment in public litigation. This is a bit of a thought experiment, and probably, after I'm done talking, I'll be approached by someone who says, "Well, I've been doing this for a few years now." In which case I'll say, well, good. At least I'm anticipating something that's already happening."

The thought experiment is this. It's really thinking about the parties who can take advantage of litigation investment. Why can't state and municipal governments be parties who take advantage of litigation investment? Obviously, there's lots of policy justifications for litigation investment. We've talked about those, one which Professor Wendel and I sort of are interested in is the moral argument that these are property rights that people should have the right to dispose of as they see fit.

My talk today has nothing to do with that. I'm really thinking about the policy argument that suggests that in general we want a litigation system where money flows to the highest and best use to address wrongs that the legal system has announced as wrongs. And the states and municipalities I'm talk-

ing about here also have a role in that; they, of course, are actors of great importance in identifying wrongs in our civil justice system.

Now, a couple of definitions. These are definitions I've stipulated. They are debatable, but I am going to stipulate them for purposes of this paper. By public litigation, I'm going to refer now only to non-criminal activity—non-criminal prosecution by the state. I'm not talking about criminal prosecutions by the state, although lord knows that those, too, need support. I'm also not talking about what's conventionally known as the private attorney general—the idea of under civil rights statutes a private attorney brings claims as a private attorney general. Or even *qui tam*. I want to leave that separately. There has been investment in *qui tam*, to my knowledge, from the litigation investment community. I want to take that out.

I want to focus, really, on a very formalistic definition, focusing on the identity of the lawyer and the identity of who the lawyer represents. I want to basically focus on government attorneys representing the state, and the classic example of that would be someone at a state AG's office. Within that definition, public litigation can cover, I think, three general areas, I could be missing something here. There's, of course, civil penalties that the state seeks. The line between civil and criminal penalties, the Supreme Court has looked at this line, but has asserted, at least, again, on an arbitrary basis, that there's a certain core sense of what a civil penalty is as opposed to a punitive or penal penalty.

I only want to talk about this idea that the state certainly can pursue civil penalties, and these civil penalties can be quite significant. I won't go through the examples, but you may be aware of them. Exxon Valdez is a good example. Now, in addition, the state, like any citizen, actually has private law rights that can be interfered with. I mean, it has property, it has contracts, it can suffer torts. So, the second category are these private law rights that the state is able to seek redress for the way you or I might. And examples of this might include, for example, recent suits about Medicare overcharging, right? I mean, the idea that the state actually paid too much to the producers of certain drugs.

There are a number of suits right now brought by state AG's offices saying we paid too much; we paid—not our citizens paid too much. We paid too much. That's category num-

ber two. And the third category, which is going to occupy most of my talk, is the *parens patriae* category. And again, not because the other two aren't interesting, but I think that they are just less lucrative, perhaps.

I think *parens patriae* produces the greatest payoff for the private investor. Now, *parens patriae* is a doctrine you may have heard bandied about. Its definition is loose. It's also been the subject of Supreme Court analysis. Essentially, there are two elements of it, I think. There's a loss by some substantial number of private citizens of rights, property rights or other forms of injury in private law. And the second is that a remedy *could* be secured by the state through the operation of police power, but it has chosen not to do so. And it can have a second bite at that apple, so to speak, by bringing a *parens patriae* suit, essentially by bringing a suit on behalf of those citizens for the redress of those private law wrongs.

A classic example of this would be antitrust. You often see *parens patriae* suits brought by state AGS with respect to consumer antitrust violations on behalf of the losses suffered by the citizens of the state due to the overcharging in antitrust. The grounds of authority for *parens patriae* are actually not just the common law and the inherent powers of the state, going all the way back to the 14th century, but also statutory. There's a lot of federal statutes now to explicitly authorize the state to bring *parens patriae* actions under federal causes of action, such as antitrust.

Now, really, the people who have done the most, I think, to identify *parens patriae* as an interesting topic is my colleague, Myriam Gilles, and her co-author, Gary Friedman. They pointed out, in the wake, in some sense, of the double-whammy—as I call it—the attack on class certification by the Supreme Court, and the attack on class arbitration on the Supreme Court, they pointed out that what might be left in order to achieve many of the same goals that class actions and class arbitrations allegedly secure for us, is *parens patriae* suits by the state. Of course, here, the observation is that the Supreme Court has not yet gotten to say that the state cannot aggregate the claims of its citizens in a class-like form. There's nothing in the Supreme Court jurisprudence on class actions that touches that claim.

Secondly, there is nothing so far that suggests that a private citizen signing an arbitration agreement can in any way

interfere with the power of the state to pursue a *parens patriae* action on their behalf. I mean, there's a theory—I'm sure it's being cooked up somewhere at the U.S. Chamber of Commerce—but it's not yet been approved by any court. Now, why would this be a good thing? Where's the need for it? Well, obviously, as I've already suggested, there is this issue about sort of the collapse of the class action.

But there's also what I call the funding gap. I don't think I have time to go into all the reasons why attorney generals lack funding to initiate their own *parens patriae* litigation, which is very expensive, but you can imagine that they do have actual budget constraints. Therefore, private investment from the outside could be quite welcome.

Now, there already has been a workaround to fund AGs to do *parens patriae* litigation, and that is borrowing from the tobacco litigation. The idea the contingent fee attorneys will come in and work on behalf of the state, and then take as part of their fee a part of what was collected on behalf of the citizenry.

