NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 12 SPECIAL ISSUE 2016 NUMBER 3

THE COLOR OF MONEY: A STORY OF ONE COMPLEX CASE AND ITS MANY FINANCIERS

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ABSTRACT

This is a paper about the business of litigation—it starts off by recognizing that while courts sometimes dispense justice, they also redistribute money. Therefore, the focus here is on how litigants, lawyers, and other parties with an economic interest in the outcome of a legal dispute shape legal process and allocate money and time to maximize the value of their stakes.

To examine how parties invest in lawsuits, the paper tracks the antitrust case against an international cartel manufacturing LCD panels. With multibillion claims, high-profile executives facing jail, a stream of commerce affecting several industries and almost every consumer, this highly precedential case has become a nexus of various public and private interests. Sieving through thousands of court records, the study offers a unique insight into litigation finance, showing different avenues through which complex litigation is financed.

The studied case demonstrates that the universe of litigation stakeholders transcends litigants and their lawyers. While some parties remain self-funded, others leverage by finding third-party allies: contingency lawyers, banks, or specialty financiers. Furthermore, the study shows that third-party funding of business-to-business disputes is not limited to direct dealings between a litigant and a third party. Rather, much of the funding is indirect, with litigation attorneys often playing a key role in the arrangement.

Finally, the paper argues that in the context of complex litigation, stakeholders have an enhanced opportunity to behave strategically, also by

 J.S.D., Stanford Law School. I would like to thank professors Deborah Hensler, Joseph Grundfest, Ronald Gilson, Mark Lemley, and Darrell Duffie for their suggestions, guidance, and introductions. Without those, I would not have embarked on my exploration of the fascinating world of legal finance. I am also grateful to Manuel Gomez, Sergio Puig, and my fellow J.S.D.'s at Stanford Law whose comments and support not only made this paper better, but, more importantly, helped me finish it.

leveraging their own resources. Actors in a legal dispute can—and do—build coalitions to "crowdfund" claims; recycle resources expended by others; and find ways to benefit from successes achieved in frontrunner cases with superior access to capital.

INTRODUCTION

That day, the San Francisco courtroom of Judge Susan Illston was brimming with anxious lawyers.

> So, these two things that I've said—one, that it was clearly cartel behavior, and two, that it involved billions of dollars—all of this was known to everybody in this room on day one, pretty much. . . . However, except for proving up the cartel behavior, everything else about this case was very, very difficult,

said the judge.[1]

> [T]he funding that will go to claimants in this case is excellent. It is . . . remarkable. And this part of the case I think . . . will go a long way to—to reaffirming the value of litigation like this, to—to ordinary consumers and citizens and participants in our society. So, . . . I am really happy to see that, and I think you all deserve enormous credit for that.[2]

In the aftermath of the class action the Judge was commenting on and its sister case which settled shortly before,

1. Transcript of Proceedings of Jan. 31, 2013 at 10–11, *In re* TFT-LCD (Flat Panel) Antitrust Litig., MDL No. 1827 (N.D. Cal. Feb. 14, 2013), ECF No. 7614.

2. *Id.* at 12–13.

more than $1.5 billion would change hands, a third of which plaintiff law firms would divide among themselves.

> It's a very, very expensive prospect to prosecute an action like this. . . . Not only did the lawyers not get paid for six years, but they also have to fund the expenses of the litigation out of their own pockets, on the front end. . . . And it is extremely difficult to provide the kind of up-front funding that is required to pay for advanced costs in cases of this magnitude . . . . So, that's another factor to take into account,

noted Judge Illston before approving the bill from the class counsel.[3]

Indeed, prosecuting a cartel whose product was grossing eight times more than cocaine was no piece of cake.[4] But the court campaign went far beyond class actions. And it was funded with far more than just the money put up by class counsel.

This paper is a case study of *In re* TFT-LCD (Flat Panel) Antitrust Litigation [hereinafter *In re LCD*],[5] one of the largest and most precedential antitrust disputes of the last decade.[6] It

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3. *Id.* at 13.

4. In 2007, the global revenues from large-sized LCD panels alone exceeded $100 billion in producer prices. *See, e.g.*, *Large LCD Panel Suppliers Expected to Post Robust Results for Q3*, IHS TECH. (Oct. 23, 2007), http://www.isuppli.com/Display-Materials-and-Systems/MarketWatch/Pages/Large-LCD-Panel-Suppliers-Expected-to-Post-Robust-Results-for-Q3.aspx. The wholesale value of the annual cocaine production at the time would be $12 billion if sold at United States prices. *See* U.N. OFFICE ON DRUGS & CRIME, 2007 WORLD DRUG REPORT 175 (2007).

5. MDL No. 1827 (N.D. Cal. 2007). The official name refers to the most popular type of display panels using thin-film transistors. But the LCD family also comprises other technologies (e.g., the STN-LCD), and those were also relevant for the case at issue. *In re LCD* seems the most appropriate short form and I will use it hereinafter in text and notes when referring to the entire MDL docket or the LCD antitrust litigation generally.

6. The case was reviewed by the Supreme Court. *See* Mississippi *ex rel.* Hood v. AU Optronics Corp., 134 S. Ct. 736 (2014) (holding that *parens* actions are not removable under CAFA and, therefore, not subject to MDL consolidation). It also created new hard-fought precedents under both federal law and in California. *See* Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2015) (refusing to extend antitrust injuries under the Sherman Act to foreign purchasers); AT&T Mobility LLC v. AU Optronics Corp., 707 F.3d 1106 (9th Cir. 2013) (finding that California's Cartwright Act may be applied to out-of-state purchasers).

originates from the notion that legal claims may be financed by parties other than litigants themselves (or, in some cases, plaintiff lawyers). Moreover, it assumes the perspective of those who are in it for the money, treating legal claims as assets with certain economic potential to be unlocked with a proper investment of resources—like a deposit of ore to be mined or a plot of land to be developed.

This idea—that a lawsuit is not merely a means to justice, but also an investment project to be funded and managed—has recently received much attention from legal scholars. However, the academic discussion focused primarily on broad policy questions, such as whether legal funding "levels the playing field" for litigants or whether it merely encourages frivolous suits.[7] Some considered ethical questions relevant for the financing of disputes through third-party arrangements.[8] Others tried to compare it across different legal systems.[9] But empirical foundation for the debates remains limited.

This study of *In re LCD* explores fundamental questions of litigation finance: What does it mean to "fund" a lawsuit? Who does it? How? And, how do different parties with a financial stake in the outcome of a legal dispute relate one to another?

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7. *See, e.g.*, Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65 (2010); Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273 (2012) (all making various claims in favor of litigation financing). *But see, e.g.*, Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VERMONT L. REV. 615 (2007); JOHN BEISNER ET AL., U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES 2 (2009) (both arguing for prohibition of third-party funding, or at least substantial limitation of third-party funding).

8. *See, e.g.*, Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649 (2005); Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571 (2010); Stuart L. Pardau, *Alternative Litigation Financing: Perils and Opportunities*, 12 U.C. DAVIS BUS. L.J. 65 (2011); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011); Nora F. Engstrom, *Lawyer Lending: Costs And Consequences*, 63 DEPAUL L. REV. 377 (2014).

9. *See, e.g.*, Marco A. de Morpurgo, *Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT'L & COMP. L. 343 (2011); Jasminka Kalajdzic et al., *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93 (2013).

The rest of the article is organized as follows. Part I is a rough sketch of the procedural history of *In re LCD*, decomposing the case into stages and identifying major groups of actors.

Part II explores who bankrolled different stages of the case, and discusses different avenues through which money was provided to litigants and their attorneys: from actions brought by public actors self-funded with taxpayer money to mass-funded class actions represented by consortia of plaintiff law firms to bespoke financing used by individual corporations which opted out from the class proceedings.

Part III then considers how dispute stakeholders make the most of the resources available to them by recycling resources put into other cases or attaching tag-along cases to frontrunners with superior funding.

The paper closes by arguing that greater attention must be paid to indirect funding transactions. It also speculates that third-party funding may impact the universe of commercial disputes more than suspected—because successful outcomes achieved in a funded dispute are likely to incidentally benefit other cases, particularly in the context of complex litigation.

I.
In re LCD: When Two Hundred Suits Become One

It all started in December 2006, when the Department of Justice (DOJ), together with watchdogs from South Korea, Japan, and the European Union, announced that they started to investigate whether manufacturers of liquid-crystal display (LCD) panels were in fact a price-fixing cartel.[10] Brought to the mass market in the 1990s, LCD has become a part of Average Joe's everyday life: "crystals" are in any kind of device with a screen—from phones to TV sets to industrial and medical monitors.

In late 2006, the world learned that for years the global LCD market, which grew to over $100 billion in annual sales, had been rigged.

