# THIRD-PARTY LITIGATION FUNDING AND THE DODD-FRANK ACT

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Third-party funding is no longer a new phenomenon, but rather is a mainstay in global commerce and dispute resolution.[1] This article introduces the question of whether third-party litigation funding[2] should fall within the purview of the Dodd–Frank Wall Street Reform and Consumer Protection Act.[3] Third-party litigation funding involves a third-party entity as the financier of the legal

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1 *See, e.g.*, Vanessa O'Connell, *Funds Spring Up to Invest in High-Stakes Litigation*, WALL ST. J., Oct. 3, 2011. ("The new breed of profit-seeker sees a huge, untapped market for betting on high-stakes commercial claims. After all, companies will spend about $15.5 billion this year on U.S. commercial litigation and an additional $2.6 billion on intellectual-property litigation, according to estimates by BTI Consulting Group Inc., a Wellesley, Mass., research firm that surveyed 300 large companies in 2011."); Jennifer Smith, *Litigation Investors Gain Ground in U.S.*, WALL ST. J., Jan. 12, 2014, http://online.wsj.com/news/articles/SB10001424052702303819704579316621131535960 (discussing that several litigation funders have several hundreds of millions of dollars in assets under management); Jennifer Smith, *Investors Put Up Millions of Dollars to Fund Lawsuits*, WALL ST. J., Apr. 7, 2013, http://online.wsj.com/news/articles/SB10001424127887323820304578408794155816934 ("…Gerchen Keller Capital LLC, a Chicago-based team that includes former lawyers … has raised more than $100 million and says there is plenty of room for newcomers given the size of the U.S. litigation market, which they put at more than $200 billion, measuring the money spent by plaintiffs and defendants on litigation."); Press Release, Excend, Excend Engaged as Advisory [sic] for Multi-Billion Dollar Judgment Litigation Funding (May 1, 2012), http://www.excend.com/press/2012-05-09-Excend-Engaged-as-Advisor-for-Multi-Billion-Dollar-Judgment-Litigation-Funding.pdf.

2 Some scholars use the term "third-party funding" or "litigation funding" to refer to this same phenomenon.

3 Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

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.[4] If the funded party is the plaintiff, then the third-party entity contracts to receive a percentage or fraction of the proceeds from the case, if the plaintiff wins.[5] If the funded party is the defendant, then the third-party entity contracts to receive a predetermined payment from the defendant, similar to an insurance premium.[6] In addition, depending on the structure of the agreement, the funder may legally control or influence aspects of the legal representation or may completely take over the case and step into the shoes of the original party.[7]

Generally, regulation of litigation funding has been rather light in the three major litigation-funding jurisdictions — the United States, the United Kingdom and Australia.[8] Both Australia and the United Kingdom have investigated or addressed litigation funding at the federal level.[9] Australia has addressed litigation funding through opinions of its High Court (the equivalent to

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[4] There are other types of third-party funding, such as lawyer lending, assignment, or insurance covering legal expenses. This paper limits its discussion, however, to third-party funding arrangements with the following three characteristics: (1) the funder contracts directly with the original party to the case, (2) the original party remains a party to the case, and (3) the funder does not become a party in the case.

[5] *See* LISA BENCH NIEUWVELD & VICTORIA SHANNON, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 4-11 (2012) (describing the players in third-party funding, the types of funding relationships, and the effect of the type of funder on the attorney-client relationship).

[6] *Id.*

[7] Assignment of the claim or an insurance arrangement are two structures in which the funder may legally control or influence the case, perhaps even becoming a party to the dispute. For an in-depth treatment of assignment and insurance policies in the third-party litigation funding context, *see, e.g.*, Paul Bond, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297 (2002); Terrence Cain, *Fringe Economy Lending- The Problem, its Demographics, and Proposals for Change: Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 CHI.-KENT L. REV. 11 (2014); Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DEPAUL L. REV. 453 (2011); Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329 (1987).