Well, this is controversial, and it's controversial both for political and, I think, genuinely, policy-driven concerns. The policy-driven concern is the loss of control that always happens. The problem is often talked about in terms of class actions in general, with entrepreneurial class action attorneys, the loss of control over the litigation when the lawyer has the power to direct the litigation.

Now, with outside funding to the state that does not take the form of a deal with a contingent fee attorney, as I'll point out, the state has a choice of what kind of attorney, and which attorneys, and if they want to even use outside attorneys. They might just use the money only for expenses, or they might hire an hourly rate attorney. So, it gets around the contingency fee attorney disagreement in that sense. Now, the other reason why this might be attractive is that here have been laws passed in a number of states—the Private Attorney Retention Sunshine Act, and the Transparency in Private Attorney General Contracting Law—which basically were designed to restrict the use of contingent fee attorneys by state AGs, and those, of course, are now barriers.

If I may indulge my timekeeper and say I have four advantages of litigation investment in public litigation, and then I will stop. Okay?

Here are the four. First, it gives you the option of separatingfunding legal costs versus funding legal expenses, because not all AGs want what they get with a contingency fee contract. They don't want the other person's lawyer. What they might just want is funding for their expenses. And they want todo the litigation with the state lawyers that they already have. Not all the time, but sometimes.

Second, you might get a better deal. I mean, literally, you might get a better deal. Contingent fee attorneys often ask for 33%, even from the states, and funders might actually take less if you look at the multiple of the amount invested taken from the recovery.

Third—and this, I think, is really important—this allows the state to get the lawyer it wants, not the lawyer who can afford to bankroll the case. Because often, contingent fee attorneys brought in by AGs—while they are great attorneys, and Susman Godfrey is a great firm—often firms that are brought in on the contingent fee side, their advantage is that they are banks. Of course, sometimes the law firm who is a good bank is not the law firm who is thebest at an antitrust suit, or at an environmental suit. This is the AG option of separating banking from lawyering.

Finally, of course, as I mentioned earlier, it puts the AG more in control. Not as much as in control perhaps as the critics would like, but puts them more in control than if a contingent fee firm has been brought in and operating as an entrepreneurial class action attorney. To the extent that we're worried, genuinely, about control questions, I think there's an advantage, here. There are disadvantages, too, but I'm out of time, so I'm not going to cover them. I might cover them in the questions. Thank you.

MR. ISSACHAROFF: Tony, one quick question before we go on to Tom. You gave an example in your papers which I think is a very salient one, of Wyoming having no funds whatsoever. That kind of captures the problem you're trying to address. Can you. . .?

MR. SEBOK: It's an academic study of a western state—I think it was Utah—and then comparing it to an eastern state, which is West Virginia. Lord knows West Virginia has had a lot of problems with controlling the mining industry, but it has a lot of mining there. Utah, on the other hand, hasn't even tried. Utah has actually no mine inspectors. Utah has, actually,

zero people now; they rely entirely on federal enforcement. And the explanation for this, arguably, is lobbying. Or, the other explanation is, they just don't have the money. And this is an example of how, if you wanted to staff state lawyers or state investigators, financing matters.

MR. ISSACHAROFF: Okay. Tom?

MR. THOMAS COYLE: I want to first thank everyone for coming today. I'm very excited to be here, to speak with you. I feel truly honored to be a part of such distinguished group of panelists. My presentation is a little different from the other panelists. Today, I'm going to talk about aggregating consumer arbitration claims after the Supreme Court's decision in *Italian Colors*, through litigation finance, and securitization of legal claims.

My presentation is going to be about three parts. First, I'm going to give a little bit of background on *Italian Colors*, so that most of you who are unfamiliar with the case can follow along, and then I'm going to define what I call the *Italian Colors* Problem. Next, I'm going to offer a solution to that problem, and I'm finally going to offer a few concluding remarks about the desirability of that solution.

Italian Colors was a class action lawsuit brought on behalf of merchants who accepted American Express credit cards. And essentially, what they alleged was that one of the provisions in the card acceptance agreement constituted an unlawful tying arrangement. So, American Express moves to dismiss the class action on the basis of the card acceptance agreement, and clearly in the card acceptance agreement it's stated that there could be no joinder of legal claims, and that either party can compel individual arbitration instead of litigation. The plaintiffs opposed the motion, but not on the basis that the card acceptance agreement was unclear. They opposed it on the basis of something called the Effective Vindication Doctrine. Essentially, what that doctrine means is that it's unlawful in an adhesion contract for one party to prospectively waive a right to pursue a statutory right.

The case bounces around, and eventually gets up to the Supreme Court, and the Supreme Court is going to answer to this question: Does the Effective Vindication Doctrine prevent a waiver of class treatment in an arbitration contract when the economics of pursuing an individual arbitration are completely illogical?

In *Italian Colors*, the largest individual claim would be about $38,000, and the cost of proving a tying arrangement with an expert economic study would be somewhere between $250,000 to $2 million. So, no one's going to bring this claim. It's Posner. Only a lunatic would sue over this. But the Supreme Court says the money doesn't matter. They essentially say that as long as a lunatic could sue, then the Effective Vindication Doctrine isn't implicated. Justice Scalia says that just because you've waived the ability to pursue the statutory right in a way that is economically logical doesn't mean that you've waived the right to pursue that statutory right.

Consequently, this is what I call the *Italian Colors* Problem, and it's a twofold question. It's, if the law won't allow aggregation to make these negative value claims pursuable, can the market step in and provide a manner for aggregation and achieving of economies of scale? And the second question is, if the market does step in, is this actually desirable?

