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ESSAY

CLARIFYING THE "PROBATE LENDING" DEBATE: A RESPONSE TO PROFESSORS HORTON AND CHANDRASEKHER

Jeremy Kidd, Ph.D.∗

INTRODUCTION

The debate over third-party funding of legal claims just got more interesting. The debate already had plot twists, such as free-market scholars[1] lining up in opposition to the U.S. Chamber of Commerce[2] and alongside proplaintiff scholars[3] who they oppose in tort reform debates. Now add to the mix a recent paper by Professors Horton and Chandrasekher[4] that introduced an entirely new angle to the debate: funding of probate disputes. Now that this parallel area of funding has been identified, comparing and contrasting probate funding with litigation funding should illuminate the incentives that funders/recipients face in both scenarios. By pointing out the importance of probate funding, Professors Horton and Chandrasekher have benefitted the debate.

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1 *See, e.g.*, Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL'Y 613 (2012); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367 (2009); Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329 (1987).

2 *See generally* JOHN H. BEISNER & GARY A. RUBIN, U.S. CHAMBER INST. FOR LEGAL REFORM, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION (2012).

3 *See, e.g.*, Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 120–33 (2011); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011).

4 David Horton & Andrea Cann Chandrasekher, *Probate Lending*, 126 YALE L.J. 102 (2016).

And yet, their contribution does not make the impact that it should have made, due to some unfortunate and avoidable missteps. This Essay identifies the authors' mistakes so that the debate can proceed in more fruitful fashion. Part I addresses how *Probate Lending* gives short shrift to the difficult questions involved in discerning whether probate funding is a loan. Part II points out how the authors mistakenly conclude that they have measured ex ante risk instead of ex post results. Part III argues that the authors presume too much when they derive broad policy conclusions from an extremely narrow empirical study and when they ignore alternative explanations that are at least as plausible as those they champion. This Essay then concludes.

I. WHAT'S IN A NAME?

One of the most pivotal arguments in the debate over legal funding is whether or not it constitutes a loan, since the answer to that question determines whether or not the transactions are subject to usury and other consumer protection laws.[5] The authors' choice of title—*Probate Lending*—begins with the presumption of a lending relationship that would make these transactions loans. It is true that the authors make an attempt to prove that probate funding transactions are loans, but their choice of title indicates that they were offering justifications for a conclusion they never questioned.

Why does it matter? Because the exchange of money in return for a future return payment *might* be a loan, but it might also be an investment, a loan-investment hybrid, or perhaps just a purchase of a property interest. Usury laws do not apply to investment transactions and they certainly would not apply to a purchase of property; neither would the requirements of the federal Truth in Lending Act (TILA).[6] The authors could have chosen a more neutral term to describe these transactions, such as "probate funding" or "probate financing," but not only did they use a term that presumes the status as a loan, the absence of any mention indicates that they were likely blind to their biases.

In its limited attempt to address the loan versus investment distinction, *Probate Lending* asks only whether probate funding agreements are contingent. The contingent nature of the transaction is one that courts have considered carefully when determining whether something is a loan,[7] but it need not and should not

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5 *See, e.g.*, Oasis Legal Fin. Grp., LLC v. Coffman, 361 P.3d 400, 409 (Colo. 2015) (holding that litigation funding was a loan under the Uniform Consumer Credit Code); Anglo-Dutch Petrol. Int'l, Inc. v. Haskell, 193 S.W.3d 87, 96–97 (Tex. App. 2006) (holding that litigation funding was not a loan subject to state usury laws).

6 Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified at 15 U.S.C. § 1601 (2012)).

7 *See, e.g.*, Capela v. J.G. Wentworth, LLC, No. CV09-882, 2009 WL 3128003, at *10 (E.D.N.Y. Sept. 24, 2009) (holding that a structured settlement was not a loan because there was no absolute obligation to pay the settlement installments); *Haskell*, 193 S.W.3d at 96–97 (refusing to apply usury laws to a litigation funding agreement because the funder's ability to recover was contingent on the outcome of the lawsuit); Sheri P. Adler, Note, *Alternative Litigation Finance and the Usury Challenge: A Multi-Factor Approach*, 34 CARDOZO L. REV. 329, 334–35 (2012) (stating the majority rule that litigation funding is not subject to usury laws because they are only contingently repayable). *But see Oasis Legal Fin. Grp., LLC*, 361 P.3d at 409 (holding that an

conclude the analysis. Yet, it is precisely where the authors abandon their inquiry after concluding that probate funding is less contingent than litigation funding.[8]

