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Financing Issue Classes: Benefits and Barriers to Third-Party Funding

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FINANCING ISSUE CLASSES: BENEFITS AND BARRIERS TO THIRD-PARTY FUNDING

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INTRODUCTION

Issue classes have gained steady traction over the last few years as plenary class certification has become more difficult. By focusing on a defendant's uniform conduct, issue classes can capture and adjudicate collectively what is truly common to all the people affected by the same acts or omissions.[1] But funding quandaries hamper the issue class's utility. Plaintiffs' attorneys may be reluctant to request issue certification even in multidistrict litigation where they might prove most useful, in part because of the uncertain nature of attorneys' fees.[2] Unlike plenary classes or settlement classes, issue classes are uniquely situated because they do not immediately produce a common fund from which successful class counsel can recover.

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1. *See* Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA L. REV. 1855, 1871–81 (2015) [hereinafter Burch, *Constructing Issue Classes*]. This is true at least insofar as a defendant's conduct toward plaintiffs is non-individuated. *Id.* at 1875.

2. *Id.* at 1905.

Although courts might turn to charging liens and the common-benefit doctrine for sound compensation analogies,[3] those doctrines still require plaintiffs' attorneys to shoulder an enormous amount of risk. That risk is compounded in the multidistrict-litigation context when issue-class counsel must split fees with individual claimants' attorneys who resume case control upon remand. Remand scenarios, while rare, could require issue-class counsel to entrust the resolution of individual cases to attorneys with whom they may not be familiar and then fight to collect fees in dispersed jurisdictions.

Enter alternative legal financing. Third-party financiers—hedge funds, venture capitalists, and private investors—can bridge the gap with a greater ability to play the long game, aggregate financial incentives across plaintiffs' law firms, and, in multidistrict litigation, follow through on collections if a case is remanded. But third-party funding faces substantial impediments too.

As the literature and lore surrounding alternative financing conveys, sentiments often fall into one of two camps: financiers are either knights in shining armor galloping in on a white horse to assist David in taking down Goliath or the new wolves of Wall Street with their sights now set on commodifying our legal system.[4] The truth, of course, is far more nuanced. If nothing else, this study in contrasts reveals that financiers have a long way to go before achieving mainstream acceptance. Judges, for example, typically regard funders with marked skepticism, concerned that they turn attorneys into puppets.[5] That general concern turns specific in class actions, where settlement "consent" turns on adequate representation and a failure to opt-out, not on traditional acceptance.

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3. *Id.* at 1908–14.

4. *See* Mattathias Schwartz, *Should You Be Allowed To Invest in a Lawsuit?*, N.Y. TIMES MAG. (Oct. 22, 2015), http://www.nytimes.com/2015/10/25/magazine/should-you-be-allowed-to-invest-in-a-lawsuit.html?_r=0.

5. *See, e.g.*, Public Opinion Strategies, *National Judges Survey*, at 6 (Nov.–Dec. 2013), http://masonlec.org/site/rte_uploads/files/LEC%20National%20Judges%20Survey%20Interview%20Schedule%20Performed%20by%20Public%20Opinion%20Survey%20November%20December%202013.pdf.

Despite the skeptics, the third-party financing industry continues to grow and flourish.[6] Not only is alternative legal funding well positioned to alleviate financing concerns in issue classes, but, if the relationship is structured such that the financier's incentives align with the class members' interests, then funders might likewise alleviate principal–agent problems.[7] What remains to be seen, however, is whether industry insiders are willing to deviate from their current funding models to realign their interests with absent class members and build the goodwill necessary to gain a toehold in the United States' class-action market. Accordingly, this symposium essay identifies the incentives, benefits, and pitfalls of outsourcing funding to set the agenda for future research.

I.
The Funding Problem in Issue Classes

Plenary class certification has become increasingly less likely in a host of substantive areas ranging from employment discrimination to products liability. In a recent article, I suggested that issue classes under Rule 23(c)(4) could circumvent the mismatch between private attorneys' regulatory reach in light of stricter certification standards and a defendant's nationwide conduct.[8] Currently, even when a defendant acts uniformly, concerns over a plaintiff's eligibility for relief inject variances that may prompt individual questions to predominate over common ones. But issue classes as to a defendant's conduct—what a defendant knew, when the defendant knew it, whether a defendant used a biased hiring procedure or compensation policy, for example—can refocus the court's attention on what actually connects the plaintiffs for adjudicative purposes.[9]

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6. Roy Storm, *Numbers Never Lie—Or Do They?*, Chi. Law. (Feb. 2016) http://www.chicagolawyermagazine.com/Archives/2015/02/Litigation-Funding-Business.aspx (citing profit increases from a number of third-party lenders, but noting certain risks facing the industry).

7. Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. Rev. 1273, 1277 (2012) [hereinafter Burch, *Financiers as Monitors*]; Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions*, 63 DePaul L. Rev. 561, 566 (2014).

8. *See* Fed. R. Civ. P. 23(c)(4); Burch, *Constructing Issue Classes, supra* note 1.

9. *See* Burch, *Constructing Issue Classes, supra* note 1, at 1871–81.

