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RE-FINANCING CIVIL LITIGATION

*Stephen C. Yeazell**

INTRODUCTION

We find ourselves in the second stage of a revolution in the financing of civil litigation. The tobacco settlements, on which this symposium focuses, were the effect, not the cause of the revolution, which had been underway for decades. As interesting as the tobacco cases are, we risk misunderstanding the dynamics of civil litigation if we focus too closely on them, for the tobacco cases are in some respects anomalous. We shall understand better if our gaze covers a broader landscape, in which ordinary tort litigation plays a more prominent role and bet-the-industry cases like asbestos, tobacco, and guns a smaller one. Seen in this broader perspective, the changes run deep and affect defendants as well as plaintiffs. Compared with the situation seventy-five years ago, the plaintiffs' bar is today better financed, both absolutely and relative to the defense bar. Using the same reference point, the defense bar, in ordinary cases, is more constrained than it was when Model Ts came only in black. As a consequence, plaintiffs' and defendants' lawyers are more evenly matched than they were in the first quarter of the twentieth century. Those changes in capitalization affect the outcome of cases, without regard to changes in procedural or substantive rules. Procedural and substantive changes have in some cases magnified the changes brought about by changes in case financing, and in other situations necessitated the deeper capitalization. Important in itself, understanding these changes in capital structure also sheds light on some recent legislative reactions and allows us to assess the durability of the changes. Finally, this understanding may give us a different perspective on a question that has occasioned much debate: is the increased rate of civil litigation in recent decades a result of increased demand or increased supply?

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II. SEVENTY-FIVE YEARS AGO

As a starting point, move back seventy-five years. As with any periodization, this one is somewhat arbitrary, but not entirely. Emerging from World War I, the U.S. economy was recognizably modern, with mass production establishing itself as the basis of what was to become enormous industrial strength. The banking system had assumed a modern shape with the establishment of the Federal Reserve System,¹ though deposit insurance was still in the future, and the broader financial markets were an accident waiting to happen. The legal profession likewise had a modern shape: most lawyers were being trained in law schools, with the elite tier of the profession constantly complaining about the inadequacy of the standards in the tier of schools that trained the lower tier, as well as about the growing number of lawyers concentrated in the claimants' bar.² Let me take from this period a quite ordinary lawsuit.

A few blocks south of the UCLA campus lays the intersection of Wilshire and Veteran Boulevards, now claimed as the busiest traffic intersection in the United States.³ That claim was not available seventy-five years ago, but traffic was adequate to generate auto accidents. Assume such an accident, a left-turn collision, yielded substantial injuries. Let us start with the person who might become the plaintiff. That person could by 1925 find a lawyer who would handle the case on a contingency basis; this form of feeing had become, if not well liked, at least accepted in the United States after the First World War.⁴

That plaintiff would almost certainly have sought a lawyer engaged in solo practice; indeed, it might have been difficult for her to find a lawyer not engaged in solo practice, since that was the predominant form of practice for most lawyers until the last few decades.⁵ More significantly, that lawyer would likely have been operating a practice

1. President Woodrow Wilson signed the Federal Reserve Act establishing the Federal Reserve System on December 23, 1913.

2. RICHARD L. ABEL, *AMERICAN LAWYERS* 52-55 (1989).

3. Jeannine Stein, *The Virtues of L.A.'s Prime Protest Spot*, L.A. TIMES, July 25, 1996, at E1.

4. "Acceptance [of contingent fees] was fairly general by the end of the nineteenth century." CHARLES WOLFRAM, *MODERN LEGAL ETHICS* 527, n.10 (1986). The ABA approved such fees in their 1908 Canon of Ethics, although "careful Victorian lawyers gave it the same reception as they gave ballroom dancing: that the masses engaged in it and the police did not intervene meant only that it was lawful." *Id.* at 527. See also, JEROME E. CARLIN, *LAWYERS ON THEIR OWN* 22 (2d ed. 1994) (stating "The contingent fee probably first came into prominence with the rise of personal injury practice . . .").

5. In 1954, reporting an analysis done several years earlier, Blaustein & Porter found that just over two-thirds of American lawyers were solos, neither working with nor employing any other lawyer. ALBERT BLAUSTEIN & CHARLES PORTER, *THE AMERICAN LAWYER* 8 (1954).

that was thinly capitalized, with only very modest resources to invest in the case.⁶ The complaint drafted by our thinly capitalized lawyer would have asserted negligence on behalf of the other driver, the sole defendant in the suit. Damages would have been available for lost wages, medical care, and pain and suffering.

Plaintiff's counsel would have filed that claim only if the defendant had significant independent means or if he had liability insurance for his auto (his "machine" as my grandmother would have had it), insurance that one could by no means have taken for granted.⁷ If we suppose the defendant was insured, he would tender defense of the action to his insurance carrier, who would refer it to a lawyer on retainer in Los Angeles. That lawyer would be likely to have an understanding about hourly rates with the insurer but otherwise operate relatively free of constraints in regard to litigation strategy. The insurer would control settlement decisions, but if the case did not settle, as many did not, it would go to trial.⁸

The reference to the insurer's settlement authority emphasizes that, as at all periods during the last two hundred years, the most likely resolution of the case would be a settlement. In 1925, that settlement would be quite straightforward: a release of all claims signed in return for a check drawn on the insurer (or the defendant if the plaintiff had had the good fortune to be injured by a solvent, uninsured defendant). Though common, settlements were not inevitable. This is a period in which rudimentary data suggest that about one in five filed cases ended in trial—a minority but a very substantial minority.⁹ Civil practice was still in significant measure a trial practice. If the case did go to trial, there might be expert testimony on the extent and likely dura-

6. Even in the generally optimistic view of Blaustein and Porter, writing in the early 1950s and seeing through rose-tinted glasses supplied by the American Bar Association, the picture did not look good. In a world in which "annual expenditures of \$5,000" on law libraries were "not uncommon" and the gross average income of lawyers was \$14,000, one finds it hard to imagine a richly resourced solo practitioner. *Id.* at 15, 21 (finding the income differentials between solo and firm lawyers striking). Even more remarkable, the median net income of a solo practitioner in 1951 was *below* the net income of all lawyers in 1929—in nominal, unadjusted dollars. *Id.* at 15. Writing a decade later, Jerome Carlin still found his solo practitioners barely making it financially. JEROME E. CARLIN, *LAWYERS ON THEIR OWN* 184-200 (1962).

7. The compulsory insurance movement dates from this era and was called forth by the circumstance that in an increasing number of accidents, a prospective defendant was uninsured and unable to respond in damages. ROBERT H. JERRY, *UNDERSTANDING INSURANCE LAW* 842-46 (2d ed. 1996).

8. I have not located good state-court trial rate data for this period. A decade later, the federal courts were trying about 20% of the civil cases filed. Stephen C. Yeazell, *The Misunderstood Consequences of Civil Process*, 1994 WIS. L. REV. 631, 633 n.3 (1994).

9. In 1936, 19% of all civil filings went to trial; in 1938, 19.9% did. Thus, the trial rate appears to have been fairly stable throughout that period. *Id.*

tion of the plaintiff's injuries, but no other expert testimony would be likely. As a consequence, the variables that could affect trial outcome were relatively modest: how credible would the witnesses—particularly the parties—be, and how serious were the injuries? Damages, if they were awarded, would be limited to compensatories; the only significant wild card would be the amount the jury might award for pain and suffering.

III. THE MATERIALS OF TRANSFORMATION

Many of the central elements of this quite ordinary lawsuit have transformed themselves between that not-too-distant past and now. Because some of the more obvious aspects of the case—the negligence suit, the contingent fee, and settlement as a predominant resolution—look superficially similar, however, we can easily miss the transformation. Legal academics may be particularly likely to miss the point because many of the changes have occurred in places where we are less likely to look: in social and economic developments outside law and, within law, in the business and financial structure of practice, rather than in its substantive or procedural rules. Moreover, even when legal rules have changed, the interaction of the changes with the business and financial structure, rather than the substantive changes themselves, has produced the most dramatic results. To make the camouflage almost complete, some of the most salient changes have been quite obvious: there is no hidden key to be found or deep conspiracy to be uncovered. Instead, we need to connect some developments that individually will be quite well known, and to reflect on how they have transformed the practice of civil litigation, particularly the hemisphere focusing on torts. Broadly speaking, one can summarize these changes by saying that a large expansion of consumer credit and insurance created a vast pool of solvent potential defendants. As this happened, procedural changes made it possible to probe more deeply into the minds and file cabinets of these defendants. Combining the products of this discovery with improved firm capitalization, the plaintiffs' bar was able over several post-war decades to persuade courts and legislatures to make a series of small changes in the law, the effect of which was to improve substantially the plaintiffs' chance of recovery.

A. *Credit and Insurance*

No one working on a contingent fee intentionally sues an insolvent defendant. As a consequence, anything that changes the proportion of solvent defendants has the potential for increasing the proportion

of lawsuits to liability-producing events. Enormous changes in U.S. society over the past seventy-five years have produced just such a set of linked developments. Since the Great Depression, this country has seen vastly increased credit-enabled purchasing of two major sources of liability-producing activity: automobiles and housing. With credit has come liability insurance, and with liability insurance has come growth in “defendant populations.”

In 1920, about 45% of U.S. households owned the dwelling in which they lived.¹⁰ In 2000, the proportion had increased to 67%.¹¹ This change will give heart to those who cherish Jeffersonian democracy. Combined with other changes, it will also give heart to tort lawyers, whether representing plaintiffs or defendants. The rise in ownership did not by itself increase the prevalence of insurance. In 2000, an owned house was almost certainly an insured house, with the coverage extending not only to fire, hail, and water, but also to liability.¹² By contrast, while in 1925 one might expect that prudent homeowners would purchase fire insurance, two circumstances made such insurance less important to the tort bar. First, not all fire coverages included liability.¹³ Second, it was a good deal less than certain that all homeowners would carry any insurance; in 1951, a standard insurance text noted that “at the present time it is regarded as improvident for any property owner to allow his property to be uninsured.”¹⁴ But the improvident will be always with us, and in the prewar period, any given house had a non-trivial chance of being uninsured or, if insured, of having no liability coverage. Two developments changed that.

