Where's the Insurance in Mass Tort Litigation?

Tom Baker*

Drawing on qualitative empirical research, this Article reports and explains the unusual role of insurance in mass tort litigation. In contrast to ordinary tort, corporate governance, and securities litigation: (1) mass tort plaintiff lawyers do not build their litigation and settlement strategy around defendants' liability insurance, except in the insolvency or near-insolvency context; (2) mass tort defendants typically retain control over their defense, even when they recover under insurance policies that assign the insurer control over their defense; (3) mass tort defendants typically use their own funds to settle claims, obtaining indemnification from their liability insurers, if any, later; and (4) many mass tort plaintiff law firms rely on non-recourse litigation funding that resembles the earliest forms of commercial insurance—bottomry and respondentia—and there is an emerging insurance market that reduces the cost of this funding and may one day supplant it. In addition to providing a new understanding of the role of insurance in mass tort litigation, this research provides empirical support for two of the conceptual insights in Kenneth Abraham's The Liability Century*: (1) the mismatch between product liability and product liability insurance that emerged near the end of the twentieth century and (2) the increasingly insurance-like function of tort law.*

* Thank you to David Hyman, Charles Silver, Kenneth Abraham, and Alexandra Lahav for comments on a prior draft; Robin Pearson for historical references; Andrew Lang, Doug Snyder, and Cody Wong for research assistance; the participants at the Texas Law Review Symposium; the respondents I interviewed for this project; and the many people in and around liability insurance and litigation funding who have helped me understand those fields (including the lawyers with whom I have worked as an expert witness for policyholders and insurers in cases involving insurance coverage for mass torts).

In the magisterial work *The Liability Century*, Kenneth Abraham described tort law and liability insurance as a binary star: two separate institutions that revolve around each other, forming a common gravitational field.[1] Abraham's evocative image captured an emerging consensus among tort and insurance law scholars at the turn of the twenty-first century. Insurance had not only contributed to the twentieth century expansion of tort law doctrine[2] but also governed tort law in action.[3] While there were important nuances, liability insurance had become a de facto element of most tort claims. As a result, plaintiff lawyers shaped their tort suits to match the available insurance, and liability insurance companies controlled the defense and settlement of those suits.[4] This understanding was informed by empirical research on auto, medical malpractice, and other personal injury litigation; securities and corporate governance litigation; food safety litigation; and legal malpractice litigation.[5]

1. KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, at 1 (2008).

2. *Id.* at 5–6.

3. *See* H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 18, 21–22, 122, 235 (rev. 2d ed. 1980) (contrasting formal legal remedies with insurance-based settlement of liability claims in practice).

4. Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 3, 9 (2005).

5. *See, e.g.*, Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 278–80 (2001) [hereinafter Baker, *Blood Money*] (discussing a research study on personal injury lawyers, the impact of insurance coverage on lawsuit magnitude, and the relationship between defense attorneys and insurance companies); TOM BAKER & SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION 14–15, 128–30, 132 (2010) (comparing and contrasting the insurer's role in D&O and auto insurance in light of a research study); John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1544, 1549, 1551 (2017) (discussing how liability insurance companies exert influence over policing practices); BERNARD S. BLACK, DAVID A. HYMAN, MYUNGHO PAIK, WILLIAM M. SAGE & CHARLES SILVER, MEDICAL MALPRACTICE LITIGATION 74–76, 80 (2021) (discussing a research study on medical malpractice policy limits impacting claim amounts). For additional empirical-study discussion, see Tom Baker & Rick Swedloff, *Mutually Assured Protection Among Large U.S. Law Firms*, 24 CONN. INS. L.J. 1, 9–10 (2017) and Timothy D. Lytton, *Using Insurance to Regulate Food Safety: Field Notes from the Food Produce Sector*, 52 N.M. L. REV. 282, 291–92 (2022).

Surprisingly, mass torts have escaped the attention of empirical researchers investigating the tort-and-insurance binary star. Torts and civil procedure scholars have written about mass tort litigation, including case studies that involved significant empirical research, but insurance was not their focus.[6] Insurance scholars have written about legal issues that arise at the intersection of mass torts and liability insurance, but that research was neither empirical nor focused on the mass tort litigation side of the equation.[7] And some scholars, notably Kenneth Abraham and George Priest, have long commented on the friction between product liability and product liability insurance, but they did not engage in empirical research, nor did they explicitly draw on their participant observation of those frictions.[8] In short, while there is a large body of research and writing on mass tort litigation and liability insurance, no one has gone into the field to study the intersection of insurance and mass tort litigation empirically, notwithstanding the dominance of mass tort suits in the federal courts, the prevalence of mass torts in state courts, and the formative role of mass tort insurance coverage litigation in developing insurance law and making that litigation an elite law firm practice.[9]

This Article begins to fill that gap. After a note on empirical methods in Part I, I present the four key findings in Parts II and III:

---

6. *E.g.*, PETER H. SCHUCK, AGENT ORANGE ON TRIAL 4 (enlarged ed. 1987); JOSEPH SANDERS, BENDECTIN ON TRIAL iv (1998).

7. *See, e.g.*, Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 CONN. INS. L.J. 349, 350 (2006) (assessing the impact of mass tort asbestos litigation on insurers); Thomas Baker & Eva Orlebeke, *The Application of Per-Occurrence Limits from Successive Policies*, 3 ENV'T. CLAIMS J. 411, 411 (1991) (responding to an insurance industry proposal to restrict the amount of coverage available for long-term environmental property damage claims); Kenneth S. Abraham, *The Long-Tail Liability Revolution: Creating the New World of Tort and Insurance Law*, 6 U. PA. J.L. & PUB. AFFS. 347, 349, 352 (2021) (analyzing the impact and consequences of long-tail liability on tort and insurance law).

8. *E.g.*, ABRAHAM, *supra* note 1, at 6; Kenneth S. Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 VA. L. REV. 85, 99–100 (2001); Kenneth S. Abraham, *The Maze of Mega-Coverage Litigation*, 97 COLUM. L. REV. 2102, 2116 (1997); Abraham, *supra* note 7, at 387–89; George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1521–22 (1987) [hereinafter Priest, *Insurance Crisis*]; George L. Priest, *The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform*, 5 J. ECON. PERSPS., Summer 1991, at 31, 31–32.

9. *See, e.g.*, D. Theodore Rave, *Multidistrict Litigation and the Field of Dreams*, 101 TEXAS L. REV. 1595, 1597 (2023) (describing the breadth of mass tort litigation and explaining that, by some estimates, "more than 50% of pending civil cases" on the federal docket are MDLs); Kenneth S. Abraham & Tom Baker, *What History Can Tell Us About the Future of Insurance and Litigation After Covid-19*, 71 DEPAUL L. REV. 169, 171–72 (2022) (arguing that a series of developments in American history shaped the insurance marketplace, insurance law doctrine, and the "financialization" of insurance); Stempel, *supra* note 7, at 350 (claiming that the asbestos mass tort had a substantial impact on liability insurance law).

- Outside of the insolvency or near-insolvency context, mass tort plaintiff lawyers do not build their litigation and settlement strategy around defendants' liability insurance.
- Mass tort defendants typically retain control over their defense, even when they recover under insurance policies that assign the insurer control over their defense.
- Mass tort defendants typically use their own funds to settle claims, obtaining indemnification from their liability insurers, if any, later.
- Many mass tort plaintiff law firms rely on non-recourse litigation funding that resembles the earliest forms of commercial insurance—bottomry and respondentia—and there is an emerging insurance market that reduces the cost of this funding and may one day supplant it.

Each of these findings differs from those reached in empirical investigations of other parts of the tort-and-insurance binary star. In Part IV, I present some potential explanations for these differences. Part V concludes with a discussion of potential implications.

