For more than 150 years, companies called “heir hunters” have operated in the shadows of the court system. Heir hunters monitor probate filings to identify intestate decedents who have missing or unknown relatives. They then perform genealogical research, locate the decedent’s kin, and offer to inform them about their inheritance rights in exchange for a share of the property. States are sharply divided about whether to enforce contracts between heir hunters and heirs. This discord stems from the fact that we know virtually nothing about heir hunting.

This Article illuminates this mysterious corner of succession law by reporting the results of the first empirical study of heir hunting. Its centerpiece is a hand-collected dataset of 1,349 recent probate matters from San Francisco County, California.

The Article reaches three main conclusions. First, heir hunting is a booming business. Indeed, the Article unearths 219 agreements between heir hunters and heirs from twenty-seven American states and eleven foreign countries. Second, heir hunting can be socially valuable. Heir hunters sometimes locate long-lost relatives after everyone else has failed. Third, heir hunting is also problematic. For one, the Article’s multivariate regression analysis reveals that cases with heir hunters are especially likely to devolve into litigation. In addition, heir hunters usually pay for the heir’s attorney, thus creating a stark conflict of interest. Finally, heir hunters charge exorbitant fees and routinely contact heirs before the administrator has even tried to locate them. Using these insights, the Article critiques existing approaches to heir hunting and suggests reforms that would enable the legal system to harness the practice’s benefits while limiting its costs.
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INTRODUCTION

On January 25, 2016, Henry Imperial died intestate in San Francisco, California.1 His property was worth more than $425,000, but none of his relatives came forward to claim it.2 Thus, on April 29, the Public Administrator—an agency that handles the cases of decedents who have no apparent kin—filed a petition in probate court to administer Henry’s estate.3

1 Petition for Letters of Admin. at 1-2, Est. of Imperial, No. PES-16-299740 (Cal. Super. Ct. filed Apr. 29, 2016).
3 Petition for Letters of Admin., supra note 1, at 1; see also Public Administrator, CITY & CNTY. OF S.F. HUM. SERVS. AGENCY, https://www.sfhsa.org/services/care-support/public-administrator [https://perma.cc/TW36-8Y5H] (“When a San Francisco resident dies and there are no family members able or willing to take care of his or her affairs, the Office of the Public Administrator will manage the estate.”).
One day later, the phone rang in Hal Imperial's house in Oak Run, a rural area north of Sacramento. The caller told Hal that if he was Henry’s son, he “would be entitled to a beneficial interest in [Henry’s] estate, but only if he acted immediately.” The caller said that he would send paperwork that Hal needed to sign and return as soon as possible. Hal, whose poor health prevented him from working, followed the caller’s instructions.

On May 3, he signed a contract with a company called American Research Bureau (ARB). ARB promised to help Hal obtain his inheritance in return for an assignment of twenty-five percent of his share of the property. On May 6, Hal’s brother, Robert Imperial, a laborer who lived thirty-five miles east of San Francisco, signed the same agreement with ARB.

Yet Hal and Robert did not need ARB’s assistance. On May 23, three weeks after the phone call, the probate court granted the Public Administrator’s petition to be appointed administrator of Henry’s estate. Like all administrators, the agency owed a duty to try to find Henry’s heirs. The Public Administrator would have had little difficulty locating Hal and Robert, who shared Henry’s surname and lived in the same geographic area. But by each signing away a quarter of their birthright to ARB, Hal and Robert forfeited a total of $100,000.

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5 Id.
6 Id.
7 See id. at 3 (“We believed that we had to act quickly in order to be entitled to an interest in the estate and we did not have any time to get independent legal advice.”).
8 Agreements & Assignments at 2, Est. of Imperial, No. PES-16-299740 (Cal. Super. Ct. filed June 10, 2016).
9 Id.
10 Id. at 3.
Rosemary Elizabeth Poston died intestate in San Francisco on May 9, 2016. Her property, worth $2,000,000, was going to pass to her three surviving children. Her sons, Michael and Robert, lived nearby and were handling her estate, but her daughter, Laurie Montoya, had long been estranged from the family. Montoya had even lost contact with her own children. Michael and Robert were unable to notify Montoya of the probate proceeding. As a result, they filed a Declaration of Diligent Search with the court, explaining that they had examined telephone directories and records from jails, probation offices, and hospitals, but had no “current information on [Montoya’s] whereabouts.”

This document captured the interest of Michael Heath, the President of Trust and Estate Search LLC (TES). Using his company’s proprietary database, Heath discovered Montoya’s Social Security number and former address. He then hired Ed Kelly, a private investigator, to “hit the streets” and find Montoya. Heath gave Kelly a letter to present to Montoya that described his business:

Trust & Estate Search has located money to which we believe you are entitled.

We make our living locating missing people and unclaimed assets. For the work and expense of locating such assets and the rightful beneficiaries, we enter into an agreement with such people to be paid only from a portion of the asset that we have located for them.

We are trying to get money to you that we believe is rightfully yours; we are not, and will not, ask for money from you.

Heath also asked Kelly to give Montoya a “gift” of $1,000 and a contract to sign.

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15 Id. at 2-5.
17 Id.
18 Id.
19 Id. at 2-3.
20 Declaration of Michael Heath Regarding Efforts Undertaken to Locate Missing Heir at 1, In re Est. of Poston, No. PES-16-299983 (Cal. Super. Ct. filed Dec. 6, 2017) [hereinafter Heath Declaration].
21 Id. at 3.
22 Id.
24 Id. at 3; Heath Declaration, supra note 20, at 3-4.
Kelly tracked down Montoya on skid row in San Francisco. He allegedly told Montoya that he worked for her family, but that they did not want her to contact them. Montoya claims that Kelly presented her with a one-page document that, he told her, would pass her share of Poston’s estate to Montoya’s children, allegedly offering her $1000 to sign. Montoya did not have her reading glasses, but she trusted Kelly, accepted the offer, and took the cash. But as Montoya later discovered, the document actually assigned 29%—totaling more than $111,000—of her inheritance to TES.

Figure 1: Letter from TES to Laurie Montoya

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25 Kelly Declaration, supra note 23, at 2.
26 Declaration of Laurie Elizabeth Montoya at 2, In re Est. of Poston, No. PES-16-299983 (Cal. Super. Ct. filed Dec. 6, 2017) [hereinafter Montoya Declaration].
27 Id. Kelly’s version of events is different. He contends that he told Montoya that he worked for a “forensic genealogy firm” and that “she was entitled to some valuable assets that might be lost to her if she did not appear to claim them.” Kelly Declaration, supra note 23, at 2. In addition, Kelly asserts that Montoya read the contract before signing it. Id.
28 See Montoya Declaration, supra note 26, at 2.
29 Id. at 3; Proposed Statement of Decision at 6-7, In re Est. of Poston, No. PES-16-299983 (Cal. Super. Ct. filed Jan. 5, 2018).
In 1995, Carlos Colson died in San Francisco. The Public Administrator opened a probate case, but could not find Colson’s kin. In 1997, Colson’s mother, Evangelina Osorno Menchaca, came out of the woodwork to claim his estate. Then, just as quickly as Menchaca had emerged, she vanished. For two decades, Colson’s property sat in limbo, on the verge of escheating to the state.

31 Id.
32 Id.
33 See id. (noting that, despite the filing of Menchaca’s heirship affidavit in 1997, the Colson estate remained undistributed as of 2010).
34 Escheat is “seizure by the state of property which has no owner.” David C. Auten, Note, Modern Rationales of Escheat, 112 U. PA. L. REV. 95, 96 (1963). In California, the Attorney General must file a petition seeking to capture unclaimed assets. See Bogert v. Davis, 263 Cal. Rptr. 129, 130 (Cal. Ct. App. 1989) (“The state must institute proceedings to establish its rights in [unclaimed]
Meanwhile, Estate Research Associates (ERA) was monitoring the Colson case and searching for Menchaca. In 2016, ERA discovered that Menchaca had died intestate in Mexico City some two decades prior, leaving six grandchildren who did not realize that they were entitled to inherit Colson’s assets through Menchaca.ERA sold Menchaca’s grandchildren this information. Then, in a forty-five page court filing, ERA produced nineteen exhibits—passports, birth and death certificates, and genealogical charts—that proved its clients’ relationships to Colson. For its services, ERA collected 33% of each grandchild’s inheritance, for a total of $68,126.

Companies like ARB, TES, and ERA have deep roots in the Anglo-American probate system. Since the 1850s, these “heir hunters” have intervened in cases with unclaimed inheritances. Heir hunters employ a business model that has remained virtually unchanged since the industry’s inception. They start by finding decedents whose estates have yet to be distributed. Then they perform research to identify the decedent’s heirs, contact these individuals, and offer to reveal the relevant facts about the case and to help them collect in court. In return, heir hunters ask for an assignment of a percentage of the heirs’ recovery.

Although heir hunting is pervasive, it has flown beneath the scholarly radar. This inattention is surprising. In the past decade, there has been fierce property.”). In the two decades that Colson’s case sat idle, all that stood between his estate and escheat was the filing of such a lawsuit.

35 Elissiry Declaration, supra note 30, at 2-3.
36 Id. at 3.
37 Id. at 1-45.
39 See infra text accompanying notes 74–77.
40 See infra text accompanying note 74. Heir hunters typically focus on intestate decedents (those that have no will). However, some testators leave property to amorphous classes, such as “my heirs at law.” Gertsch v. Int’l Equity Rch. (In re Est. of Katze-Miller), 463 N.W.2d 853, 855 (Wis. Ct. App. 1990). Heir hunters occasionally target these individuals if they are not aware of their status as beneficiaries. See, e.g., id. at 855-857 (informing individuals of their potential status as heirs or owners of interest).
41 See infra text accompanying notes 76–77.
42 See infra text accompanying notes 76–77.
43 Heir hunting is probably best-known as the subject of a popular British television show. See Heir Hunters, BBC, https://www.bbc.co.uk/programmes/b007nms5 [https://perma.cc/S9P8-ZQ44 (“Series following the work of heir hunters, probate detectives looking for distant relatives of people who have died without making a will.”)]. In addition, heir hunting briefly flickered in the public mind in 2019, when the Department of Justice announced that a leading firm, Kemp & Associates, had pleaded guilty to antitrust violations. Heir Location Services Company and Co-Owner Plead Guilty To Antitrust Charge for Long-Running Agreement Not to Compete, U.S. DEPT OF JUST. (July 10, 2019), ***
debate about third party litigation funders: businesses that invest in pending claims. The ancient doctrine of champerty once barred outsiders from encouraging "strife and contention" by buying an interest in a complaint. However, champerty has fallen from favor in some jurisdictions, allowing consumers by charging exorbitant fees. Dozens of commentators disagree about whether litigation funding facilitates access to justice, exploits consumers, or encourages litigation. But that vast literature has overlooked heir hunting, which established the prototype for litigation funding and raises nearly identical issues. In fact, in sharp contrast to the deluge of law review articles


45 4 WILLIAM BLACKSTONE, COMMENTARIES *134-35 (1860).


49 See, e.g., SELLING LAWSUITS, supra note 44, at 4 (accusing litigation funders of “increas[ing] the overall litigation volume”).

50 See infra subsection I.B.4.
on litigation funding, only two student notes—one from 1953 and the other from 1991—have addressed heir hunting.\textsuperscript{51}

In addition, the scholarly neglect of heir hunting is unfortunate because the rules that govern the practice are wildly unsettled. Originally, many heir hunters were scam artists who chased down known heirs before news of the decedent’s death arrived through normal channels.\textsuperscript{52} Courts invalidated these companies’ assignments for champerty\textsuperscript{53} or deemed their pseudo-legal services to be the unauthorized practice of law.\textsuperscript{54} But starting in the 1990s, the pendulum began to swing in the other direction. Some judges departed from traditional doctrine and enforced heir hunting contracts,\textsuperscript{55} finding that they confer “a substantial benefit”\textsuperscript{56} and “provide the only means by which those entitled to unclaimed property might learn of their entitlement.”\textsuperscript{57} That trend generated a sharp split in authority over “[w]hether heir hunters should be viewed as ‘self-serving intermeddlers’ or the providers of ‘useful and necessary service[s].’”\textsuperscript{58}

This Article sharpens our understanding of heir hunting by reporting the results of the first empirical study of the industry. The Article’s centerpiece is an original dataset of 1,349 probate filings from San Francisco County, California between 2014 and 2016. The Golden State allows heir hunters to collect directly from the estate if a probate court finds that their assignments are fair.\textsuperscript{59} As a result, heir hunters routinely file their agreements in the public


\textsuperscript{52} See infra text accompanying notes 93–97.

\textsuperscript{53} See, e.g., Merlaud v. Nat’l Metro. Bank of Wash., D.C., \textit{84 F.2d} \textit{238}, 240 (D.C. Cir. 1936) (“[I]f this be not champerty, we fail to see wherein there can be champerty.” (quoting Peck v. Heurich, \textit{167 U.S.} \textit{624}, 631–32 (1897))); see also infra text accompanying notes 104–07.

\textsuperscript{54} See, e.g., Butler v. Cox (\textit{In re Butler’s Est.}), \textit{177 P.2d} \textit{16}, 18 (Cal. 1947) (accusing an heir hunter of taking “complete control of litigation” and “intervening for profit in the conduct of legal proceedings”); see also infra text accompanying notes 109–15.


\textsuperscript{57} Nelson, \textit{896 P.2d} at 1266.


\textsuperscript{59} See \textit{CAL. PROB. CODE} \textsection 11604 (West 2020).
record. This disclosure norm enabled us to unearth 219 agreements from twenty-seven American states and eleven foreign countries that generated more than $1.5 million in heir hunting fees.

We use this evidence to critique existing regulation of heir hunting and propose reforms. First, we argue that the conventional approach of voiding heir hunting contracts for champerty is defensible but imperfect. Some courts apply champerty to prevent heir hunters from causing or exacerbating probate conflicts, and our logit regression analysis suggests that estates with heir hunters are especially likely to devolve into litigation. Similarly, other judges invoke champerty to “protect[] beneficiaries of estates from . . . unnecessary expense.” We show that these consumer protection concerns are well-founded. Heir hunters often preempt the administrator’s efforts to locate the decedent’s kin. Like ARB, which contacted Hal and Robert Imperial just one day after their father’s probate case began, the vast majority of heir hunters in our data secure contracts before the court even appoints an administrator. By intruding so early in the process, heir hunters provide an unnecessary “service.” However, champerty, which effectively bars heir hunting, would also prevent heir hunters from helping heirs who are genuinely unaware of their inheritance rights. For instance, in the Colson and Menchaca estates, ERA solved a decades-old genealogical conundrum and ensured that assets remained within the decedent’s family. Because champerty would eliminate both the costs and the benefits of heir hunting, it provides a blunt response to a multidimensional problem.