10. *See, e.g.*, Elaine Chow, *Worldwide Antitrust Probe Of LCD Panels Expands*, Law360.com (Dec. 12, 2006, 12:00 AM), http://www.law360.com/ articles/ 14890/worldwide-antitrust-probe-of-lcd-panels-expands (reporting on early antitrust probes).

The heart of the crystal business beat (as it still does today) in East Asia, with ninety percent of the global LCD-panel market controlled by AU Optronics (AUO), Chi Mei, Chunghwa, and HannStar (all headquartered in Taiwan); LG and Samsung (both South Korean); Epson, Hitachi, Sharp, and Toshiba (all Japanese). Linked by far more than just geographical proximity, those companies renounced the "evils" of cut-throat competition, and opted for a peaceful coexistence. As it would later turn out, executives from most of those companies would regularly meet to "stabilize prices" of LCD panels.[11]

No sooner had the DOJ issued first subpoenas than a flood of private antitrust suits began. Consolidated in a single multi-district litigation (MDL) docket[12] in the Northern District of California,[13] the case would grow to eventually comprise over two hundred actions,[14] divided into several stages.

First, the DOJ went ahead with criminal complaints, obtaining a number of guilty pleas and convictions from corporations and individuals connected with the cartel.[15]

Then, two separate class action law suits (one representing direct purchasers and the other—consumers) were litigated and ultimately resolved by settlements totaling over $1.5

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11. *See* Indirect-Purchaser Plaintiffs' Third Consolidated Amended Complaint at ¶¶ 138–148, *In re* LCD, MDL No. 1827 (Apr. 29, 2011), ECF No. 2694.

12. The procedure of multidistrict litigation, or MDL, gives the Judicial Panel for Multidistrict Litigation the power to transfer civil actions involving common questions of fact pending in different districts to a chosen district for consolidated pretrial proceedings. 28 U.S.C. § 1407 (2001).

13. Transfer Order, *In re* LCD, MDL No. 1827 (J.P.M.L. Apr. 17, 2007), ECF No. 86.

14. In total, the MDL docket comprised 186 civil suits and 20 criminal cases related to it.

15. *See, e.g.*, Plea Agreement, United States v. LG Display Co., No. CR 08-0803 SI (N.D. Cal. Dec. 17, 2008); Plea Agreement, United States v. Sharp Corp., No. CR 08-0802 SI (N.D. Cal. Dec. 17, 2008); Plea Agreement, United States v. Chunghwa Picture Tubes Ltd., No. CR 08-804 SI (N.D. Cal. Jan. 15, 2009) (entering judgments against defendant corporations that pleaded guilty); *see also* Plea Agreement, United States v. Chang Suk Chung, No. CR 09-0044 SI (N.D. Cal. Feb. 17, 2009); Plea Agreement, United States v. Chih-Chun "C.C." Liu, No. CR 09-0045 SI (N.D. Cal. Feb. 27, 2009) (sentencing officers of the "crystal cartel" members upon guilty pleas).

billion.[16] From both recoveries class counsel took just under a third, or about half a billion dollars, in attorney's fees.[17]

The twin class disputes were gargantuan, costing class counsel hundreds of years in attorney time and $18 million out of pocket.[18] Although the class effort involved many firms, it was spearheaded by two pairs of co-lead counsel appointed by the MDL court. Zelle, Hofmann, Voelbel, Mason & Gette, LLP (Zelle Hofman) and the Alioto Law Firm were put in charge of the indirect-purchaser plaintiffs (IPPs). And Pearson, Simon, Soter, Warshaw, and Penny, LLP (Pearson Simon) and Lieff, Cabraser, Heimann & Bernstein, LLP (Lieff Cabraser) led the class of direct purchasers (DPPs).[19]

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16. *See* Direct Purchaser Class Plaintiffs' Notice of Motion & Motion for Attorneys' Fees, Reimbursement of Expenses, & Incentive Awards at 2, *In re* TFT-LCD Antitrust Litig., No. MDL 3:07-md-1827 SI (N.D. Cal. Dec. 14, 2012) (stating a total recovery of $473,022,242 after the settlement with AUO and Toshiba); Notice of Motion & Motion for Preliminary Approval of Class Settlement at 2, *In re* TFT-LCD Antitrust Litig., No. MDL 3:07-md-1827 SI (N.D. Cal. Sept. 10, 2012) (reporting the Toshiba settlement of $30 million); Indirect-Purchaser Plaintiffs' & Settling States' Joint Notice of Motion & Motion for Preliminary Approval of Combined Class, *Parens Patriae*, & Governmental Entity Settlements at 2-3, *In re* TFT-LCD Antitrust Litig., No. 3:07-MD-1827 SI (N.D. Cal. July 12, 2012) [hereinafter *IPP Combined Settlement Motion*] (submitting for approval settlements providing for $1.082 billion in damages and $42.2 million in civil penalties).

17. *See In re* TFT-LCD Antitrust Litig. Relating to All Indirect Purchaser Plaintiffs Involving Final Approval of Combined Class and Governmental Entity Settlements, No. M 07-1827 SI., 2013 WL 1365900, at *20 (N.D. Cal. Apr. 3, 2013) [hereinafter *IPP Settlement Approval Order*] (awarding attorneys' fees of $309,725,250, amounting to 28.6% of the Settlement Fund); *In re* TFT-LCD Antitrust Litig. Relating to All Direct Purchaser Actions Overruling Objections to Settlements and Attorneys' Fees, No. MDL 3:07-md-1827 SI., 2011 WL 7575004, at *1 (N.D. Cal. Dec. 27, 2011) [hereinafter *DPP Fee Award I*] (overruling objection that 30% fee requested is excessive); *In re* TFT-LCD Antitrust Litig. Relating to All Direct Purchaser Class Actions Involving Attorneys' Fees, No. M 07-1827 SI, 2013 WL 149692, at *1 (N.D. Cal. Dec. 20, 2012) [hereinafter *DPP Fee Award II*] (awarding additional fees in connection with settlements with AUO and Toshiba).

18. *DPP Fee Award I*, *supra* note 17, at *3 (recognizing "250,000 hours of work performed by the counsel without compensation since 2007 . . . and $6,055,335.31 . . . unreimbursed costs expended").

19. *See In re* TFT-LCD Antitrust Litig. Relating to All Direct Purchaser Actions Involving Fifth Amendment Privilege, No. M07-1827 SI, 2009 WL 4016124 (N.D. Cal. Nov. 9, 2009) (listing the attorneys and law firms for direct purchaser plaintiffs); *In re* TFT-LCD Antitrust Litig., 267 F.R.D. 583, at

In the third stage of the *In re LCD* litigation, the "direct action plaintiffs" (DAPs) who opted out from a class had their day in court. They were nudged to cooperate by procedural decisions of the MDL court, and, additionally, a number of them clustered around a few high-profile law firms. The DAPs, at least initially, behaved almost like another class. In particular, they were ordered to choose a liaison counsel who would coordinate their actions with other groups of *In re LCD* actors.[20]

The liaison job went to a partner of Crowell & Moring LLP (Crowell).[21] The firm was representing plaintiffs who jointly had the largest financial stake in the case, which by analogy to securities class actions made Crowell the "presumptively most adequate" liaison counsel.[22] The "Crowell group" of opt-out plaintiffs comprised a number of affiliates of AT&T Inc. (AT&T);[23] Motorola Inc. (Motorola);[24] a coalition of major American retail chains, with Target Corp. leading the pack (jointly, the Target group);[25] The Hewlett-Packard Company (Hewlett-Packard);[26] and several smaller, late-stage plaintiffs.[27]

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614 (N.D. Cal. Nov. 9, 2009) (listing the law firms for indirect purchaser plaintiffs).

20. Special Master's Order Regarding Individual Action Plaintiffs And Case Management, *In re* LCD (Mar. 12, 2010), ECF No. 1595 [hereinafter *DAPs Pretrial Order*].

21. *In re* LCD (Mar. 29, 2010), ECF No. 1644 (appointing Liaison Counsel for DAPs).

22. *See* 15 U.S.C. § 78u-4(a)(3)(B)(v) (2010) (statute requiring that "the most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class").

23. Complaint & Demand for Jury Trial, AT&T Mobility LLC v. AU Optronics Corp., No. 09-4997 (N.D. Cal. Oct. 20, 2009).

24. Complaint, Motorola, Inc. v. AU Optronics Corp., No. 09-6610 (N.D. Ill. Oct. 20, 2009), No. 09-5840 (N.D. Cal. Oct. 20, 2009).

25. Complaint & Demand for Jury Trial, Target Corp. v. AU Optronics Corp., No. 10-4945 (N.D. Cal. Nov. 1, 2010) (suing on behalf of Target Corp., Sears, Roebuck & Co., Kmart Corp., Old Comp Inc., Good Guys, Inc., Radioshack Corp., and Newegg Inc.).

26. Complaint & Demand for Jury Trial, Hewlett-Packard Co. v. Epson Imaging Devices Corp., No. 10-CV-5577 SI (N.D. Cal. Dec. 6, 2010).

