

Selling Your Torts: Creating a Market for Tort Claims and Liability.

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If an exchange between two parties is voluntary, it will not take place unless both believe they will benefit from it. Most economic fallacies derive from the neglect of this simple insight, from the tendency to assume that there is a fixed pie, that one party can gain only at the expense of another.¹

Introduction

This note argues that allowing free assignability and creating primary and secondary markets consisting of current and future-contingent tort claims, will be more beneficial to nearly all parties involved in the current tort system. In essence, *pareto* efficiency² can be achieved through the application of this proposed mechanism.

The American tort system is not a stagnant system; it has evolved as the needs of society have changed. “The law of torts is anything but static, and the limits of its development are never set.”³ This statement holds true for the general common law itself; as Holmes stated “because an idea seems very familiar and natural to us, that it has always been so. Many things which we take for granted have had to be laboriously fought out or thought out in past times.”⁴

A classic and relevant example of this change is easily visible by the pervasive use of contingency fee arrangements in the legal profession. Today these are common

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¹ MILTON FRIEDMAN & ROSE D. FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT*, 13(1980).

² Pareto efficiency also known as Pareto optimality or allocative efficiency is a situation where no party can be made better off without the harming of another. If however, one party can be made better off without another party suffering harm, then the system is not pareto efficient until such a change is undertaken. RICHARD G. LIPSEY ET AL., *ECONOMICS* 276 (9th ed.1997).

³ *SMITH V. SUPERIOR COURT*, 151 Cal. App. 3d 491, 496 (Cal. Ct. App. 1984).

⁴ OLIVER WENDALL HOLMES, JR., *THE COMMON LAW* 2 (Barnes & Noble Books 2004)(1881).

place and of little question or dispute, yet there was a time when “[f]ew other issues cut so deeply into social mores and professional concerns in an urban industrial age.”⁵ The legality of this type of fee arrangement was settled by the United States Supreme Court in *Stanton v. Embrey* by stating a contingent fee was “beyond legitimate controversy”⁶. If the law can evolve to include the contingency fee arrangement, which at its very core is nothing more than a risk shifting device and on its face appears to violate the laws of champerty^{7, 8}. It is then certainly plausible to advance a theory that depends on the removal and abridgment of ancient doctrines whose underlying policies are no longer relevant to today’s society.

The tort system in America costs about 180 billion dollars each year or 1.8 percent of a Gross Domestic Product (GDP)⁹ of 10.2 trillion.¹⁰ The Council of Economic Advisors estimated that in 2002, twenty percent of the total system cost went back to injured parties as compensation for economic damages, leaving eighty percent allocated to transaction costs and non economic damages.¹¹ With this economic background in mind, it becomes obvious that the potential exists for people to reap a profit if they can

⁵ JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 44 (1976).

⁶ *STANTON V. EMBREY*, 93 U.S. 548, 556 (1877). *See also*, AUERBACH *supra* note 5, at 45.

⁷ Champerty- *See infra*, note 31

⁸ *Compare* *SCHOMP V. SCHNECK*, 40 N.J.L. 195, 201 (N.J. 1878) (recognizing that according to the English statutes the payment of an attorney from any recovery would be champertous), *with* 15 *ARTHUR L. CORBIN, CORBIN ON CONTRACTS* § 83.12.(2004) (noting that contingency fee contracts on their face would be champertous, however over the years courts have viewed these contracts as enforceable).

⁹ Gross Domestic Product (GDP) is the market value of goods and services produced by labor and property in the United States, regardless of nationality; GDP replaced GNP as the primary measure of U.S.

production in 1991. US Department of Commerce Bureau of Economic Analysis Glossary at http://www.bea.doc.gov/bea/glossary/glossary_g.htm

¹⁰ *See* Council of Economic Advisors, *Who pays for tort liability: An Economic Analysis of the U.S. Tort Liability System*, 2 (April 2002), at http://www.whitehouse.gov/cea/tortliabilitysystem_apr02.pdf; *See also*, Press Release, Bureau of Economic Analysis, Gross Domestic Product and Corporate Profits (8:30 am Thursday March 28th, 2002) at <http://www.bea.doc.gov/bea/newsrelarchive/2002/gdp401f.htm> (containing the final GDP amounts for 2001 and Current Dollar GDP is measured at 10,263.3 billion.)

¹¹ *See* Council of Economic Advisors, *Who pays for tort liability: An Economic Analysis of the U.S. Tort Liability System*, 9 (April 2002), at http://www.whitehouse.gov/cea/tortliabilitysystem_apr02.pdf.

introduce efficiency into the system by the reduction of transaction costs. Part of the profit these individuals would reap would be a reward for the assuming some of the system's risk, consequently there are several benefits that accrue on system wide basis and individual level as a result of a willing assumption of risk.

Transaction costs in the tort system arise due to an inherently high level of risk associated with tort litigation. In response to this element of the system, a person takes measures to reduce their risk, such as hiring a lawyer; however these measures have associated costs. This note proposes the idea of a market based system whereby people will be able to shift their risk at a low cost to a party more willing to bear the burden. This will be accomplished by allowing people to sell their claim to the highest bidder. In return for the guaranteed compensation to the seller, the buyer will have the opportunity to either resell the claim to a fourth party on a secondary market, or bring action upon the claim and keep the resulting judgment award.

A clear and concise definition of what exactly is being exchanged is fundamental to the understanding of this proposed market mechanism. A current claim is either: (i) "the right to receive or recover a debt, demand, or damages on a cause of action ex contractu or for a tort or omission of duty"¹², or (ii) the right to defend against the right to receive or recover a debt, demand, or damages on a cause of action ex contractu or for a tort or omission of duty. A future- contingent claim is either: (i) the future-contingent right to receive or recover a debt, demand, or damages on a cause of action ex contractu or for a tort or omission of duty, or (ii) the future-contingent to defend against the right to

¹² See *PICADILLY INC. v. RAIKOS*, 582 N.E.2d 338, 340 (Ind. 1991) (holding that a legal malpractice claim could not be assigned to an adversary. The Court defined a chose in action as "the right to receive or recover a debt, demand, or damages on a cause of action ex contractu or for a tort or omission of a duty" (Internal quotation omitted). This definition forms the basis for the definition of claim presented in this paper, the only change being the addition of a party specific point of view and a temporal element.).

receive or recover a debt, demand, or damages on a cause of action ex contractu or for a tort or omission of duty.

Consider the most simple tort scenario where a plaintiff (P) suffers a redressable injury as result of a defendant's (D) action. The typical characterization of these facts is that P has a right to seek redress from D. More importantly it is commonly believed that P's right to redress arises from a personal relationship between the two.¹³ The personal aspect of this relationship is extremely significant, since this type of relationship cannot be assigned.¹⁴

This characterization is not the only possible one. Consider the same scenario, but instead of insisting on a personal-relationship characterization, apply the same facts through the perspective of a debtor-creditor relationship. The P could be considered an unwilling creditor of the D. P's creditor status emerges as a result of D's tortious conduct. This is analogous to the way a widget-seller becomes a creditor if the buyer keeps the merchandise but does not pay the price. However, in the tort scenario P had no choice in the matter; he becomes a creditor through no action of his own. Naturally, D now becomes a debtor since he owes P damages for his actions. D additionally retains the sole non-transferable right and ability to redeem the debt in a transaction normally called a settlement. One might believe that it is a settlement of a tort; however it is more accurate to characterize the transaction as settlement of an outstanding debt or obligation.

¹³ J.B. Ames, *Inalienability of Choses in Action*, 3 Har. L. Rev. 337,339 (1890).

¹⁴ *Id.*

This note presents an alternative solution, the creation of secondary market for both post and pre-injury claims.¹⁵ At the core of this proposed system are fundamental changes between the interaction of the laws of contracts and torts. A secondary market can exist only if rights can be traded freely within a regulated framework. This requires modification or the outright removal of several ancient doctrines related to the assignability of causes of action.

Much of the preceding scholarship in this area has focused on the creation of a market for tort claims as a response to a crisis within the system.¹⁶ Furthermore, prior has historically been divided into two very separate and distinct categories: matured and unmatured claims.¹⁷ This note attempts to bridge this gap by advancing the theory that these two ideas are inherently related.

The “pre-accident” scholars, notably Professors Robert Cooter, Stephen Sugarman, and Jeffery O’Connell have strongly advocated for a future contingent claims market.¹⁸ Although this note’s proposed market includes the concept of a future-contingent claim, it does not presuppose what the terms of the exchange would be. Instead it advocates a true market instead of a guaranteed compensation scheme of full or

¹⁵ By definition a secondary market requires the existence of primary market. A primary market is made up of the original exchange from victim to 1st purchaser. The secondary market is made up of any subsequent sale of the claim.

¹⁶ See, e.g., Peter C. Choharis, *A Comprehensive Market Strategy For Tort Reform*, 12 YALE J. ON REG. 435, 443 (1995). (Detailing a market strategy to address the “numerous and serious problems” in the current tort system).

¹⁷ See, e.g., *Id.* at 453 (criticizing the “pre accident market”); See also, e.g., ROBERT D. COOTER AND STEPHEN D. SUGARMAN, A REGULATED MARKET IN UNMATURED TORT CLAIMS: TORT REFORM BY CONTRACT, in *New Direction in Liability Law* 174,174 (W. Olson editor, 1988).(Presenting a proposal for a market of unmatured tort claims “that could correct many shortcomings of existing tort law”).

¹⁸ See, e.g., COOTER AND SUGARMAN, *supra* note 17; see also, Jeffery O’Connell and Janet Beck, *Overcoming Legal Barriers to the Transfer of Third-Party Tort Claims as a Means of Financing First-Party No-Fault Insurance*, 1980 WASH. U. L.Q. 55, 55-56 (1980). (Suggesting that the deal in future-contingent market be one for insurance where by the party would receive no-fault insurance in return for the assignment of claims to the insurer).

expanded medical benefits and income support.¹⁹ Another key difference explored in this note is the creation of a secondary market for future-contingent claims. The sale would not result in the claim being owned by an insurance company or tortfeasor. Instead the focus is on giving the potential the victim the choice to sell and concurrently ensuring that this choice does not create adverse effects felt by other parties or the system as a whole.

The fundamental difference between my proposed system and those aforementioned is the goal of using market to achieve market based goals of *pareto* efficiency. Additionally, positive externalities may be felt throughout the tort system as a by product of the market. The goal of the proposed system is to harness the power of the market by increasing choices. This increase in choice allows each party to settle comfortably into a role, based on their risk tolerance, without sacrificing traditional tort objectives or altering the substantive law of torts.

Although the application of market economics to the tort system is still in a theoretical phase, there is evidence that business oriented people are beginning to inch closer to engaging in champerty. The most notable example is litigation support firms, who generally limit their activity to appeals.²⁰ Although these firms do not yet assume

¹⁹ See, COOTER AND SUGARMAN, *supra* note 17, at 174. (Envisioning “a market in which people who are otherwise adequately insured against accidents will sell their preaccident bargaining chips.” The authors go on to suggest that the main actors in the market would be “workers with good employment-benefit packages” selling their claims to their employers who would presettle (sell) them to their liability insurers.); See also, Jeffery O’Connell, *Harnessing the Liability Lottery: Elective First-Part No-Fault Insurance Financed by Third-Party Tort Claims*, 1978 WASH. U. L. Q. 693, 697 (1978). (Arguing that “Elective first –party no-fault insurance” would be a bargain premised upon on the insurer offering no-fault insurance benefits to the insured in return for “absolute assignment of the insured’s tort claim”).

²⁰ Susan L. Martin, *Financing Plaintiffs’ Lawsuits: An Increasingly Popular (and Legal) Business*, 33 U. MICH. J. L. REF. 57, 79 (1999). (Detailing the functioning of the Judgment Purchase Corporation, whereby the company becomes an investor in the appeal and takes a percentage from the winnings, but they do not assume control of the litigation.).

control of the litigation, it would be a natural evolution of the business to eventually take over the litigation as is suggested by the argument put forth here.

Part I will examine the origin and historical evolution on the prohibition of assignment of claims and its underlying rationale, as well as the non-uniform application of the prohibition in American jurisprudence today. Part II undertakes an examination of the tort system today by separating it out into two components micro-tort²¹ and macro-tort²². The baseline of the tort system is explained, detailing the major goals and incentives that currently affect participants. Part III introduces the market system, its' basic function, and provides an overview of the advantages the system will deliver to each party involved. Part IV examines how the market system will have positive affects on the macro-tort concepts of deterrence and compensation, while further reducing vengeance as decision influencing factor. Part V examines the chief legal obstacles of champerty, maintenance and barratry and some public policy concerns that are or may prevent the development of the market and why these obstacles should be removed. Part VI examines non legal issues that must be overcome in order for the market system to work and presents possible solutions.

²¹ Micro-tort focuses on the relationships among individuals within the system, especially the plaintiff and defendant. *See* discussion *infra* Part II.A.

²² Macro-tort focuses on the societal interests that effect the system. *See* discussion *infra* Part II.B.

Part I – The Origin and Historical Evolution of the Prohibition of Assignment of Claims, its’ Underlying Rationale, and the Non-Uniform Application of the Prohibition in American Jurisprudence.

The black letter rule of law has been that a chose in action is not assignable²³; one commentator has referred to this rule as having the “widest application”²⁴. The origins of the rule against assignment stem from a historical sentiment that the only parties who should be involved in litigation are the two litigants and the judge.²⁵ It was believed that the inclusion of anyone else, in any capacity, could only lead to mischief.²⁶ This notion extends back through Roman law, where no one but the litigants and the officers of the court had any business with the court.²⁷

A. The Ancient Origins of the Prohibition.

It is worthwhile to consider ancient Athens and the issues associated with the sycophancy²⁸. In Athens there was great political capital to be earned from successful prosecutions, not to mention the possibility of rewards.²⁹ With the rewards that a sycophant could receive, it is easy to envision how such power would be abused in a legal system lacking the intricate safeguards in place against malicious prosecution that we have today.

²³ See, e.g., PICADILLY INC. V. RAIKOS, 582 N.E.2d 338, 339-340 (Ind. 1991) (“under ancient common law ancient common law, hardly any chose of action was assignable.”); DODD V. MISSLESEX MUT. ASSURANCE CO, 242 Conn. 375, 382 (1997) (Under common law a cause of action for personal injuries cannot be assigned).

²⁴ J.B. Ames, *supra* note 13, at 337.

²⁵ Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48 (1937). (Radin., thoroughly traces the evolution of the doctrines of maintenance and champerty from ancient times until the first half of the twentieth century.).

²⁶ *Id.*

²⁷ *Id.*; See also, MERCH. PROTECTION ASS’N V. JACOBSON, 127 P. 315, 317 (Idaho, 1912) (“Maintenance of causes of action was denounced by the Roman law in the strongest of terms.”).

²⁸ Sycophancy- is a technical term of Greek law. It is the bringing of unnecessary or baseless actions in both civil and criminal actions. See Radin, *supra* note 25, at 49.

²⁹ *Id.*

Eventually, sycophancy became a means of “political agitation” and people would pledge their support to each other against common political rivals.³⁰ This abuse of powers and the primitive legal systems whence it first appeared are the primary reasons for the development of a blanket ban on assignment. Without assignment there would be no need to attempt to regulate the actions of the sycophants. Of course Athens did not have the prohibition on assignment of causes of actions that exists today. The “modern” form of the prohibition stems from medieval England and the related concepts of champerty³¹, maintenance³² and barratry³³. Ironically, in Athens one was allowed to purchase an interest in a current claim³⁴, Roman law however, did not permit such an acquisition; as discussed below the dangers of such assignments are no longer present in our legal system.

B. The English Origins of Champerty, Maintenance, and Barratry:

Medieval society viewed legal proceedings as a dangerous procedure; this is not surprising considering a legal system that permitted trial by battle.³⁵ The inherent

³⁰ *Id.* at 51. (“Sycophancy was, however, not merely a device by which individuals profited either in money or prestige. It became a recognized means of political agitation and a part of the organized activity of what we should call political parties.” “[T]here is abundant evidence that the members of these clubs [political clubs in Athens] were pledged to support each other in the litigation which was deliberately fomented against political antagonists.”).

