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Finding Transparency & Equity in Consumer Litigation Funding

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FINDING TRANSPARENCY & EQUITY IN CONSUMER LITIGATION FUNDING

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INTRODUCTION

Litigation finance "is likely the most important development in civil justice in our time."[1] So what is litigation finance? It is "financial assistance to persons or companies involved as plaintiffs in civil suits."[2] In the world of litigation finance, there are broadly two forms of third-party litigation funding (TPLF), (1) commercial litigation funding and (2) consumer litigation funding.[3] Commercial litigation funding, "is the territory of large litigation funding companies (LFCs)" which fund large-scale lawsuits (or a portfolio of cases) in exchange for a share of the recovery.[4] By contrast consumer litigation funding, is usually funded by smaller LFCs which "provide[] individuals with cash advances on a non-recourse, fixed interest basis to pay for living expenses during the claim pursuit."[5] Generally,

[1] Maya Steinitz, *Following the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C., DAVIS L. REV. 1073, 1075 (2019).
[2] Charles Silver, *Litigation Funding Versus Liability Insurance: What's the Difference?*, 63 DEPAUL L. REV. 617, 619 (2014).
[3] SWISS RE INSTITUTE, US LITIGATION FUNDING AND SOCIAL INFLATION 5 (2021).
[4] *Id.*
[5] *Id.*

consumer litigation funding cases relate to relatively small personal injury suits, and within that category mostly motor vehicle accident cases.[6]

Commercial and consumer TPLF "share the same legal DNA" in that both are contingent on the outcome of the litigation. They diverge however, in that commercial products usually entitle the funder "to a portion of the client's recovery or . . . a multiple of initial advance" while consumer funding agreements are "loan-like," using interest rates and behave like "a subprime debt product."[7]

There are a wide variety of legal issues in both the commercial and consumer litigation arenas. In the commercial litigation space, concerns largely come from the Chamber of Commerce (and their allies), seeking to diminish the ability of commercial actors to sue large corporations.[8] These concerns have led to calls for greater disclosure of the existence of TPLF and the actual funding agreements.[9] By contrast, the legal concerns and discussions surrounding consumer litigation funding largely revolve around protecting consumers from predatory lending practices,[10] at least superficially, similar to issues present in the payday lending space.[11] That is, consumers often pay extremely high interest rates, that might be considered usurious if legally considered a loan and purportedly "often leaves [consumers] with almost nothing from the award or settlement."[12]

[6] Ronen Avraham & Anthony J. Sebok, *An Empirical Investigation of Third Party Consumer Litigation Funding*, 104 CORNELL L. REV. 1133, 1147 (2019) (showing that 59% of all cases funded by a consumer litigation funder were in motor vehicle accidents).

[7] *Id.* at 1168.

[8] Suneal Bedi & William C. Marra, *The Shadows of Litigation Finance*, 74 VAND. L. REV. 563, 580-81 (2021) (emphasizing the Chamber of Commerce's concern with "frivolous litigation because there may be circumstances where a claimholder is unwilling to risk her own capital to self finance a case . . . .").

[9] *See* Steinitz, *supra* note 1 at 1076-1077.

[10] This is not to say that the Chamber of Commerce does not view consumer litigation funding as adverse to their interests, but only that much of the focus of reforms has been to protect consumers rather than to protect defendants. This is likely the result of two important factors. Firstly, consumer litigation is generally funding relatively small amounts of money to litigants. Paige Marta Skiba & Jean Xiao, *Consumer Litigation Funding: Just Another Form of Payday Lending?*, 80 L. & CONTEMPORARY PROBS. 117, 122 (2017). Additionally, the funding is not tied to actually to funding the litigation and proceeds are generally used for general living expenses. *Id.* at 126.

[11] *Id.* at 120-26 (discussing similarities and differences with consumer litigation funding and payday lending).

[12] Ronen Avraham & Anthony J. Sebok, *An Empirical Investigation of Third Party Consumer Litigation Funding*, 104 CORNELL L. REV. 1133, 1137 (2019).

