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BORROWING IN THE SHADOW OF DEATH:
ANOTHER LOOK AT PROBATE LENDING

DAVID HORTON*

ABSTRACT

“Fringe” lending has long been controversial. Three decades ago, demand for subprime credit soared, and businesses started to offer high-interest rate cash advances, such as tax refund anticipation loans, payday loans, and pension loans. These products have sparked intense debate and are subject to a maze of rules.

However, in Probate Lending, published in the Yale Law Journal, a coauthor and I examined a form of fringe lending that has gone largely unnoticed: firms that pay lump sums in return for an heir or beneficiary’s interest in a pending decedent’s estate. Capitalizing on a California law that requires companies to file these contracts in probate court, we analyzed seventy-seven loans that stemmed from deaths in 2007.

In this companion Article, I report the results of a study of two additional twenty-two months of probate records. My research provides hard evidence about the multimillion dollar inheritance-buying industry, including the prevalence of loans, characteristics of borrowers, how often lenders are repaid, and annual interest rates. I then use this data to compare probate lending to other species of fringe lending and to outline how courts and lawmakers should regulate the practice.

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INTRODUCTION

In 2008, a woman named Carolyn Chubbuck signed a tidy holographic will that divided her assets among her surviving descendants.¹ A year later, she died, leaving three daughters, Kristina (age twenty-eight), Stefani (age twenty-one), and Jamie (age twenty).² Her estate began the probate process in Hayward, California.³

But then something happened that altered the distribution of Carolyn's property. Kristina assigned \$23,100 of her expected inheritance to an entity called Heir Advance Company, Inc. (HAC) in return for an immediate payment of \$15,000.⁴ Just thirteen days later, Kristina traded an additional \$38,500 of her mother's legacy to HAC for a lump sum of \$25,000.⁵ As the probate case continued, Kristina borrowed eight more times, surrendering a total of \$173,510 of inheritance rights and collecting \$116,480.⁶ Likewise, Stefani executed seven agreements, selling a \$144,080 share of the estate for

1. See Petition for Prob. of Will & for Letters Testamentary, Holographic Will at 1-2, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. May 28, 2009) (DomainWeb).

2. *Id.* Petition at 4.

3. *Id.* at 1.

4. See Agreement of Kristina M. Chubbuck at 1, *In re Estate of Chubbuck*, No. HP 09454847 (Cal. Super. Ct. Nov. 10, 2009) (DomainWeb).

5. See Agreement of Kristina M. Chubbuck for Second Assignment at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Nov. 23, 2009) (DomainWeb).

6. See Sixth Agreement of Kristina M. Chubbuck at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. May 15, 2013) (DomainWeb); Agreement of Kristina M. Chubbuck for Fifth Assignment at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Aug. 5, 2011) (DomainWeb); Agreement of Kristina M. Chubbuck for Fourth Assignment at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Mar. 7, 2011) (DomainWeb); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Dec. 27, 2010) (DomainWeb); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Dec. 3, 2010); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Nov. 23, 2010) (DomainWeb); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. June 15, 2010) (DomainWeb); Agreement of Kristina M. Chubbuck for Third Assignment at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Mar. 23, 2010) (DomainWeb).

\$97,440,⁷ and Jamie signed eleven contracts, relinquishing \$131,670 and receiving \$78,500.⁸ The final such transaction, in which

7. See Stefani L. Chubbuck's Assignment #6, Sale & Transfer of Beneficial Interest in Decedent's Estate to Inheritance Funding Co., Inc. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. July 21, 2011) (DomainWeb); Stefani L. Chubbuck's Assignment #5, Sale & Transfer of Beneficial Interest in Decedent's Estate to Inheritance Funding Co., Inc. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. May 26, 2011) (DomainWeb); Stefani L. Chubbuck's Assignment #3, Sale & Transfer of Beneficial Interest in Decedent's Estate to Inheritance Funding Co., Inc. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Apr. 5, 2011) (DomainWeb); Stefani L. Chubbuck's Assignment #3, Sale & Transfer of Beneficial Interest in Decedent's Estate to Inheritance Funding Co., Inc. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Feb. 17, 2011) (DomainWeb); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Jan. 26, 2011) (DomainWeb); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Dec. 8, 2010) (DomainWeb); Agreement of Stefani Lea Chubbuck at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Nov. 23, 2009) (DomainWeb).

8. See Jamie Chubbuck's Assignment #9, Sale & Transfer of Beneficial Interest in Decedent's Estate to Inheritance Funding Co., Inc. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Jan. 22, 2013) (DomainWeb); Jamie Chubbuck's Assignment #8, Sale & Transfer of Beneficial Interest in Decedent's Estate to Inheritance Funding Co., Inc. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Aug. 20, 2012) (DomainWeb); Jamie Chubbuck's Assignment #7, Sale & Transfer of Beneficial Interest in Decedent's Estate to Inheritance Funding Co., Inc. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. July 9, 2012) (DomainWeb); Jamie Chubbuck's Assignment #6, Sale & Transfer of Beneficial Interest in Decedent's Estate to Inheritance Funding Co., Inc. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Mar. 17, 2011) (DomainWeb); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Jan. 14, 2011) (DomainWeb); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Dec. 27, 2010) (DomainWeb); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Oct. 5, 2010) (DomainWeb); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Aug. 6, 2010) (DomainWeb); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 1, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. July 2, 2010); Agreement of Jamie L. Chubbuck for Second Assignment at 1, *In re Estate of Chubbuck* at 1, No. HP09454847 (Cal. Super. Ct. Mar. 23, 2010); Agreement of Jamie L. Chubbuck, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. Feb. 5, 2010) (DomainWeb).

Kristina sold a \$7500 cut of the estate for \$5000, occurred just twenty days before the court granted the petition for final distribution and the lenders were repaid.⁹ If it had been a conventional loan, its annual percentage rate (APR) would have been 913 percent.

Carolyn Chubbuck's estate offers a glimpse into a blind spot in a divisive industry. For decades, there has been fierce debate over so-called "fringe" lending.¹⁰ Traditionally, usury laws capped APRs at around 10 percent,¹¹ and the Truth in Lending Act (TILA) required creditors to conspicuously disclose their loans' key terms.¹² But near the end of the twentieth century, businesses designed several cash advance products that attempted to slip between the cracks of orthodox consumer protection regulation. These alternative forms of finance—including tax refund anticipation loans,¹³ payday loans,¹⁴ and pension loans¹⁵—have received sustained attention from

9. See Sixth Agreement of Kristina M. Chubbuck, *supra* note 6, at 1; see also Judgment Settling First & Final Account & Report of Admin. Ordering Final Distribution, Comp. for Servs. Rendered & Reimbursement of Costs at 8, *In re Estate of Chubbuck*, No. HP09454847 (Cal. Super. Ct. June 4, 2013) (DomainWeb).

10. See generally JOHN P. CASKEY, FRINGE BANKING: CHECK-CASHING OUTLETS, PAWN-SHOPS, AND THE POOR 12-64 (1994) (detailing the history of "fringe" banking and its contemporary impacts).

11. *E.g.*, CAL. CONST. art. XV, § 1(1); see also *infra* notes 34-35 and accompanying text.

12. See 15 U.S.C. §§ 1601-1608, 1631-1635, 1637-1651, 1661-1667f (2012) ("It is the purpose of [the TILA] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.")

13. See, e.g., Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 166-77 (2004); Leslie Book, *Refund Anticipation Loans and the Tax Gap*, 20 STAN. L. & POL'Y REV. 85, 99-104 (2009); Danshera Cords, *Paid Tax Preparers, Used Car Dealers, Refund Anticipation Loans, and the Earned Income Tax Credit: The Need to Regulate Tax Return Preparers and Provide More Free Alternatives*, 59 CASE W. RES. L. REV. 351, 377-81 (2009); Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. REV. 589, 612-13, 644-46 (2000).

14. See, e.g., Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 44-45, 55-56 (2008); Richard R.W. Brooks, *Credit Past Due*, 106 COLUM. L. REV. 994, 1006-09 (2006); Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 9-12 (2002); Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 857-61 (2007); Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1123-28 (2008); Pearl Chin, Note, *Payday Loans: The Case for Federal Legislation*, 2004 U. ILL. L. REV. 723, 724-26; see also Bethany McLean, *Payday Lending: Will Anything Better Replace It?*, ATLANTIC (May 2016), <https://www.theatlantic.com/magazine/archive/2016/05/payday-lending/476403> [<https://perma.cc/NPX6-ZTV2>].

15. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-420, PENSION ADVANCE TRANS-

litigants, academics, journalists, and advocacy groups.¹⁶ Recently, Congress, agencies, and state legislatures have taken aggressive steps to regulate them.¹⁷

Conversely, inheritance-buying firms like HAC have flown beneath the radar. Until recently, a grand total of one magazine article and two newspaper columns had mentioned the practice.¹⁸ Even more remarkably, probate lending exists in a legal vacuum. There is no authority on whether these agreements are usurious.¹⁹ Likewise, just one state, California, has a statute that addresses probate lending.²⁰ Thus, although \$59 trillion will flow from the dead to the living over the course of the next fifty years—the largest posthumous wealth transfer in history²¹—borrowing against a decedent's estate is the most unstudied and unregulated species of fringe finance.

ACTIONS: QUESTIONABLE BUSINESS PRACTICES IDENTIFIED 6-8 (2014), <http://www.gao.gov/assets/670/663800.pdf> [<https://perma.cc/5A3W-RRGN>]; Jeff Schwartz, *The Corporatization of Personhood*, 2015 U. ILL. L. REV. 1119, 1152 n.226; Jessica Silver-Greenberg, *Loans Borrowed Against Pensions Squeeze Retirees*, N.Y. TIMES (Apr. 27, 2013), http://www.nytimes.com/2013/04/28/business/economy/pension-loans-drive-retirees-into-more-debt.html?pagewanted=all&_r=1&&gwh=64F6F14410B9365AB93B3B06A6B2115D&gwt=pay [<https://perma.cc/4VPR-5LCF>] [hereinafter Silver-Greenberg, *Retirees*]; Jessica Silver-Greenberg, *New York State Investigating Pension-Advance Firms*, N.Y. TIMES: DEALB%K (May 7, 2013, 2:14 PM), <http://dealbook.nytimes.com/2013/05/07/new-york-state-investigating-pension-advance-firms/> [<https://perma.cc/EKC3-EBHE>] [hereinafter Silver-Greenberg, *Pension-Advance*].

16. See, e.g., *James v. Nat'l Fin., LLC*, 132 A.3d 799, 811 (Del. Ch. 2016) (“Put mildly, widespread controversy exists over high-interest credit products that are predominantly marketed to and used by lower-income, credit-impaired consumers.”).

17. See *infra* Part I.A.

18. See David Lazarus, *Probate No Time for Preying*, S.F. GATE (Oct. 13, 2004, 4:00 AM), <http://www.sfgate.com/business/article/Probate-no-time-for-preying-2717738.php> [<https://perma.cc/3JPK-UHZ3>] [hereinafter Lazarus, *Probate*]; David Lazarus, *Sorry for Your Loss—Would a Cash Advance Ease Your Pain?*, S.F. GATE (Oct. 8, 2004, 4:00 AM), <http://www.sfgate.com/business/article/Sorry-for-your-loss-would-a-cash-advance-ease-2719166.php> [<https://perma.cc/G2X2-PJN4>] [hereinafter Lazarus, *Sorry for Your Loss*]; Brigid McMenemy, *For Impatient Heirs*, FORBES (Aug. 7, 2000, 12:00 AM), <https://www.forbes.com/forbes/2000/0807/6604110a.html> [<https://perma.cc/32FA-YQQ2>].

19. Likewise, only a single, unpublished federal district court opinion has considered whether probate loans fall under the TILA. See *Reed v. Val-Chris Invs., Inc.*, No. 11CV371 BEN (WMC), 2011 WL 6028001, at *2 (S.D. Cal. Dec. 5, 2011); see also *infra* note 328.

20. See *infra* notes 167-70 and accompanying text.

21. See Robert Frank, *\$59 Trillion to Go to Heirs, Charity by 2061*, CNBC (May 29, 2014, 5:00 PM), <http://www.cnbc.com/2014/05/28/greatest-wealth-transfer-in-history-underway-59-trillion-to-heirs-charity-by-2061.html> [<https://perma.cc/P8SJ-67MN>].

In 2016, a coauthor and I published an article called *Probate Lending*, which began to fill this gap.²² We used a dataset that I had previously assembled of all 594 testate and intestate administrations stemming from deaths that occurred in 2007 in Alameda County, California.²³ Because California requires probate lenders to file their contracts in the judicial record, we were able to examine information that would normally be private, such as the amounts borrowed and repaid and the length of time between the advance and the end of the probate case.²⁴ We found seventy-seven loans, in which firms paid \$808,500 to acquire \$1,378,786 in decedents' assets.²⁵

This companion Article picks up where *Probate Lending* left off. It augments the research I used to cowrite *Probate Lending* with a study of every new matter that came on calendar in Alameda County between March 1, 2009, and December 31, 2010. This additional sample increases the total size of my dataset to 2100 estates and 291 loans. It leaves little doubt that probate lending is a lucrative business. Indeed, the ten different firms in my data entered into deals with borrowers from a dozen states, obtaining nearly \$5 million in property.

In addition, this Article situates probate lending within the larger debate over fringe finance. *Probate Lending* compared probate lenders to litigation lenders (companies that buy a stake in a pending civil lawsuit).²⁶ This Article goes further by considering how probate loans stack up against a variety of fringe products, including tax

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

23. See *id.* at 130-31. I previously used this dataset to write two other articles. See generally David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605 (2015) [hereinafter Horton, *In Partial Defense*]; David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094 (2015).

24. See Horton & Chandrasekher, *supra* note 22, at 130-31.

25. See *id.* at 132-33. For two articles that criticize *Probate Lending*, see generally Jeremy Kidd, Clarifying the "Probate Lending" Debate: A Response to Professors Horton and Chandrasekher (Mar. 10, 2017) (unpublished manuscript) [hereinafter Kidd, Response], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2870615 [<https://perma.cc/6KK4-3BTQ>]; and Jeremy Kidd, Probate Funding and the Litigation Funding Debate (July 28, 2017) (unpublished manuscript) [hereinafter Kidd, Funding], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3010374 [<https://perma.cc/BU8V-2HRM>]. I address Professor Kidd's work *infra* notes 183, 185, 220, 321.

26. See Horton & Chandrasekher, *supra* note 22, at 110-18.

refund anticipation loans, payday loans, and pension loans. The Article contends that many of the fairness concerns that have prompted courts and policymakers to regulate these arrangements²⁷ also plague probate lending. For instance, because probate lenders charge markups of thousands of dollars, but only wait an average of about fifteen months until the estate closes, the mean APR in my dataset is a sky-high 50 percent.²⁸ Moreover, consumers are ill-equipped to assess the pros and cons of a probate loan. Unlike lenders, who routinely participate in probate, most heirs and beneficiaries are unfamiliar with the process. For these reasons, governmental intervention into the market for inheritance rights is necessary.

The Article then considers how to regulate probate lending. It starts by urging the California legislature to revise its probate lending statute by making judicial review of probate loans mandatory, rather than permissive.²⁹ In addition, it doubles down on one of *Probate Lending*'s most provocative claims: that probate lending falls within the ambit of usury laws and the TILA.³⁰ Admittedly, these venerable consumer protection measures are subject to an important limit: they only govern advances of money that are certain to be repaid.³¹ On their face, probate loans do not seem to meet this benchmark. Because they are structured as nonrecourse assignments of inheritance rights, lenders recover nothing if the estate becomes insolvent.³² Yet my data shows that this hazard is illusory. Companies recovered the full amount of the principal and interest on 97.5 percent of their probate loans.³³ Finally, to fill gaps in states that have abolished or weakened their usury laws, the Article proposes that courts review probate loans under the contract defense of unconscionability.

The Article contains three Parts. Part I lays the groundwork by surveying three well-known fringe products—tax refund anticipation loans, payday loans, and pension loans—and comparing them

27. See *infra* Part I.A.

28. See *infra* Part II.B.1.

29. See *infra* Part III.A.

30. See *infra* Part III.B.

31. See *infra* notes 157-61 and accompanying text.

32. See *infra* notes 293-302 and accompanying text.

33. See *infra* Part II.B.3.

to probate loans. Part II describes my research methodology and presents my results. Part III uses this data to offer guidance to courts and policymakers as they confront the budding practice of borrowing against rights in a decedent's estate.

I. BORROWING ON THE FRINGES

This Part describes how probate lending fits within the larger universe of fringe finance. It first describes how fringe products have sparked heated debate and attracted interest from Congress, agencies, state legislatures, and judges. It then pivots to probate loans. It demonstrates that we know little about probate lending, and that the practice is subject to very few legal constraints.

A. *The Rise of Fringe Finance*

Until the end of the twentieth century, consumer credit was one of the most regulated industries in America. For starters, usury statutes kept predatory lenders at bay. Although these laws are riddled with exceptions,³⁴ they generally cap the amount of annual interest on a loan for “personal, family, or household purposes” at between 8 and 12 percent.³⁵ Likewise, in 1968, Congress passed the TILA.³⁶ The TILA requires lenders to disclose information to

34. See, e.g., CAL. CIV. CODE § 1916.1 (West 2017) (exempting some loans made by licensed real estate agents); N.J. STAT. ANN. § 31:1-1(e)(1) (West 2017) (excluding loans for \$50,000 or more, with the exception of those secured by a first lien on residential real estate); WASH. REV. CODE § 63.14.010(7) (2017) (carving out “retail installment contract[s]”).

35. See CAL. CONST. art. XV, § 1(1) (10 percent); OKLA. CONST. art. XIV, § 2 (10 percent); ALA. CODE § 8-8-1 (2017) (8 percent); ALASKA STAT. § 45.45.010(a) (2017) (10.5 percent); COLO. REV. STAT. § 5-2-201(1) (2017) (12 percent); 815 ILL. COMP. STAT. 205/4(1) (2017) (9 percent); MICH. COMP. LAWS § 438.31(1) (2017) (7 percent); MINN. STAT. § 334.01(1) (2017) (8 percent); MISS. CODE ANN. § 75-17-1(2) (2017) (10 percent); MO. REV. STAT. § 408.030(1) (2017) (10 percent); OHIO REV. CODE ANN. § 1343.01(A) (West 2017) (8 percent); 41 PA. STAT. AND CONS. STAT. ANN. §§ 201(a), 202 (West 2017) (6 percent); WASH. REV. CODE § 19.52.020(1)(a) (2017) (12 percent); cf. N.J. STAT. ANN. § 31:1-1(a) (West 2017) (16 percent); N.Y. GEN. OBLIG. LAW § 5-501(1) (McKinney 2017) (6 percent); TEX. FIN. CODE ANN. § 342.004(a) (West 2017) (10 percent).

36. Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1608, 1610-1613, 1631-1635, 1637-1651, 1661-1667f (2012)).

prospective clients in a regimented format³⁷ and imposes strict liability for violating these mandates.³⁸

However, near the dawn of the new millennium, the landscape changed. First, the Supreme Court dealt usury statutes a body blow with its decision in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*³⁹ The National Bank Act (NBA) allows national banks to charge “interest at the rate allowed by the laws of the State ... where the bank is located.”⁴⁰ The Justices interpreted this provision to permit national banks to charge all of their customers whatever interest rate was allowed in the jurisdiction where they are headquartered.⁴¹ In turn, this prompted national banks to set up shop within states that have no usury limits—such as Delaware, South Dakota, and Utah—and “export” this laissez-faire regime throughout the country.⁴²

Second, credit became a hot commodity. Consumer debt soared from about \$650 billion in the late 1970s to \$5.6 trillion in 1998.⁴³ This massive increase was driven largely by the prime market, which includes home mortgages and credit cards.⁴⁴ But as Americans began to borrow in record numbers, entrepreneurs saw opportunities in the shadowy subprime sector.⁴⁵ As the next Subsections describe, these entrepreneurs designed a range of financial arrangements that try to evade consumer protection laws.

37. *E.g.*, 15 U.S.C. §§ 1631-1632 (2012).

38. *See, e.g.*, *Brodo v. Bankers Tr. Co.*, 847 F. Supp. 353, 356 (E.D. Pa. 1994) (noting that the TILA imposes liability “even if the violation is technical and unintended” (citing *Smith v. Fid. Consumer Disc. Co.*, 898 F.2d 896, 898 (3d Cir. 1990))).

39. *See* 439 U.S. 299, 313-14 (1978).

40. 12 U.S.C. § 85 (2012).

41. *See Marquette Nat'l Bank*, 439 U.S. at 313; *see also* *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 745-46 (1996) (interpreting the term “interest” in section 85 of the NBA to include a broad range of fees).

42. *See* NEV. REV. STAT. § 99.050 (2016); S.D. CODIFIED LAWS § 54-3-1.1 (2017); UTAH CODE ANN. § 15-1-1(1) (LexisNexis 2017); *see also* Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation*, 88 MINN. L. REV. 518, 552 (2004) (discussing *Marquette's* aftermath). State-chartered banks can also import rates under section 27 of the Federal Deposit Insurance Act. *See* 12 U.S.C. § 1831d(a) (2012).

43. *See* *Drysdale & Keest*, *supra* note 13, at 591-92.

44. *See id.* at 594.