First came the Federal Housing Administration and the Veterans Administration home loan programs.¹⁵ Born of economic depression and war, they had their primary effect in opening lines of credit to employed citizens who lacked either the down payment or the financial standing to convince a private mortgage lender to make a loan. By guaranteeing repayment, the VA and the FHA enabled employed buyers with trivial assets to purchase houses: “\$99 down to VA buyers,” blared the billboards around new suburban postwar subdivisions. One of many secondary effects rippled out to the tort system: as part

10. U.S. BUREAU OF THE CENSUS, FIFTEENTH CENSUS OF THE U.S.: FAMILIES 6 (1933).

11. U.S. BUREAU OF THE CENSUS, HOUSING VACANCY SURVEY: THIRD QUARTER 2000, *available at* <http://www.census.gov/hhes/www/housing/hvs/q300tab5.html> (last visited Oct. 19, 2001).

12. Standard home insurance policy.

13. WILLIAM. R. VANCE & BUIST M. ANDERSON, HANDBOOK OF THE LAW OF INSURANCE 23, 866-907 (3d ed. 1951).

14. *Id.* at 23.

15. KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE U.S. 203-06 (1985).

of the required loan conditions, these governmental insurers required homeowners insurance, which by the early 1950s almost inevitably included liability coverage.¹⁶ Consequently, as Levittowns and Daly Cities went up all over the United States, each dwelling represented not only housing but also a new ability to respond to a tort judgment. Since World War II, the expansion and securitization of the mortgage market has meant that two-thirds of U.S. households own their dwelling *and* possess at least one form of liability insurance.¹⁷

What the federal government did for housing, what used to be known as the Big Three did for automobile insurance. Automobile ownership is ubiquitous; in 1999, 104 million household units in the United States owned 216 million registered vehicles, yielding just over two registered vehicles per household.¹⁸ Automobile financing, including a recent variation—leasing—is only slightly less ubiquitous. In 1947, only about a third of car purchasers financed their purchases.¹⁹ By 1970, that proportion stood at about 50%,²⁰ and it has since then grown. With institutional financing comes mandatory insurance; your mother or your state government may not require you to buy insurance, but a finance company will, and, unlike your mother or your state government, the finance company will rigorously enforce and monitor the insurance obligation. Because no finance company will allow a purchaser to be uninsured and auto policies include both liability and comprehensive insurance, almost seven-eighths (86%) of the 216 million motor vehicles registered in the United States were covered by liability insurance.²¹ The remaining 14% still amounts to thirty million vehicles, which are not evenly distributed among states

16. Mortgage lenders require fire and casualty insurance to protect their collateral. They do not require liability insurance, but since about 1950, homeowners have overwhelmingly chosen such policies as part of their insurance package. HOWARD W. LEGG, *A BRIEF OUTLINE OF INSURANCE 197-98*, 203 (1968).

17. In 2000, 67.4% of American households owned their home. U.S. BUREAU OF THE CENSUS, *HOUSING VACANCIES AND HOME OWNERSHIP ANNUAL STATISTICS: 2000*, available at <http://www.census.gov/hhes/www/housing/hvs/annual00/ann00t13.html> (last visited Oct. 19, 2001).

18. USA Statistics in Brief—Law, Education, Communication, Transportation, Housing, available at www.census.gov/statab/www/part2.html (last visited Oct. 19, 2001). I have not found a report parallel to that on housing ownership that gives the actual proportion of vehicle ownership.

19. U.S. BUREAU OF THE CENSUS, *HISTORICAL STATISTICS OF THE U.S.: COLONIAL TIMES TO 1970*, Pt. 2 717 & SERIES Q 175-86 (1975).

20. More precisely, it was 53% for new cars, 48% for used. *Id.*

21. USA Statistics in Brief—Law, Education, Communications, Transportation, Housing, available at <http://www.census.gov/statab/www/part2.html> (last visited Oct. 19, 2001).

and cities, but even in the jurisdictions with the highest rates of uninsured motorists, two-thirds are insured.²²

Expanded credit spread home and automobile ownership widely within the United States. Two-thirds of U.S. households own (with their mortgage-holder) their dwelling and with it a liability insurance policy. Those same households are likely to own a fraction more than two automobiles, each covered by a liability policy. These changes in insurance coverage were primarily the result not of mandatory insurance laws but of the spread of credit markets. Institutional creditors like their risks in small doses, and when they can easily shift those risks to others, they will. This risk-reduction effort by financial institutions has increased the pool of insured actors, a development with significant implications both for the plaintiffs' and defendants' bars.

As the spread of liability insurance was remaking the landscape of potential defendants, the growth of another insurance market affected the damages available in those lawsuits. In 1940, about 9% of the U.S. population had health insurance.²³ In 1993, encouraged by generous federal tax treatment as well as growing national wealth, that proportion was more than 70%, having dropped from a high of 80% in 1980.²⁴ Health insurance has a more complicated relation to litigation than does liability insurance. Liability insurance directly produces a solvent prospective defendant and, given liability and injury, obviously increases prospective recovery. Health insurance might, theoretically, reduce propensity to claim by absorbing some plaintiffs' damages from liability-producing behavior. In fact, the story has been more complicated. Until quite recently, the courts of most states and those of the federal government applied to tort damages the collateral source rule, making it possible to recover from a tortfeasor costs that had been absorbed by an insurer.²⁵

More important, the availability of insurance, together with government investment in research and the growth of medical technology, has fueled a large rise in costs of medical care. In every decade since

22. Ins. Research Council, *New IRC Study Estimates 14% of Drivers Uninsured*, Aug. 12, 1999, available at <http://www.ircweb.org/news/Press-uninsured.html> (last visited Oct. 19, 2001).

23. Randall Bovberg et al., *U.S. Health Coverage and Costs: Historical Development and Choices for the 1990s*, 21 J. L., MED. & ETHICS 141, 144 (1993).

24. *Id.* The 70% figure measures only the proportion of the population covered by private health insurance, and thus excludes another fifty million persons.

25. See Note, *Section 1983 and the Collateral Source Rule*, 40 CLEV. ST. L. REV. 101, 103 (1992); John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478 (1966). Since 1980, legislative changes have altered the rule, but even in those jurisdictions that have done so "allow plaintiff to retain any portion of the collateral benefit that he has directly or indirectly paid for." Note, *Section 1983 and the Collateral Source Rule*, *supra*, at 107.

1929, the growth in health care expenditures has exceeded the growth in Gross National Product,²⁶ and in the post-war period, the rate of inflation in health care costs has substantially exceeded the Consumer Price Index.²⁷ Because medical expenses are a key element in most injury cases—perhaps *the* key element—if medical costs increase at more than the rate of inflation, lawsuits become comparatively more attractive to plaintiffs' lawyers, who are working for a share of the total damage bill. Put another way, insurance and health care research have made tort suits more attractive investments for plaintiffs. Making them more attractive for plaintiffs has made them a growth industry for the insurance industry and for the defense bar. Litigation has achieved a symbiotic relationship with the most significant aspects of the consumer credit market.

B. Changes in Substantive Law

Changes in the incidence of individual insurance coverage produced a greater number of insured owners of houses and cars, but most individual insurance coverages are relatively modest. Before the tort bar could recapitalize itself, additional mechanisms for risk spreading and incentives for deeper investment both had to appear. They did, starting in the late 1950s, as a result of several related developments.

First, products liability laws opened the doors wider. With the California Supreme Court leading the way, manufacturers became liable for a wide variety of injury-producing products.²⁸ Such liability had long-term consequences for the financing of the plaintiffs' bar. Products liability made deeper investments in specialized knowledge profitable. Automobile accidents might have repetitive patterns, but any given auto accident could injure a fairly limited number of persons. Not so with defective products: one could now attack the design of the bumper, gas tank, or steering wheel as the cause of injuries in hundreds or in thousands of accidents, with the added advantage that a Fortune 500 corporation, not an individual insurance policy, would be the source of damages.²⁹ Moreover, products liability suits expanded

26. Bovberg et al., *supra* note 23, at 142.

27. Bovberg et al., *supra* note 23, at 151.

28. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 62 (1963). Chief Justice Traynor first proposed strict liability as the basis for recovery in products liability. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461 (1944) (Traynor, J., concurring).

29. A brief search online reveals literally thousands of recent products liability suits against Fortune 500 companies. See, e.g., *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992) (conditionally approving a \$4.23 billion class settlement for silicone breast implant litigation against Dow Corning Corp.); *Clay v. Ford Motor Co.*, 215 F.3d 663 (6th Cir. 2000) (affirming a \$17.5 million jury award after finding a design defect in victim's SUV).

liability into realms that might in an earlier era have seemed to involve self-inflicted injuries: power saws and tools, snow blowers, home heaters and appliances. Mass production and distribution meant that it became increasingly difficult to imagine an injury in which there was not a potentially liable manufacturer. For the bars—plaintiffs' and defendants'—products liability suits required more experts and some knowledge of design and manufacturing processes;³⁰ a lawyer contemplating a series of such cases might make substantial investments, economic and intellectual, in developing expertise. Others have and will continue to debate the economic and social wisdom of such developments;³¹ for my purposes, it is enough to note its existence.