³¹ *Compare* 4 BL. COMM. 135 (7th ed. 1775) (Champerty- is a species of maintenance; a bargain with a party to litigation to divide the subject of the suit, if successful; where the champertor is to carry on the party’s suit at his own expense. Champerty signifies the purchase of a suit or the right to sue.), *with* BROWN V. BIGNE, 28 P.11, 12 (Ore. 1891) (“Some authorities omit from their definition the statement that the champertor is to carry on the suit at his own expense, and confine it simply to an agreement to aid a suit, and then divide the thing recovered.”) (citations omitted).

³² 4 BL. COMM. 134 (7th ed. 1775) (Maintenance- is the “officious intermeddling in a suit that no way belongs to one by maintaining or assisting either party with money or otherwise, to prosecute or defend it.”).

³³ *Id.* (Barratry- “is the offense of frequently exciting and stirring up suits and quarrels...” between people at law or otherwise.).

³⁴ Radin, *supra* note 25, at 51.

³⁵ *Id.* at 58.

physical danger of trial coupled with the Christian sentiment of forgiveness and turning the other cheek, led people to believe that litigation was an indication of an un-Christian spirit.³⁶ Therefore, anything that could increase the amount of litigation in society was viewed as an evil to be avoided.

Also, the concept of usury played an important role in the formation of the English version of the prohibitions on assignment. The investor would be purchasing the mere chance to recover on the claim, this was bound in speculation.³⁷ Speculation, no doubt back then, as it does today appeals to those who have resources to speculate and the ability to reap the rewards of their actions. In the medieval mind, speculation would surely increase the amount of litigation because the purchasers of claims would be better able to handle litigation than the original parties. Thus the high stakes and complicated nature of litigation, kept many valid claims from being brought. Lord Coke, in *Lampet's* Case, said of the prohibition:

And first was observed the great wisdom and policy of the sages and founders of our law, who provided that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying contentions and suits, of great oppression of the people...³⁸

The socio-economic climate of England also needs to be considered. There was increasing tension between the merchant/capitalist class and the landed aristocracy.³⁹ If the tenants who toiled under the aristocracy had a valid claim against their landlord, they would be able to sell it to a merchant for a sum of money. The aristocrat would then have had to defend the suit against an individual of similar prestige and economic status,

³⁶ *Id.*

³⁷ *Id.* at 60-61.

³⁸ LAMPETS CASE, 10 CO. REP. 48(a) (1612).

³⁹ Radin, *supra* note 25, at 61.

making it more difficult for him.⁴⁰ The prohibition therefore also served to protect the aristocratic status quo.

The English basis for the prohibition can be fit into four broad categories: (i) discouraging of speculation, which is thought to promote frivolous litigation.⁴¹ (ii) The personal nature relationship view of lawsuits.⁴² (iii) Protecting the weaker parts of society from being abused through the legal system.⁴³ And (iv) preventing the rich and powerful from using the legal system to satisfy personal vendettas.⁴⁴

All four of the above policies, even if they are considered important today, are no longer effectively served by the laws of champerty and maintenance. As Professor Radin stated “the condemnation of litigiousness alone remains as a common element in the medieval and modern attitudes, but neither then nor now did it play a controlling role.”⁴⁵ The Court for the Correction of Errors of New York in 1824, with similar sentiment, observed “[i]n many States of this Union these laws are not in force, and the want of them, is said to no inconvenience.”⁴⁶ The evolution of society has reached such a point that the harms the laws champerty and maintenance were designed to protect against are more effectively controlled by other safety checks in the system.⁴⁷

⁴⁰ MERCH. PROTECTION ASS’N V. JACOBSON, 127 P. 315, 317 (Idaho, 1912) (The rules of maintenance and champerty “may have been invoked as much for the protection of the feudal lords against each other as for their weaker and less influential subjects. ”).

⁴¹ See, Martin, *supra* note 20, at 58; See also, Radin, *supra* note 25, at 5.(the purchaser of law suits was at worst a lay figure designed to help extortioners to escape and at best a speculator or gambler).

⁴² J.B. Ames, *supra* note 13, at 339 (“a chose in action always presupposes a personal relation between two individuals”); Radin, *supra* note 25, at 54 (“a controversy properly concerned only the persons actually involved in the original transaction.”).

⁴³ THALLHIMER V. BRINCKERHOFF, 3 Cow. 623, 643 (N.Y. 1824) (Chronicles the policies behind the English doctrine of Maintenance, stating that one of the policy’s was the prevention of “oppression which followed from the influence of great men, in such cases.”).

⁴⁴ Radin, *supra* note 25, at 65.

⁴⁵ Radin, *supra* note 25, at 66.

⁴⁶ THALLHIMER, 3 Cow. at 646.

⁴⁷ James E. Moliterno, *Broad Prohibition, Thin Rationale:” The Acquisition of an Interest and Financial Assistance in Litigation” Rules*, 16 GEO. J. LEGAL ETHICS 223, 251 (2003) (“With sophisticated controls on

C. Champerty, Maintenance, Barratry, and Assignment of Claims in the American Legal System Today.

The exact status of the doctrine of champerty in American common law is subject to a diversity of opinion among the courts.⁴⁸ There are four basic positions reflected in American jurisprudence today: (i) no enforcement of the laws of maintenance and champerty; (ii) only lawyers are subjected to the laws of maintenance and champerty; (iii) some claims are subject to the laws and other are not; (iv) the full prohibition of maintenance and champerty is in effect.

i. No Enforcement or Recognition of Maintenance and Champerty.

The best examples of this position are Massachusetts and New Jersey. It is prudent to examine New Jersey first, because the courts and legislature of the state never adopted the laws of maintenance and champerty.

In its' seminal decision in *Schomp v. Schenck* the Supreme Court of New Jersey stated "...that the doctrine of maintenance has never had a foothold in the jurisprudence of this state..."⁴⁹ Although this decision is over 125 years old, the reasoning employed still resonates today on the topic of maintenance. The Court, recognized that the laws of maintenance and champerty were enacted in time and place that was vastly different then

frivolous litigation already in place, current acquisition of interest and financial assistance rules disproportionately prevent the bringing of meritorious claims, not frivolous ones."); Susan L. Martin, *supra* note 20 at 57 ("any potential evils associated with champerty are addressed in a variety of other laws").

⁴⁸ MERCH. PROTECTION ASS'N V. JACOBSON, 127 P.315, 317 (Idaho, 1912).

⁴⁹ SCHOMP V. SCHNECK, 40 N.J.L. 195, 203-4 (N.J. 1878).

late nineteenth century New Jersey⁵⁰, *a fortiori* today's society is even less like medieval England that necessitated the creation and applications of the law of maintenance.

The Court also noticed, even then, the gradual decline in the usefulness and applicability of the doctrine stating “[t]hat such a doctrine, repugnant to every honest feeling of the human heart, should be soon laid aside, must be expected.”⁵¹ Further the court notes that the doctrine of maintenance is “not altogether in harmony with the habits, needs and business of modern life.”⁵² This can be seen as foreshadowing the eventual rise of modern market economics as means for not only solving the problem of scarcity but of addressing the efficient allocation of resources, one such scarce resource is the willingness to bear risk.⁵³

The contemporary question arising from this decision is; does a New Jerseyan suffer any added adverse effects from the lack of this law when compared to a New Yorker? This author believes that a plaintiff in New Jersey is not likely to suffer any added injustice then a similarly situated plaintiff in New York. This is because the New York plaintiff and New Jersey plaintiff are both adequately protected by other laws, for example the rules against bringing frivolous lawsuits.⁵⁴

While New Jersey never recognized the doctrines of Champerty and Maintenance; Massachusetts did enforce a common law prohibition against maintenance and champerty

⁵⁰ *Id.* at 202. (any inquirer into this branch of jurisprudence will be satisfied that the entire doctrine of maintenance was the product of a state of society very different from that which now exists, or has ever existed, in this state.)

⁵¹ *Id.* at 203

⁵² *Id.*

⁵³ The last reason the court finds for not permitting the doctrine of maintenance and champerty to gain a foothold in New Jersey jurisprudence, is that Judge Paterson who was authorized by the legislature to collect the statutes of England that would remain in force in New Jersey left out the sections on maintenance and champerty. *SCHOMP V. SCHNECK*, 40 N.J.L. at 204-206

⁵⁴ *See* Martin, *supra* note 20, at 57.

with some exceptions.⁵⁵ The recognition of the three interrelated doctrines of champerty, maintenance, and barratry was eliminated in a single case by the Supreme Court of Massachusetts, in *Saladini v. Righellis*.

The *Saladini* case is factually more interesting than the *Schomp* case above, because in *Saladini* the contract was not a contingency fee between lawyer and client. Rather, it was a contract in which Saladini agreed to advance funds to Righellis to allow him to pursue a potential legal claim.⁵⁶ In return Saladini was to receive, from the first amount recovered, his advance and 50 percent of any amount after the payment of expenses.⁵⁷ The important things to note in this case are (i) that the lender was uninterested except for the potential of profit, and (ii) that the contract called for the lender to make a profit in the case of a successful suit.

The Court decided to invalidate the laws of maintenance and champerty in the state for many of the same grounds that New Jersey Court, 119 years earlier, decided to not enforce them in the first place. Namely, the ancient origins of the doctrine and a doubt as to whether they continue to serve any useful purpose.⁵⁸ The Court also noted, that today's society views litigation as a "socially useful way to resolve disputes"⁵⁹ as opposed to the medieval view of litigation as an evil. Furthermore, the preference courts have for non-judicial resolution of disputes may be fostered by allowing people to purchase an interest in an action.⁶⁰ Further buttressing its' decision, the Court recognized with respect to the harms the laws of champerty were designed to protect against, that

⁵⁵ Martin, *supra* note 20, at 59.

⁵⁶ SALADINI V. RIGHELLIS, 687 N.E.2d 1224, 1224-25 (Mass. 1997).

⁵⁷ *Id.*

⁵⁸ *Id.* at 1226.

⁵⁹ *Id.*

⁶⁰ *Id.*

“[t]here are now other devices that more effectively accomplish these ends”⁶¹ The decision gave a partial list of the tools available to courts to prevent injustice, including regulations against bringing frivolous lawsuits, the doctrines of unconscionability, good faith, duress, and standards of fair dealing.⁶²

ii. Only Lawyers are expressly prohibited from engaging in champertous dealings

The best representative of this position is the state of Montana. The champerty statute codified in Montana is directed only at attorneys.⁶³ The Supreme Court of Montana in *Green v. Gremaux* stated as the policy behind the statute is “... to prevent attorneys from stirring up litigation or becoming involved in a lawsuit solely for personal economic benefit.”⁶⁴ From the language of the statute and the holding in the case it appears that a non-attorney would be able to validly undertake champertous contracts.

The Court’s policy does not make much sense, because outside of *pro bono* cases and other public interest law, an attorney’s primary motivation for doing anything is payment. His very reason for involvement in a case is that he seeks to gain personal economic benefit. The question of how personal economic benefit of attorneys is relevant to limiting the maintenance statute to the legal profession is not answered by the Montana Court.

⁶¹ *Id.* at 1226.

⁶² *Id.* at 1227.

⁶³ MCA §37-61-408 Attorney prohibited from buying claim or demand for purpose of bringing action.

(1) An attorney and counselor must not directly or indirectly buy or be in any manner interested in buying a bond, promissory note, bill of exchange, book debt, or other thing in action with the intent and for the purpose of bringing an action thereon.

(2) An attorney and counselor must not, by himself or by or in the name of another person, either before or after action brought, promise or give or procure to be promised or given a valuable consideration to any person as an inducement to placing or in consideration of having placed in his hands or in the hands of another person a demand of any kind for the purpose of bringing an action thereon. This subsection does not apply to an agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received.

⁶⁴ *GREEN V. GREMAUX*, 945 P.2d 903, 907 (Mont. 1997).

In the only case dealing with the statute following the *Green* opinion, the Court decides that the statute does not apply for two reasons; firstly, the issue of personal economic gain in litigation was unpreserved for appeal, and secondly, the agreement between the parties was a trust in which the beneficiary retained the final say over, which actions would be prosecuted.⁶⁵

What the Montana Legislature and Supreme Court have failed to address is why attorneys as a group require this added measure of statutory limitation. Furthermore, one is required to ask, whether such rules are needed if they are rarely used. It may be inferred from the lack of use that attorneys are being regulated from stirring up lawsuits by other laws and regulations.

iii. Some claims are subject to the laws of champerty or similar prohibitions and others are exempt

The States that fall into this category are more difficult to pin down because of their varying nature. Two contrasting positions however are worth analysis: The traditional view is one of survivability, if the claim would survive the death of a party and pass to the estate then it is assignable. The more liberal approach is embodied by a case specific analysis, determining whether public policy is violated by the assignment in question.

Before turning to the states themselves it is important to note the possible implications of the United States Supreme Court decision in *Comegys v. Vasse*. The important aspect of the case is the declaration and accepting as fact “that mere personal torts, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment;” contrasted with property interests or those interests

⁶⁵ BALYEAT LAW, P.C. V. HARRISON, 983 P.2d 902, 904 (Mont. 1999)

arising out of property which are assignable.⁶⁶ The Court however did not apply this rule and instead used a more specific rule dealing with abandonment and insurance.⁶⁷ The non-use of the survivability rule by the Court relegates it to dicta and lacking in precedential power, thereby leaving the states free to reject or accept it as they see fit.

Turning to the states, those of interest that fall into this category are Washington which still clings to the traditional view, Arkansas which has rejected survivability reasoning and just adopted a non-assignability per se rule, and Oregon which has made the shift from the traditional to the more liberal position.

Washington State lacks any statutory provision of champerty or maintenance however, it uses its survival statute to determine which causes of action are assignable. Washington State's test of assignability is "does the cause of action survive to the personal representative of the assignor?"⁶⁸ In *Cooper v. Runnels*, the Court enunciated the test citing to an 1892 case.⁶⁹ The *Cooper* decision is important because it surveys the law of the State tracing the development of this rule. In *Cooper* the defendant corporation negligently conducted a paint job and damaged 137 cars owned by 92 individuals.⁷⁰ Each car suffered a small amount of damage. The Plaintiff then purchased the ninety one other causes of action and brought suit for all of them, with each cause of action having an average value of approximately \$43.25.⁷¹

⁶⁶ *COMEGYS V. VASSE*, 26 U.S. 193, 213 (1828).

⁶⁷ *Id.* at 213-214. The Court states "We do not think, that upon an examination of the doctrines of insurance, there is any difficulty in this part of the case" furthermore it mentions "the material consideration here, is, whether upon the principles of the law merchant, the right, title, interest possibility... to the indemnity awarded in this case, did not pass by the abandonment to Vasse."

⁶⁸ *COOPER V. RUNNELS*, 291 P.2d 657, 658 (Wash. Dep't 2, 1955).

⁶⁹ *Id.* (citing to *SLAUSON V. SCHWABACHER BROS. & CO.*, 4 Wash. 783, 31 Pac. 329 (1892)).

⁷⁰ *Id.*

⁷¹ *Id.* (average value is calculated by taking the total amount of claims \$3,978.55 and dividing by the 92 claims that were assigned equaling approx. \$43.25).

The Court reasoned that if a claim could be maintained by a personal representative in the event of the death of plaintiff, then such a claim could be assigned.⁷² The Court traced the changing nature of assignability, pointing out that at early common law there were two reasons for why a tort was not assignable: (i) there was no representative of deceased person, therefore there was no survivability; and (ii) the concept that a personal cause of action dies with the person.⁷³ Of course, by tracing and phrasing history in this way the Court implies that the rule on assignability has always been tied to survivability. Hence when survivability was gradually introduced and expanded in modern jurisprudence, it had an associated impact on assignability.

The key benefit of the rule is its simplicity which makes it attractive to the judiciary. It is bright line test; if the cause survives it is assignable. The legal analysis in any given case then becomes an exercise in statutory interpretation. This is demonstrated by the *Harvey v. Cleman* decision.

In *Harvey v. Cleman*, the Washington Supreme Court declared the survivability equals assignability rule to be the rule of the state.⁷⁴ The Court states that “[t]he reason, or lack of reason...” for the rule is discussed in *Cooper*⁷⁵ This statement gives rise to the implication that the reason for the rule is its simplicity. After declaring this to be the rule, the Court launches predictably, into an interpretation of the survivability statute to see if

⁷² *Id.* (“if the cause of action can be maintained against the tort-feasor by the personal representatives of the property owners, then the assignments are valid.”).