Issue classes may likewise better serve class members than settlement classes, where courts certify a class for settlement purposes only.[10] In their quest for certification in the current anti-class landscape, plaintiffs' attorneys may winnow the constellation of claims they seek to certify, and 'litigate' with an all-encompassing aim toward resolution via a settlement class action. Settlements classes can tip the balance of power in the defendants' favor: plaintiffs gain settlement leverage by credibly threatening trial, and without plenary class certification, they lose that bargaining chip. The defendant, on the other hand, has the "power of a monopolistic purchaser of res judicata" and can shop around for the best deal by negotiating with other plaintiffs' lawyers who would welcome settlement and the attorneys' fees that accompany it.[11] Settlement classes might also mean that the court never hears or adjudicates the dispute's merits.[12] If cases lack adversarial litigation before settling, then the judge is at an informational disadvantage in acting as a check on collusive deals. These circumstances create a risk that settlement classes will undervalue class members' claims.[13]

Issue classes, on the other hand, may strengthen the relationship between a claim's merits and its final disposition.[14] First, plaintiffs' attorneys currently tend to leave valuable claims on the table that endanger plenary class certification. Allowing attorneys to target the defendant's conduct directly

10. *See, e.g., In re* Chinese-Manufactured Drywall Prods. Liab. Litig., MDL No. 2047, 2013 WL 499474, at *11 (E.D. La. Feb. 7, 2013) (certifying settlement class actions); *In re* Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig., No. 8:10ML2151JVS (FMOx), 2012 WL 7802852 (C.D. Cal. Dec. 28, 2012) (provisionally certifying a national settlement class for economic-loss cases).

11. Howard M. Erichson, *The Problem of Settlement Class Actions,* 82 GEO. WASH. L. REV. 951, 953 (2014); *see also* Creative Montessori Learning Ctrs. v. Ashford Gear LLC, 662 F.3d 913, 918 (7th Cir. 2011) ("[W]e and other courts have often remarked the incentive of class counsel, in complicity with the defendant's counsel, to sell out the class . . . .").

12. Erichson, *supra* note 11, at 953. Courts consider the merits only insofar as they overlap with the certification requirements. *See* Amgen, Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1194–95 (2013). The move away from the merits is not just limited to class actions. *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure,* 88 N.Y.U. L. REV. 286, 357–60 (2013).

13. *See* Erichson, *supra* note 11, at 953.

14. *See* Burch, *Constructing Issue Classes, supra* note 1, at 1916–19.

without worrying about a plaintiff's eligibility for relief may encourage them to assert the full panoply of claims available to class members. That, in turn, can further substantive goals. Second, issue classes restore plaintiffs' ability to credibly threaten to try the case, and thus strengthen their bargaining position. Finally, vigorous litigation over the certification question and the potential class-wide trial can equip judges with merits-related information that they can use to evaluate the fairness of any eventual settlement.

Despite the upside, issue classes face a substantial funding hurdle. In plenary classes, restitution theories justify paying class attorneys: a class member who benefits from a class settlement will be unjustly enriched at counsel's expense unless counsel receives a reasonable fee.[15] Similarly, in issue classes, lawyers confer a substantial benefit on class members by successfully advancing the litigation.[16] But there is a catch—the common-fund doctrine typically requires a fund that "consists of money or other property" before class members must contribute to the attorney's costs of securing it.[17]

For many issue classes, establishing a common fund after a successful class-wide trial on the defendant's conduct will be a non-issue. Once they survive dispositive motions and become certified classes, many will settle collectively in the same court and thereby create a common fund.[18] Common funds have

15. *See* Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) ("The common fund doctrine reflects the traditional practice in courts of equity and it stands as a well recognized exception to the general principle that requires every litigant to bear his own attorney's fees."); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 cmt. c (2011) ("Class counsel assumes for this purpose the role of restitution claimant; the restitution claim is asserted by the counsel against the class. Counsel asserts that the class will be unjustly enriched, at counsel's expense, unless a reasonable fee is awarded from the common fund."); Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656, 663–66 (1991).

16. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §2.09 cmt. c (AM. LAW INST. 2010) ("The lawyers in the aggregate proceeding will have conferred a substantial benefit on claimants insofar as that preclusive effect, in a given instance, inures to their advantage in other proceedings.").

17. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29(1), cmt. a (2011); ALAN HIRSCH & DIANE SHEEHEY, FED. JUDICIAL CTR., AWARDING ATTORNEYS' FEES AND MANAGING FEE LITIGATION 61 (2005).

18. Burch, *Constructing Issue Classes*, *supra* note 1, at 1889 ("[C]ertifying an issue class should not become a backdoor to plenary certification via a settlement class action."). If an issue class settles after it was certified, then

materialized in high-profile issue class successes and failures such as *Engle* and the *Blood Products Litigation.*[19] When a common fund exists and the certifying court retains jurisdiction over that fund, class attorneys' fees can proceed conventionally.

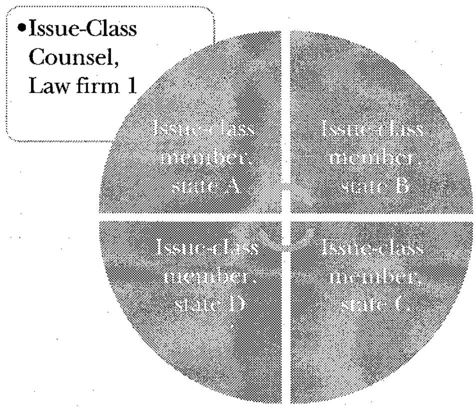
Even if no common fund exists immediately, some subsequent proceedings will still be straightforward. When federal courts litigate federal questions that would entitle class members to considerable damages, plaintiffs' attorneys have every incentive to recruit and represent claimants in additional proceedings. *McReynolds* is a prototypical illustration: once the district court used an issue class to determine whether Merrill Lynch's teaming and account distribution policies violated Title VII, each class member would then have to prove eligibility for relief, but because most brokers "earn[ed] at least $100,000 a year," individual suits were possible.[20] Plus, those claims would continue in the same court that certified the issue class. Figure 1 illustrates this possibility.

the judge must conduct a separate Rule 23 analysis as to the settlement class. *Id.*

19. Engle v. RJ Reynolds Tobacco Co., Order Granting Petition of Class Counsel for Attorneys Fees, Case No. 94-08273 (Fla. Cir. Ct. 2008); DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 304–06 (2000); E-mail from Stanley Rosenblatt, Howard Engle's Attorney, to Elizabeth Chamblee Burch, Associate Professor of Law, University of Georgia College of Law (Sept. 11, 2014, 2:33 p.m. EST) (on file with author). For more on how these cases settled, see Burch, *Constructing Issue Classes, supra* note 1, at 1907.

20. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 491–92 (7th Cir. 2012).

FIGURE 1: ISSUE-CLASS CONFIGURATION IN MULTI-DISTRICT LITIGATION (MDL)



Issue classes may likewise prove useful in multidistrict litigation, where many plaintiffs sue and the Judicial Panel on Multidistrict Litigation (the Panel) aggregates them for pretrial purposes. Because the authorizing statute requires only a single common question of fact,[21] oftentimes proof of eligibility components (specific causation, reliance, damages, etc.) differ and can undermine plenary certification. When plaintiffs rely on a common body of evidence to establish a defendant's conduct, litigating those questions collectively through an issue class can materially advance the resolution of all plaintiffs' claims, as well as claims by those who have not yet sued.[22]

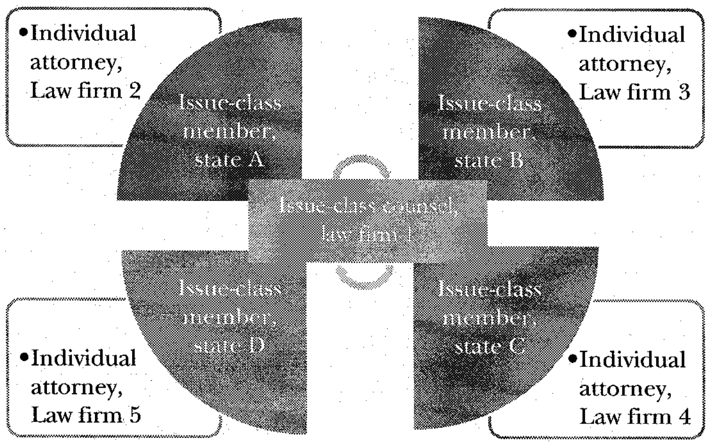
There is, however, little to no precedent for awarding fees once counsel successfully litigates an issue class in multidistrict litigation, and the remaining issues must be remanded for trial. There are two principal concerns that arise: (1) meritorious claims that are too expensive to pursue individually may

21. 28 U.S.C. § 1407 (2012).

22. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 2.02(a)(1), 2.02 cmt. a, 2.08, 2.08 cmt. a (AM. LAW INST. 2010); McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 234 (2d Cir. 2008) (requiring issue classes to "materially advance the litigation"); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472–73 (5th Cir. 1986) ("It is difficult to imagine that class jury findings on the class questions [regarding the state-of-the-art defense] will not significantly advance the resolution of the underlying hundreds of cases."); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.24 (2004) (suggesting that aggregate treatment should "materially advance[ ] the disposition of the litigation as a whole").

be abandoned; and (2) there may be no common fund. Multiple attorneys further complicate the matter. While issue-class counsel will have contributed to the outcome with issue preclusion, a plaintiff may have a different attorney who litigates her case upon remand, which raises questions about fee splitting. If issue-class counsel materially advances the class members' claims by establishing a defendant's conduct components, then she has conferred a substantial, issue-preclusive benefit. Failing to compensate her when plaintiffs cash in on that preclusive effect through a successful settlement or verdict would unjustly enrich the plaintiffs at class counsel's expense. Figure 2 illustrates potential attorney–client relationships post–remand.

FIGURE 2: FOLLOW-ON PROCEEDINGS POST–MDL REMAND



There are some existing doctrines that help ease this tension, such as charging liens and the common-benefit doctrine.[23] In most states, charging liens permit attorneys to assert liens against a client's cause of action when they invest labor and resources into the client's case and help produce a successful judgment or settlement.[24] The lien attaches upon filing

23. For more detail on these doctrines, see Burch, *Constructing Issue Classes*, *supra* note 1, at 1908–16.

24. *E.g.*, Froelich v. Graham, 80 S.W.3d 360, 363 (Ark. 2002); Musikoff v. Jay Parrino's The Mint, LLC, 796 A.2d 866, 869–70 (N.J. 2002) ("An attorney's statutory lien attaches broadly to any 'verdict, report, decision, award, judgment or final order in his [or her] client's favor, and the proceeds

the initial case and accompanies the claim through judgment. Translated into the issue-class context, filing the class complaint (the cause of action) would trigger class counsel's lien if: (1) counsel successfully litigated the issue; (2) the issue class inured to the plaintiffs' benefit through preclusion; and (3) the plaintiff-class member ultimately received a favorable judgment or settlement award.[25] The court conducting the follow-on proceedings could then apportion fees to class counsel and individual counsel based on quantum-meruit principles.[26]

The common-benefit doctrine complements the common-fund doctrine in cases where no common fund exists but plaintiffs' attorneys successfully litigate declaratory or injunctive relief.[27] In these cases, the common-benefit doctrine permits attorneys' fees when the litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction of the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them."[28] If plaintiffs' attorneys establish conduct components through an issue class and materially ad-

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thereof in whosesoever hands they may come.'"); RACHEL M. KANE, 7 AM. JUR. 2D *Attorneys at Law* § 318 (2014); RACHEL KANE ET AL., 7A C.J.S. *Attorney & Client* § 446 (2014); ROBERT L. ROSSI, 2 ATTORNEYS' FEES § 12:13 (3d ed. 2014).