As products liability developed, another previously closed door opened: municipal and charitable immunity crumbled. Hospitals, municipalities, and state and federal governments all began to be subject to something that looked like tort liability. The Federal Tort Claims Act³² and equivalent state statutes made governments liable for ordinary negligence;³³ their continued immunity existed only for decisions that could be characterized as "discretionary" or intentional³⁴ and they continued to be immune to punitive damages. Because this lowered liability corresponded with an array of post-war governmental initiatives ranging from the interstate highway system to expanded public education, the tort regime combined with increased governmental activity to produce a broad range of potential lawsuits. The story of charitable institutions was similar: hospitals, orphanages, and

30. The Restatement (Third) of Torts places the burden of proof on the plaintiff to demonstrate that a "reasonable alternative design would have reduced the foreseeable risks of harm." PRODUCTS LIABILITY § 2 cmt. f (1997). Though the plaintiff does not need to produce a prototype alternative design to make his case, proving an alternate design will strongly support her case and clearly require expert testimony. *Id.*

31. Many of the debaters, whether decrying or applauding the changes, tend to take a short view of the problem, focusing either on the costs of the compensation system or on the importance of compensating injured persons, without embedding the system in the context of contemporary U.S. society. The United States is, among industrial societies, low both on the index of regulation and of social welfare systems. The tort system thus performs in the U.S. regulatory and compensatory functions that in other systems are performed by government. Those who want to limit the tort regime thus have the responsibility of suggesting alternatives; those that want to preserve it have the responsibility of demonstrating its superiority to alternatives. Neither group characteristically accepts this responsibility.

32. 28 U.S.C. § 2671 et seq. (1988).

33. 28 U.S.C. § 2674 (1990).

34. For a history of sovereign immunity and its decline in the United States, see PETER H. SCHUCK, *SUING GOVERNMENT* 35-41 (1983); COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *SOVEREIGN IMMUNITY: THE TORT LIABILITY OF GOVERNMENT AND ITS OFFICIALS* (1979).

similar institutions were now subject to liability,³⁵ and although their pockets were shallower than those of the product manufacturers or state and federal governments, they were substantial enough to warrant more than an occasional lawsuit. For the many charitable institutions that ran hospitals, the combination of their new exposure to suits with the increasing ability of the plaintiffs' bar to locate physicians willing to testify against a fellow doctor expanded the number of suits in which the plaintiff's lawyer could say, in effect, "I don't know whether this terrible injury was the fault of the doctor or the hospital; I leave that question in the jury's capable hands."³⁶

As these events unfolded, a final substantive doctrinal change consolidated their effect: the substitution of comparative fault for the regime of contributory negligence.³⁷ In its purest form, of course, contributory negligence was a complete defense: any negligence of the plaintiff entirely barred recovery. Anecdotal evidence suggests that juries sometimes declined to apply the comparative negligence rules in their full rigor.³⁸ Plaintiffs, however, never knew in advance whether juries would thus temper the law, and the formal regime insisted that even a small amount of contributory negligence entirely negated defendant's liability. As a consequence, plaintiff's tort litigation was often a losing, and always a risky game. As courts and legislatures modified contributory negligence into various regimes of comparative negligence, plaintiffs' chances of at least a modest return on a given lawsuit increased. To be sure, comparative negligence could also reduce the plaintiff's recovery by allowing the jury explicitly to recognize his fault. But this feature of comparative negligence only served to emphasize the respects in which both sides to a tort case were engaged in risk management—the plaintiff trying to avoid an investment

35. Charitable immunity came under widespread attack in the mid-1940s, inspired in part by Judge Rutledge's extensive criticism. *Georgetown v. College of Hughes*, 130 F.2d 810 (D.C. Cir. 1942). For a summary of the fall of charitable immunity, see EDITH L. FISCH ET AL., *CHARITIES AND CHARITABLE FOUNDATION* 471-80 (1974). For an argument against the possible rebirth of charitable immunity, see Note, *The Quality of Mercy: "Charitable Torts" and their Continuing Immunity*, 100 HARV. L. REV. 1382, 1382 (1987).

36. In one medical malpractice case, a surgical instrument broke off into the plaintiff's spinal canal during surgery. The jury found the doctor, hospital, and manufacturer each not liable because the plaintiff could not sufficiently prove liability for any one defendant. *Anderson v. Somberg*, 67 N.J. 291, 297 (1975). The appellate court held that "the jury should have been instructed that the failure of any defendant to prove his non-culpability would trigger liability A cause of action against all . . . defendants will be unacceptable and would work a miscarriage of justice sufficient to require a new trial" *Id.* at 298.

37. California courts led the transition to a comparative fault regime. *Li v. Yellow Cab Co.*, 119 Cal. Rptr. 858, 861 (1975).

38. Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 113-14 (1990).

in excess of recovery, and the defendant seeking to prevent or minimize any recovery.

The expansion of products liability, the fall of municipal and charitable immunities, and the advent of comparative negligence combined to produce the phenomenon that my late colleague Gary Schwartz called “the secondary defendant.”³⁹ In a mass-production society, many injury-producing events will appear to have several legally plausible causes. The immediate moral agent of my injuries is the driver who ran the red light, but the manufacturer of my car (which lacked safety features that could have prevented or contained design features that exacerbated my injuries), the manufacturer of the other car (with a similar list of design defects), the municipality that designed the intersection (failing to light or mark it optimally), the hospital to whose emergency room I was taken (which failed to treat me promptly and properly), and others have some role in bringing about my current state of health. As any lawyer will note, many of these “secondary” defendants have the substantial advantage of possessing deep pockets, so that a liability judgment, even of partial responsibility, has a high likelihood of being collectible. Their attractiveness as plausible defendants is therefore great; I leave to a later section an analysis of the importance of this added attractiveness.

So far, I have cataloged several developments in substantive law that opened doors to expanded tort liability. Each opened door benefited the plaintiffs’ bar in obvious ways; each also benefited the defendants’ bar, for every action against a solvent or insured defendant was defended. This rise in lawyers’ employment was magnified by the rise of the secondary defendant, which produced employment for not one but several defense lawyers in many cases.

C. Changes in Process: Discovery & Settlement

My argument thus far would seem unlikely to come from the hand of someone who makes a living writing and teaching about civil procedure, for almost none of what I have thus far said relates to procedural rules.⁴⁰ Let me redress that omission. Civil litigation in the second half of the twentieth century has become less risky but more expensive than it was in the first. More precisely speaking, as a result of procedural changes, contemporary civil litigation requires a longer-

39. Interview with Gary Schwartz, William D. Warren Professor of Law, UCLA School of Law, in Los Angeles (May 2001).

40. The exception would be the importance of the secondary defendant, chronicled in the preceding section. Without a liberalized joinder regime, it would have been less feasible and less attractive to sue the secondary defendants.

run investment horizon but increases the expectable returns on such long-run investments. The plaintiffs' bar became more diversified and better capitalized in part because these changes enabled it to survive. At the same time, changes in the procedural system meant that deeper capitalization paid off for the bar as it might not have in an earlier era: there was productive work for that capital to do.

Civil litigation in 1925 was what criminal litigation is today—essentially a trial practice. Many cases settled, but a substantial proportion went to trial, and, more important, the pretrial phase of litigation rarely called for substantial investment. A lawyer had to do some investigating of the episode underlying the litigation. A defendant might prepare a demurrer to a badly drafted complaint and the drafter of that complaint might have to redraft it, but there was not much call for substantial investment between the complaint and the weeks before trial.

That all changed in the decades following 1938. The Federal Rules of Civil Procedure and the state law changes that imitated them moved the focus of civil litigation from the back to the front of the lawsuit—from trial to discovery and a pretrial practice. They permitted, and in time came to be seen to require, the pretrial documentation of the factual record on which the claim and defense rested. Moreover, until 2000, the Rules explicitly permitted a pretrial investigation *broader* than evidence admissible at trial, and discovery inevitably included much that was marginally relevant, inadmissible, or merely peripheral to the main lines of argument at trial.⁴¹ By permitting the lawyers to make this broad exploration, the Rules and their state analogues increased the expense of preparing and defending a civil trial: a lawyer who saved her preparation until the weeks before trial was likely to find the case dismissed on a summary judgment motion.⁴² By increasing the expense, the Rules also placed the thinly capitalized plaintiffs' bar initially at a disadvantage. Although today the defense bar routinely excoriates the fishing expeditions permitted by broad discovery,⁴³ discovery initially put plaintiffs at a practical dis-

41. The 2000 amendments restrict parties to discovery of material "that is relevant to the claim or defense." FED. R. CIV. P. 26(b)(1) (2000).

42. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Estate of Henderson v. W.R. Grace Co.*, 541 N.E.2d 805 (Ill. App. Ct. 1989); *Robinson v. Warner-Lambert & Old Corner Drug*, 998 S.W.2d 407 (Tex. App. 1999) (making explicit the lawyer's responsibility to employ discovery before trial—at least enough to produce evidence that would withstand a defense motion for summary judgment).

43. The 2000 amendments to the Federal Rules, which slightly narrowed the material discoverable without judicial authorization, were widely seen as favoring defendants. See, e.g., John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 540 (2000) (calling the amendment "radical, pro-defendant").

advantage because many plaintiffs' lawyers did not have the capital to sustain a prolonged lawsuit, and whatever else discovery did, it prolonged lawsuits. It took several decades for the plaintiffs' bar to catch up by recapitalizing themselves to the point where they could take cases deep enough into discovery to realize some of the potential gain from such pretrial preparation. One can see the modern plaintiffs' bar, better capitalized and diversified, as a response to the demands of a procedural regime requiring greater investment. Without better financial resources, the plaintiffs' bar simply could not have survived, much less prospered.

But the discovery rules not only required more investment by the plaintiffs' bar. Pretrial discovery enabled that investment to pay off. Consider the expanded bases of liability discussed in the preceding section. Products liability and municipal and charitable liability have one characteristic in common: they open up for legal scrutiny large and complex institutions. Because such institutions are bureaucracies, they provide fertile ground for discovery to plow. Bureaucracies run on written documents and employ substantial amounts of technology to produce, copy, and archive those documents. The photocopy machine and digital technology have greatly expanded the likelihood that any given document will exist in multiple copies. Those documents can be uncovered if one has enough knowledge of the institution, persistence, and cash to back the persistence. Such an environment creates a symbiotic relationship between discovery and substantive law. Had there not been a regime of pretrial discovery, it would not have been worth developing a law of products liability. Without pretrial access to engineering studies, internal memoranda, and the like, decisions about appropriate safety levels in relation to known technology and cost would have been difficult to make. On the other hand, once there was an embryonic products liability regime, modern discovery gave it a good deal to chew on. The situation for municipal and charitable liability is similar: to decide whether the state designed the roadway sensibly, one needs internal reports; having those internal reports, it is possible to make sensible decisions about the appropriate framework of liability. To assert symbiosis is not to argue that the organism has evolved in an optimal way: the law of liability in all of these areas may be sub-optimal. My point is rather that it is difficult to imagine developing such a body of law without pretrial access to substantial amounts of internal information.