45. *See id.*

1. *Tax Refund Anticipation Loans*

In the 1980s, tax preparers and banks teamed up to provide what they called “instant tax refunds,” and later become known as refund anticipation loans (RALs).⁴⁶ This service involves three steps. First, a tax preparer calculates a consumer’s expected refund.⁴⁷ Second, the tax preparer performs due diligence by checking the IRS’s “debt indicator,” which reveals whether the consumer’s check will be offset by child support or student loan obligations.⁴⁸ Third, if the consumer is, in fact, entitled to money back from the government, a financial institution offers to pay this sum immediately in return for a small service charge.⁴⁹

RALs were once wildly popular. H&R Block, Jackson Hewitt, Liberty Tax Service, Instant Tax Service, Bank One, JPMorgan Chase, HSBC, Republic Bank & Trust Company, and Santa Barbara Bank & Trust offered the product.⁵⁰ These companies issued between eight and thirteen million RALs each year, generating hundreds of millions of dollars in profits.⁵¹ In 2002, consumers paid more than \$1 billion in RAL fees.⁵²

46. See GARY RIVLIN, *BROKE, USA: FROM PAWNSHOPS TO POVERTY, INC.—HOW THE WORKING POOR BECAME BIG BUSINESS* 27, 171-77 (2010). The IRS prohibits tax preparers from issuing RALs themselves; hence, these companies partnered with financial institutions. Barr, *supra* note 13, at 172-73; see Rev. Proc. 98-50, 1998-2 C.B. 375.

47. See U.S. DEP’T OF THE TREASURY, *CHARACTERISTICS OF USERS OF REFUND ANTICIPATION LOANS AND REFUND ANTICIPATION CHECKS* 3 (2010), <https://www.treasury.gov/resource-center/financial-education/Documents/Characteristics%20of%20Users%20of%20Refund%20Anticipation%20Loans%20and%20Refund%20Anticipation%20Checks.pdf> [https://perma.cc/3258-GPLL].

48. *Cf. id.* at 3 n.1, 5. The IRS stopped providing the debt indicator in 1995, but began again in 1999. See Barr, *supra* note 13, at 173.

49. See U.S. DEP’T OF THE TREASURY, *supra* note 47, at 3.

50. See *id.* at 5-6.

51. See CHI CHI WU & JEAN ANN FOX, *MAJOR CHANGES IN THE QUICK TAX REFUND LOAN INDUSTRY* 6 (2010), http://www.nclc.org/images/pdf/high_cost_small_loans/report-ral-2010.pdf [https://perma.cc/E75P-8AER]; see also U.S. DEP’T OF THE TREASURY, *supra* note 47, at 5, 6 fig.1. Companies also offered refund anticipation checks (RACs), in which a bank deposits the refund into a dummy bank account and then issues a check or prepaid debit card to the customer. See U.S. DEP’T OF THE TREASURY, *supra* note 47, at 3. RACs are marketed to taxpayers who do not have bank accounts. See Blake Ellis, *New Tax Refund Loans Carry Sky-High Fees and Rates*, CNN (Mar. 6, 2013, 10:30 AM), <http://money.cnn.com/2013/03/06/pf/taxes/tax-refund-loans/index.html> [https://perma.cc/987D-MFXX].

52. See Stacy Cowley, *Tax Refund Loans Are Revamped and Resurrected*, N.Y. TIMES (Jan. 15, 2017), <https://www.nytimes.com/2017/01/15/business/tax-refund-loans-are-revamped-and->

However, RALs drew fire from academics and consumer watchdogs. These critics raised three main points. First, they accused tax preparers and banks of targeting low-income communities.⁵³ Indeed, more than half of RAL customers received the Earned Income Tax Credit (a subsidy provided to the working poor).⁵⁴ Second, they argued that taxpayers did not understand RAL terms. For example, RALs usually required consumers to cover any shortfall between their anticipated and actual refunds.⁵⁵ Yet surveys discovered that 70 percent of consumers did not realize that they would be on the hook if their check from the IRS was less than expected.⁵⁶ Third, RALs featured astronomical interest rates. In raw dollar amounts, RAL fees seemed modest: they usually ranged from \$30 to \$100.⁵⁷ But because many taxpayers received their refunds by electronic deposit no later than two weeks after they filed their return, the APR on a RAL often reached the triple digits.⁵⁸ For example, a \$1500 RAL with slightly more than a \$60 fee that is repaid within ten days would be the equivalent of a loan with an APR of 149 percent.⁵⁹

Tax preparation chains and banks mounted a full-throated defense. They claimed that RALs were valuable for customers who could not bank electronically and thus would need to wait longer for

resurrected.html?_r=0 [https://perma.cc/2F5P-RWLW].

53. See Barr, *supra* note 13, at 169, 171-72; Cords, *supra* note 13, at 377-81; Diane Hellwig, Note, *Exposing the Loansharks in Sheep's Clothing: Why Re-regulating the Consumer Credit Market Makes Economic Sense*, 80 NOTRE DAME L. REV. 1567, 1598-1600 (2005); Ann Carrns, *After This Year, No More Tax Refund Loans*, N.Y. TIMES: BUCKS (Jan. 19, 2012, 1:53 PM), <https://bucks.blogs.nytimes.com/2012/01/19/after-this-year-no-more-tax-refund-loans/> [https://perma.cc/5CQL-VFYL].

54. See Bernice Yeung, *Tax Refund Scheme Targets the Working Poor*, NATION (Apr. 17, 2006), <https://www.thenation.com/article/tax-refund-scheme-targets-working-poor/> [https://perma.cc/NBJ8-ETSV].

55. See Book, *supra* note 13, at 99.

56. See CHI CHI WU & JEAN ANN FOX, PICKING TAXPAYERS' POCKETS, DRAINING TAX RELIEF DOLLARS: REFUND ANTICIPATION LOANS STILL SLICING INTO LOW-INCOME AMERICANS' HARD-EARNED TAX REFUNDS 8 (2005), https://www.nclc.org/images/pdf/high_cost_small_loans/ral-2005-ral-report.pdf [https://perma.cc/C9VZ-L5MY].

57. See Barr, *supra* note 13, at 169-70; Ellis, *supra* note 51.

58. See Press Release, Nat'l Consumer Law Ctr., *One Last Bite: Final Year for Bank Tax Refund Anticipation Loans* (Jan. 17, 2012), <http://www.nclc.org/images/pdf/pr-reports/ral-pr-2012.pdf> [https://perma.cc/NC7L-BJF5].

59. See Carrns, *supra* note 53.

a paper check from the IRS.⁶⁰ Likewise, they touted their product as “a critical way to pay off holiday debt, catch up on overdue bills[,] or cover emergency expenses like car repairs.”⁶¹

Nevertheless, private plaintiffs, public interest organizations, and state attorneys general filed class actions under usury laws and the TILA against RAL providers.⁶² Tax preparers and banks responded by noting that usury laws and the TILA only govern “loans.”⁶³ In turn, they contended that RALs were not “loans,” but rather “assignment[s] of [the] right to receive an income tax refund.”⁶⁴ However, most courts rejected this argument, reasoning that RALs bear the hallmarks of a “loan,” fronting “money to taxpayers in exchange for the right to collect a payment.”⁶⁵ On the other hand, tax preparers that had joined forces with national banks had more success using *Marquette* as a shield against usury laws. For example, in *Christiansen v. Beneficial National Bank*, a federal district court held that the NBA shielded a RAL with an APR of more than 245 percent from Georgia’s usury statute.⁶⁶

Likewise, efforts by state lawmakers to regulate RALs achieved mixed results. Thirteen jurisdictions passed legislation that require tax preparers and banks to inform consumers of the loan’s salient features, including its estimated APR.⁶⁷ In addition, a few statutes went further. Connecticut and New Jersey tried to cap RAL interest

60. See Yeung, *supra* note 54.

61. Cowley, *supra* note 52.

62. See, e.g., *Basile v. H & R Block, Inc.*, 897 F. Supp. 194, 195 (E.D. Pa. 1995); Complaint for Injunction, Civil Penalties & Other Relief at 12-13, *People v. JTH Tax, Inc.*, No. CGC-07-460778, 2007 WL 6832818 (Cal. Super. Ct. Feb. 26, 2007); Yeung, *supra* note 54.

63. See *Cullen v. Bragg*, 350 S.E.2d 798, 799-801 (Ga. Ct. App. 1986); see also *State ex rel. Salazar v. Cash Now Store, Inc.*, 31 P.3d 161, 164 (Colo. 2001) (noting that the district court found that the RALs were merely “purchases of choses in action”).

64. See *Cullen*, 350 S.E.2d at 799.

65. *Salazar*, 31 P.3d at 166-67; see also *Drysdale & Keest*, *supra* note 13, at 644 (reporting that state attorney general opinions and trial courts held that RALs “were in fact loans subject to the usury law”). But see *Cullen*, 350 S.E.2d at 799 (reaching the opposite conclusion).

66. 972 F. Supp. 681, 684 (S.D. Ga. 1997).

67. See CAL. BUS. & PROF. CODE § 22251(g) (West 2017); 815 ILL. COMP. STAT., 177/10 (2017); MINN. STAT. § 270C.445 (2017); NEV. REV. STAT. § 604B.210 (2016); N.J. STAT. ANN. § 17:11D-3 (West 2017); N.Y. GEN. BUS. LAW § 372(e)(2)(i) (McKinney 2017); N.C. GEN. STAT. § 53-249(d) (2017); OR. REV. STAT. §§ 673.605, 673.712 (2017); TENN. CODE ANN. § 62-29-202(d) (2017); TEX. FIN. CODE ANN. § 352.004 (West 2017); VA. CODE ANN. § 6.2-2500 (2017); WASH. REV. CODE § 19.265.030 (2017); WIS. STAT. §§ 421.301, 422.310 (2017).

rates,⁶⁸ but courts held that the NBA preempted these rules when applied to national banks.⁶⁹ Conversely, North Carolina had more success with its Refund Anticipation Loan Act.⁷⁰ This rubric required lenders to file a fee schedule with an administrative agency, which decides whether it is fair.⁷¹ Because the law exempted national banks, the state supreme court upheld it against a preemption challenge.⁷²

Finally, in 2010, the Obama Administration took decisive action.⁷³ The IRS announced that it would no longer provide RAL issuers with the “debt indicator.”⁷⁴ Without this key component of the RAL-creation process, the three biggest banks in the industry—HSBC, JPMorgan Chase, and Santa Barbara Bank & Trust—folded up their tents.⁷⁵ Then, in February 2011, the Federal Deposit Insurance Commission notified the remaining institutions willing to underwrite RALs that lending against tax refunds without the benefit of the debt indicator was unsafe.⁷⁶ Thus, RAL sales declined to about one million per year.⁷⁷

2. *Payday Loans*

Payday lending began about three decades ago as spinoff from check-cashing services.⁷⁸ On weekends, when banks were closed, some stores would cash personal checks for a small fee.⁷⁹ Eventually, they agreed to accept checks and not deposit them for several

68. See CONN. GEN. STAT. § 42-480(d) (2017); N.J. STAT. ANN. §§ 17:11D-1, 17:11D-3.

69. See *Pac. Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 353-54 (2d Cir. 2008); *Pac. Capital Bank, N.A. v. Milgram*, No. 08-0223 (FLW), 2008 WL 700180, at *1, *8 (D.N.J. Mar. 13, 2008).

70. See N.C. GEN. STAT. § 53-249.

71. See *id.* § 53-249(a)-(b).

72. See *N.C. Ass'n of Elec. Tax Filers, Inc. v. Graham*, 429 S.E.2d 544, 549, 551 (N.C. 1993).

73. In 2006, Congress had taken a small step in this direction by prohibiting tax preparers and banks from charging military personnel an APR of higher than 36 percent on a RAL. See 32 C.F.R. § 232.4(b) (2017).

74. See Press Release, IRS, IRS Removes Debt Indicator for 2011 Tax Filing Season (Aug. 5, 2010), <https://www.irs.gov/pub/irs-news/ir-10-089.pdf> [<https://perma.cc/46T5-4XKW>].

75. See Press Release, Nat'l Consumer Law Ctr., *supra* note 58.

76. See *id.*

77. See Cowley, *supra* note 52.

78. See Mann & Hawkins, *supra* note 14, at 862.

79. See *id.*

days, charging slightly more for the extra risk.⁸⁰ This practice evolved into payday lending.⁸¹

The payday lending market has grown exponentially. In 1990, there were about two hundred payday lenders in the United States.⁸² Today, there are more than twenty thousand, which exceeds the combined number of McDonald's restaurants, J.C. Penney outlets, and Target stores nationwide.⁸³ These companies serve nearly twenty million households and reap about \$40 billion each year.⁸⁴

In a typical payday loan, a borrower fills out an application and provides a driver's license, pay stub, and bank statement.⁸⁵ She then writes a check for between \$50 and \$500, postdating it to coincide with her next payday.⁸⁶ In return, the lender gives the consumer a smaller amount of cash, usually withholding about \$15 for every \$100 advanced.⁸⁷ For instance, on February 1, a customer might cut a check for \$230, date it February 15, and receive \$200 immediately. When the due date arrives, the lender cashes the check unless the borrower has already repaid the principal and the markup.⁸⁸

Payday lending is polarizing for several reasons. For one, as with RALs, the short timeframe between the consumer's receipt of the cash and the due date transforms small fees into high APRs.⁸⁹ Indeed, studies show that the APRs on payday loans can be as high

80. *See id.*

81. *See id.*

82. *See* JOHN P. CASKEY, *THE ECONOMICS OF PAYDAY LENDING* 11 (2002).

83. *See* Paige Marta Skiba & Jean Xiao, *Consumer Litigation Funding: Just Another Form of Payday Lending?*, 80 *LAW & CONTEMP. PROBS.*, no. 3, 2017, at 117, 120.

84. Astra Taylor, *Why It's So Hard to Regulate Payday Lenders*, *NEW YORKER* (Aug. 3, 2016), <http://www.newyorker.com/business/currency/why-its-so-hard-to-regulate-payday-lenders> [<https://perma.cc/4EBF-52ZZ>].

85. *See* Johnson, *supra* note 14, at 9-10.

86. *See* *Smith v. Check-N-Go, Inc. of Ill.*, 200 F.3d 511, 513 (7th Cir. 1999); Johnson, *supra* note 14, at 9-10.

87. *See* Mann & Hawkins, *supra* note 14, at 861-62.

88. *See* Johnson, *supra* note 14, at 10.

89. To use the example above, a lender who receives \$230 two weeks after making a \$200 advance earns an APR of nearly 400 percent.

as 800 percent.⁹⁰ In addition, payday loans often “roll over.”⁹¹ A rollover occurs when a borrower pays a service charge to postpone the repayment date or takes out a new loan to repay an existing loan.⁹² The Consumer Financial Protection Bureau (CFPB) found that 80 percent of payday loans are renewed within fourteen days.⁹³ In 2015, more borrowers in California entered into ten payday loans than those who took out only one.⁹⁴ According to the Center for Responsible Lending, rollovers are so common that “[t]he typical payday borrower pays back \$793 for a \$325 loan.”⁹⁵ These statistics are commonly cited as proof that consumers are wildly over-optimistic about their ability to discharge their debt.⁹⁶

But payday lenders have defended their vocation. For one, they argue that their high APRs are necessary because defaults are endemic.⁹⁷ Indeed, write-offs account for one-fifth of their operating costs.⁹⁸ As one payday lending advocate puts it, because the *true*

90. See EDMUND MIERZWINSKI ET AL., U.S. PUB. INTEREST RESEARCH GRP. & CONSUMER FED’N OF AM., SHOW ME THE MONEY! A SURVEY OF PAYDAY LENDERS AND REVIEW OF PAYDAY LENDER LOBBYING IN STATE LEGISLATURE 1, 7 (2000), https://consumerfed.org/wp-content/uploads/2016/12/Show-Me-the-Money_Report.pdf [<https://perma.cc/K6V7-NR6S>].

91. See Johnson, *supra* note 14, at 56-58.

92. *Id.* at 56-57.

93. See OFFICE OF RESEARCH, CONSUMER FIN. PROT. BUREAU, CFPB DATA POINT: PAYDAY LENDING 4 (2014), http://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf [<https://perma.cc/AXH9-CSFL>].

94. See *Payday Lending Is Declining*, ECONOMIST (Apr. 8, 2017), <http://www.economist.com/news/finance-and-economics/21720297-regulators-squeeze-industry-payday-lending-declining> [<https://perma.cc/9G8D-ZXWN>].

95. URIAH KING ET AL., FINANCIAL QUICKSAND: PAYDAY LENDING SINKS BORROWERS IN DEBT WITH \$4.2 BILLION IN PREDATORY FEES EVERY YEAR 6 (2006), http://www.responsiblelending.org/sites/default/files/research-publication/rr012-Financial_Quicksand-1106.pdf [<https://perma.cc/UA72-RZFC>].

96. See, e.g., Bar-Gill & Warren, *supra* note 14, at 56 (“The payday loan product is arguably designed to take advantage of consumers’ optimism bias and their consistent underestimation of the risk of nonpayment.”); Karen E. Francis, Note, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Payday-Loan Industry*, 88 TEX. L. REV. 611, 629-30 (2010). *But see* Robert DeYoung et al., *Should Payday Lenders Be Banned?*, NEWSWEEK (Oct. 25, 2015, 4:02 PM), <http://www.newsweek.com/should-payday-lenders-be-banned-386766> [<https://perma.cc/YP22-KBWA>] (challenging the idea that payday lending customers are unduly optimistic).

97. See Tim Worstall, *Why Payday Loans Are So Expensive*, FORBES (Dec. 20, 2011, 1:44 PM), <https://www.forbes.com/sites/timworstall/2011/12/20/why-payday-loans-are-so-expensive/#68109c472039> [<https://perma.cc/WA5S-KX9D>].

98. See Mark Flannery & Katherine Samolyk, *Payday Lending: Do the Costs Justify the Price?* 10 (FDIC Ctr. for Fin. Research, Working Paper No. 2005-09, 2005), <https://www.fdic.gov>.

profit on every failed loan is zero, “the stratospheric APRs are only expected rates, not actual rates.”⁹⁹ Lenders also contend that their product opens doors for low-income individuals or those with tarnished credit histories.¹⁰⁰ They claim that eliminating their services will drive vulnerable populations toward even worse arrangements, such as car title and installment loans, which allow the lender to repossess the debtor’s property upon default.¹⁰¹

These arguments have not persuaded regulators, which have subjected payday lenders to a phalanx of rules. At the federal level, companies must comply with the TILA.¹⁰² Although lenders initially argued that the statute did not apply to them because they were merely cashing checks—not making “loans”—the vast majority of courts disagreed.¹⁰³

Likewise, many states have adopted payday lending legislation. Arizona, Arkansas, Connecticut, the District of Columbia, Georgia, Maryland, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, Vermont, and West Virginia either expressly ban these transactions or do so through the back door by requiring them

gov/bank/analytical/cfr/2005/wp2005/2005-09.pdf [https://perma.cc/XGX2-BTT7].

99. Robert DeYoung, *What’s Missing from Payday Lending Debate: Facts*, AM. BANKER (Nov. 25, 2015, 9:30 AM), <https://www.americanbanker.com/opinion/whats-missing-from-payday-lending-debate-facts> [https://perma.cc/B4JK-WSY4].

100. See Stephen L. Carter, *Restrictions on Payday Loans Hurt the Poor*, BLOOMBERG QUINT (June 10, 2016, 9:16 AM), <https://www.bloombergquint.com/opinion/2016/06/09/restrictions-on-payday-loans-hurt-the-poor> [https://perma.cc/2U7K-6YSY] (“It’s important to remember that reducing the supply of credit to high-risk borrowers doesn’t necessarily reduce the demand for credit by high-risk borrowers.”); see also Paige Marta Skiba, *Regulation of Payday Loans: Misguided?*, 69 WASH. & LEE L. REV. 1023, 1041-42 (2012) (surveying the empirical literature and concluding that “while there certainly exists evidence that payday loans are harmful to some consumers in some situations, there is as much evidence that payday loans help consumers”).

101. See Carter, *supra* note 100; cf. Mann & Hawkins, *supra* note 14, at 886-94 (“[T]he evidence suggests that bans may well cause consumers to borrow from sources that provide products that are less beneficial.”). But see Michael Kenneth, *Payday Lending: Can “Reputable” Banks End Cycles of Debt?*, 42 U.S.F. L. REV. 659, 665 (2008) (“[S]tatistics on frequency of use of payday loans demonstrate that payday loans are not used just for emergencies, but become a regular part of most borrowers’ lives.”).

102. See generally 15 U.S.C. §§ 1601-1608, 1610-1613, 1631-1635, 1637-1651, 1661-1667f (2012).

103. See, e.g., *Turner v. E-Z Check Cashing of Cookeville, TN, Inc.*, 35 F. Supp. 2d 1042, 1048 (M.D. Tenn. 1999); *Hamilton v. York*, 987 F. Supp. 953, 957-58 (E.D. Ky. 1997). In 2000, the Federal Reserve amended Regulation Z (the primary interpretive guide to the TILA) to clarify that payday loans fall within the ambit of the statute. See 12 C.F.R. § 226 (2017).

to comply with their usury laws.¹⁰⁴ Other jurisdictions impose stringent licensing requirements on lenders,¹⁰⁵ limit rollovers,¹⁰⁶ or cap the amount,¹⁰⁷ the term,¹⁰⁸ or the APR¹⁰⁹ of payday loans.

104. *See, e.g.*, ARK. CONST. amend. LXXXIX, § 3; ARIZ. REV. STAT. ANN. § 6-613 (2017); CONN. GEN. STAT. § 36a-556 (2017); D.C. CODE § 26-319 (2017); GA. CODE ANN. § 16-17-1 (2017); MD. CODE ANN., COM. LAW § 12-314 (LexisNexis 2017); MASS. GEN. LAWS ch. 140, § 96 (2017); N.J. STAT. ANN. § 17:15A-47 (West 2017); N.Y. BANKING LAW § 373 (McKinney 2017); N.C. GEN. STAT. § 53-173 (2017); 63 PA. STAT. AND CONS. STAT. ANN. § 2325 (West 2017); VT. STAT. ANN. tit. 8, § 2519 (2017); W. VA. CODE § 32A-3-1 (2016).