27. Complaint & Demand for Jury Trial, Jaco Elec., Inc. v. AU Optronics Corp., 11-2495 (N.D. Cal. May 20, 2011); Complaint & Demand for Jury Trial, Rockwell Automation Inc. v. AU Optronics Corp., No. 12-2495 (N.D. Cal. Apr. 19, 2012).

The final layer to the case was added by State Attorneys General, suing as a "parent of all citizens."[28] Eight large states allied with the indirect-purchaser class counsel becoming a part of one big settlement.[29] Other states preferred to face defendants one on one, either staying in the MDL court next to the opt-outs or avoiding removal from their own courts altogether.[30]

To summarize: *In re LCD* was an extremely complex and costly antitrust dispute, consolidated in the federal district court in San Francisco. There, the litigation would be split into several, largely consecutive stages: criminal prosecutions by the DOJ were first, followed by class actions, *parens patriae* suits, and finally individual, opt-out plaintiffs.

II.
In re LCD Whodunit, or Various Ways to Fund a Suit

Having laid out the procedural history of the *In re LCD* case, in Part II of the paper I "follow the money," identifying various sources of capital employed by different groups of plaintiffs. I find that, next to conventional financial arrangements, there exists a universe of complex and mostly indirect relationships involving litigants, attorneys, and third-party capital providers, including banks.

A. *Fund-It-Yourself Lawsuits*

Let us begin by spelling out the obvious: that lawsuits may be financed from plaintiffs' own pockets.

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28. *See* 15 U.S.C. § 15c (granting attorneys general of each state the *parens patriae* standing in antitrust lawsuits on behalf of natural persons residing in that state).

29. Arkansas, California, Florida, Michigan, Missouri, New York, West Virginia, and Wisconsin chose that path. *See* Indirect Purchaser Plaintiffs' and States Attorneys General's Joint Motion for Interim Reimbursement of Expenses, *In re* LCD (Mar. 14, 2012), ECF No. 5157, at 3–4; *IPP Combined Settlement Motion*, *supra* note 16.

30. For example, Oregon filed in the district court in Portland. Complaint & Demand for Jury Trial, Oregon *ex rel.* Kroger v. AU Optronics Corp., No. 10-00933 (D. Or. Aug. 10, 2010), and had its case transferred to the MDL court, Oregon *ex rel.* John Kroger v. AU Optronics Corp., No. 10-4346 (N.D. Cal. Sept. 27, 2010). Mississippi was one of the states which (successfully) objected to removal and consolidation. *See* Mississippi *ex rel.* Hood v. AU Optronics Corp., 134 S. Ct. 736 (2014).

In the *In re LCD* litigation, the DOJ was a self-funded party (with the bill footed by federal taxpayers). Those were public actions, governed by a different logic than the one underpinning private suits. Litigation spending decisions of the DOJ generally do not aim to maximize the financial outcome, but rather are driven by the goals of antitrust enforcement policy. Moreover, the DOJ has no financial stake in the money it rakes in—all of it is considered revenue of the federal budget.[31]

Similarly, the state *parens patriae* actions should be seen as an alternative to private enforcement not just in terms of claims aggregation and management, but also funding. States acting as *parens patriae* pursue both public and private interests, for private gains, paying the costs of prosecution with state taxpayers' money. Financing the enforcement of private interests with public resources is a viable option, and it should be given due place in the discussion on litigation funding.

I mention the self-funded lawsuits not only to trace all groups of *In re LCD* plaintiffs to their funding sources, but also because they are important to the overall gestalt of the studied case in its financial dimension. Some plaintiffs may be self-funded, but that does not necessarily mean they only fund themselves. Their spending may well turn out to propel other cases—even if indirectly and, sometimes, inadvertently.

I now move on to the private actions brought within the *In re LCD* litigation: the IPP and DPP class actions, and opt-out suits. None of them was financed by the plaintiffs alone.

B. *Making Pot with Borrowed Money: Class Counsel*

The single most important piece of the litigation financing puzzle is the lawyer. He is the go-to third-party financier, and not just in the context of class actions. But the role of attorneys and law firms goes further: as incumbent third-parties enjoying broad "market acceptance," law firms are the primary means to transport capital throughout the American legal system. Sometimes, the capital they carry is theirs. But at

31. *Cf. Antitrust Division Criminal Program Update 2013*, U.S. DEP'T OF JUSTICE, www.justice.gov/atr/public/division-update/2013/criminal-program.html (last visited June 29, 2014) (reporting that criminal fines generated in the antitrust enforcement contributed to the Crime Victim's Fund, and that in 2008–2012, the DOJ was "grossing" ten times more in fines it imposed than it got back in appropriations).

many occasions a firm is really an outlet for another's investment.[32]

The *In re LCD* class plaintiffs were represented by contingent-fee attorneys. They, and their firms, assumed the primary burden of finding resources necessary to adequately represent the classes. And, very likely, the law firms in charge of the *In re LCD* class actions shouldered a significant part of the cost and the risk themselves. But even if the class attorneys were willing to cover "soft costs," someone still had to pay the "hard costs" of the lawsuits: experts and research, e-discovery, translations, travel expenses—all adding up to millions of dollars. And funding *In re LCD* class actions required plenty of free cash.[33]

Some plaintiff law firms choose to self-finance, making new gambles with old winnings. However, most lawyers would much rather see the bulk of the profits boost their personal net worth than stay frozen in the firm. Partnerships change, lawyers come and go, and last year's profit payouts are a yardstick of success for the legal profession, separating rising stars from those in decline. As a result, even the most successful firms have only so much working capital of their own, and they are often keen to use somebody else's.

Law firms have little interest in advertizing to the world whether they take third-party money, and if so, from whom. But, fortuitously for this paper, financial institutions often do have an interest in disclosing themselves as creditors secured by a debtor. Therefore, I adopted a research strategy that copies what prudent financiers do when vetting potential borrowers: I checked records of secured-credit transactions.[34]

I started by identifying the law firms acting on behalf of *In re LCD* class plaintiffs, and the dollar cost of time for which they each billed the class plaintiffs (the lodestar).[35] I treat the

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32. *See* Radek Goral, *Justice Dealers: The Ecosystem of American Litigation Finance*, 21 STAN. J.L. BUS. & FIN. (forthcoming 2015) (manuscript at 21–25).

33. *See DPP Fee Award I, supra* note 17 and accompanying text.

34. Lenders are meticulous record-keepers, particularly when the people who owe them money are concerned. They also adhere religiously, sometimes to a fault, to procedures they consider tried and true. This is extremely helpful for spotting patterns, as similar transactions are likely to have a similar "footprint" in the paper trail.

35. I rely on the information aggregated by the liaison for counsel in each class action and submitted to the MDL court in support of the motions for an award of attorneys' fees to respective class counsel. *See* Compendium of IPP Counsel Declarations. in Support of Motion for Attorneys' Fees Incen-

relative lodestar of each individual law firm as a proxy for its importance for the class counsel consortium to which it belonged.

A total of 153 firms claimed a share of the half-a-billion-dollar pot of attorneys' fees awarded to both class counsel. The IPP consortium comprised 115 law firms; its DPP counterpart—38.[36] In both groups, the distribution of work was long-tailed: sixteen IPP law firms with the highest lodestar contributed over seventy five percent of the billings submitted by all IPP counsel. In the DPP class action, ten firms billed over seventy-five percent of the total lodestar.[37] Therefore, the skewed distribution of lodestars suggests that each consortium had a group of leaders whose resources carried the rest, and who later claimed most of the reward.

Then I searched for secured interests in assets of the *In re LCD* class action counsel disclosed in financing statements filed under Article 9 of the Uniform Commercial Code (U.C.C.).[38] I looked for indications of transactions where counsel secured a creditor in connection with a loan or another financing agreement in force within the time frame of *In re LCD*,[39] and where unpaid attorney's fees were pledged as

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tive Awards, *In re* LCD (Sept. 7, 2012), ECF No. 6634 (submitting a breakdown of attorneys' fees and expenses incurred by each IPP law firm); Declaration of Elizabeth C. Pritzker in Support of Direct Purchaser Class Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards, *In re* LCD (Oct. 28, 2011), ECF No. 4061, Ex. A, at 2 (reporting the same for the DPP law firms until August 31, 2011); Declaration of Elizabeth C. Pritzker in Support of Direct Purchaser Class Plintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards, *In re* LCD (Oct. 26, 2012), ECF No. 7059, Ex. A (providing an update for the period between September 1, 2011 and October 20, 2012).