What happens with all this information, of course, is that the parties begin to talk about settlement. Sometimes they do this because in the face of good information good lawyers make converging assessments

about the value of their cases. Sometimes they do this because judges push them into various forms of settlement discussions. Sometimes they do this because the prospect of trying the case seems so terrifyingly risky—for both sides—that even a bad settlement is preferable to a trial. Whatever the reason, settlement is a very common means of concluding civil litigation—so common that one thoughtful writer has referred to a trial of a civil lawsuit as pathological.⁴⁴

When settlements occur, they are, as compared with our reference point in 1925, as likely to look like a corporate merger than a cash sale at a supermarket. Just the set of names should convince most of us of this proposition: Mary Carter agreements, Sliding Scale agreements, High-Low agreements, structured settlements, and cede-back agreements. Each of these is a staple not of bet-the-industry class actions but of run-of-the-mill tort litigation.⁴⁵ Several of these new settlement forms feed on a development already discussed—expanded liability of secondary defendants.

The sliding scale agreement provides a good example.⁴⁶ Such agreements are, by definition, of use only in multi-defendant cases. The plaintiff settles with one defendant. That defendant will pay more if some of the cost is contingent. Such an arrangement benefits the plaintiff if the settling defendant will pay some of the settlement amount immediately, giving the plaintiff bridge financing for the rest of the lawsuit. For example, in one prominent case, the settling defendant guaranteed that the plaintiff would recover at least \$3,000,000. If the remaining defendants escaped liability entirely, the settling defendant would pay all of that amount; if plaintiff recovered less than \$3 million from the remaining defendants, the settling defendant would

44. Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 3 (1996) (stating "Trial is a disease, not generally fatal, but serious enough to be avoided at any reasonable cost.").

45. To be completely accurate, this statement should exclude the cede-back provision, which was born of the Exxon Valdez oil spill and its attendant litigation. The cede-back agreement was a deal between Exxon and some, but not all, of a class of punitive damage plaintiffs, in which the plaintiffs agreed with Exxon to collect, then return to Exxon any portion of a punitive damage award they might be entitled to. *In re Exxon Valdez*, 229 F.3d 790, 792 (9th Cir. 2000). The Valdez litigation was not a bet-the-company case, given Exxon's size, but it cannot fairly be characterized as run-of-the-mill either. *Id.*

46. A sliding scale recovery agreement is a covenant between one or more plaintiffs and some, but not all, of the defendants that limits the agreeing defendant's liability to an amount dependant upon the amount of the recovery from the non-agreeing defendants. CAL. CIV. PROC. CODE § 877.5 (1980). Sliding scale settlements are also known as "Mary Carter" agreements. See *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Ct. App. 1967). These settlements have been criticized as unfair against public policy. See, e.g., John E. Benedict, *It's a Mistake to Tolerate the Mary Carter Agreement*, 87 COLUM. L. REV. 338 (1987) (claiming that "Mary Carter" agreements prejudice non-settling defendants and are legally unethical).

make up the difference, and if the plaintiff recovered more than that amount against the non-settling defendant, the settlor would be relieved of liability.⁴⁷ Such a settlement allows the plaintiff and one of the defendants to settle on terms whose ultimate cost to the settling defendant will depend on the outcome of litigation with the remaining defendants. Such agreements come in several sub-types.⁴⁸ All the types serve two related purposes. First, and most obviously, they reduce the risk to the plaintiff of continued litigation by guaranteeing some minimum recovery. Second, they often serve to provide bridge financing for the part of the lawsuit that remains unsettled. By settling with one defendant, the plaintiff gains funds that can be used to pay rent, medical bills, and the like—and by his lawyer to finance continued or increased discovery. One can see this feature quite explicitly in the form some such agreements take—that of contingent loans. In this type of agreement, the settling defendant makes all or part of the settlement a loan, whose repayment is made contingent on the outcome of the rest of the lawsuit. This form of agreement thus extends to the settling defendant the contingent arrangement characteristic of the original agreement between the plaintiff and her lawyer. It thus spreads and reduces the risk of continuing the lawsuit.

One sees the same sophisticated risk spreading in the high-low settlement. Unlike many settlements, a high-low agreement assumes the case will be tried.⁴⁹ Rather than ending the suit, it puts a cap and a ceiling on the amounts at risk. Plaintiff agrees that no matter what the eventual judgment, he will not collect more than the amount specified in the agreement. In return, defendant agrees that even if there is a verdict for the defense, the plaintiff is entitled to a minimum amount. Often used in cases where liability is uncertain but damages high, the high-low agreement enables both parties to manage the risks of litigation: it amounts to insurance against a catastrophic verdict, with the premium being the surrender of total victory.

D. Defense Constraints: Litigation Budgets and Insurance Controls

Many of the changes chronicled thus far either rewarded or required increased investment by plaintiffs' law firms. As these changes occurred, defendants' firms, at least those compensated by insurance companies, found themselves under increased economic pressure

47. *Abbot Ford, Inc. v. Superior Court*, 741 P.2d 124 (Cal. 1987).

48. In some, the settlor pays a minimum amount no matter what the subsequent recovery; in others, the "sliding" part of the scale goes all the way to zero. In some, the settlor has veto power over subsequent settlements by the remaining parties, and so on.

49. John L. Shanahan, *The High-Low Agreement*, *FOR THE DEFENSE*, July 1991, at 25.

from the insurers who retained them. It is easy to understand the insurance carriers' concerns. Contemporary litigation has few "natural" expense limits: the proliferation of experts and the variety of pretrial discovery techniques, generally operating with slight judicial supervision, would enable any given lawyer to conduct an elaborate and expensive defense for many common claims were he operating on his own without budget constraints. Such a total-war defense has the added attraction of increasing the lawyers' fees, since locating, consulting with, deposing, and preparing an expert for trial takes time and thus creates fees. The insurers' response has been firm. They have established elaborate agreements with their counsel, all imposing cost and permission constraints on lawyers' time and fees. Not only must retained counsel agree to fee schedules (sometimes on a per-case rather than an hourly basis), but carriers have generally required that their retained counsel must seek permission before taking litigation steps likely to increase expenses substantially (engaging an expert, scheduling a deposition, and even legal research beyond a threshold number of hours). A few insurance defense bars have argued that these constraints are so severe as to impair their ability adequately to represent their nominal clients, the insured.⁵⁰ Those contentions may be exaggerated, but they reflect a sea-change in the balance of litigative power. Today, in some cases, it will be the defense that is undercapitalized and outgunned. Such imbalances will not occur in high-profile bet-the-company defenses, where the client will be supplementing or substituting for the insurers' legal fees. For example, this defense constraint did not occur in the asbestos or tobacco litigation, and it is unlikely to occur in major products liability litigation directed against well-heeled manufacturers. Rather, it will crop up sporadically, in more ordinary tort litigation, where all or most of the defense is conducted by an insurance carrier. In such cases, a well-capitalized and specialized plaintiffs' lawyer may have deeper resources than does the defense. I am not suggesting charitable foundations start financing products liability defense; nor am I arguing that this scenario is pervasive, but conversations with experienced plaintiffs' and insurance counsel suggest that neither is it fanciful, as it would have been seventy-five years ago.

IV. THE RE-CAPITALIZED PLAINTIFFS' BAR

The mere possibility of a plaintiffs' bar with resources superior to counsel retained by an insurer reflects a series of changes that have

50. *In re The Rules of Prof. Conduct*, 2 P.3d 806, 810 (Mont. 2000).

occurred in the plaintiffs' bar over the past three-quarters of a century. Many of them have been enabled, others necessitated by changes in law; still others have resulted from more subtle shifts in social climate. Some are well documented (though their significance sometimes overlooked); for others, I shall rely on more impressionistic evidence.

A. Aggregation, Marketing, Specialization, and Diversification

The average size of group in which U.S. lawyers practice has increased over the past seven decades. In spite of the turn-of-the-century growth in big firms, until late in the twentieth century, the average U.S. lawyer was a solo practitioner.⁵¹ Today, the solo lawyer is still the modal form of practice, but the mean and median lawyer operates in a small firm.⁵² That shift from solo to "firmness," even for the small firm, creates three opportunities. First, the individual lawyer—and sometimes the firm—can be more specialized, with higher levels of expertise in a particular subject area. One thus finds plaintiffs' lawyers who specialize in air crash litigation, asbestos, tobacco, tire blowouts, and the like—something almost unthinkable in the first quarter of the twentieth century. The website of the American Trial Lawyers Association lists seventy-three fields, ranging from the relatively broad (business litigation) to the specialized (food and drug, aviation), to the esoteric (Phen-fen and Redux). That specialization allows firms to amass intellectual capital—in pilot training and air traffic control, in damage assessment, in banks of experts, and the like. This expertise has two results. First, such lawyers and firms can market themselves, primarily to other lawyers, as experts in particular forms of litigation. Such marketing can produce enough referrals to justify maintaining this specialized intellectual capital. Second, the investment in intellectual capital can then produce the returns to scale that derive from having a set of cases with similar subject matter, as well as greater returns from any particular case. Finally, the larger firm (recalling that in this context "larger" means a dozen, not hundreds of lawyers) may rationally make a larger investment in firm-specific capital. The solo lawyer cared about her own reputation—probably—but knew for certain that her own professional life expect-

51. In 1971, 52% of U.S. lawyers were solo practitioners. By 1980, 49% were solo practitioners, and in 1995 (the most recent data available), 47% of all lawyers were solo practitioners. Note that 1991-1995 saw the first increase in solo practitioners (at least since 1960) from 45% to 47% (approximately 35,000 lawyers). CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT* 7 (1999).