105. *See, e.g.*, CAL. FIN. CODE § 23005 (West 2017); IDAHO CODE § 28-46-402 (2017); 815 ILL. COMP. STAT. 122/3-3 (2017); IOWA CODE § 533D.3 (2017); KY. REV. STAT. ANN. § 286.9-040 (West 2017); MICH. COMP. LAWS § 487.2131(1) (2017); NEB. REV. STAT. § 45-904 (2010); N.D. CENT. CODE § 13-08-02 (2017); OHIO REV. CODE ANN. § 1321.36 (LexisNexis 2017); OR. REV. STAT. § 725A.020 (2017); S.D. CODIFIED LAWS § 54-4-52 (2017); TENN. CODE ANN. § 45-17-104 (2017); UTAH CODE ANN. § 7-23-201 (LexisNexis 2017); VA. CODE ANN. § 6.2-1801 (2017); WASH. REV. CODE § 31.45.030 (2017).

106. Statutes that outlaw rollovers include CAL. FIN. CODE § 23036(b), FLA. STAT. § 560.404(18) (2017), 815 ILL. COMP. STAT. 122/2-30, IOWA CODE § 533D.10(1)(e), MICH. COMP. LAWS § 487.2153, MINN. STAT. § 47.60 subdiv. 2(f) (2017), OHIO REV. CODE ANN. § 1321.41(E), (G), TENN. CODE ANN. § 45-17-112(q), VA. CODE ANN. § 6.2-1816(6), and WYO. STAT. ANN. § 40-14-364 (2017). Other laws only allow a specified number of rollovers. *See, e.g.*, COLO. REV. STAT. § 5-3.1-108(1) (2017) (permitting one rollover); DEL. CODE ANN. tit. 5, § 2235A(a)(2) (2017) (four); N.D. CENT. CODE § 13-08-12(12) (one); OR. REV. STAT. § 725A.064(6) (two); S.D. CODIFIED LAWS § 54-4-65 (four); WASH. REV. CODE § 31.45.073(2) (one); WIS. STAT. § 138.14(12)(a) (2017) (one).

107. *See, e.g.*, ALASKA STAT. § 06.50.410 (2017) (\$500); COLO. REV. STAT. § 5-3.1-106(1) (\$500); DEL. CODE ANN. tit. 5, § 2227(7) (\$1000); FLA. STAT. § 560.404(5) (\$500); IDAHO CODE § 28-46-412(2) (\$1000); IOWA CODE § 533D.10(1)(b) (\$500); KAN. STAT. ANN. § 16a-2-404(1)(c) (2017) (\$500); MICH. COMP. LAWS § 487.2153(1) (\$600); MINN. STAT. § 47.60 subdiv. 1(a) (\$350); MISS. CODE ANN. § 75-67-519(2) (2017) (\$500); MO. REV. STAT. § 408.500(1) (2017) (\$500); N.H. REV. STAT. ANN. § 399-A:17(VI) (2017) (\$500); N.D. CENT. CODE § 13-08-12(3) (\$500); OHIO REV. CODE ANN. § 1321.41(E) (\$500); OKLA. STAT. tit. 59, § 3106(7) (2017) (\$500); 19 R.I. GEN. LAWS § 19-14.4-5.1(a) (2017) (\$500); TENN. CODE ANN. § 45-17-112(o) (\$500); VA. CODE ANN. § 6.2-1816(5) (\$500); WASH. REV. CODE § 31.45.073(2) (“seven hundred dollars or thirty percent of the gross monthly income of the borrower, whichever is lower”); WIS. STAT. § 138.14(12)(b) (the lesser of “\$1,500 or 35 percent of the customer’s gross monthly income”).

108. Many restrict loan duration to about a month. *See, e.g.*, IOWA CODE § 533D.10(1)(c) (thirty-one days); MICH. COMP. LAWS § 487.2153(4)(b) (thirty-one days); MINN. STAT. § 47.60 subdiv. 2(b) (thirty days); OHIO REV. CODE ANN. § 1321.39(B) (thirty-one days); OR. REV. STAT. § 725A.064(3) (thirty-one days); TENN. CODE ANN. § 45-17-112(d) (thirty-one days); WYO. STAT. ANN. § 40-14-363(b) (one month); *cf.* DEL. CODE ANN. tit. 5, § 2227(7) (sixty days); WASH. REV. CODE § 31.45.073(2) (forty-five days); WIS. STAT. § 138.14(1)(k) (ninety days).

109. *See, e.g.*, CAL. FIN. CODE § 23036(a) (limiting the APR to “15 percent of the face amount of the check”); COLO. REV. STAT. § 5-3.1-105 (45 percent); FLA. STAT. § 560.404(6) (10 percent of the check plus no more than a \$5 verification fee); IOWA CODE § 533D.9(1) (15 percent of the first \$100 and \$10 on each further \$100 increment); KY. REV. STAT. ANN. § 286.9-100(1) (\$15 per each \$100); MONT. CODE ANN. § 31-1-722(2) (2017) (36 percent); OHIO REV. CODE ANN. § 1321.40(A) (28 percent); OR. REV. STAT. § 725A.064(1) (36 percent); TENN.

Payday lenders have tried mightily to navigate around these commands. Some sought to insulate themselves from state law claims by partnering with national banks and invoking *Marquette*.¹¹⁰ In response, plaintiffs began to file lawsuits that omitted the bank and named only the payday lender as a defendant.¹¹¹ To this day, it remains unclear whether the NBA preempts such a surgically tailored complaint.¹¹² In addition, lenders forged alliances with Native American tribes in order to invoke sovereign immunity—a gambit that has also divided courts.¹¹³

CODE ANN. § 45-17-112(b) (15 percent); VA. CODE ANN. § 6.2-1817(A) (36 percent).

110. See, e.g., *Hudson v. Ace Cash Express, Inc.*, No. IP 01-1336-C H/S, 2002 WL 1205060, at *4 (S.D. Ind. May 30, 2002); *Goleta Nat'l Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 713 (E.D.N.C. 2002); *Colorado ex rel. Salazar v. Ace Cash Express, Inc.*, 188 F. Supp. 2d 1282, 1284 (D. Colo. 2002).

111. See, e.g., *Cmty. State Bank v. Knox*, 850 F. Supp. 2d 586, 590 (M.D.N.C. 2012), *aff'd*, 523 F. App'x 925 (4th Cir. 2013); *Flowers v. EZPawn Okla., Inc.*, 307 F. Supp. 2d 1191, 1204 (N.D. Okla. 2004).

112. Most of the case law on the subject deals with the threshold issue of federal jurisdiction. Under the complete preemption doctrine, complaints under state law can nevertheless give rise to federal question jurisdiction if “the pre-emptive force of a [federal] statute is ... ‘extraordinary.’” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). Payday lenders have asserted that the NBA is such a statute and thus allows them to remove class actions that seek relief under state consumer protection principles to federal court. See, e.g., *Ace Cash Express*, 188 F. Supp. 2d at 1284. Courts have been skeptical of this argument when the plaintiff’s allegations are directed only at the lender and make no mention of the bank. See *Knox*, 850 F. Supp. 2d at 600-01; *Flowers*, 307 F. Supp. 2d at 1204-06; cf. *Hudson*, 2002 WL 1205060, at *6-8 (dismissing complaint where plaintiff alleged that a national bank made the payday loan); *Ace Cash Express*, 188 F. Supp. 2d at 1285.

113. See Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751, 778 (2012) (noting that “it is unclear whether and under what circumstances the typical tribally-affiliated payday lender will meet the[] test[]” for sovereign immunity). Compare *People ex rel. Owen v. Miami Nation Enters.*, 386 P.3d 357, 379 (Cal. 2016) (refusing to grant sovereign immunity), with *Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099, 1108 (Colo. 2010) (remanding the sovereign immunity issue to the trial court). Payday lenders have also attempted to minimize liability by lacing their contracts with mandatory arbitration clauses and class action waivers. See, e.g., *McKenzie Check Advance of Fla., LLC v. Betts*, 112 So. 3d 1176, 1188 (Fla. 2013) (holding that the Federal Arbitration Act precludes a court from deeming a class arbitration waiver in a payday loan to be unconscionable). In addition, some lenders took the extraordinary step of mandating arbitration under the rules of particular Indian tribes that “do[] not authorize [a]rbitration.” *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 776 (7th Cir. 2014); cf. *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 336 (4th Cir. 2017) (featuring a lender that “purposefully drafted the choice of law provisions in the arbitration agreement to avoid the application of state and federal consumer protection laws”).

In 2017, the CFPB entered the fray.¹¹⁴ It finalized a series of new rules that govern loans with terms of forty-five days or fewer.¹¹⁵ In particular, the CFPB requires lenders to take steps to determine whether borrowers will be able to repay their loans, and limits each loan to two rollovers.¹¹⁶ However, as this Article entered the publication stage, House Republicans introduced a bill to repeal the CFPB's regulations under the Congressional Review Act.¹¹⁷

3. Pension Loans

As the economy soured in the mid-2000s, firms began to buy the right to receive monthly retirement benefits from former public-sector employees.¹¹⁸ These businesses typically provide lump sums in return for five to ten years of a consumer's future pension payments.¹¹⁹

114. See David Silberman, *We've Proposed a Rule to Protect Consumers from Payday Debt Traps*, CFPB (June 2, 2016), <https://www.consumerfinance.gov/about-us/blog/weve-proposed-rule-protect-consumers-payday-debt-traps/> [<https://perma.cc/LN9M-HAJ3>].

115. See Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47,864, 47,864, 48,168 (proposed July 22, 2016) (to be codified at 12 C.F.R. pt. 1041); *CFPB Finalizes Rule to Stop Payday Debt Traps*, CFPB (Oct. 5, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-stop-payday-debt-traps/> [<https://perma.cc/T3V7-UKRN>].

116. See Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. at 47,864-65, 48,169, 48,196.

117. See Jim Puzzaghera, *House Lawmakers Move to Repeal New CFPB Payday Lending Rules*, L.A. TIMES (Dec. 1, 2017, 10:35 AM), <http://www.latimes.com/business/la-fi-cfpb-payday-loan-repeal-20171201-story.html> [<https://perma.cc/T6G2-8G57>]; see also ECONOMIST, *supra* note 94 (speculating that the Trump administration would try to thwart the rule). Another wild card is that the constitutionality of the CFPB is in doubt. In *PHH Corp. v. Consumer Financial Protection Bureau*, the D.C. Circuit held that the agency's structure violated Article II of the Constitution. 839 F.3d 1, 12 (D.C. Cir. 2016), *rev'd en banc*, 881 F.3d 75 (D.C. Cir. 2018). However, just before this Article went to print, the D.C. Circuit sitting en banc reversed the original appellate panel's order. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc); see Lorraine Woellert, *Consumer Financial Protection Bureau Wins Rehearing on Court Ruling, in Setback to GOP*, POLITICO (Feb. 16, 2017, 3:53 PM), <http://www.politico.com/story/2017/02/consumer-financial-protection-bureau-court-ruling-235109> [<https://perma.cc/V595-EU8C>].

118. See Silver-Greenberg, *Retirees*, *supra* note 15.

119. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 15, at 3. Pension lenders often insist that the borrower take out life insurance and list the company as a beneficiary. See Silver-Greenberg, *Retirees*, *supra* note 15. Some of these companies then bundle the income streams and sell them to investors. See Daniel Fisher & John Wasik, *Investors Who 'Buy' Pensions Are Buying Trouble*, FORBES (June 6, 2012, 11:34 AM), <https://www.forbes.com/>

Although lenders often purchase pensions from veterans,¹²⁰ the practice probably violates the letter (and definitely violates the spirit) of federal law.¹²¹ A federal anti-assignment statute dictates that “[a]n enlisted member of the Army, Navy, Air Force, or Marine Corps may not assign his pay, and if he does so, the assignment is void.”¹²² The U.S. Supreme Court has interpreted the term “pay” in the legislation to include “military retirement benefits.”¹²³ Thus, the Fourth Circuit and several federal judges have invoked the anti-assignment law to invalidate pension loans made by former armed service members.¹²⁴ To try to avoid this restriction, pension lenders have started to require veterans to open new bank accounts so that the money does not flow directly from the government to the company.¹²⁵ Courts have split over whether this additional step sanitizes the transaction.¹²⁶

Even though pension loans are not as heavily regulated as RALs and payday loans, the government has cracked down hard on the industry in the last five years. For example, the Los Angeles City Attorney and the Attorneys General of Iowa and Massachusetts banned a large pension lender called Future Income Payments, LLC

sites/danielfisher/2012/06/06/investors-who-buy-pensions-are-buying-trouble/ [https://perma.cc/X5JZ-8W5C].

120. See *Consumer Fin. Prot. Bureau v. Future Income Payments, LLC*, 252 F. Supp. 3d 961, 965 (C.D. Cal. 2017).

121. STEVE TRIPOLI & AMY MIX, NAT’L CONSUMER LAW CTR., IN HARM’S WAY—AT HOME: CONSUMER SCAMS AND THE DIRECT TARGETING OF AMERICA’S MILITARY AND VETERANS 25-26 (2003), https://www.nclc.org/images/pdf/special_projects/military/report-scams-facing-military.pdf [https://perma.cc/7PGJ-5YHV].

122. 37 U.S.C. § 701(c) (2012).

123. *Barker v. Kansas*, 503 U.S. 594, 605 (1992).

124. See *Dorfman v. Moorhous (In re Moorhous)*, 108 F.3d 51, 56 (4th Cir. 1997); *Structured Invs. Co. v. Webb (In re Webb)*, 376 B.R. 765, 767 (Bankr. W.D. Okla. 2007) (“Based upon the plain language of § 701(c), the Court holds that the contract is unenforceable.”); *Bowden v. Structured Invs. Co. (In re Bowden)*, 315 B.R. 903, 908-10 (Bankr. W.D. Wash. 2004).

125. See *Silver-Greenberg, Retirees*, *supra* note 15.

126. Compare *In re Pierson*, 447 B.R. 840, 848 (Bankr. N.D. Ohio 2011) (holding that a veteran’s choice to assign proceeds of his pension after it had been deposited into his account “does not frustrate the purpose of [the statute]”), and *Structured Invs. Co. v. Weber (In re Weber)*, Nos. BK07-82354-TJM, A08-8012-TJM, 2009 WL 983311, at *3 (Bankr. D. Neb. Apr. 10, 2009) (same), with *Structured Invs. Co. v. Price (In re Price)*, 313 B.R. 805, 811 (Bankr. E.D. Ark. 2004) (invalidating the transaction by considering its substance, rather than its form), and *Structured Invs. Co. v. Dunlap (In re Dunlap)*, 458 B.R. 301, 327 (Bankr. E.D. Va. 2011) (same).

from doing business within their respective jurisdictions.¹²⁷ In 2013, the New York Department of Financial Services (NYDFS) subpoenaed ten pension lenders as part of its investigation into whether they “dupe retirees into signing up for loans by disguising the[ir] soaring interest rates.”¹²⁸ Shortly afterward, the NYDFS and the CFPB sued Pension Funding, LLC and Pension Income, LLC for violating New York’s usury statute.¹²⁹ Likewise, the Washington Department of Financial Institutions filed complaints against two large companies, seeking a cease-and-desist order and \$250,000 in fines.¹³⁰

In 2014, the U.S. Government Accountability Office (GAO) issued a comprehensive report on pension lenders.¹³¹ The GAO identified thirty-eight firms that offer pension loans.¹³² The GAO noted two unusual facts about these companies. First, a healthy plurality of them were located in California.¹³³ Second, many of these supposedly independent businesses actually had murky connections to each other. Thirty were either a subsidiary of another firm or simply a different entity operating under another name.¹³⁴ Undercover

127. See Press Release, L.A. City Attorney, City Attorney Mike Feuer Sues to End Allegedly Predatory Pension Loan Business (Feb. 16, 2017), <http://www.lacityattorney.org/single-post/2017/02/16/City-Attorney-Mike-Feuer-Sues-to-End-Allegedly-Predatory-Pension-Loan-Business> [<https://perma.cc/F5B9-VDLR>]; Press Release, Iowa Dep’t of Justice Office of the Attorney Gen., California-Based Pension Advance Company Banned in Iowa from Illegal High-Interest Lending (Jan. 4, 2017), <https://www.iowaattorneygeneral.gov/newsroom/attorney-general-california-based-pension-advance-company-banned-in-iowa-from-illegal-high-interest/> [<https://perma.cc/Q348-MS26>]; Press Release, Mass. Attorney Gen., Lender to Provide More Than \$2 Million in Relief to Massachusetts Veterans, Other Consumers for Pension Advance Scheme (Mar. 28, 2016), <http://www.mass.gov/ago/news-and-updates/press-releases/2016/2016-03-28-veterans-pensions.html> [<https://perma.cc/X7UF-3FA8>].

128. See Silver-Greenberg, *Pension-Advance*, *supra* note 15.

129. See Complaint for Violations of the Consumer Fin. Prot. Act & N.Y. Banking & Fin. Servs. Laws at para. 96, *Consumer Fin. Prot. Bureau v. Pension Funding, LLC*, No. 8:15-cv-1329, 2016 WL 7637656 (C.D. Cal. July 11, 2016); see also John Wasik, *A Classic Retirement Trap: Why the CFPB Is Cracking Down on Pension Advance Loans*, FORBES (Aug. 20, 2015, 4:39 PM), <https://www.forbes.com/sites/johnwasik/2015/08/20/a-classic-retirement-trap-why-the-cfpb-is-cracking-down-on-pension-advance-loans/> [<https://perma.cc/4ZQV-LSZM>].

130. See Press Release, Wash. State Dep’t of Fin. Insts., DFI Fines Unlicensed Lenders Providing Pension Loans (May 20, 2014), <http://www.dfi.wa.gov/news/press/dfi-fines-unlicensed-lenders-providing-pension-loans> [<https://perma.cc/8W4X-9VE5>].

131. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 15.

132. See *id.* at 13.

133. See *id.*

134. See *id.* at 15.

GAO investigators then solicited bids from the lenders.¹³⁵ They discovered that most sales representatives were careful not to describe their products as “loans.”¹³⁶ They also found that companies often did not disclose key facts to potential customers, including their fees.¹³⁷ Finally, they determined that the APRs on pensions loans usually ranged from 27 percent to 46 percent.¹³⁸ The GAO concluded by inviting federal regulators to dig deeper and “determine whether practices such as the ones described in this report are unfair or deceptive, and therefore may warrant related enforcement action[.]”¹³⁹

In 2017, the rash of negative publicity about pension lending sparked an unusual lawsuit. A pension lender that identified itself only as “John Doe Company” sought to block the CFPB from disclosing the fact that the company was under investigation.¹⁴⁰ John Doe argued that the CFPB’s jurisdiction merely covers “consumer financial product[s] [and] service[s],” and pensions advances do not fit within that paradigm.¹⁴¹ A federal district court emphatically disagreed, reasoning that “at least six state regulators and the City of Los Angeles have found that [these] products *do* constitute loans.”¹⁴² Thus, the CFPB appears to be on the cusp of following

135. *See id.* at 4.

136. *See id.* at 31; *see also* Stuart Rossman & Hellen Papavizas, *When the Military Paycheck Is Prey*, TRIAL, Sept. 2006, at 43, 46 (noting that pension lenders “try to avoid providing required disclosures by referring to the buyouts as something other than loans”); David Lazarus, *‘Pension Advance’ Company Is Unmasked—And It’s No Friend of California Consumers*, L.A. TIMES (Mar. 14, 2017, 3:00 AM), <http://www.latimes.com/business/lazarus/la-fi-lazarus-cfpb-future-income-payments-20170317-story.html> [<https://perma.cc/ABR7-JYFD>] (noting that pension lenders “insisted that they weren’t making loans” (quoting Tom Dresslar from the California Department of Business Oversight)).

137. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 15, at 30.

138. *See id.* at 24.

139. *Id.* at 40.

140. *See* *John Doe Co. v. Consumer Fin. Prot. Bureau*, 235 F. Supp. 3d 194, 200-01 (D.D.C. 2017). The agency had served the company with a Civil Investigative Demand (CID). *See id.* at 197. The agency has the power to issue CIDs—a kind of subpoena—if it “has reason to believe that any person may be in possession, custody, or control of any ... information[] relevant to a violation.” 12 U.S.C. § 5562(c)(1) (2012). John Doe was later revealed to be Future Income Payments, LLC. *See* Lazarus, *supra* note 136.

141. *Consumer Fin. Prot. Bureau v. Future Income Payments, LLC*, 252 F. Supp. 3d 961, 967 (C.D. Cal. 2017).

142. *Id.*

through on the GAO's recommendation and policing the market for pension loans.

B. Probate Loans

This Section describes probate lending. It shows that the practice differs in two crucial ways from tax refund, payday, and pension lending: we know little about it, and it is barely regulated.