[8] *See generally* Nicholas Mavrakis, Ross McInnes & Michael Legg, *Litigation funding now (lightly) regulated*, CLAYTON UTZ INSIGHTS, Jul. 19 2012, http://www.claytonutz.com/publications/edition/19_july_2012/20120719/litigation_funding_now_lightly_regulated.page (discussing the light regulation of litigation funding in Australia); Nieuwveld & Shannon, *supra* note 5, at 144-59 (discussing the patchwork of state regulation and non-regulation of litigation funding in the United States); Victoria Shannon, *Recent Developments in Third-Party Funding*, 30 J. INT'L ARB. 443, 446-48 (2013) (discussing the voluntary code of conduct for litigation funders in the UK and how the Jackson Reforms have affected litigation funding).

[9] *See infra* notes 10-14.

the United States Supreme Court), opinions of various state courts, and regulatory guidance from the Australian Securities and Investments Commission (ASIC) (equivalent to the Securities and Exchange Commission in the United States).[10] The United Kingdom commissioned a litigation costs study in 2009 headed by Lord Justice Jackson of the Court of Appeal that examined litigation funding, among other mechanisms for managing costs.[11] In April 2013, the Jackson Reforms, derived from the costs study, paved the way for expanded litigation funding, among other reforms for managing litigation costs.[12] In addition, funders in the UK have organized themselves under a voluntary Code of Conduct, and the Ministry of Justice's Civil Justice Council has established the Association of Litigation Funders, a regulatory body responsible for litigation funding and ensuring compliance with the Code of Conduct.[13] According to its website, "[t]he Association of Litigation Funders (the ALF) is an independent body that has been charged by the Ministry of Justice, through the Civil Justice Council, with delivering self-regulation of litigation funding in England and Wales."[14]

Outside of the ALF, some third-party funders have chosen to self-regulate on their own. For example, Juridica, a publicly-traded funder based in the United Kingdom, engages in an internal compliance and ethics review process before making an investment to ensure that the litigation funding agreement complies with the applicable rules.[15] Harbour Litigation Funding LTD, a private funder in the United Kingdom, has a CFO who is also the Compliance Officer for the company.[16] Bentham IMF in the United States has recently adopted a

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[10] *See* NIEUWVELD & SHANNON, *supra* note 5 at 78-89 (discussing the laws on litigation funding in Australia).

[11] *See* Shannon, *Recent Developments*, *supra* note 8, at 447-48.

[12] *Id.*

[13] *See* NIEUWVELD & SHANNON, *supra* note 5, at 114, 245-47 (discussing code of conduct and reproducing code of conduct in Appendix of book); Shannon, *Recent Developments*, *supra* note 8, at 447-48.

[14] *About Us*, ASSOCIATION OF LITIGATION FUNDERS, http://associationoflitigationfunders.com/about-us/ (last visited Oct. 11, 2014).

[15] *See* Jennifer Banzaca, *In Turbulent Markets, Hedge Fund Managers Turn to Litigation Funding for Absolute, Uncorrelated Returns*, 2 THE HEDGE FUND LAW REPORT, no. 25, June 24, 2009, http://www.juriscapitalcorp.com/images/Hedge%20Fund%20Law%20Report%20Article.pdf.

[16] *See Ben Mawela (Individual Profiles)*, HARBOUR LITIGATION FUNDING LTD, http://www.harbourlitigationfunding.com/individual-profiles/ben-mawela (last visited Oct. 11, 2014).

voluntary Code of Best Practices, similar to the Code of Conduct in the UK.[17] Still, there is no requirement that funders self-regulate and no designated external regulatory body overseeing the activities of litigation funders.

Unlike Australia and the United Kingdom, the United States has a confusing state-by-state patchwork of laws on third-party litigation funding and no federal guidance whatsoever.[18] Seven states have passed legislation allowing or restricting litigation funding, while twelve states have proposed regulation or pending regulation.[19] Most of the other states either have spotty case law or bar ethics opinions that discuss litigation funding or have no jurisprudence at all about litigation funding.[20] As the industry grows, this disjointed regime will create confusion in the marketplace regarding which state's rules apply to any given litigation funding transaction.