52. In 1995, 69% of all firm practitioners worked in a firm of two to fifty lawyers. *Id.* at 8.

tancy limited the time in which any return on that capital could be expected. A firm of a dozen or twenty lawyers has a longer horizon and can therefore make larger investments in its own capital—training, libraries, web sites—and in its reputation.

Larger firm size also permits the lawyers involved to hedge their bets by combining complex, high-risk, high-payout cases with simpler, lower-risk, lower-payout cases that pay the rent while waiting for the larger ships to come in. Herbert Kritzer's valuable studies of the plaintiffs' bar in Wisconsin demonstrate how, within even moderately sized firms, a staple of workers' compensation or similar work can diversify a portfolio of larger, slow-maturing, high-risk, high-damage tort cases.⁵³ Such cases also serve a marketing tool: the client whose minor work-related injury pays the firm's electric bill may return if there is a family catastrophe that warrants a much larger, but much less certain lawsuit.

One can see all these forces at work in the two editions of Jerome Carlin's *Lawyers on Their Own*.⁵⁴ Both books portray a group of marginal lawyers operating on the outskirts of the profession under fiercely competitive conditions. But the terms of competition have changed. In the first edition, published in 1962, Carlin's lawyers were scrambling for a variety of cases, including personal injury litigation. As Carlin described his lawyers, they were not a particularly skilled lot, but they often succeeded in waiting out the insurance company. Thirty years later, Carlin's solo practitioners complained that they had been chased out of the personal injury field by the specialized tort lawyers, almost all operating in small firms.⁵⁵ The plaintiffs' bar, more deeply capitalized, specialized, and expert, has managed to capture a part of practice previously left to solo generalists. Put differently, lawyers who fifty years ago would have operated on their own have combined, allowing deeper intellectual and financial capitalization.

B. Changes in the Regulatory Environment and Inter-firm Transactions

For this development to occur, the plaintiffs' bar had to be able to market itself, both to prospective clients and to other lawyers, in ways that were unlawful in 1925. Without marketing, individual tort plain-

53. Herbert M. Kritzer & J. Mitchell Pickerill, Contingent Fee Lawyers as Gatekeepers in the American Civil Justice System 22, at 19-20 (Inst. for Legal Studies, Univ. of Wis., Working Paper No. DPRP 12-3, 1997).

54. CARLIN, *supra* note 4, at xix.

55. CARLIN, *supra* note 4, at 87-90.

tiffs, unlikely to be repeat litigants, would not have the knowledge that would allow them to choose a specialist lawyer. Without a more sophisticated referral system, lawyers would neither know about nor have incentives to refer to other lawyers with deeper capitalization and more expertise. Both arrangements are critical and both reflect changes in the regulatory regime over the century just past.

The more visible changes have to do with lawyers' direct marketing. Certain forms of solicitation and advertising unlawful in 1925 are now common. Watchers of advertisements on daytime television in most large urban markets know how pervasive such direct marketing is. This and similar forms of marketing—billboards and bus ads, letters of solicitation, and the like—have achieved constitutional protection in a series of cases that started in the civil rights movement and have extended to directly commercial forms of solicitation.⁵⁶ As a result, residents of most large cities could with no effort come up with the phone numbers of several lawyers in the course of a commute to work, simply by reading billboards and transportation advertisements.

Direct marketing alone, however, would likely not support specialized plaintiffs' practices. Prospective clients are too widely dispersed and insufficiently sophisticated consumers to do the sort of shopping that would enable them to distinguish clearly among the layers of the bar. The ads may bring a client to some lawyer's office, but it is unlikely to be the right lawyer's office. To get the client to the right lawyer requires fairly sophisticated inter-lawyer marketing and exchange of claims. Via referrals and various forms of permitted fee-sharing, a lawyer with a potential case can get it to a specialized, well-capitalized firm who can first make an intelligent evaluation of it and then, if warranted by the facts, afford to take it deep enough into discovery to achieve a good settlement. Such forms of referral are now well developed, the prospective recoveries are high enough, and the specialization required is obvious enough that many unspecialized and undercapitalized lawyers will refer such a case. The motives are less likely to be concerns about malpractice (one imagines that few such actions are filed) than the prospect of a really large recovery, even a small portion of which will amply reward the referring lawyer for what amounts to good brokerage. A glance at the 1,200-page directory of the American Trial Lawyers Association, with on-line access, fields of specialization, and cross-indexing of members, gives one a glimpse into the expertise and the sub-specialization achieved by what was

56. See *Shapero v. Kentucky Bar Ass'n.*, 486 U.S. 466, 475-76 (1988).

once a marginal, and marginally competent, group of lawyers.⁵⁷ The plaintiffs' bar, with its system of referrals, is achieving transactionally the kinds of specialization and breadth that the corporate bar is achieving by growth in firm size.

To make such an assertion is to pose a riddle. The history of the U.S. law firm in this century has been the growth of firm size. The large firm has all the advantages of specialization and diversification—on a larger scale. A reader of this essay who is familiar with this chapter in professional history might well concede all that has been said but ask why the plaintiffs' firms have not grown to much larger sizes—into aggregations rivaling some of the defense firm, most of whom have scores or hundreds of lawyers. Why are the typical plaintiffs' firms a dozen lawyers rather than a hundred? Why do plaintiffs' firms form temporary, case-specific aggregations rather than taking the path of the corporate and defense bar? Posing complete answers to these questions lies beyond the boundaries of this essay, but several suggestions are possible. Marc Galanter has posited a personality type for the plaintiffs' lawyer—a lone-ranger with a knight-errant set of characteristics—that does not mesh well with large organizations.⁵⁸ That observation meshes with anecdote and personal observation, but may not go far enough. As one of my colleagues put it, "Even lone rangers learn to work together if the costs of not doing so are high enough."⁵⁹ Moreover, it is possible that the plaintiffs' firms are merely lagging the rest of the bar and that the next decades will do for the plaintiffs' bar what the past fifty years have done for the corporate firms.⁶⁰

Alternatively, an explanation not resting on personality characteristics is possible. The markets served by the plaintiffs' bar are unsophisticated, local, and not likely to be recurrent. Most clients with personal injury suits cannot make good comparative evaluations of lawyers, and as one-shot purchasers of legal services have little motivation to develop expertise. In consequence, they are unlikely to go far beyond their communities in seeking a lawyer: personal knowledge

57. Association of Trial Lawyers of America, ATLA Desk Reference 2000-01 (2000), available at <http://www.atla.org>. (last visited Oct. 19, 2001).

58. Marc Galanter, *Anyone Can Fall Down A Manhole: The Contingency Fee and its Discontents*, 47 DEPAUL L. REV. 457, 470-71 (1998); Marc Galanter & Thomas Palay, *A Little Jousting About the Big Law Firm Tournament*, 84 VA. L. REV. 1683, 1686-87 (1998).

59. Interview with Stuart Banner, Visiting Professor of Law, in Los Angeles (Aug. 2001).

60. At least one plaintiffs' firm now tops two hundred lawyers and has diversified into defense work as well. According to its web site, "Robins, Kaplan, Miller, & Ciresi, L.L.P., is a national law firm of over two-hundred lawyers and three-hundred support staff located in Atlanta, Boston, Chicago, Los Angeles, Minneapolis/St. Paul, Naples, Orange County, and Washington, D.C." See <http://www.rkmc.com/firm.about.cfm> (last visited Jan. 9, 2002).

may be much more important than breadth or expertise. The plaintiffs' bar has used inter-firm referral and fee splitting to achieve a network of expertise that replicates many of the advantages of larger firms. A local lawyer whose client has a case that requires expertise greater or different than that of the original lawyer, can refer his client to a firm with enough expertise and capital to develop the case well. The original lawyer has the incentive to make that referral in most cases because the fee will depend on the amount of recovery. The original lawyer has the knowledge to make an intelligent referral in many cases because of changes in the regulation of the legal profession and the development of a remarkable network within the plaintiffs' bar—both described in the next section. Unlike the defense bar, then, the plaintiffs' bar is marketing as much to other lawyers as it is to clients, and the client-driven appeal of one-stop legal shopping is less important for plaintiffs than for defendants. To use a medical analogy, the plaintiffs' bar—once comprised of the ultimate general practitioners—is now made up of specialists who market to general practitioners rather than directly to clients.

C. Lines of Credit and Specialized Financing

Historically, one of many reasons for the marginal success of solo practitioners was that they lacked the intellectual and financial capital to pursue a case to a settlement that maximized the client's recovery. Instead, critics charged, the plaintiff's lawyer settled for a very small, but very early recovery, thus minimizing the number of hours. Specialization creates some of the intellectual capital needed, but that alone would probably not suffice to create the vigorous, effective representation that characterizes the best of the plaintiffs' bar today. For that, one needs financing as well as knowledge. That financing has now presented itself in a remarkable number of forms. The simplest is a line of bank credit. Most major commercial banks now routinely extend lines of credit to firms that can present a plausible business plan.⁶¹ Such financing brings with it the requirements of planning and financial discipline; as one banker described it:

One thing we do is to look at a firm's collateral base—its receivables, its inventory, how much it makes With a plaintiffs' firm, there is no asset base. What they offer is an income stream of several types of cases that will come in over time. So you research their reputation in the marketplace, the size of the organization, the number of cases coming in. . . . If a lawyer tells you, 'I'm going to invest \$1 million in this case and it's the only one I have, and I'm sure I'll

61. Michael Jonathan Grinfeld, *Justice on Loan*, 19 CAL. LAW. 39, 39 (1999).

get paid on June 30,' we know that's not how it always works. We are more inclined to lend money to someone who says, 'I have seven cases and a business plan that includes a worst-case scenario of what may happen to them.'⁶²

But such standard financing only begins the discussion. Some banks have opened more specialized divisions, which serve the legal services industry more specifically.⁶³ The financial arrangements include lines of credit but can also involve factoring and other more creative forms of finance. Beyond the realm of commercial banking lie other, more imaginative forms of investment and finance. Take as one example Perry Walton, who has established what might be called a venture capital firm, Resolution Settlement Corporation. According to press accounts, the firm makes contingent loans directly to plaintiffs and occasionally to their lawyers, based on the firm's assessment of the strength of the case.⁶⁴ It engages in no direct representation of clients and thus avoids the regulatory regimes that might affect lawyers. Instead, it is a bank for lawsuits. The sums advanced, whose repayment is contingent on the success of the suit, provide immediate cash to the plaintiff—thus avoiding the temptation of too early and too low a settlement. Alternatively, the contingent loans may directly finance the lawyer so that he can pursue a case deeper into discovery, engaging experts and conducting wide document discovery. Apparently, the firm makes an assessment of each case proffered and decides, based on that assessment, whether and how much to lend. The report indicates that the lender wishes at all costs to avoid plaintiffs who are litigating "on principle," rather than on the basis of maximizing cash recovery.