Probate lending appears to have been the brainchild of Douglas B. Lloyd.¹⁴³ In 1992, Lloyd founded Inheritance Funding Company (IFC).¹⁴⁴ His business model was simple. Probate—the traditional, court-based process for managing the assets of decedents who make wills or die intestate—is notoriously slow.¹⁴⁵ IFC thus cast itself as an elegant shortcut for prospective heirs and beneficiaries. It offers to pay them cash up front in return for a share of their expected inheritance.¹⁴⁶ For instance, an heir or beneficiary might accept a \$15,000 lump sum in return for executing an assignment that entitled IFC to \$25,000 from the estate whenever the probate case concluded.¹⁴⁷

This venture was inspired by several sources. The first was the long-standing practice of “heir hunting.”¹⁴⁸ In the early twentieth century, firms began to search probate records—which are open to the public—for wealthy intestate decedents who appeared to have no close relatives.¹⁴⁹ They would then locate the decedent's next of kin and sell them information about the probate matter in return for a percentage of the estate.¹⁵⁰ Likewise, IFC took advantage of

143. See, e.g., McMnamin, *supra* note 18.

144. See, e.g., *BBB Accredited Business Profile: Inheritance Funding Company, Inc.*, BETTER BUS. BUREAU, <https://www.bbb.org/greater-san-francisco/business-reviews/financial-services/inheritance-funding-company-inc-in-san-francisco-ca-28284> [<https://perma.cc/4XUW-MMQN>].

145. See, e.g., John H. Martin, *Reconfiguring Estate Settlement*, 94 MINN. L. REV. 42, 49 (2009).

146. See McMnamin, *supra* note 18.

147. See *id.*

148. See Frank C. Ingraham, Note, *Heir-Hunting: A Profession or a Racket?*, 7 VAND. L. REV. 104, 104 (1953).

149. See *id.*

150. See *id.* Courts initially denounced heir hunters as self-serving middlemen and nullified their contracts on public policy grounds. See, e.g., *Merlaud v. Nat'l Metro. Bank*, 84 F.2d 238, 240 (D.C. Cir. 1936); *Skinner v. Morrow*, 318 S.W.2d 419, 429 (Ky. 1958); *Carey v. Thieme*, 64 A.2d 394, 398 (N.J. Super. Ct. Ch. Div. 1949); *In re Lynch's Estate*, 276 N.Y.S. 939, 943-44

probate's transparency by examining court files to confirm the size of an estate and a prospective borrower's stake in it.¹⁵¹ In addition, IFC took a page from other fringe financiers. Like these companies, IFC justified its existence by explaining that it could be a source of emergency funds, and it was careful not to describe its products as "loans."¹⁵²

IFC was also influenced by the meteoric rise of litigation lending.¹⁵³ In the late 1980s, firms began to make cash payments to plaintiffs with pending civil complaints in exchange for a percentage of any future recovery.¹⁵⁴ These arrangements are nonrecourse: if the plaintiff wins or settles, the company takes a cut, but if the

(Sur. Ct. 1935); *In re Estate of Rice*, 193 N.E.2d 566, 571 (Ohio Prob. Ct. 1963); *In re McIlwain's Estate*, 27 Pa. D. & C. 619, 624-25 (Pa. Orphans' Ct. 1936). But gradually, most judges reversed course, recognizing that heir hunters could spare the personal representative from a costly and time-consuming search when a decedent's lineage was unclear. *See, e.g.*, *Gunning v. Caudill* (*In re Estate of Wright*), 108 Cal. Rptr. 2d 572, 578 (Cal. Ct. App. 2001) (enforcing heir hunting contract); *Nelson v. McGoldrick*, 896 P.2d 1258, 1266 (Wash. 1995) (reasoning that heir hunting contracts "may be beneficial rather than harmful in some cases"); *Gertsch v. Int'l Equity Research* (*In re Estate of Katze-Miller*), 463 N.W.2d 853, 860 (Wis. Ct. App. 1990) (same).

151. *See Lazarus, Probate, supra* note 18.

152. *See McMenamín, supra* note 22.

153. For more detail on litigation lending, see Horton & Chandrasekher, *supra* note 22, at 111-18. There is also prodigious literature on the topic. *See generally, e.g.*, JOHN BEISNER ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES (2009); Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697 (2005); Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 CHI.-KENT L. REV. 11 (2014); Jenna Wims Hashway, *Litigation Loansharks: A History of Litigation Lending and a Proposal to Bring Litigation Advances Within the Protection of Usury Laws*, 17 ROGER WILLIAMS U.L. REV. 750 (2012); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83 (2008); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004) [hereinafter Martin, *Wild West*]; Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615 (2007); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011); Yifat Shaltiel & John Cofresi, *Litigation Lending for Personal Needs Act: A Regulatory Framework to Legitimize Third Party Litigation Finance*, 58 CONSUMER FIN. L.Q. REP. 347 (2004); Paul Bond, Comment, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297 (2002); Ari Dobner, Comment, *Litigation for Sale*, 144 U. PA. L. REV. 1529 (1996); Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571 (2010); Mattathias Schwartz, *Should You Be Allowed to Invest in a Lawsuit?*, N.Y. TIMES MAG. (Oct. 22, 2015), http://www.nytimes.com/2015/10/25/magazine/should-you-be-allowed-to-invest-in-a-lawsuit.html?_r=0 [https://perma.cc/9AKM-95WJ].

154. *See, e.g.*, Martin, *Wild West, supra* note 153, at 55; McLaughlin, *supra* note 153, at 618-20.

plaintiff loses, the company receives nothing.¹⁵⁵ Because funders bear so much risk, they usually deal themselves a slice of the plaintiff's damages that makes their markup on the principal equivalent to a 100 percent APR.¹⁵⁶

The litigation lending model was especially appealing to IFC because it exploits a loophole in traditional consumer protection regulation. As noted, usury laws and the TILA govern "loans."¹⁵⁷ In many jurisdictions, "loan" is a term of art that means a transaction that saddles the debtor with "an absolute obligation to repay the principal."¹⁵⁸ Arguably, because litigation lenders recover nothing if the plaintiff loses, the phrase "litigation '*loans*'" is a misnomer. Because the company's recovery hinges "upon a bona fide contingency,"¹⁵⁹ most courts have held that litigation loans do not fall under the auspices of usury laws and the TILA.¹⁶⁰ IFC mimicked

155. See, e.g., *MoneyForLawsuits V LP v. Rowe*, No. 10-cv-11537, 2012 WL 1068760, at *4-5 (E.D. Mich. Mar. 29, 2012), *aff'd sub nom.* *Money for Lawsuits V LP v. Rowe*, 570 F. App'x 442 (6th Cir. 2014).

156. See Martin Merzer, *Cash-Now Promise of Lawsuit Loans Under Fire*, FOX BUS. (Mar. 6, 2016), <http://www.foxbusiness.com/features/cash-now-promise-lawsuit-loans-under-fire/> [<https://perma.cc/4N2E-JXWU>]; cf. *Rancman v. Interim Settlement Funding Corp.*, No. 20523, 2001 WL 1339487, at *1-2 (Ohio Ct. App. Oct. 31, 2001) (involving litigation funding contracts with APRs of 180 percent and 280 percent), *aff'd*, 789 N.E.2d 217 (Ohio 2003).

157. See *supra* note 63 and accompanying text.

158. *Walker & Assocs. Surveying, Inc. v. Roberts*, 306 S.W.3d 839, 850 (Tex. Ct. App. 2010) (quoting *First Bank v. Tony's Tortilla Factory, Inc.*, 877 S.W.2d 285, 287 (Tex. 1994)); see also *Blackwell Ford, Inc. v. Calhoun*, 555 N.W.2d 856, 859 (Mich. Ct. App. 1996).

159. *Stuback v. Sussman*, 8 N.Y.S.2d 141, 142 (Sup. Ct. 1938), *aff'd*, 10 N.Y.S.2d 240 (App. Div. 1939), *aff'd*, 23 N.E.2d 544 (N.Y. 1939).

160. See, e.g., *MoneyForLawsuits V LP*, 2012 WL 1068760, at *4-5; *Dopp v. Yari*, 927 F. Supp. 814, 823 (D.N.J. 1996); *In re Transcapital Fin. Corp.*, 433 B.R. 900, 910 (Bankr. S.D. Fla. 2010); *Fausone v. U.S. Claims, Inc.*, 915 So. 2d 626, 629 (Fla. Dist. Ct. App. 2005); *Kraft v. Mason*, 668 So. 2d 679, 684 (Fla. Dist. Ct. App. 1996); *Aldrich v. Aldrich*, 260 Ill. App. 333, 361 (App. Ct. 1931); *Nyquist v. Nyquist*, 841 P.2d 515, 518 (Mont. 1992); *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 98 (Tex. Ct. App. 2006). As I will discuss in further depth, see *infra* text accompanying notes 305-10, courts have made an exception for cases in which a plaintiff is virtually certain to be successful. In the last three years, policymakers have rushed to fill this regulatory lacuna. Arkansas, Indiana, and Tennessee passed statutes capping APRs on litigation loans. See ARK. CONST. amend. LXXXIX, § 3; ARK. CODE ANN. §§ 4-57-104, 4-57-109(b) (2017) (17 percent); IND. CODE §§ 24-4.5-1-201.1, 24-4.5-3-508(2) (2017) (roughly 36 percent); TENN. CODE ANN. § 47-16-110(a) (2017) (roughly 10 percent per year). In addition, eight state legislatures and one jurisdiction's supreme court have required litigation lenders to conspicuously disclose their fees and repayment schedules to prospective clients. See ARK. CODE ANN. § 4-57-109(c); IND. CODE § 24-12-4-1; ME. STAT. tit. 9-A, § 12-104 (2017); NEB. REV. STAT. § 25-3303 (2017); OHIO REV. CODE ANN. § 1349.55(B) (West 2017); TENN. CODE ANN. § 47-16-106(b)(1); VT. STAT. ANN. tit. 8, § 2253 (2017); Oasis Legal Fin. Grp.,

this arrangement by making its advances nonrecourse: heirs and beneficiaries had no obligation to reimburse the company if the estate declined in value or was consumed by creditors or mismanagement.¹⁶¹

By the early 2000s, IFC was thriving. It made about five hundred probate loans and earned \$5 million in revenue each year.¹⁶² Soon it found itself competing with rivals such as Advance-Direct.com and Inheritance Now.¹⁶³

But in 2004, these companies attracted some unwanted attention. David Lazarus, a columnist who specializes in consumer issues, published an exposé of the fledgling industry in the *San Francisco Chronicle*.¹⁶⁴ Lazarus highlighted the fact that Heir Buyout Company, an IFC knock-off, had recently sent an unsolicited letter touting its services to thousands of people who were grieving the recent loss of a loved one.¹⁶⁵ This aggressive marketing struck a discordant note with California lawmakers, who observed that probate lending “seems predatory on its face.”¹⁶⁶

A year later, the state legislature passed “a first-of-its-kind attempt to regulate the probate purchase industry.”¹⁶⁷ This legislation, which became Probate Code section 11604.5, contains three core mandates. First, it requires probate loans to be in at least ten-point font and include the amount of the assignment, the sum paid to the borrower, and the fees and costs charged by the lender.¹⁶⁸ Second, it

LLC v. Coffman, 361 P.3d 400, 410 (Colo. 2015) (holding that litigation loans are subject to the Uniform Consumer Credit Code); cf. OKLA. ADMIN. CODE § 160:75-9-1(a) (2017) (providing a model contract for lenders to use). Finally, in early 2017, the CFPB filed complaints against three high-profile litigation lenders, “signal[ing] that it is investigating the industry and intends to rein in excesses.” Alison Frankel, *CFPB Signals Regulation of Litigation Funding Industry*, REUTERS (Feb. 8, 2017, 6:49 PM), <https://www.reuters.com/article/us-otc-litfunding-idUSKBN15N2W1> [<https://perma.cc/U28B-73DB>].

161. See Lazarus, *Probate*, *supra* note 18.

162. *Id.*

163. See *id.*; McMenamain, *supra* note 18.

164. See Lazarus, *Sorry for Your Loss*, *supra* note 18.

165. See *id.*

166. See Lazarus, *Probate*, *supra* note 18 (statement of California Assemblyman Tom Harman).

167. CAL. SENATE JUDICIARY COMM., BILL ANALYSIS, SB 390 (2005).

168. See CAL. PROB. CODE § 11604.5(d)-(f) (West 2017). The statute only governs people or entities that “regularly engage[] in the purchase of beneficial interests in estates for consideration.” *Id.* § 11604.5(b)(2). It excludes assignments made to heir hunters, or to the decedent’s family, or to other heirs and beneficiaries. See *id.* § 11604.5(c).

dictates that lenders must lodge their agreements with heirs and beneficiaries in the judicial record no more than thirty days after they are signed.¹⁶⁹ Third, it gives courts the power to scrutinize probate loans for fairness:

The court may refuse to order distribution under the written agreement, or may order distribution on any terms that the court considers equitable, if the court finds that the [probate lender] did not substantially comply with the requirements of this section, or if the court finds that ... [t]he fees, charges, or consideration paid or agreed to be paid by the beneficiary were grossly unreasonable.¹⁷⁰

Despite this intervention, probate lending continued to expand. IFC now reports that it has advanced more than \$100 million to heirs and beneficiaries.¹⁷¹ Scores of copycat companies have emerged, including Advance Inheritance (AI),¹⁷² HBS Finance,¹⁷³ HAC,¹⁷⁴ Inheritance Advance,¹⁷⁵ and Key National Funding.¹⁷⁶ Nevertheless, we know virtually nothing about these firms. Indeed, since Lazarus's articles and the passage of the California statute, no reporter, scholar, or policymaker had mentioned inheritance-purchasing firms again.

In *Probate Lending*, my colleague Andrea Cann Chandrasekher and I took up the gauntlet.¹⁷⁷ Our article's centerpiece was a hand-collected dataset of all 594 testate and intestate administrations stemming from deaths that occurred in 2007 in Alameda County, California.¹⁷⁸ Thanks to the disclosure mandate in section 11604.5,

169. *See id.* § 11604.5(d)(1).

170. *Id.* § 11604.5(h).

171. *Who We Are*, INHERITANCE FUNDING, <http://www.inheritancefunding.com/who-we-are> [<https://perma.cc/3TSN-8ETX>].

172. *Why Should We Need to Hire an Inheritance Funding Company?*, ADVANCE INHERITANCE, LLC, <http://advanceinheritance.blogspot.com/2015/03/why-should-we-need-to-hire-inheritance.html> [<https://perma.cc/HW8Y-MLBP>].

173. HBS FIN., <http://www.probateestatelans.com> [<https://perma.cc/3URD-H5VH>].

174. HEIR ADVANCE CO., <http://www.heiradvance.com> [<https://perma.cc/TLF9-ETR2>].

175. INHERITANCE ADVANCE, <http://www.inheritanceadvance.com> [<https://perma.cc/SYP6-YWDE>].

176. KEY NAT'L FUNDING, LLC, <http://www.inheritancemoney.com> [<https://perma.cc/93SQ-MF46>].

177. Horton & Chandrasekher, *supra* note 22.

178. *See id.* at 130-31.

we unearthed seventy-seven loans in thirty cases.¹⁷⁹ Because the advances in our sample were fully repaid 96 percent of the time, we argued that they were “absolutely repayable” and therefore should trigger usury laws and the TILA.¹⁸⁰ In addition, we claimed that probate lenders routinely violate these laws.¹⁸¹ For instance, although California’s usury limit is 10 percent, we did not find a single probate loan with an APR below that ceiling.¹⁸² Thus, we argued that this multimillion dollar industry is built on a foundation of sand.¹⁸³

But *Probate Lending* was just a conversation starter. Because it merely sought to christen the debate about inheritance-buying firms, it left many questions unanswered. Is probate lending California-specific, or does it happen throughout the country? Is the market shrinking or expanding? Are the high repayment rates and APRs in our data an aberration? Moreover, the study’s relatively small sample size means that it only provides a snapshot of the information that courts and policymakers need in order to decide whether (and how) to regulate this burgeoning industry. Accordingly, as I explain in the next Part, I expanded the scope of my research.

II. EMPIRICALLY ASSESSING PROBATE LOANS

This Part first discusses how I collected and analyzed my data. It then presents my findings about (1) the probate lending industry,

179. *See id.* at 132-33.

180. *See id.* at 143, 147-48.

181. *See id.* at 144, 149.

182. *See id.* at 145 tbl.3; *see also* CAL. CONST. art. XV, § 1.

183. We also analyzed whether probate lending is champertous. *See* Horton & Chandrasekher, *supra* note 22, at 155-67. To discourage frivolous litigation, the ancient champerty doctrine prohibits third parties from acquiring an interest in a pending complaint. *See, e.g.,* Lampet’s Case (1613) 77 Eng. Rep. 994, 997-98; 10 Co. Rep. 46 a, 48 a. We discovered that probate lenders do, in fact, often initiate litigation. *See* Horton & Chandrasekher, *supra* note 22, at 157-60. Nevertheless, we noted that these claims often seek to remove or surcharge a poorly performing personal representative and thus seem to benefit the estate and the other heirs and beneficiaries. *See id.* at 161-62. Accordingly, we concluded that probate lending should not be champertous. *See id.* at 162. Bizarrely, Professor Kidd faults *Probate Lending* for failing to “prove that probate funders are overly litigious” and ignoring the fact that “the results could just as easily be evidence of probate [lenders] making the process more efficient.” Kidd, Response, *supra* note 25, at 15. I am not sure how to defend the article from the accusation that it should have reached the conclusion that it actually did reach.

(2) why heirs and beneficiaries might borrow against their inheritances, (3) repayment and interest rates, and (4) how parties have used California's probate lending statute.

A. Methodology

As noted, *Probate Lending* was based on a dataset of every estate administration that stemmed from deaths that occurred in 2007 in Alameda County, California.¹⁸⁴ This racially and economically diverse region, which sits just east of San Francisco, boasts a population of about 1.6 million.¹⁸⁵ It includes wealthy enclaves in the Berkeley Hills, suburbs such as Hayward, and dilapidated urban sections of Oakland.

I collected this sample through DomainWeb, an online resource that allows users to access court files.¹⁸⁶ During my initial research pass, I used the “date search” function to examine every case that appeared on the probate court calendar between January 1, 2008, and March 1, 2009. To ensure a common denominator, I cut long-running cases by limiting my sample to decedents who passed away in 2007. I also eliminated matters that were not relevant to probate lending, such as guardianships, trust administrations, and matters involving “pour-over” wills.¹⁸⁷

For this Article, I mimicked my initial data-collection procedures as closely as possible.¹⁸⁸ Research assistants took a first crack at

184. See Horton & Chandrasekher, *supra* note 22, at 130-31.

185. See *QuickFacts: Alameda County, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/alamedacountycalifornia/PST045216> [<https://perma.cc/8QCC-Y7GE>]. Professor Kidd complains that *Probate Lending* does not acknowledge that the population of Alameda County is not representative of either California or the United States. See Kidd, Response, *supra* note 25, at 10. First, with all due respect, this is not a fair reading of the article. See Horton & Chandrasekher, *supra* note 22, at 132 (acknowledging that “[i]t is hard to know whether this ratio [of loans to estates] is representative of the national market” and “that borrowing against an estate may be less common in other regions”). Second, Professor Kidd does not explain why any of the minor differences he identifies could influence the prevalence of loans, repayment amounts, or APRs. See Kidd, Response, *supra* note 25.

186. *DomainWeb*, SUPERIOR CT. CAL., CTY. ALAMEDA, <http://www.alameda.courts.ca.gov/pages.aspx/domainweb> [<https://perma.cc/ZKF8-7QY9>]. Data on file with author.

187. A pour-over will transmits assets to the decedent's trust. See MICHAEL J. GAU, A PRACTICAL GUIDE TO ESTATE PLANNING AND ADMINISTRATION 61 (2005). Because there are no individual beneficiaries of such a will, they cannot lead to probate loans.

188. When I first began using DomainWeb for research in 2014, the website made all filings in testate and intestate probate administrations available for free. Unfortunately, it

moving day by day through the probate court docket, starting on March 1, 2009, and ending on December 31, 2010. When they found a testate or intestate administration—cases that might involve probate loans—they recorded the information on a spreadsheet. I then accessed the case file and recorded about ten variables from it, including whether there was a probate loan, when the matter opened and closed, the value of the decedent’s property, and whether litigation occurred. Together, my original and supplemental research yielded 2100 estates. I will refer to this as my “combined dataset.”

I created a second spreadsheet for the cases that featured probate loans. This document contains the dates and amounts of each advance, the identity of the lender and borrower, and repayment information. I then calculated the effective APR on each loan. I did so by using the following formula, where A is the amount ultimately received by the lender, B is the amount of the advance, and C is the number of days between the loan and the repayment¹⁸⁹:

$$\frac{\frac{(A - B)}{C} \times 365}{B}$$

My APR calculations are conservative in two respects. First, companies frequently offer a small rebate—usually about 10 percent—if the estate closes by a particular deadline.¹⁹⁰ Sixty-three loans (22

soon began limiting access to the right half of all documents and charging users about one dollar per page to download the entire page. See *How This Site Works*, SUPERIOR CT. CAL., CTY. ALAMEDA, <https://publicrecords.alameda.courts.ca.gov/PRS/Home/HowThisSiteWorks> [<https://perma.cc/LAU4-3QUP>]. Thus, I was not able to gather as much information as I did in my initial Alameda County projects. For example, unlike my initial data-collection pass, the research I conducted for this Article does not exclude decedents who passed away before 2007.

189. For example, suppose a borrower received \$20,000 and the lender collected \$30,000 when the case closed 400 days later. I took raw markup (\$30,000 - \$20,000 = \$10,000), divided it by the number of days until repayment (400), which equals the daily amount of interest (here, \$25). Multiplying that by 365 gives the raw yearly markup (\$9125). Finally, dividing that result by the amount of the advance expresses it as a percentage of the original loan (here, 9125/20,000 = 0.46, or 46 percent). This is the same formula we used in *Probate Lending*. See Horton & Chandrasekher, *supra* note 22, at 144 n.245.