This paper will focus on the issues relating to consumer litigation funding. This paper will offer two potential reforms in furtherance of protecting consumers from predatory lending practices, while still maintaining the practice without banning or capping interest rates in the industry.[13] Proposal I advocates for a uniform statute disallowing compounding interest, interest buckets, and interest accruing upfront fees. Additionally, consumer LFCs will be required to present clear and coherent disclosures that are modeled upon those enacted in Vermont, Nebraska, Oklahoma, Ohio, and Maine that require a clearly outlined schedule of the amount due at monthly intervals[14] throughout the repayment period. This paper does not advocate for disallowing minimum interest periods because effective disclosures can sufficiently inform consumers of the minimum payment due once the recission period has ended. Minimum interest periods reasonably allow LFCs to cover the cost of underwriting the funding opportunities without charging upfront fees.

Proposal II proposes enacting legislation that requires LFCs to predict the amount of the judgment or settlement and the amount of time it will take to reach such settlement or judgment.[15] Moreover, LFCs will also be required to predict the total legal costs due to the plaintiff's counsel which will likely include a contingency fee and legal costs. The funder will then provide the plaintiff with an Estimated Total Recovery Amount, reflecting the plaintiff's "take-home" amount.[16] Finally, if the actual Total Recovery is lower than originally assessed, the plaintiff, with the advice of counsel shall be entitled to enter into mediation to reduce the fee owed to the LFC. Although LFCs may oppose such reductions, research has shown that LFCs consistently take haircuts from the amount technically

[13] *See* Skiba, *supra* note 10 at 130-34 (explaining why bans and loan restrictive regulations would not be beneficial for consumers in the consumer litigation funding industry).

[14] Under the law currently in the aforementioned states, the payment schedule only requires payment at six-month intervals. It would likely be more beneficial for borrowers to have a payment schedule with payments at monthly intervals.

[15] Skiba, *supra* note 10, similarly advocates for requiring LFCs to make an estimate of payment amount and timing but does not advocate for an effective enforcement mechanism to induce LFCs to make accurate predictions.

[16] *See infra*, Table 2.

due on funding, so such a proposal will ensure that such haircuts are actually directed towards those consumers that have not been accurately informed of the cost of borrowing.

I. Current or Pending Legislation

Currently, there are two types of legislative/regulatory reforms that have been enacted (or are being contemplated) in the consumer litigation field. The first form seeks to address the transparency issue through disclosure requirements—to protect consumers from complicated, unclear, and opaque agreements. The second form seeks to set caps on interest rates/fees or formally restrict loan characteristics. The latter reforms are considered to be supported by the "tort reform" lobby that seeks to curtail the availability of such funding—essentially creating restrictive rules to price LFCs out of the market.[17]

A. Disclosure Enactments

Vermont has enacted quite robust disclosure requirements. The statute requires litigation funding agreements to include (1) a description of possible alternatives to litigation funding contract; (2) a consumer's right to rescind the agreement within five business days if the plaintiff returns the funds provided by the LFC; (3) an APR disclosure; (4) an itemization of all charges associated with the agreement; (5) schedule of repayments if repayment is made any time after the funding contract is executed;[18] and (6) the contract must be written "in a clear and coherent manner using words with common, everyday meanings."[19] Maine, Nebraska, Oklahoma, and Ohio have similarly robust disclosure requirements.[20]

B. Caps on Interest Rates & Restrictions of Loan Characteristics

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[17] Avraham, *supra* note 12 at 1139.

[18] Though not explicit in the Vermont statute, other states seem to require payment schedules based on six-month intervals, though based on later discussion with Interest Buckets, Vermont might be attempting to address concerns about smaller intervals.

[19] VT. STAT. ANN. tit. 8, § 2253 (2016).

[20] ME. REV. STAT. ANN. tit. 9-A § 12-104 (2008); OKLA. STAT. ANN. tit. 14A, § 3-805 (2013) (does not have APR disclosure requirement); NEB. REV. STAT. ANN. § 25-3303 (2010); OHIO REV. CODE ANN. § 1349.55 (2008).