Worldwide, three litigation funders are publicly traded — IMF in Australia, Burford Group[21] and Juridica in the United Kingdom. These three publicly traded funders are subject to the financial regulations of the Securities and Exchange Commission (SEC),[22] the Financial Services Authority (FSA),[23] and

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17 *See Litigation Funder Bentham IMF Adopts Code of Best Practices for US*, BENTHAM IMF, http://www.benthamimf.com/docs/default-source/default-document-library/bentham-press-release-for-code-of-best-practices.pdf?sfvrsn=2.

18 *See* NIEUWVELD & SHANNON, *supra* note 5, at 144-59 (discussing a 51-jurisdiction survey of the patchwork of laws on third-party litigation funding in the United States as of early 2012); *see also infra* note 19.

19 *See generally* Heather Morton, *Litigation or Lawsuit Funding Transactions 2014 Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jun. 4, 2014), http://www.ncsl.org/research/financial-services-and-commerce/litigation-funding-transactions-2014-legislation.aspx (listing proposed and passed legislation state by state); Richard A. Blunk, *Have the States Properly Addressed the Evils of Consumer Litigation Finance?*, A MODEL LITIGATION FINANCE CONTRACT (Jan. 21, 2014), http://litigationfinancecontract.com/have-the-states-properly-addressed-the-evils-of-consumer-litigation-finance/ (describing the litigation funding statutes in Maine, Ohio, Nebraska and Oklahoma). As of June 2014, the states that have passed legislation either allowing or prohibiting consumer litigation funding are Maine, Indiana, Ohio, Oklahoma, Nebraska, New York (allowed for large commercial disputes), and Tennessee. The states that have proposed legislation in this area are Alabama, Georgia, Illinois, Indiana (other bills proposed), Iowa, Kansas, Louisiana, Missouri, North Carolina, Rhode Island, South Carolina, and Vermont. Other states either have case law or attorney ethics opinions. *See* NIEUWVELD & SHANNON, *supra* note 5, at 144-59 (51 jurisdiction survey of existing state laws as of early 2012).

20 *See supra* notes 18-19.

21 Although Burford is a US-based funder, it decided to go public on the UK stock exchange.

22 The SEC is located in the United States. *See* U.S. SEC. AND EXCH. COMM'N, http://www.sec.gov/ (last visited Nov. 18, 2014).

23 The FSA is located in the United Kingdom. *See* FINANCIAL SERVICES AUTHORITY, http://www.fsa.gov.uk/ (last visited Nov. 18, 2014).

the Australian Securities and Investments Commission (ASIC).[24] Yet, there are dozens of other private litigation funders that are subject to little or no financial regulation at all.

Most third-party funders that fund commercial litigation are private hedge funds.[25] Dodd-Frank provisions aimed at hedge funds have not directly addressed the litigation funding industry.[26] Some scholars fear that funders will securitize their investments in litigation and sell derivative interests in lawsuits to spread the risk of funding among numerous investors.[27] Asset-backed securities fall under Dodd-Frank.[28] Does a contractual agreement to pay the legal fees and costs for a litigant qualify as an asset? If so, then bundling and selling litigation finance contracts may constitute asset-backed securities that would be subject to regulation under the Dodd-Frank Act and the general securities laws.[29] Prior to the bundling, the underlying transaction is largely unregulated.[30] If securitizing unregulated litigation funding contracts could lead to problems regarding the valuation and stability of the bundled securities, then litigation funding contracts themselves might warrant regulation under the Dodd-Frank Act or other securities laws.

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24 The ASIC is located in Australia. *See* AUSTRALIAN SEC. AND INVESTMENTS COMM'N, http://www.asic.gov.au/ (last visited Nov. 18, 2014).