⁷³ *Id.*

⁷⁴ HARVEY V. CLEMAN, 400 P.2d 87, 88 (Wash dep’t 2,1965). (“The test of assignability in this jurisdiction is whether the cause of action survives to the personal representative of the assignor. If it does, the cause of action is assignable.”).

⁷⁵ *Id.*

the claim would survive.⁷⁶ Since the cause of action at issue in the case would not survive because it was for pain and suffering, it was deemed to be un-assignable.⁷⁷

The latest Washington Supreme Court case, *Kommavongsa v. Nammathao*, carves out an exception to the assignability rule for legal malpractice claims. This decision demonstrated that the rule's simplicity and lack of an underlying public policy rationale are its shortcoming. In *Kommavongsa*, the defendant assigned his legal malpractice claims to the plaintiffs as part of a settlement agreement.⁷⁸ The Court recognized that the general rule of assignability in Washington is the survivability test.⁷⁹ Although, the Court refused to announce a broad rule dealing with all legal malpractice claims, it choose to void the assignment because of public policy reasons, thereby reluctantly departing from the survivability statute in this case.⁸⁰ In a "vigorous" dissent, Judge Ireland pointed out that the law of Washington is the survivability test, and the public policy reasons cited by the majority insufficient to overcome the bright line rule and necessitate an exception in this case.⁸¹

Therefore, outside of the exception in *Kommavongsa*, in Washington assignability is going to turn on the language of survival statute RCW §4.20.046. This statute divides claims into two categories based on the type of damage sustained.⁸² The key to

⁷⁶ *Id.* at 88-89 (the court declared "No reason has been advanced why it [the survivability equals assignability rule] should be abandoned in the absence of legislative direction." The next paragraph then begins dealing with survivability statute).

⁷⁷ *Id.* at 90. (quoting the trial court decision declaring the general verdict reflected pain and suffering).

⁷⁸ KOMMAVONGSA V. NAMMATHAO, 67 P.3d 1068, 1071 (Wash. 2003)

⁷⁹ *Id.* at 1072 ("The traditional test for assignability of a cause of action in Washington is this: "Does the cause of action survive to the personal representative of the assignor? If it does, the cause of action is assignable.").

⁸⁰ *Id.* at 1070 ("We answer that narrow question in the negative on the grounds of public policy, leaving for another day the broader issue of whether legal malpractice claims may be assignable in other circumstances.").

⁸¹ *Id.* at 1084. (J. Ireland dissent).

⁸² ARCW §4.20.046 (2004) (Survival of Actions) ("All causes of action by a person... against another person... shall survive to the personal representative... PROVIDED HOWEVER,... the personal

understanding the rule of assignability, in light of the statute, is to determine if the cause of action would survive to the personal representative, not in whether it would survive to the beneficiaries of RCW § 4.20.020.⁸³ Therefore, even though there is no statute dealing with champerty, maintenance, or the common law version of barratry,⁸⁴ it appears that the statute would prohibit the assignments contemplated by this note. This is because the claims include all damages, some of which are not covered under the statute. Of course the assignment of injuries to personal property or for economic damages would appear to be legal in Washington even though no factoring⁸⁵ would have occurred at all.⁸⁶

The key case on point from Arkansas is *Southern Farm Bureau Casualty Insurance Company v. Wright Oil Company Incorporated*.⁸⁷ In the case Mr. Hickson owed Wright Oil \$1,206.24.⁸⁸ Mr. Hickson also had unliquidated personal injury claims, arising from a traffic collision, against Howard Cox and his liability insurer Southern Farm.⁸⁹ Mr. Hickson decided to assign \$1,206.24 of his tort claim against Cox and Southern Farm to Wright Oil.⁹⁰ Subsequently, Mr. Hickson settled with Southern farm and Wright Oil received no money.⁹¹ Wright Oil then launched a lawsuit against all three

representative shall only be entitled to recover damages for pain and suffering, anxiety, emotional distress, or humiliation” missing for example would be punitive damages arising from the events.).

⁸³ KOMMAVONGSA V. NAMMATHAO, 67 P.3d 1068, 1084 (Wash. 2003) (J. Ireland dissent) (“the test for assignability in Washington is whether the cause of action would survive to the personal representative of the assignor upon his or her death.”).

⁸⁴ Compare RCW § 9.12.010 (In Washington Barratry is the bringing of a false suit with the intent to harass or distress a defendant.), with 4 BL. COMM. 134 (7th ed. 1775), *supra* note 33 (the common law definition of Barratry).

⁸⁵ Factoring- is the selling of a receivable at a discount rate. A claim can be viewed as a receivable.

⁸⁶ KOMMAVONGSA V. NAMMATHAO, 67 P.3d 1068, 1086 (Wash 2003) (J. Ireland dissent).

⁸⁷ SOUTHERN FARM BUREAU CAS. INS. CO. V. WRIGHT OIL CO. INC., 454 S.W.2d, 69 (Ark.1970).

⁸⁸ *See Id.*

⁸⁹ *See Id.*

⁹⁰ *See Id.*

⁹¹ *See Id.*

defendants (Hickson, Cox, and Southern Farm) Southern Farm was the only one to appeal.⁹²

The Court then goes to discuss the origins of the *survivability equals assignability* doctrine.⁹³ In Arkansas the rule: “causes of action that survive are assignable; those that do not survive are not assignable”⁹⁴ developed from a dicta opinion. The Court recognizes that the fusion of the two doctrines occurred over time, almost subconsciously.⁹⁵ The Court, goes so far as to point out that in previous cases when this rule is adopted it has been without a discussion of “the basic issue of public policy in the course of holding that survivability carries with it assignability with respect to personal injury claims.”⁹⁶ One possible reason the Court advances for the marrying of survivability and assignment, is that the early cases invalidating assignment of a claim did so on the grounds that the claim did not survive the death of the injured person.⁹⁷ Therefore, when legislatures began to adopt statutes that provided for the survivability of those claims, the previous reasoning appeared to have been defeated, and these previously unassignable claims were now considered assignable.⁹⁸

The survivability statute of Arkansas does not mention assignability, rather it spells out what rights pass on to the estate of a deceased person.⁹⁹ The Court, believing that it is no longer necessary to use the survivability statute to separate assignable and non-assignable claims, decides to adopt the *per se* rule that no personal injury claim

⁹² *See Id.*

⁹³ *See SOUTHERN FARM BUREAU CAS.*, 454 S.W.2d at 70.

⁹⁴ *See Id.*

⁹⁵ *See Id.*

⁹⁶ *See Id.* at 71.

⁹⁷ *See Id.*

⁹⁸ *See Id.*

⁹⁹ A.C.A. §16-62-101 (2003) Survival and Abatement of actions.

should be assignable.¹⁰⁰ As a basis for its ruling the Court cites to “public policy”.¹⁰¹ This reasoning implies that a shift in those fundamental supporting public policies would necessarily invalidate the new rule. However, the Court fails to enumerate even a single public policy supporting the new rule once it is debased from its historical root of survivability, most probably suggesting that the policies would be similar to those of champerty and maintenance.

Oregon has oscillated between adopting the liberal, case by case analysis, and the traditional, *survivability equals assignability*, positions. In *Brown v. Bigne*, the Oregon Supreme Court was faced with the issue of whether to adopt the doctrines of champerty and maintenance as law in its jurisdiction.¹⁰² However, in a decision whose reasoning should still resonate today, the Court decided that champerty and maintenance were no longer bright line rules anymore, and their scope is limited to “speculation in lawsuits and to repress the gambling propensity of buying up doubtful claims.”¹⁰³ The Court enunciates the rule that champertous agreements should be governed by the intent of the champertor.¹⁰⁴ If the purchaser had a “*bona fide* object of assisting a claim believed to be just” then the contract is valid; if however it is for “the purpose of injuring and oppressing others by aiding in unrighteous suits, or for the purpose of gambling in litigation or to be so extortionate or unconscionable as to be inequitable against the party” it should be void.¹⁰⁵ This rule foreshadows the adoption of a case by case analysis to determine the validity of a contract based on public policy reasons. The probable reason

¹⁰⁰ See SOUTHERN FARM BUREAU CAS., 454 S.W.2d at At 71.

¹⁰¹ See *Id.*

¹⁰² BROWN V. BIGNE, 28 P.11, 12 (Or. 1891) (“the solution of this question depends upon how far the ancient doctrine of champerty and maintenance is to be recognized in this state”).

¹⁰³ See *Id.* at 13.

¹⁰⁴ See *Id.* (stating “the purchase of a right, which is the subject matter of a pending lawsuit, ... is not unlawful, unless it be made for the mere purpose or desire of perpetuating strife and litigation...”).

¹⁰⁵ See *Id.*

that it is forgotten at the turn of the century by subsequent decisions is most likely a result of the intent element of the test. It is incredibly difficult to determine why someone intended to support another in litigation. Furthermore, the rule is couched in terms that echo the romantic notion of lawyering where lawyers would perform their trade in return for guaranteed payment.¹⁰⁶

Some twenty-two years later the Oregon Supreme Court again revisited the issue of assignability of torts; this time in conjunction with an action for fraud. In, *Sperry v. Stennick* the court announced:

[t]he rule is nearly universal that tortious acts of a party causing damages to another creates a right of action which abates with the death of the person sustaining injury and therefore cannot be transferred so as to confer upon the assignee authority to maintain a suit for the wrong inflicted.¹⁰⁷

This is an unequivocal adoption of the survivability test without so much as reference to the *Brown* case and its holding; that survivability is not correct measure rather it should be an inquiry into the public policy effects of the assignment.¹⁰⁸ The Court, then reveals why this rule is so attractive, it is a bright line test that will permit the assignment of injuries to property but will serve as a blanket prohibition against assignment of a “wrong committed upon a person”.¹⁰⁹ The Court goes on to give a partial non-exclusive list of such torts.¹¹⁰ The opinion, then goes on to state that claims for damage to property should

¹⁰⁶ See Radin, *supra* note 25, at 69-70.(Stating that the contingent fee arrangement lowered the dignity of the Bar and that a lawyer’s fee was to be a definite condition prior to litigation.).

¹⁰⁷ SPERRY V. STENNICK, 129 P.130, 132 (Or. 1913).

¹⁰⁸ BROWN V. BIGNE, 28 P.11, 13(Or. 1891).

¹⁰⁹ SPERRY V. STENNICK, 129 P.130, 132 (Or. 1913).

¹¹⁰ *Id.* (“A wrong committed upon a person resulting in damages by reason of assault and battery, breach of promise of marriage, false imprisonment, malicious prosecution, slander, etc... so not survive... and hence... cannot be assigned...”).

be assignable, because they survive.¹¹¹ It is easy to see through this logic and conclude that the Court knows what types of claims it wants to be assignable. The distinction of assignable versus un-assignable is generally the same as the distinction that existed at the time differentiating survivable and non-survivable claims. The *Sperry* court therefore instituted the traditional *survivability equals assignment* test in Oregon.

Subsequently, the Oregon Supreme Court alluded that the real differentiation of concern is damage to property versus damage to the person. In *Johnson v. Bergstrom*, the court stated “[t]he reasons of policy against assignment of personal injury claims have little relevance with respect to property damage claims.”¹¹² This statement also drives at the heart of the issue by suggesting that Oregon is really concerned with the public policy implication of assignment, not the arbitrary rule of survivability.

Recently, in 2001, the Court of Appeals in *Gregory v. Lovlien*, surveyed the evolution of assignability of tort in the context of a legal malpractice assignment.¹¹³ The Court traced the evolution from the *Sperry* decision, which moved from the traditional rule to the more liberal position where the inquiry is “whether the public policy concerns that the rule against assignments was intended to prevent were present.”¹¹⁴ There is another telling change in the law that the court considers a change in the survivability statute. The Court points out that in 1969 the legislature changed the survivability statute to include all causes of action.¹¹⁵ This of course had the effect of rendering the survivability rule meaningless, so if the court wanted to continue enforcing some ban on

¹¹¹ SPERRY V. STENNICK, 129 P.130, 132 (Or. 1913) (“A tortious act causing damages to property or an act of negligence producing an injury to a person generally, creates a cause of action that survives and is therefore assignable”).

¹¹² JOHNSON V. BERGSTROM, 587 P.2d 71, 73 (Or. 1978).

¹¹³ GREGORY V. LOVLIE, 26 P.3d 180, 181-82 (Or. App. 2001).

¹¹⁴ *Id.* at 182

¹¹⁵ *Id.* (note 3).

the assignment of claims it had to develop a new standard or finally embrace the rule against assignability to be one standing upon public policy considerations.

iv. The State continues to enforce a substantial Champerty or Maintenance or anti-assignment prohibition based on Champerty/Maintenance.

There are two states that represent this position with each having a slightly different statutory maintenance provision. Illinois' statute is almost identical to the Blackstone definition. Georgia does not define champerty or maintenance in the statute but includes them as part of list under contracts that contravene public policy.

Illinois has codified maintenance in §720 ILCS 5/32-12. The statute is almost a wholesale adoption of Blackstone's definition. The only real difference is that Illinois includes the phrase: "with a view to promote litigation".¹¹⁶ This implies that action of the maintainer must be done with intent to foster frivolous litigation. This is the language that the court would use to limit the scope of the statute.

The key case to understanding the development of the related doctrines champerty and maintenance in Illinois is *North Chicago Street Railroad Company. v. Ackley*. The Court rejected the survivability test and instead adopted a "broader inquiry" consisting of (i) avoiding maintenance and (ii) all assignments are void unless the assignor has possession or potential possession of the object of assignment.¹¹⁷ The first part of the inquiry is a clear adoption of maintenance. However the court does recognize that the

¹¹⁶ 720 ILCS 5/32-12 (2004) Maintenance. If a person officiously intermeddles in an action that in no way belongs to or concerns that person, by maintaining or assisting either party, with money or otherwise, to prosecute or defend the action, *with a view to promote litigation*, he or she is guilty of maintenance and upon conviction shall be fined and punished as in cases of common barratry. It is not maintenance for a person to maintain the action of his or her relative or servant, or a poor person out of charity. (emphasis added).

¹¹⁷ NORTH CHICAGO STREET R.R. CO. V. ACKLEY, 49 N.E.222, 226 (Ill. 1897).

doctrine is not as robustly applied as it once was.¹¹⁸ The second part of the test has little relevance with the conception that property today can include intangibles.

The legislature in Illinois has defined what maintenance is and how it is to be applied. However, there has been no decision citing to the latest incarnation of the statute. The majority of the legal activity surrounding maintenance occurred during the 19th and early 20th centuries.¹¹⁹ For the purpose of the inquiry at hand however, the prohibition contained in the statute appears to have changed little since the time of Blackstone.

Georgia, on the other hand, does not have a specific maintenance or champerty statute. Instead, it has a general statute detailing types of contracts that are void for violating public policy.¹²⁰ The leading case on the meaning of the statute is *Sapp v. Davids*, where the court decides to take the definition from the “common law, or the statute of England before the revolution”.¹²¹ The Court cites to an earlier case where it had adopted the Blackstone definition. With this definition in tow the Court arrives at the conclusion the contract in controversy in *Sapp* is void because it is champertous.¹²² The statute and interpretation by the Georgia Supreme Court in *Sapp*, facially suggests that champerty and maintenance are in full effect in the state. There has been no abridgment of the doctrines by any court, leaving the state in the same position as Illinois. However there does not appear to have been a case, invalidating a contract for champertous reasons, since *Sapp*.

¹¹⁸ NORTH CHICAGO STREET R.R. CO. V. ACKLEY, 49 N.E.222, 226 (Ill. 1897)(“This reason has in modern times lost much, but not the whole, of its force.”).

¹¹⁹ See the research notes associated with §720 ILCS 5/32-12. (No citing case is found).

¹²⁰ O.C.G.A. §12-8-2(a)(5)Contracts contravening public policy. A contract which is against the policy of the law cannot be enforced. Contracts deemed contrary to public policy include but are not limited to: (5) Contracts of maintenance or champerty.