Is probate funding contingent, then? The recipient of probate funding receives money in exchange for the right to pursue some portion of the heir's claim to the estate.[9] If the heir's claim is successful, the funder receives some percentage of the heir's portion, as agreed to in the funding document.[10] Importantly, the funding transaction is nonrecourse, so the funder can only receive as much as the heir would have received from the estate.[11] *Probate Lending* concludes that, because the vast majority of funding transactions yield a positive return for the funder, the contingent nature of the funding transaction is merely "colorable," at best.[12] This conclusion, however, is suspect, even given the authors' own data.

In one case, the heir received no award, leaving the funder without any recovery.[13] In two other cases, the funder recovered less than the amount advanced, yielding a negative return.[14] The authors dismiss these cases as representing easily preventable mistakes and argue that they are "not likely to recur."[15] This strains credulity, for it requires the reader to believe that, somehow, the authors have managed to capture a unique occurrence purely by accident. Probate funding has been ongoing since at least 2004,[16] and it is highly unlikely that the only time these negative-return outcomes were realized was during the short window of time studied by the authors. Far more likely is that these events are regular, even if they only comprise a small percentage of the total funding arrangements.

There are many reasons to believe the probate funding process is subject to significant uncertainties. The authors concede that an heir might receive little to nothing because the probate process drains the estate.[17] Other contingencies that could lead to an heir's not receiving the expected inheritance include unforeseen bills that the estate must pay or even the discovery of an unknown will that disinherits an heir that received funding. All of these possibilities reflect the reality that our legal system—even our probate system—is not merely a mechanistic process. There is every reason to suspect that the probate funding transaction reflects an attempt by the heir to transfer the burden of uncertainty—either temporal[18] or

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absolute repayment obligation was not necessary for the Uniform Consumer Credit Code definition of loan to apply).

8 Horton & Chandrasekher, *supra* note 4, at 140–46.

9 *See id.* at 118.

10 *See id.* at 125.

11 *See id.*

12 *Id.* at 142–43 (arguing that the funding transaction is "absolutely repayable").

13 *Id.* at 143 ("[O]ne company lost its entire investment when the personal representative stole the decedent's assets and then disappeared.").

14 *Id.*

15 *Id.* at 143–44.

16 *Id.* at 125.

17 *Id.* at 163 ("[P]robate litigation is notorious for allowing attorneys and personal representatives to bleed the estate dry . . . .").

18 In *Probate Lending*, the probate process is referred to as "snail-like," which could explain heirs' preferences for bypassing the temporal risk and receiving money now. *Id.* at 135.

substantive[19]—to the funder. The authors even concede that time preference—pure temporal risk—cannot fully explain the heir's decision to seek out a funding opportunity,[20] but fail to grasp the full import of that concession.

The risk assumed by probate funders is not illusory, as claimed in *Probate Lending*. Real and significant contingencies—not only *whether* the heir will be entitled to any portion of the estate but also *when* payment will occur—lead heirs to seek out probate funders, and those contingencies cannot be assumed away.[21] That the authors do so is yet another indication that they are unaware of their bias in favor of probate funding as loans.

Even if probate funding were largely devoid of contingencies, however, there is an even more compelling reason to doubt that these transactions are properly considered loans. Put simply, they bear far more resemblance to a purchase of a property interest. In many cases, what an heir stands to inherit is actual property, real or personal.[22] Even in cases where the heir inherits money, it is often derived from the sale of property,[23] indicating that the heir had a de facto interest in that property and has the right to alienate that interest.

Probate Lending even concedes this point, describing a number of funding transactions where the funder was granted an interest in real property,[24] and states: "Courts generally do not apply the doctrine [of champerty] to parties who first acquire an interest in property and then bring a cause of action related to that property. This is an apt description of probate lenders . . . ."[25] Strangely, this fact is acknowledged for the purpose of arguing that the doctrine of champerty should not be applied, but its import is far broader, because sale of property is of an entirely different type than a loan transaction.