Compared with Perry Walton, several other ventures are positively staid. They lend not on the basis of complaints but on judgments entered on jury verdicts.⁶⁵ Again, their theory is that many suits can reach a greater recovery given deeper capitalization. In this case, the event that needs bridge financing is the defendants' appeal, an event that one can expect in most high-recovery cases.⁶⁶ If one needs further proof that sophisticated finance has come to ordinary litigation, consider the fact that one of the players in this emerging world of

62. *Id.* at 40.

63. Interview with Jean L. Tardy-Valleraud, Bank Julius Baer, in Los Angeles (Oct., 2000) (formerly associated with First Interstate Bank and Security Pacific Bank).

64. Richard B. Schmidt, *Staking Claims*, WALL ST. J., Sept. 15, 2000, at A1.

65. Margaret Cronin Fisk, *Large Verdicts for Sale*, NAT'L L.J., Jan. 11, 1999, at A1.

66. Litigation expenses are front-loaded, so in many cases the additional legal expenses of an appeal will be slight. But the plaintiff often wants immediate recovery. To enable the plaintiff's lawyer to hang on through the appeal, bridge financing not of legal costs but of plaintiff's ordinary expenses, medical and similar costs, is necessary. *Id.*

litigation finance is General Electric Capital Corporation, a major, well-capitalized player in the contemporary financial world.⁶⁷ One can imagine wonderful forms of financial hedging in which GE finance takes a piece of a judgment on appeal—a judgment against a GE manufacturing arm. In such a world, everyone wins, no matter what the outcome. Even without supposing such an interconnected universe, it is clear that we have come far from the constrained, marginal world of the 1925 lawsuit with which we began. The next section steps back to summarize and assess the changes.

V. THE RESULTING TRANSFORMATION

We can measure the distance in several ways. Perhaps the most direct is to revisit the Los Angeles traffic accident with which we began—an intersection collision.

A. *The Case Transformed: 2000*

To begin with, the plaintiff will have an easier time finding a lawyer than in 1925. Indeed, if she is still conscious after the accident, as she awaits the ambulance, she can find the names and telephone numbers of several lawyers just by observing the ads on the sides of buses passing the intersection. Even if the lawyers doing such saturation marketing are low on skill, they have easy access to networks of more skilled and better capitalized lawyers with whom they can make fee arrangements, thus putting the plaintiff in the hands of a lawyer who can afford to take her case as deep into litigation as the amount at stake warrants. That itself is an enormous change.

Compared with the reference point seventy-five years earlier, the amounts at stake are more likely to be determined by the extent of injuries and by the merits of various claims than simply by the size of the other driver's insurance policy. In many such cases one can posit several secondary defendants—the manufacturers of both vehicles, the City of Los Angeles (as designer of the intersection and employer of the ambulance drivers), the manufacturers and designers of street and traffic lights, and the UCLA Hospital (supposing this to be the nearest emergency room). Under California law, each of these possible tortfeasors may be jointly and severally liable for the economic damages to the plaintiff.⁶⁸ Thus, even a very modest degree of com-

67. In one recent tort action, General Electric Capital Corporation paid \$5.8 million for a \$10 million contingency share of the final judgment. *Id.*

68. Non-economic damages—e.g. pain and suffering—are proportional to the defendant's degree of fault. *See, e.g.,* CAL. CIV. CODE § 1431.2 (West 1997 Supp. 2001) (stating "Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in

parative fault may yield a significant recovery. Moreover, spurred by the knowledge of these liability rules, one or more of these secondary defendants may seek to settle early in the lawsuit, thus supplying bridge financing for a suit against the remaining defendants. To be sure, such settlements by less than all defendants must be approved by the court after a "good faith" hearing, but the set of standards is sufficiently elastic that either a small sum paid by an insolvent defendant, a small sum paid by a solvent but marginally liable defendant, or a large sum paid by any defendant is likely to be approved.⁶⁹

Compared to its earlier analogue, one can also be reasonably sure that the case will not go to trial. Kent Syverud's work with California jury trials tells us that only the pathological case will go to trial. Barring some grudge match between insurance carriers or among the municipal and governmental defendants, one can be fairly certain that something like economic rationality will prevail. For the defendants, the primary job will be avoiding the very small chance of a catastrophically large verdict. In a world in which 2% of trials result in 50% of damages,⁷⁰ the job is not to prevent any recovery by the plaintiff but to keep it within manageable bounds. For the plaintiff, the job is the converse: to minimize the chance of no recovery and, beyond that, to maximize the chance of a very large verdict. The plaintiff can do so in several ways—by pyramiding a set of successively larger settlements; by taking several such settlements and then going to trial with one of the remaining ones (a trial perhaps financed by a sliding scale agreement); by bluffing the preceding strategy and then going to trial with a high-low agreement, and so on.

Given this larger bag of plaintiff's tools, it is particularly important not to jump to conclusions about assured victory for the plaintiff. Not all plaintiffs win, and most settlements and verdicts are low. Syverud reminds us that most tort trials in California end with defense victories.⁷¹ In another jurisdiction, Bert Kritzer reminds us that plaintiffs' lawyers have achieved parity—but just parity—with their defense

direct proportion to that defendant's percentage of fault . . ."); N.Y. C.P.L.R. § 1601 (McKinney 1997) (basing liability on the "relative culpability of each person causing or contributing to the total liability for non-economic loss . . ."). In addition, damages for medical practice are subject to absolute pain and suffering caps. See, e.g., CAL. CIV. CODE § 3333.2 (West 1997) (establishing a \$250,000 pain and suffering cap in medical malpractice actions); WIS. STAT. § 893.55(4)(d) (West 1997) (limiting non-economic damages to \$350,000).

69. *Abbot Ford, Inc. v. Superior Court*, 43 Cal. 3d 858, 886-87 (1987).

70. 35% of all damages in the California trials sampled were awarded in just 1% of the cases. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 384 (1991).

71. Defendants were successful (defined as judgments of less than \$10,000) in 93.5% of the cases sampled. *Id.* at 337.

counterparts.⁷² They work hard for their livings, which, putting a small number of outliers to one side, are comparable to those of their adversaries but not wildly superior. But, even with Syverud's and Kritzer's important cautions in mind, it is equally important to mark the distance between 1925 and 2000. The plaintiffs' bar is professionally and economically on a par with their defense counterparts in the litigation that forms the great bulk of the caseload. As a consequence, the playing field is much closer to level than it was in our great-grandmothers' days.

B. The Drab and the Golden: The Development of Several Torts Bars

How then did we get here? I think it is possible to trace two somewhat different paths, though here I would defer both to John Coffee and Bert Kritzer, each of whom knows more about one of those paths. Writing about the early phase of English Renaissance literature, C.S. Lewis once purported to be able to see two schools, which he rather tendentiously called "the drab" and "the golden."⁷³ I think one can see two analogous segments of the modern U.S. torts bar—one, the golden, that has attracted much press, much controversy, and some legislative opposition; another, the drab or ordinary, that has proceeded largely beneath the radar screens but may be more significant. Writing a history of English literature, Lewis not surprisingly focused on the golden. In the history of civil litigation, I think the drab deserves more emphasis.

Reading contemporary accounts of civil litigation, particularly tort litigation, one easily imagines that most plaintiffs recover, that recoveries are of storied sums, and that the primary problem of tort lawyers is managing their investments wisely. Bert Kritzer, Kent Syverud, and Sam Gross,⁷⁴ among others, have demonstrated otherwise. But we must also remember that there is a top tier of the torts bar, where these folk legends approximate reality more closely than with ordinary litigation. We can understand the tiers better by starting in the borderlands.

72. Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 280 (1998).

73. C.S. LEWIS, *ENGLISH LITERATURE IN THE SIXTEENTH CENTURY, EXCLUDING DRAMA* 64 (1954).

74. "The plaintiff is unlikely to cash in on the remote chance of a grand prize, and no market exists in which she can sell her claim to someone who is in a better position to extract its full value." Gross & Syverud, *supra* note 70, at 384.

Products liability started the second stage of growth. Such suits have two salient features. They require deeper capitalization than do most common personal injury suits: more experts, more discovery, and the higher likelihood of trial. But they repay this investment because in a world of mass production, a product that has injured one is likely to have injured several. So long as the lawyer has initial capitalization and can communicate his knowledge (and his success) to fellow lawyers, he can reap the returns from the initially higher investment. One is therefore not surprised to learn, for example, that more than one lawyer has created a specialty in suits resulting from injuries sustained by the explosion of a particular brand of tires attached to a particular brand of automobile.⁷⁵ These product liability suits were one of the critical steps in creating a specialized, well-capitalized plaintiffs' bar.