25. Constructive liens generally follow "the judgment into whatever form it may assume." *Froelich*, 80 S.W.3d at 363; *see also* Trickett v. Laurita, 674 S.E.2d 218, 229 (W. Va. 2009) (noting that a charging lien "follows the proceeds, wherever they may be found").

26. *See, e.g.*, Northern Pueblos Enters. v. Montgomery, 644 P.2d 1036, 1038 (N.M. 1982) ("Because a court exercises its equitable powers in enforcing an attorney's charging lien, it may inquire into the reasonableness of the asserted fee for purposes of enforcing the lien."); People v. Keeffe, 405 N.E.2d 1012, 1015 (N.Y. 1980) ("Generally, however, if an attorney is discharged without cause he will be allowed a charging lien upon the proceeds of the lawsuit, the amount to be determined on a quantum meruit basis at the conclusion of the case."); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 125–35 (2015) [hereinafter Burch, *Judging Multidistrict Litigation*].

27. Allen v. Lloyd's of London, 975 F. Supp. 802, 806 (E.D. Va. 1997) ("[A]n award of attorney's fees and expenses under the common benefit doctrine does not depend on the specific nature of the relief granted the plaintiff. Indeed, a fee award may be predicated on the grant of either monetary or equitable relief."); HIRSCH & SHEEHEY, *supra* note 17, at 83–84.

28. Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 393–94 (1970); *see also Allen*, 975 F. Supp. at 806 (citing *Mills*).

vance the class members' claims, then counsel has conferred a substantial, issue-preclusive benefit.

Both the common-benefit doctrine and charging liens present difficulties for a transferee judge in multidistrict litigation who seeks to compensate issue-class counsel where no common fund exists. Several issues arise in this unique context.

First, to what extent can a transferee judge who certifies an issue class retain jurisdiction to award counsel's fees once the Panel remands cases to transferor courts? While precedent on this point is limited, under the plain language of section 1407, transferee judges could suggest that the Panel separate fees before remanding, which would allow transferee judges to make fee decisions.[29] In practice, the Panel has made this allowance for claims that benefit from uniform and consistent rulings, such as punitive damages.[30] Although attorneys' fees, like punitive damages, are not standalone claims, courts have recognized that "the meaning of 'claim' is not so circumscribed" so as to include only a cause of action,[31] which suggests that transferee judges might retain jurisdiction over fee awards.

On the other hand, allowing the transferee court to preside over fees after remand (and presumably post–trial) may run afoul of both section 1407 and the Supreme Court's *Lexecon* opinion.[32] As *Lexecon* explains, a transferee court's authority is limited to "pretrial" rulings and section 1407 "obligates the Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings have run their

29. 28 U.S.C. § 1407(a) (2012) (allowing the Panel to "separate any claim" and "remand any of such claims before the remainder of the action is remanded").

30. *E.g.*, *In re* Wilson, 451 F.3d 161, 167 (3d Cir. 2006) (noting that the transferee judge refused to remand to ensure "uniform and consistent application of detailed medical criteria" to opt outs); *In re* Collins, 233 F.3d 809, 810 (3d Cir. 2000) (severing punitive damages); *In re* Roberts, 178 F.3d 181, 184 (3d Cir. 1999) (severing punitive damages); *In re* Asbestos Prods. Liab. Litig. (No. VI), MDL No. 875, 2014 WL 3353044, at *1 n.1 (E.D. Pa. July 9, 2014) ("When a case is remanded, it is the Court's regular practice to sever any claims for punitive or exemplary damages and retain jurisdiction over these claims in the Eastern District of Pennsylvania.").

31. *In re Collins*, 233 F.3d at 811.

32. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

course."[33] Attorneys' fees are post-resolution issues. Rule 23(h), which governs class counsel's fee, requires that counsel move for fees "no later than 14 days after the entry of judgment," and that judges state their factual findings and legal conclusions in accordance with Rule 52(a).[34] While transferee judges would be intimately familiar with issue-class counsel's effort, without a settlement before remand, they could not make factual findings as to individual counsel's post–remand efforts.[35] While efficiency and public policy may counsel in favor of allowing transferee judges to retain jurisdiction over fees, neither proved persuasive in *Lexecon*.[36]

Second, if the courts of origin must apportion fees, those judges may be less familiar with issue-class counsel's effort and fees could lack uniformity.[37] Moreover, some states' charging-lien statutes contain peculiarities like notifying the claimant about the lien in advance[38] or requiring contracts between the attorneys and clients.[39] There are ways to overcome these obstacles, like including lien information in the class notice,[40] but requiring issue-class attorneys to have a direct contractual relationship with class members could inhibit fee recovery from clients in a minority of states.[41] Yet, even in those states, class counsel can recover fees from a class member's individual attorney on a quantum-meruit basis if the matter concludes

33. *Id.* at 34–35.

34. FED. R. CIV. P. 23(h); FED. R. CIV. P. 54(d)(2).

35. FED. R. CIV. P. 52(a).

36. *Lexecon*, 523 U.S. at 32.

37. Some states attach charging liens only to the judgment. *E.g.*, Howell v. Howell, 365 S.E.2d 181, 183 (N.C. Ct. App. 1988) ("A charging lien is not available until there is a final judgment or decree to which the lien can attach."). Even if the lien attaches to the cause of action, fees cannot be apportioned until the case concludes, which could happen in the transferor court.

38. *E.g.*, Thompson v. Montgomery & Andrews, P.A., 816 P.2d 532, 534–35 (N.M. Ct. App. 1991).