I. A Note on Method

This Article reports results of qualitative research based on participant observation and semi-structured interviews. My service as the Director of the Insurance Law Center at the University of Connecticut (1997–2008), as a member of the Scientific Committee of the Geneva Association (2003–2013), and as the reporter for the *Restatement of the Law, Liability Insurance* (2010–2018) brought me into frequent contact with insurance-industry and law-practice participants and less frequent but informative contact with mass tort lawyers. In the past two years, I have conducted similar participant-observation research on litigation funding through teaching my litigation finance seminar, moderating panels at industry and legal conferences, and assisting in the evaluation of insurance-related claims.

In addition, I conducted forty-eight confidential, semi-structured interviews of high-level participants in the mass tort field during the six-month period beginning in August 2022. I recruited the respondents using a snowball technique, radiating out from contacts gained through the participant observation. The respondents included fourteen plaintiff lawyers, seven defense lawyers,[10] two lawyers with significant experience consulting in mass tort settlements, seven litigation funding professionals who issue non-recourse financing to mass tort law firms, two brokers who help law

10. I started the project planning to interview an equal number of lawyers on the plaintiff and defense sides, but I quickly learned that liability insurance does not serve the same functions in the mass tort context that it serves in ordinary tort litigation. Accordingly, I shifted my focus more to the plaintiff side of the mass tort field.

firms obtain this financing, five brokers who arrange insurance policies that support and compete with the non-recourse financing, four mediators who mediate mass tort claims and associated insurance coverage disputes, two former general counsels of large property casualty insurance companies, three lawyers who regularly litigate insurance coverage cases involving mass tort liabilities, and two lawyers who specialize in litigation funding transactional work and related advice. I took field notes during the interviews, typed them up thereafter, and conducted follow-up discussions by phone and email. I shared a prior draft with respondents and other participants in the mass tort field to check the accuracy of my description.

II. Liability Insurance Usually Does Not Matter (Much) in Mass Tort Litigation

As prior research describes, ordinary personal injury tort litigation is largely about the insurance: targeting the defendant with the most insurance, shaping the tort claim to fit the insurance, convincing the insurer to pay, and often preserving the settlement proceeds from the subrogation demands of a workers' compensation or health insurer.[11] Prior research also suggests that insurance matters nearly as much in securities and corporate governance liability actions, notwithstanding the deep pockets of the entity defendants in those actions.[12] There are differences between these domains to be sure. For example, ordinary tort liability insurance policies give the insurer control over both defense and settlement, while directors and officers liability insurance policies typically give the liability insurer control over settlement but not defense.[13] To a remarkable extent, however, the scope of liability for the claims that plaintiff lawyers bring to court in both domains closely matches the defendants' liability insurance, not because the scope of the available insurance necessarily matches the scope of potential liability, but rather because plaintiff lawyers shape the claims that they bring to match the available liability insurance.[14] The potential damages in a particular case may

---

11. Baker, *Blood Money*, *supra* note 5, at 275; Baker, *supra* note 4, at 3–4; BLACK ET AL., *supra* note 5, at 69–70; *see also* Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 189 (2001) (arguing that an increase in liability insurance has indirectly increased the pool of potential defendants and prospective recovery amounts); Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606 (2006) (noting that plaintiff attorneys usually decline to litigate against uninsured defendants).

12. Tom Baker & Sean J. Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, 157 U. PA. L. REV. 755, 797 (2009) ("[V]irtually all U.S. public corporations purchase D&O insurance, and securities settlements are largely funded by insurance proceeds. More often than not, then, the D&O insurer's willingness to pay, rather than the willingness of the corporation to pay, is what ultimately matters." (footnotes omitted)).

13. *Id.* at 804, 808.

14. The tort claims available in theory include claims that would not be covered, such as domestic violence claims in the ordinary tort context and truly intentional fraud claims in the securities litigation context. *See, e.g.*, Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L.

exceed the amount of insurance the defendant purchased, but the odds are low that the defendant has no insurance that covers the case,[15] and liability insurance law rules governing settlement provide significant incentive for the parties to the case to settle within the limits of the available insurance.[16]

The mass tort domain turns out to be quite different. Except when mass tort losses threaten to render the defendant insolvent (or nearly so), plaintiff lawyers report that they pay little attention to liability insurance in framing, litigating, or settling a mass torts case:

> Plaintiff Lawyer #9: In the kinds of mass torts I've been doing for all these years involving really big companies, I never see the insurance companies. In 90% of the cases I'm convinced that there is insurance, maybe it's a captive, but we only deal with opposing counsel. Sometimes in a negotiation or mediation there is someone sitting quietly in the room who I don't know. It may be a client or it may be an insurance company person. But we don't deal directly with them.
>
> Settlement Consultant #1: Here are some thoughts I have on the role of insurance in mass torts, based on my 25 years of experience assisting with major, large-dollar mass tort settlements: In product liability cases involving pharmaceuticals, medical devices, toxics, ignition switch defects, etc., I expect that insurance *never* plays a role.
>
> Plaintiff Lawyer #13: When I got your message, I started trying to think, when have I actually encountered insurers. I have not seen insurance companies at all. Basically, mass torts have a threat—because they are torts and not class actions—to go outside the bounds of any company. The scale is such that they exceed the limits of any insurance.

REV. 121, 135 (2001) ("Lack of insurance is a major contributor to the scarcity of tort claims for domestic violence injuries.").

15. I have learned through participant observation that when a large corporation is a defendant, the insurance for an auto, premises liability, or other ordinary tort claim is likely to be either a "fronting" insurance policy or a policy issued by a "captive." However, the claims-handling arrangements under such policies are very similar to claims-handling arrangements under ordinary market insurance because of, among other reasons, the overlap in personnel and procedures between the claims departments of third-party claims administrators and liability insurance companies. A fronting insurance policy is a policy that satisfies a regulatory or contractual obligation to purchase insurance but does not involve risk transfer, for example, because the policy contains a deductible that is equal to the limits, or the policy is 100% reinsured by a captive. A captive insurance company is a company that is owned by the corporate group to which the captive provides insurance.

16. *See* Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1127–28 (1990) (discussing how liability limits incentivize insurance companies to reject some reasonable settlement demands and incentivize insureds to accept some unreasonable demands); Baker & Griffith, *supra* note 12, at 761 ("[T]he vast majority of securities claims settle within or just above the limits of the defendant corporation's D&O [liability insurance] coverage."); Tom Baker, *Transforming Punishment into Compensation: In the Shadow of Punitive Damages*, 1998 WIS. L. REV. 211, 234–35 (noting the incentive to settle to convert punishment into compensation and "terminate[] the insurance company's ability to contest coverage for the claim").

The lawyers reported that most pharmaceutical companies and many medical device manufacturers have not purchased commercial liability insurance for their product liability risks for at least the last ten years.[17] When defendants do have insurance, plaintiff lawyers pursue their legal right to obtain complete information about that insurance,[18] but they base their settlement demands primarily on "merits" factors,[19] including the plaintiffs' injuries, the prospects for getting to and succeeding at trial, and comparable settlements and verdicts. Secondarily, plaintiff lawyers base settlement demands on their own financial issues and the defendant's balance sheet, without regard to how much liability insurance may or may not be available to the defendant for the liabilities.[20]

> Plaintiff Lawyer #4: I don't care about insurance. The defendants are well-heeled. I'm looking at their balance sheet, not their insurance.

None of the plaintiff lawyers or any other respondents described any effort to shape a mass tort claim to match the available liability insurance or any reluctance, outside the insolvency or near-insolvency context, to allege seriously wrongful conduct that might provide the defendant's insurers a basis for avoiding coverage.