190. See *id.* at 133 n.180. *In re Estate of Perry* is a typical case. See No. HP08426199 (Cal. Super. Ct. Dec. 18, 2008) (DomainWeb). On June 25, 2010, a beneficiary sold a \$28,000 slice of the decedent’s property to AI for \$20,000. See Second Assignment of Beneficial Interest in Decedent’s Estate; Declaration of Compliance: Proof of Serv. at 1, *In re Estate of Perry*, No. HP08426199 (Cal. Super. Ct. June 25, 2010) (DomainWeb). However, the contract also

percent) in the combined dataset qualified for an early payment markdown. Nevertheless, even when a case met this benchmark, lenders almost always pocketed the *entire* amount of the assignment from the probate court.¹⁹¹ I will assume that companies honor their promised discounts through some kind of private, post-distribution procedure, although I cannot confirm that they do so.

Second, my APR figures omit some instances in which lenders were repaid early. The California Probate Code allows personal representatives to make preliminary distributions of up to half of the decedent's property.¹⁹² Companies in the combined dataset cashed out early fifty-six times in thirteen matters. In these cases, I used the preliminary distribution date—not the final distribution date—as the termination of the loan, because that was when the lender recouped its advance. However, companies also occasionally received a *partial* preliminary distribution. For example, in *In re Estate of Musgrove*, an heir entered into several agreements, selling a total of \$122,500 of his inheritance.¹⁹³ The firm then recovered \$110,000 (90 percent of the total assigned amount) on February 5, 2014, and the remaining \$12,500 (10 percent of the total assigned amount) on July 9, 2015.¹⁹⁴ I initially considered treating each of these transactions as separate loans with different APRs.¹⁹⁵ But

specified that AI would accept \$25,000 if the matter wrapped up before December 30, 2010. *See id.*

191. For example, in *In re Estate of Wit*, a beneficiary sold a \$28,000 slice of the decedent's property on September 23, 2008, for \$20,000. *See* Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proofs of Serv. at 4, *In re Estate of Wit*, No. RP07362504 (Cal. Super. Ct. Sep. 23, 2008) (DomainWeb). The contract stated that the lender would only collect \$25,000 if the lender was repaid within six months. *See id.* at 1. Although the lender collected sometime between November 5, 2008, and January 7, 2009—well within the six-month window—it received the entire \$28,000. *See* Receipt on Preliminary Distribution at 1, *In re Estate of Wit*, No. RP07362504 (Cal. Super. Ct. Jan. 7, 2009) (DomainWeb).

192. *See* CAL. PROB. CODE § 11623 (West 2017).

193. *See* Petition for Preliminary Distribution at 4, *In re Estate of Musgrove*, No. RP 09439944 (Cal. Super. Ct. Oct. 16, 2013) (DomainWeb).

194. *See* Order for Preliminary Distribution at 2, *In re Estate of Musgrove*, No. RP 09439944 (Cal. Super. Ct. Feb. 5, 2014) (DomainWeb); Order on Petition for Attorney's Fees to Be Assessed Against Daryl Passmore; Final Report of Former Adm'r & Request for Statutory & Extraordinary Comp. of Adm'r & Attorney; First & Final Account & Report of Special Admin. & for Statutory & Extraordinary Comp. & Approval of Fees of *Guardian Ad Litem* & for Final Distribution at 4, *In re Estate of Musgrove*, No. RP09439944 (Cal. Super. Ct. July 10, 2015) (DomainWeb).

195. To make this concrete, consider the July 2012 agreement in *Musgrove*, in which the

that soon made the data unwieldy. Thus, for simplicity's sake, I chose to ignore all partial preliminary distributions. As a result, my APR calculations understate the true return on probate loans.

B. Results

1. The Market for Inheritance Rights

My combined dataset includes 291 probate loans. These agreements were clustered in 93 cases (4.4 percent of all estates). Although this might not seem like a striking finding, it is important to note that there are tens of millions of probate matters every year in the United States.¹⁹⁶ If anything close to this estate-to-loan ratio holds outside of Alameda County, then there is a booming market for inheritance rights.

Overall, companies took home \$4,963,897 in return for \$3,033,400. The average span between the assignment and repayment was 469 days, which makes the mean APR 50 percent.

lender received \$23,800 and paid \$12,500. *See* Von Roderick Passmore's Assignment #1, Sale & Transfer of Beneficial Interest in Decedent's Estate to Inheritance Funding Co., Inc. at 1, *In re* Estate of Musgrove, No. RP09439944 (Cal. Super. Ct. July 9, 2012) (DomainWeb). To accurately reflect the transaction's value and duration, I would have needed to treat it as (1) a loan of \$21,480 (90 percent of the assigned amount) in return for \$11,250 (90 percent of the payment to the heir) that was repaid on February 2, 2014, and (2) a loan of \$2380 (10 percent of the assigned amount) in return for \$1250 (10 percent of the payment to the heir) that was repaid on July 9, 2015.

196. *See* John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2042 n.5 (1994) (book review).

Table 1. Probate Loan Descriptive Statistics (Combined Datasets)¹⁹⁷

	Mean (SD)	Median	Min	Max	N
Days from Loan Until Repayment	469 (361)	349	19	1479	285
Amount that Borrower Received (Principal)	\$10,569 (\$10,338)	\$7,000	\$2,000	\$100,000	287
Amount that Company Received (Principal Plus Interest)	\$17,296 (\$16,989)	\$11,900	\$0	\$162,944	287

Revisiting the Alameda County files helps clarify the contours of the industry. In *Probate Lending*, we observed that the overwhelming majority of probate lenders are headquartered in California.¹⁹⁸ Thus, we admitted that one might wonder whether the phenomenon is regional, rather than national.¹⁹⁹ However, when I reviewed my initial data and conducted my supplemental research, I recorded a new variable: the state in which the borrower lives. Although this information was only available for about half of the loans, I found heirs and beneficiaries from Arkansas,²⁰⁰ Arizona,²⁰¹

197. The first row of Table 1 excludes two loans that were not repaid at all: one “pure principal” loan in which the lender chose not to try to collect interest from the borrower, and four loans that did not contain required information under Probate Code section 11604.5. The second and third rows exclude the pure principal loan and the four loans with defective disclosures.

198. See Horton & Chandrasekher, *supra* note 22, at 128-29. As noted above, the GAO found that a large number of pension lenders were located in California. See *supra* notes 132-33 and accompanying text. It is unclear why so many probate and pension lenders hail from the Golden State.

199. See Horton & Chandrasekher, *supra* note 22, at 128-29, 132.

200. See, e.g., Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent’s Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proofs of Serv. at 3, *In re Estate of Sadler*, No. RP08378213 (Cal. Super. Ct. Dec. 11, 2008) (DomainWeb).

201. See, e.g., Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent’s Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5;

Florida,²⁰² Georgia,²⁰³ Idaho,²⁰⁴ Iowa,²⁰⁵ North Carolina,²⁰⁶ Oklahoma,²⁰⁷ Oregon,²⁰⁸ Texas,²⁰⁹ and Virginia.²¹⁰ This geographical diversity suggests that inheritance selling occurs throughout the country.

My research also seems to have captured a market in flux. Figure 1 shows the aggregate value of sales per company. It reveals that IFC remains the powerhouse, capturing 65 percent of the total revenue from probate loans. Yet there are also signs of increased

Proof of Serv. at 3, *In re Estate of Costello*, No. RP09440395 (Cal. Super. Ct. May 27, 2009) (DomainWeb).

202. *See, e.g.*, Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proofs of Serv. at 3, *In re Estate of Thaler*, No. RP08401139 (Cal. Super. Ct. Apr. 3, 2009) (DomainWeb).

203. *See, e.g.*, Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 3, *In re Estate of Henderson*, No. RP09435869 (Cal. Super. Ct. June 21, 2010) (DomainWeb) [hereinafter Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights].

204. *See, e.g.*, Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proofs of Serv. at 3, *In re Estate of Kerrigan*, No. HP08396950 (Cal. Super. Ct. Dec. 22, 2008) (DomainWeb).

205. *See, e.g.*, Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proofs of Serv. at 3, *In re Estate of Ballard*, No. RP08423495 (Cal. Super. Ct. Mar. 12, 2009) (DomainWeb).

206. *See* Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 3, *In re Estate of Nelson*, No. VP08423420 (Cal. Super. Ct. Dec. 17, 2010) (DomainWeb).

207. *See, e.g.*, Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 3, *In re Estate of Silva*, No. RP10494837 (Cal. Super. Ct. July 28, 2010) (DomainWeb).

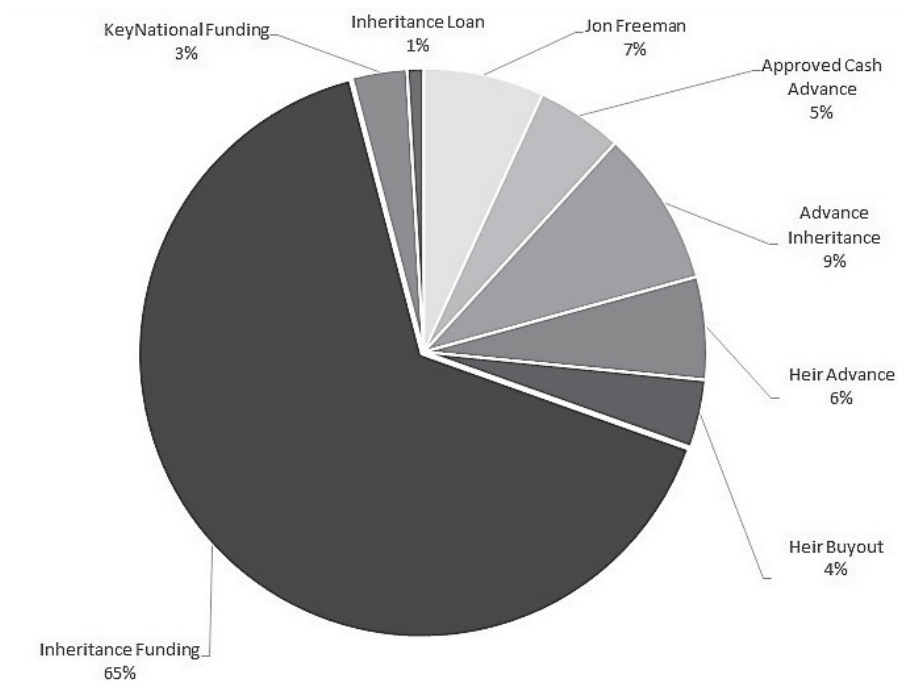
208. *See, e.g.*, Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proofs of Serv., *supra* note 191, at 3.

209. *See, e.g.*, Agreement for Sale & Transfer of Beneficial Interest, Assignment & Waiver of Disclaimer Rights of Cheryl I. Nelson; Declaration Attesting to Satisfaction of Prob. Code Section 11604.5; Proof of Serv. at 8, *In re Estate of Nelson*, No. VP08423420 (Cal. Super. Ct. July 16, 2010) (DomainWeb).

210. *See, e.g.*, Agreement for Sale & Transfer of Beneficial Interest, Assignment & Waiver of Disclaimer Rights of Suanne M. Brady; Declaration Attesting to Satisfaction of Prob. Code Section 11604.5; Proof of Serv. at 8, *In re Estate of Barr*, No. HP08379816 (Cal. Super. Ct. Oct. 7, 2008) (DomainWeb) [hereinafter Agreement for Sale & Transfer of Beneficial Interest, Assignment & Waiver of Disclaimer Rights of Suanne M. Brady].

competition: although there were only six lenders in my original dataset,²¹¹ my supplemental research uncovered four new firms.²¹²

Figure 1. Market Share



2. Characteristics of Estates with Loans

One of the most fraught issues in the fringe lending debate is why consumers enter into these transactions.²¹³ Does the decision to borrow on such unfavorable terms stem from a lack of self-control, or do customers use fringe products to cover emergencies or to make ends meet? The same question has important consequences for probate lending. This Subsection examines my data for clues about the

211. They are Accelerated Inheritance, AI, Heir Buyout Company, IFC, Jon Freeman, and KeyNational Funding, LLC. See Horton & Chandrasekher, *supra* note 22, at 132 n.178.

212. They are Approved Cash Advance, American Asset Finance LLC, HAC, and Law Finance Group, Inc.

213. See *supra* Part I.A.

factors that might motivate heirs and beneficiaries to borrow against their inheritances.

People might enter into probate loans for several reasons. First, they might do so out of frustration with probate's notorious delays.²¹⁴ This would mean that loans would arise in cases with longer durations. Second, because conflict can derail the administrative process, loans could be more common in estates that have degenerated into litigation.²¹⁵ Third, as with RALs and payday loans, people in lower income brackets might borrow to bridge a financial gap.²¹⁶ Unfortunately, my research does not allow me to measure the economic status of heirs and beneficiaries. The best proxy I have for this variable is the total value of the decedent's property, which might roughly reflect the financial standing of her friends and family.²¹⁷ Fourth, loans could be associated with estates that lack liquid assets. Often, a decedent's most valuable possession will be her home.²¹⁸ But when such an individual dies, her loved ones will not receive a penny until they take the additional time-step of selling the residence.²¹⁹ Thus, assigning inheritance rights might be more prevalent in estates that consist largely of real property. Fifth, in *Probate Lending*, we discovered that loans were correlated with (1) intestacies and (2) matters in which banks or credit card companies filed creditors' claims against the decedent.²²⁰

214. See *supra* note 145 and accompanying text.

215. See Horton & Chandrasekher, *supra* note 22, at 156-58.

216. See *supra* notes 61, 101 and accompanying text.

217. See Horton & Chandrasekher, *supra* note 22, at 135.

218. Admittedly, this may be particularly true in Northern California, which has a reputation for high real estate values. Emmie Martin, *The 25 Most Expensive Housing Markets in the US*, BUS. INSIDER (Sept. 8, 2016, 3:05 PM), <http://www.businessinsider.com/most-expensive-housing-markets-in-the-us-2016-9> [<https://perma.cc/VZ5M-V8W6>]. For example, the total amount of wealth that passed through probate in my combined dataset was \$1,007,857,478. Real property accounted for \$718,615,960, or about three-fourths of that sum.

219. See Horton, *In Partial Defense*, *supra* note 23, at 639; Horton & Chandrasekher, *supra* note 22, at 163 n.319.

220. See Horton & Chandrasekher, *supra* note 22, at 136, 163. Professor Kidd speculates that heirs and beneficiaries might assign their rights for emotional reasons. As he puts it, "Given the cause of a probate dispute—death of someone who was an important person in the heir[or beneficiary]'s life—a reasonable [person] could legitimately want some distance from probate." Kidd, *Funding*, *supra* note 25, at 7. This theory is not convincing. For one, because heirs and beneficiaries do not actively participate in probate, it is unclear how opting out of the process would insulate them from reminders of their deceased loved one. But even more importantly, the desire to wash one's hands of probate *completely* would only explain assignments of a person's *entire* interest in the estate. None of the contracts in my data fit this

I began testing these hypotheses by examining the raw data. As Table 2 reveals, I found that estates with loans deviated from their loanless counterparts in a few statistically significant ways. For one, the mean case length was longer in the loan subsample (739 days to 577 days) ($p < 0.001$). In addition, as in *Probate Lending*, loans were more common if (1) the decedent died intestate ($p < 0.05$) or (2) a bank or a credit card company sought to collect a debt from the decedent ($p < 0.01$).²²¹ Conversely, cases with loans were indistinguishable from other matters in several respects. Although they boasted a higher mean value (\$670,035 versus \$572,077), and featured a greater proportion of both (1) litigation (17 percent to 10 percent) and (2) illiquid estates (58 percent to 47 percent), none of these differences were statistically meaningful.

description.

221. See Horton & Chandrasekher, *supra* note 22, at 136, 163.

Table 2. Estate Characteristics

	Estates with Loans	Estates Without Loans
Average Case Length (Days)	739***	577
Litigation¹	17%	10%
Total Value	\$670,035	\$572,077
Illiquid Estate²	58%	47%
Testacy	41%*	54%
Bank Claim³	37%***	17%
Total⁴	90	1677
Notes:		
1. For estates without loans, I defined “litigation” as any matter in which a petition sparked an objection from an adverse party. For estates with loans, I defined “litigation” as any matter in which a party objected <i>before</i> the first loan was signed. That is, “litigation” excludes estates in which a loan was issued and <i>then</i> a dispute arose. I classified cases this way because I wanted to test the hypothesis that heirs and beneficiaries are more likely to seek the services of a lender when conflict has <i>already</i> derailed the probate process.		
2. An “illiquid estate” consists of 90 percent or more of real property and 0 otherwise.		
3. A “bank claim” occurs when a bank or credit card company sought to collect a debt from the estate.		
4. I dropped 333 estates because they were missing variables.		
5. * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$		

To excavate further, I ran a linear probability regression analysis. My dependent variable was whether a case contained at least one probate loan, and my independent variables were those mentioned above. As Table 3 reveals, the only statistically significant correlates of estates with loans were (1) case length²²² and (2) the fact that a bank or credit card company filed a claim against the estate.²²³

222. Our regression in *Probate Lending* did not find that longer cases were linked to loans. See Horton & Chandrasekher, *supra* note 22, at 137. The raw data helps pinpoint the root of this discrepancy. For whatever reason, the mean length of cases with loans in the *Probate Lending* sample was 684.5 days, *see id.* at 133, whereas matters with loans in my supplemental research here lasted an average of 759 days.

223. As mentioned above, I was unable to collect as much data for this Article as I was for *Probate Lending*. See *supra* note 188. Thus, this Article's regression analysis does not include the number of times lawyers appeared in court: a factor that *Probate Lending* found to increase the odds of a loan. See Horton & Chandrasekher, *supra* note 22, at 135 n.189, 137 tbl.2. Arguably, however, counting attorney appearances is just another way of measuring case duration. Because this Article unearthed a link between longer cases and loans, omitting the attorney appearance variable probably makes little difference. In addition, this regression analysis does not control for two characteristics that *Probate Lending* discovered did not affect the likelihood of a loan in a statistically significant fashion: the date of the will and the decedent's marital status. See *id.*

Table 3. Correlates of Probate Loans: Linear Probability Model
(Robust Standard Errors in Parentheses)

Average Case Length (Days)	0.00* (0.00)
Litigation	0.01 (0.03)
Total Value of Estate (in \$1,000s)	0.00 (0.00)
Illiquid Estate	-0.02 (0.01)
Testate	-0.02 (0.01)
Bank Claim Filed	0.06** (0.02)
Constant	0.04 (0.01)
N	1,767
Adj. R2	0.021
Notes:	
1. I defined each variable in the regression analysis the same way as I defined it in Table 2's bivariate analysis.	
2. I excluded 333 observations from the regression because they were missing variables.	
3. * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$	

These results are both intuitive and surprising. On the one hand, the idea that every passing day of the probate matter increases an heir or a beneficiary's impatience (and thus the odds of a loan) makes sense. But the link between creditors' claims and assignments of inheritance rights—which was also present in the smaller sample that I used to cowrite *Probate Lending*²²⁴—is more mysterious. It might be a tantalizing sign that there is a “culture of debt” in which decedents who borrow also have loved ones who borrow.²²⁵

224. See Horton & Chandrasekher, *supra* note 22, at 135. In both the original and combined datasets, the likelihood of a loan was 6 percentage points higher in cases where a bank or credit card company filed a claim against the estate. See *id.*

225. See David Brooks, *The Culture of Debt*, N.Y. TIMES (July 22, 2008), <http://www.nytimes.com/2008/07/22/opinion/22brooks.html> [<https://perma.cc/W6G4-X48J>].

Likewise, because credit card liability is more common among those lower on the economic totem pole,²²⁶ it could also be an echo of the fact that probate lenders—like RAL providers and payday lenders—cater to poorer Americans.

3. Repayment and Interest Rates

As mentioned above, both usury laws and the TILA only apply to advances that are likely to be repaid.²²⁷ Thus, one of *Probate Lending's* most important findings was that lenders recouped the funds that they fronted 96 percent of the time.²²⁸ My research in this Article reveals that this was no aberration. As Table 4 reveals, lenders collected the full amount due—both principal and interest—on 97.5 percent of their loans.

Table 4. Repayment Rates (Combined Datasets)

	N	Percent
Fully Repaid (Principal Plus Interest)	278	97.5%
Partially Repaid (Lender Gain)	2	0.7%
Partially Repaid (Lender Loss)	3	1%
Completely Unrepaid	2	0.7%
Total	285	100%

My combined dataset also confirms that probate lenders are virtually guaranteed returns that would be illegal in the context of conventional loans.²²⁹ As Figure 2 shows, more than 99 percent of

226. See TAMARA DRAUT & JAVIER SILVA, DÉMOS, BORROWING TO MAKE ENDS MEET: THE GROWTH OF CREDIT CARD DEBT IN THE '90S 10 (2003), <http://www.aecf.org/m/resourcedoc/aecf-BorrowingMakeEndsMeetGrowthCreditCardDebt90s-2013.pdf> [<https://perma.cc/7R3X-JDRS>].