Of course, if the authors are wrong that probate funding is a loan transaction, their arguments in favor of applying usury laws and TILA rules are without factual support and must be abandoned.

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19 *See, e.g.*, Kenneth S. Lyon, *Why Economists Discount Future Benefits*, 92 ECOLOGICAL MODELLING 253 (1996) (explaining that interest rates reflect both a time preference and a substantive risk component). The two may overlap, with every delay increasing not only the time to receipt of the inheritance, but also the risk that further complications will deplete the estate or disinherit the heir. The passage of time can reduce the heir's total award even if the heir's share of the estate ends up exactly as expected.

20 Horton & Chandrasekher, *supra* note 4, at 134–35 (concluding that neither general delays nor financial pressures on the heir explain the use of probate funding).

21 They are, in fact, pivotal to the question. *See* RESTATEMENT (FIRST) OF CONTRACTS § 527 cmt. a (AM. LAW INST. 1932) ("A creditor who takes the chance of losing all or part of the sum to which he would be entitled if he bargained for the return of his money with the highest permissible rate of interest is allowed to contract for greater profit.").

22 *Probate Lending* makes this point explicitly in its statistical analysis. *See* Horton & Chandrasekher, *supra* note 4, at 157 (describing how one independent variable used was whether the probate process "divided *property* unequally among similarly situated relatives" (emphasis added)).

23 *Cf. id.* at 157–58.

24 *See id.* at 144 n.244.

25 *Id.* at 160–61.

II. HOW TO MEASURE RISK?

The authors also make a fundamental error in their assessment of risk. Risk is an inherently ex ante concern.[26] It is never measured by ex post results. It is the potential for future adverse events that leads us to take precautions to mitigate the likelihood of those future events or to pay insurance premiums to compensate us if those events occur and cause harm. The lower the risk, the fewer the precautions and the lower the premium, but it would be incorrect to assert that there was no risk during a year in which no adverse events occurred. It would be incorrect to claim that someone had been robbed because health insurance premiums have been paid but nothing bad had happened which required payment by the insurance company. Yet, this is precisely what *Probate Lending* does, repeatedly concluding that probate funding has little to no risk[27] because the vast majority of transactions yielded positive ex post results.[28]

Countering the authors' claim that there is no risk are the very examples from their dataset where funders realized a loss.[29] In another example of confusing ex post results with ex ante risk, *Probate Lending* concludes that these losses are aberrations that are easily accounted for and will therefore not likely be repeated.[30] Importantly, however, there is no evidence that the authors scrutinized the successfully recouped funding agreements for the risk factors that led to the losses. It is therefore possible that these risk factors were more common than what appears in a solely ex post analysis.

In the first two cases that experienced losses, the funders "unwisely entered into assignments before the [Inventory and Appraisal] was filed."[31] The authors are certainly correct that by so doing there was a risk that the value of the estate would not be high enough to allow payment in full. Similarly, in the third case, the losses were the result of the personal representative absconding with the decedent's assets.[32] There, the funding arrangement was signed prior to requiring the personal representative to post a bond to assure payment to all stakeholders.[33] Once again, the authors are correct that a slight change in the process would have minimized that risk.

26 *See* Thomas Root, *Defining, Measuring, Managing, and Facing Risk*, 56 DRAKE L. REV. 571, 572 (2008) ("[R]isk is something that we do not know with certainty. It is an outcome about which we cannot be certain.").

27 *See, e.g.*, Horton & Chandrasekher, *supra* note 4, at 144.

28 *See id.* at 143 (arguing that there was no risk because ninety-six percent of the authors' dataset of transactions "were fully reimbursed").

29 *See supra* notes 13–15 and accompanying text. As a separate matter, these cases appear to have been dropped from the authors' calculation of "interest rates," as they appear nowhere in Table 3. *See* Horton & Chandrasekher, *supra* note 4, at 145 tbl.3. Had these cases been included, the authors would have needed to include at least one category for negative interest rates. When the claim is that probate funding has high average interest rates, dropping low outliers looks highly suspicious.

30 *See id.* at 144.

31 *Id.* at 143.

32 *Id.*

33 *Id.* at 143–44.