> Plaintiff Lawyer #14: I don't think anyone ever pled a mass tort to get coverage. We want our pleadings to be as dynamic as possible. We want them to be picked up by the press. That gets the word out. That brings plaintiffs in.

Similarly, mass tort litigation funders report that, except when considering a claim against an insolvent or nearly insolvent defendant, they do not consider the defendants' liability insurance when they are making decisions about plaintiff lawyers' funding requests.[21]

On the defense side, the mass tort lawyers are not hired by and do not take direction from liability insurers. Moreover, except when defendants lack sufficient other assets, mass tort cases generally settle with the defendant

---

17. *See* STEVEN GARBER, ECONOMIC EFFECTS OF PRODUCT LIABILITY AND OTHER LITIGATION INVOLVING THE SAFETY AND EFFECTIVENESS OF PHARMACEUTICALS 5 n.3 (2013) ("Pharmaceutical companies are typically not insured for costs of legal defense or for most indemnity payments associated with product-liability actions."); *infra* subpart IV(C).

18. According to Plaintiff Lawyer #14, "Responsible lawyers always ask the question. It's an asset."

19. For more information on what counts as a merits factor, see Baker & Griffith, *supra* note 12, at 786–87.

20. Plaintiff Lawyer #14 confirmed, "This is generally true for healthy companies. For near-insolvent companies, that asset becomes important because it's undesirable for defendants to bring the claims into bankruptcy."

21. I observed this by asking open-ended questions about what factors the funders and brokers considered when evaluating a financing request. When they didn't mention the defendant's liability insurance (none did), I asked about liability insurance. *E.g.*, Funders #1 and #2.

itself paying the settlement and, if the defendant has liability insurance, pursuing that asset separately after the settlement:

> Defense Lawyer #2: Either the defendant doesn't have insurance anymore, like pharma, or there's a tower somewhere with lots of pieces. Then the insurance issues get worked out later, maybe in a London or Bermuda arbitration. . . . In big MDLs, insurance is the tail of the dog, and it doesn't wag the dog. The case proceeds. The carriers are notified. The carriers often don't even care to be kept up to speed. They're not involved in managing the case at all. The MDL is self-contained, and the insurers don't play a role. Not even a minor role.

In that subsequent insurance coverage litigation, the mass tort defense counsel is involved, if at all, only to provide evidence about what occurred in the litigation and settlement process, as I have seen repeatedly in my participant observation.

Notably, the mediators confirmed the lawyers' reports, observing that the "pay and chase" approach to settlement prevalent in the mass tort context differs from that in securities and corporate governance litigation:

> Mediator #2: Mass torts tend to have different constituencies and alignment than securities cases. In securities class actions, there are five rooms: class action counsel, company, individuals, underwriters and accountants, and insurers. In those cases—except in the "oh shit" situation where you have to settle now-with-a-capital-*N* and you can't wait for the insurers to turn like a school of whales as opposed to a school of minnows; the insurers lead the way. Everyone understands that it's insurance money first. Insurers lead the way like the Rangers lead the way in Army maneuvers. . . . In the mass tort context, there are a lot more coverage disputes and a lot more denials. It may just be the kind of case that I have, but I see the companies just going out ahead. There's a lot more pay and chase than I see in securities cases.
>
> Mediator #3: In my experience in the resolution of mass tort claims in federal and state courts, the insurers are largely irrelevant. . . . The insurer is not at the table and not even a factor. It's not on my watch to engage the insurers. Either because the company has a captive or no insurance, or simply [because] they don't want or need me to deal with their insurance.

A few of the interviews suggest that this "liability insurance doesn't matter" story may be overstated to at least some degree. Defense Lawyer #2 explained how the structure of a company's captive insurance can affect the timing and even the amount of settlements, for example, by making it easier to settle cases during years in which the captive's cash flow is favorable and conversely harder to settle cases in years in which the captive has already paid substantial amounts in other cases. Several plaintiff lawyers described the settlements they reached in single-event, non-product mass torts by reference to how much more than the defendants' liability insurance they obtained in the settlements, suggesting that the policy limits may play a role in anchoring settlement negotiations in at least those kinds of mass torts. Plaintiff Lawyer #14 described how information found in the underwriting file of the defendant's liability insurer helped prove that the defendant knew about the risk, noting "I've always found insurance to be more tactical. . . . The value isn't about how much money there is, but what may be in the underwriting file." In addition, two plaintiff lawyers said that "plaintiff lawyer bravado" may be leading my other respondents to overstate their "insurance doesn't matter" story:

> Plaintiff Lawyer #8: Insurance matters even when there isn't any because that means the plaintiff lawyers know that the company itself will pay. They always know whether there is insurance, how much and what kind, and they're supposed to find out—at least under Florida statutory law—about coverage defenses.
>
> Plaintiff Lawyer #6: Here's the thing about insurance. In little cases with big limits and big cases against companies with big assets, insurance doesn't matter. Where insurance matters is in the middle. The policy limit is in your head. Think about this. Your first interrogatory in a case is "Do you have insurance; how much?" Knowing how much insurance there is a ceiling in people's minds. They'll rationalize: the company doesn't have much money, they're teetering on bankruptcy, whatever.

Finally, the two former insurance company general counsels I interviewed reported that liability insurance nevertheless remains "the banker for even the mass tort part of the tort liability system"—through reinsurance provided to defendants' captive insurance companies, high-level excess insurance policies sold to defendants that attach above their captive or fronting insurance policies or self-insured retentions,[22] and the still-important coverage provided for long-tail liabilities such as asbestos and sex abuse claims under legacy insurance policies:

> Interviewer: Reflecting on the conversation, I take your big picture point to be: (1) don't confuse differences in how visible the liability insurance is to the tort lawyers or mediators with the comparative importance of the insurance in the ultimate compensation and risk spreading; and (2) liability insurance remains the banker for the tort system, even the mega-mass tort part of the tort system (perhaps excluding pharma, but even there the J&J type captives may well have reinsurance). Is that fair?

22. A captive is an insurance company owned by the corporate group for which the captive provides insurance. A fronting policy is a policy that does not transfer risk, either because the deductible is equal to the policy limit or because it is fully reinsured by a captive. A self-insured retention is like a deductible.

> General Counsel #1: I might include a third point to be: (3) as between a tortfeasor and the liability insurance, the party that has the most influence over the situation, or the financial power, will tend to call the shots with regard to the defense and the negotiations. In many situations, maybe most situations, torts are resolvable within insurance limits. In true "mass tort" situations, there may not be sufficient limits to run a negotiation/resolution in the traditional (bilateral) manner. Only then a multilateral structure is required.[23]

As the two general counsels agreed, however, liability insurance generally plays this banking role in a more behind-the-scenes manner in the mass tort context that differs significantly from that in the other fields of liability explored in prior research. On balance, these counterpoints add important nuance but do not fundamentally change the finding that liability insurance matters less to the framing and resolution of mass tort litigation than to the framing and resolution of ordinary personal injury litigation and securities and corporate governance class action litigation.

III. Plaintiff-Side Insurance, Properly Understood, Matters a Great Deal

While liability insurance may be less important in mass tort litigation than in other liability fields, plaintiff-side insurance appears to be more important in mass torts, provided that plaintiff-side insurance is understood to include the insurance embedded in non-recourse litigation funding. My research for this Article focused on the non-recourse funding provided to plaintiff law firms, but there is also a robust market in non-recourse funding provided to plaintiffs directly.[24] In addition, there is an emerging commercial insurance market that complements and has begun to compete with law firm litigation funding.[25]

To appreciate the importance of insurance on the plaintiff side of mass tort litigation, it is essential to understand the insurance embedded in non-recourse litigation funding. Non-recourse litigation funding represents a contemporary form of the respondentia and bottomry that insurance historians regard as the earliest forms of commercial insurance.[26] These early

23. In the interview, the general counsel explained that he preferred the neutral term "multilateral structure" to the more evocative "pay and chase" term that I had borrowed from one of the mediator respondents.

24. Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer Litigant Funding*, 104 CORNELL L. REV. 1133, 1133–34 (2019); Ronen Avraham, Lynn A. Baker & Anthony J. Sebok, *The Mysterious Market for Post-Settlement Litigant Finance*, 96 N.Y.U. L. REV. ONLINE 181, 182 (2021); Ronen Avraham, Lynn A. Baker & Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 REV. LITIG. 143, 145 (2021) [hereinafter Avraham et al., *MDL Revolution*].

25. *See infra* text accompanying notes 35–36.

26. *See* C.F. TRENERRY, THE ORIGIN AND EARLY HISTORY OF INSURANCE: INCLUDING THE CONTRACT OF BOTTOMRY 45–47 (1926) (identifying ancient antecedents to bottomry in

forms of insurance were financing contracts secured by a designated asset—the "bottom" of the ship (hence the name *bottomry* for contracts secured by a vessel) or the goods carried in a ship or caravan (in which case the contract came to be called a respondentia bond)—that obligated the counterparty to the capital provider only if the asset reached a designated destination.[27] If the ship came to shore or the caravan returned from market and the shipper failed to pay, the contracts authorized the funder to seize and sell the ship or goods to satisfy the contract.[28] If the ship was lost at sea or the caravan lost to bandits, however, the shipper had no obligation to pay the funder.[29]

As insurance historians have long observed, bottomry and respondentia combined financing with insurance.[30] In return for promising to pay a higher rate of interest than ordinarily permitted for a loan, the contracts included an insurance element that, in effect, paid off the funder if the ship was lost at sea or the caravan was lost to bandits. If a merchant needed only the insurance and not the capital, the merchant could enter into a bottomry contract, deposit the capital with a banker, earn interest until the time came (if ever) to pay the funder, and pay out of pocket only for the insurance element of the contract.[31] Over time, the development of the commercial insurance market gave parties greater flexibility to combine or separate the capital provision and insurance aspects of bottomry and respondentia. If the merchant wanted only the insurance, the market was limited to insurance underwriters. If the merchant wanted the combined product, the market included insurance underwriters as well as other capital providers, and these providers could shift their downside risk by buying their own insurance if they wished.[32]

Babylonian, Indian, and Greek sources, among others); Luisa Piccinno, *Genoa, 1340-1620: Early Development of Marine Insurance*, *in* MARINE INSURANCE 25, 25 (A.B. Leonard ed., 2016) (describing marine insurance as "probably the oldest financial instrument intended solely to protect against the impact of fortuitous commercial losses"); Frederick Hendriks, *Contributions to the History of Insurance, and of the Theory of Life Contingencies, with a Restoration of the Grand Pensionary De Wit's Treatise on Life Annuities*, 2 ASSURANCE MAG. 121, 127 (1852) (proposing "[t]hat the contract of nautical interest or loan on bottomry, or respondentia, was used from very remote ages by the Greeks, Romans, and other nations, as their ordinary insurance contract, which end it perfectly answered"). Eventually, this contract "formed the traditionary groundwork on which arose the superstructure of the insurance system of modern Europe." *Id.*

27. *See* Hendriks, *supra* note 26, at 129–31 (reproducing examples of bottomry and respondentia contracts and explaining that "[i]n all these contracts, the risk of not arriving at the place of destination was and is at the lender's hazard"); TRENERRY, *supra* note 26, at 45, 54 (explaining the requirements of bottomry and respondentia contracts).

28. *See* Hendriks, *supra* note 26, at 129–30 (describing an ancient Greek contract providing that if a borrower did not pay back the loan, "creditors may cause . . . goods [on the ship] to be sold").

29. TRENERRY, *supra* note 26, at 45.

30. Hendriks, *supra* note 26, at 131; Nikol Žiha, *The Insurance Function of Roman Maritime Loan*, *in* MARITIME RISK MANAGEMENT 35, 35–36 (Phillip Hellwege & Guido Rossi eds., 2021).

31. Hendriks*, supra* note 26, at 132.

32. *See* TRENERRY, *supra* note 26, at 273–74 (discussing merchant reinsurance). For example, the Insurance Company of North America was issuing bottomry contracts to American ship captains

Today, in the newer, commercial form of mass tort litigation financing, a funder advances money to a law firm at a higher rate of interest than a bank would charge for an ordinary commercial loan, with repayment owed only as the law firm successfully settles its mass tort cases.[33] In the older, still important, lawyers-only form of mass tort litigation financing, a capital-rich lawyer or law firm forms a joint venture with a law firm that needs working capital, and they strike a fee-sharing agreement that reflects the lawyers' relative contributions of labor and capital to the venture. The capital-rich lawyer's capital functions as non-recourse financing for the law firm that is contributing only (or primarily) labor to the venture. Both kinds of non-recourse financing arrangements include an insurance element: the law firm receives capital it can use to finance the costs of building and litigating an inventory of mass tort cases and insurance in the amount of those costs (and the accrued interest for the use of the capital) against the possibility that the cases turn out not to generate the expected revenue.[34]

as early as 1795, including a premium fee for insurance in the interest rate charged. THOMAS H. MONTGOMERY, A HISTORY OF THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA 52 (Philadelphia, Press of Rev. Publ'g & Printing Co. 1885).

33. *See* Nora Freeman Engstrom, *Re-Re-Financing Civil Litigation: How Lawyer Lending Might Remake the American Litigation Landscape, Again*, 61 UCLA L. REV. DISCOURSE 110, 117–18 (2013) (discussing the modern evolution of American litigation, including the rise of non-recourse lending). Because of the private nature of litigation funding contracts, no reliable statistics exist regarding the size or prevalence of mass tort litigation funding. A newsletter tracks the assets under management (AUM) of the ten largest (by AUM) commercial litigation funders, some of which participate in mass tort litigation funding. *Funder League Table*, LITIG. FIN. INSIDER, https://litigationfinanceinsider.com/league-leaders/ [https://perma.cc/7LK2-4NU5]. But my research suggests both that privately held, multi-strategy hedge funds not included in that list provide much of the commercial funding for mass tort litigation and that the traditional practice of law firms joint venturing with capital-rich lawyers and law firms remains an equally important aspect of mass tort litigation funding. A Swiss Re publication on third-party litigation funding, despite misleading time series charts (e.g., the report uses nominal dollars in its time series reports and selects the years in a manner that obscures the impact of the underwriting cycle) and tendentious argument regarding "social inflation," provides useful description and summary statistics regarding mass tort and other third-party litigation funding. SWISS RE INST., US LITIGATION FUNDING AND SOCIAL INFLATION 2–4 (2021).

34. Finance scholars that have studied non-recourse financing in the real estate and project finance context have described this insurance as an "embedded put option," meaning the right to sell the secured asset if the value of the asset falls so low that it is no longer in the borrower's interest to repay the funder (in the case of a non-recourse mortgage) or complete the project (in the case of non-recourse project finance). *E.g.*, Andrey Pavlov & Susan Wachter, *Robbing the Bank: Non-recourse Lending and Asset Prices*, 28 J. REAL EST. FIN. & ECON. 147, 147–48 (2004). These forms of non-recourse lending differ from non-recourse litigation financing by giving the lender a security interest in an asset with a market value, such that describing the insurance component of the transaction as an embedded put option makes sense. Because of the attorney–client relationship and the prohibition of non-lawyers owning law firms or practicing law, however, the insurance included in a non-recourse litigation finance provided to a law firm cannot be described as an embedded put option. While there are steps that the lender can take to preserve the value of its investment if the lawyer dies or wishes to abandon cases that the lender believes are valuable, those steps are a far cry from exercising an option to sell a secured asset.