39. California is one such example. Carroll v. Interstate Brands Corp., 121 Ca. Rptr. 2d 532, 534–35 (Cal. Ct. App. 2002) ("Because an attorney's lien is not automatic and requires a contract for its creation, a direct contractual relationship between the attorney and the client is essential.").

40. For notice to be timely, it generally must take place before the lawsuit ends in judgment or settlement. Levine v. Gonzalez, 901 So. 2d 969 (Fla. Dist. Ct. App. 2005).

41. *Carroll*, 121 Cal. Rptr. 2d at 534–35.

successfully.[42] Still, that takes time and persistence, which is not reimbursable on a billable-hour rate. Because remand itself is rare, transferor courts have not devised a uniform method for handling those cases. In the asbestos cases, for example, some courts have placed trial-ready, remanded cases at the end of their docket.[43] This not only extracts an extraordinary toll on plaintiffs, but further prolongs an already protracted payday for their lawyers.

To overcome these hurdles within the current system, before remanding, transferee judges could issue interlocutory orders placing class members within presumptive fee categories (settlement immediately upon remand versus a subsequent trial on eligibility components, for example).[44] Although transferee judges would lack both full information and jurisdiction to decide final fee awards, this approach is pragmatic. First, it lends some uniformity and predictability to fees subsequently awarded in dispersed transferor courts. Second, it provides some security for issue-class attorneys who might be hesitant to undertake the endeavor for fear their payday may never come. Because transferor judges must afford interlocutory orders some deference under the law-of-the-case doc-

42. *Id.*; Trimble v. Steinfeldt, 224 Cal. Rptr. 195, 197–98 (Cal. Ct. App. 1986).

43. Participant, Mass-Tort MDL Program for Judicial Conference Committees, Oct. 8, 2015, https://law.duke.edu/judicialstudies/conferences/october2015/.

44. Certifying courts have general authority to award fees under Rule 23(h). The Eighth Circuit has also ruled that "[i]t is well established that courts can impose liability for court-appointed counsel's fees on all plaintiffs benefitting from their services." Walitalo v. Iacocca, 968 F.2d 741, 747 (8th Cir. 1992).

trine,[45] clear-error standards,[46] or comity,[47] they should not revisit the presumptive allocation categories absent changed circumstances. Finally, because issue-class counsel cannot control how others handle remanded cases, this approach incentivizes class counsel to inform and represent as many individual clients as possible. This may make smaller claims more economical to litigate on remand, prompt careful notice to class members, and ensure faithful agency so long as no structural conflicts exist between clients.[48]

II.
ENTER THIRD-PARTY FUNDING?

While it is possible to navigate the current system's constraints without it, the question remains as to whether third-party financing could play a beneficial role in funding issue classes. Just as law firms aggregate clients, financiers could aggregate attorneys or clients, too, depending on the nature of the funding relationship. The funder's ability to work across multiple law firms gives it the ability to follow disaggregated litigation to its originating forum in a way that issue-class counsel can't unless the same firm represents all the plaintiffs. Figures 3 and 4 illustrate how external financing might change the funding relationship by backing firms that lack intra-firm agreements dictating fee sharing and capital contributions.

45. *See, e.g.*, *In re* Ford Motor Co., 591 F.3d 406 (5th Cir. 2009) (using law of the case to determine transferor court's deference to transferee court's orders); *In re* Zyprexa Prods. Liab. Litig., 467 F. Supp. 2d 256, 273–75 (E.D.N.Y. 2006); *see also* MANUAL FOR COMPLEX LITIGATION § 20.133 (4th ed. 2004) (suggesting that the transferor judge can vacate or modify rulings by the transferee judge subject to "law of the case" considerations, but that transferor courts should not do so absent a significant change in the circumstances because it would frustrate the purpose of centralization).

46. *See, e.g.*, Motorola Mobility, Inc. v. AU Optronics Corp., No. 09-C-6610, 2014 WL 258154 (N.D. Ill. 2014); Hill v. Ford Motor Co., 975 F. Supp. 2d 1351, 1351 (N.D. Ga. 2013).

47. *E.g.*, Guddeck v. SmithKline Beecham Corp, 34 F. Supp. 3d 990, 997 (D. Minn. 2014) (suggesting that the law-of-the-case doctrine is inapplicable to interlocutory orders but nonetheless noting that "considerations of comity and judicial economy weigh against disturbing [a transferor] court's rulings" and applying a similar standard as *In re Ford Motor Corp.*, 591 F.3d 406).

48. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a) (A.L.I. 2010) (defining structural conflicts).

FIGURE 3: TRADITIONAL NON-CLASS AGGREGATION IN MULTIDISTRICT LITIGATION

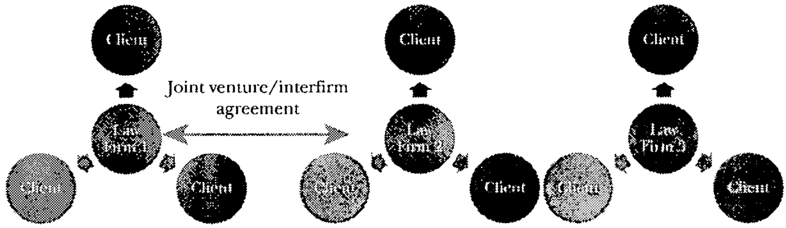
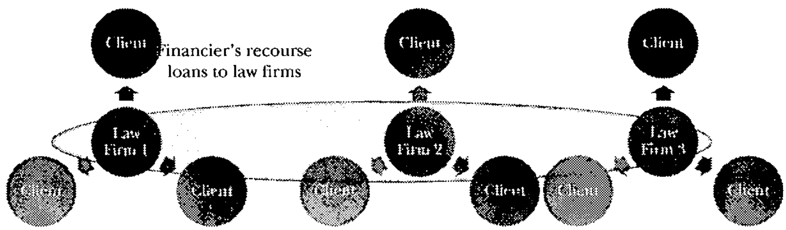


FIGURE 4: POSSIBLE THIRD-PARTY FINANCING STRUCTURE IN MULTIDISTRICT LITIGATION



In theory, meritorious claims that are too expensive to pursue individually on remand would receive continued funding from a financier who stands to gain not only in that particular case but from the spillover effect it has on others like it. As such, the information sharing and collective wisdom gained through consolidation need not end when formal centralization concludes. The funder's ability to coordinate resources and aggregate information across clients and law firms can advantage plaintiffs in several ways.