Second, we contend that heir hunting is a fertile source of ethical problems. Our research reveals that the same lawyer often represents both the heir hunter and the heirs in a single case. This creates a grave conflict of interest. Indeed, as one court has observed, an attorney representing an heir hunter cannot render unbiased legal advice to the heir about whether “the heir hunter’s assignment is suspect or unreasonable.” Moreover, although some courts have banned dual representation, we discover that heir hunters have managed to slip around this rule. By funneling heirs to “industry lawyers”—ostensibly “independent” counsel who, in fact, routinely represent

60 See infra text accompanying notes 104–07, 125–26, 130–32.
62 See infra subsection III.A.1.b.
63 See supra text accompanying notes 4–10.
64 See Elissiry Declaration, supra note 30, at 3 (“ERA accomplished what no one else was able to do since Colson died over 20 years ago.”).
65 See infra Section III.B.
66 Gunning v. Caudill (Est. of Wright), 108 Cal. Rptr. 2d 572, 578 (Ct. App. 2001).
67 See infra text accompanying notes 144–54.
heir hunters—they comply with the law on paper while still retaining total dominion over the proceeding.

Finally, we synthesize our findings into a proposal for legislation that tightens the reins on heir hunters. We argue that states should pass statutes that cap heir hunting fees and impose a moratorium on the solicitation of heirs until after the administrator has had an opportunity to try to find the decedent’s family. We demonstrate that these interventions would reduce the litigation rate, prevent heir hunters from exploiting their clients, and lower the stakes for heirs with disloyal lawyers.

The Article contains three Parts. Part I traces the evolution of heir hunting from Victorian England to contemporary America. It reveals that, initially, most courts refused to enforce agreements between heir hunters and heirs. Yet it also shows that this resistance ebbed over the decades, creating confusion about the legality of heir hunting. Part II describes our empirical methodology and general findings. Part III excavates deeper into our data to assess the existing legal framework and prescribe policy recommendations.

I. THE HISTORY OF HEIR HUNTING

This Part describes the history of heir hunting. It reveals that courts in the nineteenth and early twentieth centuries viewed heir hunting with “very considerable suspicion.”68 Yet it also demonstrates that modern judges have become less skeptical of the practice, sowing confusion about whether and how to regulate the industry.

A. Early Hostility

Since ancient Rome, courts have invalidated contracts in which a third party interferes with someone else’s legal proceeding. The doctrine of maintenance prohibits “officious intermeddling in a [law]suit that no way belongs to one . . . ”69 More specifically, champerty, a species of maintenance, applies when an outsider agrees “to carry on [another] party’s [claim] at his own expense.”70

68 Proceedings Affecting the Profession, 36 IRISH L. TIMES & SOLICS.’ J. 457, 460 (1902).
69 BLACKSTONE, supra note 45, at *134-35.
70 Id. at *135; see also WILLIAM JOHN TAPP, AN INQUIRY INTO THE PRESENT STATE OF THE LAW OF MAINTENANCE AND CHAMPERTY 20-21 (1861) (“[A]ll champerty is maintenance, though all maintenance is not champerty; the one being the genus and the other the species.”). Courts also invalidated attempted assignments of choses in action: intangible property rights, such as pending causes of action. See, e.g., Walter Wheeler Cook, The Alienability of Choses in Action, 29 HARV. L. REV. 816, 816 (1916) (“[A]ccording to the original common law rule . . . a chose in action was not assignable.”(emphasis omitted)).
Supposedly, champerty serves two purposes. First, it prevents exploitation. Roman Emperor Anastasius, troubled by plaintiffs who were selling claims for “far below their value,” banned the practice in 506 A.D. Second, judges believed that allowing parties to alienate their interest in a lawsuit would encourage litigation. Trials, in medieval society, were seen as “a dangerous instrumentality” that exhibited “a quarrelsome and un-Christian spirit.” By refusing to treat causes of action like other forms of property—which can be freely transferred for consideration—champerty prevented claims from being commodified and the judicial system from becoming a market.

But in 1850s England, a new kind of entrepreneur began to test champerty’s boundaries. Genealogists who called themselves “next-of-kin agents” began scouring probate filings for estates in which nobody had sought to inherit the decedent’s assets. Next-of-kin agents used their professional training to track down the decedent’s relatives and tantalize them with news that they stood to receive a substantial sum. Then, in return for a fraction of the estate, next-of-kin agents offered to identify the relevant probate matter and supply proof of the heirs’ genetic link to the decedent. If the heir did not recover, the next-of-kin agent also took nothing.

These fledging businesses raised novel legal questions. As noted, champerty nullified any contract in which a non-party promised to “carry on . . . litigation.” Yet next-of-kin agents were “skilled in the law of

71 Max Radin, Maintenance by Champerty, 24 CALIF. L. REV. 48, 55 (1935). Indeed, champerty’s etymology contains a subtle reference to the doctrine’s consumer protection rationale: the word “champerty” comes from “champart,” which refers to a property arrangement that permitted feudal landowners to exploit tenants without violating the usury laws. Id. at 61.

72 See Lampert’s Case (1613) 77 Eng. Rep. 994, 997; 10 Co. Rep. 46 b, 48 a (predicting that the sale of lawsuits would lead to a “multiplying of contentions and suits”).

73 Radin, supra note 71, at 38.

74 For a few contemporary accounts of these “next-of-kin agents,” see generally Rees v. De Bernardy (1896) 2 Ch 437; Reynell v. Sprye (1892) 42 Eng. Rep. 710; 1 De G. M. & G. 660; Sprye v. Porter (1856) 19 Eng. Rep. 1169; 7 El. & Bl. 57; Wedgerfield v. De Bernardy (1908) 24 T.L.R. 497 (Eng.). See also Banking & Commercial Law, 51 BANKERS’ MAG. 842, 842 (1891) (mentioning a next-of-kin agent called Adams & Co., which had sought access to a list of unclaimed dividends from the Bank of England).

75 See, e.g., Porter, 119 Eng. Rep. at 1178, 7 El. & Bl. at 80 ( remarking upon an heir’s “ignorance of his being related to [the decedent] or in any way entitled to the property”).

76 Id.

77 See, e.g., Reynell, 42 Eng. Rep. at 722 (observing that an heir had agreed to “be[] indemnified against all costs whatever incurred in the attempt to recover [the property], whether that attempt should or should not prove successful”).

78 Stanley v. Jones (1831) 131 Eng. Rep. 143, 146; 7 Bing. 369, 379. For instance, in Stanley, the British Court of Common Pleas invalidated a contract between the plaintiff and a witness who agreed to provide favorable evidence in exchange for one-eighth of the litigation proceeds. Id. at 140-47; 7 Bing. at 377-79. The witness had promised to “exert his utmost influence and means for procuring such evidence as should be requisite to substantiate the [plaintiff’s] claims.” Id. at 146; 7 Bing. at 378. The court held that this personal stake in the outcome of the case made the agreement champertous. Id. at 146-47; 7 Bing. at 378-79.
champerty”79 and thus knew to maintain a plausible distance from the probate proceeding. For instance, they styled their written agreements as bare promises "to give information" rather than as commitments to corroborate the heir’s inheritance allegations in court.80 Some of these assignments further obfuscated the true nature of the next-of-kin agent’s services by stating that heirs did not need “to take any proceedings at law or in equity to recover the [] property.”81 Judges were rightly skeptical. Instead of accepting these transactions at face value, they scrutinized the record for clues that the next-of-kin agent had orally agreed to help the heir prevail in probate.82 If the next-of-kin agent had obtained the heir’s business by leading her to “believe that he would recover the property,” then the exchange was void for champerty.83

Next-of-kin agents fought this conclusion tooth and nail. In particular, they contended that their transactions should be exempt from champerty because probate often functions as an administrative, non-adversarial proceeding.84 For example, the filing of an heirship petition—the vehicle for establishing inheritance rights in complex matters—only requires the court to adjudicate a dispute if another party objects.85 Thus, next-of-kin agents argued that they did not encourage “litigation” as that term is commonly understood.86 But courts disagreed, reasoning that champerty requires only the possibility that the probate proceedings “might have become . . . hostile.”87

Eventually, next-of-kin agents started to appear in America. In 1902, Comfort, one of the most widely-circulated magazines of its time, ran a feature story that described next-of-kin agents as resourceful entrepreneurs.

His library . . . comprises hundreds of old directories, domestic and foreign, old court guides, peerages, long records of births, marriages, and deaths . . . . One next-of-kin agent has also a wonderful series of

79 Rees, [1896] 2 Ch at 447.
80 Id.
81 Porter, 119 Eng. Rep. at 1169; 7 El. & Bl. at 58.
82 See Rees, [1896] 2 Ch at 446 (analyzing the parties’ “true agreement”); Porter, 119 Eng. Rep. at 1178; 7 El. & Bl. at 80 (“There can be no doubt that the [heir] is at liberty to allege that the written agreement declared upon was merely colourable, and to disclose, as a defence, the real nature of the transaction.”).
83 Rees, [1896] 2 Ch at 447; see also Porter, 119 Eng. Rep. at 1178; 7 El. & Bl. at 81 (“The [next-of-kin agent] purchase[d] an interest in the property in dispute, bargains for litigation to recover it, and undertakes to maintain the [heir] in the suit . . . . Upon principle such an agreement is clearly illegal . . . .”). Conversely, if there was no such side deal, the transaction stood. See Wedgerfield v. De Bernardy (1908) 24 TLR 497, 497 (Eng.) (“There is nothing illegal in a sale by one person to another of information likely . . . . to lead to the recovery of property, and in an agreement to pay the person selling the information at share of the property if and when recovered.”).
84 See Rees, [1896] 2 Ch at 442 (“A transaction such as this is not champerty or maintenance unless there is a certainty or probability of litigation . . . .”).
85 See id. (“Here no one had an adverse interest. The title was clear. Litigation was improbable . . . .”).
86 Id.
87 Id. at 449 (emphasis added).
cards, millions of them, arranged in alphabetical order, so skillfully and comprehensively that it is hardly possible to name any man of the slightest consequence, providing he lived since 1750, about whom this remarkable reference library will not reveal something.\footnote{88 More than a Billion Dollars Awaiting Owners, COMFORT, Aug. 1902, at 13. For more on Comfort’s popularity, see DOROTHY STEWARD SAYWARD, COMFORT MAGAZINE, 1888-1942: A HISTORY AND CRITICAL STUDY (1960).}

Shortly thereafter, an assortment of heir-finding firms sprung up around the country. For instance, in 1913, Walter C. Cox founded W.C. Cox & Company in Chicago.\footnote{89 About the Company, W.C. COX & CO., http://www.wccox.com/about.html [https://perma.cc/65C5-HT53] [hereinafter About the Company].} Cox had once helped life insurance executives track down missing beneficiaries, and he later expanded into “the more complicated arena of probate research nationwide.”\footnote{90 Id.} Cox’s endeavors were so lucrative that his employees routinely broke away to establish rival firms.\footnote{91 See id. (“Many who would start their own research companies during the 1930s and 1940s began their careers under the expert tutelage of Walter C. Cox.”).}

These businesses soon became known as “heir hunter[s],”\footnote{92 Horan v. Varian, 268 P. 637, 637 (Cal. 1928).} and acquired a reputation for unsavory practices. For one, instead of providing valuable genealogical research in estates plagued by long-lost relatives or complex family trees, heir hunters often targeted heirs regardless of whether they were on the administrator’s radar. One common scam preyed on the large population of immigrant decedents who still had ties overseas.

Other heirs lived in the same city as the decedent\textsuperscript{94} or were her siblings\textsuperscript{95} or parents,\textsuperscript{96} rather than her distant relatives. In all of these cases, the heirs’ rights to receive property “would have been proven without [the firm’s] intervention.”\textsuperscript{97}

Other heir hunters smooth-talked their way into the probate system. For instance, in 1925, Joseph Woerndle and Henry Gordon formed the Transatlantic Estates & Credit Company in New York.\textsuperscript{98} Neither man had been admitted to the New York bar.\textsuperscript{99} Woerndle had been rejected four times, and Gordon’s education at “a correspondence law school in Kansas” had earned him a law license in Georgia, but not New York.\textsuperscript{100} Despite its principals’ lack of qualifications, Transatlantic represented approximately four hundred heirs in more than three hundred estates in Bronx, Kings, Queens, and Westchester Counties, “handl[ing] all the legal proceedings”\textsuperscript{101} and charging fees as high as fifty percent of the value of the assets.\textsuperscript{102}

During this early period, American judges “almost uniformly refused to enforce [heir hunting] contracts.”\textsuperscript{103} Courts in the District of Columbia, Kansas, Kentucky, Pennsylvania, and Ohio followed the English approach, holding that heir hunting contracts violated the champerty doctrine.\textsuperscript{104} However, the logic of these opinions did not always align. Some courts faulted heir hunters for paying the heir’s legal expenses, a subsidy that encouraged the heir to pursue an heirship petition in probate court.\textsuperscript{105} We will

\textsuperscript{94} E.g., McIlwain’s Est., 27 Pa. D. & C. 619, 623 (C.P. Phila. Cnty., Orphans’ Ct. Div. 1936) (“All of the [decedent’s] family [and the decedent] lived in Philadelphia, and it was inevitable, because of their proximity and close relationship, that sooner or later the news of his death would be communicated to them.”).


\textsuperscript{96} E.g., In re Lynch’s Est., 276 N.Y.S. at 943 (father and mother).

\textsuperscript{97} In re Wellington’s Est., 276 N.Y.S. at 947; see also In re Reilly’s Est., 184 P.2d at 924 (explaining that an heir hunter’s client “was located in Ireland within eighteen days after the filing of the petition for letters of administration”).

\textsuperscript{98} In re Lynch’s Est., 276 N.Y.S. at 941.

\textsuperscript{99} Id. at 941-42.

\textsuperscript{100} Id. at 941-42.

\textsuperscript{101} In re Wellington’s Est., 276 N.Y.S. at 948; see also In re Lynch’s Est., 276 N.Y.S. at 942 (providing more detail about the company).

\textsuperscript{102} In re Lynch’s Est., 276 N.Y.S. at 941.

\textsuperscript{103} Skinner v. Morrow, 318 S.W.2d 419, 429 (Ky. 1958).


\textsuperscript{105} See, e.g., Merlau, 84 F.2d at 240 (“[A]n agreement by an attorney at law to prosecute at his own expense a suit . . . in which he personally has and claims no title or interest in consideration of receiving a certain portion of what he may recover is unlawful and void for champerty.”).
call this the "litigiousness" theory of champerty. Another group of judges held that heir hunters thwarted the administrator’s duty to find the decedent’s family.

[T]his Court will not tolerate, sanction or permit these self-appointed Lost Heir organizations to compete with duly appointed Administrators . . . of estates . . . . This Court is its own Clerk and has custody and jurisdiction over its files, papers, cases and records, and as such, does not intend to permit any self appointed person or organization to operate in open competition with duly appointed fiduciaries. Such activity is against public policy and borders on “ambulance chasing”. . . .

According to this view, heir hunters’ intermeddled prevented heirs from inheriting “in the usual course of the administration of the estate without any deductions for collection fees.” We will refer to this as the “interference” theory of champerty.