Arkansas has enacted legislation capping interest rates on litigation funding agreements at 17% per year.[21] States like Indiana and Tennessee have also enacted statutes capping litigation interest charges at approximately 36% per annum.[22] New York is currently considering legislation that would cap litigation funding interest rates at 36%.[23] Scholars and LFCs have said that such caps and restrictions on loan characteristics will force LFCs to exit such markets because of their inability to remain profitable.[24] Such exits are considered a victory for the insurance industry, but likely harm low-income consumers the most, who may be forced to "resort to payday lending or other forms of more costly capital."[25]

II. Proposal I

Congress should enact specific legislation aimed at creating greater transparency in consumer litigation funding that is analogous to the Truth in Lending Act (TILA), but goes further in (1) disallowing minimum interest periods, interest buckets, and interest on upfront fees, which essentially requires funders to build all of their intended return into the "as advertised" interest rate (2) requiring a payment schedule on a monthly basis, and (3) granting consumers the ability to rescind the agreement within five business days of the funding. TILA is a federal law passed in 1968 to protect consumers from unfair lending practices.[26] Essentially, it is national standard for commercial lending that requires lenders to provide adequate disclosures to consumers in the true cost of borrowing capital.[27] The requirements include "(1) minimum font size (2) itemization of one-time fees (3)

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[21] *See* ARK. CODE ANN. §§ 4-57-109(b)(1), 4-57-104 (2017); ARK. CONST. amend. 89, § 3.

[22] TENN. CODE ANN. § 47-16-110 (2020) (capping interest rate at 36% and disallowing terms greater than three years); IND. CODE ANN. § 24-12-4.5-2 (2019) (capping interest rate at 36% per annum).

[23] *Litigation Funding May Soon Be Addressed by New York's Legislature*, THE NATIONAL REVIEW (Nov. 20, 2021), https://www.natlawreview.com/article/litigation-funding-may-soon-be-addressed-new-york-s-legislature.

[24] *See* Andrew G. Simpson, *Litigation Financing Firm Exits Tennessee as New Law Goes into Effect*, INSURANCE JOURNAL (July 3, 2014), https://www.insurancejournal.com/news/southeast/2014/07/03/333772.htm; Skiba, *supra* note 10 at 132-34 (describing how setting interest rates too low harms consumers and forces LFCs to exit markets).

[25] Skiba, *supra* note 10 at 133.

[26] *Truth in Lending Act – Consumer Rights and Protections*, DEBT.ORG (last updated Dec. 16, 2021) https://www.debt.org/credit/your-consumer-rights/truth-lending-act/.

[27] *Id.*

provision of schedule of payments, and (4) disclosure of the APR."[28] Payday loans are subject to TILA, yet it does not ostensibly apply to legal finance because LFCs are not technically classified as "creditors" under the Act.[29] As Skiba and Xiao note, simply applying TILA to consumer litigation finance context[30] would fail to meet the needs of consumers in this space.[31]

Firstly, from a behavioral economic perspective, consumers generally lack the capacity to appropriately mentally account for the price of immediate funding attached to the indeterminate results of their lawsuit.[32] "Research has shown that customers do not heed certain components of price and thus underestimate price if these components are not salient."[33] As Skiba and Xiao explain, generally, commercial loans are paid from an individual's future income or paychecks, while litigation funding repayment comes out of a future judgment or settlement payment making it inherently opaque because the consumer can't accurately predict the timing *or* the amount she will receive.[34] Research has shown that the inability to accurately mentally account results in consumers being unable to effectively determine whether the funding is actually worthwhile and cost-efficient.[35] The result is that consumers often don't fully account for the true cost of accepting a consumer litigation finance agreement.

Secondly, it is unclear whether TILA would effectively protect consumers from (1) compounding interest (2) interest buckets, and (3) upfront fees[36] that accrue interest until repayment. Avraham and Sebok's research (the "LFC Study") of "one of the largest consumer litigation financing firms in the United States" with a dataset of approximately 200,000 funded and unfunded cases over

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[28] Skiba, *supra* note 10 at 135.
[29] *Id.*
[30] Contrary to the law in most states, the Colorado Supreme Court ruled that litigation finance agreements are loans and would therefore be governed by TILA. Oasis Legal Fin. Grp., LLC v. Coffman, 361 P.3d 400 (Colo. 2015).
[31] Skiba, *supra* note 10 at 135.
[32] *Id.* at 127.
[33] *Id.*
[34] *Id.* at 127-128.
[35] *Id.* at 128-129
[36] Such fees are inaccurately characterized as *upfront* fees because they are in fact charged at the end, and the funder charges interest on those fees even though no such funds are distributed to the consumer.

a ten-year period show that consumer litigation funding firms make a significant portion of their fees using these complex financial structures.[37]