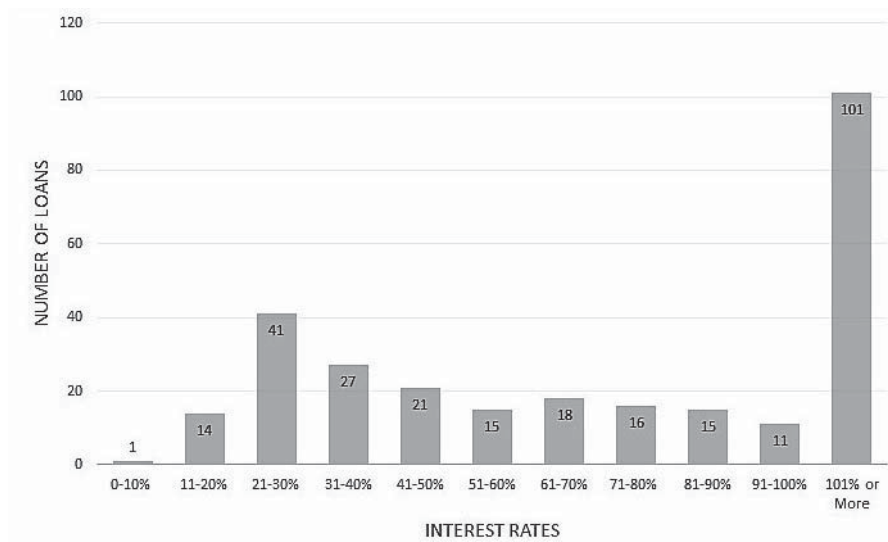
227. See *supra* notes 157-60 and accompanying text.

228. See Horton & Chandrasekher, *supra* note 22, at 143.

229. See *id.* at 144-45.

the loans that were at least partially repaid resulted in APRs above California's 10 percent usury threshold. In fact, 101 loans (36.0 percent) boasted rates of over 100 percent, and 49 (18.9 percent) topped 200 percent.

Figure 2. APRs



4. Judicial Intervention

Recall that California Probate Code section 11604.5 allows judges to strike down “grossly unreasonable” probate loans.²³⁰ No party in the *Probate Lending* dataset tried to use this safeguard.²³¹ However, the statute arose twice in the supplemental research I conducted for this Article. This Subsection briefly describes these cases.

Section 11604.5 first arose in one of the rare matters in which a lender did not recover the full amount of its markup. In *In re Estate of Matthews*, the decedent's only asset was her home, which was encumbered by a \$23,000 tax lien.²³² To prevent the government

230. See CAL. PROB. CODE § 11604.5(h) (West 2017).

231. See Horton & Chandrasekher, *supra* note 22, at 138.

232. See Second Amended First & Final Account & Report of Adm'r & Petition for Its Settlement, for Allowance of Comp. for Ordinary & Extraordinary Servs. & for Final Distribution at 5-6, *In re Estate of Matthews*, No. RP-09-441460 (Cal. Super. Ct. Feb. 14,

from seizing the property, the decedent's daughter, Yvonne, borrowed \$42,000 from AI in return for a \$75,000 share of the estate.²³³ However, the value of the house then plummeted from \$576,000 to \$410,000.²³⁴ As a result, Yvonne stood to inherit roughly \$49,000, which was not enough to cover the amount she owed to AI.²³⁵

Louis Matthews, the decedent's son, then spotted a lurking issue: either Yvonne or AI could argue that they were entitled to be reimbursed from the estate for the \$23,000 lien payment because it exonerated one of the decedent's debts.²³⁶ In turn, this would reduce the pot of money to be divided among the other heirs. Thus, Louis filed a petition asking the court to rule that Yvonne had paid the lien to further her own interests.²³⁷ As a fallback argument, Louis asked the judge to reduce the amount that Yvonne owed to AI, citing section 11604.5 and asserting without elaborating that the statute "empower[s] the Court ... to determine [a loan's] reasonableness."²³⁸ The court denied the request.²³⁹ Although the judge did not explain his decision, it might have reflected the fact that AI recovered only \$48,668.63 (rather than \$75,000), making the APR a modest 8 percent.²⁴⁰

The second section 11604.5 case was *In re Estate of Ellis*.²⁴¹ Barbara Ellis died intestate, survived by her husband, Weldon, and

2011) (DomainWeb) [hereinafter *Matthews*, Petition for Final Distribution]; Objection to First & Final Account & Petition for Distribution at 1-2, *In re Estate of Matthews*, No. RP09441460 (Cal. Super. Ct. Dec. 14, 2010) (DomainWeb) [hereinafter *Matthews*, Objection].

233. See *Matthews*, Objection, *supra* note 232, at 1-2.

234. See *Matthews*, Petition for Final Distribution, *supra* note 232, at 4.

235. See *id.* at 10.

236. See *Matthews*, Objection, *supra* note 232, at 1-2.

237. See *id.* at 2.

238. *Id.*

239. See Order on Second Amended First & Final Account & Report of Adm'r & Petition for Its Settlement, for Allowance of Comp. for Ordinary & Extraordinary Servs. & for Final Distribution at 2-3, *In re Estate of Matthews*, No. RP-09-441460 (Cal. Super. Ct. Mar. 1, 2011) (DomainWeb).

240. See *id.* at 2.

241. See Petition for Letters of Admin., *In re Estate of Ellis*, No. RP10533555 (Cal. Super. Ct. Aug. 27, 2010) (DomainWeb) [hereinafter *Ellis*, Petition for Letters]; see also Third Supplement to First & Final Account & Report & Response to Prob. Exam'r's Notes at 3, *In re Estate of Ellis*, No. RP10533555 (Cal. Super. Ct. May 1, 2013) (DomainWeb) [hereinafter *Ellis*, Third Supplement].

seven adult children, including her son, Kenya, who was mentally retarded.²⁴² Barbara's only asset was her house.²⁴³

Shortly after the probate case began, Barbara's heirs began to fight about who should serve as personal representative.²⁴⁴ This dispute pitted Barbara's daughter Cynthia, who, along with Kenya, had been living with Barbara and not paying rent, against Weldon and several other kids.²⁴⁵ By the time the court resolved the issue, it was April 2011.²⁴⁶ Although Barbara's estate had been pending for a year, it had not begun the slow march through the administrative process. Making matters worse, because Barbara's only possession was her residence, it needed to be sold within probate to avoid thrusting the warring factions of her family into the awkward role of co-owners.²⁴⁷

As the delays mounted, Barbara's heirs began to enter into probate loans. Weldon assigned \$16,100 of his share of the estate to IFC in return for \$8000 cash.²⁴⁸ Barbara's son, Donald, and daughter, Yolanda, entered into similar arrangements, each giving IFC \$8800 of their expected inheritances in exchange for \$5000 each.²⁴⁹ Finally, Barbara's daughter Benita took the mentally impaired Kenya to a different probate lender, Inheritance Loan Company (ILC), where they both sold \$9500 of their inheritance rights for \$7000

242. See *Ellis*, Third Supplement, *supra* note 241, at 3; *Ellis*, Petition for Letters, *supra* note 241, at 4.

243. See *Ellis*, Petition for Letters, *supra* note 241, at 2.

244. See, e.g., Object Petition at 1, *In re Estate of Ellis*, No. RP10533555 (Cal. Super. Ct. Oct. 20, 2010).

245. See Objector's Declaration in Opposition to Appointment of Adm'r at 1-2, *In re Estate of Ellis*, No. RP10533555 (Cal. Super. Ct. Oct. 20, 2010) (DomainWeb).

246. The court sided with Cynthia. See Order Appointing Adm'r at 1, *In re Estate of Ellis*, No. RP10533555 (Cal. Super. Ct. Apr. 12, 2011) (DomainWeb).

247. See Order Confirming Sale of Real Prop. at 1, *In re Estate of Ellis*, No. RP10533555 (Cal. Super. Ct. Sept. 4, 2012) (DomainWeb).

248. See Weldon H. Ellis's Assignment #1, Sale & Transfer of Beneficial Interest in Decedent's Estate to Inheritance Funding Co., Inc. at 1, *In re Estate of Ellis*, No. RP10533555 (Cal. Super. Ct. May 20, 2011) (DomainWeb) [hereinafter Weldon H. Ellis's Assignment #1].

249. See Donald Ellis's Assignment #1, Sale & Transfer of Beneficial Interest in Decedent's Estate to Inheritance Funding Co., Inc. at 1, *In re Estate of Ellis*, No. RP10533555 (Cal. Super. Ct. Oct. 10, 2012) (DomainWeb) [hereinafter *Ellis*, IFC Assignment]; Yolanda Ellis's Assignment #1, Sale & Transfer of Beneficial Interest in Decedent's Estate to Inheritance Funding Co., Inc. at 1, *In re Estate of Ellis*, No. RP10533555 (Cal. Super. Ct. Jan. 15, 2013) (DomainWeb).

each.²⁵⁰ As Figure 3 demonstrates, Kenya misspelled his own first name on the signature block.²⁵¹

250. See Benita Ellis' Assignment #1, Sale & Transfer of Beneficial Interest in Decedent's Estate to Inheritance Loan Co., Inc. at 1, *In re Estate of Ellis*, No. RP10533555 (Cal. Super. Ct. Apr. 15, 2013) (DomainWeb); Kenya Ellis' Assignment #1, Sale & Transfer of Beneficial Interest in Decedent's Estate to Inheritance Loan Co., Inc. at 1, *In re Estate of Ellis*, No. RP10533555 (Cal. Super. Ct. Apr. 15, 2013) (DomainWeb) [hereinafter *Ellis*, ILC Assignment]; *Ellis*, Third Supplement, *supra* note 241, at 3. The paperwork relating to Kenya's loan is downright bizarre. Not only is ILC's name virtually identical to IFC's, but ILC's pleadings were literally copied from an IFC template. Compare *Ellis*, IFC Assignment, *supra* note 249, with *Ellis*, ILC Assignment, *supra*. Moreover, the hard copy of ILC's receipt for distribution at the end of the case mentions IFC, not ILC. See, e.g., Receipt on Distribution at 1, *In re Estate of Ellis*, No. RP10533555 (Cal. Super. Ct. Oct. 7, 2014) (DomainWeb). Someone crossed out the references to IFC and hand-wrote ILC's information on the page. See *id.* This potential link between the two firms could be an eerie echo of the GAO's finding that many "rival" pension lenders were actually camouflaged affiliates of each other. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 15, at 15. Of course, it could also be a combination of plagiarism and sloppiness. Other firms also made mistakes, such as botching their section 11604.5 disclosures by failing to include the amount paid to the beneficiary. See, e.g., Notice of Assignment, Irrevocable Direction of Payment & Authorization to Release Info. at 8, *In re Estate of Fernandez*, No. HP10502002 (Cal. Super. Ct. June 22, 2010) (DomainWeb).

251. *Ellis*, ILC Assignment, *supra* note 250, at 3.

Figure 3. Portions of the First and Last Pages of Kenya Ellis's Contract with ILC

<p>1 INHERITANCE LOAN COMPANY, INC. 1231 PINE STREET 2 OAKLAND, CA 94607-1460 3 TELEPHONE: (510) 735-9846 4 FACSIMILE: (510) 922-8835</p> <p>5 In Pro Se</p> <p>6</p> <p>7</p> <p>8 In Re: Estate of</p> <p>9 BARBARA JEAN ELLIS, 10 Deceased.</p> <p>11</p> <p>12 THIS ASSIGNMENT is made and entered into between KENYA ELLIS who resides at 1304 13 E. 15th STREET, Apt. #1, OAKLAND, CALIFORNIA, 94606 (hereinafter "Seller"), and purchaser, 14 INHERITANCE LOAN COMPANY, INC., (hereinafter "ILC") a California Corporation, located 15 at 1231 PINE STREET, OAKLAND CA 94607-1460.</p> <p>16 1. Assignment. Seller hereby irrevocably assigns, sells and transfers \$9,500.00 of Seller's 17 beneficial interest in the ESTATE OF BARBARA JEAN ELLIS, Decedent (hereinafter "Estate") 18 to ILC in exchange for an immediate cash payment of \$7,000.00. The statement of the assigned 19 amount, cash payment and total cost to Seller was provided to Seller prior to signing this agreement.</p> <p>20 2. Payment. Seller authorizes and instructs the personal representatives of the Estate and their 21 attorneys to pay and deliver \$9,500.00 to ILC prior to making any distribution from this Estate to 22 Seller.</p> <p>23 3. Early Payoff Rebate Period. There are no Early Payoff Rebates in this agreement. All 24 outstanding assignments between Seller and ILC must be paid in full before any rebate shall be 25 payable by ILC to Seller.</p> <p>26 4. Beneficial Interest Assigned. Seller's beneficial interest in the Estate shall include any and 27 all rights: a) as a beneficiary, devisee, heir, legatee or otherwise of the Estate; b) to commissions and 28</p> <p>Page 1 of 3 KENYA ELLIS' ASSIGNMENT #1, SALE AND TRANSFER OF BENEFICIAL INTEREST IN DECEDENT'S ESTATE TO INHERITANCE LOAN COMPANY, INC.</p>	<p style="text-align: center;">FILED ALAMEDA COUNTY APR 15 2013 CLERK OF THE SUPERIOR COURT By: <i>[Signature]</i> Deputy</p> <p>1 12. Consult Legal Counsel. Seller acknowledges that ILC advised him/her to consult with 2 legal counsel concerning this transaction prior to signing this agreement.</p> <p>3</p> <p>4 Date: <u>04/05/13</u> <i>Kenya Ellis</i> 5 <i>Ms. Kenya Ellis, Seller/Assignee</i></p> <p>6</p> <p>7 Date: <u>04/05/13</u> 8 <i>[Signature]</i> 9 INHERITANCE LOAN COMPANY, INC., Purchaser/Assignee 10 By: <i>[Signature]</i> 11</p> <p>12 ACKNOWLEDGMENT</p> <p>13 STATE OF <u>California</u> 14 COUNTY OF <u>Alameda</u></p> <p>15 On <u>April 05, 2013</u> before me, <i>D. W. Saunders, Notary Public</i> 16 <i>[Signature]</i> (last name and state of NOTARY) 17 personally appeared <u>KENYA ELLIS</u>, who proved to me, on the basis of satisfactory evidence to be the person(s) whose 18 name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in 19 his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity 20 upon behalf of which the person(s) acted, executed the instrument. 21 WITNESS my hand and official seal.</p> <p>22 Signature <u>See Attached Acknowledgment</u> 23 24 (Notary Seal) 25 26 27 28</p> <p>Page 3 of 3 KENYA ELLIS' ASSIGNMENT #1, SALE AND TRANSFER OF BENEFICIAL INTEREST IN DECEDENT'S ESTATE TO INHERITANCE LOAN COMPANY, INC.</p>
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Barbara's personal representative filed a short supplemental brief that asked the court to invalidate Kenya's loan under section 11604.5.²⁵² She argued that Kenya lacked the mental capacity to contract.²⁵³ The court set the issue for hearing,²⁵⁴ but ILC mooted the dispute by limiting its recovery to the \$7000 it had advanced to Kenya, rather than pursuing the full \$9500.²⁵⁵

In sum, three years of court records reveal that probate lending is a profitable business that raises fairness concerns. Yet probate lending is also anomalous: it is the only form of fringe lending that

252. See *Ellis*, Third Supplement, *supra* note 241, at 3.

253. See *id.*

254. See Final Distribution, Alameda Cty. Prob. Exam'r Checksheet at 1, *In re Estate of Ellis*, No. RP10533555 (Cal. Super. Ct. June 14, 2013) (DomainWeb).

255. See Receipt on Distribution at 1, *In re Estate of Ellis*, No. RP10533555 (Cal. Super. Ct. Oct. 7, 2014) (DomainWeb).

is almost completely unregulated. The next Part argues that this should change.

III. POLICY IMPLICATIONS

This Part uses my data to analyze how the legal system should address probate lending. It suggests an amendment to California's pioneering law and also briefly describes how other state legislatures might address probate lending. It then outlines how courts can also use usury principles, the TILA, and the contract defense of unconscionability to limit abuse.

A. Legislation

Dozens of laws address fringe financial products. This regulation is far-reaching and heavy-hitting: as mentioned, the federal government has stopped just short of outlawing RALs, and thirteen states have banned payday loans.²⁵⁶ Conversely, only California has a probate lending statute, and it is rarely invoked.²⁵⁷ This Section critiques California's law and outlines ways for policymakers in other states to get involved.

The first principle in private ordering is that individuals, rather than the state, best know how to organize their affairs.²⁵⁸ Anyone seeking to restrict a particular class of transactions between competent adults bears the burden of proving that these exchanges are plagued by systemic problems.²⁵⁹

Nevertheless, fringe lending is ground zero for allegations of market failure. A chorus of judges, lawmakers, scholars, and public interest groups have tried to abolish or limit RALs, payday loans,

256. See *supra* Part I.A.

257. See CAL. PROB. CODE. § 11604.5 (West 2017); Horton & Chandrasekher, *supra* note 22, at 138.

258. See, e.g., LARRY A. DIMATTEO ET AL., VISIONS OF CONTRACT THEORY: RATIONALITY, BARGAINING, AND INTERPRETATION 18 (2007) (“[P]rivate bargaining by rational people should, in light of the Coase Theorem, maximize wealth.”); STEPHEN A. SMITH, CONTRACT THEORY 110 (2004) (“[I]f two persons make a voluntary exchange the exchange will make each better off, and is therefore efficient.”); cf. *Manchester, Sheffield & Lincolnshire Ry. Co. v. Brown* [1883] 8 AC 703 (HL) 718-19 (reasoning that the fact that two individuals decided to enter into an exchange “is the strongest possible proof that it is ... reasonable”).

259. See, e.g., MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 58-77 (1993).

and pension loans.²⁶⁰ They claim that these products are predatory, that borrowers do not understand them, and that even when accurate data is available, consumers suffer from cognitive biases that prevent them from gauging the costs and benefits.²⁶¹

Many of these arguments apply with equal force to probate lending. First, like RALs, payday loans, and pension loans, probate loans *seem* unfair. Indeed, the average APR in my sample is five times the legal limit.²⁶²

Second, probate lenders have an enormous informational advantage over heirs and beneficiaries. They routinely participate in estate administration, and thus can predict the likely length of a particular matter. But consumers are unlikely to have been embroiled in probate before. This experiential gap can lead to lopsided bargains. For instance, no knowledgeable person would take out a probate loan after the personal representative has filed a petition for final distribution. Because this is the last step in the probate process, there is only a matter of weeks until the estate closes. Nevertheless, in my sample, thirteen transactions occurred after this benchmark. The average APR in these deals was a whopping 315 percent.

Third, like payday loans, which roll over with alarming frequency,²⁶³ probate loans have a penchant for snowballing into more loans. Sixty-five of the 152 heirs and beneficiaries in my sample (43 percent) signed multiple assignments. Some of these borrowing sprees were egregious. For example, in *In re Estate of Chubbuck*, which I mentioned in the Introduction, the decedent's three daughters entered into a total of twenty-eight probate loans, surrendering \$449,260 of their mother's legacy in return for \$279,500.²⁶⁴ Likewise, in other cases, several borrowers entered into between four and six loans each, often waiting only about a month between transactions.²⁶⁵ Thus, some heirs and beneficiaries seem unable to resist the hypnotic allure of instant access to cash.²⁶⁶

260. *See supra* Part I.A.

261. *See supra* Part I.A.

262. *See supra* Part II.B.1, II.B.3.

263. *See supra* text accompanying notes 91-95.

264. *See* Judgment Settling First & Final Account & Report of Admin. Ordering Final Distribution, Comp. for Servs. Rendered & Reimbursement of Costs, *supra* note 9, at 4-6.

265. Data on file with author.

266. Although competition can ameliorate concerns about market failure, repeat borrowers

Fourth, probate lending targets people who are mourning. Psychologists have discovered that individuals who have recently lost a loved one exist in a mental fog.²⁶⁷ As one researcher put it, “[W]hen grieving, consumers do not play an active role in monitoring marketplace transactions ... because of their confused states of mind.”²⁶⁸ Of course, not every heir or beneficiary experiences a wrenching loss. Individual relationships vary, and some borrowers are probably far-flung “laughing heir[s]” who are “so loosely linked to [their] ancestor as to suffer no sense of bereavement at [their] loss.”²⁶⁹ Yet because some consumers are emotionally raw, probate lending has the potential to prey on the vulnerable.

Fifth, probate loans involve comparatively large amounts of money. As noted, RALs and payday loans typically involve advancements of a few hundred dollars.²⁷⁰ The average probate loan is for more than \$10,000.²⁷¹ Thus, heirs and beneficiaries have more at stake than other borrowers.

Admittedly, probate loans are less problematic in some ways than other fringe products. RAL and payday loan customers tend to be disproportionately poor.²⁷² Yet I found no concrete proof that recipients of probate loans are low on the economic totem pole. The

do not seem to shop among various lenders. One hundred and twenty-eight contracts in my combined dataset were signed by consumers who had already taken out at least one probate loan. Yet these individuals virtually never switched lenders. Indeed, 118 repeat borrowers (92 percent) assigned their inheritance rights to just one company. This could be evidence that firms face minimal pressure to offer lower markups (although, admittedly, it could also indicate that customers are happy with their initial lender).

267. Stacey Menzel Baker et al., *Building Understanding of the Domain of Consumer Vulnerability*, 25 J. MACROMARKETING 128, 130 (2005) (noting that people who are grieving “have little desire and ability to act in their best interests”).

268. James W. Gentry et al., *The Vulnerability of Those Grieving the Death of a Loved One: Implications for Public Policy*, 14 J. PUB. POL’Y & MARKETING 128, 139 (1995); see also Terrence G. Gabel et al., *The Disposal of Consumers: An Exploratory Analysis of Death-Related Consumption*, 23 ADVANCES CONSUMER RESEARCH 361 (1996) (discussing predatory practices in the funeral services industry).

269. David F. Cavers, *Change in the American Family and the “Laughing Heir,”* 20 IOWA L. REV. 203, 208 (1935).

270. See *supra* text accompanying notes 57-59, 85-88. Admittedly, it appears that some pension loans are for comparable or even greater amounts. See *infra* text accompanying notes 340-41.