Their analysis fails, however, because at no time do they indicate that they scrutinized the profitable funding transactions for these potential problems. In other words, they appear to have presumed zero risk factors where profit was realized, but it is entirely possible that some profitable funding transactions also exhibited these characteristics. In fact, competition in a market such as this will tend to drive funders to make earlier offers—further minimizing the customer's temporal risk—even prior to the filing of the Inventory and Appraisal.[34] This is a well-developed market,[35] making it far more likely that what the authors consider foolish mistakes were, instead, increased risk assumption by funders in a competitive market. This is one of many ways in which the authors' misunderstanding of risk corrupts their results.

III. PROBLEMATIC ANALYSIS

The authors deserve credit for undertaking to use data to better understand probate funding. Unfortunately, empirical work done poorly more often misleads than enlightens.[36] *Probate Lending* suffers from a number of important methodological flaws, which make its conclusions highly suspect as general propositions.

A. Limited Data

The most damaging flaw is that *Probate Lending* offers broad policy prescriptions based on data collected from a single county—out of 3031 counties in the United States[37]—for a period of only fourteen months.[38] Small datasets are not useless—they can provide the groundwork for basic hypotheses and motivate future research—but any conclusions drawn from limited data should be accompanied by a host of qualifiers. The authors offer no such qualifications and go in the opposite direction, touting their source as a "trove of empirical evidence."[39]

The limited nature of the dataset hinders its usefulness in two important ways. First, the population of Alameda County is not a representative sample of the U.S.

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34 In a market with multiple funders, all funders compete for the same contracts. To succeed, participants must offer some combination of price and quality improvements. In the probate funding scenario, these will include a lower differential between amount funded and amount repaid, better ancillary terms, and earlier funding. Competition need not always result in earlier payments, but competitive pressures and consumers' positive time preference, see Lyon, *supra* note 19, at 259, make time horizon for payment an important margin upon which market players will compete.

35 Forms of this type of funding have existed for hundreds of years, with the current form beginning either in 2004 or at least in 2005 with the passage of Cal. Prob. Code § 11604.5. *See* Horton & Chandrasekher, *supra* note 4, at 118–26 (citing CAL. PROB. CODE § 11604.5 (West 2016)).

36 *See, e.g.*, Gordon Tullock, *A Comment on Daniel Klein's "A Plea to Economists Who Favor Liberty*,*"* 27 E. ECON. J. 203, 205 (2001) ("As Ronald Coase says, 'if you torture the data long enough it will confess.'").

37 *Local Governments by Type and State: 2012*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG02.US01&prodType=table (last visited Apr. 15, 2018). This excludes independent cities and other county equivalents.

38 Horton & Chandrasekher, *supra* note 4, at 130–31.

39 *Id.* at 108.

population. Table 1 compares county, state, and federal statistics, and in none of the categories represented is Alameda County a reflection of California or the United States, as a whole.[40] The authors do not address this fundamental shortcoming or offer any substantive justifications. As a result, the conclusions drawn from data exclusive to Alameda County are, at best, interesting and useful for future inquiry; they are unhelpful for motivating useful policy now, either in California or nationwide.

Table 1

	Alameda County	California	United States
Median Age	36.6	35.2	37.2
Gender (% Female)	51	50.3	50.8
Race			
White	47.7	61.6	74.8
Black	14.2	7.2	13.6
Hispanic	22.5	37.6	16.3
Asian	29.2	14.9	5.6
Pacific Islander	1.5	0.8	0.4
Other	12.4	18.9	7.0
Labor Force Participation	66.2	63.8	63.9
Median Household Income	$73,775.00	$61,489.00	$53,482.00
Uninsured	11.8	16.7	14.2
Poverty Rate	12.9	16.4	15.6
% Rent	46.6	44.1	34.9
Single Parent	18.1	19.3	18.1

QuickFacts, U.S. CENSUS BUREAU, www.census.gov/quickfacts (last visited Mar. 7, 2017).

Second, the fact that the results are derived from a span of only fourteen months means that nothing can be said regarding rates of change. After *Probate Lending*, we know nothing new about trends in utilization of probate funding, competition in the market, or any other intertemporal concerns. These are not frivolous concerns.