¹²¹ SAPP V. DAVIDS, 168 S.E. 62, 64 (Ga. 1933)

¹²² *Id.*

The following section divides the current tort system into two components, which details the incentives and choices parties currently have and the policy goals that are promoted by the system. This provides a baseline by which to measure the effects of the market system in later sections.

PART II: Micro-Tort and Macro-Tort Distillation of the American Tort System.

The tort system in America serves several different functions. One of the main functions is to carry out public policy ends, including but not limited to: compensation, deterrence, and restitution. In order to be able to effectively trace out the working and effect of a market on the system, a brief analysis of the current system is required.

The tort system can be broken down into two components; the “micro-tort” component which includes the relationships among individuals, with special focus on the plaintiff and defendant. The “macro-tort” component is made up of the societal concerns of the system, for example general deterrence. Examining the current system from these two vantage points will reveal a landscape with fertile opportunities for the introduction of *pareto* efficiency through the application of market principles.

A: The Micro-Tort Component.

The micro-tort component is the aspect of the system that deals with the parties directly involved with tort litigation. Each of these parties has their own set of priorities and incentives to undertake actions and behaviors seeking to maximize their award, or minimize their exposure to liability. The two obvious parties required in any tort action are the victim, traditionally known as the plaintiff and the tort-feasor, traditionally known as the defendant.

The existence and importance of the micro-tort aspect of tort law, is primarily responsible for the characterization that “[l]iability in tort is based upon the relations of person with others...”¹²³ This characterization can be classified as the traditional model. It views the parties as being personally related to each other as a result of the action of the defendant and the effect of that action on the plaintiff. The extreme focus on the individuals involved, as discussed above, is one of the reasons often referred to for not permitting the assignment of a claim.¹²⁴

Tort law is “directed toward the compensation of individuals”¹²⁵ and this is the central focus of the micro-tort aspect of the system. The Plaintiff, in any action is seeking to redress an injury caused by the Defendant. This simple concept is of primal importance to tort law. The other aspect of the above statement is that the compensation comes from some other single or unitary entity, meaning a plaintiff cannot collect from society at large he must be able to name a defendant.¹²⁶ The compensation goal is the area that naturally creates most tension between the actors. Assuming all actors to be wealth maximizing entities, the plaintiff will look to get the highest award possible, whereas the defendant will seek to minimize his liability.

A useful analogy can be drawn to the regular competitive marketplace. In such a scenario, a buyer of a widget will seek to purchase the widget for the lowest price;

¹²³ W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 1 (5th ed. 1980) 5.

¹²⁴ See Patrick T. Morgan, *Unbundling Our Tort Rights: Assignability for Personal Injury and Wrongful Death Claims*, 66 Mo. L. Rev. 683, 686 (2001) (detailing the legal orthodoxy that personal injury rights are unassignable because they are personal rights).

¹²⁵ KEETON, *Supra* note 123.

¹²⁶ Arguably when a private party sues the government he is collecting from society at large, however the wrong was not done unto him because of society at large, rather it is a result of tortious conduct of government as unitary entity. Therefore the tort action should be conceptualized as P v. Government not P v. Society at large represented by the Government.

whereas the seller will seek to sell his widget at the highest price.¹²⁷ Assuming both parties to be wealth maximizing entities, there exists an inherent tension between buyer and seller over the price of the widget. In the marketplace, this tension coupled with other factors produces desirable results. If one substitutes, defendant for buyer and plaintiff for seller and the legal system for the marketplace, the same tension is observed. Yet, it is curious that the marketplace has developed self resolving mechanisms in response to this tension, whereas the tort system has not.

This tension locks the parties into a zero-sum game as individuals. The gain of the plaintiff is the loss of the defendant, the converse also holds true, any gain made by the defendant by averting liability is a loss suffered by the plaintiff. But this simple analysis is not the whole story from either perspective. The eventual resolution of a tort claim still has the associated transaction costs as a result of the complicated nature of the system and its inherent risk. Unlike the market analysis above where over time buyers and sellers have had the opportunity to develop mechanisms that reduce the costs of making the transaction; for example: standardized methods of payment, universal and divisible currency, and standard behavior¹²⁸. The tort system has not yet developed as sophisticated tools for self resolution, the proposal presented in this note would further this development.

One commentator has pointed out that the adversarial nature of the system and its dependence on the principles of negligence is inherently high in transactions costs,

¹²⁷ In this scenario the seller has only one unit to sell therefore his profit maximizing point is equal to the highest possible price. If he had more than one unit his profit maximizing point might be lower than the price he would charge for a single unit.

¹²⁸ An example of standard behavior would be shopping around looking for the best price or the right product. Or, understanding that purchasing is an exchange in which both parties gain something.

because negligence is almost always litigated.¹²⁹ This highlights another key difference between the efficient widget market discussed above and the inefficient tort litigation system; namely, the forced relationship of the parties. In the widget market the seller or buyer can walk away at any given time and seek out another buyer or seller. The tort system does not allow for such an occurrence. The plaintiff who wants to get the most compensation has only one source from which to get it, the defendant. Recall, that the plaintiff is in fact the seller in tort market, he is the one holding the debt or the good, and is seeking to get the most value for the claim.

In his quest to be compensated the plaintiff may involve several other parties, the most recognized is the lawyer. The lawyer brings his considerable and specialized knowledge of the workings of the legal system to benefit his client. The same way a doctor brings his specialized knowledge of the human body to help the client maximize his health. It is important to spell out in detail what benefit the lawyer is bringing to his client. It must be that some benefit is derived from a lawyer; otherwise, lawyering would be a dying profession.

The largest benefit that a lawyer provides is information, he is able to assess and coalesce the facts of a case and figure out the legal strength of the client's position; develop strategies to improve the client's chances of increasing his welfare; and implement one or more of these strategies on behalf of the client. These three functions have two dependent effects; they reduce risk, which in turn increases the probability of making a wealth maximizing decision.

The primary parties (plaintiff and defendant) may also involve insurance companies in their dispute, this generally occurs before the tort. These companies

¹²⁹ JOHN G. FLEMING, THE AMERICAN TORT PROCESS, 19 (1988).

function much to the same effect as a lawyer but in a different capacity. They provide safety from risk in the event of a suit, in return for premium payments and certain rights, which are not important at this point of the analysis.¹³⁰

Turning to the defendant, he is in a monopsonist position, the lone buyer of the good, this creates a market distortion. The defendant is able to purchase the tort at lower than market cost¹³¹ through an out of court settlement, or he can litigate the claim against him. If he litigates there are two simultaneous scenarios, either: he tries to argue that in fact the debt held by the plaintiff is not his or is defective, this is denying liability. Or, he can argue that the claim (amount of the debt) is lower than what the plaintiff maintains, this in effect turns the court and jury into price arbitrators. The two litigation scenarios are not mutually exclusive, many if not most defendants argue them simultaneously and in conjunction with each other.

Aside from being in privileged position to redeem the tort, the defendant also has other advantages over the plaintiff. He has not suffered any injury, therefore his actual costs do not start to accrue from the moment of injury, rather they start to accrue only from the moment he incurs expense to increase his chances of fending off a successful claim by the plaintiff. This lack of injury allows the defendant to exert pressure on the plaintiff by simply delaying the litigation; this will increase the plaintiff's costs. Thus making him more susceptible to accepting a settlement, which would be less than what a jury may award; or in the extreme case it is possible that the defendant might raise the plaintiff's costs so high he may abandon all attempts to collect.

¹³⁰ The other rights may include things like subrogation and obligations to notify the insurance company.

¹³¹ In this case market cost is equivalent to the amount of a jury award because as will be discussed later what a jury is willing to give is the actual cost of a tort or the value of the debt held by the plaintiff.

When litigation is viewed as a transaction between the two parties it becomes evident that the defendant is in a better starting position than the plaintiff. He can leverage time and cost, in order to pressure the plaintiff into accepting less than what a jury award would give him. Theoretically the jury award should be equal to the cost of the injury, therefore by accepting less the plaintiff is getting less the cost of the injury and the defendant is being under-deterred.

B: The Macro-Tort Component.

The macro-tort aspect of the system encompasses all of the societal concerns that weigh into the decision making process. This part of the system is generally observed in two scenarios; when either litigant is looking to support their position by appealing to “public policy” or when the court/jury decides a case with an eye towards affecting the behavior of society at large.

The first scenario is really a response by the litigants, to the way courts and juries were deciding cases and their jurisprudential views. As judges have increasingly viewed themselves as “social engineers who balanced the claims of competing interests on behalf of the public good.”¹³² Lawyers realized that their success in litigation would necessitate the inclusion of public policy based arguments.

Cardozo described the role of a judge as “fashion[ing] law for the litigants before him. In fashioning it for them, he will be fashioning it for others.”¹³³ This embodies the interaction and inherent possibility for tension between the micro-tort and macro-tort parts of the system. Sometimes the just result between parties, will not serve the public at

¹³² G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 106 (Oxford University Press 2003) (1980).

¹³³ BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 21 (1921)

large, the macro-tort part of the system is the consideration given to society at large even though they have no exclusive representative among the parties before the court.

This concept of macro-tort can be seen most readily when courts cite general deterrence as *ratio decidendi*. In *Lauer v. City of New York* the court was considering whether a person could recover against the City of New York for the negligence of a city employee.¹³⁴ The dissent highlights the existence of the macro-tort concept and the tension that can occur in cases, between the micro and macro elements of the system. The dissent faults the majority for not “balancing several policy considerations” instead of just considering “compensation for the victim and general deterrence”.¹³⁵ The dissent is faulting the majority’s reasoning for suggesting that liability in this case would contravene public policy.¹³⁶ In essence the case became about weighing the needs of society at large. With the majority deciding that the public is better served by not imposing liability, because the public’s concerns and the plaintiff’s concerns are at odds with each other.¹³⁷ The dissent suggests the opposite, that the plaintiff’s concern and society’s are harmonious and dictate the possibility of liability.¹³⁸

Another New York Court of Appeals decision can serve as an example of the large effect the macro-tort aspect of the system has on the system as a whole. In *De Angelis v. Lutheran Medical Center* the court had to decide whether children could bring a suit for loss of consortium, when one of their parents had been seriously disabled.¹³⁹

¹³⁴ LAUER V. CITY OF NEW YORK, 95 N.Y.2d 95, 97 (N.Y. 2000).

¹³⁵ *Id.* at 111. (Smith dissent)

¹³⁶ *Id.* at 112. (Smith dissent).

¹³⁷ *Id.* at. 103 (the new duty needed for liability to be found would run to other members of the public who may be subject to investigation by the medical examiners office. Consequently giving them grounds to sue and this would be detrimental to the work of the medical examiner.).

¹³⁸ *Id.* at 112 (Smith Dissent) (“On the contrary, liability under these circumstances would affirm the reasonable expectations of both the parties and society”).

¹³⁹ DE ANGELIS V. LUTHERAN MEDICAL CENTER, 58 N.Y.2d 1053, 1055 (N.Y. 1983).

Although the loss suffered was indeed real, the court decided that no cause of action existed for the children.¹⁴⁰ As the sole reason for its decision the Court said:

A line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. It is always tempting, especially when symmetry and sympathy would so seem to be best served, to impose new duties, and, concomitantly, liabilities, *regardless of the economic and social burden*. But, absent legislative intervention, the fixing of the "orbit" of duty, as here, in the end is the responsibility of the courts.¹⁴¹ (citations omitted) (emphasis added).

The Court's sole reason stated for deciding that there was no duty and consequently no *prima facie* case, was because the "economic and social burden" dictated against it.¹⁴²

This case is an example, of when the macro-tort considerations trumped the micro-tort objective of compensation for a wrong.

Consequently, from the above analysis the incorporation of a system that could bring the macro-tort and micro-tort considerations into harmony would be a more just system for all parties involved. One such mechanism was recognized by Adam Smith to accomplish just such a result, "the automatic equilibrating mechanism of the competitive market."¹⁴³

The following section examines the basis for formation of the markets. It will also demonstrate the advantages the market will have on tort system from the micro-tort perspective.

¹⁴⁰ *Id.* at 1055.

¹⁴¹ *Id.* at 1055.

¹⁴² *Id.* at 1055.

¹⁴³ MARK BLAUG ECONOMIC THEORY IN RETROSPECT, 57 (5th ed.1996) (1962).

Part III- The Tort Claims Market: Advantages and its Micro-Tort Implications

A market is a mechanism where buyers and sellers of goods come together in order to exchange their wares. A market in legal claims is one where “bundles of rights”¹⁴⁴ are exchanged for money.¹⁴⁵ Before sketching how such a market would function, it is important to establish the key provision of all market operations. A person will undertake to sell something *only* if they believe the sale to be to their benefit, concurrently, a person will *only* buy something if they believe the purchase to be to their benefit.¹⁴⁶ The market in claims, as it is contemplated, is a *voluntary* market. No person is forced to sell and no person is forced to buy; they each will transact only if they *both* see value in the transaction. It is worth reiteration, the market as envisioned by this note is a completely voluntary one, having no effect on substantive tort law or on the options plaintiffs and defendants have to conduct themselves in the traditional manner.

The proposed market in claims will consist of two general commodities, current claims and future-contingent claims. No further breakdown beyond this will be discussed, because it should be up to the individual participants involved in the market, to decide whether a certain kind of claim is marketable or not, therefore there will be no analysis of specific causes of action. This section will deal first with the general reasons for a market, then the current claims market, and finally the future-contingent claims market.

¹⁴⁴ See Introduction *supra* P.3. (“Bundle of rights” is everything included by the definition of claim, including but not limited to the right to recover and standing to sue).

¹⁴⁵ See Choharis, *supra* note 16, at 443.

¹⁴⁶ See FRIEDMAN, *supra* note 1.

A. Formation and Basis of the Current Claim Market

The reason a market in claims will exist is because people have different relative abilities to bear risk.¹⁴⁷ Several factors figure into a party's willingness to bear risk, the main one is the wealth of the party.¹⁴⁸ Torts and personal injury present a unique opportunity, because the risk of litigation is thrust upon unwilling parties, this is the opposite of a contractual relation where risk is assumed willingly. Therefore, the market is a clearinghouse where people who want to get rid of their risk can sell it to those who want to assume it.

The reason anyone will want to purchase risk is because at its core, risk is an uncertain opportunity to make money. People who want to sell it do not have the means or desire to fully exploit the risk. The potential for profit arises from the differential between the price paid to the seller and the potential payout, this difference represents a risk premium. It is the price paid by the buyer of certainty (seller of risk) to the seller of certainty (buyer of risk).

From an economic perspective, the sale of a tort is possible because of the differences between the risk factors of the individuals involved and the resulting certainty equivalent generated. A certainty equivalent is the "minimum amount of money" a person "would rather have for certain instead of taking some risk".¹⁴⁹ In essence this can be seen as the minimum value a plaintiff will accept in order to forgo the risk of litigation and the possibility of winning. This will generally occur when the victim-seller is a risk averse individual, meaning that they value certainty more than risk, and the buyer is at minimum risk neutral. The parties will also transact if there is a differential in what each

¹⁴⁷ Ari Dobner, *Litigation For Sale*, 144 U. PA. L. REV. 1529, 1531 (1996).

¹⁴⁸ *See Id.* at 1532.

¹⁴⁹ *See Risk and Uncertainty*, available at <http://www.gametheory.net/Mike/applets/Risk/>

party expects value of the claim to be post litigation. If the victim believes the value of the claim to be lower than what the buyer believes, then the parties will have an opportunity to contract; with each party being better off without affecting the defendant's rights or opportunities.

While the market will standardize some expected value claims it will be unable to do so with all claims, because rarely are two tort cases identical much the same way no two stock offerings are identical. Each tort has a specific set of facts, applicable laws, and parties; just like each company offering stock has its specific business area, structure, and personnel. All of these factors, in both cases, will affect the price evaluations of a claim or the stock offering.

i. The Micro-Tort Impact of the Primary Market

Market functioning is most easily understood by applying the mechanism to set of facts. This section will analyze the market from the perspective of the individuals involved, their choices, and how this affects their welfare. The legal analysis of this section will be conducted by examining the relationship and interaction of three principal parties: Paul the victim, seller, and original plaintiff; David the tort-feasor, defendant, and interested buyer; Ivan the uninterested buyer of the victim's (Paul's) claim; Larry, the uninterested buyer of the tortfeasor's (David) defense; and Sam the secondary market buyer of claims.