Commercial insurance products are emerging to complement and, in some cases, compete with non-recourse mass tort financing, much as commercial insurance emerged in the Middle Ages to complement and compete with bottomry and respondentia.[35] Examples of these emerging commercial insurance products include insurance wraps that lower the cost of non-recourse financing by insuring some or all of the principal against the possibility of non-repayment, judgment-preservation insurance that helps a plaintiff monetize a trial verdict on more favorable terms by insuring the judgment against the possibility of reversal on appeal, and litigation expense insurance that protects a law firm from the downside risk of being unable to recoup the expenses incurred in acquiring and litigating mass tort (or other) contingent fee cases.[36] Because the market for such "contingent risk insurance" is so new and dynamic, any more detailed description I could provide would soon be outdated. Whatever form this insurance may take going forward, however, its emergence supports the proposition that non-recourse mass tort litigation finance functions as plaintiff-side mass tort litigation insurance.

IV. Explaining the Mass Tort Litigation Difference

To summarize, the differences I have identified between the role of insurance in mass tort litigation and in the other litigation fields explored in prior research are as follows:

- Outside of the insolvency and near-insolvency context, mass tort plaintiff lawyers do not build their litigation and settlement strategy around defendants' liability insurance.
- Mass tort defendants typically retain control over their defense, even when they intend to recover under insurance policies that assign the insurer control.
- Mass tort defendants typically use their own funds to settle claims or pay judgments, seeking indemnification from their liability insurers, if they have any, afterwards.
- Many mass tort plaintiff law firms rely on non-recourse litigation funding that resembles earlier forms of insurance, and there is an emerging insurance market that reduces the cost of non-recourse funding and has the potential to supplant it.

35. *See, e.g.*, AON, https://www.aon.com/ [https://perma.cc/9WT6-XCEC] (offering technology-based commercial risk identification and management services); *Risk*, WTW, https://www.wtwco.com/en-US/risk [https://perma.cc/3VQ3-VS5R] (same).

36. Funders # 1–6; *see also* INT'L LEGAL FIN. ASS'N, *2022 Session Recordings*, https://conference.ilfa.com/2022/session-recordings/ [https://perma.cc/98GT-AQG3] (presenting an October 2022 panel discussion video regarding emerging commercial insurance products in "Afternoon Session #2").

In addition, as described and explained in prior research, the mass tort field today includes non-recourse financing for mass tort plaintiffs themselves that is part of a growing market for such plaintiff financing, with the mass tort litigation difference being a lower interest rate.[37] The subparts that follow represent my preliminary effort to explain these differences.

A. Why Plaintiff Lawyers Ignore Mass Tort Defendants' Liability Insurance

Plaintiff lawyers ignore mass tort defendants' liability insurance because they can. They can because enough of the organizations with the scale to inflict mass harm have correspondingly large balance sheets, making insurance superfluous to plaintiff lawyers' concerns about collectability.[38] Also, for reasons discussed next, mass tort defendants' liability insurance arrangements generally do not give their insurers the same control over the settlement of mass tort actions that large corporations' (including pharmaceutical companies) directors and officers liability insurance policies give their insurers over the settlement of securities litigation. As a result, absent collectability concerns, mass tort defendants' insurers are not necessary parties to the resolution of mass tort litigation.

Organizations that inflict large-scale harm but do not have correspondingly large balance sheets do present collectability problems, making them less attractive mass tort defendants, among other reasons, because of the complications of dealing with their liability insurers discussed in the next two sections. When it comes to these organizations, plaintiff lawyers do pay attention to defendants' liability insurance, as illustrated in the recent bankruptcy court opinion regarding the reorganization of the Boy Scouts of America:

> The Scouting-Related Releases and the Channeling Injunction are the cornerstone of the Plan. Without the global settlement of insurance coverage disputes with BSA's two primary carriers (Hartford and Century) these cases would devolve into a morass of coverage litigation, and recoveries to holders of Abuse Claims would be delayed for countless years.[39]

But according to my respondents, that is the exception, not the rule. Especially because of the increasing significance of bankruptcy to mass tort

37. Avraham et al., *MDL Revolution*, *supra* note 24, at 147–48.

38. *See supra* note 20 and accompanying text. For information on collectability concerns elsewhere, see Baker, *supra* note 16, at 219–28; Yeazell, *supra* note 11, at 186–90, 193; and Gilles, *supra* note 11, at 606–07.

39. *In re* Boy Scouts of Am., 642 B.R. 504, 610 (Bankr. D. Del. 2022).

resolution explored elsewhere in this symposium, this exception may become increasingly important and, thus, merits further study.[40]

B. *Why Mass Tort Defendants Can Retain Control Over Their Defense Without Losing Their Insurance Rights*

Mass tort defendants typically retain control over their own defense without losing their insurance rights for one of three reasons. First, some companies no longer have any market-based mass tort liability insurance rights to lose.[41] Second, in recent years most large companies with significant mass tort exposure have instituted captive or fronting primary insurance arrangements that constitute a form of organized self-insurance and that give the companies control over their own defense. If the companies do purchase true risk-transfer insurance for mass tort liabilities, that risk-transfer insurance typically comes in the form of reinsurance for their captive insurance companies or high-level excess insurance that attaches only after there are many millions of dollars in losses.[42] For the obvious reason that it usually makes little sense to change control over litigation midstream, let alone litigation as potentially threatening to the company as mass tort litigation, that excess insurance does not give the insurer the right to take over the defense.

Third, if a mass tort defendant has coverage under liability insurance policies that give insurers the right and duty to defend covered claims, the liability insurers are almost certain to issue formal "reservation of rights" letters in any significant mass tort context.[43] Those letters will identify reasons why the insurer contends that it may not be obligated to pay the mass tort suits.[44] Because mass tort plaintiff lawyers typically are not worried about pleading their way out of coverage, those reasons almost always include conduct-related provisions in insurance policies, such as the exclusion for harm that is expected or intended by the insured.[45]

---

40. *See generally* Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEXAS L. REV. 1745 (2023) (discussing the role of the bankruptcy system in the mass torts context); Jonathan C. Lipson, *"Special": Remedial Schemes in Mass Tort Bankruptcies*, 101 TEXAS L. REV. 1773 (2023) (analyzing Chapter 11's "special remedial scheme" and its impact on mass tort liability).

41. *See* GARBER, *supra* note 17, at 5 n.3 ("Pharmaceutical companies are typically not insured for costs of legal defense or for most indemnity payments associated with product-liability actions.").

42. *See id.* ("At least some drug companies do . . . buy 'excess' insurance to cover indemnity costs above a fairly large amount (such as $25 million) in particular cases.").

43. *Cf.* ABRAHAM, *supra* note 1, at 170 ("[N]o policyholder contemplating the purchase of CGL insurance can be anything but uncertain about the prospect of recovering insurance monies in the event that it is named as a defendant in a major products, mass tort, or environmental liability action.").

44. RESTATEMENT OF THE L. OF LIAB. INS. § 15(4) (AM. L. INST. 2019).

45. For a discussion of the expected or intended exclusion, see *id.* § 32.

Under liability insurance law in most states, an insurer that reserves the right to deny coverage based on conduct that is also at issue in the underlying litigation loses the right to control the defense because of the conflict of interest presented.[46] If that isn't enough to divest liability insurers of their defense control rights, the mediators reported that the duty-to-defend insurance policies that come into play in the mass tort context often include at least some policies issued with the "occurrence" form of coverage. This form of coverage produces complicated allocation disputes, typically among multiple insurers that issued multiple insurance policies over a series of years:

> Mediator #1: It's very hard to resolve coverage in many mass torts. Even under the best of circumstances there are a plethora of issues to be worked through. Almost by definition there is a long tail. That means insurance archeology and allocation.[47]

In that context, no insurer wants to step up and assert those rights because that could obligate the insurer to pay for the entire defense and then sue the others to obtain contribution.[48] While mass tort defendants are not happy about spending their own money to fund all or part of their defense, they do not mind keeping control:

> Mediator #4: Where insurance exists, the companies don't want the insurer to handle the defense. You absolutely want to control the case, especially if it's "bet the company." Companies put insurers on notice, keep them informed, and fight about coverage later.