Other states which have never recognized champerty nevertheless invalidated heir hunting contracts on other grounds. Courts in California, Florida, Louisiana, New Jersey, and New York held that heir hunters were engaged in the unauthorized practice of law. To maximize the likelihood of recovering property, firms insisted that their clients sign powers of attorney that gave them “complete control” over the probate. Some of these documents were fatally flawed because they vested heir hunters with the right to perform “essentially legal services,” such as to “conduct or defend all litigation.” But even when these contracts merely allowed companies to hire counsel for heirs, they violated the prohibition on “running and capping”

106 In re Est. of Rice, 193 N.E.2d at 569-70 (internal quotation marks and emphasis omitted).
110 In re Butler’s Est., 177 P.2d at 18-19 (nullifying contract where heir hunter obtained the power "to petition for letters of administration or letters testamentary, to recognize, defend or contest wills . . . [and] to institute, proseecue or defend suits and proceedings in law, equity or in probate").
111 In re Robinson’s Est., 275 N.Y.S.2d at 341.
112 Carey, 64 A.2d at 396.
(non-lawyers drumming up business for attorneys). This rule recognizes that because lawyers are forbidden from soliciting clients, third parties should not be able to solicit clients for lawyers. Thus, when heir hunters funneled heirs to particular counsel, judges condemned them as "middle[en] intervening for profit in . . . legal proceedings."

Finally, legislatures in California and New York passed statutes that governed heir hunting. In 1939, citing the "long history of overreaching in this field," lawmakers in the Golden State passed what is now Probate Code section 11604. This provision empowers a probate court to review heir hunting contracts *sua sponte* or if the administrator or any heir so requests. In addition, section 11604 permits judges to rewrite or strike down assignments if "[t]he fees, charges, or consideration paid or agreed to be paid by a beneficiary are grossly unreasonable." Likewise, section 13.2-3 of the

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113 See In re Butler's Est., 177 P.2d at 18 ("'[C]ommercial exploitation' of the legal profession . . . is contrary to public policy.").

114 See, e.g., NAACP v. Button, 371 U.S. 415, 423-24 (1963) (describing state regulation of "running" and "capping"); CAL. BUS. & PROF. CODE § 6152(a)(1) (West 2020) ("It is unlawful for . . . [a]ny person . . . to act as a runner or capper for any attorneys or to solicit any business for any attorneys . . . ").

115 Merrick v. Larson (In re Larson's Est.), 206 P.2d 852, 856 (Cal. Dist. Ct. App. 1949) (internal quotation marks omitted); see also Seidel v. United Cal. Bank (In re Estate of Collins), 73 Cal. Rptr. 599, 602 (Dist. Ct. App. 1968) ("[W]hen a nonlawyer acts for prospective beneficiaries under arrangements providing for his payment of litigation expenses and the nonlawyer controls the litigation instituted on behalf of the beneficiaries, such procedure amounts to commercial exploitation of the legal profession."). But see Foreman v. Gwirtz (In re Cohen's Est.), 152 P.2d 485, 488 (Cal. Dist. Ct. App. 1944) (holding that heir hunter did not violate ethical norms where he informed the heir "that he could not select a lawyer for her" and she "was represented . . . by attorneys of her own selection").


118 CAL. PROB. CODE § 11604(b) (West 2020). Before lawmakers intervened, probate courts in California were hamstrung by archaic rules that forbade them from adjudicating "the validity of an assignment made by an heir, legatee or devisee of an interest in an estate." Gordon v. Nichols, 195 P.2d 444, 447 (Cal. Dist. Ct. App. 1948). This jurisdictional problem may still exist in other states that have yet to pass heir hunting statutes. See, e.g., Crosby v. Ide, 110 N.E.2d 314, 316 (Mass. 1953) ("A Probate Court . . . cannot take cognizance of assignments of their interests made by heirs, legatees, or distributees."); Downs v. Myers (In re King's Est.), 272 N.W. 205, 206 (Neb. 1937) (explaining that probate courts cannot hear an "extraneous controversy"); Friedman, *supra* note 51, at 87 ("Connecticut's probate courts are unable to oversee the activities of [heir hunters] because [they] currently have no jurisdiction over agreements between heir-hunters and beneficiaries of estates.")

119 CAL. PROB. CODE § 11604(c)(1). Heir hunters "bear[] the burden of establishing the adequacy of consideration for the assignment." Gunning v. Caudill (Est. of Wright), 108 Cal. Rptr. 2d 572, 580 (Ct. App. 2001). In addition, the probate court can intervene if "[t]he transfer, agreement, request, or instructions were obtained by duress, fraud, or undue influence." CAL. PROB. CODE § 11604(c)(2).
New York Estates, Powers and Trust Law allows probate courts to decide whether heir hunters’ compensation is “reasonable.”\(^{120}\)

In sum, for more than a century, jurisdictions either prohibited or heavily regulated heir hunting. Yet, as we discuss next, that soon would change.

B. Modern Confusion

As the decades passed, the legal landscape surrounding heir hunters shifted. In addition, companies adjusted some of their practices to try to evade regulation. This section explains how these developments made the legal status of heir hunting unclear.

1. Champerty’s Twilight

In the second half of the twentieth century, champerty became embattled. A few states abolished the doctrine, calling it “anachronistic”\(^{121}\) and unnecessary in light of other rules that deter “frivolous lawsuits[ ] or financial overreaching by a party of superior bargaining position.”\(^{122}\) To be sure, a handful of courts reaffirmed their allegiance to the rule, opining that allowing plaintiffs to sell claims would spur litigation and “pervert[] the remedial process of the law into an engine of oppression.”\(^{123}\) Nevertheless, as the Ninth Circuit observed in 2011, “[t]he consistent trend across the country is toward limiting, not expanding, champerty’s reach.”\(^{124}\)

\(^{120}\) N.Y. EST. POWERS & TRUSTS LAW § 13-2.3(a), (b)(3) (McKinney 2020).
\(^{121}\) TMJ Haw., Inc. v. Nippon Trust Bank, 153 P.3d 444, 449 (Haw. 2007).


\(^{124}\) Del Webb Cmtys., Inc. v. Partington, 652 F.3d 1145, 1156 (9th Cir. 2011).
Champertty’s decline has shifted heir hunting into a legal gray area. For example, in *Finders Diversified, Inc. v. Baugh*, which was decided in 1984, it was unclear whether an heir hunting contract was governed by Florida, Missouri, or Ohio law. However, an Ohio appellate court held that this detail made no difference, because all three states held that heir hunting caused “vexatious and speculative litigation” and therefore was champertous. Conversely, six years later, in *Estate of Katze-Miller*, the Wisconsin Court of Appeals disavowed the litigiousness theory of champerty. Embracing an argument that heir hunters had been making for decades, the court reasoned that because probate administration is non-adversarial, heir hunters are engaged in “a fact-finding expedition rather than a litigious exercise.”

This haze still hangs over the field. In 2017, a Pennsylvania trial court invalidated an heir hunting contract for champerty despite noting that the rule “has not been the subject of an appellate court case [in the state] for over forty years.” The judge reasoned that the arrangement met all the elements of the doctrine: a third party who (1) has “no legitimate interest in the suit,” (2) “expend[s] his own money in prosecuting the suit,” and (3) is “entitled by the bargain to share in the proceeds of the suit.” But in 2019, a federal district court in Minnesota went the other way. The plaintiffs had assigned a quarter of their inheritances to Kemp & Associates. When Kemp’s fee ended up being more than $62,000, the plaintiffs accused the company of violating a consumer protection statute by soliciting their business even though it “knew that champerty and maintenance were prohibited in Minnesota.” The judge rejected this claim, noting that it could find no authority “that Minnesota’s laws against champerty and maintenance apply to Kemp’s business model.”

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125 No. L-83-424, 1984 WL 7841, at *3 (Ohio Ct. App. Apr. 20, 1984) (per curiam). The opinion does not specify whether the assignment had a choice of law clause or the conflict of law question arose from the case’s factual background. See id.

126 Id. at *2-3.


128 See supra text accompanying notes 85-86.

129 In re Est. of Katze-Miller, 463 N.W.2d at 859.


131 Id.


133 Id. at *1.

134 Id. at *1-2.

Heir hunters also changed the way they obtained control over heirs’ claims. Recall that courts objected to contracts that expressly gave heir hunters the power to hire counsel for the heirs.\textsuperscript{136} Heir hunters tried to overcome this obstacle by giving their customers the “choice” to use the heir hunter’s counsel for free.\textsuperscript{137} Unfortunately, it is unclear whether this arrangement is permissible.

In \textit{Estate of Lynch}, which was decided in 1978, a California appellate court held that merely encouraging heirs to hire a lawyer did not constitute the unauthorized practice of law.\textsuperscript{138} In that case, the firm W.C. Cox procured assignments from fourteen heirs.\textsuperscript{139} The contract did not include a power of attorney; rather, Cox simply gave its clients the option to use the company’s lawyer “to protect [their] interest in the estate” at “no charge.”\textsuperscript{140} Not surprisingly, all of the heirs accepted Cox’s offer.\textsuperscript{141} The majority held that Cox had not violated ethical rules, reasoning that “[t]he heirs were not required to use Cox’s attorney.”\textsuperscript{142}

However, not every judge agrees that dual representation—where the same lawyer works for both the company and the heir—is benign. For instance, in a blistering dissent in \textit{Lynch}, Justice Kaus explained why Cox’s technique of nudging heirs toward its lawyer was profoundly misleading:

\begin{quote}
[It implies a mutuality of interest between assignee and heir which does not, in fact, exist. First I very much doubt whether the attorney picked by the assignee considered it part of his duty to the heir to explain that he could attack the assignment [as unreasonable]. Second, even if the assignor’s and the assignee’s interests coincide as to the total amount which the heir is to receive from the estate, the heir may have problems of timing, taxes, nature of interest and so forth about which the assignee could not care less and which, to avoid delay, he does not want raised.]\textsuperscript{143}
\end{quote}

\begin{flushleft}
136 See \textit{supra} text accompanying notes 113–15.
137 See Ingraham, \textit{supra} note 51, at 107 (“[H]eir-hunters have learned to . . . omit[] in the formal written contract any reference to their control of the heir’s claim.”).
139 \textit{Id.} at 863.
140 \textit{Id.}
141 See \textit{id.} (stating that all fourteen heirs “signed retainer agreements” with the heir-hunter’s attorney).
142 \textit{Id.} (emphasis added). But see Florida State Bar Ass’n Comm. on Pro. Ethics, Op. 77-8 (1977) (“It is improper for an attorney to allow an heir-hunting service to advise potential heirs of his services.”).
Likewise, the D.C. Circuit and Pennsylvania Superior Court have both opined that dual representation “creates not a potential but an actual and present conflict of interest.”

In *Estate of Wright*, which was decided in 2001, another California appellate panel analyzed the heir hunting contract with more nuance than in *Lynch*. Joseph Caudill, a private investigator working for an heir hunter, located Dorothy Gunning, the decedent’s missing sister. Gunning agreed to assign thirty-five percent of her inheritance to the heir hunter. Gunning also executed two documents: a limited power of attorney that authorized Caudill “to order and receive any and all documentation relating to [her] identity or the identity of [her] parents” and a general power of attorney that allowed John Boessenecker, a San Francisco lawyer, “to exercise or perform any act, power, duty, right or obligation whatsoever.” Eventually, Gunning revoked the general power of attorney and hired a Reno law firm to represent her in the case.

The court classified the two powers of attorney differently. First, it upheld the instrument that entitled Caudill to collect evidence about Gunning’s lineage. As the court remarked, this arrangement “did not empower Caudill to represent Gunning or to control the probate litigation.” Second, the court invalidated the power of attorney in favor of Boessenecker.

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144 Sullivan v. Comm. on Admissions & Grievances of the U.S. Dist. Ct. for D.C., 395 F.2d 954, 956-57 (D.C. Cir. 1967); see also *In re Atkinson’s Est.*, 20 Pa. D. & C. 3d 700, 721 (C.P. Phila. Cnty., Orphans’ Ct. Div. 1981), aff’d sub nom. *Est. of Atkinson*, 468 A.2d 841 (Pa. Super. Ct. 1983) (echoing this reasoning). Similar conflicts of interest can arise in the insurance defense context. If a plaintiff sues an insured and it is not clear that all of the claims are covered by the policy, “the standard practice of an insurer is to defend under a reservation of rights where the insurer promises to defend but states it may not indemnify the insured if liability is found.” *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc’y*, Inc., 208 Cal. Rptr. 494, 498 (Cr. App. 1984). In turn, this means that the defense lawyer’s duties to the company may clash with her obligations to the insured. To resolve this dilemma, some states require insurers to pay for independent counsel to represent the insured. See, e.g., CAL. CIV. CODE § 2860 (West 2020).

145 See *id.* at 574-75.
146 See *id.* at 575.
147 See *id.*
148 *Id.*
149 *Id.*
150 See *id.* at 576.
151 See *id.* at 577.
152 *Id.*
153 See *id.* at 577-78.
reasoned that by obtaining this document, Caudill had impermissibly engaged in running and capping by “solicit[ing] business for an attorney.” 154 Nevertheless, the court held that the defective power of attorney did not doom the underlying assignment of thirty-five percent of Gunning’s inheritance. 155 In the court’s eyes, the critical fact was that Gunning had cut her ties to Boessenecker:

The result here may have been different had the heir hunter succeeded in inducing Gunning to employ Boessenecker as her attorney. In such event, all the documents may have been so inextricably tied to one other that the taint of Boessenecker’s power of attorney may have rendered them all void for reasons of public policy. But Gunning revoked the power of attorney and employed independent counsel. 156

Thus, the court implied—but did not hold—that heir hunting assignments can be invalid if the company persuades the heir to hire the company’s counsel. 157

3. Unclaimed Property Statutes

As these changes were brewing, the widespread adoption of unclaimed property statutes transformed how some courts viewed heir hunters’ fees. Within the last half-century, almost every state has enacted a comprehensive scheme to address the escheat of abandoned intangible property, such as money held in accounts with no ascertainable accountholder. 158 These laws deem an asset to be “abandoned”—and hence eligible for escheat—if nobody

154 Id.
155 Id. at 578.
156 Id.
157 Id. For a similar sentiment, see In re Est. of Campbell, 742 A.2d 639, 642 (N.J. Super. Ct. Ch. Div. 1999). The administrator challenged the heir hunter’s fees as excessive. Id. at 640. The court held that the administrator lacked standing to raise the issue because she “is not a party to those agreements” and that any such complaint “should arise in an action between the heirs and the genealogical firm.” Id. at 641. Yet in a footnote, the court flagged the dual representation problem:

The court is concerned, however, with defense counsel’s apparent dual role in this matter. While describing itself as counsel “for the heirs” it seems that defense counsel is also representing the interests of the genealogical firm in connection with the dispute raised by the administratrix herein. The interests of the genealogical firm and the heirs, however, are not aligned on the issue raised.

claims it for a specified time period. The government then seizes the derelict property and holds it while trying to find the rightful owners.

Two aspects of these laws govern heir hunters. First, about thirty jurisdictions’ unclaimed property statutes invalidate heir hunting contracts that pertain to assets that have been in state custody for two years or less. The purpose of this post-escheat “no-fly zone” is to increase the odds that rightful owners will track down government-held property themselves. Second, once the two year ban has expired, states cap the amount that heir hunters can charge. Most set the ceiling at 10% of the value of the property, although others are as low as 5% or as high as 35%.