First, if a single funding company financed disaggregated claimants' continued litigation in transferor courts, it could combat a defendant's divide-and-conquer strategy. That strategy is currently working to the defendants' advantage in remanded asbestos cases. Berkshire Hathaway, under its various subsidiaries, has purchased the reinsurance obligations for asbestos claims and is reportedly delaying and refusing to settle particularly with law firms that have fewer cases.[49] According

49. *See* William Powell Co. v. Nat'l Indem. Co., No. 1:14-cv-807, 2015 WL 5729381 (S.D. Ohio Sept. 30, 2015) (dismissing a complaint describing various defense tactics that subsidiaries of Berkshire Hathaway have used in the asbestos context); Brief for Resolute Management Inc. as Amicus Curiae

to the lawsuits filed over these practices, the company pursues aggressive delay and payment reduction strategies like low-ball offers that give the company time to invest the "float"—the money it holds from policy payments before holders make claims.[50] When the company settles, it does so cheaply and then uses that reduced price point as the new going rate even for law firms with a larger inventory of asbestos claims.[51] Defendants have purportedly pursued a similar strategy even within consolidation: in the trans-vaginal mesh cases, the largest set of multidistrict proceedings since asbestos, defendants are rumored to be settling cases in bulk and on the cheap. A plaintiff's firm with just a few cases must pay the lead lawyers to package its cases with many others like them before the defendants will discuss settlement. If a financier backed all of the cases, it stands to reason that it could cut these "pay-to-deal" costs as well as negate a defendant's divide-delay-and-diminish strategy.

Second, financiers could reduce costs within the pretrial aspects of issue classes. When lead lawyers conduct discovery in multidistrict litigation or assign it to their law-firm allies, there

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Supporting Petitioners, Travelers Indemn. Co. v. Bailey, 557 U.S. 137 (2009) (No. 08-295), 2009 WL 271048 ("Resolute Management Inc. is the administrative arm of the Berkshire Hathaway Insurance Group's run-off operation. The primary business activity of the run-off operation is the assumption of other insurers' liabilities arising from their discontinued lines of business . . . . The long-tail insurance liabilities assumed under these transactions include liabilities related to asbestos exposure . . . ."); Mark Greenblatt, *Berkshire Hathaway Subsidiaries Deny, Delay Asbestos, Hazard Claims, Suits, Insiders Allege*, SCRIPPS NEWS, (Oct. 7, 2013), http://www.wptv.com/news/local-news/investigations/berkshire-hathaway-subsidiaries-deny-delay-asbestos-hazard-claims-suits-insiders-allege_20140102230128180.

50. Greenblatt, *supra* note 49. *See generally* Paul Walker-Bright et al., *Policy Holders with Long-Tail Claims Under Liberty Mutual Policies Should Be Prepared for 'Sea Change' in Claims Handling After Berkshire Hathaway*, REED SMITH CLIENT ALERTS (July 19, 2014) ("The longer it takes to pay claims, the longer the money can be invested and the greater the profit."), https://www.reedsmith.com/Policyholders-with-Long-Tail-Claims-Under-Liberty-Mutual-Policies-Should-Be-Prepared-for-Sea-Change-in-Claims-Handling-After-Berkshire-Hathaway-Deals-07-18-2014/.

51. *See* Greenblatt, *supra* note 49 ("Asbestos defendants often drag out court proceedings, Accurso said—a strategy he called 'delay, deny until they die.'"). *But see* Chad Hemenway, *Berkshire Hathaway: Asbestos Claims-Handling Story, Inaccurate, Misleading*, PROP. CASUALTY 360.COM (Nov. 1, 2013) (disputing Greenblatt's account), http://www.propertycasualty360.com/ 2013/11/01/berkshire-hathaway-asbestos-claims-handling-story.

is an incentive to perform that service in-house. Document review can generate billable hours for attorneys, which are eventually paid with the profit baked into the hourly rate. That means that firms are less likely to outsource review overseas to a legal process vendor that could perform the service at less expense to plaintiffs.[52] Such vendors require only attorney supervision; the vendor's work constitutes a litigation expense and is reimbursed at cost, thereby providing substantial savings to plaintiffs.[53] Where financiers footing the bill might rely on those services to keep costs down, law firms would prefer to profit from the billable hours.

Third, like other repeat players such as plaintiffs' lawyers, financiers will develop a vast knowledge about the myriad layers of administrative service providers that surround multidistrict proceedings, some of whom may renege on their price structuring and deliverables. These include document warehousing services and claims administrators.[54] Because some of these auxiliary services relate to a lawsuit's conclusion, such as claims processing that could occur post–issue class through a private settlement, there is little regulatory or judicial oversight. As repeat players, financiers could use their size and the promise of future business as extralegal carrots and sticks. As such, they might negotiate reduced prices and incentivize providers to follow through on their commitments. Moreover, publically traded financiers who have to divulge their expenditures might be less susceptible to providers' enticements—wining, dining, and offers of all-expense-paid trips—and more attune to their bottom-line bid.

