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Introduction[1]

Crowdfunding continues to be a popular source of financing in various contexts. Yet, the legal profile of crowdfunding is ill understood. This may not be a source of concern for some, but it should be. The prospect of liability for violations of law is important to the success of individual crowdfunding participants and ultimately the health and longevity of the crowdfunding market as a whole.

Crowdfunding is variously defined by scholars and other commentators. This paper adopts a simple, yet somewhat non-obvious, definition from the work of Belleflamme et al. (2015): "an open call to provide financial resources" (p.1). The concept of an "open call" may exclude from this definition crowdfunding opportunities available only to specified segments of the crowd meeting certain identified criteria. In fact, however, virtually all platforms restrict the nature of the crowd in some respects, whether based on the financial means, residency, age or other attribute of the potential funders. Accordingly, judgment calls are made in certain cases about the inclusion or exclusion of certain types of crowdfunding in this definition for individual components of this and other papers (including, e.g., crowdfunding opportunities available only to funders with minimum annual earnings or net worth or available only to funders resident in a specific geographical area). Whenever possible, this paper endeavors to clarify the attributes of platforms included in or excluded from the study and the related analysis and observations. Archetypally, however, even with a circumscribed crowd, crowdfunding involves many individual funders, each contributing a small amount. Funding may be sought for businesses or projects or business or personal expenses.

There are many models and a number of useful taxonomies of crowdfunding and crowdfunding intermediation (Bradford, 2012; Heminway, 2016 & 2013). This paper distinguishes the following crowdfunding types in which platforms may play a role: donative (in which funders make donations to finance businesses or projects); reward (in

[1] The author offers special thanks to Philip G. Swan (The University of Tennessee College of Law 2017) for his research assistance on this project and Sean Cary von Gunter for his secretarial and administrative assistance in the preparation of this paper and related materials.

which funders are promised a perquisite—often one related to the business or project being funded—in return for funding); pre-order or pre-purchase (in which funding is provided with the promise of getting a priority position for ordering the product produced or service rendered by the funded business or project); and securities or investment (in which funders become investors and are promised a share in profits or revenues of the business or project being funded). These distinctions are based on the nature of the funder's interest in the business or project funded. This categorization is useful in this context because the nature of legal claims that may be brought by funders, the most likely claimants in the crowdfunding context, often depends on the nature of their interest in the venture from which the claim arises.

Internet-based crowdfunding campaigns are most commonly conducted through websites designed to promote businesses or projects being funded and to attract the necessary crowd of funders. Although in some cases promoters of businesses or projects create their own websites for this purpose, many turn to third parties to supply these websites and provide attendant services. These websites commonly are referred to as platforms. The price and terms of a third-party platform's services and the reputation of the platform are points of differentiation and elements of competition in the crowdfunding market. In some combinations, these factors may discourage or encourage promoters and funders from participating in the crowdfunding market altogether.

Third-party platforms, intermediaries in the financing proposition offered by crowdfunding, assume various risks in undertaking that intermediation role, including the risk that legal actions may be brought against them by those seeking funding and the funders they attract. This litigation risk undoubtedly affects the terms of the services provided by third-party platforms, including the pricing of those services. Moreover, the reputation of a platform may impact and be impacted by litigation risk.

Untangling these factors and assessing their interaction will involve multiple studies over an extended period of time. This paper begins that process by identifying platform litigation risks (using U.S. law as a key reference point) and specific nonfinancial terms of platform hosting arrangements relating to litigation risk. Preliminary, anecdotal observations are made about the effects of litigation risk on the pricing of platform services and platform reputation. In later work, it is anticipated that empirical observations also could be made about certain elements of the relative cost of platform services and platform reputation.

Platform litigation risks are identified primarily based on legal research conducted through a review of statutes, cases, and secondary sources relating to financing generally and, as available, relating to crowdfunding specifically. The market for crowdfunding is young and has not yet produced a body of legal actions that can be empirically studied. Information about the terms of the servicing arrangements, cost of platform services, and platform reputation are gathered from a review of and analysis involving current data on crowdfunding websites listed in the "Top 100 Crowdfunding Sites in the United States, Europe, Asia, South America, Africa and other Global Markets in 2015", as compiled by Robert Hoskins, a public relations consultant who specializes in crowdfunding. The list

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ranks crowdfunding websites by traffic (2015 Hoskins Top 100). The ultimate objective of the paper is to begin to isolate and theorize relationships between litigation risks, on the one hand, and terms of service (as well as, to a more limited extent, cost and reputation), on the other hand.