Suppose, Paul is injured by David's conduct resulting in personal injuries. Normally, Paul would be inline to receive economic damages for the medical expenses and income lost during his time out of work. Also Paul may be able to collect compensation for the pain and suffering caused by his injuries.

Under the traditional tort system Paul would have two options, he can settle with David for an agreed upon price avoiding the cost of litigation. Or he can launch litigation and begin to invest in the process hoping, that it will pay off and he will recover enough to compensate him and cover the costs of litigating. If Paul decides to litigate, he is taking all the risk of the procuring compensation, normally he can shift up to a third of that risk to his lawyer, with the hope that his lawyer's specialized knowledge will reduce the risk, thereby increasing his chances of success.

Suppose that Ivan approaches Paul and proposes that Paul assign to him the claim he has against David. In return Ivan promises to pay him the present value of the expected jury (Pv) award less a discount for assumed risk (Ra), equaling Paul's certainty equivalent (CE). In mathematical terms the price (P) of a suit equals $(Pv - Ra)$ which is equal to Paul's (CE). With this option in hand Paul's realm of options changes dramatically.

If Paul decides to negotiate with David and attempt settlement, he is not in a position to be strong armed. Paul can always walk away from the settlement negotiations without his sole recourse being litigation. This immediate removal of David's monopsonist position will increase the amount that David is willing to pay to purchase the claim if indeed he wants to avoid litigation. Therefore Paul is better off by the simple presence of Ivan, even if Paul does not sell him anything. David has suffered a small setback in position, because he is no longer a monopsonist, but this is not terribly detrimental to him, he is being forced to pay closer to the actual cost¹⁵⁰ of the injury and as discussed below his gains offset this small setback. However, from a societal point of

¹⁵⁰ Actual cost of an injury is used to mean the amount that a jury would determine to be the value of the claim.

view, as discussed above, the purpose of the tort system is to compensate the victim for the damage done¹⁵¹, therefore the market in this case has brought the level of compensation closer to the cost of injury without an increase in litigation.

David's options have not be reduced or impinged upon in anyway. As a useful analogy to David's change in position, consider the reason's behind the anti-trust legislation, the presence of a monopoly entity is inevitably bad for all parties involved except the monopolist. David, until the arrival of Ivan's proposal and the corresponding introduction of competition into the system, occupied the position of the only legal buyer of the claim. David, as monopolist was in a position of excessive power. Further, any harm David faces is outweighed by some other benefits that the system provides to David which are detailed later, and the inferences that David can make from the interaction between Paul and Ivan. Primarily David gets the benefit of an independent third party assessment of the strength of Paul's claim. David is able to deduce the strength without even knowing what the price offered was, if Ivan is willing to buy then he believes that he can make a profit, this should cause David worry and believe that the claim has some merit.

Paul's next option would be to launch litigation and attempt to collect through the court system. The introduction of Ivan's proposal has done nothing to affect this decision. Paul can turn down Ivan and proceed as he normally would. There has been no prejudice to his position, nor has David's ability to defend himself been impinged by the insertion of Ivan into the situation.

Finally, Paul can sell his claim to Ivan. In that case Paul receives certain and guaranteed compensation. He has also effectively sold all of his risk. He has paid a

¹⁵¹ See KEETON, *Supra* note 113.

premium to get rid of his risk, but that choice is of his own free will, and he as decided that the risk of getting nothing is higher then the difference between the amount a jury will award less the price Ivan offers.

Switching focus from Paul to Ivan, Ivan steps into the shoes of Paul as the one directing the course of the proceedings. His options include settling with David, pursuing litigation, or in turn selling the claim to another party; these are substantially the same choices that Paul faced.

Ivan could settle with David and the analysis will be the same except that now there is a risk neutral party dictating the terms of litigation. A risk neutral party values each dollar equally,¹⁵² instead of at a discount like a risk averse party. Therefore a risk neutral person will have a higher certainty equivalent, meaning that Ivan will require a higher amount to settle because he is more willing to bear risk.

Since Ivan does not have the worries that Paul had, for example how he was going to make any money to feed his family, pay the rent, or recoup lost income;¹⁵³ he is able to make a purely economically motivated choice. Ivan's lack of personal motivation for vengeance reduces transaction costs, because the legal system is used simply as a tool to end, which is the settlement of the outstanding debt or obligation. The possibility that a lawsuit could be used as a means for vengeance is eliminated or substantially reduced in cases where the victim has sold their claim. As a by product of the sale, the possibility of vengeance based irrational decision making is also reduced. In essence, Ivan is more of a profit maximizer then Paul because of his lack, of a psychological need, to extract any

¹⁵² See Risk and Uncertainty, *supra* note 149.

¹⁵³ See Choharis, *supra* note 16, at 480.

sort of revenge.¹⁵⁴ Ivan therefore, can compare the true value of the settlement with the expected net outcome of litigation.¹⁵⁵

Ivan could also choose to litigate, thereby assuming all the rights and responsibilities of a plaintiff. He would be able to conduct discovery, deposition, hearings, and a trial. However, there are several advantages of having Ivan litigate over Paul. Ivan's willing investment in the claim, indicates that he made sure to have a good legal team and available resources in order to conduct the litigation if need be. He will evaluate the potential outcome of litigation when he is deciding whether to make an offer for the claim. His rational choice to become involved in the claim suggests that he believes that there is a certain amount of money that the claim is worth and upon reaching that amount he will sell the claim.

This process will reduce litigation because there will be a certain point where Ivan will forgo the risk of litigation for a certain amount of money, the same way that Paul did. The key difference is that Ivan has higher threshold for risk; he lacks the non-economical factors such as the actual physical injury and the possibly associated emotional trauma. Ivan also lacks the economical issues that Paul has, he does not lack cash in order to withstand the rigors of litigation with a well-heeled David, this parity in resources may lower David's incentive to try and win the case by delay.¹⁵⁶

Ivan has another possible option he can sell his claim Sam. Sam represents the existence of a secondary market. Sam's presence provides, for Ivan, the same advantages that Ivan provided for Paul. Namely, Sam provides Ivan the ability to liquidate his

¹⁵⁴ See Choharis, *supra* note 16, at 483.

¹⁵⁵ Teal E. Luthy, *Assigning Common Law Claims fro Fraud*, 56 U. CHI. L. REV. 1001,1016 (Summer, 1998).

¹⁵⁶ See Choharis, *supra* note 16, at 489.

position in the claim without extinguishing the claim by selling it to David. This option is discussed in further detail in the following section.

David has several options as well. He can attempt to purchase the claim from Paul or Ivan. Of course he is now competing for the claim so the price may be higher. However, there is a flip side to the introduction of competition to the system that benefits David. The presence of other players or lack thereof is a signal to him, of independent third party valuations of the strength of the claim. If he sees strong competition for the claim he can infer that independent third parties believe that there is a reasonable chance for success; or he may be able to deduce that Paul is valuing the claim too low therefore if he raises his settlement offer a bit more he might be able to settle the claim and avoid litigation. David's uncertainty has been reduced because of the presence of price system and the information contained in a commodities price. Therefore, David is better off by Paul having access to the market system.

David may also benefit from Ivan's purchase, because Ivan may be more receptive to finding a middle ground in settlement negotiations. Ivan as a rational economic actor is satiated by adjustment of pecuniary rewards during the settlement phase of the negotiation.

David may choose to litigate and defend against Ivan or Paul. This option has not been abridged or effected in any substantive way, by the introduction of the market. David, can still rely on all the applicable laws that were available to him before Ivan became involved. His position is no worse off than under the current tort system.

Finally, David has one other interesting option that was unavailable to him under the current system, he can assign his liability. If Paul is allowed to sell the right to

recover on the debt, David should be allowed to assign the obligation to pay the debt. This transaction would look something like the following: David approaches Larry and offers him an amount to take on the obligation to pay the debt. In essence this means to incur the risk of being liable for the value of the claim. This transaction is possible for the same reasons that Paul and Ivan choose to transact, namely, there is a difference in the parties relative tolerance for risk.

This proposition also eliminates the problem of the plaintiff (the party with ownership rights to the debt) being able to set the minimum price that the defendant must pay in order to avoid litigation. If David is able to pay Larry less than he would have had to pay Paul, or Ivan, or Sam then he can extricate himself from the situation and the party willing to bear the risk of liability is allowed to do so. Paul, Ivan, and Sam are indifferent to this situation.

David has not escaped unscathed from the tort he has committed as he has had to pay Larry enough money, to induce him from a position of certainty into a gambling position. Although in some cases Larry may lose and in that case David may have paid less than what the tort was worth, Paul, Ivan or Sam has been fully compensated. This will even out on a societal level because there will be situations where Larry is the winner and no liability is found or he is able to execute a settlement for less than what David paid him, in that case David has over paid.

The other key factor to consider is that Larry is not going to take a very small amount from David in a case where the chances of loss at litigation or the cost of settlement are going to be very high. The weaker David's defense the more money it will take for Larry to be induced to take on the risk.

Shifting to Larry's perspective, he like Ivan and Sam, has all of the choices and options that were available to David. But because Larry is *willing* to bear risk that David had no choice to bear, he is better able to assess the offers and options that are available. Furthermore, Larry is also emotionally detached for the actual tort meaning, that he is more likely making an economically rational decision.

Finally, Sam presents an interesting scenario. If he comes to own both Paul's rights to sue (Paul's claim) and David's right to defend (David's claim), then case has been effectively settled. In this scenario the market has settled the lawsuit through a series of voluntary transactions that exploit the differences in relative ability to bear risk. In essence, the market and the price mechanism by which it operates has acted as a mediator, mediating between seller and buyer just as it does with any other commodity. In theory this self settling transaction can occur without the victim and tortfeasor ever engaging in negotiations.

The self settlement scenario might unfold as follows. Paul sells to Ivan who sells to Sam. Concurrently, David pays Larry who then pays Sam. If the pricing works out, then what Larry is willing to pay may be more than what Ivan is asking for, in such a case Sam has the opportunity to make the difference between his price to take on the liability from Larry (David's liability) and the price Ivan asks to sell the claim (Paul's claim).

If this occurs, legally Sam would own the right to sue himself. Yet examining the results, each and every person was paid in accordance with the level risk they were willing to bear. This of course is only a possibility and not a certainty in every case, financially, it only works out if the amount that person holding the right to defend (the right to be liable) is higher than the amount of the claim itself.

From the micro-tort perspective the market system creates opportunities and options for all parties, without compromising the basic goal of compensating the victim. It has the potential to remove emotion from decisions that deserve to be made in a rational manner, thereby reducing the use of the tort system for vengeance. The market also provides valuable information feedback to all parties through the price mechanism, this increase in information reduces uncertainty. With uncertainty being reduced, parties are more confident in their decisions and are able to reduce the transaction costs associated with trying to insulate themselves from uncertainty.

ii. The Micro-Tort Impact of the Secondary Market.

The secondary market is where primary purchasers sell to secondary purchasers. From the hypothetical used above, Ivan and Larry would be primary purchasers, whereas Sam would be a secondary purchaser. The purpose of the secondary market is to provide the primary purchaser with liquidity.¹⁵⁷ The increased liquidity will allow for greater risk sharing and distribution, it will also provide for the parties involved in the market to hedge their risks.¹⁵⁸

Liquidity itself is a certainty generating concept. If an investor is locked into an investment he runs the risk that over time there will be an effect on the investment by changing market conditions and he also suffers an opportunity cost by not being able to realize a fungible return.¹⁵⁹ In essence, the longer a purchaser of a good has to hold on to the good before realizing a return, the more risk he is incurring.¹⁶⁰ Since an increase in risk, will raise the certainty equivalent of the party assuming the risk, the product

¹⁵⁷ See Choharis, *supra* note 16, at 500.

¹⁵⁸ If a party or suit is not sold by either party then none of the analysis of this paper is relevant as it will not be subject to benefits that the market bestows.

¹⁵⁹ See Choharis, *supra* note 16, at 503.

¹⁶⁰ See *Id.*

associated with the risk becomes more expensive.¹⁶¹ Thus, making people less inclined to participate in the market and therefore reducing the number of low transaction cost exchanges.

Transaction costs are reduced by the existence of the market on an individual level in several ways. The most prominent is that the downward pressure on the cost of legal services. A buyer of a tort will have an incentive to keep his costs as low as possible because the higher his costs the lower the profit margin. His rational decision to become involved with the claim, also suggests that he will choose legal services that fit the risk. Accordingly, since the purchaser has a higher tolerance for risk they will spend relatively less on mitigating the risk in an attempt to increase their profits. Since the majority of costs involved in any tort action are the legal costs, any system that can reduce these costs is providing an individual and societal benefit, by bringing the amount paid out and amount received closer to the actual cost of the tort.¹⁶²

This downward pressure on legal costs will be especially noticeable if institutional investors develop economies of scale. They will be able to assemble litigation teams at fixed or almost fixed prices further reducing transaction costs. These investors will be able to avoid duplicative discovery costs, if they have more than one unrelated claim outstanding against the same defendant.¹⁶³

This ability to consolidate unrelated claims against a common defendant, also leads to an increased probability for settlement and more efficient settlement discussions.

¹⁶¹ See Choharis, *supra* note 16, at 503.

¹⁶² See FLEMING, *supra* note 129, at 19. See also, FLEMING, *supra* note 129, at 19 (note 73) (detailing a study whereby the combined attorney's fees in an average settlement is approximately equal to 61.3% of the total value of the settlement. When a case was litigated the combined attorney costs were approximately equal to 62.9% of the total award. These amounts are expressed as a percentage of the award, but they are not subtracted from any payment made to the plaintiff.).

¹⁶³ See Choharis, *supra* note 16, at 486.

These bulk purchasers are able to settle several claims at one time for a lump sum. Lawyers under today's market are not permitted to conduct such arrangements because of their fiduciary duties to each client. But, the holder of several claims against a common defendant is able to negotiate one price for all outstanding claims held. This is more efficient on several levels; firstly there are fewer parties involved, only one on each side with several claims outstanding; instead of a plaintiff per claim. Secondly, the singular control of the decision making process on each side will lead to the same efficiencies that are observed in class action cases, which are administered by a single legal team. Yet this is done without the long drawn out issues of certification or of having several different clients in the end. This situation allows for the spontaneous formation of plaintiff classes based on economic efficiency with minimal, if any, judicial involvement.

In this scenario the incentives on each side are to settle. The defendant will want to avoid litigating several different claims each with duplicative costs. The purchaser will have the same concern, because if he can deal with several claims at once, he is able to reduce his costs which is an automatic increase in his profit margin. Litigating will mean that all non joinable, or class actionable claims must be treated individually. By allowing people to sell their torts, under the above scenario, the market has changed the incentives of the parties from litigation as the highest profit payout to settlement as a having a higher payout.

Under this scenario no party is worse off. Each original victim was compensated where some would not have been. Therefore, as a class they are better off and individually each was able to move with their life and none of them had any option truncated by the new system. The purchaser is able to make a profit, the existence of the

market makes him better off automatically. The defendant is able to reduce his transaction costs because he is dealing with one purchaser instead of several different individual plaintiffs and he is able to discharge several claims in one sitting. This is all made possible because the purchaser was able to collect these claims easily and efficiently on the secondary market. If this had been done on the primary market his costs would be much higher because of its decentralized nature, but it would also be possible and the analysis would be the same.

The secondary market is of vital importance in another respect, regulation.¹⁶⁴ Entrance to the secondary market is the logical point from which to regulate the operation of the entire market. This is due to the lucrative nature of the secondary market. Most if not all, primary purchasers will want to have access to it. Therefore, if guidelines and regulations are adopted that dictate requirements for sale of claim¹⁶⁵ on the secondary market. The primary purchasers, not wanting to forgo their access to liquidity, will adhere to the guidelines. This situation is analogous to the function of the Securities and Exchange Commission and other market regulating agencies with respect to the stock market and other capital markets. The issue of regulation is further addressed in section VI.