Compounding interest is the financial structure in which during a set period the interest is calculated and added to outstanding balance so that in the following period the borrower is charged interest on the principal and the accrued interest. For example, a loan of $500 with a 3% per month interest rate, which uses simple interest (non-compounding) would result in the borrower owing $680 (3%*12=36%) after one year. By contrast, if interest was compounded monthly, then the borrower would owe $712.88 (500*(1+.03)^12=$712.88), which is an effective interest rate of 42.4%. While the LFC advertises a rate of 3% per month, during a single year, the consumer actually pays almost 4% per month on the amount funded.[38] According to the LFC Study, 88% of all completed cases had monthly compounding interest.[39]

Minimum Interest Periods are a set of intervals at which a borrower must pay back the interest that would have accrued for an entire period whether or not that time has actually elapsed.[40] For example, using the same loan terms as previously discussed, with a loan of $500 and a monthly interest rate of 3% and we assume the loan has an MIP of six months, then the borrower must pay back $590 (3%*6 months)[41] even if the borrower pays back the loan after only two months. Without the MIP, she would only be required to pay $530. Similarly, Interest Buckets create periods upon which interest is required to be paid when payment is made at any time during the period, even if that time has not elapsed. For example, if the aforementioned litigation agreement has six-month interest buckets, then if repayment is made in the seventh month, then the consumer must pay $680 (3%*12) instead of only $605 (3%*7). Essentially, IBs create minimum interest periods throughout the

[37] Avraham, *supra* note 12.
[38] *See infra*, Table 1.
[39] Avraham, *supra* note 12 at 1151.
[40] *Id.* at 1152.
[41] Using simple interest instead of compounding.

term of the loan. Almost 90% of all the 200,00 cases in the LFC Study had an MIP and an IB of three months.[42]

Finally, consumer LFCs used interest bearing processing or application fees which were to be paid *ex post* upon successful recovery.[43] In the LFC Study 54% of completed cases had $250 processing fee, while 24% were set at $350 for a single request.[44] Those numbers might not superficially seem so egregious, but the LFC Study shows that because the fees were interesting bearing and the fees were often tied to the amount funded, advertised interest rates of 36% (3% monthly) could turn into over 90% when IBs, MIP, and fees were added to the funding agreement.[45]

Avraham and Sebok have argued that compounding interest, MIPs, IBs, and interest-bearing upfront fees should be outright prohibited because they could find no economic rationale for not building those fees into an increased simple interest rate.[46] That is, there is no justification for embedding these financial structures into to the agreements except to make the financial arrangement opaque and more difficult for the consumer to understand.[47] I agree with Avraham and Sebok's contention that compounding interest, IBs, and interest-bearing upfront fees should be prohibited, but I don't think that MIPs should be prohibited.

Compounding interest could essentially be captured by raising the simple interest rate. Instead of charging 3% monthly compounding (yearly $712), they can charge 3.5% non-compounding (yearly $710).[48] Unsophisticated borrowers can more easily calculate a non-compounding interest than compounding. This is especially important because as noted, plaintiffs are especially prone to improper mental accounting.[49] Moreover, as will be discussed in Part II, during the underwriting

[42] Avraham, *supra* note 12 at 1153.
[43] *Id.* at 1154-56.
[44] *Id.* at 1155.
[45] *Id.* at 1156.
[46] *Id.* at 1173-74.
[47] *Id.*
[48] *See infra*, Table 1.
[49] Skiba, *supra* note 10 at 128-29.

process LFCs will predict the timing of the judgment or settlement,[50] so disallowing compounding interest does not disadvantage funders from a financial perspective because based on the projected length of the case the LFCs can calculate their expected return using a more transparent and easily understood metric—simple interest rates.

LFCs will likely counter that doing so isn't necessarily beneficial for the consumer because while the higher simple interest rate and compounding rate have approximately the same amount due at the end of the year, the higher simple rate actually has higher payments at any point before month 11 in a single year.[51] But that argument misses the point. The most critical concern in consumer litigation finance is lack of transparency and the inability for consumers to effectively mentally account. A consumer's ability to easily account, using basic mathematics for the amount she will owe at any given point is fundamental. The consumer can then decide, *meaningfully*, if she wants to proceed with a full understanding of what she will owe.

Similarly, IBs and interesting bearing upfront fees seem to be implemented to obscure the actual cost of the loan to the consumer instead of implementing the cost through a simple interest rate. Interest Buckets give LFCs an upcharge for a particular period even though their capital has been recouped. Upfront fees are almost certainly intended to obscure the true cost of borrowing because LFCs can just as easily "charge"[52] those fees with an increased interest rate.