This study, while preliminary in nature, may help platforms recognize, assess, and manage risk in a cost-effectivemanner and may assist those seeking and providing funding for businesses and projects through third-party platforms in differentiating among crowdfunding platforms in a more meaningful way. At the very least, given that intermediation continues to be understudied in crowdfunding, this paper opens up avenues for future research in the field. Ultimately, this project and other work of this kind will enable the generation of models for crowdfunding platform operations that may allow individual platforms to optimize price, terms, and reputation in specific litigation risk contexts.

Platform Litigation Risk

The establishment of business operations involves, among other things, planning around projected profits and losses. All business operations are accompanied by the possibility of various types of losses. These losses include operating losses, investment losses, accounting losses, property losses, personnel losses, and liability losses. The risk that a firm will be subject to legal actions raising claims relating to its operations—referenced in this paper as litigation risk—represents a threat that business principals find particularly salient, yet difficult to assess, qualitatively and quantitatively (Calihan et al., 2004).

Specifically, sound business planning involves risk assessment and management. As a result, effective firm principals and managers must (among other things) identify relevant business risks; evaluate the probability of occurrence of these risks; and isolate and employ strategies, tactics, and resources to address these risks efficaciously. Identifying, evaluating, and addressing litigation risk is, therefore, important to sound business development.

The litigation risk identification process must take into account the precise nature of the activities in which the firm engages and, given that law and other regulation is in principal part territorial in application, the localities touched by the firm's activities. This makes the litigation risk identification process in the crowdfunding context—in which business models are non-standard and activities disregard geographical borders—particularly complex. Yet, guidance may exist based on analogies to similar markets. In particular, analogies to traditional securities offerings and other business finance settings may provide needed direction and helpful information.

In fact, litigation risk has been studied in the U.S. securities offering context. The literature on litigation risk in public offerings (principally, literature on initial public offerings, or IPOs) identifies fraud and misstatement liability under the U.S. federal securities laws as the key source of litigation risk in that context (Hughes & Thakor 1992,

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pp. 713-15). Intermediaries (including underwriters and auditors) as well as issuers are subject to potential liability in legal actions alleging securities fraud or misstatements. Actions against a corporate issuer's directors and officers alleging a breach of fiduciary duty are also common (O'Hare. 2002). One scholar aptly summarizes the litigation landscape relative to securities offerings and other corporate finance transactions, in pertinent part, as follows:

> Depending upon the specific type of securities transaction at issue and the specific nature of the professional relationship at issue, a number of federal and state claims may be triggered. For example, those in the business of providing information for the guidance of others involved in business transactions may be held liable for negligent misrepresentation. Those who stand in a fiduciary relationship with a party to securities transaction may be held to answer for breach of fiduciary duty. Similarly, the type of securities transaction also determines which claims are available. (Ramirez, 1998, p. 17)

Some offerings generate securities litigation, some generate fiduciary duty litigation, and some generate both (or other causes of action based on specific facts relating to the offering).

Although crowdfunding is new and the litigation landscape remains to be seen, similar litigation risks may be attendant to crowdfunded offerings and crowdfunding intermediaries. However, fraud and misstatement claims may arise under different legal regimes and may apply to the various transaction participants in distinct ways in the crowdfunding context. In addition, crowdfunding may give rise to legal claims against crowdfunding intermediaries that are not attendant to public securities offerings.

In crowdfunded offerings, like IPOs, platforms (as well as businesses and projects seeking funding) and their principals may be at risk for fraud and misstatement liability, either on a primary basis or, as permitted under applicable law, as aiders and abettors of a primary violator. In equity crowdfunding or other securities crowdfunding (also known as investment crowdfunding), that liability would derive from applicable principles of securities regulation (Hazen, 2010).