36. Compendium of IPP Counsel Declarations., *supra* note 35.

37. *Id.*

38. The statute provides for several methods of perfecting security interest in the debtor's assets. The default and by far the most popular method is the filing of a financing statement, U.C.C. § 9-310(a) (AM. LAW INST. & UNIF. LAW COMM'N 2000). As a rule, a perfected secured interest has priority over a conflicting unperfected security interest in the same collateral, *id.* §§ 9-322(a)(2), 9-317(a)(1). If several interests in the same asset were perfected by filing, their respective priorities are ranked by the date of effective filing, *id.* at §§ 9-322(a)(1), 9-317(a)(1).

39. Classified as "funded" is each firm listed as *In re LCD* class counsel and disclosed as debtor in a UCC statement of a financing transaction not lapsed or terminated before the class proceedings commenced. This includes instances where law firm debt was incurred by its partners personally.

collateral—sometimes, in addition to other assets owned by counsel. I inspected records of all 153 firms identified as class action counsel, with special focus on their leaders.[40]

I found that in total, 62.5 percent of the IPP law firms (representing 75.2 percent of the IPP class counsel lodestar) had disclosed credit financing secured by attorney's fees.[41] Among the DPP counsel, 76.3 percent of all firms (contributing 87.7 percent of all billable hours) were named in statements of financing collateralized with a law firm's cash flow. As far as the lead law firms are concerned, ten of the top-sixteen IPP law firms and all top-ten DPP firms availed themselves of external source of capital, including all co-lead counsel.

Although most *In re LCD* class counsel were borrowing from banks, some found money elsewhere. A number of firms, particularly the smaller ones, have a record of taking money from third parties specializing in attorney lending—the UCC records indicate that at least two of the DPP law firms and fourteen of the IPP law firms obtained money from that source. Several tapped other, more unconventional, capital providers.[42]

Quantitative findings are summarized in Tables 1 and 2.

Excluded are the firms whose disclosed debts were limited to: (a) leasing and other financing of asset purchases; (b) nonfinancial debts (e.g., medical or telecommunications bills); (c) public obligations, such as taxes; and (d) judgments.

40. The set of class law firms participating in the *In re LCD* litigation, if taken as a sample from the general population of law firms in the United States, is not representative. Nevertheless, because of its nationwide character, *In re LCD* brought together a diverse and geographically comprehensive collection of law firms. The DPP law firms were headquartered in fourteen different states and the District of Columbia. The IPP lawyers had head offices in thirty four states, the District of Columbia, and Puerto Rico. In both pools a number of firms had more than one office, thus providing additional geographical coverage.

41. When calculating those statistics, I excluded law firms from Puerto Rico (because of limited data access) and one sole-practitioner law firm with a negligible stake which I was unable to distinguish from other, identically named law practices.

42. One partnership was bankrolled by a high-net worth individual from Aspen who appears to manage a hedge fund. In another case, one of the partners got a loan as an individual, securing the bank with his personal assets; then he lent the money forward to his partnership against the whole firm's future proceeds.

	All	**Leaders**
The DPP class action law firms	**39**	**10**
% financed (absolute) % financed (weighted)	76.9% 88.8%	80.0% 91.5%
The IPP class action law firms	**115**	**16**
% financed (absolute) % financed (weighted)	60.7% 75.2%	62.5% 77.3%

Table 1: Presence of external financing among the *In re LCD* class counsel, as distributed in the populations of the DPP and IPP counsel (left column) and among the leaders (right column). For each population, I found the smallest subset of law firms such that their aggregate billings represent at least seventy five percent of the total lodestar reported for the population. Each law firm in the subset is considered a "leader." Absolute statistics refer to the count of law firms with a given characteristic. Weighted statistics refer to the lodestar reported by firms with that characteristic.

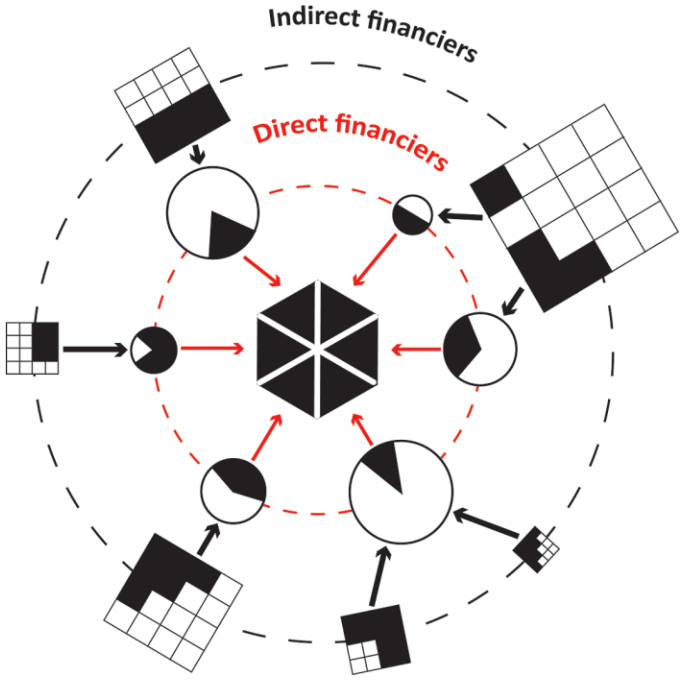
	Financed: all firms	**Financed: leaders**
The DPP class action law firms	**30**	**8**
% financed by a non-bank (absolute) % financed by a non-bank (weighted)	6.7% 24.0%	12.5% 30.1%
The IPP class action law firms	**68**	**10**
% financed by a non-bank (absolute) % financed by a non-bank (weighted)	20.6% 25.8%	20.0% 24.4%

Table 2: Presence of non-bank financing among counsel identified as externally funded within the DPP and IPP populations (left column) and within leaders of each population (right column). Terms used in Table 1 retain the same meaning here. Note that bank financing and non-bank financing are not mutually exclusive characteristics, and several law firms were found to use both.

The information collected does not suffice to say how much the law firms actually got from their bankers. Not every financier would reveal itself as a secured creditor, and not every disclosed line of credit would be drawn upon. It is likely that credit available to some of the law firms found to be bankrolled by third parties was in fact modest—and only a fraction of the financing, if any, would be allocated to any one case.

Then again, even small amounts tend to add up. Collaborating law firms aggregate their inventories of cases, but they aggregate resources, too. Those resources include monies from traditional banks, shadow banks, and other financiers the

firms may have at their disposal. If a sufficient number of attorneys work together over any one aggregate case, and if enough of them can tap third-party capital, the case may well end up being "mass funded" with large sums of money. Capital commitments of particular third-party backers of law firms may be relatively small and not earmarked to fund any one lawsuit, which also makes them inconspicuous. Yet their proper place in the market for third-party financing of legal claims must be recognized: banks and other institutions who by financing law firms provide fractional funding for the lawsuits in which the law firms hold stakes, spawn the financial plankton that feeds litigation whales.[43]



43. Assume that an average class action firm participating in *In re LCD* and disclosed as financed were good for a mere $30 thousand in credit—an amount many individual consumers in America can borrow without collateral, based on their good credit history. Then the DPP attorneys would have almost $1 million of borrowed working capital among them. The IPP firms would have over $2 million. Those amounts make a very conservative lower bound of third-party involvement in *In re LCD* through "litigation crowdfunding."

Figure 1: Litigation mass funding. Third-party financiers (checkered squares) distribute capital among multiple law firms (circles), which in turn divide their respective allocations (shaded fields in a square) among their cases. Once the firms form a consortium, the working capital each of them invests in the common case (the shaded sector of a circle)—or a fraction of a fraction of the capital deployed by a third-party financier—becomes a part of one litigation fund (the hexagon in the center). Thus, law firms may be seen as a circle of direct investors in a lawsuit while their bankers form a circle of indirect stakeholders. When aggregated through law firms, even small indirect holdings may fuse into a significant interest in an aggregate litigation.

Irrespective of the litigation-mass-funding hypothesis, few law firms, even if organized into a consortium, have enough muscle to maintain a case as large as *In re LCD*, in terms of both the necessary cash outlays and the ability to contribute a large number of hours in exchange for a contingent payout several years away. It is probable (though remains to be proved empirically) that the distribution of financial capabilities among plaintiff law firms resembles the distribution of the class counsel lodestar discussed above: that is to say, it is dominated by a small group of large firms controlling a disproportionately large share of pooled labor and capital.[44]

Let us now take a look at those on the pinnacle of the two consortia of lawyers working on *In re LCD* class actions: the four law firms whose partners the court appointed as co-leads. Each made a major contribution to the efforts of class counsel.[45] And each likely had a financial capacity much larger than the consortium average.

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44. The sources interviewed for this paper maintained that many law firms, particularly smaller or without a long track record, either do not receive bank financing at all, or can borrow substantially less than what the working capital they require to maintain their case inventory. The interviewees were consistent in their claims that banks are cautious when lending to law firms against their cash flow rather than hard assets owned by the firm or its equity partners. (Indeed, sources pointed to the market need unsatisfied by traditional financiers as their primary explanation for the rise of third-party financiers catering to law firms.) But the interview data also suggests that top-tier plaintiff law firms have an outsized borrowing power, with individual credit lines "in eight figures."