As it relates to MIPs, I respectfully disagree with Avraham and Sebok and believe that there is a reasonable economic justification for allowing MIPs. As noted, MIPs require a borrower to pay back a minimum amount of interest for their advance even if the settlement or judgment occurs earlier than the MIP. LFCs outlay significant capital to underwrite the applications for funding and while

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[50] *See infra*, note 56.

[51] *See infra*, Table 1.

[52] If LFCs intention in charging upfront fees was to actually defray the cost of underwriting the litigation, then those charges should actually be charged upfront to *both* funded and unfunded cases. *See* Avraham, *supra* note 12 at 1154-55.

increased interest rates can be used to defray the cost of overhead, if the funding is paid out "too early," then funders can't effectively cover the cost of overhead and capital. Moreover, there is an effective way to inform consumers without obscurity. Funders should be required to include in their disclosure the minimum required payment after the recission period, which effectively captures the MIP.[53] Using that information together with the payment schedule, consumers are not being baited into accepting funding, but can effectively assess the true cost of the funding in any alternative.

III. Proposal II

Congress or state legislatures should adopt legislation that would require LFCs to (1) predict the (a) amount and (b) timing of the settlement or judgment, (2) disclose the amount due to plaintiff's lawyer under the contingency agreement and estimate the legal costs not included in the attorney's fee, (3) outline in clear and easily understood terms the actual amount the plaintiff will receive upon settlement or judgment (Total Recovery Amount), and (4) require LFCs to agree to enter into mediation to negotiate a reduction of the amount due if the estimated recovery is less than predicted in the LFC disclosure. Although Proposal I would inform consumers more meaningfully in the actual cost of borrowing and would protect consumers from complex financial structures that appear to be employed for the sole purpose of obscuring the actual borrowing costs, it is not sufficient. Because of the uncertainty in (1) the amount and (2) timing of judgment/settlement to be received, Proposal I alone, fails to allow consumers to effectively assess the cost and relative benefit of accepting the funding. Skiba and Xiao explain that because of this uncertainty and lack of salience, consumers fail to appropriately account for the actual cost of borrowing.[54] Skiba and Xiao therefore argue that "funder[s] should give the plaintiff an estimate of how much he will owe and when the amount owed will be due."[55] For example, if an LFC predicts that a particular case will settle in fourteen months for

[53] *See infra*, Table 2, "Payment Schedule."
[54] Skiba, *supra* note 10 at 128-129.
[55] *Id.* at 135.

$100,000 and is willing to fund $7,000 at 3% per month[56] the funder will be required to inform the plaintiff that under the terms of the agreement, she will likely owe $9,940 ($7,000 principal and $2,940 of interest), so the plaintiff we be informed that she will only recover $90,160. Skiba and Xiao's proposal is a good start, but it isn't adequate.

Firstly, plaintiffs in the personal injury space often pay their legal counsel through a contingency fee. If we assume the plaintiff's lawyer takes a 33% contingency fee[57] the plaintiff's actually recovery is $60,060. But that's not all. Plaintiff's lawyers often take legal costs and expenses off the top of the recovery which can be as high as 30% of the recovery, but we'll assume 10%.[58] Plaintiff's recovery now drops to $47,060.[59]

Secondly, and more importantly, there's no apparent enforcement mechanism or incentive for the LFC to accurately predict the timing and amount of recovery. Essentially, LFCs are incentivized to underpredict the amount of time it will take to settle and overestimate the recovery, to "pad" plaintiff's estimated recovery, so the plaintiff is inclined to accept the funding.

This paper therefore advocates for requiring LFCs to include the contingency fee percentage (with a calculated contingency amount on the Estimated Settlement/Judgment Amount), the projected legal costs, and a total estimated recovery to the plaintiff.[60] Also to the extent applicable in a particular jurisdiction, LFC disclosures should inform plaintiffs of the potential subrogation rights by first-party insurers that may claw back some of the judgment/settlement for costs that have been

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[56] I use this settlement period, interest rate, and amount of willingness to fund because according to the LFC Study, (1) the median period from funding to settlement was 14 months; (2) the median interest rate was 3%, and the average amount funded relative to the settlement was 7%. Avraham, *supra* note 12 at 1141.