Fraud and Misstatement Liability

Although many fraud and misstatement liabilities under securities laws are general in nature and pre-existed crowdfunding, specialized securities liabilities may be adopted for particular application in crowdfunding. In the United States, for example, this already has happened. Federal legislation created new liability for fraud and misstatements in the Jumpstart Our Business Startups Act—or JOBS Act (2012). In other types of crowdfunding (e.g., donative, reward, or pre-purchase crowdfunding), fraud and misstatements claims would derive from the statutory or decisional law governing charitable donations or consumer or other commercial transactions, as applicable. These generalized and pre-existing bodies of regulation also may respond to the crowdfunding phenomenon with specialized rules (as may be deemed necessary or desirable over time).

Federal and state consumer fraud protection enforcement has begun to occur in the United States, although the rate of enforcement anecdotally appears to be low. Recent publicized enforcement efforts include the U.S Federal Trade Commission's settlement with project promoter Erik Chevalier for his failure to deliver a board game called *The Doom That Came to Atlantic City* (Lorenzetti, 2015; U.S. Federal Trade Commission, 2015) and the Washington State Attorney General's enforcement proceeding against Edward J. Polchlopek III for his failure to deliver promised Asylum Playing Cards featuring artwork created by a Serbian artist (Washington State Office of the Attorney General, 2015). In neither case did legal action implicate the platform.

Fiduciary Duty Liability

Claims against crowdfunding platforms also may arise, however, under legal regimes outside fraud and misstatements liability. For example, to the extent fiduciary duties may arise out of a platform's relationships with those pursuing crowdfunding for their businesses or projects or (more likely) out of platform relationships with prospective or actual funders), platforms and their principals may be subject to legal action for a breach of those fiduciary duties. Intermediaries may have fiduciary duties under statutes or regulations governing their activities. However, the general law of agency (and perhaps in some cases the law of trusts) also may be the source for legally enforceable intermediary fiduciary duties.

Under applicable U.S. law, registered broker-dealers and registered funding portals may serve as platforms for securities crowdfunding under Title III of the JOBS Act, known as the Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act—or CROWDFUND Act (2012). These broker-dealer platforms may only engage in narrowly tailored activities that do not include investment advice. Although a formal rule-making proposal imposing fiduciary duties on broker-dealers has not yet been published, one is expected in the coming months. However, as yet, neither broker-dealers nor funding portals currently have fiduciary duties under applicable statutory or regulatory mandates (Bullard, 2013; Edwards, 2014; Hazen, 2010; Laby, 2010; Melnick, 2014; Nelson, 2015). Yet, as many note, broker-dealers have duties to investors that are not fiduciary in nature. For instance, under the Financial Industry Regulatory Authority's Rule 2111 (2014), a broker–dealer must have a "reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer." Moreover, under applicable decisional law, broker-dealers may owe common law fiduciary duties to investors (Bullard, 2013; Edwards, 2014; Gedicks, 2005; Hazen, 2010; Laby, 2010; Nelson, 2015; Weiss, 1997).

Non-fiduciary duties and common law fiduciary duties may be a source of litigation risk for crowdfunding platforms involved in securities, donative, reward, or pre-purchase crowdfunding, in any individual case depending on the nature of the platform's activities. Agency law generally imposes fiduciary duties on agents. An agency relationship is created when there is mutual assent to a relationship in which a person (entity or individual), known as the agent, agrees to act for, on behalf, and under the control of another (entity or

individual), known as the principal (American Law Institute, 2006, § 1.01). Trust law similarly imposes fiduciary duties on individuals and entities holding property for another (American Law Institute, 2003, §2). These fiduciary duties demand compliance by the fiduciary with duties of loyalty and care for the benefit of the individuals or entities to whom or which the duty is owed based on the agency or trust relationship. Platforms that offer advice to funders (or otherwise create a relationship characterized by good faith, confidence, or trust with funders) and platforms that hold funds for funding campaigns may be classified as fiduciaries, notwithstanding the views of some that this type of intermediary relationship should not generate fiduciary obligations (Ribstein, 2011; Walsh & Johns, 2013).