Conceptually, air crash litigation is a concentrated form of products liability litigation. From the plaintiffs' lawyers' point of view, such suits have the added attraction of high damages (until recently, airplanes have been occupied primarily by people with above-average earning capacities) and a concentrated group of plaintiffs. There may be some unseemly scrambles to sign up clients, but once that unpleasant aspect is past, a well-financed plaintiffs' firm can competently maximize recoveries for the heirs of those killed in the crash. Again, such suits emphasize the distance between the solo-dominated, undercapitalized, often inexpert tort bar of 1925 and that of the turn of the twenty-first century. Air crash litigation takes the lawyers deep into conflicts of law, international treaties and conventions, actuarial testimony involving life expectancies and earning capacities, frequently into a search for secondary governmental or similar defendants,⁷⁶ and often into intricately structured and staged settlement arrangements. These are not your grandmother's tort lawyers, operating out of storefronts without libraries and with dirty windows while hoping they could wait out the insurance company.⁷⁷

75. One firm's website devoted specifically to Firestone and Bridgestone tire litigation states that the firm is currently accepting cases in New York, New Jersey, and Pennsylvania; if your claim does not arise in one of these states, "[they] also have the resources to refer your matter to colleagues in your area" <http://www.njlabor.com/defectivetires.html> (last visited Oct. 20, 2001).

76. *See, e.g.*, *United States v. Finley*, 490 U.S. 545, 556 (1989) (where such a search precipitated a Supreme Court argument over the reach of pendent federal jurisdiction).

77. According to its web site, the law office of one successful plaintiffs' lawyer has won an American Bar Association award for law office design. *See* <http://www.cliffordlaw.com/> (last visited Oct. 20, 2001).

Asbestos litigation combines the substantive aspects of products liability with many of the damage aspects of air crash litigation. The story of the slow discovery, first of the health effects of asbestos and then of its manufacturers' knowledge and concealment of those hazards has been told.⁷⁸ More interesting for the purposes of my story is the role of the plaintiffs' bar in bringing first a series—many tens of thousands—of individual cases and, with more fanfare and controversy, assembling an ultimately unsuccessful settlement class. Both the individual and the class actions bespeak a mature, sophisticated, well-capitalized bar. The individual actions are in this respect even more impressive than the class suits. The individual actions reflect the ability of a segment of the bar first to specialize in an area that required assembly of some expertise and of the capital to take the early cases deep enough into discovery to reveal the basis for liability, and then to assemble a large set of clients with similar claims, so as to realize returns on the sunk intellectual capital. From this standpoint, the reference in the Supreme Court opinion to a group of clients whom both the plaintiffs' and defendants' lawyers referred as the "inventory" plaintiffs was impressive.⁷⁹ The plaintiffs' lawyers were operating on an essentially industrial scale, managing a stream of clients who represented future income flow. The defendants, understanding the implications of this income stream, sought in the class action to enter into what might in a different context be called an exclusive output contract with an indefinite duration.⁸⁰ This characterization casts no light on the propriety of proposed settlement, but does underline the financial sophistication of the bar involved.

With the asbestos cases, we have crossed the boundary from the drab to the golden, a term that describes not so much the returns to the lawyers involved as the high profile of the cases. The asbestos cases have occasioned years of hand wringing⁸¹ by the judiciary who feared the collapse of the litigation system, by the bar, and by academia who either applauded the creativity or decried the collapse of professional ethics implicit in the proposed settlement class.⁸² For our present purposes, it is beside the point to resolve any of these questions substantively. Instead, their importance lies in their reflec-

78. See generally IRVING J. SELIKOFF & DOUGLAS H.K. LEE, *ASBESTOS & DISEASE* (1978); U.S. DEP'T. OF HEALTH & HUMAN RES., *TOXICOLOGICAL PROFILE FOR ASBESTOS* (UPDATE) (1995).

79. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 601 (1997).

80. See U.C.C. § 2-306 (1998).

81. *Georgine v. Amchem Prods., Inc.*, 878 F. Supp. 716 (E.D. Pa. 1994).

82. See Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159 (1995).

tion of a revolution in the plaintiffs' bar, which at the end of the twentieth century had the intellectual and financial capital to inflict bankruptcy or a near-equivalent on a major industry.

The tobacco litigation wars that provide the theme of this conference are, like the asbestos cases, "golden" tort litigation. Here the reference ought to include both the reward to the lawyers, as well as the high profile of the cases—not unrelated phenomena. Others in this symposium will anatomize the remarkable features of this litigation, including the remarkable alliance between state governments and plaintiffs' lawyers. For my purposes, the tobacco litigation again reflects the deepened financial and intellectual capital of this elite tier of the plaintiffs' bar. After many years of unsuccessful litigation against the tobacco defendants, a combination of persistence and luck resulted in some plaintiffs' victories. That much was fairly standard to an observer of the products liability bar. What followed was not, and it bespoke the flexibility, imagination, and entrepreneurial spirit of this segment of the plaintiffs' bar. The lawyers were able to form risk-sharing arrangements among themselves to finance what was obviously going to be very expensive bet-the-company litigation—litigation that was going to be well and expensively defended. That pooling of resources and sharing of risk was so successful that many states were prepared to invest in the litigation vicariously, shifting the risk of losing to the private bar in return for fees whose size is now being challenged.⁸³ We read that the successful plaintiffs' bar has now "securitized" its stream of fee income by floating a bond issue, enabling them to re-deploy the capital from the tobacco fees.⁸⁴ This is financing sophistication on a scale that would have caused the heads of Carlin's solo lawyers to swim.

The final, "golden" segment of the plaintiffs' bar is, of course, the securities bar, which has the nearly unique distinction of having spawned a series of federal statutes designed, unsuccessfully, to put it out of business.⁸⁵ This bar, dominated by a handful of firms, is an outlier both in terms of intellectual and financial capital. But it represents a high concentration of elements present in much larger and

83. *In re Private Counsel Agreement*, 1999 WL 1022131, at *1-*2 (E.D. Tex. Nov. 5, 1999); *State v. Am. Tobacco Co.*, 772 So. 2d 417, 418-19 (Ala. 2000); *State ex rel. Nixon*, 34 S.W.3d 122, 125-26 (Mo. 2000).

84. James Wooton, *Litigation Bonds Are a Risky Investment*, WALL ST. J., Mar. 14, 2001, at A22.

85. One can think of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.), and specifically the section referring to class actions, 15 U.S.C. § 78u-4 (1995), as designed essentially to hamper the operation of several small but nationally prominent plaintiffs' firms.

more widely dispersed firms: specialization (combined with a dash of bet-hedging diversification),⁸⁶ sufficiently deep capital to withstand the expectable procedural motions and the duration of discovery, including the ability to finance credible experts, and the financial and transactional sophistication to create elaborate settlements, understand the strategic significance of tiered insurance coverage, and the experience credibly to threaten to take cases to trial.

Most of the public debate, high outrage, and proposed legislation have focused on these “golden” elites of the bar with allegedly obscene fees and devastating effect on American enterprise.⁸⁷ These topics are worth debating in another forum. I want instead to concentrate on the ways in which these high-profile groups share, in a concentrated form, characteristics of much of the U.S. tort bar. Further, this more broadly dispersed tort bar is likely of greater and more durable significance than their higher-profile brothers and sisters. In three-quarters of a century, the previously marginal plaintiffs’ bar has reorganized itself. Several features produced the reorganization—broad demographic shifts in the incidence of asset ownership and insurance, as well as changes in substantive law and in procedure. The changes in organization, in turn, effected several of these framing features: a better-capitalized bar, in turn, exploited the opportunities inherent in a broad discovery regime, producing liability in several areas requiring deeper expert knowledge and the discovery of internal documents.

Through this well-capitalized tort bar, the United States has privatized some of the regulatory regime that some other developed nations have socialized. There is a legitimate inquiry about the comparative costs of the two regimes. But that inquiry, not the question of whether legal fees or litigation itself are “excessive,” is the real question. Such an inquiry lies far beyond the boundaries of this essay, whose ambitions are descriptive rather than normative.

86. Lief, Cabraser, Heimann & Bernstein, LLP, for example, does mass tort as well as securities litigation. Interview with Elizabeth Cabraser, attorney & partner, in Los Angeles (Apr., 1998).

87. See, e.g., Bob Keefe, *Talk of Tort Reform Heats Up*, ST. PETERSBURG TIMES, Feb. 23, 1997, at 5D (reporting that many businesses have avoided locating themselves in Florida because of its litigious reputation); Henry Weinstein, *Attack Waged on Fees Anti-Tobacco Attorneys Received*, L.A. TIMES, Mar. 15, 2001, at C1 (discussing the U.S. Chamber of Commerce’s possible attack on the tobacco settlement legal fees); Robert A. Levy, *Spoils of the Tobacco Shakedown*, TEX. LAW., Feb. 15, 1999, at 23 (urging contingency-fee contracts between the state and private attorneys to be made illegal).

C. What the Drab and Golden Share: Litigation as Investment

Stepping back from the sub-anatomization of the segments of this mature bar, one notes several features that they share both with their peers on the plaintiffs' side and with their characteristic adversaries on the defense side. These characteristics make these two bars into symmetrical forms of investment and risk management—in effect into a part of the larger financial services industry. For both sides, litigation is an investment portfolio in which the task is to manage and spread risks, maximizing gains, and insuring and reinsuring against losses.