Any solution to the *Italian Colors* Problem kind of has to conform to three sets of constraints. The first is that is has to be legally viable. That means that it can't violate any terms of the card acceptance agreement, and it can't violate any extrinsic bodies of state law, like champerty. The second is that it has to be practically viable. It can't be some esoteric law school answer, right? You have to be able to actually aggregate these claims. The other part of practical viability is that any proposed aggregation structure has to provide enough legal certainty so that after it its implemented, it can't be challenged collaterally. And the third and final constraint with which a solution has to comply is the most important, because this is the real world, you know? The money does matter. And that is, it has to be economically viable.

So, if a ligation financier steps in and aggregates these claims, it has to be able to do so in a way that it can achieve an above-market, risk-adjusted return. So, in the interest of time I'm only going to talk about economic viability today, because I think that's probably the most interesting part and not the part that's been covered by a lot of other papers.

My proposed solution is three steps. First would involve aggregation. A litigation financier would go out and contract with individual claimants to sell them, essentially, an antitrust study for a percentage of any potential proceeds. Now, this method of aggregation creates challenges to economic viabil-

ity, and essentially—I'm going to talk about why in a little bit—the financier is put in a bad position, where it needs to hedge its bet.

I came up with a solution where the financier would offer litigation proceed-backed securities, similar to other asset-backed securities, into the market in order to defray some of its upfront costs. After a litigation financier has securitized enough claims that it wouldn't have any capital at risk but it could still share in the upside, it would be in a very strong bargaining position to try and achieve a global settlement with the defendant. So, the reason that economic viability through aggregating each claim individually is kind of a problem is that, especially in *Italian Colors*, it was a formulaic harm case, right? The only thing that liability would hinge on is the defendant's conduct.

And more importantly—and I'm not going to talk about this—but under my aggregation method, it would be the same group of lawyers bringing these claims, over and over. So, controlling for all these variables, you kind of realize that the outcome of any single arbitration is going to be correlated to the other outcomes of arbitrations; that is, the outcome in one will be predictive of the outcome in another. So, rather than the financier having aggregation lead to a series of low-stake coin flips, you get the same economics as a traditional class action. You have one really high-stakes coin flip. So the way that a financier can hedge, and, you know, solve this problem is through securitization. So, rather than use the numbers from *Italian Colors*, I'm going to use a little bit simpler of an example.

Imagine a financier aggregates 5,000 claims, and 30% of the time—it costs $500 a claim to sign it up, right? 30% of the time they lose, 50% of the time they win $2,000, 20% of the time, they win $5,000. The claims are 90% correlated. And in order to sell a litigation proceed-backed security, they're going to have to offer it at a 250% discount. That is—for every one dollar a market participant spends in buying a litigation proceeds security, that security has to contain the economic right to $2.50 of the expected value of the litigation financier's aggregated portfolio.

The investment profile without securitization will leave the financier with a seriously high stakes coin flip. He's got about $2.5 million at risk, and he expects to win $9 million if

he wins, but if he loses, you know, there's no in between. The costs from securitization at a 250% discount would be that he would give up about $6 million of his expected return, but he would take in $2.5 million to defray his costs.

After securitization, you have a much better investment portfolio. It's still a coin flip, but it's a coin flip where you either win $3 million, or you lose nothing, which is a coin flip I would take most days.

I use these kind of fake numbers, but in the paper I wrote I actually modeled out what *Italian Colors* would be worth after a litigation financier, you know, aggregated claims and then securitized them. And you know, at one of the levels that I looked at, a financier would stand to, after securitizing claims, potentially profit $22 million and have zero capital at risk. The point is, of these numbers, that the solution is practically viable, and it's very profitable. So, there is a market solution, and that market solution could, you know, really change the scape of consumer arbitration going forward.

The main criticism to securitizing legal claims, is, in the words of Professor Issacharoff, any gatekeeper eventually become a toll collector, right? I talk about securitizing legal claims, and I'm sure all of you are seeing the ghosts of the 2008 RMBS market, that subprime market, and this could happen with legal claims. It would be very bad, and there's any number of reasons that you shouldn't do this.

But my answer to that is, it just doesn't matter, right? Currently, under the case law, there is no justice being served, right? And some justice is pretty categorically better than no justice. So, allowing securitization of arbitration claims will permit the market to step in and fill a void which the current law is prohibiting from being effectively vindicated. Thank you.

MR. ISSACHAROFF: Tom, just one quick question before we get into broader discussion. Under your model, the financier would then come in and secure all the experts, and prepare the econometric studies, and then basically, that would be the asset that would be available to individual claimants. Is that right?

MR. COYLE: Yeah, that's right. So, the financier, in order to be in a strong bargaining position, can't incur any incremental costs when each additional arbitration is brought. So, by selling a study, as compared to financing a litigation, he has

a fixed cost, which allows better amortization and increasing the investment portfolio.

MR. ISSACHAROFF: Which is also—the finance is being directly targeted at what the class action obstacle was under the particular case? So, under the particulars, it could be different things, in different cases?

MR. COYLE: Yeah, of course. In different consumer arbitrations, it would, obviously have to be tailored, but I kind of wrote the paper as a case study, so it's highly specific.