40 *Probate Lending* acknowledges that California may not be representative of the country when it says that probate funding is "more established in California than elsewhere." *Id.* at 128. That alone would be enough to limit any conclusions to the state of California, but the obvious next step would normally be to acknowledge that Alameda County may not be representative of California, making it harder to draw any broad conclusions. Admittedly, these particular statistics were chosen in ad hoc fashion, representing some of the more common demographic characteristics that might be of use. However, even such an ad hoc analysis is missing from *Probate Lending*.

If probate funding is being utilized with decreasing frequency, for example, any problems are resolving themselves and statutory or regulatory reforms are unlikely to have much effect. Similarly, if competition in the probate funding market is increasing over time, then prices—the differential between the amount funded and the amount received—will be decreasing and consumer service will be improving, mitigating or eliminating consumer-protection concerns.

B. Ignoring Alternative Explanations

One of the primary questions in the broader legal funding debate is whether it leads to more litigation,[41] particularly frivolous litigation.[42] The empirical data is inconclusive,[43] but there is reason to suspect that increased litigation need not be a foregone conclusion.[44] *Probate Lending* claims empirical support for the claim that probate funding increases the total amount of litigation.[45] Those results, however, require defining litigation very broadly,[46] to include not only new probate cases but every motion filed in every case, so long as that motion "spark[ed] an objection from an adverse party."[47]

The decision to consider every motion filed is potentially useful, but to conclude that "[p]robate lending thus introduces litigious third parties into the court system"[48] requires far more justification than the authors are willing to provide. Perhaps probate funding increases the costs or the duration of probate disputes? No, *Probate Lending* concludes that there is no increase in the number of days until the probate matter was resolved,[49] and there is no data provided regarding costs.

The authors' conclusions that more motions are filed in disputes with funding[50] deserves closer inspection. Unlike a traditional heir, a probate funder has paid something for the right to be involved in the process, so the funder should be more conscious of the margins, filing motions only when the returns clearly outweigh the

41 *See, e.g.*, BEISNER & RUBIN, *supra* note 2, at 4 ("[Third-Party Litigation Financing] can be expected to prompt an increase in the filing of questionable claims."); *see also* Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 743–45 (2005); Kidd, *supra* note 1, at 624–27; Shukaitis, *supra* note 1, at 342–46.

42 Kidd, *supra* note 1, at 627–29.

43 David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075, 1097–1103 (2013) (finding evidence of an increase in litigation but at only weak levels of significance).

44 *See* Jeremy Kidd, *Modeling the Likely Effects of Litigation Financing*, 47 LOY. U. CHI. L.J. 1239, 1246–54 (2016) (concluding that litigation funding is unlikely to yield a significant increase in the total amount of litigation).

45 *See* Horton & Chandrasekher, *supra* note 4, at 158.

46 *Probate Lending* concedes that its definition of litigation is, perhaps, not ideal. *Id.* at 160 ("[B]ecause we defined 'litigation' so broadly—as any contested petition—we have swept up claims that may be only tenuously related to the presence of a lender.").

47 *Id.* at 157. Probate funding does not increase deaths and cannot, therefore, increase the number of estates that need disposition. At worst, the substitution of funder for traditional heir could force the estate into probate prior to the wishes of the rest of the heirs, but that is a matter of timing only.

48 *Id.* at 160.

49 *Id.* at 163.

50 *Id.* at 158.

legal costs. Conversely, a traditional heir might file out of spite or in response to some relational dynamic amongst the heirs. What could motivate funders to file more motions than traditional heirs? The authors claim funders have a more litigious nature, but two alternative answers are both plausible and more in line with the incentives faced by funders: first, that funding is more likely in connection with estates that are more likely to be litigious for other reasons; and second, that the nature of filings by funders are of a different type.

Heirs caught up in a more contentious probate dispute will have greater incentive to sell their interests—partially or entirely—to a funder. Greater conflict means that the process will likely be lengthier and costlier—monetarily and otherwise—and the ultimate outcome is likely to be based, in part, on which heir is the most stubborn. All of these factors increase the risk to each individual heir; since funders are better able to bear or avoid those risks, an opportunity for exchange arises and the heir will be willing to pay the funder a premium to accept some or all of those risks. *Probate Lending* acknowledges this possibility,[51] but dismisses the reverse-causation explanation because "[i]n two-thirds of these cases, the petition or objection was initiated by the lender itself."[52] To be clear, a plausible explanation for a full third of all cases investigated is ignored because it did not account for all cases.