See, e.g., Revised Unif. Unclaimed Prop. Act § 201 (Unif. L. Comm’n 2016) (providing time periods that vary by the type of property).

See id. § 603(a) (requiring that all property reported as abandoned be delivered to the administrator).


Bizarrely, although these fee limitations expressly apply only to abandoned property, some courts have also applied them to recently-filed probate matters.\textsuperscript{164} For example, in Landi v. Arkules, a company obtained a 40% assignment from an heir.\textsuperscript{165} Although the estate was not in government custody, an Arizona appellate court held that the contract violated the state unclaimed property law’s 30% maximum.\textsuperscript{166} The court admitted that the statute did not “literally appl[y],” but nevertheless concluded that the deal violated the spirit of the law.\textsuperscript{167}

Conversely, the unclaimed property statute helped heir hunting gain legitimacy in New Jersey. Courts in the Garden State once dismissed the practice as a “racket.”\textsuperscript{168} But more recently, judges have cited the unclaimed property law as proof that the legislature intends “to regulate, not prohibit, the business.”\textsuperscript{169} For example, in Estate of Campbell, the administrator argued that an heir hunter’s 35% fee was unconscionable and violated public policy.\textsuperscript{170} The court noted that the estate had not been abandoned and therefore did not fall under the unclaimed property law.\textsuperscript{171} Nevertheless, the court cited the legislation as proof that the legislature harbors “no particular hostility” toward heir hunters and opined that it would be difficult to find that the assignments were invalid “when the compensation agreed to by the genealogical firm and the heirs falls within the [statutory] ceiling . . . ”\textsuperscript{172}


\textsuperscript{166} Id. at 465.

\textsuperscript{167} Id. But see Nelson v. McGoldrick, 896 P.2d 1258, 1266 (Wash. 1995) (“We are unable to discern legislative intent that this policy should extend beyond the statute’s terms.”).


\textsuperscript{171} See id. at 640-41.

\textsuperscript{172} Id. at 641. The court ultimately held that the issue was moot because the administrator lacked standing to complain about the fees. See id. In addition, the rise of law and economics affected the way some courts viewed the propriety of heir hunters’ fees. To slightly oversimplify, “Chicago school” academics began to argue that the legal system should generally enforce private transactions, no matter how “harsh” they seem. See, e.g., Alan Schwartz, \textit{A Reexamination of Nonsubstantive Unconscionability}, 63 VA. L. REV. 1053, 1055 (1977) (“[P]overty, market unresponsiveness, and incompetence are improper reasons to invalidate a contract.”); George L. Priest, \textit{A Theory of the Consumer Product Warranty}, 90 YALE L.J. 1297, 1348 (1981) (arguing that if sellers are prevented from using contract terms to segregate consumers according to risk, “both manufacturers and consumers are worse off”). This \textit{laissez-faire} ideology began to surface in legal opinions. For example, in In re Estate of Crake, 578 N.E.2d 567, 569 (Ill. App. Ct. 1991), an Illinois appellate court rejected an heir’s argument that an assignment of 33% of his inheritance was unconscionable. The judges refused to “set aside a contract merely because [it] is not a wise one from the standpoint of the party seeking rescission” or “merely because it is unfair.” Id. Likewise, other courts upheld heir hunting assignment
4. Litigation Funding

Finally, champerty’s retreat fueled a controversial new industry that borrows from the heir hunting playbook. In the 1990s, third party litigation funders began advancing money to plaintiffs in return for a partial assignment of any damage award or settlement.\footnote{173} Like heir hunters, these companies acquire an interest in a pending case and are paid only if their clients recover.\footnote{174} Eventually, litigation financing became a popular investment for banks, hedge funds, and private equity firms,\footnote{175} blossoming into a billion-dollar business\footnote{176} that has provoked fierce debate.\footnote{177}

Third party litigation funding raises many of the same concerns as heir hunting. First, echoing the litigiousness theory of champerty,\footnote{178} critics argue that allowing outsiders to buy a share of a lawsuit increases the likelihood of “abusive litigation.”\footnote{179} In fact, the Sixth Circuit and the Ohio Supreme Court have cited precedent involving heir hunters to strike down litigation funding while declaring that “[p]ublic policy commands that [we] enforce contracts voluntarily entered between competent adult parties.” Gertsch v. Int’l Equity Rsch. (In re Estate of Katze-Miller), 463 N.W.2d 853, 859 (Wis. Ct. App. 1990).\footnote{173}

For descriptions of the rise of litigation finance, see Leslie Spencer, Some Call It Champerty, FORBES, Apr. 30, 1990, at 72; Ari Dobner, Comment, Litigation for Sale, 144 U. PA. L. REV. 1529, 1529-30 (1996); Steinitz, Whose Claim?, supra note 44, at 1276-77. The phrase “third party” refers to the fact that an outsider “finance[s] the legal representation of a party in a case as an alternative to the party self-funding the legal representation or receiving attorney financing through a contingent or conditional fee agreement.” Victoria A. Shannon, Harmonizing Third-Party Litigation Funding Regulation, 36 CARDOZO L. REV. 861, 863 (2015).\footnote{174}

See AM. BAR. ASS’N COMM’N ON ETHICS 20/20, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 6 (2012) (“The business model requires that [the funder] assume the risk . . . if the claim is unsuccessful . . . .”).\footnote{175}


See, e.g., Jeffrey Schacknow, Comment, Applying the Common Interest Doctrine to Third-Party Litigation Funding, 66 EMORY L.J. 1461, 1464 (2017) (observing that American investors have contributed “upwards of $1 billion directly to plaintiffs’ firms”).\footnote{177}

See Courtney R. Barksdale, Note, All That Glitters Isn’t Gold: Analyzing the Costs and Benefits of Litigation Finance, 26 REV. LITIG. 707, 735 (2007) (proposing that policymakers increase the information available about funders and regulate the amount of fees they charge); Paul Bond, Comment, Making Champerty Work: An Invitation to State Action, 150 U. PA. L. REV. 1297, 1317 (2002) (urging state legislatures to revamp the champerty doctrine); Jason Lyon, Comment, Revolution in Progress: Third-Party Funding of American Litigation, 58 UCLA L. REV. 571, 571 (2010) (contending that funding “should be permitted but regulated to guard against its fairly limited dangers”); Martin, Wild West, supra note 44, at 68 (“It would be bad policy and unfair to poor plaintiffs with good cases to regulate litigation financing firms out of business.”); Steinitz, Whose Claim?, supra note 44, at 1326 (arguing that the costs of litigation funding are dwarfed by its ability to facilitate access to justice).\footnote{178}

See supra text accompanying note 105.\footnote{179}

SELLING LAWSUITS, supra note 44, at 5-7; see also Joshua G. Richey, Comment, Tilted Scales of Justice? The Consequences of Third-Party Financing of American Litigation, 65 EMORY L.J. 489, 500 (2015) (“[T]hird-party litigation financing . . . encourages parties to file frivolous claims.”).\footnote{178}
contracts as champertous. Second, litigation funding can create ethical complications. Funders often try to maximize their returns by insisting that the plaintiff give them authority to select a lawyer or make strategic decisions. This means that attorneys must balance the duties owed to their client with the funder’s contractual right to direct the litigation. Finally, litigation funding fees can seem inflated. For instance, there are anecdotal accounts of companies charging interest rates of 15% per month and 280% per year. In these ways, policy concerns about heir hunting and litigation funding overlap.

Nevertheless, there are also important differences between the two businesses. For one, because litigation funders advance money to litigants in return for the (potential) repayment of a larger sum in the future, they may be subject to state usury laws, which limit annual interest rates on loans at

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181 See Steinitz, Incorporating Claims, supra note 44, at 1165-66 (“[C]ommercial funders are emboldened to seek overt control and not mere influence over the litigations they invest in.”).

182 See Douglas R. Richmond, Other People’s Money: The Ethics of Litigation Funding, 56 MERCER L. REV. 649, 669-74 (2005) (describing this tension as “[a] primary concern with litigation funding”). In addition, funders sometimes insist that plaintiff’s counsel divulges information that is protected by the work-product or attorney-client privileges. See James M. Fischer, Litigation Financing: A Real or Phantom Menace to Lawyer Professional Responsibility?, 27 GEO. J. LEGAL ETHICS 191, 200 (2014).

183 See Paige Marta Skiba & Jean Xiao, Consumer Litigation Funding: Just Another Form of Payday Lending?, 80 LAW & CONTEMP. PROBS. 177, 122 (2017) (comparing interest rates in litigation funding to those in payday lending).

184 Barksdale, supra note 177, at 708.

185 Rancman v. Interim Settlement Funding Corp., No. 20523, 2001 WL 1339487, at *2 (Ohio Ct. App. Oct. 31, 2001). But see Avraham & Sebok, supra note 44, at 1150-51 (analyzing data from a major litigation funder and discovering that although the median contractually-mandated annual interest rate was 115%, the company only recovered a median of 45% in annual interest “because some clients did not pay anything back, and many of them received a haircut on their balances”).
about 10%. Heir hunters, by contrast, do not pay cash up front, and thus are exempt from these laws.

In addition, during the past few years, policymakers have aggressively regulated litigation funders. For example, in 2017, the Consumer Financial Protection Bureau (CFPB) filed an enforcement action against RD Legal Funding for allegedly luring “consumers into . . . cash advance agreements” that were “void under state law.” Likewise, lawmakers in about ten states have passed statutes either capping litigation funders’ interest rates or requiring them to make disclosures to potential clients. Conversely, no legislature has addressed probate-based heir hunting since California and New York passed their statutes more than eighty years ago.

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186 Whether funders must satisfy usury statutes is unclear. Traditionally, usury laws only govern “loans,” which is defined as an advance of money that is “absolutely repayable.” Ghirardo v. Antonioli, 883 P.2d 960, 965 (Cal. 1994). Thus, because funders’ payments are non-recourse—if the plaintiff recovers nothing, the funder also recovers nothing—several courts have held that they are not “loans” and are therefore exempt from usury regulation. See, e.g., MoneyForLawsuits V LP v. Rowe, No. 10–CV–11537, 2012 WL 1068760, at *4 (E.D. Mich. Mar. 29, 2012) (“Michigan law . . . requires an absolute obligation-to-repay to trigger application of [the] usury statute.”); Anglo-Dutch Petrol. Int’l, Inc. v. Haskell, 193 S.W.3d 87, 98 (Tex. App. 2006) (holding that a funder’s payment did not trigger the usury statute when its duty to repay “depended upon a contingency beyond [its] control”). But see Echeverria v. Est. of Lindner, No. 018666/2002, 2005 WL 1083704, at *6 (N.Y. Sup. Ct. Mar. 2, 2005), judgment entered sub nom. Echeverria v. Lindner, 801 N.Y.S.2d 233 (Table), at *9 (N.Y. Sup. Ct. 2005) (holding that funder’s payment in strict liability action was a “loan” because “the plaintiff is almost guaranteed to recover”).

187 See supra text accompanying notes 78–83.

188 Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 746 (S.D.N.Y. 2018). To be clear, the case did not involve funding of a pending complaint; rather, the alleged victims had assigned their right to future payments stemming from settlements relating to the September 11 attacks and concussions sustained while playing professional football. Id. at 746–49. The court ultimately held that the CFPB lacked the power to bring the claim because it was unconstitutionally structured. See id. at 785.

189 See TENN. CODE ANN. § 47-16-110(a) (West 2020) (“All consumers entering into litigation financing transactions shall pay the litigation financing an annual fee of not more than ten percent (10%) of the original amount of money provided to the consumer for the litigation financing transaction.”); NEV. REV. STAT. ANN. § 604C.310(1) (West 2020) (setting a maximum annual interest rate of 40%).

190 ME. REV. STAT. ANN. tit. 9-A §§ 12-104(1), (2) (2019); NEB. REV. STAT. ANN. §§ 25-3303(i) (West 2020); NEV. REV. STAT. ANN. § 604C.360; OHIO REV. CODE ANN. § 1349.55(B) (LexisNexis 2020); OKLA. STAT. ANN. tit. 14A § 3-807 (West 2020); TENN. CODE ANN. § 47-16-106(b); VT. STAT. ANN. tit. 8, § 2253(a)-(c) (West 2020).

191 See supra text accompanying notes 116–22. As noted above, state legislatures have recently regulated the discrete issue of heir hunting related to abandoned property. See supra text accompanying notes 161–63.
In sum, there is vast confusion about the legal status of heir hunting. In the next Part, we describe how we designed a study of more than a thousand recently-filed probate cases to try to answer these questions.

II. EMPIRICALLY ASSESSING HEIR HUNTING

This Part reports the Article’s empirical findings about heir hunting. It begins by explaining our research techniques, and then discusses some overarching results.

A. Data Description

Although California Probate Code section 11604 does not expressly require heir hunters to divulge their contracts, it achieves that result through the back door.192 As we mentioned, the statute allows judges to evaluate the fairness of these transactions.193 Counter-intuitively, heir hunters have strong incentives to submit their agreements to court to facilitate this review. For one, when an heir hunter files an assignment and no one objects, then the order on final distribution conclusively establishes its validity.194 Also, by obtaining the court’s approval, heir hunters can request that the administrator pay them directly during the final distribution.195 Collection from the estate is cheaper, faster, and more reliable than trying to recapture funds that were initially disbursed to the heirs. For these reasons, section 11604 in effect functions as a disclosure mandate.

To capitalize on this window into heir hunting, we analyzed probate files from San Francisco County, California. Using the Superior Court’s online “search by date” tab, research assistants collected every matter that appeared

192 By way of comparison, a different statutory provision that governs probate lenders requires the “written agreement [to be] filed with the court not later than 30 days following the date of its execution.” CAL. PROB. CODE § 11604.5(d)(1) (West 2020).
193 The statute provides in relevant part:

The court may refuse to order distribution, or may order distribution on any terms that the court deems just and equitable, if the court finds either of the following: (1) The fees, charges, or consideration paid or agreed to be paid by a beneficiary are grossly unreasonable. (2) The transfer, agreement, request, or instructions were obtained by duress, fraud, or undue influence.

PROB. § 11604(c).
194 See Burchell v. Strube, 279 P.2d 1, 7 (Cal. 1955) (holding that a probate court’s determination of the reasonableness of an heir hunter’s fees under the predecessor to section 11604 triggers the doctrine of res judicata).
We then created two datasets. One consisted of about thirty variables from all 1,349 cases, including demographic information about the decedent, whether she died intestate or made a will, the value of her property, whether litigation occurred, and the amount of personal representatives’ and attorneys’ fees. The other spreadsheet consisted of matters in which heir hunters appeared. We collected detailed information from these cases, including the timing of the contract, the relationship between the heir and the decedent, the fee collected by the heir hunter, and the identity of the heir’s lawyer.

Focusing on San Francisco has both advantages and drawbacks. On the one hand, the county provides free access to all filings in every case. This liberal policy allowed us to review the thousands of documents that were necessary to collect our data. But on the other hand, San Francisco County is not nationally representative. Indeed, its residents have higher median incomes and home values than the rest of the country. Because heir hunters may be drawn to wealthy estates, they may not be as active in other regions.