[57] Research has shown that this is the approximate amount contingency fee lawyers take for representation in personal injury cases. Martin Nolo Research, *How Much Does a Personal Injury Lawyer Charge?*, LAWYERS.COM (updated Sept. 12, 2016) https://www.lawyers.com/legal-info/personal-injury/average-compensation-and-duration/how-much-does-a-personal-injury-charge.html

[58] David Goguen, *Lawyers' Fees in Your Personal Injury Case*, ALLLAW, https://www.alllaw.com/articles/nolo/personal-injury/lawyers-fees.html (last visited Apr. 26, 2022)

[59] *See infra*, Table 2.

[60] Table 2.

outlaid.[61] Then after breaking down the various costs and expenses, the LFC should provide a final "Total Estimated Recovery"—which would provide the plaintiff with an estimate of her "take home" amount.[62] These disclosures and estimations serve the same function as Skiba and Xiao's proposal—increasing the saliency of the loss of paying out fees from a judgment or settlement.[63] By disclosing and estimating other costs and fees that the plaintiff will have to pay before paying off the funding, the plaintiff can accurately assess her actual recovery and the loss associated with the various fees and expenses that will be incurred on that future (potential) cash flow.

While such disclosures will help the plaintiff engage with the saliency of the future income by giving her an estimated judgment/settlement recovery and the cost/loss, by estimating the LFC and legal expenses, the proposal still does not address enforcement and incentivization for accurate predicting. Therefore, LFCs shall be required to engage in mandatory mediation with the plaintiff to negotiate a reduction in the amount owed to them if the LFC overpredicts the Total Estimated Recovery of the plaintiff. Using this mechanism, LFCs are incentivized to predict lower Total Estimated Recoveries, through more conservative and less aggressive underwriting. LFCs are still incentivized not to aggressively underpredict the Total Recovery because plaintiffs will be unlikely to accept funding if their Total Recovery is paltry or unbalanced in relation to the Settlement/Judgment Amount.

Although the idea of renegotiation of the terms of an executed agreement might seem implausible, highly impractical, and likely to cause LFCs to leave the market entirely, the practice of reducing an amount owed to an LFC *ex post* is referred to as a "haircut" and is far more common than

[61] Relevant issues include: (1) subrogation rights of insurers, (2) whether the case resulted in judgment or settlement, and (3) whether the jurisdiction employs a "Made Whole Rule" or a Priority Rule. This paper does not advocate for placing the burden of assessing those issues on the LFC, but only that the LFC should advise the plaintiff of those issues in clear and easily understood language.

[62] Table 2.

[63] *See* Skiba, *supra* note 10 at 128-129 (explaining loss aversion and disutility as it relates to payday loans and generic commercial loan products)

many commentators expect.[64] The LFC Study showed that in more than 50% of the funded cases in which the LFC was able to collect a profit (the principal component plus a premium), the LFC accepted an amount *less than the contractually required amount due to the funder.*[65] In only 34% of all funded cases did the plaintiff actually pay the amount due based on the funding agreement.[66] It is apparent that LFCs willingly agreed to accept a lower amount due to them in negotiation with the plaintiff. Although it's possible that in some of those cases the plaintiff's positive recovery was sufficient to pay back the principal and some premium, but not enough to cover the entire premium, it is highly unlikely that in *all* of those cases that was the case.[67] The more "likely explanation is that, although the client received sufficient net proceeds . . . to cover the amount due, the proceeds *were less than she and her lawyer anticipated*, and therefore the funder voluntarily agreed to forego its legal right to full payment of the amount due."[68]

So, then the question is whether LFCs would provide haircuts even if there wasn't mandatory mediation for plaintiffs that received a lower amount than initially estimated. The LFC Study seems to indicate that clients of law firms that sent significant business to the LFC were more likely to receive haircuts.[69] The evidence shows that plaintiffs represented by law firms that were repeat "mega-players"—that is, firms that represented clients that accepted funding in more than 1,000 cases, received haircuts in 59% of their cases, compared to in only 48% of cases for regular repeat players and one-timers.[70] That differential might not seem so superficially stark, but as Avraham and Sebok note, the numbers are in fact more consequential because the median embedded interest rate for mega-players' clients was only 62% as compared to 113% for one-timers and 133% for regular repeat

[64] Avraham, *supra* note 12 at 1143.
[65] *Id*. at 1157.
[66] *Id.* at 1158.
[67] *Id.*
[68] *Id.* (emphasis added).
[69] *Id.* at 1163-64.
[70] *Id.* at 1164.

players' clients.[71] There was far less room for the funders to provide a haircut to mega-player's clients and yet their clients *still* received a haircut far more often than non-mega-player clients.[72] The takeaway is obvious. Funders were far more willing to give haircuts to mega-player clients because their negotiating counterparty was likely to provide more business and funders were less inclined to provide such discounts to clients of non-repeat players.