Although no reported decisions under U.S. law raise a claim that a crowdfunding platform is a fiduciary and owes funders (or, for that matter, promoters of crowdfunded businesses or projects) fiduciary duties, we may expect that legal actions on this basis are forthcoming. Allegations of a breach of fiduciary duty would be very fact-dependent. A possible scenario involving allegations of a breach of fiduciary duty might involve, for example, a funder's claim that he relied on a recommendation (perhaps in the form of a "staff pick" or "trending" prompt on the platform or in an email message from the platform) made by a platform that resulted in an inappropriate funding decision. The probability of success for a claim of this kind might be low, but litigation risk assessment involves the consideration of possible—not merely successful—claims.

Contract Law Liability

Perhaps most critically, crowdfunding platforms may be subject to breach of contract claims because of their unique role as distributional, information, and collectivizing intermediaries (Heminway, 2013). Important to this aspect of litigation risk is the fact that platforms are the fulcrum player in a two-sided market. (Nelleflamme & Lambert, 2014; Belleflamme et al., 2015; Haas et al., 2014; Viotto, 2015; Zvilichovsky et al., 2013) The relationship between a crowdfunding platform and the promoters of fundraisers—businesses and projects seeking funding—and their funders is governed by specific terms on which they agree before they engage in business with each other. These terms are often referred to as "Terms of Use" (TOUs), and they may constitute a valid, binding, and enforceable contract (Heminway, 2014; Misterovich, 2014; Moores, 2015; Pokrasso, 2015). In practical application, however, the alleged contractual counterparty may be able to assert defenses to the formation, binding nature, or enforceability of the TOUs as an asserted contract. Even so, absent barriers to legal action, both fundraisers and funders may sue the platform for a breach of the express and implied (e.g., in the case of implied warranties) terms of their arrangement, and the platform also can take legal action against either a fundraiser or a funder for a breach of those terms.

Although the TOUs for each crowdfunding platform are unique, many do provide that the terms are legally binding (even if the term "contract" is not used in that connection. The Kiva crowdfunding platform (https://www.kiva.org/legal/terms) does, in fact, label its TOUs as a contract. Kickstarter (https://www.kickstarter.com/terms-of-use?ref=footer) takes a slightly different approach. On its website, the TOUs provide:

> By using this website (the "Site") and services (together with the Site, the "Services") offered by Kickstarter, PBC (together with its parents, subsidiaries, affiliates, agents, representatives, consultants, employees, officers, and directors — collectively, "Kickstarter," "we," or "us"), you're agreeing to these legally binding rules (the "Terms")."

Other platform sites, like GoFundMe (https://www.gofundme.com/terms), may be less direct about the legal effect and implications of their TOUs. Yet, the overall content of each platform's TOUs (and the language chosen to express that content) indicate that the terms are designed to be enforceable through judicial or other processes.

If platform TOUs are enforceable, it will become important for platforms to both comply with them and take advantage of the opportunity to use them to tailor the platform's relationship with the businesses and projects seeking funding and their prospective and actual funders. In other words, platforms can use applicable contract law to limit litigation risk through their respective TOUs, a matter addressed in some detail later in this paper. For example, platforms may disclaim responsibility to funders for a fundraiser's failure to deliver what it has promised, including a promise to deliver a reward or a pre-ordered product (Misterovich, 2014).

In addition, a platform would be empowered to bring a claim for breach of contract against a funder or the principals of a business or project with a campaign hosted on the platform for their respective breaches of the TOUs. Platforms would need to identify and assess litigation risk in this context, also. Initiating (as opposed to responding to) litigation claims has its own set of attendant risks.

Other Factors in Assessing Litigation Risk

Because crowdfunding is a new and diverse financing market, the probability and frequency of any of these claims being brought are each highly uncertain. Other aspects of the potential claims—e.g., the precise venue in which claims are made, the remedies sought and obtained, settlement and success rates, the duration of the proceedings, and other matters important to a full assessment of litigation risk—also are somewhat indeterminate. Nevertheless, there are a few key additional points that can be made about litigation risk even at this early stage of the crowdfunding market.