271. See *supra* Table 1.

272. See *supra* text accompanying notes 54, 100-01.

best proxy for this variable in my data—the decedent’s financial standing—is inconclusive.²⁷³

In addition, RALs, payday loans, and pension loans take a bite out of a consumer’s income and thus her ability to cover necessities such as food, shelter, and clothing. Conversely, an advance on an inheritance depletes a pool of “found money”: a one-time cash infusion that supplements the normal income stream.

Finally, probate lending can be beneficial. As noted, there is a statistically significant link between sluggish estates and loans.²⁷⁴ This suggests that some clients sell their inheritance rights because a case has been bogged down in the system. In turn, that makes probate loans vital for borrowers who desperately need access to cash. Although I cannot determine what heirs and beneficiaries did with their advances, I unearthed anecdotal evidence of the funds going to medical expenses²⁷⁵ and, as mentioned above, in *Estate of Matthews*, paying off a tax lien to prevent the government from seizing a family home.²⁷⁶ Thus, a bright-line prohibition on assignments of inheritance rights would make some heirs and beneficiaries worse off.

California’s probate lending statute does a good job balancing these concerns. It wisely allows *probate* courts to refuse to enforce lopsided agreements.²⁷⁷ Giving this power to the probate judge, who already has jurisdiction over the matter, makes more sense than requiring borrowers to challenge loans through a separate lawsuit. For example, recall that in *In re Estate of Ellis*, the personal representative was able to unwind the contract between ILC and Kenya simply by including a short paragraph in a supplemental brief.²⁷⁸ It is unclear whether anyone would have blown the whistle if they had needed to file a complaint in civil court.

However, my data also indicate that California’s law does not go far enough. Although more than one hundred loans featured APRs

273. See *supra* Part II.B.2. Then again, as I mentioned above, the fact that loans are more likely in estates with creditors’ claims filed by commercial lenders might be a clue that borrowers tend to be poor. See *supra* text accompanying notes 225-26.

274. See *supra* Part II.B.2.

275. See Lazarus, *Sorry for Your Loss*, *supra* note 18.

276. See Final Distribution, Alameda Cty. Prob. Exam’r Checksheet at 1, *In re Estate of Matthews*, No. RP09441460 (Cal. Super. Ct. Dec. 30, 2010) (DomainWeb).

277. See CAL. PROB. CODE § 11604(c) (West 2017).

278. See *supra* notes 252-55 and accompanying text.

over 100 percent, just two parties invoked section 11604.5.²⁷⁹ Thus, the legislature should consider revising the statute to *require* judicial review of probate loans. Every estate administration culminates in a petition for final distribution, in which the court ensures that the personal representative has paid the decedent's creditors and managed the decedent's assets prudently.²⁸⁰ Because court oversight is the norm, it would only be a small step to ask judges to inquire into the fairness of each loan. This would create powerful incentives for lenders to avoid signing multiple loans in quick succession or locking borrowers into deals with runaway APRs.

In addition, jurisdictions other than California should consider at least gathering data about probate lending. Because there is no other disclosure statute on the books, we simply do not know how far the industry's tendrils extend. Yet as *Probate Lending* observed, some lenders claim to "[o]perate in all 50 states" or "throughout the USA."²⁸¹ Similarly, as this Article has documented, companies purchase rights in Alameda County estates from heirs and beneficiaries who live all over the map.²⁸² In addition, there are reported cases involving lenders who acquired interests in estates that were being probated in Maine,²⁸³ New York,²⁸⁴ South Carolina,²⁸⁵ and Utah.²⁸⁶ If probate lending is, in fact, widespread, then policymakers outside of the Golden State might consider experimenting with their own versions of section 11604.5.²⁸⁷

279. See *supra* Parts II.B.3-4.

280. See CAL. PROB. CODE § 11640.

281. Horton & Chandrasekher, *supra* note 22, at 129 & n.162 (alteration in original).

282. See *supra* text accompanying notes 200-10.

283. See *Metcalf v. State Tax Assessor*, 70 A.3d 261, 263 (Me. 2013).

284. See *In re Reid*, 942 N.Y.S.2d 176, 177 (App. Div. 2012).

285. See *Inheritance Funding Co., Inc. v. Chatman*, No. 3:12-cv-1308-JFA, 2013 WL 3946237, at *1 (D.S.C. July 31, 2013).

286. See *Cosby v. Cazares*, No. 20091035-CA, 2010 WL 3795133, at *1 (Utah Ct. App. Sept. 30, 2010) (per curiam).

287. If states other than California passed probate lending statutes, they would face a threshold complication: many of the loans in my dataset contain California choice-of-law clauses. Notably, though, lenders use "narrow" choice of law clauses, which declare that the contract "is made and shall be interpreted" under California law. See Weldon H. Ellis's Assignment #1, *supra* note 248, at 3; Assignment of Interest in Estate & Declaration Pursuant to Prob. Code § 11604.5 at 4, *In re Estate of Brawner*, No. HP07351203 (Cal. Super. Ct. June 25, 2008) (DomainWeb) (same); see also Second Assignment of Beneficial Interest in Decedent's Estate; Declaration of Compliance; Proof of Serv., *supra* note 190, at 3 ("The Assignment shall be interpreted under California law."). It is well settled that "narrow"

Accordingly, lawmakers should consider regulating probate loans more aggressively, just as they have been proactive about RALs, payday loans, and pension loans. But until more states take the initiative, courts are left with traditional consumer protection laws. The next two Sections address how these measures apply to probate loans.

B. Usury Laws and the TILA

Probate lenders may be violating usury laws and the TILA on an epic scale. The APR on their agreements almost invariably exceeds the usury ceiling in many states, including California.²⁸⁸ Likewise, my supplemental research confirmed our finding in *Probate Lending* that lenders do not obey TILA's nitpicky disclosure mandates.²⁸⁹ Although probate lenders have floated two theories about why their products are not "loans," this Section explains why these arguments fail.

First, probate lenders contend that their contracts are not "loans" because they are other kinds of arrangements. Each agreement emphasizes that it is an outright sale of the heir or beneficiary's property rights.²⁹⁰ Some go further by expressly declaring that they

choice-of-law provisions do not bar statutory claims arising from another state's laws. *See, e.g., Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 171 (9th Cir. 1989). As a result, these terms would not preclude courts in other states from applying their own probate lending statutes.

288. *See supra* Part II.B.3.

289. *See Horton & Chandrasekher, supra* note 22, at 146-55. For example, the TILA requires creditors to conspicuously disclose "[t]he 'amount financed', using that term," 15 U.S.C. § 1638(a)(2)(A) (2012), "[t]he 'finance charge', ... using that term," *id.* § 1638(a)(3), and "[t]he finance charge expressed as an 'annual percentage rate', using that term," *id.* § 1638(a)(4). No loan in either my research for *Probate Lending* or my supplemental research for this Article mentions these matters in its paperwork.

290. *See, e.g.,* Assignment of Interest in Estate & Declaration Pursuant to Prob. Code § 11604.5 at ex. A at 1, *In re Estate of Rios*, No. HP07327103 (Cal. Super. Ct. Dec. 28, 2007) (DomainWeb) (stating that a probate loan is the transfer of "the right to receive a distribution of a fixed amount of ... [an] estate for an immediate cash payment").

are “not a loan,”²⁹¹ or requiring borrowers to sign a statement that “in no way do I consider [this transaction to be] a loan.”²⁹²

However, this labels-driven assertion is not persuasive. Under both usury laws and the TILA, courts “disregard the form and look to the substance of the transaction.”²⁹³ For this reason, the vast majority of jurisdictions have refused to hold that RALs are merely sales of property rights²⁹⁴ and payday loans are nothing more than “check-cashing activities.”²⁹⁵ In the same vein, a half dozen regulatory bodies and a federal district court have concluded that pension advances are loans.²⁹⁶ Exactly as in these contexts, it does not matter what probate loans *purport* to be. Rather, what counts is the well-founded expectation that companies will recover their advances along with an additional markup.

291. Second Agreement for Sale & Transfer of Beneficial Interest, Assignment & Waiver of Disclaimer Rights of Catherine L. Sanders; Declaration Attesting to Satisfaction of Prob. Code Section 11604.5; Proof of Serv. at 2, *In re Estate of Barr*, No. HP08379816 (Cal. Super. Ct. Jan. 22, 2009) (DomainWeb) [hereinafter Second Agreement for Sale & Transfer of Beneficial Interest, Assignment & Waiver of Disclaimer Rights of Catherine L. Sanders].

292. Partial Assignment of Beneficial Interest of Samuel Davis at 5, *In re Estate of Davis*, No. RP07347450 (Cal. Super. Ct. Nov. 7, 2007) (DomainWeb). Likewise, in *Estate of Matthews*, the lender’s objection to the section 11604.5 petition took pains to assert that the deal before the court was “not a loan.” See Response of Advance Inheritance, LLC to: *Objections to First & Final Account & Petition for Distribution* at 2, *In re Estate of Matthews*, No. RP09441460 (Cal. Super. Ct. Dec. 23, 2010) (DomainWeb) [hereinafter *Matthews*, Response] (emphasis added); see also Kidd, Response, *supra* note 25, at 5 (asserting that probate loans are merely the “purchase of a property interest”).

293. *Rouse v. Peoples Leasing Co.*, 638 P.2d 1245, 1247 (Wash. 1982) (quoting *German Sav., Bldg. & Loan Ass’n v. Leavens*, 153 P. 1092 (Wash. 1916)); see also *Turner v. E-Z Check Cashing, Inc.*, 35 F. Supp. 2d 1042, 1047 (M.D. Tenn. 1999) (“Because TILA is a remedial act designed to protect consumers, courts construe it liberally in favor of consumers [and] ... focus on the substance, not the form, of credit-extending transactions.”); *Sw. Concrete Prods. v. Gosh Constr. Corp.*, 798 P.2d 1247, 1249 (Cal. 1990) (“In determining whether a transaction constitutes a loan or forbearance, we look to the substance rather than the form of the transaction.”); *Victoria Bank & Tr. Co. v. Brady*, 811 S.W.2d 931, 941 (Tex. 1991) (Mauzy, J., concurring and dissenting) (“To determine the existence or non-existence of usury, a court should look beyond a transaction to its substance.” (citing *Gonzales Cty. Sav. & Loan Ass’n v. Freeman*, 534 S.W.2d 903, 906 (Tex. 1976))).

294. See *State ex rel. Salazar v. Cash Now Store, Inc.*, 31 P.3d 161, 165 (Colo. 2001); see also *supra* note 65 and accompanying text.

295. *Turner*, 35 F. Supp. 2d at 1048; see also *supra* note 103 and accompanying text.

296. See *Consumer Fin. Prot. Bureau v. Future Income Payments, LLC*, 252 F. Supp 3d 961, 967 (C.D. Cal. 2017); cf. *In re Stone St. Capital, LLC*, No. NOCV2012-01891, 2013 WL 3341052, at *1, *3 (Mass. Super. Ct. May 10, 2013) (holding that contract in which lottery winner accepted \$40,000 in return for an assignment of \$70,000 fell under usury statute even though the borrower “ha[d] no personal obligation to repay any of the monies advanced”).

Second, probate lenders have suggested that they do not make “loans” because they have no contractual right to demand reimbursement. In some states, “[t]he hallmark of a loan is the *absolute* right to repayment.”²⁹⁷ As we explained in *Probate Lending*, this safe harbor is indispensable for litigation lenders.²⁹⁸ The general rule is that because litigation loans do not involve a “guarantee of repayment,” they cannot be usurious.²⁹⁹ For example, in *Kraft v. Mason*, the plaintiffs in an antitrust lawsuit assigned a generous portion of their potential recovery to third parties in return for \$100,000.³⁰⁰ The plaintiffs then settled the antitrust case, but refused to pay the lenders, claiming that the arrangement violated the usury laws.³⁰¹ A Florida appellate court disagreed, reasoning that “[q]uite possibly, there would be *no* successful recovery from the antitrust litigation,” and therefore the lenders could easily have lost their entire investment.³⁰²

Similarly, probate lenders do not require heirs and beneficiaries to repay a single penny of their advances. Indeed, companies highlight the fact that they “shall have no recourse against [a borrower] if the distribution ... is less than the [a]ssigned [a]mount.”³⁰³ Moreover, as one lender explained in its opposition to a section

297. *Blackwell Ford, Inc. v. Calhoun*, 555 N.W.2d 856, 859 (Mich. Ct. App. 1996); *see also* *Bankers Mortg. Co. v. Comm’r*, 142 F.2d 130, 131 (5th Cir. 1944) (“The word ‘loan’ implies an advance of money with an absolute promise to repay.”). Other jurisdictions factor the “absolutely repayable” element into the black-letter test for usury, rather than the threshold definition of whether an advance is a “loan.” *See, e.g.*, *Pearl Capital Ravis Ventures, LLC v. RDN Const., Inc.*, 41 N.Y.S.3d 397, 400 (Sup. Ct. 2016) (“[T]here can be no usury unless the principal sum is repayable absolutely.” (quoting *Transmedia Rest. Co. v. 33 E. 61st St. Rest. Corp.*, 710 N.Y.S.2d 756, 760 (Sup. Ct. 2000))). On the other hand, usury statutes in a few states are broader. *See, e.g.*, *Oasis Legal Fin. Grp., LLC v. Coffman*, 361 P.3d 400, 408 (Colo. 2015); *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767, 777 (N.C. Ct. App. 2008) (holding that usury under North Carolina law “does not require unconditional repayment of the principal”). In these jurisdictions, probate loans likely fall under the usury laws without regard to whether they are absolutely or contingently repayable.

298. *See* *Horton & Chandrasekher*, *supra* note 22, at 146-55.

299. *MoneyForLawsuits V LP v. Rowe*, No. 10-cv-11537, 2012 WL 1068760, at *4 (E.D. Mich. Mar. 29, 2012), *aff’d sub nom.* *Money for Lawsuits V LP v. Rowe*, 570 F. App’x 442 (6th Cir. 2014); *see also supra* text accompanying notes 157-60.

300. 668 So. 2d 679, 681 (Fla. Dist. Ct. App. 1996).

301. *See id.* at 681-82.

302. *Id.* at 684.

303. *Agreement for Sale & Transfer of Beneficial Interest, Assignment & Waiver of Disclaimer Rights of Suanne M. Brady*, *supra* note 210, at 2.

11604.5 petition, many unexpected events can derail the probate process:

Examples of such risks include, but are not limited to: Department of Health Services [actions] to recover Medi-Cal payments; quiet title actions against [e]state properties; claimants under equitable adoption theories; family allowance claims; probate homestead claims; subsequent testamentary instruments ...; will contests; the real estate market; foreclosure sales; and a litany of other situations.³⁰⁴

On paper, then, a probate lender's recovery hinges on a contingency: the estate remaining solvent as it passes through the court system.

Nevertheless, the "contingency" exception to usury laws and the TILA does not apply when the odds of the lender forfeiting its advance are "remote."³⁰⁵ Indeed, courts ignore "pretend[] contingencies"³⁰⁶ and hold that "a mere colorable hazard" does not count.³⁰⁷ Thus, even litigation loans are not contingent if the plaintiff was "nearly certain to be successful."³⁰⁸ For example, in *Echeverria v. Estate of Lindner*, the New York Supreme Court held that a litigation loan made to a plaintiff in return for share of his worker's compensation lawsuit was usurious.³⁰⁹ Because the underlying substantive law all but guaranteed that the plaintiff would receive *some* damages, the judge explained that "it is ludicrous to consider this transaction anything else but a loan."³¹⁰

304. *Matthews*, Response, *supra* note 292, at 3.

305. RESTATEMENT (FIRST) OF CONTRACTS § 527 cmt. a (AM. LAW INST. 1932).

306. *Vee Bee Serv. Co. v. Household Fin. Corp.*, 51 N.Y.S.2d 590, 600 (Sup. Ct. 1944), *aff'd*, 55 N.Y.S.2d 570 (App. Div. 1945).

307. *Olwine v. Torrens*, 344 A.2d 665, 667 (Pa. Super. Ct. 1975).

308. *Falconpoint Unlimited, LLC v. Senn*, No. 14-cv-02342 NC, 2015 WL 5188811, at *5 (N.D. Cal. Sept. 4, 2015) (refusing to grant summary judgment in favor of litigation lender in light of allegations that plaintiffs' tort complaint was legally sound); *see also* *Lawsuit Fin., L.L.C. v. Curry*, 683 N.W.2d 233, 240 (Mich. Ct. App. 2004) (*per curiam*) (holding that litigation loans were usurious where defendant had conceded liability and only the amount of damages was uncertain); *Rancman v. Interim Settlement Funding Corp.*, No. 20523, 2001 WL 1339487, at *3 (Ohio Ct. App. Oct. 31, 2001) ("[T]he contracts were loans because no real probability existed that non-payment would occur."), *aff'd on other grounds*, 789 N.E.2d 217 (Ohio 2003).

309. No. 018666/2002, 2005 WL 1083704, at *1-2, *9 (N.Y. Sup. Ct. Mar. 2, 2005).

310. *Id.* at *9.

Although the line between an authentic and an artificial contingency is blurry, a close reading of the case law brings it into focus. For one, in *Oasis Legal Finance Group, LLC v. Coffman*, the Colorado Supreme Court held that a litigation loan triggered the usury statute, in part, because of evidence that the company “fully recover[ed]” the fronted funds “in eighty-five percent of cases.”³¹¹ As noted, probate lenders enjoy an even higher success rate.³¹² In my combined dataset, they collected (1) the entire amount of principal and interest 97.5 percent of the time and (2) the principal and at least some profit 98.3 percent of the time.³¹³ In addition, judges sometimes declare that the contingency exception only applies when a creditor exposes itself to a probability of loss that is “over and above the risk which exists with all loans ... that the borrower will be unable to pay.”³¹⁴ So what are the odds that a conventional lender will lose money? During the period of my research, the following transactions had higher default rates than probate loans: first mortgages (between 3.7 percent and 5.6 percent), second mortgages (between 2 percent and 4.6 percent), car loans (between 2 percent and 2.75 percent), and credit cards (more than 9 percent).³¹⁵ Thus, probate loans are actually *less* hazardous for lenders than many prosaic forms of credit.

Examining the rare cases in which lenders lost money reinforces this conclusion. The Arizona Supreme Court’s oft-cited opinion in *Britz v. Kinsvater* can help frame this point.³¹⁶ In that case, the state justices announced that “a loan is ‘contingently’ repayable only if the lender has—by the terms of the loan—subjected himself to some greater hazard than that ... the security will depreciate.”³¹⁷ With one exception, the non-repaid loans ran into trouble precisely *because*

311. 361 P.3d 400, 408 (Colo. 2015).

312. *See supra* Table 4.

313. *See supra* Table 4.

314. *See* Thomassen v. Carr, 58 Cal. Rptr. 297, 301 (Ct. App. 1967).

315. *See* Floyd Norris, *Default Rates Easing, Except on Credit Cards*, N.Y. TIMES (May 21, 2010), <http://www.nytimes.com/2010/05/22/business/economy/22charts.html> [<https://perma.cc/6VEE-E7F9>]; *see also* Frank Nothaft, *Single-Family Mortgage Default Rate Falls to Pre-Recession Level*, CORELOGIC (June 2, 2016), <http://corelogic.com/blog/authors/frank-nothaft/2016/06/single-family-mortgage-default-rate-falls-to-pre-recession-level.aspx#.WdbsXBNSz-Z> [<https://perma.cc/G3VE-TVTY>] (noting that the default rate on first mortgages was not lower than 3 percent over the past decade).

316. 351 P.2d 986 (Ariz. 1960).

317. *Id.* at 990.

the company acquired an interest in property that declined in value. Each contract was signed in late 2007 or early 2008 in an estate that consisted entirely of real property.³¹⁸ In 2009, as these cases were percolating through the probate system, housing prices in Alameda County fell by 42.6 percent.³¹⁹ As a result, estates that were once worth several hundred thousand dollars ended up barely having enough funds to cover attorneys' fees and creditors' claims.³²⁰ This shared thread illustrates that only extraordinary events can deny probate lenders a profit.³²¹ But it also underscores the fact that

318. See Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proofs of Serv. at 4, *In re Estate of Mouzon*, No. RP07322619 (Cal. Super. Ct. Apr. 8, 2008) (DomainWeb); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proofs of Serv. at 1, *In re Estate of Reynolds*, No. RP08371115 (Cal. Super. Ct. Apr. 2, 2008) (DomainWeb); Assignment of Interest in Estate & Declaration Pursuant to Prob. Code § 11604.5, Exhibit A at 1, *In re Estate of Rios*, No. HP07327103 (Cal. Super. Ct. Dec. 28, 2007) (DomainWeb) [hereinafter Assignment of Dec. 10, 2007]; Assignment of Interest in Estate & Declaration Pursuant to Prob. Code § 11604.5, Exhibit A at 1, *In re Estate of Blakeney*, No. RP07336253 (Cal. Super. Ct. Dec. 10, 2007) (DomainWeb); Assignment of Interest in Estate & Declaration Pursuant to Prob. Code § 11604.5, Exhibit A at 1, *In re Estate of Blakeney*, No. RP07336253 (Cal. Super. Ct. Sept. 11, 2007) (DomainWeb). The one case that did not fit this mold involved the extraordinary circumstance of the decedent's personal representative stealing the estate assets and disappearing. See Final Distribution, Alameda Cty. Prob. Exam'r's Checklist at 1, *In re Estate of Littleton*, No. RP07-329280 (Cal. Super. Ct. Aug. 18, 2009) (DomainWeb).

319. Jay Barmann, *SF Home Prices Fall 20%; Overall Bay Area Prices Fall 46%*, SFIST (Apr. 17, 2009, 3:48 PM), http://sfist.com/2009/04/17/sf_home_prices_fall_20_overall_bay.php [<https://perma.cc/V7HG-GAM5>].