C. *Why Mass Tort Defendants Settle with Their Own Money*

Mass tort defendants settle with their own money for different reasons, all of which necessarily include having sufficient non-insurance assets to pay the settlement. Some defendants have no true risk-transfer liability insurance at all, or they may have liability insurance that expressly excludes the mass tort liabilities in question. Other defendants have only high-level excess policies that require the defendant to pay the settlement and then seek

---

46. *See id.* § 16 (requiring the insurer to provide an "independent defense" when "there are facts at issue that are common to the legal action for which defense is due and to the coverage dispute"); Tom Baker, *Liability Insurance Conflicts and Defense Lawyers: From Triangles to Tetrahedrons*, 4 CONN. INS. L.J. 101, 123 (1997) (citing potential opportunities for conflict between the insurance company and the insured in three-way settlement negotiations).

47. *See also* RESTATEMENT OF THE L. OF LIAB. INS. § 33 (AM. L. INST. 2019) (describing the timing of events that trigger coverage).

48. *Id.* § 20. *See* ABRAHAM, *supra* note 1, at 169 (explaining that "the more insurers involved, the more multilateral and complex the coverage issues become, and the more difficult it is for the policyholder to pin down any individual insurer").

reimbursement.[49] Other defendants settle with their own money because they conclude that they will be unable to get their insurers to voluntarily pay for a reasonable settlement. They decide that it is better to risk not having liability insurance coverage than to lose the opportunity to settle on favorable terms. Finally, mass tort settlements differ significantly from securities class action settlements (in which, in the words of Mediator # 2, "[i]nsurers lead the way like the Rangers lead the way in Army maneuvers") in the following respect: a securities class action settlement obligates the defendant to pay the full amount immediately, while a mass tort settlement sets up a claims-payment process through which the defendant pays claims over time.[50]

When a mass tort defendant with liability insurance decides to settle, some liability insurers may waive whatever legal right they may have to require the defendant to obtain consent before settling.[51] Even when the insurers do not expressly waive the right to consent, however, defendants have strong legal support for the proposition that they can settle without the insurer's consent in the kinds of circumstances presented in mass tort settlements.[52]

> Defense Lawyer #3: When settling, insurers are put on notice. I've never seen an insurer that said, "That seems reasonable; let's go ahead." No. They just send a letter reserving their rights.
>
> Interviewer: Do they waive consent?
>
> Defense Lawyer #3: No. They reserve everything. In a state like New York, I don't worry about that. I just proceed. All the deals are made without the insurers.

The need to take this settle-and-then-chase approach means that mass tort defendants face the obvious hardship and risk involved in litigating with their liability insurers after the fact. These transaction costs increase the cost of liability insurance for mass torts and, thus, help explain the trend toward self-insurance.[53]

---

49. *See, e.g.*, DAVID SCOREY, RICHARD GEDDES & CHRIS HARRIS, THE BERMUDA FORM 13 (2d ed. 2018) (describing the insurer's obligation under the "Bermuda Form" excess liability insurance policy as "purely financial in nature, and . . . one of reimbursement").

50. Thank you to Kenneth Abraham for this observation. For the avoidance of doubt, Professor Abraham is not Mediator #2.

51. Participant observation.

52. *See* RESTATEMENT OF THE L. OF LIAB. INS. § 25 (AM. L. INST. 2019) (describing the circumstances in which the insured can settle the action if the insurer has reserved the right to contest coverage for a legal action).

53. *See* ABRAHAM, *supra* note 1, at 170 ("In many instances a policyholder who buys insurance against several hundred million dollars of liability merely buys the right to claim coverage and to litigate future claims.").

D. *Why Plaintiff-Side Insurance Has Become So Important in Mass Tort Litigation*

On the plaintiff side, my main goal in this Article is to draw attention to the insurance embedded in non-recourse mass litigation financing and thereby identify a previously unnoticed aspect of the tort-and-insurance binary star. Why that financing has become so prevalent in mass tort litigation is a larger topic than I can answer with confidence based on my research to date. With that said, my preliminary explanation is as follows:

- Because the successful recruitment and representation of mass tort plaintiffs requires substantial investment years before significant revenue can be earned from the representation, many plaintiff law firms need external capital.
- Plaintiff law firms highly value the insurance embedded in non-recourse financing.
- The commercial insurance market has not (yet?) developed a product that provides this insurance in stand-alone form; and
- The increasing interest of asset managers in alternative finance has provided a supply-side push for the expansion of litigation finance as an asset class.

In the sections that follow I offer some insights drawn from my research into each of these points.

1. The Need for External Capital.—My respondents took the high cost of mass tort litigation as a given.[54] To demonstrate just how expensive they expected litigation to be, funders reported that the mass tort funding provided to individual law firms now regularly exceeds \$50 million. One broker described a law firm with \$250 million in funding. When I asked how the law firms spend that money, several funders described the large vendor exhibition hall at the annual Mass Torts Made Perfect conference at the Bellagio Hotel in Las Vegas:

> Litigation Funder #2: To understand what the financing is for, who provides it, and why the numbers get so big, go to Mass Torts Made Perfect and walk through the exhibition hall at Bellagio. There are tons of booths. For everything that has to be done in the lifecycle of a mass tort case—advertising, calling clients, intaking clients, following up to get medical records, everything through the process all the way through litigating the case—there are multiple vendors that law firms can and do outsource to. If you are an aggregator, meaning

54. For a discussion of the high costs associated with aggregate lawsuits and the way that these costs have shaped litigation financing, see generally Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273 (2012).

> you find and sign-up clients, you make deals with firms litigating and settling the cases. They include your inventory of clients in return for a share of the legal fees. Funding pays for all of the above.

By increasing the cost of and potentially reducing barriers to entry into plaintiff-side mass tort litigation, this "vendorization" of mass tort litigation helps explain the increasing importance of mass tort financing. These vendors typically require payment well before the end of what can appropriately be considered a long and perilous mass tort litigation journey—a journey that is, from a risk management perspective, not that different from the caravans and voyages that produced bottomry and respondentia. The ability to contract out so much of the work lowers the logistical and management barriers to entry, making it possible for lawyers with access to capital to enter more easily, while also increasing the demand for the capital that mass tort litigation funders provide:

> Plaintiff Lawyer #9: When litigation funding came on the scene, mass tort practice changed. There used to be a small number of firms who had the experience and the money and were willing to go the distance. When funding became available, it not only allowed experienced lawyers without money who were willing to go the distance, it also allowed a new kind of law firm.

As Elizabeth Chamblee Burch observed long ago, litigation financing reduces the barrier to entry to a plaintiff-side mass tort litigation practice.[55]

2. The Preference for Embedded Insurance.—My research suggests both a rational-actor and a behavioral-economic explanation for plaintiff law firms' revealed preference for the insurance embedded in non-recourse financing, neither of which have been previously reported in the litigation funding literature, at least to my knowledge.[56] The rational-actor explanation focuses on the risk-segregation function of non-recourse funding. A non-recourse funding arrangement segregates the downside risk of the designated portfolio of cases from the lawyers' personal assets (such as the lawyers' homes and their children's college funds) and, depending on the extent of the firm's practice as collateral, other parts of the firm's practice. For example, one litigation funding broker explained that some client law firms balance their high-risk, high-reward mass tort cases with lower-risk,

55. *Id.* at 1335, 1338.