MR. ISSACHAROFF: So, this is following up on my opening observation, but in all of these three cases, what you have is seeking to exploit the division. If we assume that there should be a division between the traditional integrated functions of lawyer, financier, prosecutor, selector, all these functions that go on in the United States customarily—if we assume that we will disaggregate them, each of these papers is a way of taking advantage or exploiting that disaggregation so that you can have private money up to bear to shore up the public, you could have public money being brought up to bear to shore up private, you could have finance being used to create a different model of aggregation.

And so that's what's on the table for Brian.

MR. BRIAN FITZPATRICK: Thank you, Sam, and thank you to the panelists. It's my pleasure to be here today. These papers, as Sam says, they all offer different models on how we might bring financing to aggregate litigation. I have a few comments in the eight or nine minutes I have about each of the models that our authors have offered us today.

But I also have a broader question that I hope we might discuss as well on the panel: whether we really want to bring all of this outside financing to aggregate litigation. It strikes me that the ordinary story we hear about why third party financing is a good thing doesn't quite apply in the same ways to class actions and other aggregate litigation. And so I hope we can discuss the normative question, as well as some of the mechanics behind these proposals.

I'd like to start with Tom's presentation, if I could. I have to be honest with you, I cannot say that I understood entirely his paper. I am from Nashville, and as I like to say, I am just a simple country law professor. So some of it was over my head. But I gather the proposal here is for financiers to do the upfront expert work in the case, sell the expert work, and also

obtain some kind of global settlement authority, but to sell the expert work and obtain this authority to all these various consumers that have arbitration claims. It strikes me as a complicated solution to the *Italian Colors* problem. The first question I had was: why don't the financiers just buy the claims? Just buy the arbitration claims outright, rather than go through this relatively complex procedure of doing the expert work, and selling it, and have global settlement authority; why not just buy it?

Beyond that, my question about this model is, either way, whether they buy all the arbitration claims up, or they sell the study to the individual claimants and obtain this global settlement authority—either way, it seems that the transaction costs of this proposal are very high. This is basically an opt-in, class action model. People are going to have to come forward and opt in, either by selling their claims to the financier, or by buying the study. And the question then becomes: how many people are going to opt in? And how expensive is it going to be to find these people, to get them to opt in? And I guess my own intuition is that opt-in is not a very good substitute for the class action; we ask, how often, for example, do people file claim forms when there's already a settlement, when the money is already there waiting for them? And the answer is often not very frequently do they file those claim forms. I wonder if not very frequently they're going to buy Tom's econometric study or sell their claim outright to a financier.

In the numerical example that Tom gave, the claim, it looked like, was worth $5000 per person. That, I think, is a rare class action— consumer class action, anyway—where each consumer has $5000 of potential value to their claim. Most consumer class actions are $100 claims or something along those lines. How much money can a financier invest in collecting $100 claims? Not very much. And so, I guess, with Tom's model, I just worry that what he's basically offering us is to replace the opt-out class action with an opt-in one. And I don't think that's going to be very effective.

It's how they do financing for a class action, as I understand it, in Australia. In Australia, they ask the class members to agree contractually with the financier, and they define the class as those people who have agreed to financing with the financier. So they use the opt-in method in Australia. I'd be curious to see some data on how many people, what percent-

age of the class, we actually get opting in to those agreements before I am able to sign on to Tom's substitute for the opt-out class action.

I'd like to, secondly, address Catherine's proposal, and this is to have the government loan money to class action lawyers. I think that my reaction here was much like Sam's was. I don't know if it's an American bias or a bias of my own politics, but I guess I'm just skeptical that the government is going to be a better banker than a bank would be.

Do we really want the government deciding who to lend money to? Who is going to run this government fund? What are the incentives of the people who are going to run the government fund?

Bankers have profit motives, and some of us are suspicious of profit motives, but if the substantive law is doing its job, and the jury system is doing its job, then the more important cases, I think, should be correlated with the ones that offer the most return on investment to outside funders. Big cases should be the ones where's been lots of harm that's been inflicted upon people, and lots of deterrence that could be accomplished. So profit motive is correlated with good cases, I think, and so I'm not afraid of the profit motive.

What's the government going to do if it's not pursuing profits? Is it going to do the social good? Well, what's the social good? Is the government going to reward friends and supporters of the government? You know, we do have some experience, even in this country, with government-as-bank, and I'm not sure it's a happy one.

The most recent example is the Obama administration's program to lend money to solar panel startup companies. And as we know, the government ended up lending money to campaign supporters of the president. We have other models we can look to. The World Bank is another government lender. I don't know enough about how things have worked out with the World Bank to know whether it's been successful or not, but I guess my own suspicion is that the government is not going to do as good a job as the private sector would do in finding cases that are worthwhile, and investing in those cases.

Now, I will say that there are, of course, a number of cases that are not going to be attractive to outside investors because they don't offer much in the way of money—but maybe they're about injunctions or other such things like this. And

so, we need other mechanisms to fund cases that don't offer monetary relief. So, there certainly is a role for government. The question is whether, even in the monetary cases, are those the ones that government should get into?

When we get into the role for the government, that brings me to Tony's paper where the government brings the lawsuit. And the question is, can we have outside financers help the government do that? I think that Tony is right that using outside financers to fund government actions offers a lot of advantages over the alternative model of these government lawsuits, which is the government contracting with contingency fee lawyers to bring this suit. I think he's absolutely right. There are a lot of advantages to using the financiers as opposed to the contingency fee lawyers if the government is the client.