45. We calculate that the co-lead counsel for the IPP class contributed jointly 27.3% of the total loadstar reported by counsel for that class. The

I start with Zelle Hofmann, leading the IPP class. The Minneapolis-based firm and its financier seem to perpetuate the stereotype of Minnesota nice: Zelle Hoffmann remains in a sensible, mature relationship with a prosperous bank next door, U.S. Bank, N.A. (the firm and the bank have their headquarters some 350 yards away from each other). The couple, despite unavoidable changes affecting them both, continues to renew their vows from time to time, and, the way things stand, is on track to celebrate the thirtieth anniversary of their bond in 2018.[46]

Pearson Simon, with offices in Los Angeles and San Francisco, has been a client of Manufacturers Bank, a California commercial bank wholly owned by the Japanese financial group of Sumitomo Mitsui. The bank started financing Pearson Simon not later than in 2006 and remains secured until 2016,[47] which suggests a long-term, satisfactory relationship.

Interestingly, Sumitomo Mitsui is affiliated with one of the companies Pearson Simon sued on behalf of the DPP class in *In re LCD*—i.e., the co-lead counsel has been bankrolled by the capital group with a major, if indirect, stake in one of the defendants.[48] Such entanglement may raise some ethical questions, because of the potential for a conflict of interests.

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respective contribution of their DPP class co-leads was 43.17%. *See* sources cited *supra* note 35.

46. Minn. Sec. of State, U.C.C. Rep., Fin. Statement, May 7, 2013, No. 20133226469 (showing U.S. Bank N.A., the successor of the First Bank N.A., as the secured party, with the financing history going back to October 31, 1988 and the current lapse date of October 1, 2018).

47. Cal. Sec. of State, U.C.C. Rep., Fin. Statement, Feb. 1, 2006, No. 067058035993 (as amended and continued, currently set to expire on February 1, 2016).

48. One of the defendants to the DPP class action, albeit a minor one, was Mitsui & Co. (Taiwan), Ltd. (Mitsui Taiwan), which ended up settling for $0.95 million, *In re* LCD Antitrust Litig., MDL No. 1827 (Dec. 27, 2011), ECF No. 4438 (order granting motion for settlement). Mitsui Taiwan is wholly owned by Mitsui & Co., Ltd. (Mitsui), a major Japanese conglomerate with its hands in anything from steel to automobiles to food to telecommunications. Japanese *keiretsu* tend to have complex and widespread corporate family trees; at least nine separate entities from the Mitsui Group are listed as part of Nikkei 225 Index. One of those is Sumitomo Mitsui Financial Group, Inc. (SMFG), a financial holding whose wholly-owned subsidiary is Sumitomo Mitsui Banking Corporation (SMBC), the second largest Japanese bank (by assets). Although SMFG and Mitsui are separate entities, they have strong business ties going back for more than a century: SMFG is a

The third co-lead, Lieff Cabraser, has had an almost two-decade long relationship with Citibank.[49] And although the law firm started at San Francisco and still calls California home, its managing partner operates from the firm's office in the Lower Manhattan—which is within a walking distance from the Citibank's headquarters at Park Avenue.

There seems to be more financial muscle behind Lieff Cabraser than just its (allegedly very substantial) line of credit with Citibank, however. In particular, assisted by Deutsche Bank, the firm engaged in a sophisticated financial structuring and securitized almost $40 million of its earned but uncollected attorney's fees into an asset-backed security (ABS), thus pioneering the issuance of bonds backed by uncollected legal fees. The Lieff Cabraser ABS issue is a special case of post-settlement litigation funding, or bridge financing capitalizing law firms through full-recourse, collateralized debt.[50]

The fourth and final co-lead counsel of *In re LCD* class actions was the Alioto Law Firm. One of the most dramatic

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principal shareholder of Mitsui, its primary banker, and a business partner in multiple joint ventures. At the same time, Manufacturers Bank, the bank of Person Simon, is fully owned by SMBC. Which means that one of the co-lead counsel in a class action against a Mitsui subsidiary has been indirectly financed by Mitsui's number-one banker and affiliate. Tracing money flows through multiple layers of corporate ties and screening them all for potential conflicts of interest is difficult—if not at all impossible. But such difficulty brings about the risk that defendants may end up funding cases against themselves. *In re LCD* demonstrates that such eventuality—one of the biggest fears of big corporate litigation targets as well as financial institutions presented with an opportunity to invest in litigation funding—is not too far-fetched. Yet it would be dead wrong to associate such risk solely with litigation hedge funds or specialized law firm financiers. It is inherent to any form of financial involvement by a third party in litigation.

49. CAL. SEC. OF STATE, U.C.C. REP., FIN. STATEMENT, June 26, 1996, Filing No. 9617860750. Records show that the financing has been continued and amended eight times since 1996, with the last continuation statement filed on December 28, 2010, extending the relationship until June 26, 2016 (the parties presently indicated as secured creditors are Citibank (West), F.S.B., Citibank, F.S.B., and Citibank, N.A.). This suggests a financial relationship with the Citibank group which, under agreements already executed, will have lasted for twenty years by 2016.

50. For a detailed study of the securitization of attorney's fees earned by tobacco attorneys, including Lieff Cabraser, see Radek Goral, Buying Suits: Exploring Business-To-Business Financing Of American Disputes, ch. 8 (Dec. 5, 2014) (unpublished S.J.D. dissertation, Stanford University) (on file with author).

twists in the course of *In re LCD* was the appearance of the firm's backer: LFG National Capital, affiliated with a leading law-firm financier, the Law Finance Group.[51] Before the court allocated the class counsel fees it already approved, the financier wrote the court asking for $28.2 million from Mr. Alioto's share.[52] The funder claimed that the fee was part of the collateral for the loan which it made to the Alioto Law Firm, and on which the firm defaulted.[53] And while the lender ultimately secured a judgment of $31 million in California state court, the case remains vigorously litigated.[54]

Irrespective of the fallout between the Alioto Law Firm and its financier, the theme of a law firm picking the funder from one's own backyard continues: both the firm of Mr. Alioto and Law Finance have substantial, if not primary, presence in the San Francisco Bay Area.

Going beyond the consortia leaders, there is a hint of a larger pattern. Big firms deal with big banks.[55] Smaller firms do business with regional and local banks, and those small deposits-and-loans institutions dominate the ranks of secured creditors of the *In re LCD* class counsel. Although some firms were successful in shopping for financing away from home,[56] a vast majority of the examined relationships matched a firm and a bank from the same neighborhood or region.

Among the third-party financiers of the IPP and DPP class counsel, one can find some "unusual suspects." Central Pacific Bank (Hawaii), Pandora State Bank (Iowa), Kaw Valley Bank

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51. *See* Goral, *supra* note 32, at 39–41.

52. *See* Letter from Attorney for LFG National Capital, *In re* LCD Antitrust Litig., MDL No. 1827 (Feb. 4, 2013), ECF No. 7586.

53. *Id.*

54. *See* LFG Nat'l Capital, LLC v. Alioto, 2014 WL 4655122 (Cal. Sup. Ct. Aug. 4, 2014) (granting plaintiff motion for summary judgment); LFG Nat'l Capital, LLC v. Alioto, No. A144346, 2015 WL 2214156 (Cal. App. 1st Feb. 4, 2015) (appeal pending).

55. For example, Hausfeld, LLP banks with Citibank, N.A.; Heins Mills & Olson P.L.C.with Wells Fargo Bank, N.A.; Grant & Eisenhofer P.A. with BNY Mellon, N.A.

56. A popular choice among the *In re LCD* class attorneys was the Huntington National Bank, operating primarily in the Great Lakes region. The UCC records disclosed it as a secured creditor of four DPP law firms—two from Illinois, one from Pennsylvania and one from Washington, and one IPP law firm—headquartered in California. However, the bank has no branches in any of those states except for Illinois.

(Kansas), Mechanics & Farmers Bank (North Carolina), Post Oak Bank (Texas), or Capstar Bank (Tennessee)—local or regional banks such as those were secured creditors of many among the local or regional firms representing *In re LCD* class plaintiffs. Oftentimes, the relationships between those firms and their bankers seem to go back for a decade or more.

There is nothing to suggest that smaller banks close to home understand legal business better than bigger banks far away. Rather, the tie-up between law firms and banks from the same community is consistent with the theory of social capital which a law firm may hold on its home turf. Such capital may well outweigh the local bank's discomfort with the kind of collateral that a litigation partnership is usually able to provide. And while local banks and local law firms alike may seem small when compared to their national-scale peers, they both tend to be important players in the same business and social community. Because of that, a financial relationship between them is likely to assume a personal aspect, involving not just money, but also personal respect and social standing.[57]

To summarize: capital that funds class actions is invested indirectly, through class action lawyers. It typically does not come earmarked for a specific lawsuit but is "passively invested" as working capital in a law firm's portfolio of cases. The financing is secured with the law firm's cash flow—the return which the law firm expects to earn on the portfolio. In addition, social capital is usually exchanged: I found a clear pattern of long-term relationships that law firms have with their "banker next door."