B. Formation and Basis of Future-Contingent Tort Claim Market:

The future-contingent claim (F-CC) market is made possible by the same mechanism that allows the current market to function, namely, the existence of different

¹⁶⁴ See Choharis, *supra* note 16, at 500-01 (Since a claim may be traded or resold in a secondary market, a tort claim investment instrument must satisfy the demands of market and state and federal regulatory regimes governing markets).

¹⁶⁵ Under the definition of claim being advanced “claim” includes both the right to payment or the right to defend against payment. See Introduction, *supra* p.3.

acceptable values of risk among individuals.¹⁶⁶ Just as in the current claim market, it is the market's willingness to exploit this difference that will allow for parties to bargain.¹⁶⁷

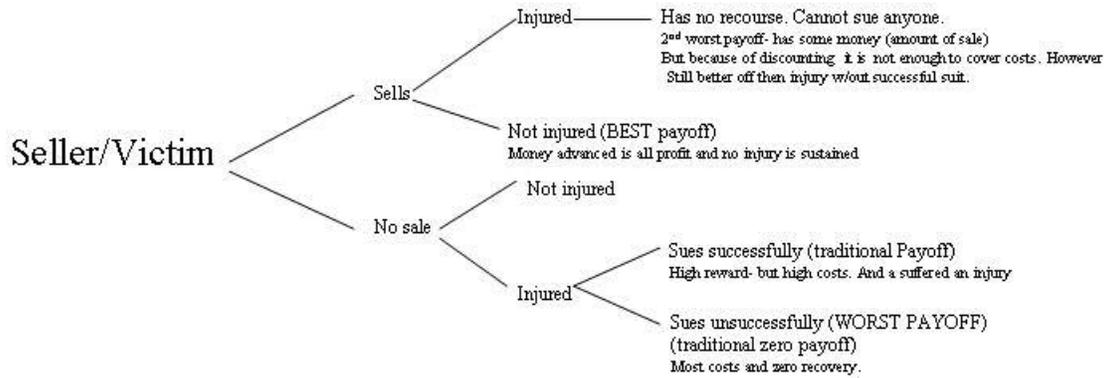
This section will highlight the key differences between the F-CC market and the current claims market and then examine the F-CC market itself from the micro tort perspective.

The key and most obvious difference between the two markets is that the F-CC market has an added layer of risk. The current claim market had only one level of risk, the success of litigation. The parties knew for certain that the tortious injury had occurred and they knew what the injury sustained was. Here the market has to make that same assessment, but it must also assess the likelihood of the injury occurring. Consider the following diagrams:

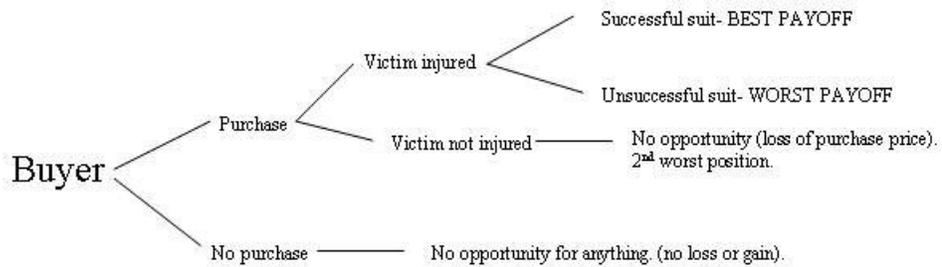
¹⁶⁶ Robert Cooter, *Liability Rights as Contingent Claims*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 575 (Peter Newman ed., 1998).

¹⁶⁷ *Id.*

Future market- Seller



Future market - Buyer



The uniqueness of the F-CC market is that the decision to sell is made before the injury. Therefore the probability of injury will affect the profit of each party. Outside of this added concern the actual functioning of the market will be very similar to the current market. The options available to each party remain unaffected save one. Paul, our original victim, has a mutually exclusive choice to make. If he sells an F-CC he will not be able to sell the claim on the current market.

It is important to note that the types of claims sold are limited solely by the imagination of the market actors. As examples, people might limit the time for which the right is valid, or it might be limited to injuries below a certain monetary threshold, or it could specify what kinds of damages or injuries are being traded. All of these decisions would be decided by the individuals who are contracting during negotiations in a manner most beneficial to them. One commentator has postulated that a “person might sell the right to recover intangible losses... and retain the right to recover tangible losses.”¹⁶⁸ Interesting scenarios also include the possibility of selling posthumous F-CCs. For example, one might sell a wrongful death suit making it no longer part of the estate.

The other significant possibility is the development of an options market, where the purchaser would have the right to buy the suit based on negotiated criteria once the injury occurs, this option is more of a middle ground between the F-CC and current claim markets. This hybrid option will allow for the parties to signal their willingness to come to a bargain and at the same time provide them with an escape, from the deal, if it is no longer in their best interests down the line. This does no harm to the victim, because he is paid for the option, but if there is a clause that allows him to walk away under certain

¹⁶⁸ Robert Cooter, *Symposium on the Law and Economics of Bargaining: Towards a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383, 384-5 (1989).

circumstances, or if the buyer chooses to walk away, then the victim is in the exact position where he would be under the traditional system.

The proposal presented here is different from the Sugarman and O’Connell models. Professor O’Connell’s model is designed to operate as a no-fault insurance scheme, where the victim has their entire pecuniary loss covered.¹⁶⁹ It is limited to insurance companies as key players, the proposal of this paper is not limited to the provision of insurance; rather, market players and forces should be able to decide for themselves what bargain are in their best interest. The essence of the bargain of O’Connell’s proposal is that by giving up the right to sue in advance, the potential victim, receives guaranteed compensation from potential injurer if he is injured in manner so covered by the contract.¹⁷⁰ Limiting the market to certain participants does nothing but creates the possibility for market distortion and reduces the benefits of unfettered competition. As has been emphasized before, the market system as proposed here, does not affect a victim’s current choices under the traditional system it is only adding another option, nor does the proposal here necessarily end in the pre-settlement of tort suits.

Professors Sugarman and Cooter’s proposal would limit a seller’s access to the market by allowing only those who are “adequately insured against accidents” to participate.¹⁷¹ Further, they envision this market as functioning primarily as a pre-settlement device, in essence, allowing the future tortfeasor to buy the claims before they arise thereby avoiding the hassle of determining liability.¹⁷² Although pre-settlement is a

¹⁶⁹ See Jeffery O’Connell & Janet Beck, *Harnessing the Liability Lottery: Elective first party No-fault insurance financed by third-party tort claims*, 1978 WASH. U. L. Q. 693, 697. (describing the bargain to be struck as no fault coverage in return for absolute assignment of claim).

¹⁷⁰ See COOTER & SUGARMAN, *Supra* note 17 at P.183 (discussing prof. O’Connell’s proposals.).

¹⁷¹ See *Id.*, at 176

¹⁷² See *Id.*

possibility under the proposal contemplated here, it is not one of the over arching goals. The proposal here is based on the efficiency of risk sifting and that when people are allowed to shift their risk (either increase or decrease it) unimpeded, they will do so only when it is in their best interests to do so. The exact nature of the transaction and the consideration given in return for a F-CC should be left up to traditional market forces to determine. The thrust of the argument presented here, is that entities should have the right to engage in such a negotiation and expect the contract to be binding so long as it meets the traditional requirements of valid contracts. Therefore, there should be no limitation on the rights of people to alienate their risks. Thus the majority of the regulation needed to insure that the market is functioning in a fair manner, done at the intersection between the primary and secondary markets, just as is done with the traditional financial markets.

i. Micro-Tort Impact of Future-Contingent Claim Market

The key premise to the F-CC market is that an unmatured claim is worth “the probability of the tort times the damages that will be suffered if the tort occurs”¹⁷³ This means that the parties are going to take a risk on whether the tort will actually occur. The other key premise is the same one as in the current market, the probability of success in litigation.

The potential victim has reason to sell his tort because he will receive future compensation today, in return for a contingent right. This means that his best case scenario as a seller is to have no injury occur and he keeps the money as profit. Consider the diagrams from above; the seller in the F-CC market weighs the possibility of loss at trial, against an injury with some mitigating amount of compensation (the amount of the

¹⁷³ See Cooter, *supra* note 168, at 384.

sale) but with no legal recourse. This simple proposition has powerful implications. Assuming the plaintiff to be a profit maximizer, his strongest incentive is to prevent injury to himself. The traditional tort system has no such incentive outside of contributory negligence. The simple sale of the F-CC has already radically changed the way the seller is going to interact with society by breeding a more cautious person, one who will avoid unnecessary risk, because he has no post accident recourse.

Of course the worst scenario for the seller is one where he sells and because of the discounting that occurs for the assumption of risk, he is left with less than the cost of his injuries. Assuming the potential victim sells an F-CC for \$100 that has an expected value after successful litigation of \$500 (after litigation costs), and assuming further, that the tort system is perfect and only gives compensatory damages for the cost of the injury then the cost of the injury would also be considered to be \$500. Consider the following payoff matrix for the seller:

	Sale	No sale	Successful Litigation	Unsuccessful litigation
Not injured	100 profit	0 profit	N/A	N/A
Injured	100 price- 500 injury= -400 loss	N/A	500 (award)- 500 (cost of injury)= No profit/ no loss	-500 loss = cost of injury.

The seller is going to weigh the possibility of getting a \$100 profit for selling the F-CC versus the possibility of getting injured. He is also going to weigh the possibility of a \$400 loss versus a \$500 loss. Once he makes the sale, he is no longer concerned with litigation. But he is concerned with the cost of the injury, because he must bear it

completely. On the flipside the F-CC is the only way he can make a profit, under the tort regime he is at best going to be put in a position back to where he was before the tort occurred, he gets no benefit for avoiding dangerous behavior. Under the F-CC market he is rewarded for avoiding injury, and profits from this avoidance. Also the F-CC market even provides a softer landing than the traditional litigation system. Compare the losing outcome when there is a sale and the seller suffers an injury, with the situation where there is no sale and a loss at litigation. When he sells, he has compensation in hand so he suffers less of a loss than he does if he does not sell and loses at litigation. This compensation in hand may prove to be a more powerful option than having legal recourse.

Prof. Cooter identified two scenarios where the potential victim chooses to sell his F-CC, (i) if he already has insurance coverage for the F-CC that is being sold or (ii) if the victim believes that the tort will not happen.¹⁷⁴ The above analysis does not change depending on which of the two scenarios is posited, and they are not necessarily mutually exclusive, nor must they be the only two scenarios although they may prove to be the most common ones. A person might have insurance and at the same time believe that the chances of the tort occurring to them would be small and limited, such a person would be willing to sell. However, one need not get into a discussion of insurance in order to understand the options presented to the seller.

¹⁷⁴ See Cooter *supra* note 168, at 385.

Consider the following chart, using the hypothetical from above, where the cost of the tort is \$500 and the price of the F-CC is \$100 and assuming no litigation costs.

	SALE	NO SALE
BEST CASE	Profit (+\$100)	Winner at litigation (net effect is zero) $\$500-\$500=0$
WORST CASE	Sale price- Cost of injury $(\$100-\$500=-\$400)$.	Loser at litigation $(-\$500)$

If the Seller looks at all the end results and compares the following: the best scenarios under each and the worst scenarios under each. It is perfectly reasonable for a person to come to the conclusion that they would rather run the risk of making a profit or a smaller loss with the sale, rather than take the risk of the largest loss and no chance for profit.

From the buyer's perspective, they are getting involved in a high risk high payout situation. They are taking on the risk of litigation compounded by the chance of the accident occurring. Because there is no certainty as to the injury sustained, its severity, and who is the tortfeasor the risk of success is quite high. Since the risk is so high the price of the F-CC will be relatively lower than a current claim. The buyer will have the potential for a very high profit if the victim suffers a tort and he holds the valid rights to it, this is because the price for the tort may have been very low. The reason for the higher profit margin in the F-CC market is the increased risk. This means that many claims will inevitably turn out to be worthless because no tort occurs.

The preceding sections have dealt with the effects of the market system on individuals and their choices. However, the tort system has effects that range beyond the individuals involved. The analysis now shifts from the individual to the societal. The following section examines the market system from a macro-tort perspective and the associated society level effect the system will have.

Part VI- The Macro-tort Effects of the Market System.

The market system will have an effect beyond just the individuals involved with its operation. It will have systemic effects on society at large just the tort system does. If these effects are generally positive then the major public policy hurdles to the market concept are overcome. The three basic tenants of the current tort system that are affected by the market system are: safety/deterrence, compensation, and vengeance.¹⁷⁵ The first two are either left unaffected or improved by the market system. The third, vengeance, is reduced and this is a beneficial development because vengeance can lead to distorted decision making. Accordingly this section will analyze the effects of the Current and F-CC markets on each of these three aspects.

The original proposition of the market system was that it is *pareto* efficient, in that it will not adversely affect any party. The same holds true for the macro-tort implications of tort law, each one of the three is either furthered or is left unchanged by the introduction of the market system.

¹⁷⁵ See DOOLEY, MODERN TORT LAW §1.02 (“[t]he law of tort can be traced back to the blood feuds of primitive societies...” The development of tort was motivated by vengeance as is evidenced by the first torts where the victim was compensated by taking the life of the wrongdoer.); See also, SPIESER ET AL. THE AMERICAN LAW OF TORTS, §1:3 (stating that the goals of tort law include compensation, restitution, punishment, and the declaration of rights.)

A. The Macro-tort Effects of the Market on Deterrence

The purpose of using tort law as a deterrent is to attempt to encourage individuals to internalize the costs of all their actions. In essence to have them make more socially desirable decisions by causing monetary loss.¹⁷⁶ The system forces individuals who may undertake injury producing behavior to contemplate the full costs of their proposed course of action. The tort law objective of deterrence is supposed to have people and, by extension society at large, consider the costs of a given course of action on third parties. The tort system raises this cost to individuals and as such, when that cost is prohibitive they are deterred from undertaking the course of action. It unimportant to the goal of deterrence that the actual victim receive the payment from the tortfeasor, deterrence is accomplished simply by payment by the tortfeasor.¹⁷⁷

Therefore, deterrence is best measured from the perspective of the tortfeasor. Under the current claim market the tortfeasor is still forced to deal with an adversary who is seeking to extract the most he can from the defendant. This means that deterrence is left unchanged, because there is still going to be a cost of choosing a tortious course of action to the defendant. However, the market is changing to whom the right to raise that costs belongs. Even if the claim was sold on a secondary market, the defendant would still have a cost associated with ending the claim by purchasing it through the market mechanism. The moment a defendant seeks to purchase an outstanding claim against him, the price will increase. This is because other market actors will infer that the defendant believes the claim has some merit, or that the defendant is willing to pay to end the claim.

¹⁷⁶ Stephan D Sugarman, *Symposium: Alternative Compensation Schemes and Tort Theory: Doing Away with Tort Law* 73 CALIF. L. REV. 558, 560 (may 1985).

¹⁷⁷ See, O'Connell, *supra* note 169 , at 706.

Either way the defendant is still going to have financial repercussions as a result of a tortious course of action.

On the flip side, if the defendant was the one who paid another to take on the liability he is still being hit financially for his actions. In such a scenario the defendant would have incurred an even greater deterrent effect. Consider the reasons advocated for the defendant wanting to give the liability to someone else, for example: they may not want the publicity of the lawsuit or of liability furthermore, there is a cost of enticing a party to decide to become liable. In essence the defendant has realized that there is a cost associated with the actions both in time used to negotiate the sale of liability and the money needed to effectuate the sale.

There is also an argument that deterrence is enhanced by the presence of the market. Under the traditional system there is a discounting that occurs on the part of the tortfeasors this is because some victims with valid claims choose not to sue.¹⁷⁸ Courts in the past have cited judicial efficiency or an increase in the amount of litigation as a policy reason for their decisions. However, concerns that the market will increase the number of tort claims, as a basis for not permitting the market to be established is not applicable. This is because the market is not creating a new cause of action or right to compensation, it is merely changing who is primarily responsible for sustaining the suit. It is contrary to the fundamental principle of tort law, of allowing victims to seek compensation via the courts, to suggest that those victims would be putting an unbearable strain on the system.