25 The predominant view among academics, attorneys, funders and regulators is that the litigation funding market is split into consumer funding (typically involving an individual person as the funded party in the case) and commercial funding (business-to-business disputes). Generally, a funder invests in either commercial or consumer cases, but not both.

26 Hedge funds (including litigation funders, whether domestic or foreign) with $100 million or more in assets under management must register with the SEC, but there are no specific regulations aimed at the litigation funding industry. *See* U.S. SEC. AND EXCH. COMM'N, *About Office of Compliance Inspections and Examinations: National Exam Program: Offices and Program Areas*, http://www.sec.gov/ocie/Article/about.html (last visited Oct. 11, 2014) ("For the most part, IAs [Investment Advisors] who manage $100 million or more in client assets must register with the SEC. Advisers to hedge funds, private equity funds and other private funds that were previously exempt from SEC registration were recently required to register for the first time. Advisers located outside the United States may also be required to register with the SEC depending on the extent of their U.S. client base and assets under management.").

27 *See* Lawrence S. Schaner and Thomas G. Appleman, *The Rise Of 3rd-Party Litigation Funding*, LAW360, Jan. 21, 2011, http://jenner.com/system/assets/publications/130/original/The_Rise_Of_3rd-Party_Litigation_Funding.pdf?1312815913.

28 *See, e.g.*, 124 Stat. 1376 §§ 941-46 (section of the Dodd-Frank Act titled "Subtitle D—Improvements to the Asset-Backed Securitization Process").

29 *See Asset-Backed Securities*, U.S. SEC. AND EXCH. COMM'N, http://www.sec.gov/spotlight/dodd-frank/assetbackedsecurities.shtml.

30 *See supra* notes 18-19.

At least one observer of the industry has suggested that litigation funding contracts should be classified as derivatives, which are regulated under Dodd-Frank.[31] No courts or legislatures in the United States have expressed a view regarding whether litigation funding is a derivative.[32] Thus, an example from Australia may be instructive.

In Australia, prior to 2012, it was unclear whether a litigation funding agreement would be subject to regulation as a derivative under section 761D of the Corporations Act 2001 (Cth).[33] If applicable, section 761D would require the funder to hold a Financial Services License issued by the ASIC and would impose requirements on the funder to maintain capital adequacy, manage conflicts of interests, make mandatory disclosures, and offer dispute resolution procedures to clients.[34] However, the ASIC has exempted litigation funders from the regulations that would require them to obtain a Financial Services License, and IMF (Australia) Limited is the only funder in Australia that holds a Financial Services License, as well as the only publicly-traded funder in Australia.[35]

In 2012, the High Court of Australia in *International Litigation Partners Pte Ltd. v. Chameleon Mining NL* addressed the issue of whether a litigation funding agreement is a financial product and whether to require litigation funders to obtain a Financial Services License from the ASIC.[36] Two justices of the lower Court of Appeals had held that the funding agreement was not a derivative, while one justice held that it was a derivative.[37] All three justices had different reasons

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[31] *See, e.g.*, Robert W. Wood, *Perspective: Litigation funding increasingly popular, but what about taxes?*, LOS ANGELES DAILY JOURNAL, Jun. 11, 2013, 4 ("As if all this was not complex enough, some litigation funding arrangements may even qualify as derivative contracts, also called notional principal contracts. They call for one or more fixed payments from the funding source, and one or more contingent payments from you depending on the outcome of the case."); *Derivatives*, U.S. SEC. AND EXCH. COMM'N, http://www.sec.gov/spotlight/dodd-frank/derivatives.shtml.

[32] The seven states that have statutes about litigation funding are silent with respect to whether to classify the litigation funding agreement as a financial product or security. *See supra* note 19.

[33] *See Corporations Act 2001* (Cth), § 761D (defining a derivative under Australian law), *available at* http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s761d.html.