56. The behavioral economic explanation parallels that for plaintiffs' preference for contingent fees over hourly fees. *See* Eyal Zamir & Ilana Ritov, *Revisiting the Debate over Attorneys' Contingent Fees: A Behavioral Analysis*, 39 J. LEGAL STUD. 245, 248–49 (2010) (reporting the results of experimental research); Nora Freeman Engstrom, *Attorney Advertising and the Contingent Fee Cost Paradox*, 65 STAN. L. REV. 633, 686 (2013) ("[T]hree unique contingency fee features—(1) the uncertainty of payment, (2) the delay between retention and payment, and (3) the fact the contingency fee is deducted, not paid—combine to strip fees of salience.").

ordinary tort cases that more reliably pay law firm expenses and partners' living expenses. Non-recourse financing can help those law firms segregate the downside risk of the high-risk/high-reward segments of their practices from the steady segments of their practice. Some law firms that focus more heavily, or even entirely, on high-risk, high-reward cases can use non-recourse financing to isolate poor results in one set of those cases from other sets of cases, thereby preserving firms' abilities to succeed in those other cases.

The appeal of the portfolio risk management aspect of the insurance imbedded in non-recourse funding can be seen in a recent development in the contingent risk insurance market: legal expense insurance. This kind of insurance reimburses a firm for its investments in litigation expenses (i.e., everything but their own fees) if the litigation is unsuccessful and thus separates the downside risk of that litigation from the rest of the firm's practice. The contingent risk insurance brokers explained that this insurance is for well-capitalized law firms with high-risk, high-reward practices that want the insurance aspect of non-recourse funding but do not need external capital. In that regard, this new litigation expense insurance is like the marine insurance that emerged to complement and compete with bottomry.

Not all mass tort plaintiff law firms are able to segregate the different parts of their case portfolios. Funders' willingness to provide capital depends on the extent and quality of the collateral that a law firm provides. Law firms that most need capital may be required to pledge all their receipts as collateral and, thus, may not be able to segregate different sets of cases from each other. Nevertheless, they can shield their personal assets, making the financing non-recourse in the sense that most matters to them and, for the funder, justifying the higher interest rate:

> Litigation Funding Broker #4: On the funder side, they're not interested in the kind of returns that are possible with recourse loans. On the law firm side, they're scared about losing their homes, their ability to send their kids to college, and having to tell their spouse about that.

The behavioral economic explanation for plaintiff law firms' preference for funding with embedded insurance draws on a well-studied cognitive phenomenon known as "loss aversion," which is part of the "prospect theory" developed by the pioneering behavioral economists Daniel Kahneman and Aaron Tversky.[57] Loss aversion is the term for the greater willingness people

57. *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 279 (1979) (explaining that "losses loom larger than gains"). Hyperbolic discounting is a potentially complementary explanation. Hyperbolic discounting is a term for the strong preference many people reveal for money today over a future sum with the same or even greater expected value. Psychologists understand this preference as the result of a mental accounting process in which people subjectively discount the perceived cost of future payments (in

have to forego a gain than to incur a loss of the same value, even when the objective expected value of the foregone gain is significantly greater.[58] Non-recourse financing transforms the mental framing of litigation expenses from a loss to a foregone gain. Thanks to the financing, the law firm does not have to pay its own money for the costs of acquiring and managing its mass tort cases until the comparatively distant future. In that comparatively distant future, the law firm will only have to pay those costs and the associated interest out of the proceeds of the mass tort settlements. From the law firm's perspective, those future proceeds are seen as gains.[59] Thus, non-recourse litigation financing allows a law firm to avoid a certain loss today (paying the costs of litigation expenses out of law firm capital) in return for making a promise to pay that money back only out of potential foregone future gains (revenue from cases that are successfully resolved).[60] Indeed, non-recourse litigation funding arbitrages the psychological difference between loss and foregone gain so well that it is a wonder that non-recourse lending to contingent fee lawyers is not even more widespread.[61]

---

technical terms, their mental discount rate increases with length of the future time horizon), with the result that many people are more eager to borrow money than is rational. Thomas Epper, Helga Fehr-Duda & Adrian Bruhin, *Viewing the Future Through a Warped Lens: Why Uncertainty Generates Hyperbolic Discounting*, 43 J. RISK & UNCERTAINTY 169, 193 (2011). Prior research suggests that uncertainty about future events increases the likelihood of hyperbolic discounting. Thus, uncertainty about the likelihood and timing of success in mass tort litigation could increase the likelihood that lawyers engage in hyperbolic discounting. For an application of the concept of hyperbolic discounting in legal scholarship, see, for example, Stephen J. Choi, Mitu Gulati & Robert E. Scott, *The Black Hole Problem in Commercial Boilerplate*, 67 DUKE L.J. 1, 60 (2017).

58. *See* Kahneman & Tversky, *supra* note 57, at 279 ("The aggravation that one experiences in losing a sum of money appears to be greater than the pleasure associated with gaining the same amount."). For an application of a closely related concept, risk aversion, in legal scholarship, see Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 590–91 (2013).

59. *See* Wistrich & Rachlinski, *supra* note 58, at 590–91 (using loss and gain framing to explain settlement delays).

60. In analyzing the choice between hiring a contingent fee lawyer and an hourly lawyer, Zamir and Ritov describe the choice as between a "pure positive gamble" (contingent fee) and a "mixed [gamble]" (hourly lawyer). Zamir & Ritov, *supra* note 56, at 248. I agree with that description and their resulting reference to prospect theory, but the difference in the timing of the payments suggests to me that the payment part of the mixed gamble will be experienced as an out-of-pocket loss today. This is an extension, not a criticism, of their research. Because of the practical limitations on laboratory experiments, they do not have the ability to test the impact of the difference that timing makes. Thus, the framing effect that they tested is likely to be even stronger outside the lab.

61. While some readers may be skeptical about expert, repeat-player lawyers engaging in hyperbolic discounting and loss aversion, my litigation funding respondents reported that many mass tort plaintiff lawyers are remarkably unsophisticated in financial understanding, and prior behavioral economic research indicates that expert lawyers often rely on their intuition in ways that make them vulnerable to these and other cognitive biases. *See* Choi et al., *supra* note 57, at 60 (using hyperbolic discounting by elite lawyers and other participants in the sovereign debt market to explain contracting behavior in that market). *See generally* Wistrich & Rachlinski, *supra* note 58 (analyzing research showing that several cognitive illusions produce intuitions in expert lawyers that cause them to settle later than they should).

3. The Absence of Commercial Insurance.—My respondents provided two reasons for commercial insurers' reluctance to provide a stand-alone insurance project that would replace the insurance embedded in mass tort litigation financing: (a) the organizational delay that always extends the time between recognizing a market gap and doing what it takes to bring a gap-filling product to market and (b) the reluctance on the part of insurance company executives to develop insurance that will help their perceived adversaries. The first reason is easy to understand. It is one thing to identify an opportunity, quite another to gain the institutional support for the infrastructure needed to seize that opportunity, and still another to build that infrastructure and bring a new insurance product to market.

An exchange at a recent litigation funding industry conference illustrates the second, perhaps more interesting reason. After a presentation about these new forms of insurance, one of the pioneers in the industry who was in the audience stood up and announced that he doubted that any of the CEOs of the insurers providing these fledgling insurance products knew that their companies had embarked on this business. He predicted that as soon as the CEOs did know, they would shut the products down because the insurers would be seen as hurting their core customers. The brokers working to develop this market responded that the CEOs of the entrepreneurial insurers providing the products definitely do know about them. But these brokers also said that they doubt that market-leading liability insurance companies (such as Chubb, Travelers, and AIG) will enter the market anytime soon because of cultural and political reluctance to be seen as promoting mass tort litigation.