There is, however, one drawback of the contingency fee lawyer model that is not overcome with Tony's alternative, and I think it's the biggest reason, frankly, why people don't like the current practice of government contracting with contingency fee lawyers: cronyism. Again, the concern is that the government is going to choose the contingency fee lawyer that contributed money to the public official's campaign. And we've seen allegations like that, where Attorneys General pick their campaign supporters as the lawyers that they hire on contingency for these *parens patriae* cases.

I'm worried we're going to see the same thing in Tony's world, that the financier is going to give money to the Attorney General, and then the Attorney General turns around and hires that financier for the *parens patriae* case. And so, I think that it's worthwhile to think about all these models, but my job as commentator is to raise questions about them as well.

I do want to raise one final question in the time I have left, and that is whether we should even try to use financing in class action cases or aggregate litigation, because I don't think our typical story applies in the same happy way in class actions as it does in individual litigation, and here's why. The typical story on why we need third party financing is that we have little plaintiffs who are going up against big defendants. And the little plaintiffs don't have the money that the big defendants have, and they don't have the risk preferences the big defendant has. They want to use their money for their operations, not to hire lawyers. Because they don't have as much money

and they are more risk-averse, that leads them to under-settle cases. They can't fight it out long enough; they can't go to the jury like a big, rich defendant can. So, we're trying to help the small plaintiffs against the big defendants.

That really doesn't work so well in any of these government cases or in the class action cases. The government is not a little, bitty plaintiff. The government has a different risk profile than a small plaintiff would have. The government is, in many ways, risk-neutral.

And even in class action cases, we typically have small claimants in class action cases who really aren't risk-averse, for example, over their $100 loss to the bank. Moreover, in class action cases, the plaintiffs aren't even the ones making settlement decisions. We can't worry about them being risk-averse and under-settling; a class action case is really all about the class action lawyer. So, we really have to ask the question, are class action lawyers like little plaintiffs going up against big defendants? And it strikes me that I'm not so sure. I'm not so sure that class action lawyers need help from financiers. A lot of people think the class action system is already rigged against defendants. A lot of people think the class action system makes defendants risk-averse. Once you certify a class action case, defendants can't go to trial, because one trial is going to resolve thousands and thousands and thousands of claims at once. No defendant can risk that, so they over-settle class action cases. That's one narrative that we see in the literature.

And so my question is, if the class action system is special, if it's a system where defendants are at the risk disadvantage, do we want to throw fuel onto the fire by adding third party financing in this area? Or maybe, is this one area we should carve out and not allow any third party financing at all? Thank you very much.

MR. ISSACHAROFF: So, as moderator, I can anticipate what the paper presenters are going to say, because I have their papers. I couldn't anticipate what the moderator was going to say, which took away the bulk of where I was going to go.

I was going to lead it with the caveat that Geoff Miller used this morning, which is, I don't necessarily believe this, but I think that Brian believes it.

MR. FITZPATRICK: I don't necessarily believe it, either.

MR. ISSACHAROFF: But it's all the more effective. Let me make a related point, which is that we have, in the United

States, a large number of litigation-inducement mechanisms. Some of them take the form of class actions, which is a lowering of the transaction costs for bringing low-value cases. Some of them take the form of fee-shifting, which is a subsidy, an increase in the expected payout from litigation. Some take the form of presumed actual damages, or liquidated damages in things like copyright, for example, so that it's very hard to prove up damages, but you can get your $1,000-per, or under the "bad facts statute," or any of these kinds of liquidated damages provisions.

There is a longstanding debate in the case law, and there's a longstanding debate in that the ALI Project on this was unable to make headway on, on the relationship between different kinds of litigation inducement systems. So, for example, should you have class actions plus presumed liquidated damages? Is that over-deterrence? Are the potential $500 per violation fines simply too much when the cable company sells your information impermissibly, but it does it billions of times, because that's how many consumers it has?

These are hard, conceptual questions, and what Brian's comments focused on is bringing that into the question of the relaxation of litigation finance, and the dropping of the barriers there, which is another form of litigation facilitation mechanism. That's a market form.

Now, that raises the question, whenever we expand legal regulation in a way that's designed to overcome some perceived barrier to socially optimal amounts of activity, you want to ask, what's the barrier that's there? What's the market failure that we're trying to overcome there?

That's why I was quite struck in the Canadian context that there's not a series of clearly set out criteria for what they want to facilitate, what kind of litigation? To use the language from this morning, do they have a sense of public justice as the driving criteria? Or perhaps, the sense is more broad that all class actions are an advancement of public justice if they prevail, which I suppose is a defensible position. It's just not one that seems to be all that articulated, and that is, I think, what gives rise to, in part, Brian's reaction to this. It's standard-less governmental conduct, and in the United States, we believe that standard-less governmental conduct in the furtherance of economic activity is likely to give rise to corruption. Whether true or not, that's the underlying motif, there.

And that's the reaction to Tony's proposal, also, which is you're just giving another way in which money can come to the back door to public officials. And we have reasons in states like—let's pick one at random—New York, to think that this may actually be a problematic enterprise, because sometimes our public officials, shockingly, are on trial this week, on this island, the head of our Assembly and the head of our Senate. So with no views whatsoever as to their guilt, it is rather extraordinary to have them both on trial at the same time. Usually you stagger it out for news coverage purposes.

But I think that that leaves open Tom's proposal, because Tom's proposal is the cleanest, I think, in terms of being addressed directly to a perceived market failure. You can identify the kinds of cases that the class action was set up to address. These are exactly the kinds of cases that a new legal device has foreclosed, so we have every reason to believe it is under enforcement.