[34] *See generally* AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION (ASIC), *Do you need an AFS license?*, http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Do%20you%20need%20an%20AFS%20licence%3F (describing what types of businesses must have an Australian Financial Services [AFS] license and indicating that some of those businesses may be exempt from the requirement to hold an AFS license under certain circumstances).

[35] *See* Wayne Attrill, *Ethical Issues in Litigation Funding*, Nov. 12, 2008, 9 n.31, http://www.claimsfunding.eu/fileadmin/Documents/Ethical_Issues_Paper.pdf.

[36] *See* NIEUWVELD & SHANNON, *supra* note 5, at 83-86 (describing the Court of Appeals decision that was appealed to the High Court).

[37] *See Australia: Has the long-anticipated regulation of litigation funding finally arrived?*, SWAAB ATTORNEYS,

for their conclusions.[38] On appeal, the High Court of Australia classified the litigation funding agreement as a "credit facility," but not a "financial product," and held that funders were not required to obtain Financial Services Licenses.[39] The High Court stated that "a contract, arrangement or understanding that is *any* form of financial accommodation is 'credit,' and its provision 'for any period' will be a 'credit facility,'" even if the funder is paying the lawyers directly and not the client.[40] The High Court declined to address the definition of "derivative" beyond saying that a litigation funding agreement is not a derivative because it is "'a contract for the future provisions of services.'"[41] Notably, however, the Financial Services License that the ASIC issued to IMF in 2005 refers to litigation funding agreements as "derivatives."[42] Furthermore, in direct response to the High Court's Decision, in 2013, the Australian Parliament passed an amendment to the Corporations Act that unequivocally states that an interest in a litigation funding scheme or litigation funding arrangement is a financial product, not a credit facility.[43]

Australia's example suggests that the United States should at least consider treating litigation funding contracts themselves as financial products and, perhaps, as derivatives. In addition, at least two scholars have suggested that consumer litigation funding[44] might be a "consumer finance product" that may

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Jun. 21, 2011, http://www.mondaq.com/unitedstates/x/135958/Corporate+Governance/Has+the+longanticipated+regulation+of+litigation+funding+finally+arrived.

38 *Id.*

39 *Id.*

40 *Int'l Litig. Partners Pte Ltd. v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455, ¶ 26, http://www.austlii.edu.au/cgi-bin/download.cgi/au/cases/cth/HCA/2012/45. (emphasis in original).

41 *Int'l Litig. Partners v Chameleon*, *supra* note 40, at ¶ 20; Minter Ellison Lawyers, *Litigation funding decision may bring regulatory treatment of numerous financial instruments into doubt* (Oct. 17, 2012), http://www.minterellison.com/publications/litigation-funding-decision-for-chameleon-mining/; ALLENS/LINKLATERS, *Focus: Litigation Funding Hits Another Speed Hump* (Apr. 20, 2011), http://www.allens.com.au/pubs/ldr/foldrapr11.htm; Clayton Utz, *Litigation funding survives a legal challenge in the High Court* (Oct. 8, 2012), http://www.claytonutz.com/publications/news/201210/08/litigation_funding_survives_a_legal_challenge_in_the_high_court.page.

42 ALLENS/LINKLATERS, *supra* note 41.

43 King & Wood Mallesons, *The High Court finds that litigation funding agreements are not "financial products,"* (2012), http://www.mallesons.com/publications/marketAlerts/2012/class-actions-Q4-2012/Pages/The-High-Court-finds-that-litigation-funding-agreements-are-not-financial-products.aspx.