I have shown that about two-thirds of the *In re LCD* class action firms, responsible for more than three-fourths of all the work, had external financing available to them in one form or another. Moreover, the third-party capital came predominantly from banks, big and small, as lines of credit extended to plaintiff law firms. Among financed class counsel, not more than one in five used a non-bank source of money.

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57. The explanation sits well with the theory of social capital and the value of private networks. *See generally* MARK GRANOVETTER, GETTING A JOB: A STUDY OF CONTACTS AND CAREERS (1995); Mark Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360 (1973); James Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. (Supplement) 95 (1988); Brian Uzzi, *Embeddedness in the Making of Financial Capital: How Social Relations and Networks Benefit Firms Seeking Financing*, 64 AMER. SOC. REV. 481 (1999).

Arguably, even relatively small sums of money extended to law firms may make a difference, because an aggregation of claims usually goes hand in hand with the aggregation of resources at the disposal of the participating law firms. On the other hand, class action attorneys often organize themselves into consortia whose leaders have access to significant amounts of money. Probing into *In re LCD*, I found that all four of the co-lead class counsel were backed by major banks or a major non-bank provider of litigation financing, and that at the time when the class actions were resolved, those relationships had an average duration of about fourteen and a half years, in two cases going back for more than two decades.

C. *Backing Opt-Outs: Bespoke Financing of Bespoke Suits*

Among the private plaintiffs of *In re LCD,* the class action duo of DPPs and IPPs was complemented by the direct-action plaintiffs. The opt-outs of *In re LCD* were big corporations with large claims and deep pockets who certainly could afford to pay by the hour. Indeed, the majority of individual plaintiffs still hired a top-tier corporate law firm.[58] Nevertheless, there is evidence suggesting that a number of opt-outs chose to have their cases represented—and funded—in a manner that seems to diverge from the traditional defendant-side arrangements where the client pays the firm out of its own (deep) pockets and the firm bills by the hour. To illustrate that claim, let us now take a look at a consortium of prominent opt-outs led by Crowell & Moring.

Recall that Crowell represented at least six large corporate families. In the initial three cases—by AT&T, Motorola, and the Target group—the firm partnered with a Washington-based firm of Adam Holcomb, LLP (Adams Holcomb). The Hewlett-Packard lawsuit was co-counseled by Crowell and Bartlit, Beck, Herman, Palenchar & Scott, LLP (Bartlit Beck). In the remaining cases Crowell was flying solo.

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58. Most of the opt-outs hired the crème de la crème of the Big Law litigators, such as Crowell (ranked 83 in the Am Law 100 ranking of 2013), Alston Bird (41.), Boies Schiller (92), Orrick (27) and Perkins Coie (49). *See The 2013 Am Law 100. Gross Revenue: A New Number One*, AM. LAW. (May 1, 2013), http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202596371400.

The rest of this section examines how the Crowell faction was structured and claims that the entire group benefitted, directly or indirectly, from third-party capital available to two of the Crowell plaintiffs.

It is noteworthy that on the three largest—and leading—*In re LCD* cases in its "portfolio," Crowell partnered with a Washington-based firm of Adams Holcomb. At first glance, the two firms make strange bedfellows. Crowell is a firm of about five hundred attorneys working in seven American and four foreign offices.[59] The list of "professionals" on the website of Adams Holcomb has three names on it.[60] The firm does not list any associates. In fact, they claim that with the kind of legal practice they run they do not need young lawyers.[61] Crowell is an AmLaw100 firm, and Adams Holcomb does not even register in most rankings. Crowell has been around since 1979.[62] Adams Holcomb was in business not more than one year when it joined the *In re LCD* litigation.

But then again, Adams Holcomb is a very special law firm. It opened for business in October 2008, after its founders parted ways with Dickstein Shapiro LLP. Kenneth Adams and Bruce Holcomb both left as senior equity partners, and

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59. *Locations*, CROWELL & MORING, https://www.crowell.com/Locations (last visited May 6, 2016).

60. *Professionals*, ADAMS HOLCOMB LLP, http://www.adamsholcomb.com/professionals-adams-holcomb.html (last visited Nov. 5, 2015).

61. The firm explains on its website:

> We have not endeavored to build a substantial litigation capacity. Instead . . . we team with the litigation . . . firms who . . . can help us achieve the best results. To that end, we work with litigators at major firms who understand what it takes to represent plaintiffs. While many fine firms capably represent defendants, we have found a more limited number of litigators (outside the class action bar) who have the expertise and personality needed to represent plaintiffs effectively . . . . Depending on the case's needs, the lawyers may be selected from multiple firms. Claims resolution is handled by Adams Holcomb.

Our Mission, ADAMS HOLCOMB LLP, http://www.adamsholcomb.com/mission-adams-holcomb.html (last visited June 29, 2014) [hereinafter *Mission Statement*].

62. *See, e.g.*, Laura A. Kiernan, *Will Future Include Computers As Judges?*, WASH. POST, June 11, 1979, at C1 (reporting that the then-newly established Crowell Moring, with 53 lawyers who left Jones Day, was ranked by the Legal Times of Washington the 17th largest law firm in town).

Holcomb was heading the firm's antitrust practice.[63] Together with Christopher Leonardo, the trio of partners had among them close to one hundred years of professional experience. So it is highly improbable that Adams and Holcomb joined ranks with Crowell in order to do run-of-the-mill litigation work.[64] They had been there already, and they decided to walk away to do things differently.[65]

Adams Holcomb seems to pioneer a novel way of practicing law: it may be called a "litigation project manager"—a specialized counsel distributing and coordinating work of larger firms rather than receiving work from them. Self-reportedly, Adams Holcomb tries to add value by translating strategic objectives of a client into concrete litigation tactics. They appear eager to focus on the big-picture design and shop on behalf of the client for a partner firm able to provide high-quality legal services. Such partner firm would then do the bulk of all back-office work, realizing strategic designs into finished attorney-work products.[66]

But what Adams Holcomb brought to the table when it joined forces with Crowell was not just the top-notch expertise of its partners in antitrust litigation, but also the capital it could allocate to prosecuting select lawsuits. It could do so, because it entered into a strategic, confidential partnership with Juridica Investments Ltd. (Juridica), the first publicly-traded fund investing in American legal disputes.[67]

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63. *See, e.g.*, CHAMBERS USA: AMERICA'S LEADING LAWYERS FOR BUSINESS (2008) (recognizing both Mr. Adams and Mr. Holcomb as leading lawyers in antitrust).

64. Adams Holcomb lawyers are listed as counsel of record for AT&T, Motorola, and the Target group. But we found no records suggesting that they appeared in court regularly or actively participated in the motion practice.

65. *See* Elizabeth Goldberg, *Law Firms Face Gray Area as Boomers Age*, AM. LAW. (Dec. 10, 2007), www.alm.law.com/jsp/article.jsp?id= 1197021878240. The author describes how in 2004, the 58-year-old Mr. Adams, fresh from the legal fight in *In re* Vitamins Antitrust Litig., 305 F. Supp. 2d 100 (D.D.C. 1999), shocked Dickstein partners by deciding to "just to get reacquainted with [his] family and chill out a bit." *Id.* When he returned, he gave up a portion of the firm equity, assumed an advisory role, and focused on Dickstein's alternative fee arrangements. *Id.* The author claimed that the "arrangement succeeded," but hindsight suggests otherwise. *Id.*

66. *Mission Statement*, *supra* note 61.

67. Juridica Investments, Ltd. (using the ticker symbol JIL) raised close to $200 million through London's Alternative Investment Market. *See*

The Crowell group, with Juridica recognized as an indirect stakeholder in the front-running suits, is presented graphically in Figure 2 below.