It is important to reiterate that the market system proposed here does not create any new cause of action, it merely shifts whose responsibility it is to bring forth and sustain the suit. Therefore the fact these otherwise un-pursued injuries may potentially be

¹⁷⁸ See Sugarman, *supra* note 176, at 569.

pursued by a third party, in fact enhances the deterrent effect of the current system as people and companies would be forced to consider their action in the face of more effective and efficient plaintiff litigation capabilities.

B. The Macro-Tort Effects of the Market on Compensation

The compensation goal of tort law can be effectively summarized as an attempt “to place the injured person in the position he or she would have been but for the tortious conduct...”¹⁷⁹ Compensation has over the years become a major focus of tort law, displacing deterrence and becoming the “central focus” of the courts.¹⁸⁰ The current tort system does not provide perfect compensation to accident victims, therefore any changes to the system that help to fulfill the premise above should be considered beneficial. The market system proposed in this note would help bring compensation closer in line with the goal above. Before examining the benefits of the market system it is beneficial to briefly highlight the short comings of the current compensation scheme. There are three important scenarios of the current system that would be helped by the market system: (i) the uncompensated/undercompensated victim, (ii) the excessively compensated victim and (iii) the high administrative expenses suffered by the victim.¹⁸¹

The uncompensated victim is really a special case of the under-compensated victim where the compensation amounts to zero. These cases are generally found in two scenarios, either: where the victim is unable to bring a claim for various reasons, or where the victim brings a claim but receives less than what they theoretically should according to the compensation premise laid out above. A few of the reasons for the lack

¹⁷⁹ IN RE JOINT E. & S. DIST. ASBESTOS LITIG., 129 B.R. 710, 890 (1991).

¹⁸⁰ See Sugarman, *supra* note 176, at 590.

¹⁸¹ STEPHAN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW, 37-38 (1989).

of adequate compensation include: lack of a plausible defendant, undue delay in proceedings, urgent financial need, lack of proof, and a judgment proof defendant.¹⁸² If the market system can mitigate even one of these factors then it will help to fulfill the central premise of tort law.

The market system provides the most promise in alleviating the problems caused by, undue delay and urgent financial need. These two factors operate in tandem, exacerbating each other. If there are significant delays in the litigation process, resulting, for example from delayed discovery or excessive discovery, then a victim who needs money quickly for current bills may be forced to accept a lower settlement than they otherwise would. Such a victim would therefore be undercompensated. In some cases the victim might simply give up altogether and become disenfranchised with the entire legal system and forgo their valid claim, this in effect not only removes compensation from the victim it also undermines the deterrent feedback that tortfeasors receive through the tort system, such a victim would be uncompensated.¹⁸³

Recognizing the existence of these two factors it is possible to trace how the market system would either help to alleviate the distortion on compensation that they inflict, or leave the compensation goal unaffected. Compensation would be unaffected because if the person chose not to sell at all they are no worse off by the existence of the market system. Their fundamental ability to enforce their rights under the traditional

¹⁸² See SUGARMAN, *supra* note 181, at 37-38.

¹⁸³ It is important to note that uncompensated or undercompensated victim, does not include a situation where a person thinks that they should have deserved more, or in fact had no valid claim. This section functions on the assumption that the victim had a valid and enforceable cause of action and consequently an amount of compensation was due. It further assumes that within a perfect system the victim would receive the amount of compensation exactly sufficient to make as if the accident did not happen.

system is completely unaffected. If however they chose to sell their rights, their need for immediate cash is satisfied, thereby addressing the twin concerns of delay and urgency.

Of course in order to be effective the market system must not lower the amount of compensation in order to solve the delay and urgency problem. Presumably, the competitive forces that are associated with a market will ensure that indeed what the victim receives is the highest they can get, while still taking guaranteed money. Also, by sidestepping litigation the victim will have presumably lowered their transaction costs because of the lower risk associated with simply selling their tort, as compared to litigating it. Therefore, by allowing a victim the choice to sell their tort, the system has become more efficient and effective at delivering the compensation required without sacrificing the deterrence that is integral to the safety of society.

The overcompensated¹⁸⁴ victim is one where the defendant finds it cheaper and easier to buy off the claim than to litigate it.¹⁸⁵ This of course implies that the claim is marginal or may not be the fault of the defendant. This kind of claim will be effectively dealt with by the market system in the following way.

The defendant has the right to sell his liability to another party. That party then makes money by successfully litigating or settling the claim for less than defendant paid them. The development of the market would create specialists in this kind of arrangement who would be willing to litigate because a victory in litigation would mean that they make a profit. This mechanism would in effect help to reduce the number of the overcompensated victims, especially those who are compensated as a result of marginal or frivolous claims. This is because this kind of claim would be particularly profitable for

¹⁸⁴ Overcompensated victim is one who receives more compensation they deserve, in essence they are made more than whole by the tort system.

¹⁸⁵ See SUGARMAN, *supra* note 181, at 38

the purchaser of liability. It is important to note, that the market system would not eliminate the overcompensated victim, but it would introduce a party (the buyer of the defendant's liability) unwilling to settle for convenience sake, and who has a great incentive to force any settlement to as close to zero as possible.

This market effect will not harm those who have legitimate or strong claims because nobody would buy a claim to lose money. Therefore the kind of overcompensation that is addressed by the market operation is probably limited to nuisance suits. But nonetheless the reduction of these suits is a benefit to the defendant and to the legal system, because as soon as the liability on the suit is sold it becomes clear that the convenience reason for settlement has been neutralized. The plaintiff in such a nuisance suit still has the right to bring the suit therefore any argument that they are worse off is unfounded. Furthermore, the tort system should, if possible, try to discourage frivolous suits and this mechanism has the potential to do so.

Finally, the third scenario is where victim compensation suffers negatively, due to the high administrative costs incurred.¹⁸⁶ As has been mentioned throughout this note the high transaction costs, which are associated with people attempting to reduce their exposure to the risk of no recovery, reduce the compensation available to the victim. The market system also provides some respite from these deleterious effects by shifting the risk to parties willing and able to bear it. To briefly recap the mechanism by which this occurs; recall, that if the victim of the tort (seller) can find someone who is willing to buy their right to sue, the transaction cost is lower than attempting to negotiate and it is certainly lower than litigating. The party purchasing the suit has opportunity to capitalize

¹⁸⁶ See SUGARMAN, *supra* note 181, at 38.

on several different factors for example: economies of scale, specialized expertise, and a fixed salary legal counsel. Therefore the market system provides an optional avenue for a victim to minimize their transaction costs and maximize their compensation.

C. The Macro-Tort Effects of Market on Vengeance:

Holmes recognized “that early forms of legal procedure were grounded in vengeance”¹⁸⁷ and that our legal system developed as physical vengeance was slowly replaced by monetary vengeance.¹⁸⁸ He further suggests that vengeance, played such an important role in the development of the legal system because it “imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done”.¹⁸⁹ From here, the notion that if you are to blame then you are liable, originates.¹⁹⁰ However, as he concluded, the moral and passionate language of revenge, from where guilt and *a fortiori* liability stems, is continually shifting from moral standards into objective standards.¹⁹¹ This means that the “actual guilt of the party concerned is wholly eliminated.”¹⁹²

Professor Ehrenzweig recognized the same evolution as Holmes above, believing that society had reached some “psychological maturity” leading it to abandon the “eye for eye and tooth for tooth” philosophy of justice.¹⁹³ He further observed, that the legal system employed devices to determine fault and compensation, even though fault in the

¹⁸⁷ See HOLMES, *supra* note 4, at 2.

¹⁸⁸ See *Id.* (tracing the evolution of the law from the roman blood feud to the composition until Anglo-Saxon England where by the time of William the Conqueror even the composition had been replaced with causes of action).

¹⁸⁹ See *Id.* at 2-3.

¹⁹⁰ See *Id.* at 4.

¹⁹¹ See *Id.* at 27.

¹⁹² See *Id.* at 27.

¹⁹³ Ehrenzweig *A psychoanalysis of negligence* 47 N.W. U.L. REV. 855, 856 (1953).

moral sense was not applicable.¹⁹⁴ Using Holmes' analogy, negligence law is no longer concerned whether the dog was kicked or stumbled upon, rather only if the reasonable person would have seen the dog and avoided it.¹⁹⁵

Professor King, recently observed "there are serious doubts about the continuing validity of this goal in modern tort law."¹⁹⁶ Of course, the idea among civilized society to turn to violent self help measures is no longer an instinct of first response. Secondly, vengeance has become subordinated to the economic based goal of compensation.¹⁹⁷

Arguably the tort system has been evolving over the centuries, away from vengeance and toward compensation. The market system would further this evolution; by reducing the vengeful tendencies that may still affect the judgment of some, furthering the development of civility in society. It is important to look at the possible emotional reaction that a person can have after they have suffered a tortious injury. There are two possibilities, they can either: make decisions rationally based on their economic needs and interests, or they may decide that they want to exact their pound of flesh from the defendant. It is a fundamental premise of the argument presented, that the former is a socially more efficient reaction, because then parties are looking to compensate for the damage done and move on to other activities. The latter option only stalls the ability of the parties to bring closure to the unfortunate events and raises the costs of the accident to all, most likely without benefit to anyone.

However, market system does help to remove the possibility of vengeance affecting a victim's judgment. This is because, if the victim feels that liability is

¹⁹⁴ See Ehrenzweig, *supra* note 193, at 857.

¹⁹⁵ See HOLMES, *supra* note 4, at 5.

¹⁹⁶ Joseph J. King Jr. *Pain and suffering, noneconomic damages, and the Goals of Tort Law* 57 SMU L. REV 163,181 (2004).

¹⁹⁷ *Id.*

predicated on guilt and wants to exact vengeance, irrational decision making may occur. However, in the event the victim sells the claim; the buyer of the rights is concerned with liability only, to the extent that it will help or hinder his ability to successfully and profitably convert the right to sue into compensation. The buyer, has nothing but economic concerns, this disassociation of plaintiff and victim as a by product disassociates the human impulse of vengeance from the system while not sacrificing deterrence or compensation.

Punishment is achieved not as a result of the vengeance goal, but as a by product of deterrence which is accomplished by the fixing of adequate and reasonable compensation. This in economic terms is called, forcing a party to internalize the externalities; in essence the party is forced to consider the costs of their actions. Therefore, any fear that the defendant will not be punished under the market system, is not viable because the compensation-deterrent feedback system is left untouched.

The previous sections have detailed the workings and effects of the market system. It is important to shift focus and examine and address the obstacles preventing the development of the system. The following section analyzes the legal obstacles that must be overcome before the market system proposed in this note can develop.

Part V-Chief Legal Obstacles Preventing the Creation of Market for Tort Claims

It is important to examine the chief legal obstacles that the creation of such a market will encounter. It is difficult, if not impossible, to attempt to predict how the market system would affect every area of law; however, there are some obvious starting points which must be addressed, which will hopefully provide a guide for answering the

questions that at this time remain unasked. The two basic legal areas to be addressed are: (i) the laws of champerty, maintenance, and barratry; and (ii) the public policy concerns that may be raised.

A. The Interrelated Doctrines of Champerty, Maintenance, and Barratry and their Effect of Barring Assignment.

The origin and evolution of these doctrines was examined in part I. There it was noted, that over the years these doctrines have increasingly become obsolete, where some states have gone so far as to abolish them without any deleterious effects on their jurisprudence.¹⁹⁸ As was documented, if the law is no longer effective, it no longer serves any purpose and it is impeding the development of beneficial legal and economic doctrines, then it should be removed.¹⁹⁹ The main justification for lifting a medieval practice is the advance of society.²⁰⁰ Today, society has reached a level where the relatively precise tools available in the modern legal system do not justify such drastic and arcane measures, which are relics from another time and place.

The major worry which these laws were intended to allay, was the subversion of the legal system into a mechanism, by which, the privileged would oppress the common folk.²⁰¹ The lack of an aristocratic class structure, coupled with an independent judiciary and the adoption contingency fees has helped protect the legal system from such a development. Therefore, even if the danger that these laws are intended to remedy is still present, it is effectively taken care of by other more narrowed and nuanced developments

¹⁹⁸ See Part I, *Infra* State of Champerty Today (discussing the approach in New Jersey and Massachusetts).

¹⁹⁹ Consider the words of Holmes “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” Oliver Wendal Holmes, Jr., *The Path of the Law*, 10 HAR. L. REV. 457, 469.

²⁰⁰ See, Choharis, *supra* note 16, at 464. (“Despite the evolution of ours laws and society, the bans endure.”).

²⁰¹ See LAMPETS CASE, *supra* note, 38.

that were not present when the laws originally were instituted. In medical practice, the evolution of the arthroscopic surgery has allowed doctors to cure the patient without wielding the broad sword of the scalpel, much to the benefit of the patient. So too, the legal system must remove the broadsword of champerty and its' sister doctrines and recognize that they have been replaced, by other less invasive legal techniques.

B. Public Policy Concerns of a Legal nature

There are four public policy concerns that require some discussion. This is not an exhaustive list, but these are the most crucial concerns that need to be addressed. In keeping with the primary focus of this note, that the market system is *pareto* efficient, each one of these concerns is either cast in an incorrect light or it is balanced by a competing beneficial development. The four concerns are: the explosion of litigation/ward of deep pockets, too low of a selling price, unintended consequences of legislation, and offensiveness to society.²⁰²

i. Explosion of Litigation

The primary concern under the explosion of litigation is two fold, (i) that there will be an increase in the number of suits brought and (ii) there will be lawsuits on sale/assignment contract itself.²⁰³ The first basis is unfounded and smacks of elitism while, the second, has broad negative economic implications if it is considered a reasonable rationale.

²⁰² Paul Bond, *Making Champerty work: An invitation to StateAction*. 150 U. PA. L. REV 1297, 1310-13. (2002). (The proposal presented here takes the position that Mr. Bond calls "Private champerty Allowed" therefore each one of his concerns will be addressed).

²⁰³ *See Id.* at 1311-12. (discussing the "ward of deep pockets" and the "weary, weary courts").

In order to answer the first rationale, recall that the market system does not add any new cause of action, it merely shifts the rights of who may pursue the suit. It dissociates victim from plaintiff and tortfeasor from defendant, but does not create *new* defendants or plaintiffs. Therefore, to suggest the courts will be flooded with *new* causes of action is disingenuous. This concern is different from one that some may have of an increase in the number of suits of already existing causes of action.

There is a simple reply to this secondary concern, lawsuits are, and should be, directly related to the number of tortious events occurring in society. It is unreasonable and elitist to limit access to the courts to some victims, because of the necessity and urgency they may experience. It is also unfair to thrust them into a plaintiff's lawyer's arms in order to recover but have to forgo a percentage of the claim and still take the risk of losing in court. Under the market system the victim could sell the claim, get compensated and move on with life, without forgoing the societal function of deterrence that is served by the tort system. If courts or legislatures want to limit the number of suits then the solution must be to limit the kinds of actions that result in claims. Or to reduce the number of claims by reducing the number tortious events that result in compensable injury.

From a macro-tort perspective, the reality of the system should be that a tortious event should be pursued regardless of size. Without enforcement, the deterrent aspects of the system do not function and as such, harmful behavior is likely to continue.

Therefore, an explosion in litigation of the number of new claims or number of claims brought, is not a concern nor a by product of the market system. As the market merely introduces efficiency into the system that will allow people redress for injuries

that they may not have otherwise had and it provides choice to those who would have already sought redress.

The efficiency of consolidation must not be overlooked either, it has the potential to increase the number of settlements and keep the number of cases that go to litigation lower. Suppose there is an accident involving a passenger bus, where each victim suffers some actionable injury. If each victim got their own lawyer then defendant would have to negotiate with a hydra of lawyers. If, however, every claim was purchased by one entity then the opportunity would exist of one lump sum settlement. Such a settlement might be lower than the individual settlements because of the potential from the buyer to reap a profit from volume, whereas each of the victims might have wanted a higher amount. Even if the case went to litigation it would still be efficient because it would be one trial, with one legal team on each side, no need for coordination of many different people and there would be uniformity in the judicial outcome. Each plaintiff's injury would be evaluated by a single jury; therefore, the assessment of damages would be more uniform.