Most importantly, enforcement of any legal rights—whether under securities, tort, or commercial (including contract) law—is likely to be constrained in certain predictable ways. Prosecutors and regulators may not be willing or able to devote financial and human resources to enforcement efforts absent statutory or regulatory incentives or extraordinary policy reasons for doing so (Palmiter, 2012). Individual funders also are unlikely to bring private actions or even engage alternative dispute resolution since the cost of vindicating their rights easily could exceed their invested money and time, although the availability of treble damages (often a statutory right for willful violations of consumer protection statutes) or other extraordinary remedies may change the calculus somewhat. (Palmiter,

2012) Without a valid, binding, and enforceable agreement to online dispute resolution or other private dispute resolution mechanisms (Raymond & Stemler, 2015), class action litigation will be the most promising viable means through which funders can vindicate their legal rights.

The financial cost of class actions is low and the human capital cost associated with participation in a class action may be acceptable to funders and other prospective plaintiffs. However, class actions tend to be procedurally complex—difficult to get in front of a court—and may not be available in some jurisdictions. Moreover, the prospects for recovery are unknown and, based on recent information from U.S. securities class action litigation, financial compensation to individual members of the plaintiff class is likely to be relatively insignificant in dollar value and in relationship to losses suffered, even if the aggregate amount of damages paid by the defendant is relatively high (Bulan et al., 2015; Comolli & Starykh, 2015). Accordingly, class action litigation also may be of limited utility in bringing successful legal claims in the crowdfunding context.

Litigation-Related Crowdfunding Platform Terms of Use

Comprehension of litigation risk, even on a general level, enables firm management to take action to limit, and even (in some cases) eliminate, elements of that risk in their operations. Litigation risk assessment may affect business planning by, for instance, emphasizing the utility of including certain transaction terms in the firm's business model. For over 40 years, academic and practical literature in finance and law has identified relationships between risk of loss (including litigation risk) and the terms of business financings, including the pricing of financing transactions. (Hughes & Thakor 1992; Ibbotson 1975; Tiniç 1988) This body of work has largely focused on the correlation between litigation risk and the pricing of underwritten public offerings of equity (most particularly firm commitment IPOs).

In addressing the role that litigation risk may have on transaction terms, these papers on underwritten public offerings focus attention on pricing. However, the non-financial terms of financing transactions also may address or otherwise respond to litigation risk. This part of the paper identifies important non-financial terms common in crowdfunding and notes their relationship to crowdfunding platform litigation risk.

Specifically, this part identifies and describes eight different principal types of terms observed in the TOUs of the 2015 Hoskins Top 100. These terms include: limitations of liability, warranty disclaimers, disclaimers of third-party beneficiaries, indemnities, class action waivers, waivers of trial by jury, limitations on the time within which an action may be brought, and alternative dispute resolution covenants. Data also was gathered on other related matters, including, e.g., integration, severability, anti-assignment, claims release, choice of law, choice of forum (jurisdiction and venue), assignability of rights, etc. that may be used to illuminate the eight principal types of provision. The information provided consists of descriptive data and simple statistics to illuminate and illustrate in a basic way the current aspects of crowdfunding business models.

Overall, the findings indicate that the overwhelming majority of crowdfunding platforms are mitigating litigation risk in significant ways in their TOUs. However, the validity and enforceability of the identified TOUs is largely untested. It is possible that a court may invalidate or refuse to enforce some or all of the litigation risk management provisions employed by a platform in its TOUs based on applicable law or public policy when the application of these provisions is asserted in specific circumstances. A full survey of applicable law in all relevant jurisdictions would be required to further illuminate that issue and is beyond the scope of this paper. However, the paper makes general observations on the validity or enforceability of the identified provisions as applicable, based on broad principles under pertinent U.S. law.

The data was gathered from a review of crowdfunding platform websites primarily undertaken in December 2015 and January 2016. Of the 2015 Hoskins Top 100, one platform's website had ceased operations by the time data was gathered. An additional six platform websites did not appear to be involved in crowdfunding (but were, instead, engaged in a crowdfunding-related financing or business). One platform's website was unable to be accessed in English with sufficient confidence in the translation. Six platform websites did not include TOUs or made TOUs available only to registered users. This left a total sample size of 86 different crowdfunding platforms for which data is reported and from which observations are made. The 86 platforms in the study circumscribe the crowd in one way or another (limiting, to some extent, the call for capital) and do not, therefore, strictly meet the broadest interpretation of the definition of crowdfunding set forth in the introduction to this paper. For example, the Hoskins 100 includes platforms engaged in securities offerings made only to "accredited investors" (as that term is defined under applicable U.S. federal securities law).