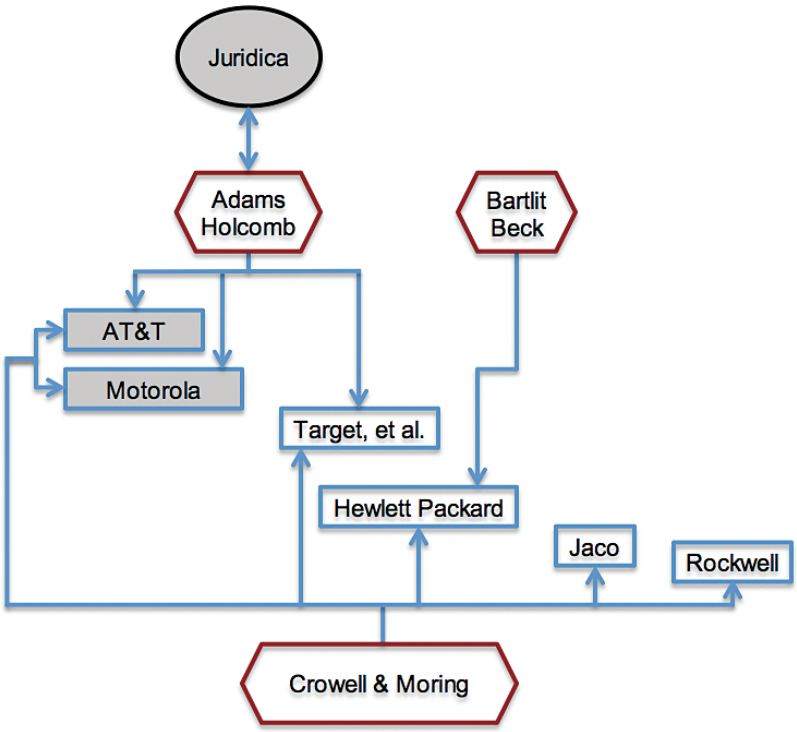

Figure 2. The Crowell opt-out group. Crowell shared three cases with Adams Holcomb (AT&T, Motorola, and the Target group) and another one with Bartlit Beck (Hewlett Packard). Other plaintiffs,

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Juridica Investments, Ltd., Interim Results for the Six Months Ended 30 June 2009, at 8 (Sept. 27, 2009) (reporting shareholder's equity of $196,694,515). The fund reported that "[i]n November 2008, [it indirectly] partnered with a group of experienced antitrust lawyers (the "Partnership") to pursue a portfolio of. . . . cases" and that it expected to continue funding those cases until the end of 2016. *See* Press Release, Juridica Investments, Ltd., Third Loan Facility to Fields Sullivan PLLC (Sept. 2, 2011) (disclosing a loan agreement with Fields Sullivan PLLC). Based on all the facts about the partnership and the funded antitrust cases disclosed by Juridica in its financial reports over the years, I identify that "group of experienced antitrust lawyers" as Adams Holcomb. For an in-depth discussion on Juridica's diverse investments see Goral, *supra* note 50, at 232–48 (identifying twelve specific cases backed by the fund).

such as Rockwell and Jaco, Crowell represented alone. Lawsuits have been arranged by filing date, from left to right. Shaded boxes indicate (indirect) investments of Juridica.

As of the beginning of 2013, Juridica injected (indirectly, through a complex conduit) almost $100 million—about half of its entire capital—into a handful of antitrust cases co-counseled by Adams Holcomb. In exchange, it was to (again, indirectly) benefit financially from the success of the financed disputes and the attorneys representing them.[68]

The *In re LCD* cases of AT&T and Motorola were both part of the portfolio on which Juridica gambled.[69] By the end of 2013, the bet on those two cases earned Juridica a realized (gross) return of almost $70 million.[70] Under conservative assumptions, Juridica's investment in that case—via Adams Holcomb—might have been in the range of $15 million,[71] which would be comparable to the cash contribution of approximately $18 million made by *all* class counsel to *both* of the *In re LCD* class actions.[72]

Although the relationship between Adams Holcomb and Crowell remains confidential, one cannot help but to wonder whether the first firm was in fact "leading from behind," controlling the strategy and directing the larger partner in the jointly represented cases. And whether Crowell also took a share of the outcome risk in the represented cases. Such an arrangement would certainly seem in the interest of Juridica, aligning economic interests of all parties; it would be consistent with the business model advertised by Adams Holcomb; and it would not be out of the question for Crowell which

68. Juridica stated that as of December 31, 2012, it had invested about $96 million in their antitrust portfolio, *see* Juridica Investments, Ltd., Annual Report & Accounts 2012, at 6 (Mar. 14, 2013) [hereinafter Juridica Annual Report 2012].

69. *Id.*

70. *See* Juridica Annual Report 2012, *supra* note 68, at 3 (reporting that the case identified here as AT&T/Motorola produced cash returns of approximately $69 million); Goral, *supra* note 50, at 176–219.

71. Juridica invested about $96 million in 6 antitrust cases. Jurdica Annual Report 2012, *supra* note 68. If it allocated money equally to all funded cases, its per-case investment would be $16 million. However, it appears that the case which we identified as *In re LCD* is one of the fund's larger investments, suggesting an above-average allocation of capital.

72. *See supra* note 18 and accompanying text.

claimed at the time that it generated a substantial revenue from alternative fee arrangements.[73]

III.
Incidental Third-Party Funding

Having discussed various stages of the enormously complex case of *In re LCD* and various channels through which third-party money may (and is) injected into legal disputes, Part III goes beyond the question of who got money from which third party. Here, I show how a sequential alignment of multiple cases into a "litigation waterfall"—whether because of a particular procedural setup or by choice of the involved parties—allows later-stage stakeholders to benefit from successes of earlier-stage litigants and leverage limited resources with "incidental third-party funding."

Let us first state explicitly a simple truth: that a litigant interested in maximizing the financial result of her case needs to consider the cost of having such case developed to the point where, broadly speaking, it offers the best chance of success relative to the money spent. The less a party needs to spend to bring a case to a certain point, the better off she is.

One way to make a case more efficient is to wait and have some of the heavy lifting done by others.[74] Because of the ben-

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73. On its website, Crowell declares:

> We develop and align incentives with our clients, that reward our output and what has been achieved for our clients, a clear-cut shift away from pricing hourly billing inputs. . . . We work with our clients to develop fee arrangements that focus on, and reward, our ability to generate or preserve value as defined by you, the clients. We no longer consider these 'alternative' but as our primary fee arrangements.

Value-Based Billing, Crowell & Moring, http://www.crowell.com/About/Innovation-in-Service/Value-Based-Billing (last visited June 29, 2014).

Among the alternative-fee arrangements they are open to, Crowell lists blended rates, caps and collars, credits toward new business, holdbacks, success fees, phase-based fees, and contingency fees. *Id.* Incidentally, in 2009, the year Crowell started representing *In re LCD* opt-outs, the Financial Times ranked it first (tied) for its innovative billing arrangements. *Billing and Fees 2009: FT.com Innovative Lawyers Report*, Financial Times, http://rankings.ft.com/exportranking/billing-and-fees-2009/pdf (last visited June 29, 2014) (reporting that the majority of the firm's revenue comes from alternative fees).

74. The operative word here is "to wait": waiting for others to do the work costs time. I.e., the benefit in the form of litigation savings must be

efit created by the works of somebody else, the coattails-rider saves what she does not spend (because the benefit is conferred either for free or costs less than developing the same work product independently). Therefore, she can improve the net outcome of the case by either bringing the cost down, or by spending more of her budget on those parts of the case where she needs to go on her own.

In the "crystal cartel" litigation explored here, the above proposition appears particularly salient. Despite their substantive and procedural differences, all *In re LCD* actions consolidated before the MDL court relied at least in part on similar factual findings and legal arguments.[75] And, crucially, those related actions were organized into a sequence of clearly delineated litigation stages.

It was the Government and its taxpayer-funded prosecution that created litigation freebies for all other plaintiffs. The Government played a leading role in establishing the cartel behavior and antitrust liability of its members, paving the way for the private plaintiffs able to focus on *quantum* and case-specific issues.

The second act of *In re LCD* belonged to class plaintiffs. Counsel for both classes cooperated throughout discovery, sharing some of its financial burdens.[76] However, their efforts also benefitted from opt-outs (and some *parens* states). It was

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weighed against the cost of money. To the extent that a litigant is able to manage spending (by disbursing money only after the waiting time is over) and is patient enough (her preference to monetize her claim today rather than tomorrow is not too high), the benefit should be expected to outweigh the cost.

75. This is to be expected; common issues of fact and law are one of the main reasons for centralization mechanisms such as the MDL procedure or special jurisdictional rules under CAFA. *Cf.* Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 894 (2001) (noting that aside from facilitating efficient discovery and pretrial development of the cases, the MDL procedure also structures the aggregated dispute and may encourage settlement).

76. Because of the huge volume of produced documents, class counsel hired together a software developer, Autonomy Zantaz, to build a custom-made file repository. Then they arranged with LexisNexis a special link between its CaseMap suite and the Autonomy-made software to organize and code key documents. *See* Declaration of Bruce L. Simon in Support of Direct Purchaser Class Plaintiffs' Motion for Attorney Fees Reimbursement of Expenses, and Incentive Awards, ¶¶ 41–50, *In re* LCD (Oct. 28, 2011), ECF No. 4060.

for that reason that the DPP counsel demanded common-benefit reimbursement from the direct-action plaintiffs, arguing that the class financed the endeavors on which the opt-outs would likely rely in their own cases.[77] The argument did not fall entirely on deaf ears: at least some of the late-stage litigants appreciated the opportunity to use somebody else's work product and chose to purchase it instead of developing the material from scratch.[78]

Finally, during the opt-outs stage of *In re LCD*, the plaintiffs scheduled to have their day in court early blazed the trail for the rest of the "opt-out class." For example, a number of "similarly situated" plaintiffs expressly relied on AT&T and Motorola cases—backed with Juridica's money to blaze the trail and litigate certain points of law common to them all.[79] In addition, the Crowell group plaintiffs settled jointly with various defendants, which dramatically shortened the filing-to-resolution time for those able to piggyback earlier lawsuits.