Plausible explanations for the remaining two-thirds are also ignored. The motions might have been standard practice and would have eventually been filed by traditional heirs; the funder might simply have filed first. It is also possible that the other heirs favored the petition or objection but, due to the complex relationships that exist in families or otherwise among heirs, could not file. In both cases, the funder has not instigated any legal proceedings that were not preferred by other heirs; if anything, the funder may have sped up the process and made everyone better off. This is consistent with another finding of *Probate Lending*: while more petitions or objections are filed in proceedings that involve a funding agreement, those proceedings do not last any longer, on average, than those without funding.[53]

One type of filing might be different—a petition to be appointed personal representative. The authors ascribe funders' filing of these petitions to "rank self-interest,"[54] a pejorative as unfortunate as it is dismissive of Adam Smith's centuries-old insight that self-interest need not be detrimental to the interests of others.[55] The

51 *Id.* at 160 (conceding that it is possible that "litigation causes loans").

52 *Id.*

53 *See id.* at 163.

54 *Id.* at 162. *Probate Lending* also includes petitions for a preliminary distribution or to require the personal representative to sell real property. *Id.* These petitions may certainly be motivated by self-interest, but they would be regardless of who filed them, and there is no evidence provided that probate funders file them at a greater rate or—more importantly—that such petitions by probate funders are granted more frequently than when filed by a more traditional heir. Petitions to be appointed personal representative are of a different type.

55 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 11 (London, Hartford 1811) ("[M]an has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self-love in his favour, and shew them that it is for their own advantage to do for him what he requires of them. . . . It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest.").

question is not whether funders will seek out their own interests—as all individuals do—but whether those interests are properly aligned with the rest of the heirs.

A funder who is paid as a personal representative is, at worst, depriving another heir of a paycheck, but this is a transfer rather than a drain on the estate. In fact, a funder has reason to develop expertise in disposing of an estate quickly and efficiently,[56] so the selection of the funder as a personal representative can be beneficial to the remaining heirs.[57] While there may be some heirs who wish the process to drag on for a variety of personal reasons, the only interests that can be said to be common to all heirs is a speedy, inexpensive resolution of the estate. The most reasonable assumption, therefore, is that a funder's interests are properly aligned with the heirs, and one's appointment as personal representative should have no negative effect on the estate.

These are plausible explanations for *Probate Lending*'s results; rather than proving that probate funders are overly litigious, the results could just as easily be evidence of probate funders making the process more efficient. The authors hint at conceding these alternatives, but exert almost no effort in justifying their conclusions to the contrary. Instead, they brush past them and either ignore or casually dismiss them. As a result, the conclusions in *Probate Lending* are little more than the authors' personal preferences.

CONCLUSION

Probate Lending starts a dialog that is worth having as part of the ongoing debate over how and where third-party funders will be allowed to have a role in our judicial system. It opens up a new line of inquiry, and the comparisons between the litigation process and the probate process will hopefully aid in understanding the impact of funding on both areas of law. Unfortunately, there are too many significant flaws for it to be more than a cursory first step. It falls short of proving that probate funding is a loan transaction, subject to usury and TILA rules. It fundamentally misunderstands the nature of risk, mistaking ex post results for ex ante probabilities. Finally, its largest potential contribution—statistical analysis of probate disputes—suffers from nearly fatal flaws.

Even with these significant flaws, *Probate Lending* has the potential to move the legal funding debate forward in important ways. Until its flaws are remedied, however, *Probate Lending* should not be viewed as a useful foundation for policy debates.

56 The funder, more than anything else, wants their investment in the estate to be profitable, and that requires speed and minimal costs.

57 It bears asking why a probate court would choose a funder with no connection to the decedent as the personal representative. Unless it can be credited that the court is simply derelict in its responsibilities, it must make the choice believing that, in fact, the funder has the best chance of disposing of the estate in the most efficient manner possible, thereby minimizing the costs and assuring every heir of receiving a greater inheritance.