1. Specialization, Diversification, and Insurance

That point is relatively obvious when applied to the defense bar. Many such lawyers are retained by an industry whose purpose is insurance, an institutionalized form of risk-reduction through risk-spreading. It is slightly less obvious as applied to the plaintiffs' bar, but an examination of their activities suggests that it is just as true here. Consider first the assembly of a litigation portfolio. Until the last few decades, it was unlawful for a lawyer representing individuals to do the sort of direct marketing that made it likely that he could attract a sufficient number of similar cases to warrant the investment of significant intellectual capital in a specialized area. Removal of bans on advertising have made it easier, and the formation of good inter-lawyer referral networks, now speeded by Internet technology, have made such specialization easier. An account in the legal press nicely captures the consequences. The article refers to a lawyer in Arizona who has specialized in cases involving Firestone tires, whose alleged failure caused various vehicle mishaps;⁸⁸ the article captures a moment shortly after a rash of such accidents had led to an investigation by the National Transportation Safety Board, which released a report:

Longtime accident victims' lawyers such as Tom Dasse of Scottsdale, Arizona, previously armed with the best data are hustling to keep up with the fresh statistics the companies are releasing—in between potential clients calling, other lawyers calling to offer cases if you give them a cut, and then the lawyers calling again to take back their cases.⁸⁹

The point about Dasse is that he is not a fabled member of the torts bar, but a much more ordinary contemporary practitioner. He has established an expertise (“previously armed with the best data”) in tire safety and made that expertise known to a group of colleagues

88. Bob Van Voris & Matt Fleischer, *Feeding Frenzy Over Firestone*, NAT'L. L.J., Sep. 11, 2000, at A1, A9.

89. *Id.*

sufficiently broad to create a steady stream of referrals from lawyers who understand that Dasse's intellectual capital is sufficiently deep that they will profit from drawing on it ("other lawyers calling to offer cases"). Dasse, in turn, is prepared to enter into agreements ("if you give them a cut") with these referring lawyers. At the moment depicted in the news article, the value of Dasse's specialized intellectual capital was sinking quickly in the wake of disclosures by governmental agencies, which by making available data previously known only to a small group of specialists was, in effect, putting Dasse's trade secrets into the public domain. Dasse's special expertise in tire manufacture and tire defect litigation was rapidly becoming less special, and accordingly less valuable, as government sources made public the fruits of their investigation. As this process occurred, the lawyers who had previously referred cases to Dasse because of his expertise were concluding that they could handle the litigation themselves and consequently "calling again to take back their cases."⁹⁰ The less specialized lawyers suddenly find that, with the information released by the government, they can handle the cases without Dasse's specialized knowledge. This news account, then, depicts a well-functioning market in tort claims, organized among generalists and specialists, with active brokerage of those claims finding the place where they can most efficiently be handled: the referring lawyer's initial judgment was that Dasse could maximize the recovery. That market is sufficiently sensitive and flexible that it quickly responds to changes in informational capital: they now believe that with the publicly released information, Dasse's comparative advantage has disappeared. Even with relatively ordinary claims, that market is functioning actively.

Diversification lies on the other side of this portfolio-management coin. The referring lawyers off-loading a case onto Dasse might be seeking two goals. One was Dasse's presumably better ability to judge the value of the claim and to maximize that value. Another was to diversify their own claims portfolio. For a lawyer not already expert in tire litigation, such a case, if competently managed, would require a large investment and would, therefore, occupy a large share of the lawyer's productive capacity—her time. By referring the case to Dasse, a lawyer could rebalance her portfolio, reducing the risk posed by a disproportionately large investment in a single claim. Bert Kritzer has shown us how contemporary tort practitioners diversify in another way: they often operate in firms that consciously seek to bal-

90. *Id.*

ance lines of work, mixing some cases with a low but relatively certain return with others that have a much higher but far less certain payoff.

This strategy of diversification faithfully reflects litigation realities. Kent Syverud's work with California jury verdicts has nicely demonstrated the rationality of such a strategy. In the last two decades of the twentieth century, most jury-tried tort cases in California ended in a defense victory, and even when the plaintiff won, the mean damage award was small: half of the total damages awarded in the state were awarded in two percent of the cases.⁹¹ Under these circumstances, rational plaintiffs' lawyers would be seeking a balanced portfolio, in which a stream of small but reliable low-payout cases would be blended with a smaller number of potentially high-recovery cases. Kritzer's work tells us that, for once, the real world rather closely mirrors one that an economist might model.

The argument that the plaintiffs' lawyers and the insuring entities who pay the defense costs are both engaged in portfolio management and risk hedging misses one significant difference between the two groups. Because of the contingent fee, plaintiffs' lawyers are more like the insurance companies than they are like the insurance defense counsel. Defense counsel, whether paid by insurers or retained directly by self-insuring entities, generally lack a direct stake in the litigation.⁹² Defense counsel are more like salaried portfolio managers than like investors.

2. *Risk Hedging and the Fancy Settlement*

This picture of civil litigation as portfolio management extends as well to the actual conduct of individual pieces of litigation. From the plaintiffs' side, many of the developments of the past decade enable such hedging. The growth of the multi-defendant lawsuit (when linked with joint and several liability) is one such development: with several targets, one somewhat reduces the risk of the complete defense victory, thus hedging the downside. Many of the newer forms of settlement have the same features: they enable the plaintiff (and often the settling defendant as well) to insure against catastrophic loss. The high-low agreement does this by simultaneously placing a floor and a ceiling on recovery. The sliding scale settlement does so by assuring the plaintiff some recovery while giving the settling defendant a share

91. Gross & Syverud found that 3% of the cases yielded 50% of the damages in 1985-6 and that just 1% of the cases produced 50% of the damages in 1991. *Supra* notes 70-71 and accompanying text.

92. I am ignoring here the negligible percentage of defense work done on a contingency basis. When this arrangement is in place, there is direct symmetry between the lawyers.

of any future recovery from non-settling defendants: in effect, it gives the settling defendant preferred stock in the plaintiff's future litigation successes. The emerging forms of finance litigation have a similar goal: borrowing against a judgment, lending against anticipated litigation, and the like all disperse the risks of litigation and enable rational portfolio management by the lawyers conducting it on behalf of their clients.

VI. IMPLICATIONS

Understanding these changes also gives us a different perspective on a long-running debate about the U.S. legal system. Recent decades have seen an increased per capita rate of civil litigation. Is this increase a result of increased demand from clients, or does it result from an increased supply of lawyers and claims? The perspective suggested here enables us to give a firm answer to this question: both. If my argument coheres, related developments coalesced, enabling lawyers better to serve existing demand and to offer a range of services unthought of in 1925. They also, and with notable success, sought to stimulate demand and to increase the supply.

Perhaps the best analogy is with communications technology. The telephone was in wide use in 1925 but came only in black and without features we now take for granted. The rate of telephone usage has increased many fold on a per capita basis since then, in part because of rising standards of living, but in part because of the development of technology that has taken communications to an entirely different level: cell phones, the Internet, and wireless communications represent improved products that have, in turn, stimulated a much greater demand for communications services—demand the suppliers have stimulated both with advertising and with price incentives. Something similar has occurred with lawyers. On the plaintiffs' side, the change is most marked. On one hand, the plaintiffs' bar, better capitalized, can offer superior service on ordinary "black telephone" claims—a better bar can pursue negligently caused vehicular and similar injury claims more successfully than it could in 1925. But even these "ordinary" claims have a different dimension. Because many of them have plausible additional defendants or other value-enhancing features, they are in a sense an improved product, one that has expanded demand. And, to intensify the demand for these products, lawyers are advertising, referring, and otherwise marketing under a less stringent regime of professional regulation than that which prevailed seventy-five years ago. As a result of this product improvement and increased marketing, the plaintiffs' bar is able to offer its

clients a more valuable product at a lower cost than it could in my grandparents' era: they are offering digital cellular service for less than a party line cost our grandparents. These product changes have served existing demand—for the “black phone” claims that have existed for several centuries. They have also, by creating new services, created demand that did not exist.

On the defense bar side, the demand has increased as a result of the product improvement on the plaintiffs' side: lawsuits generate defenses. But the supply has increased faster than the demand, with the result that clients have been able to drive the price down as well with various pricing regimes and cost controls. The consequence of the different forces operating on the supply and demand side of the plaintiffs' and defense bars has been an increasingly competitive market, resulting both in lower costs and in improved products—better legal services available at lower unit prices.

VII. CONCLUSION: TWO WORLDS OF LITIGATION

Multi-billion dollar tobacco settlements, asbestos manufacturers driven into bankruptcy by tort judgments, the subcontracting to tort teams of state suits against gun manufacturers, and a plaintiffs' securities bar sufficiently powerful to draw federal legislation designed to thwart its work: these are the stuff of urban legend and editorials in the *Wall Street Journal*. And they surely warrant serious discussion. But if we focus our gaze too narrowly on these remarkable events, we miss the quieter deeper story of civil litigation. Both the plaintiffs' and defense bars have reorganized themselves, the former more profoundly than the latter. Compared to the world before the Great Depression, the defense bar operates under tighter financial constraints, while the plaintiffs' bar is better capitalized, both in intellectual and financial terms. A consequence is that the conduct of civil litigation—even ordinary civil litigation in which the survival of whole industries is not at stake—is conducted with more intensity and with greater factual, legal, and financial sophistication than in the past. It is in that world of ordinary tort litigation that the greatest transformation has occurred. That transformation, in turn, made possible the celebrated asbestos and tobacco litigation.

Moreover, because the causes of the transformation lie deeply rooted in contemporary social life and legal institutions, it is unlikely that passing outrage and occasional spasms of legislation will change the deeper structure. The credit economy and insurance have penetrated deeply into the practice of law. The modal civil case today involves two lawyers, both managing a portfolio of lawsuits and seeking

to maximize gain while minimizing risks in an environment of substantial, but still incomplete, information, and who will end the case without adjudication of the merits. The changes that have produced this transformation are mostly, but not entirely, financial. But their domain is much wider than the headline-producing tort verdicts: those are results, not the causes of the changes. The causes lie much deeper: in the credit revolution that has produced widespread home and auto ownership, as well as specialized lending sources of interest to lawyers and clients; in structural changes in the practice of law that have increased average firm size; in changed substantive law; in changes in procedure that have loaded the most important events into the front end of litigation; in fee-shifting statutes; in increasingly sophisticated settlement arrangements; and in cost controls that place substantial constraints on insurance-paid defense lawyers in routine cases.

Combined, these changes have transformed civil litigation over the past seventy-five years: it makes available to prospective plaintiffs a more sophisticated, better-capitalized bar, one that can invest more deeply in individual cases. These changes have, in many respects, leveled the playing field on which the plaintiffs' and defendants' bars play their respective roles while making more legal services available at lower costs both to plaintiffs and defendants.