4. The Supply-Side Explanation.—Modern portfolio theory, which informs the investment strategy of university endowments, family offices, pension funds, life insurance companies, hedge funds, and other large repositories of capital, posits that as long as a new asset class can be priced with sufficient confidence, adding that asset class to the portfolio will decrease the risk of the portfolio if the expected returns of that new asset class are not correlated with the expected returns of other assets in the portfolio.[62] Litigation funders claim, and managers of pools of investable assets apparently believe, that the expected returns of litigation funding are sufficiently uncorrelated with other assets classes, making litigation funding an attractive new asset class.[63]

62. *See* Frank J. Fabozzi, Francis Gupta & Harry M. Markowitz, *The Legacy of Modern Portfolio Theory*, J. INVESTING, Fall 2002, at 7, 8 (discussing modern portfolio theory and the reasoning behind portfolio diversification).

63. *See, e.g.*, *How Legal Finance Providers Add Value as Equity Investors*, BURFORD CAP. (Feb. 11, 2020), https://www.burfordcapital.com/insights/insights-container/how-legal-finance-

V. Conclusion

In addition to providing a new understanding of the role of insurance in mass tort litigation, this research provides empirical support for two of the conceptual insights in Abraham's *The Liability Century*: (1) the mismatch between product liability and product liability insurance that emerged near the end of the twentieth century and (2) the increasingly insurance-like function of tort law. The withdrawal of market insurance from high stakes mass product liabilities, especially for pharmaceuticals and medical devices, means that the loss-spreading function of mass tort liability increasingly occurs through the large organizations facing those liabilities, not through the liability insurance market (as originally posited by Justice Traynor and others).[64] In other words, pharmaceutical and medical device mass tort liability spreads the losses of some of the people who are injured by defective pharmaceutical and medical devices directly through the prices charged or profits forgone by companies engaged in these product markets. If there were to be a complete withdrawal of liability insurance companies from the mass tort litigation landscape (which appears to be the trend, at least on a prospective basis), that would reduce the "insurance" on the defense side of that landscape to a *metaphor* for the loss-spreading function of mass product liability.

Insurance as metaphor may not be enough to sustain the legitimacy of truly strict product liability. As Abraham observed, "[a] field of liability that was originally designed at least in part to take advantage of *defendants' superior access to insurance* now finds that one of its major reasons for being is in question."[65] Indeed, there appears to have been at least a partial reversal of the meaning that insurance has for the courts that make tort doctrine. In expanding tort liability in the mid-twentieth century, the California Supreme Court employed a concept of insurance that constituted both a metaphor for loss spreading and a reference to the business organizations that assumed and spread defendants' liability risk: liability insurance companies.[66] Later, the court distinguished between the two meanings and rejected the idea that insurance as metaphor alone could justify truly strict products liability:

providers-add-value-as-equity-investors/ [https://perma.cc/8AM3-QXSE] ("Litigation finance as an asset class is hailed as 'uncorrelated' with traditional debt or equities.").

64. *See* Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) (discussing the policy implications of manufacturer liability and the ability of large companies to spread the cost of injuries through insurance or their pricing in the market); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962) (same).

65. ABRAHAM, *supra* note 1, at 170 (emphasis added).

66. *See, e.g.*, *Escola*, 150 P.2d at 441 (Traynor, J., concurring) (describing how large manufacturers can insure and distribute risks to the public as part of the cost of doing business); *Greenman*, 337 P.2d at 901 (explaining that the purpose of holding manufacturers strictly liable is to ensure that the parties most capable of protecting themselves bear the costs of harm).

> We recognize that an important goal of strict liability is to spread the risks and costs of injury to those most able to bear them. However, it was never the intention of the drafters of the doctrine to make the manufacturer or distributor the insurer of the safety of their products.[67]

In a footnote explaining this rejection of insurance as metaphor for strict liability, the court wrote:

> The suggestion that losses arising from unknowable risks and hazards should be spread among all users to the product, as are losses from predictable injuries or negligent conduct, is generally regarded as not feasible. Not the least of the problems is insurability. Dean Wade stated the dilemma, but provided no solution: "How does one spread the potential loss of an unknowable hazard? How can insurance premiums be figured for this purpose? Indeed, will insurance be available at all?"[68]

The reasons for liability insurers' partial withdrawal from mass tort products liability deserve more careful study than is possible in this brief Article. Some scholars have provided a supply-side explanation, suggesting that product liability is too difficult for insurers to underwrite because of the potentially enormous damages in the aggregate and the uncertainty regarding liability and damages in any particular case.[69] Other scholars point to the demand side, suggesting that mass tort defendants realized that buying insurance "merely buys the right to claim coverage and to litigate future claims."[70]

The fact that litigation insurance has become increasingly important on the plaintiff side of the mass tort field suggests that uncertainty alone may not adequately explain why liability insurance companies do not sell mass tort product liability insurance that the companies most at risk are willing to

67. Anderson v. Owens–Corning Fiberglas Corp., 810 P.2d 549, 559 (Cal. 1991) (footnote omitted). It is important to note that Justice Mosk, who was part of the Court during the expansionary phase of product liability doctrine in California, sharply disagreed with the majority's description of the court's original intent. Justice Mosk argued that by expanding the scope of products liability, the Court was "retreating from" product liability's pure conception. *Id.* at 561 (Mosk, J., concurring and dissenting) (citing Daly v. Gen. Motors Corp., 575 P.2d 1162, 1181 (Cal. 1978) (Mosk, J., dissenting)). Justice Mosk further described that the court "heroically took the lead" in adopting products liability doctrine in its earlier cases "to ensure that the costs of injuries caused by defective products are borne by the manufacturers that put such products on the market and profit therefrom rather than by the victims of those injuries, who are largely powerless to protect themselves." *Id.* (first quoting *Daly*, 575 P.2d at 1181 (Mosk, J., dissenting) and then citing *Greenman*, 377 P.2d at 901).

68. *Anderson*, 810 P.2d at 559 n.14 (citations omitted) (quoting John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 755 (1983)).

69. *See, e.g.*, Priest, *Insurance Crisis*, *supra* note 8, at 1562–63 (arguing that uncertainty and higher "potential downside risks" have made offering liability insurance increasingly unattractive for insurers).

70. ABRAHAM, *supra* note 1, at 170.

buy.[71] Litigation funders and contingent risk insurers are deeply involved in pricing the mass tort product liability risk of those same companies. If they can do that, liability insurers should be able to do so as well. Of course, there are differences between the structure of traditional liability insurance contracts and the structure of litigation funding and contingent risk insurance contracts that make traditional liability insurance a more uncertain business.[72] But those are differences in product design, not the uncertainty of the underlying liability risks. Thus, the real insurance problem on the defense side of mass tort liability may lie in "product market fit," a concept first articulated in the technology start-up world to refer to the creation of a product that large numbers of customers want to buy. Large companies facing mass tort litigation risk use many of the litigation and liability risk management services traditionally bundled in liability insurance contracts, but many if not most of them do not buy those services from commercial liability insurers. Can liability insurers learn from the plaintiff side and find product market fit? Time will tell.

---

71. *See* Tom Baker, *Uncertainty > Risk: Lessons for Legal Thought from the Insurance Runoff Market*, 62 B.C. L. REV. 59, 65, 70, 103–04 (2021) (making the case that liability insurance is "riddled with uncertainty" and that insurers have many ways to manage uncertainty).

72. *See* Tom Baker, *Insuring Liability Risks*, 29 GENEVA PAPERS ON RISK & INS. 128, 142 (2004) (explaining how the duration of risk affects insurability).