Requiring funders to estimate the actual total recovery to *all* clients and then mandating mediation for clients that receive less than estimated, evens the playing field because all plaintiffs will have the opportunity negotiate a haircut when their recovery is less than expected. Getting all plaintiffs that receive funding and receive an amount less than anticipated, to the negotiating table is an important step in creating greater transparency and equality in the consumer litigation funding space.

CONCLUSION

This paper's proposals attempt to create more transparency and equity in consumer litigation funding. Proposal I would disallow funders from using complex and likely intentionally obscure financial structures to undercut plaintiffs' ability to understand the true cost of accepting funding. By requiring funders to use (1) simple interest rates without interest buckets or interest accruing fees and (2) mandating clear and coherent disclosures and payment schedules (modeled upon those enacted in Vermont, Nebraska, Oklahoma, Ohio, and Maine), plaintiffs can more accurately and saliently understand the benefit-disutility of accepting funds.

Proposal II would require funders to disclose (1) an estimated recovery amount from the judgment or settlement, (2) an estimated recovery time, (3) the estimated amount due to plaintiff's legal counsel (for both the contingency fee and legal costs), and (4) most critically an Estimated Total

[71] *Id.* at 1163.
[72] *Id.*

Recovery that the plaintiff will receive after paying off all the necessary expenses. The proposal then requires funders to engage in mediation with the plaintiff's legal counsel to negotiate a haircut of the amount due if the Total Recovery is less than the estimated amount. This serves an effective enforcement mechanism inducing funders to conservatively predict Total Recoveries, while the funders are still disinclined to underpredict because clients will then be disincentivized from accepting funding. These proposals are a meaningful step towards creating greater transparency, fairness, and equity in consumer litigation funding.

Table 1

			Months											Due @ 12mo.
	Rate	Borrowed	1	2	3	4	5	6	7	8	9	10	11	12
Non-Compounding	3%	$500	$515.00	$530.00	$545.00	$560.00	$575.00	$590.00	$605.00	$620.00	$635.00	$650.00	$665.00	$680.00
Non-Compounding	3.50%	$500	$517.50	$535.00	$552.50	$570.00	$587.50	$605.00	$622.50	$640.00	$657.50	$675.00	$692.50	$710.00
Compounding	3%	$500	$515.00	$530.45	$546.36	$562.75	$579.64	$597.03	$614.94	$633.39	$652.39	$671.96	$692.12	$712.88
Compounding	3.50%	$500	$517.50	$535.61	$554.36	$573.76	$593.84	$614.63	$636.14	$658.40	$681.45	$705.30	$729.98	$755.53

Table 2

	Amount	Calculation
Amount Borrowed	$7,000	
Monthly Interest Rate	3%	
Minimum Amount Due	$8,260	$7000*3%*6MO.+Principal
Estimated Recovery Time	14 months	
Est. Settlement/Judgment Amnt.	$100,000	
Estimated Amount Due to LFC	$9,940	$7000*3%*14MO.+Principal
Legal Contingency Fee	$33,000	Assume 33%
Legal Fees	$10,000	Assume 10%
Estimated Total Recovery	$47,060	

Monthly Payment Schedule

1	$8,260	19	$10,990.00
2	$8,260	20	$11,200.00
3	$8,260	21	$11,410.00
4	$8,260	22	$11,620.00
5	$8,260	23	$11,830.00
6	$8,260	24	$12,040.00
7	$8,470.00	25	$12,250.00
8	$8,680.00	26	$12,460.00
9	$8,890.00	27	$12,670.00
10	$9,100.00	28	$12,880.00
11	$9,310.00	29	$13,090.00
12	$9,520.00	30	$13,300.00
13	$9,730.00	31	$13,510.00
14	$9,940.00	32	$13,720.00
15	$10,150.00	33	$13,930.00
16	$10,360.00	34	$14,140.00
17	$10,570.00	35	$14,350.00
18	$10,780.00	36	$14,560.00