B. General Results

Heir hunting contracts appear frequently in our data. Admittedly, only thirty-one of the 676 intestacies (4.6%) involved an heir hunter. But because heir hunters pursue matters with large classes of heirs, such as decedents survived by multiple cousins, these cases tended to generate a high volume of assignments. In fact, one estate featured thirty-three heirs, thirty-one of whom involved an heir hunter. See Case Calendar, SUPER. CT. OF S.F., https://webapps.sftc.org/cc/CaseCalendar.dll?&SessionID=234265FB7A045EF3B4DD02F420AB811094F2C46 [https://perma.cc/TW8U-MYHE]. Of the 1,261 decedents whose gender appears in the record, 694 (55%) were men and 567 (45%) were women. The numbers here split right down the middle: there are 676 intestate decedents (50%) and 673 testate decedents (50%). The average estate value in the 1,175 administrations that included this information was $1,185,418. Intestate decedents (who owned a mean of $902,344.60) were less wealthy than their testate counterparts (who clocked in at $1,397,302) by a statistically significant margin (p < 0.01).

We discuss litigation infra subsection III.A.1.a in connection with the litigiousness theory of champerty. See infra Section III.C (comparing the average amount of personal representative and attorneys’ fees to heir hunters’ fees).

whom had signed heir hunting contracts, and another boasted thirty heirs and twenty-seven agreements. Ultimately, we unearthed assignments.

Table 1: Heir Hunting Fees

<table>
<thead>
<tr>
<th>Heir Hunter Received</th>
<th>Mean</th>
<th>Median</th>
<th>Min</th>
<th>Max</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$10,107</td>
<td>$4,100</td>
<td>$130</td>
<td>$216,239</td>
<td>152</td>
</tr>
</tbody>
</table>

Seven different firms appear in our data. Figure 3 breaks them down by market share as measured by dollars earned: Brandenburger & Davis (34%), W.C. Cox (28%), American Research Bureau (17%), Trust and Estates Search LLC (12%), Estate Research Associates (5%), Family Tree (2%), and Kemp & Associates (2%).

---


204 See Ord. for Final Distrib.; Settling First & Final Acct. & Rep. of Adm’r; Allowing Statutory Comp. to Adm’r as His Att’y’s and Reimbursement of Att’y’s Costs; And Authorizing Rsv. for Taxes and Closing Costs at 4–7, Est. of Sheldon, No. PES-16-300458 (Cal. Super. Ct. filed Nov. 14, 2019).

205 These calculations exclude thirty-eight agreements in cases that are still pending, twenty-eight contracts on which heir hunters collected nothing, and one assignment in which the heir was a child and the record did not reveal information about his inheritance.

206 Some firms appear to be bitter rivals. As noted supra note 43, Kemp & Associates recently plead guilty to criminal antitrust allegations. In one case, for no apparent reason, W.C. Cox asked the court to take judicial notice of the fact that Kemp & Associates and its President are “convicted felons.” Supplemental Declaration of John E. Boessenecker in Support of Motion to Compel Enf’t of Settlement Agreement at 2, In re Est. of Vargas, No. PES-14-298101 (Cal. Super. Ct. filed Sept. 26, 2019).
Heir hunting’s geographic sweep is impressive. Table 2 reveals that eighty-five (39%) heirs live outside of the U.S.\textsuperscript{207} In addition, as Figure 4 demonstrates, firms located members of the decedent’s family in twenty-seven American jurisdictions.

<table>
<thead>
<tr>
<th>Country</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada</td>
<td>20</td>
</tr>
<tr>
<td>Chile</td>
<td>11</td>
</tr>
<tr>
<td>Denmark</td>
<td>4</td>
</tr>
<tr>
<td>El Salvador</td>
<td>2</td>
</tr>
</tbody>
</table>

\textsuperscript{207} To facilitate heir hunting’s global reach, domestic heir hunters sometimes collaborate with their foreign counterparts. See, e.g., Declaration of Neil Fraser in Support of First & Final Acct. & Rep. of Admr & Petition for Its Settlement; Petition for Payment of Statutory Fees for Ordinary Servs. to Admr & to His Atty; Petition to Retain Rsv. for Taxes & Closing Costs; Petition to Reduce Bond; & Petition for Final Distrib. at 2, In re Est. of Johnsson, No. PES-15-298936 (Cal. Super. Ct. filed July 13, 2017) (explaining that the British heir hunting company Fraser & Fraser partnered with the American firm Brandenburger & Davis).

\textsuperscript{208} Three heirs’ countries do not appear in the court files.
England 7
Germany 3
Greece 3
Hungary 18
Italy 1
Mexico 6
Sweden 10
United States 131
Total 216

Our research also casts new light on how heir hunters operate. Their business model requires a basic understanding of the statute of descent and distribution, which governs the transmission of assets to an intestate decedent’s family.\footnote{For the history of these statutes, see W.D. Rollison, Principles of the Law of Succession to Intestate Property, 11 Notre Dame Law. 14, 18–22 (1935).}
Figure 5’s table of consanguinity helps make this system concrete. Simple estates never progress further than the left-most column: courts divide an unmarried decedent’s property among her living children or the descendants of her dead children. However, if the decedent has no surviving descendants, the statute of descent and distribution moves up a generation—advancing one column to the right along the table—and allocates property to the decedent’s parents if they are alive, or to the decedent’s surviving siblings, or to the children of deceased siblings (the decedent’s nieces and nephews).

If there are no living descendants of the decedent’s parents, the statute climbs another level on the family tree (one more step to the right in Figure 5) and looks for surviving descendants of the decedent’s grandparents. In most states, this cycle continues all the way to “laughing heirs”: people who are “so loosely linked to [an] ancestor as to suffer no sense of bereavement at h[er] loss.”

210 Table of Consanguinity: Showing Degrees of Relationship, WIKIMEDIA COMMONS (Mar. 22, 2012), https://commons.wikimedia.org/wiki/File:Table_of_Consanguinity_showing_degrees_of_relationship.png

211 See, e.g., UNIF. PROB. CODE § 2-103(a)(1) (UNIF. L. COMM’N 2013).

212 Id. § 2-103(a)(2)-(a)(4). In California, the statute of descent and distribution also gives inheritance rights to the decedent’s step-relations. CAL. PROB. CODE § 6402(g) (West 2020).

213 Id. § 2-103(a)(4). In California, the statute of descent and distribution also gives inheritance rights to the decedent’s step-relations. CAL. PROB. CODE § 6402(g) (West 2020).

214 David F. Cavers, Change in the American Family and the “Laughing Heir”, 20 IOWA L. REV. 203, 208 (1935); see also David V. DeRosa, Note, Intestate Succession and the Laughing Heir: Who Do We Want to Get the Last Laugh?, 12 QUINNIPIAC PROB. L.J. 153, 154 (1997) (“The traditional statute governing intestate succession provides an inheritance to the intestate decedent’s ‘next of kin,’ no matter how distantly removed.”).
To find potential clients who are entitled to inherit under the statute of
decent and distribution, heir hunters gather information from two sources.
The first is the petition for letters of administration. This filing—which is
probate’s version of a complaint—must identify the decedent’s closest
surviving relatives.215 Firms spend countless hours “review[ing] thousands”
of these documents in search of petitions that list distant or unknown kin.216
In fact, ARB claims that it “literally combs through every probate that is
filed in San Francisco.”217 Second, heir hunters solicit tips from so-called
“reporters.”218 Reporters, who possess inside knowledge about particular
probate matters, flag promising estates in return for an initial “acceptance
fee” and the possibility of a bonus at the end of the matter.219

In our sample, once heir hunters have identified a promising case, they
use their vast resources to find the decedent’s heirs. Most have accumulated
troves of genetic information.220 For example, Brandenburger & Davis boasts
that it “maintains its own 6,500 square foot research library containing over
40,000 volumes of city directories, birth, death, and marriage indices,
historical genealogies, filed obituaries and assessors’ records.”221 Likewise,
W.C. Cox touts a “a research library that now numbers nearly sixty-thousand
volumes, and contains many collectable rarities.”222 For particularly
challenging matters, companies consult the Latter-Day Saints’ Family

215 In California, this petition can be downloaded as a fill-in-the-blank form. DE-111, PETITION
216 See, e.g., Declaration of Douglas B. Bohne in Response to Exam’r Notes for First & Final Rep.
Representative, Fees to the Art’y, for Payment to Cal. Victims[,] Comp. & Claims in Sum of $1,971.25
from Robert S. Peet’s Share, & for Final Distrib. at 2, Est. of Pait, No. PES-14-297612 (Cal. Super. Ct.
filed Aug. 31, 2015) [hereinafter Bohne Declaration] (describing the efforts of one firm to track down
distant family); Declaration of Lee Cox in Support of Final Rep. of Adm’t on Waiver of Acct.; Petition
for Approval of Rep.; for Award of Statutory Att’y[s’] Fees & Extraordinary Att’y[s’] Fees; & for Final
Palacpac Declaration] (explaining that an heir hunter “spend[s] many hours . . . researching hundreds
of probate petitions filed within the numerous county courts in California”).
217 Declaration of J. Daniel Schwartz in Support of Validity of Assignments at 2, In re Est. of
Imperial, No. PES-16-2997240 (Cal. Super. Ct. filed July 26, 2018) [hereinafter Schwartz Declaration].
218 See, e.g., Declaration of Paul A. Hefti in Response to Prob. Exam’r Notes Regarding Petition
18, 2016) [hereinafter Hefti Declaration] (“Brandenburger & Davis maintains . . . an extensive
network of . . . reporters throughout the United States . . . .”).
reporter.html [https://perma.cc/4V9Z-3XX7].
220 See, e.g., Declaration of Lee Cox in Support of Partial Assignment of Ints. to W.C. Cox &
Co. at 3, In re Est. of Nocerini, No. PES-16-3000356 (Cal. Super. Ct. filed Mar. 27, 2019) [hereinafter
Cox Declaration] (describing a search using “in-house microfilm”).
221 Hefti Declaration, supra note 218, at 2.
222 About the Company, supra note 89.
History Library in Salt Lake City, Utah, which is “the most extensive
genealogical repository in the United States.”

After companies have identified an heir, they follow the same script.
Either in person, over the phone, or by letter, heir hunters break the ice by
telling prospects that they “ha[ve] located money to which we believe you are
entitled.” From there, firms offer to “fully disclose the nature and amount
of the claim” once the heir agrees to assign a share of her inheritance in
return. The amount shared with the heir hunter ranges from ten to forty
percent depending on where the heir lives and the anticipated difficulty of
establishing her entitlement to the estate. Overall, both the mean and
median amount of the assignments in our data is twenty percent of the heir’s
inheritance. Finally, some heir hunters emphasize the need to “act
immediately,” urging potential clients to sign the contract “as soon as possible.”

The assignments are short and simple. Heir hunters start with a
preprinted form that recites that the heir is assigning a set percentage of her
inheritance “in consideration of [the firm’s] . . . services rendered in
informing me of my interest in a pending estate, and for its efforts and
expense on my behalf in investigating and obtaining the necessary proof to
support my claim.” The contract then clarifies that the heir owes nothing
to the heir hunter and “if there is no recovery, there will be no charge of any
kind.” Finally, the company fills in blanks on the template with the names
of the heir and the estate, and both parties sign at the bottom.

Figure 6, which depicts an ARB agreement, and Figure 7, which is a contract from
international heir hunter Family Tree, seem to be typical.

---

223 Hefti Declaration, supra note 218, at 2.
224 See, e.g., Kelly Declaration, supra note 23, at 8 (reprinting a hand-delivered letter from heir hunter); Imperial Declaration, supra note 4, at 2 (describing a phone call from an heir hunter to two prospects informing them that they might be entitled to a beneficial interest in an estate).
225 Kelly Declaration, supra note 23, at 8.
226 See, e.g., Cox Declaration, supra note 220, at 2 (“This fee is usually determined by the size
of the estate, the amount of time and expense involved in locating the interested parties and the
overall risk of success in resolving the matter on behalf of the heir(s).”); Agreements & Assignments
to Fraser & Fraser at 2, In re Est. of Franco, No. PES-16-299825 (Cal. Super. Ct. filed Mar. 1, 2018)
(containing an assignment of forty percent).
227 We base these calculations on 205 contracts, excluding eleven that are in a foreign language,
two that do not appear in the probate files, and one in which the percentage is illegible.
228 Imperial Declaration, supra note 4, at 2.
229 Kelly Declaration, supra note 23, at 8.
230 Final Rep. of Adm't on Waiver of Acct.; Petition for Approval of Rep.; for Award of
Statutory Att'y's Fees and Extraordinary Att'y's Fees; & for Final Distr. at 8, In re Est. of
231 Id. (capitalization omitted).
232 Id.
Figure 6: ARB Assignment

AGREEMENT AND ASSIGNMENT

Date: [Redacted]

Name: [Redacted]
Address: [Redacted]
Telephone: [Redacted]

FEB 24 2014

Figure 7: Family Tree Assignment

MEGÉRZÉSI SZERZŐDÉS

A CSALÁDÓKA KB. (hereinafter, the "Assignor") hereby Assigns to (hereinafter, the "Assignee") [Redacted] per (hereinafter, the "Assignee") Figure 6: ARB Assignment

AGREEMENT AND ASSIGNMENT

CSCALÁDÓKA KB. (hereinafter, the "Assignor") hereby Assigns to (hereinafter, the "Assignee") [Redacted] per (hereinafter, the "Assignee") Figure 6: ARB Assignment

The amount assigned to CSALÁDÓKA KB. covers all other expenses and costs incurred by them and I shall not be liable for them in any other way.

In the event no recovery can be made from my behalf, I will be under no financial obligation to CSALÁDÓKA KB.

I authorize CSALÁDÓKA KB. to include on this Agreement the name of the Assignee accordingly.

Victor VECSEY

A Szarzki, Felhőkkel, Végélyesállás, Figyelmeztetés, Figyelmeztetés a Szarzki.

All of the above shall be binding upon me, heirs, assigns, executors, administrators and agents.

Name: [Redacted]
Address: [Redacted]
Telephone: [Redacted]
E-mail: [Redacted]
Heir hunters sometimes need to establish their clients' rights by filing an heirship petition.233 Nine of the thirty-one estates with heir hunters (29%) required such a pleading. Although courts have sometimes complained that heir hunters support their petitions with “weak evidence,”234 we did not find this to be true. Instead, the heirship petitions in the San Francisco files usually include a dazzling variety of proof linking the heirs to the decedent, such as birth and death certificates, divorce records, identification cards, filings from other probate cases, and a detailed family tree.235 For example, in one matter, Brandenburger & Davis produced an obituary from an obscure local newspaper, Census entries from 1910 and 1930, a World War I draft registration card, and an entry from the Find a Grave website.236 This attention to detail paid dividends, because during our research period, the San Francisco probate court did not deny a single heirship petition.

This Part has offered an overview of the heir hunting industry. In the next section, we drill down into the data and analyze the jurisdictional split over whether and how to regulate the field.