320. Compare Petition for Letters of Admin. at 2, *In re Estate of Reynolds*, No. RP08 371115 (Cal. Super. Ct. Feb. 13, 2008) (DomainWeb) [hereinafter *Reynolds*, Petition for Letters] (valuing the decedent's house at \$249,000), and Inventory & Appraisal at attach. 2, Estate of Blakeney, No. RP07336253 (Cal. Super. Ct. Dec. 12, 2007) (DomainWeb) (valuing the decedent's real property at \$380,000), with Order Settling First & Final Account of Adm'r, Granting Petition re Payment of Debts, Petition for Distribution of Insolvent Estate, Petition for Statutory and Extraordinary Fees to Adm'r & Attorney at 4-6, *In re Estate of Reynolds*, No. RP08371115 (Cal. Super. Ct. July 6, 2010) (DomainWeb) (distributing less than \$70,000), and First & Final Report of Adm'rs, Petition for Order Approving Report for Statutory Fees, for Extraordinary Fees, & for Final Distribution at 4, *In re Estate of Blakeney*, No. RP 07336253 (Cal. Super. Ct. Jan. 12, 2010) (DomainWeb) (noting that the personal representative only received about \$90,000 for the sale of the decedent's real property). For another case in which a lender did not recover the full amount of its advance, see *supra* text accompanying notes 232-40.

321. We speculated in *Probate Lending* that the timing of the loan might impact the risk of nonpayment. See Horton & Chandrasekher, *supra* note 22, at 143. Specifically, we observed that in two of the three cases in which lenders lost money, the companies had entered into loans before the personal representative filed the Inventory and Appraisal (the "I&A," which

the contingencies to which probate lenders expose themselves are not unique; rather, they are endemic in lending.³²² For these reasons, probate loans do not qualify for the contingency exception to usury laws and the TILA.³²³

Extending these consumer protection principles to probate loans would push the industry in the right direction. For example, the TILA would force probate lenders to be more transparent about the size of their markups. Regulation Z, which implements the statute, requires creditors to provide estimates of likely APRs.³²⁴ Under this rubric, probate lenders would need to disclose their calculations

is a detailed summary of the decedent's property). *See id.* Thus, we argued that these lenders might have suffered the consequences of jumping the gun and discovering that the estate was worth less than they believed. *See id.* However, as Professor Kidd points out, we did not examine how often loans that *were* fully repaid *also* involved pre-I&A loans. *See* Kidd, Response, *supra* note 25, at 8. This is a fair point. Thus, for this Article, I investigated the issue and found that pre-I&A loans occurred in 45 cases (49 percent). One reason why the I&A may be less relevant than we thought is that the initial petition for probate also has to include a statement about the value of the decedent's property. *See, e.g., Reynolds*, Petition for Letters, *supra* note 320, attach. 1. Accordingly, it appears that a sharp decline in real property value—and not premature lending—is the common denominator in troublesome loans.

322. Some courts describe the contingency exception as a usury-specific doctrine that hinges on whether the lender's *profit* "is wholly or partially put in hazard." WRI Opportunity Loans II LLC v. Cooper, 65 Cal. Rptr. 3d 205, 212 (Ct. App. 2007) (quoting *Lamb v. Herndon*, 275 P. 503 (Cal. Ct. App. 1929)); *see also* *Lamb v. Herndon*, 275 P. 503, 507 (Cal. Ct. App. 1929) (describing this as the interest contingency exception). Probate lenders might also try to invoke this exception by arguing that it is theoretically possible a case will take so long to conclude that the effective APR on the loan will be less than the maximum permissible amount. *Cf. Matthews*, Response, *supra* note 292, at 2-3 (noting that the lender "cannot control when [e]state distributions are made" (emphasis added)). Again, though, this is an improbable outcome. For example, in only one loan that was at least partially repaid did the APR dip below California's 10 percent usury threshold. *See supra* Part II.B.3.

323. An unpublished opinion from the Southern District of California has held that the TILA does not apply to probate loans. In *Reed v. Val-Chris Investments, Inc.*, the plaintiff accepted \$35,000 in return for pledging \$50,000 of his father's estate to AI. No. 11cv371 BEN (WMC), 2011 WL 6028001, at *1 (S.D. Cal. Dec. 5, 2011). He then sought to rescind the deal, arguing that AI had not complied with the TILA's disclosure mandates. *Id.* at *2. The judge dismissed this claim, reasoning that the transaction between the plaintiff and AI was non-recourse. *Id.* *Reed's* holding makes sense in the absence of proof about repayment rates, but my study provides this missing variable and, thus, changes the calculus. As with usury laws, courts must "look[] past the form of the transactions to their economic substance in deciding whether the [TILA] applie[s]." *Burnett v. Ala Moana Pawn Shop*, 3 F.3d 1261, 1262 (9th Cir. 1993). Even if lenders do not mandate that heirs and beneficiaries return their advances, the brute truth is that lenders recoup the principal more than 98 percent of the time. *See supra* Part II.B.3.

324. 12 C.F.R. § 226.17(c)(2)(i) (2017).

about how long a case will persist in the court system.³²⁵ This additional information would allow borrowers to compare their options and make educated choices, facilitating competition and driving down prices. Likewise, probate lenders would need to add usury savings clauses to their loans. These provisions serve as a safety valve by automatically reducing the APR on an illegal loan to the maximum permissible rate.³²⁶ Although usury savings clauses would make the business less profitable, it would also assuage concerns that probate loans are unfair.

C. Unconscionability

Finally, courts could also consider whether probate loans are unconscionable. This defense to contract enforcement, which we did not mention in *Probate Lending*, can fill gaps in states that neither have legislation on point nor effective usury laws.

Unconscionability has two prongs: procedural and substantive. Procedural unconscionability hinges on the contract formation process.³²⁷ It is a holistic test that considers disparity in bargaining power, whether the nondrafting party was sophisticated or had the ability to negotiate key terms, and the physical appearance of the contract.³²⁸ Substantive unconscionability focuses on the fairness of

325. See Horton & Chandrasekher, *supra* note 22, at 154.

326. See, e.g., Smith v. Miller (*In re Dominguez*), 995 F.2d 883, 885-86 (9th Cir. 1993); Saypo Cattle Co. v. RMF Deep Creek, LLC, 901 F. Supp. 2d 1267, 1282 (D. Mont. 2012); Jersey Palm-Gross, Inc. v. Paper, 639 So. 2d 664, 671 (Fla. Dist. Ct. App. 1994), *aff'd*, 658 So.2d 531 (Fla. 1995); First State Bank v. Dorst, 843 S.W.2d 790, 793 (Tex. App. 1992); *cf.* Arneill Ranch v. Petit, 134 Cal. Rptr. 456, 467 (Ct. App. 1976) (observing that a provision in a note limiting interest to the highest permissible rate might be enforceable). Admittedly, other jurisdictions do not enforce usury savings clauses. See, e.g., Swindell v. Fed. Nat'l Mortg. Ass'n, 409 S.E.2d 892, 896 (N.C. 1991); NV One, LLC v. Potomac Realty Capital, LLC, 84 A.3d 800, 810 (R.I. 2014). For more about these terms, see Horton & Chandrasekher, *supra* note 22, at 145-46.

327. See Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967) (dividing unconscionability famously into two spheres and defining the procedural aspect as “bargaining naughtiness”).

328. See, e.g., Whitney v. Alltel Commc'ns, Inc., 173 S.W.3d 300, 310 (Mo. Ct. App. 2005) (finding an agreement to be procedurally unconscionable because it was sent “in the mail on a take it or leave it basis”); Strand v. U.S. Bank Nat'l Ass'n ND, 693 N.W.2d 918, 925 (N.D. 2005) (opining that if “the only option presented to the other party is to take it or leave it, some quantum of procedural unconscionability is established”); *cf.* Honig v. Comcast of Ga. I, LLC, 537 F. Supp. 2d 1277, 1285 (N.D. Ga. 2008) (evaluating the “age, education, intelligence, business acumen and experience of the parties” (quoting NEC Techs., Inc. v. Nelson,

the challenged provision.³²⁹ It applies to clauses that are “overly harsh,”³³⁰ “unduly oppressive,”³³¹ or “so one-sided as to *shock the conscience*.”³³² Most states employ a sliding scale and permit strong evidence of one element to compensate for a weak showing on the other.³³³

There is little authority on whether fringe lending is unconscionable. In *James v. National Finance, LLC*, a hotel housekeeper who “needed money for food and rent” took out a \$200 payday loan with an APR of more than 800 percent.³³⁴ The Delaware Chancery Court—not a bench with a liberal reputation—refused to enforce the agreement.³³⁵ The court observed that there is “a strong American tradition of freedom of contract, and that tradition is especially strong in our [s]tate, which prides itself on having commercial laws that are efficient.”³³⁶ Nevertheless, the court held that the loan was procedurally unconscionable, reasoning that the borrower was not financially savvy and had no opportunity to haggle for better terms.³³⁷ In addition, the court observed that the instrument used “inconsistent language” to describe key concepts, which “could easily confuse an unsophisticated customer.”³³⁸ Finally, the court cited the

478 S.E.2d 769, 771-72 (Ga. 1996)).

329. See, e.g., *Ruppelt v. Laurel Healthcare Providers, LLC*, 293 P.3d 902, 906 (N.M. Ct. App. 2012).

330. *Baltazar v. Forever 21, Inc.*, 367 P.3d 6, 11 (Cal. 2016) (quoting *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013)).

331. *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 717 S.E.2d 909, 922 (W. Va. 2011).

332. *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1075 (9th Cir. 2007) (quoting *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1043 (9th Cir. 2001)).

333. See, e.g., *Sprague v. Household Int'l*, 473 F. Supp. 2d 966, 971-72 (W.D. Mo. 2005); *Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344, 350 (Ct. App. 2007); *MS Credit Ctr., Inc. v. Horton*, 926 So. 2d 167, 177 (Miss. 2006); *D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1162 (Nev. 2004) (per curiam); *Sitogum Holdings, Inc. v. Ropes*, 800 A.2d 915, 922-23 (N.J. Super. Ct. Ch. Div. 2002); *State v. Wolowitz*, 468 N.Y.S.2d 131, 145 (App. Div. 1983); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 370 (N.C. 2008); *Woodhaven Apartments v. Washington*, 942 P.2d 918, 925 (Utah 1997), *abrogated by Commercial Real Estate Inv., L.C. v. Comcast of Utah II, Inc.*, 285 P.3d 1193 (Utah 2012); *Roussalis v. Wyo. Med. Ctr., Inc.*, 4 P.3d 209, 246-47 (Wyo. 2000).

334. 132 A.3d 799, 805, 807 (Del. Ch. 2016).

335. See *id.* at 839.

336. *Id.* at 812 (quoting *Abry P'rs V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1059-60 (Del. Ch. 2006)).

337. *Id.* at 828-34.

338. *Id.* at 823.

loan's skyrocketing APR to hold that it was substantively deficient, observing that "[n]o one would borrow rationally on the terms it contemplated unless that person was delusional, mistaken ..., or under economic duress."³³⁹

Conversely, in *In re Pierson*, a federal court in Ohio rejected an unconscionability challenge to a pension loan.³⁴⁰ In return for \$28,810, Stephen Pierson promised to pay Structured Investments Company, LLC \$849 every month for eight years, for a total of \$81,504.³⁴¹ The judge held that the loan was not procedurally unconscionable, noting that Pierson had initialed next to harsh terms.³⁴² In addition, the court held that the agreement was not substantively unconscionable because Pierson had used the proceeds for home improvements and debt consolidations, rather than necessities.³⁴³

Gauged by these yardsticks, some probate loans might be procedurally unconscionable. Although it is not clear whether consumers are able to negotiate the amount of the company's markup, the remainder of the agreement often consists of preprinted text. In addition, because probate loans address two complex, legalistic matters—credit and probate—they are dense and difficult to understand. Most of them allow lenders to demand the sale of estate property, waive the borrower's disclaimer rights, and address the impact of the borrower filing for bankruptcy.³⁴⁴ Moreover, like the payday loan in *James*, some of the key terms are presented in ways that seem designed to "divert ... attention from the problems raised by them or the rights given up through them."³⁴⁵ For example, Key-National Funding's contract misleadingly implies that a borrower's "[t]otal [c]osts and [f]ees" are zero, when, in fact, the company charges a markup of several thousand dollars.³⁴⁶ Likewise, buried

339. *Id.* at 837; *see also* State *ex rel.* King v. B & B Inv. Grp., Inc., 329 P.3d 658, 674 (N.M. 2014) (invalidating a payday loan and reasoning that "[i]t is contrary to our public policy, and therefore unconscionable as a matter of law, for these historically anomalous interest rates to be charged in our state").

340. 447 B.R. 840, 851 (Bankr. N.D. Ohio 2011).

341. *Id.*

342. *Id.* at 850.

343. *See id.* at 851.

344. *See, e.g.*, Von Roderick Passmore's Assignment #1, Sale & Transfer of Beneficial Interest in Decedent's Estate to Inheritance Funding Co., Inc., *supra* note 195, at 2.

345. *See* James v. Nat'l Fin., LLC, 132 A.3d 799, 824 (Del. Ch. 2016) (quoting Fritz v. Nationwide Mut. Ins. Co., No. 1369, 1990 WL 186448, at *4 (Del. Ch. Nov. 26, 1990)).

346. *See, e.g.*, Second Agreement for Sale & Transfer of Beneficial Interest, Assignment,

in the boilerplate of HAC's agreement is a provision that imposes a nonrefundable \$500 "processing fee."³⁴⁷ Thus, some probate loans may be procedurally unconscionable.

But other aspects of probate loans cut the other way. The average length of these contracts is just five pages.³⁴⁸ In addition, one lender asks borrowers to authenticate the bottom of every sheet of paper.³⁴⁹ Although this might not be as powerful as the evidence in *Pierson* that the consumer "meticulously initial[ed] ... most of what could be considered the contract's more onerous terms,"³⁵⁰ it still might dispel any procedural infirmity. Similarly, in some jurisdictions, "[a]n agreement is not procedurally unconscionable if there is a meaningful opportunity to opt out."³⁵¹ Another company gave borrowers a three-day "cooling off" period in which they could change their minds and cancel the transaction.³⁵² These factors might tip the scales away from procedural unconscionability.

Substantive unconscionability will also vary from case to case. In general, an "exorbitant price" can elucidate that "one party has in fact been imposed upon by another party in an inequitable or unconscionable manner."³⁵³ One decision suggests that the high markup on a probate loan might be unduly harsh. In *In re Estate of Simpson*, the decedent died because of his nursing home's alleged negligence.³⁵⁴ His son, acting as personal representative of the estate, settled the case and then sought judicial approval of his decision.³⁵⁵ However, the son had also taken out a probate loan in his capacity as an heir.³⁵⁶ The New York Surrogate Court noted that this deal raised a fluorescent red flag and requested further briefing:

& Waiver of Disclaimer Rights of Catherine L. Sanders, *supra* note 291, at 1.

347. *See, e.g.*, Agreement of Corinne Coleman at 7, *In re Estate of Coleman*, No. HP0842 4996 (Cal. Super. Ct. Aug. 1, 2013) (DomainWeb).

348. *See, e.g.*, Assignment of Dec. 10, 2007, *supra* note 318.

349. *See, e.g.*, Second Agreement for Sale & Transfer of Beneficial Interest, Assignment & Waiver of Disclaimer Rights of Catherine L. Sanders, *supra* note 291, at 1-7.

350. *See In re Pierson*, 447 B.R. 840, 850 (Bankr. N.D. Ohio 2011) (emphasis added).

351. *Mumin v. Uber Techs., Inc.*, 239 F. Supp. 3d 507, 525 (E.D.N.Y. 2017).

352. *See, e.g.*, Agreement of Kristina M. Chubbuck, *supra* note 4, at 5.

353. 8 WILLISTON ON CONTRACTS § 18:15 (4th ed. 2010).

354. No. 2910-A/2006/A, 2008 WL 4925828, at *1 (N.Y. Sur. Ct. Nov. 19, 2008).

355. *See id.*

356. *Id.*

[N]otwithstanding that the court does not want to prejudge any issues, the transaction does at least raise a question with respect to whether the agreement might be unenforceable on the alternative grounds that it is unconscionable Specifically, the troublesome facts are that ... the [lender] paid \$7,990 to the petitioner, and in consideration thereof, the petitioner agreed to pay to the [lender] either \$11,900 or \$13,300 depending upon whether or not the payment was made within six months of the advance.³⁵⁷

My data bear out *Simpson's* intuition that probate loans can be quite one-sided.³⁵⁸ Recall that *James* held that an 800 percent APR on a \$200 advance was an “obvious indication[] of unfairness” that “shocks the conscience.”³⁵⁹ Likewise, even fringe lending apologists concede that “it would seem irrational for any consumer to borrow money at an interest rate exceeding 400% under any circumstance.”³⁶⁰ Although probate loans are for thousands of dollars—far more than payday loans—I uncovered transactions with APRs of 499 percent,³⁶¹ 541 percent,³⁶² 547 percent,³⁶³ 640 percent,³⁶⁴ 649 per-

357. *Id.* Unfortunately, the paper trail ends here. I cannot determine whether anyone filed the requested briefing or if the judge revisited the issue.

358. *See supra* Table 1.

359. *See James v. Nat'l Fin., LLC*, 132 A.3d 799, 816 (Del. Ch. 2016).

360. *Id.* (quoting Edward C. Lawrence & Gregory Elliehausen, *A Comparative Analysis of Payday Loan Customers*, 26 CONTEMP. ECON. POL'Y 299, 299 n.1 (2008)).

361. *See, e.g.*, Assignment of Interest in Estate & Declaration Pursuant to Prob. Code § 11604.5 Exhibit A at 1, *In re Estate of Gaxiola*, No. RP07334581 (Cal. Super. Ct. Jan. 22, 2009) (DomainWeb).

362. Agreement Regarding Assignment of Beneficiary's Interest at 1-2, *In re Estate of Manos*, No. RP07318864 (Cal. Super. Ct. Mar. 7, 2008) (DomainWeb).

363. *See* Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 1, *In re Estate of Bell*, No. RP08389640 (Cal. Super. Ct. Jan. 8, 2010) (DomainWeb).

364. *See* Third Assignment of Beneficial Interest in Decedent's Estate; Declaration of Compliance: Proof of Serv. at 1, *In re Estate of Dennis*, No. RP08386711 (Cal. Super. Ct. Mar. 1, 2013) (DomainWeb).

cent,³⁶⁵ 676 percent,³⁶⁶ 730 percent,³⁶⁷ 857 percent,³⁶⁸ 913 percent,³⁶⁹ and 930 percent.³⁷⁰ These markups “are so extreme as to suggest fundamental unfairness,”³⁷¹ and should be substantively unconscionable.

To conclude, unconscionability can be a fallback challenge to extortionate probate loans. Some of these arrangements are both procedurally and substantively suspect, and should be unenforceable even in states that have no other applicable consumer protection measures.

CONCLUSION

Probate loans have become a player on the fringe finance scene. But unlike RALs, payday loans, and pension loans, probate loans have been all but ignored. This Article provides empirical evidence

365. See Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 1, *In re Estate of Bell*, No. RP08389640 (Cal. Super. Ct. Jan. 22, 2010) (DomainWeb).

366. Agreement Regarding Assignment of Beneficiary's Interest at 1-2, *In re Estate of Manos*, No. RP07318864 (Cal. Super. Ct. Oct. 25, 2007) (DomainWeb).

367. See Assignment of Beneficial Interest in Decedent's Estate, *In re Estate of Bell* at 1, No. RP08389640 (Cal. Super. Ct. Mar. 18, 2010) (DomainWeb).

368. See Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights, *supra* note 203, at 1.

369. See Sixth Agreement of Kristina M. Chubbuck, *supra* note 6, at 1.

370. In fact, one estate featured two such loans. See Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 1, *In re Estate of Flemming*, No. RP08390868 (Cal. Super. Ct. Oct. 30, 2009) (DomainWeb) (agreement of Alonzo Wilkes); Assignment Agreement, Sale & Transfer of Beneficial Interest in Decedent's Estate/Waiver of Disclaimer Rights; Declaration Pursuant to Prob. Code Section 11604.5; Proof of Serv. at 1, *In re Estate of Flemming*, No. RP08390868 (Cal. Super. Ct. Oct. 30, 2009) (DomainWeb) (agreement of Nina Wilkes).

371. See *James v. Nat'l Fin., LLC*, 132 A.3d 799, 821 (Del. Ch. 2016). In addition, substantive unconscionability might revolve around what the heir or beneficiary did with the funds. As noted, *James* relied on the fact that the borrower “obtained the Disputed Loan because she needed money for groceries and rent.” *Id.* at 831. Conversely, *Pierson* found it meaningful that the retiree did not enter into the transaction “to obtain basic necessities, but rather out of a desire to make home improvements and to consolidate his debts.” *In re Pierson*, 447 B.R. 840, 850 (Bankr. N.D. Ohio 2011). As noted *supra* text accompanying notes 275-76, more research is required to determine how the recipients of probate loans use the proceeds. It does seem slightly perverse, however, to penalize lenders for providing funds to help cash-strapped borrowers survive lean times. That seems backwards: arguably, the fact that fringe lending can bridge the gaps between paychecks suggests that it is socially valuable.

about the industry. It contends that California should sharpen the bite of its probate lending statute and other states should consider passing similar laws. It also urges courts to recognize that probate loans must comply with usury laws, the TILA, and the unconscionability doctrine. As the largest posthumous wealth transfer in history unfolds,³⁷² a rising number of consumers will cash in early on their inheritances. The legal system should ensure that they do so in a transparent and fair fashion.

372. *See supra* text accompanying note 21.