It may be that most consumer class actions, the transaction costs of getting—it's not quite an opt-in, for a reason I'll come back to in a second. The transaction costs may be prohibitive, but in some category of cases they are worthwhile. In anti-trust cases, they are worthwhile. And this could be a useful corrective as far as it goes, and until these things are developed, we don't know how far it goes.

And the other thing that's different about Tom's proposal from the standard, opt-in class action is, like in Australia, you have people with a direct monetary incentive to figure out how to get people to opt in, and the web is a wonderful mechanism for signing up people at low cost. And there are lawyers around the U.S. who have proved surprisingly entrepreneurial at signing up even very low-value cases. The reason I reacted as a professor so well is that, you know, you don't often get a paper, you say, "Wow, that's interesting." You say, "Yeah, yeah, yeah. Alright, I'll give them an A and they won't come bother me anymore." [Laughter]

But it has this idea that you can harness some of the technology, you can harness some of the finance to do this. So, if the question is presented as I would present it—what's the market failure that you want to address—I think that it's clearest, in my view, that Tom's is designed to get at that market failure.

I'm not quite so clear in the *parens patriae* or the Quebecois example that I'm as persuaded of that. So, do you all want to respond, and then we'll open it up for questions? In the order of presentation?

Ms. Piché: Let's do that. So, just a couple of points. Of course, I think the Quebec view is quite culturally different. It is an egalitarian approach. I think the idea with the Fund is to allow as many cases to be funded in as many different areas of the law. And we don't know much more about that. On a yearly basis, a lot of attorneys try, through Access to Information requests, to get more information and to predict the cases that will be approved for financial assistance, but we don't really know much more than that.

What we know, however, to respond to Professor Fitzpatrick and Professor Issacharoff is that in terms of incentives, there is no compensation. Really, what the Fund is looking for is to be self-sustainable. It's kind of a two-parted objective: funding future cases and recuperating that percentage according to the percentage regulation. So, really, it's in term of getting a percentage regulation applied. That really is what they are looking for. I think in terms of incentives, I'm not sure there is an incentive for abuse there.

The other thing, and it's really a comment to complete [Mr. Sebok's] presentation, we had this huge tobacco trial that ended with a great success, a multi-billion-dollar judgment. And it's interesting, I think, to see that this case was never funded through third party funders. It was funded by the Fund. So, the Fund actually provided CAD 3 million to CAD 4 million, which doesn't seem like much, but was enough to cover the extensive experts on both sides, and the immunologists, and all sorts of different experts. But it made the thing possible, and it made, you know, the trial possible, and it made the great outcome possible. So, perhaps I'm just an optimist.

Mr. Sebok: So, I was looking at the list of criticisms that I didn't have a chance to review in my paper of my own idea. And I was looking for the one that matches most closely to Brian's criticism. And I see it here at the very bottom, and it's one that I'm concerned with, but when I frame it the way I want to I think it's going to help me explain my reaction, which is, you know, that there is something a little strange about the Attorney General disposing of the state's property without any oversight.

I mean, that's what people would say, I think. They'd say, listen, you know, there's going to be a $25 million civil penalty, or a $25 million collection of wrongful gains that were taken by Microsoft that's going to be going into the state. And now, the Attorney General is going to give $5 million of it to Burford—just to name a company.

Now, you could say that's bad. Now, why is that bad though? Here's what I think. It's bad because maybe we don't want only one person without the control of the legislature, and therefore the legitimacy of the rule of law, making such decisions. But it's not bad because the government of California is giving $5 million to a third party vendor. The government of California does that all the time. The government of California sells land, it has catering contracts, it hires people to fill potholes. Now, it is true that when the government of California, or New York, does that, corruption can occur.

But it seems to be a little odd to say that it's a criticism of this particular approach to solving a problem, which is that there's underfunding for litigation on behalf of the citizens of the state, that there may be the temptation for the government actors who have been tasked to do this, to sell property owning to the state for too little to private citizens, maybe even people who bribe them, or who promise them support in future elections? I mean, this is unfortunately a problem endemic to the complex democracy that we live in. I don't see, however, that it's a reason to be critical of this particular innovation.

MR. ISSACHAROFF: Tom?

MR. COYLE: So, one of the things I talked about in my paper, which I didn't have time to go into, was what Professor Fitzpatrick brought up, and that's—I didn't call it transaction costs—I called it search costs. And that's going out and actually finding these claimants.

But the first thing I want to say, and this goes from what Professor Issacharoff said, is that there's this question of compounding litigation inducement mechanisms. So, if you look at *Concepcion*, for example, the consumer arbitration contract in *Concepcion* had a huge minimum recover. It was $7,000 or something—$7,000, but that still wasn't enough to defray the costs to get people to go. So, in a class action, you would worry, well, if you have 100,000-person class, and we're all already allowing you to minimize your transaction costs through the

class, then maybe you shouldn't have this litigation inducement mechanism.

But in my proposed solution, you don't have the reduction in transaction costs or search costs through the class action. So, the litigation inducement mechanism—and in the case of *Italian Colors* it would be the trebling of damages under antitrust, which made the average claim worth about $1900—you don't have the problem of doubling the inducement mechanism, the inducement mechanism actually fulfills its role because you're not saving transaction costs through the class aggregation.