III. POLICY IMPLICATIONS

This Part uses our findings to make doctrinal recommendations. First, it argues that our research both supports and undermines the orthodox approach of nullifying heir hunting assignments for champerty. Second, it contends that even though heir hunters exert too much power over their client’s decisions about legal representation, existing law does not adequately address this problem. Finally, we propose legislation that would better regulate the industry.

A. Champerty

As noted, courts all over the literal map are all over the proverbial map when it comes to deciding whether heir hunting contracts violate the champerty doctrine.237 This section contends that champerty is a plausible but draconian solution to heir hunting’s social costs.

233 See, e.g., CAL. PROB. CODE § 11700 (West 2020) (allowing parties to “file a petition for a court determination of the persons entitled to distribution of the decedent’s estate”).
234 Peltner v. Bartsch Herterich (Est. of Bartsch), 124 Cal. Rptr. 3d 13, 23 (Ct. App. 2011); see also Kemp & Assocs. v. Herzog (Est. of Herzog), 245 Cal. Rptr. 3d 498, 507 (Ct. App. 2019) (affirming trial court’s denial of heir hunter’s heirship petition because the company relied on “problematic sources”).
237 See supra text accompanying notes 125–35.
1. Purposes of Champerty

Supposedly, champerty prevents heir hunters from causing two different kinds of harm: inciting litigation and interfering with the administrator’s duty to find the heirs. We discuss each in turn.

a. The Litigiousness Theory

Some courts hold that heir hunting contracts are champertous because they fan the flames of probate litigation. Although this view has fallen from favor over the last half-century, we discover surprisingly strong support for it.

We start by defining “litigation.” Generally, a telltale sign of litigation is that parties find themselves in court. However, because probate is an inherently court-based process, we cannot rely on that benchmark. Compounding this problem, parties in probate routinely file petitions asking the court to perform some action, such as approving the sale of real property or ordering a preliminary distribution of assets to the beneficiaries. These filings are quasi-adversarial: even if nobody opposes them, the petitioner must persuade the court through arguments and evidence to grant the requested relief. Nevertheless, we decided not to count quasi-adversarial petitions as “litigation.” Instead, we classified an estate as “litigated” only if a stakeholder objected to another party’s petition. Unlike quasi-adversarial matters, which sometimes sail through the system, formal objections inevitably require extensive briefing and oral argument. Therefore, they are more consistent with how we think of “litigation” in other spheres.

Even under this narrow definition, the connection between heir hunting and litigation in our data is undeniable. A whopping fourteen of the thirty-one estates that featured heir hunters (45.2%) degenerated into litigation. In sharp contrast, just 141 of the 1,318 other matters (10.7%) were litigated, which is a statistically significant difference (p < 0.001).


239 See supra text accompanying notes 127–29.

240 See CAL. PROB. CODE § 10309 (West 2020) (establishing criteria for court confirmation of the sale of land).

241 See CAL. PROB. CODE §§ 11620, 11621(a) (West 2020) (empowering courts to distribute some of the decedent’s property before the case closes “if at the hearing it appears that the distribution may be made without loss to creditors or injury to the estate or any interested person”).

### Table 3: Litigation

<table>
<thead>
<tr>
<th>Estate Type</th>
<th>N</th>
<th>Percent of Estates with Disputes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Heir Hunters</td>
<td>31</td>
<td>45.2%***</td>
</tr>
<tr>
<td>Other Estates</td>
<td>1,318</td>
<td>10.7% (p = 0.000)</td>
</tr>
<tr>
<td>Total</td>
<td>1,349</td>
<td>11.5%</td>
</tr>
</tbody>
</table>

Notes:
1. Z-tests compare lawyer-drafted wills with each kind of DIY will.
2. *p < 0.05, **p < 0.01, ***p < 0.001

To look closer, we conducted a regression analysis that used litigation as the dependent variable and also examined various factors that might generate conflict. First, because self-made wills “are notoriously prone to challenge,” we included independent variables for instruments that were (1) homemade and witnessed, (2) holographic, (3) fill-in-the-blank forms, or (4) produced with software. Second, to probe the link between dispositive choices and conflict, we coded estates as featuring either (1) intestate decedents, (2) testators who left assets proportionately to similarly-situated relatives (such as “to my three children equally”), (3) testators who favored some group members over others (like “two-thirds to my daughter and one-third to my son”), and (4) “pour over” wills (which leave the estate to a trust). Finally, we examined the impact of (1) creditors filing claims against the estate, (2) the decedent’s gender, (3) the decedent’s marital status at death, (4) whether an heir or beneficiary took out a probate loan, (5) the value of the estate, and (6) whether the decedent owned land.

---


244 Holographic wills do not need to be signed by witnesses, but must be largely in the testator’s handwriting. See CAL. PROB. CODE § 6111 (West 2020).


246 A pour over will ensures that any property that the decedent failed to convey to the trust during her life passes under its terms after she dies. David Horton, *Tomorrow’s Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 581 (2017).

247 As noted above, a probate loan occurs when a beneficiary sells part of her expected inheritance to a company. See Horton & Chandrasekher, supra note 51, at 167.
As Table 4 reveals, even with these additional controls, the mere fact that an estate involves an heir hunter is correlated with a 721% increase in the odds of litigation ($p < 0.001$). The association between heir hunters and probate conflict is more extreme than other attributes that seem to spawn disputes. Specifically, (1) homemade and attested wills increase the odds of litigation 289% relative to lawyer-drafted instruments ($p < 0.05$), (2) testators who leave assets unequally to similarly-situated family members see a 217% uptick in the odds of litigation when contrasted with testators who give the same amount to each class of relatives ($p < 0.05$), (3) creditor’s claims increase the odds of litigation by 217% ($p < 0.001$) compared to estates without debt, and (4) probate loans are associated with a 505% jump in the odds of litigation versus matters in which no heir or beneficiary borrows against their future inheritance. These results appear to substantiate the first wave of heir hunting cases, which applied the champerty doctrine to prevent heir hunters from “fomenting . . . litigation.”

Table 4: Litigation Regression

<table>
<thead>
<tr>
<th>Analysis</th>
<th>Logit Model</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Logit Coefficient (Standard Errors) [Odds Ratio]</td>
</tr>
<tr>
<td>Heir Hunter</td>
<td>1.976*** (0.497) [7.211]</td>
</tr>
<tr>
<td>DIY Will Type</td>
<td></td>
</tr>
<tr>
<td>(Reference Category is Lawyer-Drafted Wills)</td>
<td></td>
</tr>
<tr>
<td>Homemade and Attested</td>
<td>1.064* (0.464) [2.898]</td>
</tr>
<tr>
<td>Holograph</td>
<td>0.250 (0.445) [1.284]</td>
</tr>
<tr>
<td>Form</td>
<td>0.813 (0.684) [2.255]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Unstandardized Coefficients</th>
<th>Standardized Coefficients</th>
</tr>
</thead>
<tbody>
<tr>
<td>Software</td>
<td>0.345 (0.681)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>[1.412]</td>
<td></td>
</tr>
<tr>
<td>Dispositive Choices</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Reference Category is Wills that Divide Equally)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intestacy</td>
<td>0.295 (0.342)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>[1.344]</td>
<td></td>
</tr>
<tr>
<td>Will Divides Unequally</td>
<td>0.778* (0.383)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>[2.178]</td>
<td></td>
</tr>
<tr>
<td>Pour Over Will</td>
<td>-0.075 (0.429)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>[0.927]</td>
<td></td>
</tr>
<tr>
<td>Other Controls</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Creditor’s Claim Filed</td>
<td>0.776*** (0.212)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>[2.172]</td>
<td></td>
</tr>
<tr>
<td>Female Decedent</td>
<td>0.103 (0.215)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>[1.109]</td>
<td></td>
</tr>
<tr>
<td>Decedent Married at Death</td>
<td>0.566 (0.292)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>[1.761]</td>
<td></td>
</tr>
<tr>
<td>Probate Loan</td>
<td>1.620*** (0.399)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>[5.055]</td>
<td></td>
</tr>
<tr>
<td>Estate Value</td>
<td>0.000 (0.000)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>[1.000]</td>
<td></td>
</tr>
<tr>
<td>Estate Contains Land</td>
<td>0.277 (0.210)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>[1.319]</td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>-3.382*** (0.352)</td>
<td></td>
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<td></td>
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<td></td>
</tr>
<tr>
<td>N</td>
<td>1,158</td>
<td></td>
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</tbody>
</table>

Notes:
1. The regression samples are smaller than the overall sample because some cases are missing information.

\* p < 0.05, \*\* p < 0.01, \*\*\* p < 0.001
Four additional points emerge when we take a closer look. First, our data slightly exaggerates the frequency of litigation involving heir hunters. Not every litigated estate in which an heir hunter appeared was contentious because of the heir hunter. Indeed, in four of the fourteen litigated heir hunter matters (twenty-nine percent), the conflict was unrelated to the company. For instance, one matter featured a challenge to the validity of a will, and another involved a breach of contract claim brought by the administrator against a third party. Although these issues have nothing to do with assignments of inheritance rights, we cannot exclude them from our statistical analyses. In this way, we marginally overstate heir hunting’s propensity for sparking litigation.

Second, the received wisdom about why heir hunters generate conflict is wrong. Cases applying the litigiousness theory assume that heir hunters cause discord because they encourage their clients to file unnecessary heirship petitions. As we mentioned, heir hunters do indeed file heirship petitions in about a third of the proceedings in which they appear. Yet none of these petitions were contested. By contrast, one of the most common sources of friction in the San Francisco files is the amount of the heir hunters’ fees. For example, we began the Introduction of this Article by describing the experiences of Hal and Robert Imperial, who signed away twenty-five percent of their inheritance from their father just three weeks after he died. When Hal and Robert realized what they had done, they objected to the petition for final distribution, arguing that the company pressured them to enter into the assignment before the administrator had “any reasonable opportunity to locate the decedent’s relatives.”

249 See Contest & Grounds of Objection to Prob. of Purported Will at 2-5, Velikanje v. Castillo (Est. of Nash), No. PES-16-300045 (Cal. Super. Ct. filed Sept. 30, 2016) (providing several reasons a court should deny a will, including the decedent’s lack of sound mind and fraudulent signature).


251 Because “litigation” is a dummy variable, we must code each case as either “0” (no litigation) or “1” (litigation). We do not have a third option for estates that involve litigation that is not tied to an heir hunter.

252 See, e.g., Sprye v. Porter [1856] 119 Eng. Rep. 1169, 1178; 7 El. & Bl. 57, 80 (reasoning that heir hunting is objectionable because the firm agrees to establish that the heirs descend from the decedent); In re Atkinson’s Est., 20 Pa. D. & C.3d 700, 712 (C.P. Phila. Cnty., Orphans’ Ct. Div. 1981), aff’d sub nom. Est. of Atkinson, 468 A.2d 841 (Pa. Super. Ct. 1983) (explaining that an assignment was for the purpose of “assistance in contemplated litigation, the common element of champertous contracts” and that “[t]he contingent nature of the heir-hunter’s compensation suggests that the genealogist intended to take all steps necessary to the heir’s recovery”).

253 See supra text accompanying notes 233-34.

254 See supra text accompanying notes 1-13.

255 Objection to First & Final Acct. & Rep. of Status of Admin. of the S.F. Pub. Adm’t, as Adm’t of the Est. & Petition for Settlement Thereof; for Allowance of Statutory Att’y’s & Adm’t’s
fees were “grossly unreasonable” and entered a handwritten reduction of the fees from twenty-five percent to ten percent.\textsuperscript{256}

Figure 8: Excerpt from Court Order in \textit{Estate of Imperial}

Third, the ubiquity of fee disputes also means that we underreport the frequency of heir hunter-generated conflict. Our conservative definition of “litigation” excludes three cases in which the court announced that it was considering reducing an heir hunter’s compensation under section 11604 and invited the company to respond. Because these were judge-initiated proceedings, no party filed an objection, and they do not qualify as “litigated” in our analysis. Yet firms acted as though they were litigating by trying to justify their fees through extensive briefing.\textsuperscript{257}

\begin{itemize}
\item Mr. Kelly was able to find Ms. Montoya within the course of a day by going to her former residential hotel address in San Francisco and inquiring if anyone knew her whereabouts. An unidentified person provided Mr. Kelly with a valid phone number to the residential hotel where Ms. Montoya was living, located a few blocks away from her previous address. Mr. Kelly states in his declaration that he was able to meet with Ms. Montoya the same day, and obtained her signature on the assignment documents. . . . [T]he Court estimates that between 15 and 20 hours were spent locating Ms. Montoya . . . .
\end{itemize}

\begin{itemize}
\item Statement of Decision at 9-10, \textit{In re Est. of Poston}, No. PES-16-299983 (Cal. Super. Ct. filed Jan. 25, 2018). Accordingly, the court held that TES’ fee was “grossly unreasonable,” and reduced the assignment from 29% to 18%. \textit{Id.} at 16.
\end{itemize}
Fourth, we admit that the correlation between heir hunters and litigation may be weaker outside of California. Section 11604 facilitates challenges to heir hunting assignments by conferring the administrator or any “interested person” with standing to demand a fairness inquiry.\textsuperscript{258} Likewise, as noted above, it permits the probate judge to raise this issue on its own motion.\textsuperscript{259} Since only New York has a comparable law,\textsuperscript{260} and because section 11604 is a wellspring of litigation, further research is necessary to determine whether heir hunters have the same impact in other jurisdictions.

In sum, the litigiousness theory of the champerty doctrine is well supported by our data. In the next section, we examine its cousin: the interference theory.

b. The Interference Theory

Other judges have embraced the interference view of champerty. They reason that heir hunters “compete with duly appointed [a]dministrators” by swooping in and “finding” the decedent’s close relatives immediately after the probate case opens.\textsuperscript{261} As one court quipped, these are not heir hunters; rather, they are “heir-chasers.”\textsuperscript{262}

Our data renders a mixed verdict on whether these aggressive tactics still plague the industry. On the bright side, companies are less likely to target the decedent’s children, siblings, or parents. Indeed, as Figure 9 showcases, we were able to determine the relationships between 195 heirs and the decedent. Most were as least as distant as first cousins once removed (grandchildren of the decedent’s aunt or uncle). Thus, the “missing” heir scam is not a major part of the probate diet for most heir hunters.

\begin{footnotesize}
\textsuperscript{258} CAL. PROB. CODE § 11604(b) (West 2020). Not every state opens the courthouse door as wide for challenges to heir hunting assignments. See, e.g., \textit{In re Est. of Campbell}, 742 A.2d 639, 641 (N.J. Super. Ct. Ch. Div. 1999) (“The administratrix is not a party to those agreements, stands to lose nothing from the consummation of those agreements and, thus, does not have standing to complain.”).

\textsuperscript{259} See CAL. PROB. CODE § 11604(b) (“The court on its own motion . . . may inquire into the circumstances . . . and the amount of any fees, charges, or consideration paid or agreed to be paid by the beneficiary.”).

\textsuperscript{260} See supra text accompanying notes 120–22. (discussing New York Estates, Power and Trust Law § 13-2-3, which allows judges to reduce unreasonable heir hunters’ fees).