The second concern is that the assignment contracts themselves could be a flash point for litigation.²⁰⁴ This reason for concern, if considered valid has incredibly deep economical and societal implications. To suggest that people should not be allowed to enter into contracts because they might end up litigating would bring the entire modern free market system of economics to screeching standstill. The same logic can be extended to suggest that mergers and acquisitions should not be permitted because some of them end up falling apart and resulting in litigation. Such an argument, when placed in the proper perspective, really has no bounds and its chilling effect on economic activity suggests that it should not be raised.

²⁰⁴ See *Id.* at 1312. (stating that the victim will try to “weasel out” of the contract once they see a windfall).

The point of litigation on the contract is still important to address. In essence the sale of a claim is no different than the sale of any other good or service, as such, it would be regulated by the laws of contract. However, there is no difference between this sale and one of any other commodity; the law prevents a manufacturer from trying to renege on a sale contract because he has found another buyer who offers more money. The same would happen if the original plaintiff decided to invalidate the contract of sale, he would have to successfully navigate the well developed world of contractual law and demonstrate why the contract should be rescinded.

ii. Victims Who Sell for Too Little

Another concern is that the victim may sell their claim for too little.²⁰⁵ While addressing this concern, it is important to heed the words of Milton Friedman mentioned at the start of this note; that a voluntary exchange will not take place unless both parties believe they will benefit from it.²⁰⁶ Therefore this concern should not really play a significant factor. Furthermore, the sale transaction is a contractual transaction, as such, the defenses of contract are applicable and any sale that occurs under duress or as a result of fraud would be subject to the appropriate contractual remedies.

The market system also has another element that will help ensure that a low sale price is not a result, competition. Competition between buyers will tell the plaintiff how much their claim is worth, provided that the plaintiff shops around. If there is no competition for the claim, it should signal to the plaintiff they may not have a valid claim or that there is something particularly risky with the claim they are pursuing. At that point

²⁰⁵ See *Id.* 1310-11. (stating that the victim may sell their claim for less than they would have received otherwise).

²⁰⁶ See FRIEDMAN, *supra* note 1.

the victim has the option of proceeding the traditional way if they really believe in the claim; otherwise they have received some objective determination of the validity of the claim.

Lastly, the needed regulation of the market will also have an opportunity to ensure that the plaintiff will get a fair price for their claim. This, as will be discussed below, is most likely to occur by the creation of a secondary market and the associated regulation detailing participation within it. The secondary market will provide regulators the ability to influence how business is done in the primary market.

iii. Unintended consequences of legislation

This concern is a result of poor reasoning and a lack of faith in the ability of legislatures to legislate what they mean. It also has an element of unfairness to the poor, who suffer an injury from the tort. Using the following example:

Suppose the legislature creates a new cause of action, good against bioethicists whose negligent advice contributes to medical harm done to subjects in research trials. The legislature strategically sets a high potential punitive award capped at ten times compensatory damages, knowing that most cash strapped plaintiffs will only get a fraction of this in settlement. If champerty [assignment of claims] is allowed, investor backed plaintiffs no longer will be cash strapped, with the result that bioethicists may be hit much harder than originally intended by the legislature.²⁰⁷

Laws are enforced by what they say. In the hypothetical the legislature gives the right to claim punitive damages up to a certain amount. If the legislature wants to make it more difficult to claim such an amount, then it can do so. However, to suggest that it is beneficial for only those who are wealthy enough to pursue litigation until the end, deserve as their reward the shot at the ten times damages, seems patently unfair.

²⁰⁷ See Bond, *supra* note 202, at 1311-12.

Furthermore, it is clear that if bioethicists want to avoid liability they can simply not give out negligent advice. High awards, should not be seen as a reason for preventing some people from getting their due. If the legislature is concerned with the size of the payouts it may adjust the damage ceiling. Therefore, this argument only makes any sense if one believes that legislature enacts legislation simply for show and does not weigh the possibility that people might use it as effectively as they see possible.

iv. Offended society

The “offended society” argument is based on the notion that when the victim comes into testify in court to fulfill her contractual obligations, she is working as proxy for a rich investor who is going to profit from her misfortune.²⁰⁸ This concern fails for two major reasons: firstly, choice and secondly, she has already been compensated.

The victim made the decision to sell her rights to sue, in return for consideration that she deemed appropriate. Therefore, if she is willing to sell the rights to her misfortune, society should not be offended at that prospect. She has made a decision that is in her best interest to undertake the sale. She had the choice to proceed under the traditional manner, but elected to sell the rights because she found it to be more advantageous.

Society is not offended when paid experts are called by parties in litigation to give an expert opinion favorable to their clients. The victim should be considered nothing more than a paid expert, her expertise is what happened during the tortious event and the extent of her injuries. The traditional experts are also doing everything in court as a “proxy for the company’s economic benefit.”²⁰⁹ Society has accepted the expert as

²⁰⁸ See Bond, *supra* note 202, at 1312.

²⁰⁹ *Id.* at 1312

common place in litigation there is no reason to suggest that it would not accept the non-plaintiff victim in the same light.

Having examined the legal issues that the market system faces, it is now important to consider the non-legal based concerns that must be overcome in order to effectuate the creation of the market system.

PART VI- Non Legal Issues That Need to be Overcome In Order For the Market

Function

Apart from the legal considerations addressed in the preceding section, there are non-legal issues that require some attention. The focus of this section will be on four separate areas; these areas are by no means an exhaustive list, but they represent some of the major criticisms that have been leveled at the idea of applying market principles to the tort system. The four major areas are: regulation of the system, information deficit, assured participation of the victim, and the formation of the markets.

A. Regulation of the Market

In order to have a properly functioning market, it must be surrounded by the appropriate legal and institutional framework.²¹⁰ The market system contemplated here is no different, just as the stock market requires government intervention to assure its fair and optimal performance, the claims market would require a similar body. The purpose of this section is to present some ideas that maybe used as a starting point for future research into the solution.

²¹⁰ See BLAUG, *supra* note 143, at 62.

Choharis mentions that the tax code and security regulations will have to be considered in any market regulation attempt.²¹¹ The required changes or revisions, to the tax code or the securities regulation acts, are something that would have to be achieved through the legislative process. As a thought however, the tax free status of compensatory damages might be adopted to allow for the tax free purchase of claims, where the purchaser would then pay taxes upon the sale. This would allow the victim to maximize their award and allow the government to take its share from people who are conducting themselves as businessmen.

The securities regulation may provide an adequate blueprint for the type of regulation needed in a market for tort claims. The securities regulatory system functions at two critical points, one is the original sale and then again in the secondary transaction.²¹² The two points of transfer are the logical points for the government to assert the majority of its regulatory power. By making requirements on the parties in order to complete a valid sale, there will be incentives for the parties to conform to the standards set out by the government. The control of access to the secondary market is especially important; because it provides liquidity which as previously mentioned generates certainty.²¹³ With this blueprint in mind, the only thing missing are the value judgments and the preferred mechanism for enforcement, which is beyond the scope of this note.

²¹¹ See Choharis, *supra* note 16, at 504. (discussing the tax free status of compensatory damages and the securities regulation requirements.)

²¹² The Securities Act of 1933 regulates the primary market, whereas the Securities Exchange Act of 1934 regulates the secondary market.

²¹³ See Choharis, *supra* note 16.

B. The Information Deficit Concern

The issues regarding information deficit maybe the most oft raised issue when someone is confronted with the market proposal.²¹⁴ Generally the concern is raised from two perspectives: (i) from the buyer's point of view and (ii) from the seller's point of view. The key question from either perspective is how much is this particular claim worth?

How can the participants weigh and assess all the factors involved, is the key question. The simple answer is that the market will do this; of course this requires some explanation. The price system does more than simply state how much something costs, it also conveys information to the buyer, competitors, and potential buyers. Under the market system the buyers would be in competition with each other to purchase the claim and bring it to the secondary market. These buyers would have to make assessments based on available information as to the likely worth of the claim. Much of the information needed, would be no different the actuarial statistics that insurance companies presently use to estimate the risk and probability of injury to a person when determining premiums.

Furthermore, plaintiff lawyers would have an entire new business opportunity available to them as consultants. They are experts in evaluating injuries and the probability of success and their worth. This evaluation is no different then one that a potential buyer would make. Therefore if it is possible for a lawyer to make the evaluation it is certainly plausible for a business person to do so.

²¹⁴ See e.g. Alan Schwartz, *Symposium on the law and economics of bargaining: Commentary on "Towards a market in unmatured tort claims": A long way yet to go.* 75 VA. L. REV. 423. (1989). (for a commentary on the F-CC concept); See also, Choharis, *supra* note 16, at 505 (discussing the market demand for information in the current market).

Once the market begins to operate there will be an inevitable collection of information, which will reduce the costs of information in the future, as people begin to track different awards in different jurisdictions. This may even have the effect of standardizing, to a degree, the worth of injuries across jurisdictional boundaries as people begin to concern themselves with the relative worth of injuries.

Mr. Choharis suggests that in the current market those with the ability to make available such information may sell it.²¹⁵ He also suggests that unique and novel claims may not be marketable because there may not be enough value in the claim to warrant the risk.²¹⁶ He further elaborates, that the most likely kinds of claims to be brought on the market are those that are easily standardizable.²¹⁷ All of these observations are correct and they hold for the F-CC market as well as the current one. Anyone who develops an expertise in pricing will be a sought after commodity. The claims most likely to be traded on the F-CC are those are easily conceived and which have sufficient information to predict a basis for occurrence of the tort.

The special problem posed by the F-CC market is not novel consider the development of the catastrophe bond. The catastrophe bond is a financial instrument where investors purchase the bond and receive interest on it, but if a catastrophe enumerated by the bond occurs they lose their investment.²¹⁸ The purchase of a security without knowing whether the event it is tied to, will occur, is similar to the kind of purchase occurring in the F-CC market. Admittedly the risk in the F-CC market is greater

²¹⁵ See Choharis, *supra* note 16 at 505.

²¹⁶ See *Id.*

²¹⁷ See *Id.*

²¹⁸ David C. Croson and Howard C. Kunreuther *Customizing Reinsurance and Cat bonds for natural hazard risks*. [Http://fic.wharton.upenn.edu/fic](http://fic.wharton.upenn.edu/fic) (1999). p.8. (detailing the basic working of a catastrophe bond).

for the purchasing party; however a larger risk should not be a sufficient reason to discount the entire proposal. The purpose the market proposal is to shift risk, by using the market mechanism in a socially and individually beneficial way.

C. Assuring Participation of Victim after the Sale

Assuring the participation of the victim-seller with any litigation after the sale of the claim is of paramount importance. Once again this problem is best left to the individuals to experiment and solve. However, it essentially an issue of incentives, returning to the expert example discussed earlier; if the victim seller is treated as an expert and is given the appropriate incentives their participation will be assured. A simple example of such a structuring of incentives would be delaying payment until the victim has fulfilled their obligations as stipulated, according to the sale terms.

The other kinds of participation that are required, such as, documents that may be confidential (i.e. medical records) would also be contractually provided for in the sale. The enforceability of the original sale contract would likely play a big role in the pricing of the claim on the secondary market. Therefore the incentive is for the primary purchaser to be very thorough. The trustworthiness of the victim will also be of importance, because of the way it may play to the jury.

All of these considerations however are best left to the negotiation of the parties. Just as the terms of any specific sale agreement are most efficiently determined by the needs of the involved parties, so too, the specific concerns and needs of the parties involved in the primary transaction will be negotiated out in the most beneficial manner. With those ideas and concepts that prove themselves to be successful being copied and duplicated by other market participants.

D. The Natural Formation of a Future-Contingent Claim Market

The final issue to be addressed under this section, is unique to the F-CC market, it is the question of whether the market will generate itself naturally even if it was permissible to do so.²¹⁹ There are two answers to this concern (i) the lack of a naturally occurring market under today's economic realities should not be sufficient reason to legally prevent its existence in the future; and (ii) a novel idea needs time to germinate and develop.

That a market has not sprung up as of now, is not reason to legally ban its ability to come to fruition in the future. The market may depend on the development of actuarial models or just actual trial and error on the part of an enterprising investor and willing participants. Just as all other financial products and tools did not develop at the same time, so too, it may take time for the market to become naturally occurring.

Another key consideration is that much of the experience that would be gained in the current market would be transferable to the future market. Therefore the lack of a specialized body of knowledge and expertise that would be honed and developed in the current market, because of legal obstacles, is one of the primary reasons that potential future market participants have been unwilling to explore the F-CC market possibilities.

Turning to the second reason, the F-CC is a novel idea. It brings together at least three fields of expertise: legal, actuarial, and finance. It takes time for the interaction of these fields to reach a point sophisticated enough, whereby potential market participants have the tools necessary to make informed decisions. These tools include among other things access to the actuarial data needed to make an informed decision, the best way to

²¹⁹ Alan Schwartz *Symposium on the law and economics of bargaining: Commentary on "Towards A Market in Unmatured Tort claims": A long way to go.* P 75 Va. L. Rev. 423, 429.

structure legal services that such a market would need, and the financial modeling of how such a transaction should be structured to achieve the most benefit.

Conclusion:

The market system for tort claims is a *pareto* efficient mechanism, which would create several beneficial results to the parties involved, without affecting substantive tort law. The market will exist on two different temporal planes, the current market operating only with claims where the injury has already been sustained; whereas, the future-contingent market will deal with claims where the injury has yet to occur. The primary purpose of either market is to allow for the efficient shifting of risk to parties most willing to bear it. The benefits of each market are also seen on the micro-tort and the macro-tort levels.

The current market provides advantages on both the micro and macro tort levels. Primarily, it provides a person a third option to consider when evaluating what to do with a potential claim without affecting the right of the victim to settle or litigate in the traditional manner. The existence of the option provides the party with leverage when going into negotiations with the tortfeasor; it also provides an independent valuation of the value of the claim. This second piece of information is valuable to both the defendant and plaintiff. The defendant may use it as an independent gauge of the strength of the claim.

From the defendant's perspective the extra information and the option to sell off the liability provide benefits that are otherwise unavailable in the current system. By

being able to sell liability to, for example, a specialist in such claims the defendant can avoid the possibility of higher than expected costs associated with the claim.

The micro-tort perspective of the future-contingent market operates on the same principle as the current market, with the key difference that the seller is swapping one type of risk for another. They are evaluating the possibility of suffering a tort, going to court and losing, against suffering a tort and offsetting its costs with the money made from the sale. Under the F-CC market, the seller is rewarded for avoiding injury, this is beneficial as it breeds a safety conscious individual.

The macro-tort perspective of both markets is the same. The key consideration is the effect of the market (both the current and F-CC markets) on the twin goals of deterrence and compensation; and the reduction of vengeance as a motivating factor once a sale has occurred. Deterrence, is left unchanged at worst, or is enhanced by the bringing of meritorious suits that otherwise would not be brought; this will lead to greater internalization of generated externalities by tortfeasors. Compensation is enhanced, because of the efficiencies introduced, therefore the victims get their compensation faster and do not have to bear the normal costs of litigation or traditional settlement. Vengeance on the other hand has slowly been receding as a valid objective of the tort system, by separating plaintiff from victim the tort market furthers this goal. This produces an opportunity for increased settlements and reductions in litigation.

The potential concerns raised by the operation of the claims market, are not sufficient enough to forgo the creation of the market. Rather, if they are legitimate they are best addressed by regulation, which is probably best achieved by mechanisms that operate at the two points of transaction; the primary sale and the sale to the secondary

market. The solutions to these problems require further analysis and study, but they are not insurmountable, nor does anyone of them raise enough of an issue to suggest that the entire concept of the market would be a negative addition to the current tort regime.

The legal obstacles should be removed because they no longer function to cure the harms that they were intended to prevent. There are other legal developments that have superseded these ancient relics and more effectively prevent the abuse of the disadvantaged through the legal system.

The possibilities that the market system would make available to all parties, could effectively change the way a large number of people interact with the tort system, the financial system, and with each other. It has the potential to increase the safety of society and to introduce efficiencies into a system, which sorely needs to take steps to be more efficient instead of paying lip service to it.

Overall the market system as envisioned here has the potential to expand the access to justice for more claims. Further, it will allow people to make economic decisions when dealing with possible life altering misfortune; provide people with options in order to make the decisions that are in their best interest; and to fundamentally change for the better the social interactions of individuals.