Finally, even if a third-party financier lacks a relationship with the law firms handling the remanded cases, it has the means, incentive, and specialization to pursue its compensation. In that way, when issue-class members' cases settle or end in a favorable judgment in their originating courts, a financier

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52. *See* Morris A. Ratner & William B. Rubenstein, *Profit for Costs*, 63 DePaul L. Rev. 587, 603–04 (2014) (discussing functions that nonlawyers can perform under attorney supervision such as work coding and searching discovery documents, but noting that paying attorneys more for their time incentivizes them not to outsource work in a cost-effective manner).

53. *Id.*

54. *E.g.*, BrownGreer, http://browngreer.com; Garretson, http://www.garretsongroup.com; Providio, http://www.providiomedisolutions.com; Rust Consulting, http://www.rustconsulting.com.

can recoup and profit from the benefit issue-class counsel conferred.[55]

In many respects, one might categorize funders' benefits in issue classes under the umbrella of "monitoring." They perform a similar role to institutional investors in securities class actions as described in Elliott Weiss and John Beckerman's article, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions.*[56] Weiss and Beckerman suggested that sophisticated, institutional investors with the most at stake—and thus the most incentive to monitor class counsel—should serve as lead plaintiffs in securities class actions. Like institutional investors, financiers possess the legal acumen and financial impetus to perform this role. But much of the monitoring and the aforementioned upsides depend on the incentive structure underpinning the funding relationship. For example, if financiers simply serve as stand-ins for banks, substituting only their willingness to view pending suits as assets and loaning money directly to law firms on a recourse basis with higher interest rates, then that does little to improve the status quo. In fact, the arrangement may be more harmful: higher interest rates paid by the law firm may prompt the firm to try to pass those costs on to clients or absent class members and cut further into their recovery, or it may amplify the pressure on attorneys to settle quickly and cheaply.

In 2011, I wrote an article titled *Financiers as Monitors in Aggregate Litigation,*[57] which suggested ways in which funders might allay some of the skepticism that still surrounds them by changing the nature of the funding relationship. Instead of compounding pressure on attorneys to settle—maybe in ways that disserve their clients—financiers could play the role that Weiss and Beckerman envisioned for institutional investors: so-

55. To be sure, alternative-financing regimes can confer other benefits as well. They might, for example, help women overcome barriers to multidistrict litigation leadership roles. Amanda Bronstad, *In Mass Torts—Move over, Mister*, NAT'L L. J., Feb. 16, 2015 ("A major reason for the shortage of women on the plaintiffs side is money."). Others writing in this area have ably identified these advantages, so I will not rehash them here.

56. Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2109 (1995). Their work lead Congress to enact the PSLRA. S. REP. NO. 104-98, at 11 n.32 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 679, 690.

57. Burch, *Financiers as Monitors*, *supra* note 7.

phisticated monitors. In a nutshell, I suggested that, in non-class aggregation, lenders could contract directly with the plaintiffs for a portion of their proceeds, much like attorneys do now in contingent-fee litigation. Instead of fronting the money to plaintiffs for their daily living expenses as consumer legal funding does, the funder would use that money to finance the lawsuit on a nonrecourse basis and pay plaintiffs' chosen attorneys on a billable-hour rate plus a small percentage of the gross proceeds as a successful litigation bonus. The change from contingent fees to billable hours alters attorneys' motivations: if a financier pressed for a quick settlement, the attorney's self-interest in continued billables would counterbalance the financier's push. Billable hours encourage lawyers to spend time advising clients about the risks of litigating versus settling and alleviate the financial strain that drives attorneys to pressure their clients to settle in contingent-fee cases.

Of course, this model would require some tinkering to adapt it to class actions. While financiers might still contract directly with known issue-class members who initiated claims in multidistrict litigation, tailoring the funding relationship for absent class members—particularly those in small-claims classes—would require considering whether the named representatives could authorize funding agreements on the class's behalf. Still, one need not write on an entirely blank slate. Australia—with its loser-pays and no-contingency fee system—has permitted funders to contract directly with class members.[58]

Despite the possibilities, financiers have not stepped into the monitoring role.[59] Even if funders were theoretically willing to serve as monitors, there may be significant drawbacks. First, doctrinal hurdles exist—some seem like ancient relics, ready to be cast aside, while others require careful consideration. For instance, historical doctrines like champerty and barratry if taken seriously would ban not only third-party funding,

58. Deborah R. Hensler, *Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?*, 63 DePaul L. Rev. 499, 518–24 (2014); Issacharoff, *supra* note 7, at 569–72. Financiers in Australia have also defined the class based on the funding relationship.

59. Financiers have not followed the funding blueprint I suggested in *Financiers as Monitors in Aggregate Litigation*, though they have funded law firms who initiate class actions. *See, e.g.*, Samson Habte, *Litigation Funding Contract Didn't Violate Ethics Rules*, 84 U.S. L. Wk, Bloomberg BNA, Sept. 15, 2015.

but class actions, too, for the class promotes "officious intermeddling in a suit that belongs to no one" and "excites and stirs up suits and quarrels."[60] More pressing concerns about deterring wrongdoing and equitably compensating large plaintiff groups have long trumped those antiquated deontological and professional anxieties. Yet, weightier questions arise with regard to notice and consent to third-party funding in class actions. Depending on the nature of the funding relationship, courts, parties, and financiers may have to consider the implications of and parameters for absent class members' consent to the funding arrangement,[61] as well as whether financiers are allowed to communicate with class members.