\textsuperscript{261} \textit{In re Est. of Rice}, 193 N.E.2d 566, 569 (Ohio Prob. Ct. 1963); see also supra text accompanying notes 106–07 (noting that beneficiaries who would have normally learned of their inheritance in the ordinary course of administration of the estate may now have to pay collection fees to heir hunters).

\end{footnotesize}
But on the dark side, the timing of heir hunting contracts remains problematic. Firms still contact heirs extremely early in the probate matter. As Table 5 reveals, an average of about two months pass between the opening of a probate case and the execution of an assignment. Even more notably, heirs signed a staggering 162 (80%) agreements before the court appointed an administrator. Because administrators in those estates never had a chance to try to find the decedent’s kin, we cannot determine from our data whether the heir hunter provided a valuable service or if discovery of the heirs would have been “inevitable.”

Table 5: Heir Hunting Contracts: Timing

<table>
<thead>
<tr>
<th>Mean (Standard Deviation)</th>
<th>Median</th>
<th>Min</th>
<th>Max</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Days from Estate Opening Until Contract Signed</td>
<td>54 (170)</td>
<td>14</td>
<td>-262</td>
<td>1,232</td>
</tr>
<tr>
<td>Days from Appointment of Administrator Until Contract Signed</td>
<td>-31 (192)</td>
<td>-41</td>
<td>-288</td>
<td>1,229</td>
</tr>
</tbody>
</table>

264 Nineteen contracts either do not appear in the record or are missing information about when the heir signed them.
2. Disadvantages of Champerty

Our research also sounds a note of caution about applying champerty to heir hunting. Although heir hunting is flawed, it can also be necessary and even laudable. The nuclear option of champerty would destroy heir hunting’s social value.

Despite their self-interest, heir hunters further the public good in two ways. First, they have an uncanny ability to detect petitions for letters of administration that either fraudulently or accidentally omit heirs. For example, in *Estate of Palacpac*, the decedent’s sister alleged that she was the decedent’s sole living kin.265 W.C. Cox discovered that the sister had failed to mention the decedent’s daughter, who was entitled to take the entire estate.266 Likewise, in *Estate of Sheldon*, Sheila Allen filed a petition for letters of administration, claiming that she was the decedent’s “sole heir” and “first cousin.”267 However, ARB revealed that Allen was actually the stepchild of the decedent’s uncle, and had ignored fourteen other heirs in her petition.268 Finally, in *Estate of Nocerini*, W.C. Cox located an heir, David Abraham, who was the half-brother of the decedent’s predeceased spouse, Zara Abraham.269 This was remarkable because nobody in either the decedent’s or Zara’s family


268 See Objection to Amended Petition for Letters of Admin. at 2, In re Est. of Sheldon, No. PES-16-300458 (Cal Super. Ct. filed Mar. 24, 2017) (“[A]t least 14 maternal heirs had been intentionally omitted from the petition . . . .”). Similarly, in *Estate of Pait*, the petition for letters of administration alleged that the decedent was survived by a brother, a half-sister, and two nieces. Petition for Letters of Admin. at 9, Est. of Pait, No. PES-14-297612 (Cal. Super. Ct. filed Mar. 24, 2014). ARB recognized that this list was incomplete: the decedent also had a nephew, who was serving time in California state prison. Declaration Re Assignment to Am. Rch. Bureau at 1, Est. of Pait, No. PES-14-297612 (Cal. Super. Ct. filed Sept. 29, 2015) (explaining that the petition for letters of administration did not mention the nephew, Robert S. Peet); Ord. Approving First & Final Rep. & Acc’t of Pers. Representative & Petition for Its Settlement, for Allowance of Comm’r to Pers. Representative, Fees to the Att’y, for Payment to Cal. Victims’ Compensation Bd. in Sum of $1,971.25 from Robert S. Peet’s Share, & for Final Distrib. at 3, Est. of Pait, No. PES-14-297612 (Cal. Super. Ct. filed Nov. 18, 2015) (noting that the nephew is incarcerated).

even knew that Zara had a half-brother. As David explained, he was “very surprised to learn from W.C. Cox & Co. that Zara and I were half siblings.” In cases like these, heir hunters act like fact-checkers, ensuring the accuracy of the probate process.

Second, heir hunters are masters at solving genealogical mysteries. Probate judges must try to distribute every matter that lands on their dockets. As a result, they often struggle with decedents about whom virtually nothing is known. In these cases, the probate system depends on the skills and resources of heir hunters. Recall the Colson and Menchaca estates, which we mentioned in the Introduction. If it were not for ERA’s research, these matters would still be festering in probate court. Likewise, in Estate of Borchert, the decedent was an adopted only child who had never married or borne children, and had immigrated from Germany in the 1970s. The Public Administrator interviewed her co-workers, searched her apartment, read her mail, contacted the German consulate and police, and entered her name into people-finder websites Ancestry.com and Accurint, but could not identify her next of kin. However, W.C. Cox partnered with a European heir hunter and tracked down the decedent’s second cousins. These cases illustrate what some modern courts have recognized: heir hunting ‘agreements may be beneficial rather than harmful in some cases.”

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270 Id.
273 See supra text accompanying notes 30–38.
274 Id. at 2–3.
277 Nelson v. McGoldrick, 896 P.2d 1258, 1266 (Wash. 1995); see also Haven Sav. Bank v. Zanolini, 3 A.3d 608, 623-24 (N.J. Super. Ct. App. Div. 2010) (“[T]he public has an interest in allowing companies to assist individuals in recovering property to which they are entitled but of which they might not be aware . . . .”); cf. Friedman, supra note 51, at 111 (“A statutory abolition of the heir-hunting profession could result in the unnecessary escheat of funds that the rightful heir would otherwise recover.”). In fact, in two matters in the San Francisco files, the administrators chose to hire an heir hunter to help her carry out her duties. See Declaration of Due Diligence by Cathy Fletcher, Senior Researcher for Int’l Genealogical Search, Inc. at 2, In re Est. of Franco, No. PES-
In turn, heir hunting’s silver linings tip the scales against applying champerty in this sphere. The doctrine would likely cripple the industry and thus make probate less efficient. For example, the litigiousness theory nullifies contracts for services “to be rendered in the enforcement of [the heir’s] claim.” To bend to this rule, companies would need to sell heirs information about a pending inheritance and then disengage, leaving it up to individual heirs to assert their rights. It is not clear that this approach would be sustainable. Likewise, the interference view generates uncertainty. Firms would have little incentive to incur such hefty sunk costs—monitoring probate files, performing genealogical research, contacting clients, marshalling evidence—if a judge might find that they usurped the administrator’s role and therefore bar them from collecting. These considerations should give courts pause about using champerty to regulate heir hunting.

B. Representation

Heir hunters’ influence over their clients’ legal representation has long been a cause for concern. This section uses our data to show that these dangers are real. Yet it also urges the law to move beyond its current approach of invoking ethical rules to strike down heir hunting assignments on a case-by-case basis.

The phenomenon of heir hunters hiring counsel for heirs is troubling for two reasons. First, some states extend the rule against the unauthorized practice of law to preclude non-lawyers from touting the services of particular attorneys. The logic behind banning “running and capping” is that it is unethical for attorneys to drum up business by soliciting clients, so third parties should not be able to solicit clients for attorneys. Thus, when heir
hunters funnel heirs to particular counsel, they violate this maxim.\footnote{Indeed, as a Florida ethics commission determined, "[i]t is improper for an attorney to allow an heir-hunt[er] to advise potential heirs of his service" because "a lawyer cannot solicit and therefore cannot let others solicit for him." Florida State Bar Ass'n Comm. on Pro. Ethics, Op. 77-8 (1977); see also O'Grady v. Boldt (Est. of Molino), 81 Cal. Rptr. 3d 512, 518 (Ct. App. 2008) (remarking that it is "unlawful for person to . . . solicit business for an attorney").} Second, dual representation does not serve heirs well. The goals of the heir hunter and the heir are diametrically opposed concerning the reasonableness of the heir hunting fees. Making matters worse, any rational self-interested attorney would resolve this tug-of-war in favor of the heir hunter. After all, to the lawyer, heir hunting clients are repeat players who can be a lucrative source of revenue, but heirs are one-time clients who are unlikely to return with future business.\footnote{See generally Marc Galanter, Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC'Y REV. 95 (1974) (analyzing the advantages enjoyed by parties who frequently participate in the legal system).} Furthermore, since an attorney’s "own compensation hinges on the validity of the contract between [the company] and putative heirs, it can scarcely be anticipated that counsel . . . would question the validity of the contract."\footnote{In re Atkinson's Est., 20 Pa. D. & C.3d at 721.} But despite decades of cases that try to ensure that heirs have access to neutral counsel, our research reveals that heir hunters continue to control heirs’ decisions about legal representation. As one company admitted in a declaration, it gives heirs "the choice of having the heir locator’s attorney represent him or her, at the heir locator’s expense, or engaging his or her own legal counsel, and the heir’s own expense."\footnote{Boessenecker Declaration, supra note 269, at 2.} Understandably, many heirs opt to freeride rather than pay for their own attorney. Yet they likely do not realize that there is a severe conflict of interest.

Some heir hunters have even developed boilerplate forms for heirs to consent to dual legal representation. For instance, in one case, ARB inadvertently filed identical letters that six heirs had supposedly sent to ARB's attorney requesting that he represent them:

I understand that your firm represents the American Research Bureau, to which I have made an Assignment of Partial Interest in the Estate of Bernard Manuel Cleland, and that office has agreed to pay for your services in representing its interest as assignee in this matter. I am informed that insofar as there is no conflict of interest, you are willing to represent me . . . solely for the purpose of establishing my right to inherit and in obtaining distribution for the benefit of the American
Research Bureau and me, without making any charge to me for that service.288

The cookie-cutter language in each of the letters removes any doubt that ARB—and not the heirs—wrote them. In turn, this suggests that heir hunters have a well-oiled machine that pushes heirs toward the heir hunters’ own lawyer.

Finally, we discovered that heir hunters have a new trick up their sleeves. Several cases did not seem at first blush to feature dual representation because the company and its clients had different counsel. But upon closer inspection, the supposedly independent attorney representing the heirs turned out to be someone who routinely worked for the heir hunter in other matters. We call these “industry lawyers.”

The widespread use of industry lawyers is a blatant attempt to evade rules that prohibit dual representation.289 On paper, the heir and the heir hunter are represented by different attorneys. In reality, though, industry lawyers raise the same “insurmountable conflict of interest” as dual representation.290 For one, although evidence about who is paying the heirs’ counsel is rarely visible in the court files, it is all but certain that the heir hunter is picking up the tab. In addition, as mentioned above, industry lawyers have strong financial incentives to favor their loyal corporate clients over individuals who are unlikely to appear in probate court again.291

This problem comes to the fore in estates with disputes over heir hunters’ fees. In one such matter, the heir was also represented by the company’s counsel, and in two other cases, the heirs hired industry lawyers. However, in all three proceedings, the heirs took the paradoxical step of filing pleadings in support of the heir hunter.292 For example, in Estate of Pait, ARB located Robert Peet, the decedent’s nephew, twenty-three days after the estate opened and a month before the court granted letters to the administrator.293

289 See Gunning v. Caudill (Est. of Wright), 108 Cal. Rptr. 2d 572, 578 (Ct. App. 2001) (suggesting that dual representation can void an assignment); Sullivan v. Comm. on Admissions & Grievances of the U.S. Dist. Ct. for D.C., 395 F.2d 944, 957 (D.C. Cir. 1967) (“[T]he first obligation of a lawyer acting truly and wholly in the interests of the heir might well be to advise his heir-client . . . that the contingent fee contract between the ‘heir finder’ and the heir was void . . . . ”); In re Est. of Campbell, 742 A.2d 639, 642 n.5 (N.J. Super. Ct. Ch. Div. 1999) (“The interests of the genealogical firm and the heirs . . . are not aligned . . . . ”).
290 Est. of Wright, 108 Cal. Rptr. 2d at 578.
291 See supra text accompanying notes 285–86.
293 To be fair to ARB, we should reiterate a fact we mentioned above: the administrator did not list Peet on his petition for letters of administration, perhaps because Peet was incarcerated. See supra text accompanying note 268.
Although ARB seemed to have little difficulty finding Peet, he assigned thirty-three percent of his inheritance to the company.\(^\text{294}\) In addition, Peet agreed to be represented by counsel who appeared on ARB’s behalf in other matters.\(^\text{295}\) When the administrator moved for final distribution, the probate judge exercised his prerogative under section 11604 to question the amount of ARB’s fees.\(^\text{296}\) Acting against his own interest, Peet submitted a memorandum of points and authorities\(^\text{297}\) and an affidavit urging the court to enforce the assignment as written:

I willingly entered into a relationship with ARB. . . . I confirm that ARB has performed the necessary investigation to identify and locate me and to prove me as an heir in connection with the above-referenced estate. Without their investigation and identification of my whereabouts, I would be an omitted heir in this matter. . . . I have assigned a one-third interest [of my share] to ARB, and . . . this is fair and reasonable. . . . I confirm that the fee agreement and assignment were obtained without any duress, fraud, or undue influence.\(^\text{298}\)

Apparently, the court was persuaded, because it did not reduce ARB’s fee.\(^\text{299}\) Cases like Pait demonstrate that there is no meaningful distinction between dual representation and the use of industry lawyers. In both situations, heir hunting firms reap the benefits of being able to cherry-pick counsel for heirs.

These findings suggest that the law does not go far enough to prevent heir hunters from exploiting their dominion over heirs’ counsel-selection decisions. First, the prohibitions on running and capping and dual representation hinge on information that is rarely available in the probate record. We scrutinized every pleading and proof of service in our dataset and


\(^{295}\) Compare Pait Declaration, supra note 292, at 1 (naming Pait’s lawyer as Douglas B. Bohne), with Assignments of Int. in the Est. of Louise Starks, Deceased at 1, Est. of Starks, No. PES-15-29897 (Cal. Super. Ct. filed May 31, 2017) (listing Pait’s lawyer, Douglas B. Bohne, as representing both ARB and six individual heirs).

\(^{296}\) See Declaration of Douglas B. Bohne at 1 (acknowledging that the judge’s staff had requested more information about ARB’s fees).

\(^{297}\) Memorandum of Points & Auths. Re Assignment to Am. Rsch. Bureau at 2, Est. of Pait, No. PES-14-297612 (Cal. Super. Ct. filed Sept. 29, 2015) (“Here, there is no doubt that the consideration for the assignment made to ARB is just, equitable, and extremely reasonable.”).

\(^{298}\) Pait Declaration, supra note 292, at 1-2.

could only identify forty-five of 205 heirs’ attorneys (22%). In addition, other than the stray pleadings we mentioned above, we could not tell why heirs had chosen to hire specific attorneys or who was responsible for paying their bills. If we cannot detect improper solicitation or conflicts of interest from our comprehensive review of the probate record, then neither can the court.

Second, the limited data we do have indicates that these flaws are endemic. As Table 6 showcases, thirty-nine of the forty-five heirs (87%) whose representational status is apparent either hired the heir hunters’ counsel or industry lawyers. But despite the prevalence of these objectionable arrangements, no heir in our dataset raised an ethical challenge to an assignment, and no court inquired into these issues on its own under section 11604.