Table 1 summarizes the principal results of this study of platform TOUs. Each type of provision represented in Table 1 is described below. Simple descriptive statistics are offered to illustrate the relative frequency of each type of provision.

Limitations of Liability

Unsurprisingly, crowdfunding platforms, like others, seek to broadly limit their liability to the fullest extent permitted by law. This is the essence of litigation risk management. One way in which they have undertaken to limit their liability in the TOUs is to circumscribe the types of damages that crowdfunding participants may seek in legal actions brought against them. Specifically, many platforms include in their TOUs a clause limiting the platform's financial liability to a capped amount of direct damages. GoFundMe's provision to this effect[2] reads as follows:

[2] This paper uses exemplar provisions from GoFundMe's TOUs when possible. GoFundMe is the crowdfunding platform in the 2015 Hoskins Top 100 with the most traffic. TOU excerpts presented in allcaps in the text of this paper are faithfully reproduced from the allcaps original TOUs on the platform websites.

> YOU EXPRESSLY UNDERSTAND AND AGREE THAT NEITHER GOFUNDME NOR ITS AFFILIATES WILL BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, EXEMPLARY DAMAGES, OR DAMAGES FOR LOSS OF PROFITS INCLUDING BUT NOT LIMITED TO, DAMAGES FOR LOSS OF GOODWILL, USE, DATA OR OTHER INTANGIBLE LOSSES (EVEN IF GOFUNDME HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES), WHETHER BASED ON CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY OR OTHERWISE, RESULTING FROM: (I) THE USE OR THE INABILITY TO USE THE SERVICE; (II) THE COST OF PROCUREMENT OF SUBSTITUTE GOODS AND SERVICES RESULTING FROM ANY GOODS, DATA, INFORMATION OR SERVICES PURCHASED OR OBTAINED OR MESSAGES RECEIVED OR TRANSACTIONS ENTERED INTO THROUGH OR FROM THE SERVICE; (III) UNAUTHORIZED ACCESS TO OR ALTERATION OF YOUR TRANSMISSIONS OR DATA; (IV) STATEMENTS OR CONDUCT OF ANY THIRD PARTY ON THE SERVICE; OR (V) ANY OTHER MATTER RELATING TO THE SERVICE. IN NO EVENT WILL GOFUNDME'S TOTAL LIABILITY TO YOU FOR ALL DAMAGES, LOSSES OR CAUSES OF ACTION EXCEED THE AMOUNT YOU HAVE PAID GOFUNDME IN THE LAST SIX (6) MONTHS, OR, IF GREATER, ONE HUNDRED DOLLARS ($100). (https://www.gofundme.com/terms)

The TOUs continue, noting that the limitations of liability may be invalid or unenforceable.

> SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF CERTAIN WARRANTIES OR THE LIMITATION OR EXCLUSION OF LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES. ACCORDINGLY, SOME OF THE LIMITATIONS SET FORTH ABOVE MAY NOT APPLY TO YOU. IF YOU ARE DISSATISFIED WITH ANY PORTION OF THE SERVICE OR WITH THESE TERMS OF SERVICE, YOUR SOLE AND EXCLUSIVE REMEDY IS TO DISCONTINUE USE OF THE SERVICE. (https://www.gofundme.com/terms)

Although the instinct to limit liability is a natural one and consistent with managing litigation risk, these limitations on the nature and amount of a crowdfunding platform's liability, if enforceable, may narrow the scope of the platform's liability significantly. While they may allow successful claimants to be adequately compensated for a loss, they undoubtedly limit the specific and general deterrence value of any covered claim.

Virtually all of the platforms in the study sample—79 (92%)—included some form of general liability limitation in their TOUs. Some platforms, however, limited platform liability but not the liability of platform management and employees. Table 2 summarizes results that factor in this variable. The TOUs that omit protections for management and employees are largely outside the U.S. and do not involve a U.S. choice of law.

