The Lucrative Business of Lending Against an Expected Inheritance

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David Horton and Andrea Cann Chandrasekher, *Probate Lending*, 126 **Yale L.J.** 102 (2016).

Recently, private companies have begun advancing funds to estate beneficiaries in exchange for the beneficiaries' anticipated inheritances from those estates. These "probate loans," which have never even been mentioned in another law review article, are explored in detail by Professors David Horton and Andrea Cann Chandrasekher in *Probate Lending*.

In their excellent article, Professors Horton and Chandrasekher analyze 594 probate administrations that occurred in Alameda County, California, during 2007. Through this analysis, they learned that probate lending is more prevalent than one might expect. In fact, they discovered 77 probate lending deals in the 594 administrations. They also discovered that the lending companies paid beneficiaries about $800,000 in exchange for nearly $1.4 million in inheritances, producing an average markup of 69 percent per year.

Part I of the article surveys the rules governing the sale of rights. It begins with a discussion of litigation lending, that is, the practice of lending money to a plaintiff against her anticipated winnings. At common law, this practice was effectively prohibited because of the champerty doctrine, which prohibited the payment of financial support in return for a share of the ultimate recovery, and because courts refused to enforce attempted assignments of "choses in action." The main concerns with allowing the alienation of legal grievances were that buyers commonly paid far less than the value of the claims, claim sales were thought to encourage litigation, and lawsuits were viewed as intrinsically personal and not capable of changing hands. Over time, however, these limitations receded, and entrepreneurs began to make litigation loans, which were not technically loans because repayment was contingent on recovery.

Probate lending is effectively an expansion of the litigation lending concept. Traditionally, it was not permissible to convey an interest in the estate of someone who was still alive. This mere "expectancy" was not even a form of property. Over time, some states began to allow this anticipatory assignment of inheritances. Furthermore, even in states that didn't allow the assignment of an expected inheritance from a living person, it became permissible to assign an inheritance once a probate case had begun. Once that happened, the probate lending business began to thrive.

In Part II of their article, Professors Horton and Chandrasekher explain how they gathered their data and give an overview of the probate lending industry. They note that their data came exclusively from culling all 594 probate administrations that occurred in Alameda County in 2007. They note that only about five percent of the estates featured loans, but some estates had multiple loans. Importantly, they note that there is no significant correlation between the size of the estate or the duration of the estate administration and the existence of a probate loan.

In Part III, Professors Horton and Chandrasekher discuss the policy implications of their findings. First, they consider whether probate loans are usurious. As a general matter, usury law only applies to loans that are "absolutely repayable." Probate loans generally have been exempt from these laws because, as loans against an anticipated inheritance, they have been held to not be absolutely repayable. Professors

Horton and Chandrasekher challenge this conclusion by noting that repayment of the loans is nearly certain, unlike litigation lending. In the case of probate lending, the lender recouped the principal 96 percent of the time. Because of this, the argue that courts should weigh this fact and allow usury law to potentially apply to probate loans.

Second, they consider the potential applicability of the Truth in Lending Act (TILA) to probate lending. As a general matter TILA imposes strict liability upon creditors who fail to follow its strict disclosure mandates. In the one TILA case dealing with probate lending, a federal court held that TILA does not apply to probate lending because TILA does not cover “non-recourse advances” such a probate loans. According to Professors Horton and Chandrasekher’s data, however, probate loans are not truly non-recourse, and they would urge courts to consider the potential applicability of TILA to probate loans.

Third, they analyze whether probate loans violate the champerty doctrine. Specifically, they focused on whether probate lending increased the likelihood of conflict in the estate, which is one of the key rationales behind the champerty doctrine. Here, they learned that the presence of a probate loan increased the odds of a will contest far more than any other variable, including holographic wills, disinheritance, and intestacies. Despite that, they also found that litigation filed by lenders was sometimes in the best interest of the estate. Because of this, they do not recommend that courts use the champerty doctrine to police probate loans. Instead, testators should consider using anti-assignment clauses in wills.

Professors Horton and Chandrasekher have written an excellent piece. While they acknowledge that it is limited in scope by virtue of the fact that they only analyzed data from one California county, their results lead to the inevitable conclusion that probate lending may be a widespread and growing phenomenon. As with a growing national concern about the adverse implications of payday lending, it seems that further studies and commentaries regarding the prevalence and implications of probate lending are warranted.

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