Table 6: Heirs’ Representation

<table>
<thead>
<tr>
<th>Status</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unclear</td>
<td>161</td>
</tr>
<tr>
<td>Heir Hunter’s Lawyer</td>
<td>8</td>
</tr>
<tr>
<td>Industry Lawyer</td>
<td>31</td>
</tr>
<tr>
<td>Own Lawyer</td>
<td>4</td>
</tr>
<tr>
<td>Pro Se</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>205</td>
</tr>
</tbody>
</table>

Accordingly, the existing legal infrastructure does not adequately address the systemic ethical issues that heir hunting raises. Thus, in the next section, we prescribe stronger medicine.

C. Legislation

Rather than using the blunderbuss champerty doctrine or toothless ethical rules, jurisdictions should regulate heir hunting by statute. This legislation should have two components: a limit on heir hunting fees and a ban on heir hunting solicitations until the administrator has had a reasonable opportunity to find the decedent’s kin.

300 See supra text accompanying notes 288, 292–98.
301 We were unable to collect any information about fourteen heirs.
302 We are not targeting federal lawmakers or agencies because probate has “traditionally [been] left to state regulation.” Hayduk v. Burke (In re Burke), 592 B.R. 834, 840 (Bankr. E.D. Tenn. 2018); cf. Popp, supra note 44, at 749–50 (arguing that the CFPB should pass rules governing litigation funding).
1. Fee Caps

Lawmakers should begin by capping heir hunters’ fees, a measure that would extend an existing protection in many states for beneficiaries of unclaimed property. To determine the statutory maximum, states could borrow the analogous fee limitations established by their unclaimed property statutes, which tend to be about ten percent of the value of the assets.303

Fee caps are a simple and effective way to prevent heir hunters from overcharging heirs. Our research confirms that heir hunters’ compensation is almost always excessive given the amount of work performed. To make this point concrete, compare fees paid to personal representatives and their attorneys—parties who are intimately involved in every step of the probate process. California law entitles these individuals to “ordinary” fees in an amount that is linked to the value of the estate304 and additional “extraordinary” fees in the court’s discretion for labor-intensive cases, such as those that are litigated.305 As Table 7 reveals, the mean amount per matter of all of these fees combined—both personal representatives and attorneys and both ordinary and extraordinary fees—is $29,522.306 Yet the average heir hunter’s recovery per case is $58,696,307 or nearly twice that amount. This discrepancy is particular unfair in light of the fact that the estate pays administrators and their lawyers, in part, for their efforts to find the decedent’s heirs. Thus, in cases with heir hunters, the heirs essentially pay twice for the same service.

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303 See supra text accompanying note 163.
304 See CAL. PROB. CODE §§ 10800(a), 10810(a) (West 2020) (setting these fees at 4% of the first $100,000, 3% on the next $100,000, 2% on the next $500,000, 1% on the next $9,000,000, 0.5% on the next $15,000,000, and then a reasonable sum determined by the court for estates worth more than $25,000,000).
305 See CAL. PROB. CODE § 10801(a) (“[T]he court may allow additional compensation for extraordinary services by the personal representative in an amount the court determines is just and reasonable.”); see also CAL. PROB. CODE §§ 10811(a) (“[T]he court may allow additional compensation for extraordinary services by the attorney for the personal representative in an amount the court determines is just and reasonable.”).
306 In intestacies—the type of probate matter in which heir hunters generally appear—the average combined administrator and attorneys’ fees are even lower: $26,759.
307 If we include the one estate in which the heir hunter recovered nothing, the mean amount of heir hunters’ fees per case is $56,622.
Moreover, heir hunters’ attempts to justify their fees are not persuasive. In the San Francisco files, they repeatedly refused to prove the reasonableness of their fees with supporting documentation, such as time sheets or billing records. Instead, they likened themselves to contingency fee lawyers, who collect a substantial portion of their clients’ winnings in return for assuming the risk of performing uncompensated work on unsuccessful cases:

[We begin] the task of locating unknown heirs completely at [our] own risk and expense. The results are often disappointing, time consuming and costly. . . . Even when a potential estate with unknown/missing heirs is found, it is possible that after incurring costs of locating heirs, a will may surface, or the estate may have little or no value due to debts or liens on the estate’s assets.

<table>
<thead>
<tr>
<th>Table 7: Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean (Standard Deviation)</td>
</tr>
<tr>
<td>Personal Representatives and Attorneys (Combined)</td>
</tr>
<tr>
<td>Heir Hunters</td>
</tr>
</tbody>
</table>

Moreover, heir hunters’ attempts to justify their fees are not persuasive. In the San Francisco files, they repeatedly refused to prove the reasonableness of their fees with supporting documentation, such as time sheets or billing records. Instead, they likened themselves to contingency fee lawyers, who collect a substantial portion of their clients’ winnings in return for assuming the risk of performing uncompensated work on unsuccessful cases:

[We begin] the task of locating unknown heirs completely at [our] own risk and expense. The results are often disappointing, time consuming and costly. . . . Even when a potential estate with unknown/missing heirs is found, it is possible that after incurring costs of locating heirs, a will may surface, or the estate may have little or no value due to debts or liens on the estate’s assets.

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308 285 estates are missing data on administrator and attorneys’ fees, because the court did not enter an order of final distribution.

309 Four cases involving heir hunters are still pending, and in one matter, the heir hunter recovered nothing.

310 See, e.g., Ord. for Final Distrib.; Settling First & Final Rep. of Status of Admin. & Petition for Settlement Thereof; for Approval of Accounting; for Allowance of Att’y’s Comp.; for Allowance of Adm’t’s Comp.; & for Reimbursement of Costs Advanced at 7, Est. of O’Brien, No. PES-15-299386 (Cal. Super. Ct. filed Mar. 30, 2017) (“ARB was asked to provide documentation to the Court to support the assignments being other than grossly unreasonable . . . ARB was unable to provide any documents.”); Ord. for Final Distrib., Settling First & Final Acct. & Rep. of Status of Admin. of the S.F. Pub. Adm’t, as Adm’t of the Est., for Allowance of Statutory Att’y’s & Adm’t’s Comp.; for Approval of Assignments as Reduced for Cal. Prob. Code §7621(d) Bond Fee (Prob. Code §§ 1060, 10801, 10801, 10810, 10811, 12201) at 3, Est. of Lee, No. PES-15-298906 (Cal. Super. Ct. filed Nov. 3, 2017) (“The court had questions about the assignments to ARB . . . [ARB] decided not to file anything in support of the amount of the assignments.”). Likewise, as one federal court observed, it is telling that heir hunters do not charge “a fee based on the quality and quantity of [their] work.” In re Taylor, 216 B.R. 515, 527 (Bankr. E.D. Pa. 1998).

311 Cox Declaration, supra note 220, at 2.
Thus, heir hunters argue, their fees are so high because a small percentage of successful cases must subsidize the matters where they earn nothing.\textsuperscript{312} But our data tell a different story. Excluding the four estates that were still pending when we performed our data collection, companies recovered on 152 out of 179 contracts (84.3%). Thus, the danger of non-payment is minimal, and heir hunters can offer no convincing rationale for permitting them to charge so much.

Fee caps would also shave off heir hunting’s other rough edges. For one, fee restrictions would lower the litigation rate. As noted, disputes over the fairness of heir hunters’ compensation are quite common.\textsuperscript{313} However, a bright-line limit on fees would eliminate this fact-sensitive issue from the docket. In addition, it would improve upon California and New York’s heir hunting statutes by clarifying the amount of a “reasonable” fee up front, rather than saddling courts with reviewing each individual assignment after the fact.\textsuperscript{314} Moreover, fee caps would make dual representation and the use of

\textsuperscript{312} See id. (emphasizing the high financial risk associated with attempting to locate heirs, the financial burden on the heir hunters, and the possibility that the heir hunters will earn nothing even if heirs are found).

\textsuperscript{313} See supra text accompanying notes 252–56.

\textsuperscript{314} Policymakers should also adopt language from many unclaimed property statutes that clarifies that courts remain free to void heir hunting contracts for defects such as fraud, mistake, or duress. See, e.g., REVISED UNCLAIMED PROF. ACT § 1302(d) (UNIF. COMM’N 2016) (“An apparent owner . . . may assert that an agreement described in this section is void on a ground other than it provides for payment of unconscionable compensation.”); ALA. CODE § 35-12-93(e) (2020) (“This section does not preclude an owner from asserting that an agreement covered by this section is invalid on grounds other than unconscionable compensation.”); ALASKA STAT. ANN. § 34.45.700(c) (West 2020) (“This section does not preclude an owner from asserting that an agreement to locate property is otherwise invalid.”); ARIZ. REV. STAT. ANN. § 44-327(C) (2020) (“This section does not prohibit an owner from asserting that an agreement is invalid on grounds other than compensation.”); ARK. CODE ANN. § 18-28-225(e) (West 2020) (“This section does not preclude an owner from asserting that an agreement covered by this section is invalid on grounds other than unconscionable compensation.”); HAW. REV. STAT. ANN. § 523A-25(e) (West 2020) (“This section does not preclude an owner from asserting that an agreement covered by this section is invalid on grounds other than excessive or unjust compensation.”); 765 ILL. COMP. STAT. ANN. 1026/15-1302(d) (West 2019) (“An apparent owner or the administrator may assert that an agreement described in this Article 13 is void on a ground other than it provides for payment of unconscionable compensation.”); IND. CODE ANN. § 32-34-1-46(c) (West 2020) (“This section does not prevent an owner from asserting at any time that an agreement to locate property is otherwise invalid.”); IOWA CODE ANN. § 556.11(10) (West 2020) (“This section does not prevent an owner from asserting, at any time, that an agreement to locate property is based upon excessive or unjust consideration.”); LA. STAT. ANN. § 9:177(E) (2019) (“An owner may at any time assert that an agreement covered by this Section is otherwise invalid.”); ME. REV. STAT. ANN. tit. 33, § 2201(5) (2019) (“This section does not preclude an owner from asserting that an agreement covered by this section is invalid on grounds other than unconscionable compensation.”); NEV. REV. STAT. ANN. § 126A.740(5) (West 2020) (“This section does not preclude an owner from asserting that an agreement covered by this section is invalid on grounds other than that the compensation is more than 10 percent of the total value of the property that is the subject of the agreement.”); VT. STAT. ANN. tit. 27, § 1265(f) (West 2020) (“This section does not preclude an owner from asserting that an agreement covered by this
industry lawyers less damaging. Even if the heir’s counsel would not question the heir hunter’s bill, a court would have little trouble noticing that an heir hunter’s fee exceeds a statutorily-prescribed maximum.

Finally, to assuage concern about dealing a death blow to the industry, states could also consider installing a safety valve. Borrowing from the existing compensation schemes for personal representatives and attorneys, legislatures could allow heir hunters to petition for discretionary awards of extraordinary fees. This would leave the door open for courts to reward heir hunters for truly valuable work, such as detecting heirs who were omitted from the petition for letters of administration or solving longstanding genealogical puzzles.

2. Time Limits

In addition, legislatures should prohibit heir hunting until sixty days after the court has appointed an administrator. This “no fly zone” would prevent firms from imposing a private tax on unlucky heirs who were going to be located anyway.

As noted, the administrator must perform a reasonably diligent search for the decedent’s kin. This process entails “interviewing friends, relatives and neighbors, inspecting personal effects, and reviewing motor vehicle, post office and voter registration records.” To give the administrator the time to perform these tasks, lawmakers should ban heir hunting until two months after the court grants the petition for letters of administration. Alternatively, the period of unenforceability could commence on the date of the decedent’s death. A 2011 statute enacted by the Nevada legislature could serve as a template for this latter approach; it voids heir hunting contracts entered into within ninety days of the decedent’s death.

section is invalid on grounds other than excessive compensation.”); VA. CODE ANN. § 55.1-2542(B) (West 2020) (“Nothing in this section shall be construed to prevent an owner from asserting at any time that an agreement to locate property is based upon an excessive or unjust consideration.”); cf. MINN. STAT. ANN. § 345.515 (West 2020) (taking the extra step of preserving heirs’ rights to challenge assignments that satisfy the fee cap as nevertheless charging “excessive or unjust consideration”).

315 See supra text accompanying note 305 (noting the possibility of additional extraordinary fees for labor-intensive cases in California).

316 This would be a probate version of the ban on heir hunting in unclaimed property statutes. See supra text accompanying note 161 (noting a ban on heir hunting contracts related to assets that have been in state custody for two years or less).

317 See supra text accompanying note 12.


319 Nevada’s statute states that

[3] An agreement between an heir finder and an apparent heir, the primary purpose of which is to locate, recover or assist in the recovery of an estate for which the public
The payoff would be huge. As noted, heir hunters go out of their way to secure contracts from heirs before the administrator can even try to find them. Figure 10, a histogram of the number of days between each heir hunting contract and the appointment of the administrator, brings this dubious tactic into sharp relief. The vertical red line represents sixty days after the appointment—the date by which the administrator should have been able to find identifiable heirs. As the skyscraping bars on the left side of this line illustrate, 188 of 200 contracts (94%) were consummated before this date. Thus, a sixty-day ban would dramatically change heir hunters’ practices, and ensure that they only target heirs who are missing, unknown, or intentionally omitted from the petition for letters of administration.

**Figure 10: Days Between Contract and Appointment of Administrator**

![Histogram showing days between contract and appointment of administrator.](image)

**CONCLUSION**

Every year, countless people die without a will or any apparent relatives. Thus, for more than a century and a half, heir hunters have injected themselves into probate proceedings. Our research provides an empirical account of the heir hunting market. In a three-year sample of 1,349 estates

administrator or person employed or contracted with pursuant to NRS 253.125, as applicable, has petitioned for letters of administration, is void and unenforceable if the agreement is entered into during the period beginning with the death of the person whose estate is in probate until 90 days thereafter. Upon a showing of good cause, the court may extend such a period until 180 days after the death of the person.

NEV. REV. STAT. ANN. § 139.135(1).

120 See supra text accompanying note 261 (noting an instance of administrators seeking to secure contracts before the administrator had a chance to find the heir).
probated in San Francisco between January 1, 2014 and December 31, 2016, we identified 676 intestacies that contained a total of 219 heir hunting contracts. In 152 of those contracts, heir hunters recovered an inheritance assignment that, on average, assessed fees of $10,107 per agreement. Our analysis found that estates containing heir hunting contracts were correlated with a 721% increase in the probability of litigation and that those disputes often involved the reasonableness or amount of the heir hunter’s fee. Our data also revealed that most heir hunting contracts were consummated within sixty days of an application for probate, the period during which heirs were otherwise likely to receive notice from the estate's administrator without having to pay for an heir hunting service.

Thus, although courts have become increasingly sanguine about enforcing heir hunting agreements because they perform a valuable service in some estates, our research demonstrates that the industry needs to be regulated more stringently. By restricting fees and prohibiting heir hunting during the initial stages of probate, lawmakers could limit the practice’s costs without sacrificing its benefits.