The identified pattern—that the costs of advancing lawsuits in related cases overlap, enabling cost-sharing and free-riding—seems externally valid. Nothing suggests that the multi-stage setup of *In re LCD* is unique to the particular case or genre of antitrust litigation.

As shown in Figure 3, the idea of a cost overlap and its free-riding potential could be represented as a stack of differ-

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77. *See* Motion for Entry of an Order Compensating Direct Purchaser Class Counsel for Work Product, at 6–8, *In re* LCD (Jan. 12, 2011), ECF No. 2315 (arguing that the DAPs "should pay their fair share for the substantial benefits" they obtained from the work of the DPP counsel, which must not be "unreasonably exploited by free-riders"); *id.* at 15–16 (contending that during joint depositions class counsel sat first chair and did most of the homework). The opt-out counsel countered that despite earlier developments they still needed to prove all factual and legal factors unique to their individual cases and that class lawyers were reluctant to share—for example, by denying opt-outs access to the discovery database developed jointly by both classes.

78. For instance, an opt-out paid $200,000 to access opinions of the expert witnesses hired by class counsel; and the court explicitly approved adding all such payments to the class common fund. *See In re* LCD (Dec. 20, 2012), ECF No. 7400, at 3.

79. Note that the precedential cases of Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2015), *cert. denied*, 135 S. Ct. 2837 (2015), and AT&T Mobility LLC v. AU Optronics Corp., 707 F.3d 1106 (9th Cir. 2013), were set by the third-party funded frontrunners of the Crowell group of direct plaintiffs.

ent-shaped sheets, where the area of each sheet represents the cost of developing a case.

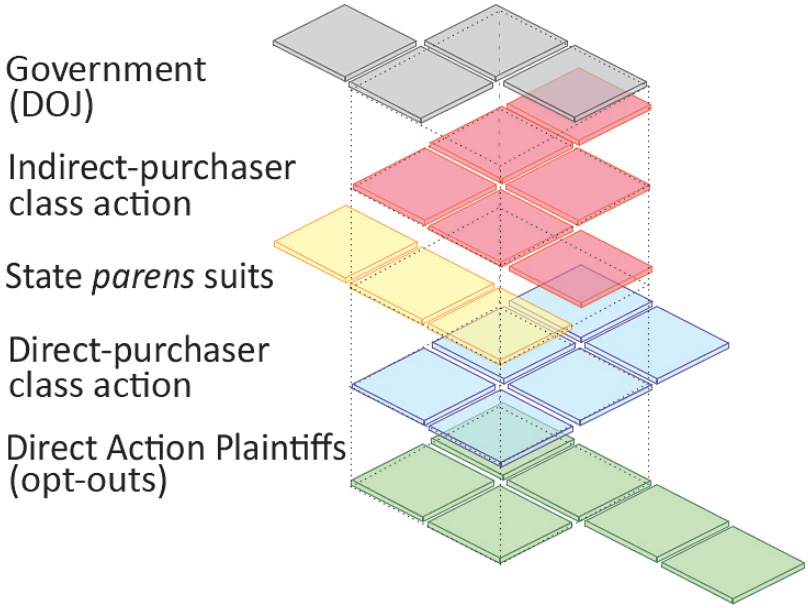

Figure 3: Overlapping costs of litigation. The expected cost required to resolve a lawsuit is represented as a colored area. Overlaps between any two areas indicate the cost common to the two respective suits which may be shared (when the two litigants cooperate) or avoided (by the litigant able to use another litigant's input for free). It follows that the marginal, case-specific cost is the part of an area that does not overlap with any other surface in the stack.

But the benefit conferred by a predecessor case, whether for free or for value, to all suits that succeed it, goes beyond the opportunity to save on costs by using somebody else's achievements. The main advantage consists in the ability to invest money in a case which, due to successes of an earlier lawsuit, has become less risky than it would have been on its own. The benefit is not just the work done by another; it is another's successful result, yielded by resources dispensed under risk.

The last remark is closely related to the notion that typically a legal process is not tantamount to a single roll of a dice, but rather a series of such rolls, with litigants being able to

make decisions and commit means gradually, as their case progresses and intermediate outcomes become known. For a hesitant or money-constrained plaintiff the wait-and-see option may be a difference between going to court and staying home.

As *In re LCD* advanced, the pace-setter of each stage paved the road for the rest, making subsequent cases less costly and less risky. Again, of particular notice is the role of the Government as a third-party (from other plaintiffs' point of view) which not only funded and established an important element of all private actions, but also acted before everyone else. A financier would say that the DOJ was the "first money in"—taking the greatest risk and allowing others to invest only after the initial uncertainty has played out. Relatively speaking, class actions carried medium risk, and opt-out suits were the safest.

Because the litigation risks cascades down over time and the early-stage financing spills over, trickling down to later stages, such complex-litigation arrangement may be called a "litigation waterfall": a process setup that enables a later-stage claim holder to benefit, sometimes indirectly, from earlier, favorable developments, by reducing the cost of the later suit and the risk of its adverse outcome. Figure 4 illustrates the concept.

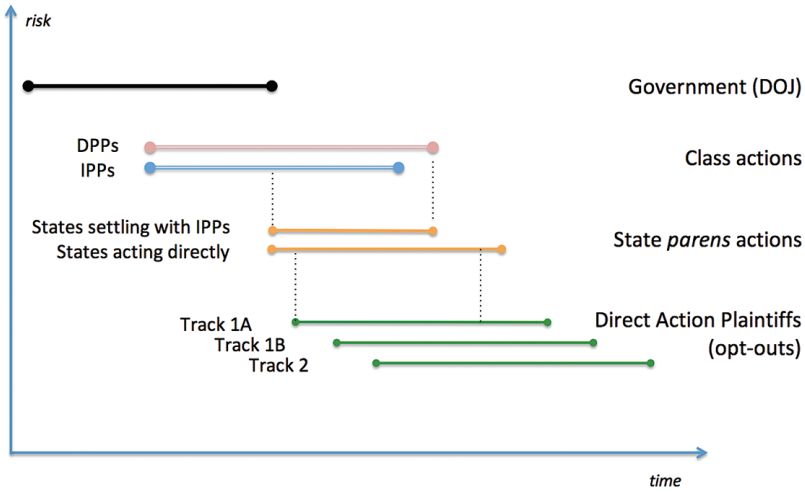

Figure 4: The "litigation waterfall". As time passes and the case of the first-moving litigant successfully resolves common issues, the benefit of such resolution "trickles down" to those whose actions are

decided later, with each stage feeding the "benefit flow" with additional work product, adding to the benefit and reducing the risk of the next-stage litigants.

Conclusion

The anecdote of *In re LCD* demonstrates that third-party financing of business litigation has many facets. Straightforward agreements between a financier and a litigant do happen, but the majority of external capital reaches a dispute indirectly.

The existing literature and academic discourse appears unduly preoccupied with direct transactions between a financier and a lawsuit party, neglecting indirect stakeholders and the impact their interests may have on the funded suit. It is of note that despite the multitude and variety of capital sources tapped by different groups featuring in the case, *In re LCD* saw hardly any traceable capital funding extended to a litigant directly by a third-party financier. Direct transactions are but the tip of the litigation financing iceberg, with much of its mass submerged under the surface and receiving little scrutiny or reflection.

Furthermore, the market for high-ticket litigation financing is usually not comprised of a series of isolated transactions. It is a complex game among repeat-players who are able and willing to benefit not just from their own resources, but also from those made available by third parties. Such resources may comprise capital invested by a third-party funder in an individual case, but they may also involve incidental third-party funding—an opportunity to benefit from litigation work paid for with money and sweat expended by others.

From the macro perspective of the litigation market as a whole, the ability to leverage developments in other lawsuits increases the practical impact of third-party funding of legal claims. Because of the possibility that resources invested once may be recycled multiple times, each third-party dollar potentially buys more than a dollar worth of extra litigation. The multiplier effect of third-party financing is all the greater in complex litigation where the opportunity to behave strategically is far greater than in an individual case.

On the level of an individual case, it should be noted that a given procedural framework or party configuration may have far-reaching "side effects," influencing which cases will sprout,

how fast they will grow, and which resources will nourish them. Conversely, parties may think of procedural choices or the case alignment within a larger lawsuit mass through the prism of their financial concerns. Those potential extralegal "side effects" of a procedural setup ought to be recognized both by judges and litigants.