And the second thing about minimizing search costs, and this stems from what Professor Issacharoff said about using the Internet, is that I proposed you go out and you aggregate claimants in two ways. And the first way you do that is, it actually costs money. You put boots on the ground, you go find people accepting American Express cards, and you sign them up. But what you do is you go find the claimants with the biggest claims. Remember, this was a formulaic harm case.

So, based on your sales volume on American Express credit cards, it's going to determine how much you were harmed by the tying arrangement. So, you go and find the companies with the biggest value claims first, and you aggregate them, and you spend money to aggregate them. And then once you have about a breakeven number, right, so you're going to get your potential money back from aggregating them, you go public, and you create a media frenzy, and you make American Express's stock price go down by announcing you've aggregated all these claims and you are coming after them. And then you ride that publicity and use the Internet the way that they do in Australia to have people sign up. Because, these aren't individuals who lost $100. These are businesses—small businesses—who lost $2000, $3000, which to them, actually means something.

If all they have to do is go click a link on the Internet, then you know, it's kind of irrational to think that they wouldn't go do that, especially if you're spending money on a media campaign to create publicity and also to increase the pressure on American Express to settle. So, you kind of get a twofold benefit. You get cheaper aggregation on the second half, and you increase the benefit via the desire for the defendant to settle.

MR. FITZPATRICK: Can I ask a quick question of Tom? Why not just have the financier buy up the claim?

MR. COYLE: So, I would love if you could do that, but you're not allowed in New York. State champerty law prevents buying of claims in New York, and the contracts in *Italian Colors* were governed by New York Law. But also, if you just think through it one step further. Fine, you can buy the claims. What's to stop the company from then just writing into the contact, "You can't sell this claim." Right? So, you're back to square one. So, maybe it will work one or two times if champerty didn't prohibit it, but then the companies are not dumb.

MR. ISSACHAROFF: So, we have questions from the audience. I think we have microphones. So, the first one is Ed Rock, who failed spectacularly this morning at providing us the securities law—wants a second chance.

MR. EDWARD ROCK: So, I want to follow up on this last exchange and suggest that, based on the Delaware experience—that Brian's intuition that making claims easily tradable is actually central to figuring out a solution to this problem. Under Delaware law, a controlling shareholder can freeze out the non-controlling shareholders, and there's not a lot that the non-controlling shareholders can do to block it. And that creates an obvious conflict of interest, because a controlling shareholder wants to pay a low price.

Delaware has two ways of handling this. One is through a fiduciary duty action, which is a class action that has all of the problems of class actions. The second is through an appraisal remedy. Historically, the appraisal remedy was viewed as a very, very plaintiff-unfriendly remedy because valuation is expensive, and appraisal does not provide for any aggregation of claims and no class actions.

What's happened in the last eight years, five years or so, is that hedge funds have entered the space, and hedge funds have bought up shares of companies that are having freeze-outs. They then "aggregate the claims," because under corporate law, if you buy the share, you buy the claim, and hedge funds have made a very nice business out of prosecuting appraisal claims in freeze-out mergers. And they hire the lawyers who they want to hire. Some lawyers have taken the view that, wouldn't it be better to bring all this within a single firm, as Maya suggested this morning. And a couple of lawyers I'm aware of tried to raise a fund-a private equity sort of fund-to

fund appraisal actions, but you know the hedge funds, the investors weren't so interested because it actually works pretty well if the hedge fund buys the claim and then hires the lawyer.

Now, what's distinctive about corporate context is you can buy the claim by buying the share. It's a very, very efficient way of transferring claims. What we see in the freeze-out context is where you have that kind of low-cost, low transaction cost ability to aggregate claims, you can get a pretty effective and efficient outcome.

MR. ISSACHAROFF: This is a little bit like the early history of the use of litigation finance and patent, where you bought, effectively, the firm, because the firm was the claim, and the claim was the right to litigate. And so in the corporate transactions world, which meant just buying the company, you bought the rights to all the claims that they might have. Yes?

MALE VOICE 1: The example of being able to buy a share of stock and own the claims that are within the company, which can be death knell claims, is a perfect platform to say what Tim was saying earlier today, is, there is no reason in the world to prohibit the sale of claims *or* to prohibit the sale of control, so long as you have some rules and regulations that might govern it. So, this whole very important part of the industry is, I think, answered through that, and then you have corporate regulations.

But if I can get back to one thing that Tony said. Tony, I've tried what you have just said, and that is going to the tax authorities in England, because they don't know what they're doing and they burn, basically, claims for tax of hundreds of millions of dollars. They don't even know how to pursue it.

And I've gone to the SEC here, and I've gotten the same reaction. Granted, I haven't really explored it. But the reaction is, "No, we're not going to do any funding. Number one, we don't like funders." Now, at that time it was still a bad reputation. "But number two, we're not going to pay what the funders are going to want. We just don't pay two or three, or four to one. We're the government. So if you want to do this, if you want to hire, we would pay you a fifth of what you would get in your practice." So, I found that as a real block to what you are suggesting. I wish it weren't there.

MR. ISSACHAROFF: Let's take one more question, then we'll go back to the panel. Go ahead.

MALE VOICE 2: I have a question to Tom, and I think it relates back to Lee Drucker's presentation early in the morning, when he said quite provocatively that legal claims are just like bonds or other classes of assets, and, um, there are obvious differences.