Second, ironing out doctrinal concerns does little to change funders' basic desire to retain decision-making control over their investment—including when and whether to settle.[62] Like attorneys who view contingent fees across multiple cases as diversifying risk,[63] settlements fund future investments for financiers, too. So, publically traded financiers might pressure plaintiffs to settle early to report a higher quarterly profit.[64] Moreover, in product-liability cases that give rise to personal injury, financiers could erode what little autonomy plaintiffs have in conducting their suit.[65] While an issue class does some of that already, plaintiffs still retain control over the subsequent handling of their case including when and whether to settle.[66]

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60. 4 WILLIAM BLACKSTONE, COMMENTARIES § 143, 2311 (William Carey Jones, ed. 1916).

61. Hensler, *supra* note 58, at 515 ("Under Rule 23(e)(1), the judge could direct that the notice to class members of a pending settlement include the terms of the litigation financing agreement, so that class members would understand how their share of the settlement would be affected by these terms, and either have the chance to object to the terms or opt out.").

62. Burch, *Financiers as Monitors*, *supra* note 7, at 1320–24; Issacharoff, *supra* note 7, at 575.

63. HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 9 (2004).

64. Maya Steinitz, *Whose Claim Is This Anyway? Third Party Litigation Funding*, 95 MINN. L. REV. 1268, 1319 (2011).

65. In nonclass aggregation, I have argued that this problem can be mitigated in various ways. Burch, *Financiers as Monitors*, *supra* note 7, at 1322.

66. For an in-depth analysis of general control issues, see Anthony J. Sebok, *What Do We Talk About When We Talk About Control?*, 82 FORDHAM L. REV. 2939 (2014).

Third, as Sam Issacharoff has explained, "one of the veritable truths of life is that every gatekeeper in life will at some point become a toll collector."[67] In securities class actions, for instance, the lead-plaintiff provision gave rise to pay-to-play practices where plaintiffs' law firms contributed to the political campaigns of those selecting counsel for public or labor pension funds.[68] The same potential for complicity exists here: both funders and class attorneys are repeat players, whereas plaintiffs (in multidistrict litigation) and absent class members are one-shotters. Even if financiers could contract directly with issue-class members, the reality is that the attorney would be the one referring clients to the financier in the first place. Attorneys' preferred funders may depend more on the hourly rate and percentage of the proceeds the financier will pay them than the clients' best interests. This raises the potential for repeaters—financiers and lawyers—to collude to their mutual benefit.[69] Granted, class actions contain built-in due process protections and judicial oversight that might uncover or deter collusive deals.[70] But that largely returns us to the status quo. Still, funding agreements may be more transparent than intra-firm agreements, which are sometimes nothing more than numerical fee splits jotted down on paper napkins or handshake deals.

Finally, a host of practical problems exist from the funder's perspective, too. First, unlike Australia's loser-pays, no-contingent-fee system, a small concentration of well-heeled plaintiffs' law firms already occupies the class-action market.[71] Newer market entrants might turn to third-party financiers, as might established firms contemplating an issue class. Law firms could worry about a slippery slope and the erosion of their market dominance. Second, depending on how much

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67. Issacharoff, *supra* note 7, at 581.

68. Stephen J. Choi, Drew T. Johnson-Skinner & A.C. Pritchard, *The Price of Pay to Play in Securities Class Actions*, 8 J. EMPIRICAL LEGAL STUD. 650, 653 (2011); Drew T. Johnson-Skinner, *Paying-to-Play in Securities Class Actions: A Look at Lawyers' Campaign Contributions*, 84 N.Y.U. L. REV. 1725, 1726 (2009).

69. Steinitz, *supra* note 64, at 1325. *But see* Hensler, *supra* note 58, at 516 (noting that funding would have to be disclosed in connection with Rule 23(e)(3), that such agreements would attract attention, and that the attention "would likely constrain class counsel and third-party litigation investors from agreeing to terms that were clearly against class members' interest").

70. Hensler, *supra* note 58, at 516.

71. Issacharoff, *supra* note 7, at 577–78.

financiers can communicate with issue-class members, if lawyers referred cases in bulk to a financier, it may be difficult to screen the strong cases from the weak ones.[72] Funders would have to rely principally on the attorney's reputation. Finally, because issue classes in product-liability and personal-injury cases present differing damages for individuals, funders may prefer to invest in cases where they can easily assess damages in the aggregate, such as antitrust or securities classes.[73]

CONCLUSION

Whether the benefits outweigh these burdens remains to be seen. With funding changes on the horizon,[74] it is time we moved past the caricatures of white knights and Wall-Street barons to consider how to align third-party financing both with class members' best interests and longstanding justice system values. That endeavor entails understanding the current regulatory landscape. Recent Supreme Court decisions have deteriorated the likelihood of plenary class certification; yet, would-be class members are unlikely to fare better in non-class multidistrict proceedings that present the same principal–agent problems, but lack Rule 23's structural assurances of fairness.[75] As such, issue classes can offer a coherent path forward. Yet, the potential for issue classes is hampered, in part, by the uncertainty surrounding recovery for issue-class counsel's efforts. While significant questions persist as to whether third-party funding is the right fit in its current form, the time has come to approach these questions holistically. Part of that undertaking demands that financiers realize that the time has also come for them to do more than just fund disputes as attorneys do now. Mainstream acceptance requires that they add value, too.

72. *See id.*, at 574.
73. *Id.*
74. Nicholas Datlowe, *Legislation on the Horizon for Alternative Legal Financiers?*, BNA (Sept. 24, 2015), http://www.bna.com/legislation-horizon-alternative-n57982058708/.
75. Burch, *Judging Multidistrict Litigation, supra* note 26, at 78–84.