44 *See supra* note 25.

fall under the jurisdiction of the Consumer Financial Protection Bureau (CFPB).[45] One scholar has suggested that Dodd-Frank should be amended to include litigation funding expressly.[46]

One of the major obstacles to the applicability of Dodd-Frank to litigation funding is that the portfolios of most litigation funders are not large enough for them to be "larger participants" under Dodd-Frank and the CFPB's definition.[47] Yet, with billions of dollars spent on lawyers and litigation each year, future securitization of litigation funding contracts could change the dynamic by magnifying the participation of funders enough to transform them into "large participants" at that time.[48] In the interim, one advantage of at least some oversight through Dodd-Frank, the CFPB, or both is to offer some baseline regulatory uniformity to the states, whose current regulatory landscape is haphazard, conflicting, and inadequate to address the most crucial aspects of litigation funding.[49]

This article highlights one perspective from the most advanced litigation funding market in the world – Australia – and hypothesizes that, depending on the structure of a litigation funding agreement in the United States, it might be a

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45 *See* Susan L. Martin, *Remarks at the Alternative Litigation Funding Conference*, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL (May 2, 2012) 4, *available at* http://www.law.gwu.edu/News/20112012events/Documents/MartinSubmission.pdf. ("Fourth, the Consumer Finance Protection Bureau should also regulate deceptive practices of litigation funders. Dodd Frank contemplates cooperation between the CFPB and state regulators, and litigation funding would be an area that clearly lends itself to that kind of cooperation. The CFPB has indicated that one of its goals is to better protect consumers by expanding supervision to nonbank companies. However, it noted that its nonbank supervision program will be able to look at companies of all sizes in the mortgage, payday lending, and private student lending markets. But for all other markets—like consumer installment loans, money transmitting, and debt collection—the CFPB generally can supervise only larger participants. It is important that Dodd-Frank be amended to include consumer litigation funders in the first group because, under most definitions, most of these funders could not be considered large participants."); Richard Painter, *The Model Contract and the Securities Laws, Part 1*, A MODEL LITIGATION FINANCE CONTRACT (July 13, 2013), http://litigationfinancecontract.com/the-model-contract-and-the-securities-laws-part-1/ ("…Litigation Proceed Rights, if used to help individual litigants cover litigation costs and other expenses, could be deemed a consumer finance product subject to disclosure and other requirements under federal law, as amended by the Dodd-Frank Act of 2010, and relevant state law. It may be advisable for this reason to avoid a contract structure that could be characterized as a 'loan' or 'financing arrangement' vis a vis the litigant.").

46 *See* Martin*, supra* note 45.

47 *Id.*

48 *See supra* note 1.

49 *See generally* Victoria Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. (forthcoming 2015) (proposing a categorized approach to harmonizing existing and future regulations regarding the transactional, procedural, and ethical aspects of third-party litigation funding), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2419686.

variety of derivative, albeit perhaps a new type. If there can be derivatives based on the weather, then there probably can be derivatives based on the outcome of litigation.[50] In addition, future bundling and sales of those litigation funding agreements may be a variety of asset-backed security. Both types of investments would likely fall within the purview of the Dodd Franck Act, depending on the corporate structure and characteristics of the litigation funder itself.[51] Further academic inquiry is needed to define the various structures of litigation funding arrangements and litigation funders themselves in order to inform regulators regarding what type of transactions they are seeking to regulate.[52]

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[50] *See* Felix Carabello, *Introduction to Weather Derivatives*, INVESTOPEDIA.COM, http://www.investopedia.com/articles/optioninvestor/05/052505.asp (last visited Oct. 11, 2014).

[51] *See supra* notes 28-31 and accompanying text.

[52] Scholars are already exploring the structure of third-party litigation funding transactions. *See, e.g.*, Maya Steinitz, *Incorporating Legal Claims*, NOTRE DAME L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423541; Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711 (2014); Maya Steinitz, *How Much is that Lawsuit in the Window? Pricing Legal Claims*, 66 VAND. L. REV. 1889 (2013); Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455 (2012); *see also* Jeremy A. Blumenthal, *Legal Claims As Private Property: Implications for Eminent Domain*, 36 HASTINGS CONST. L.Q. 373 (2009); Thomas Lee Hazen, *Disparate Regulatory Schemes for Parallel Activities: Securities Regulation, Derivatives Regulation, Gambling, and Insurance*, 24 ANN. REV. BANKING & FIN. L. 375 (2005); Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859 (2002).