I agree that there might be some kinds of claims whose value is enough to make it worthwhile to aggregate them through funding. And I think it's a fascinating idea of another way of informal aggregation. But the practical problem with, then converting that into securities, is you don't have a definite duration of your asset. Now, this in itself will make a big chunk of institutional investors uneasy. There are ways to deal with that, mainly by discounting the value based on some assumed, you know, time to money. So, the time to final resolution, and then to payout. But if you start doing that, you might need to depress the net present value of this pool so much that, again, you're running the risk that there is a very limited universe of claims that would actually work that way. So, I was wondering if you thought about it.

MR. COYLE: So, I did think about that, and I guess I should have mentioned this is my presentation, but securitizing litigation proceed-backed securities, it's not novel. It actually happens. So, the context in which it happens is mergers, right? So, you have two companies who want to merge, and one of them has a really strong claim against a third party, but you can't value that claim, so it makes valuing the merger impossible.

What companies will do is they'll spin off the potential proceeds from the unvalued claim, and then they'll issue, like, just in a normal spinoff, shares to their shareholders to preserve the value of that claim, and then they'll value the merger based on the company not having the claim.

This has happened before, and it happened in 1999 in the Windstar litigation. Usually, when they do this in a merger, it's a CVR—contingent value right—and it doesn't become freely tradeable. But in 1999, they actually registered the litigation proceed-backed securities for the Windstar litigation, and they traded in the market, and there was actually significant demand.

So, they opened around $7, and I think the high traded around $17.5, the low traded around $5, over the entire unknown duration of the claim. And further, at the peak trading volume, when it looked like a settlement was on the table, it

was about 1.3 million shares a day. It averaged about 250 thousand. But there is market demand there.

And not to scare people, but if 2007 taught us anything, bankers can sell a security, right? You know, whether or not that's a good thing is not something to opine on. So the durational problem really is a problem in offering the security, but you know, if you just look it, take a step back and look at precedent, there was market demand. So, you might as well try it, I guess.

MR. ISSACHAROFF: Yes?

MALE VOICE 3: Tom, about your intriguing proposal, let me confess, first, I haven't read the paper and I didn't fully understand it, but I detect that there are three assumptions there, and all three of them seem to be shaky. One is that there's some kind of correlation—or predictability would be a better word. It could be expressed mathematically, based on the fact that you're only dealing with the conduct of the defendant, American Express. Except if you're dealing with thousands of individual arbitrated cases, and hundreds of different arbitrators.

Nobody can be more arbitrary and unpredictable than an arbitrator. I've done a lot of practice with administrative law judges, and I know on the same case, two judges can be diametrically apart, and I'm not sure you can get that kind of certainty. One arbitrator in Idaho has this way of approaching it, another one has another. They may switch arbitrators. American Express would use as many different arbitrators as possible.

Second assumption is that there are going to be economies of scale, because all the prep work is going to be done by one organization. However, that's hard to quantify because, again, one arbitrator may want papers in a certain format or he won't accept them at all; another one has got to be three-hole punched at a 45-degree angle. And they make it up.

And again, I've seen this thing in actual law practice with administrative law judges, and with dealing with hundreds of arbitrators, the procedures become arbitrary in the form of the evidence they'll accept.

What's convincing to one might not be convincing to another, so that things may constantly have to be reformatted so that your economies of scale are diminished when you have to reinvent the wheel for every arbitrator that you do it.

And that leads to the third one. With that degree of uncertainty, would you really be able to securitize it without giving the potential investors a mathematical basis to see what their return is likely to be. And that's, you know—I could be completely misinterpreting what you're saying, but those are the three things that hit me as I listened to it.

MR. ISSACHAROFF: Okay. Before we answer those, let's take two more, because we're running out of time. Yes? And then Josh. Yes? I'm sorry, I don't know your name.

FEMALE VOICE 1: I haven't a clue whether the system exists in other countries as well, but in Germany, since many years, people who have no money to go to court or which have been sentenced to court, they will be paid all costs if the judge has decided that the case will be successful. So, people who have no money and live with money on the state have absolute free access to justice and to the courts. I think it's a quite good system.

MR. ISSACHAROFF: Okay. So, we have the German social welfare use of litigation, which is not just for public, but also private insurance in Germany provides litigation assistance. It's a very different system than ours.

Yes, Josh? Last question.

MALE VOICE 4: Thank you. This question is for Brian, in response to the question that you posed at the end of your presentation, which was asking because, essentially, class action attorneys are big boys who can fight against the wealth of the defendants, whether there was a need for litigation finance in the class action space. I'd ask you to consider two scenarios.

First, there's a huge adverse impact amongst the plaintiffs in those classes while they wait for the litigation to conclude. Yes, in the $100 cases against the banks that you point out, there may not be that adverse impact.

But in large cases, like BP oil spill, the BP oil spill case, DePuy hip case, Transvaginal Mesh cases, people need surgeries, they need living expense money directly as a result of what happened to them. And litigation finance, I'd propose, plays an important impact in providing the access to justice, standing up for the little guy, like you propose.

The second thing I'd say is, while the attorneys are well-funded, they might be too well-funded. And I think litigation finance has a role to, essentially, take some of the windfall away from some of the class action attorneys and put it back in

the pockets of plaintiffs using litigation finance as a means to compete against the contingency fee. It's something that Tony mentioned in one of his proposals. Thank you.

MR. ISSACHAROFF: Unfortunately, while we had an excellent panel, we had a lousy moderator who did not read the schedule properly. So, we have chewed in a little bit to the time of the next panel. So, I'm sorry but we cannot answer anybody. So, we are done, and let's thank the panel.

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Editor's note: This Conference transcript has been edited for clarity.