Warranty Disclaimers

Crowdfunding platforms, like other service providers, desire to limit the risk that users of their services will raise claims that the services were lacking in suitability or quality. The law implies warranties in commercial relationships, including warranties of

fitness for a particular purpose and merchantability. These warranties generally apply to contracts for the sale of goods, rather than service contracts. However, certain types of crowdfunding (especially reward and pre-order crowdfunding) involve a transaction in which goods are supplied to funders.

As a result, crowdfunding platforms have embraced contractual provisions in their TOUs as a means of forestalling claims of a breach of implied warranty. Seventy-six (88%) of the crowdfunding platforms in the sample disclaimed typical commercial warranties. The following is a typical disclaimer, taken from the GoFundMe TOUs:

> YOUR USE OF THE SERVICE IS AT YOUR SOLE RISK. THE SERVICE IS PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS. GOFUNDME AND ITS AFFILIATES EXPRESSLY DISCLAIM ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING, BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT.
>
> GOFUNDME AND ITS AFFILIATES MAKE NO WARRANTY THAT (I) THE SERVICE WILL MEET YOUR REQUIREMENTS, (II) THE SERVICE WILL BE UNINTERRUPTED, TIMELY, SECURE, OR ERROR-FREE, (III) THE RESULTS THAT MAY BE OBTAINED FROM THE USE OF THE SERVICE WILL BE ACCURATE OR RELIABLE, OR (IV) THE QUALITY OF ANY PRODUCTS, SERVICES, INFORMATION, OR OTHER MATERIAL PURCHASED OR OBTAINED BY YOU THROUGH THE SERVICE WILL MEET YOUR EXPECTATIONS. (https://www.gofundme.com/terms)

These provisions may be classified as prevalent, comprehensive, and relatively uniform, based on a review of the TOUs adopted by the platforms studied.

Disclaimers of Third-Party Beneficiaries

Crowdfunding platforms also seek to limit the parties who can bring legal claims against them. A standard way to restrict the class of plaintiffs in legal actions is to provide that those not a party to the crowdfunding arrangement cannot enforce the TOUs or are not entitled to any (or to specified) benefits available to those in privity of contract with the platform. Kickstarter's provision to this effect reads in relevant part as follows:

> We don't become involved in disputes between users, or between users and any third party relating to the use of the Services. . . . When you use the Services, you release Kickstarter from claims, damages, and demands of every kind — known or unknown, suspected or unsuspected, disclosed or undisclosed — arising out of or in any way related to such disputes and the Services.
> (https://www.kickstarter.com/terms-of-use)

Some platforms address third-party beneficiary status more directly in the text of their TOUs. For example, YouCaring's TOUs simply provide that "these rules do not create any

private right of action on the part of any third party" (https://www.youcaring.com/terms-of-service)

Fewer platforms took advantage of the opportunity to reduce litigation risk by disclaiming third-party rights to enforce the TOUs. Only 21 (24%) of the platforms in the sample included language of this kind. This relatively low adoption rate may be explained by either a lack of concern that non-contracting parties will seek to enforce the TOUs or the reticence of courts to identify third parties with enforceable legal rights in analogous commercial contexts.

Indemnities

Indemnification, a process through which an individual or entity agrees to cover or reimburse another for specified expenses, losses, damages, and the like, is a common response to litigation risk. If one cannot prevent claims from being brought or refute liability, then one may at least be able to cover some of the associated costs. In this manner, an indemnity works somewhat like (and may be a substitute for or, more commonly, used in connection with) insurance.

Almost all crowdfunding platforms included in this study include six different indemnities, three promised by the funders and three promised by the business or project seeking funding, as follows: funder indemnification of the platform, its management, and its employees and business or project indemnification of the platform, its management, and its employees. An illustrative provision from the GoFundMe TOUs is set forth below.

> You agree to release, indemnify and hold GoFundMe and its affiliates and their officers, employees, directors and agents harmless from any and all losses, damages, expenses, including reasonable attorneys' fees, rights, claims, actions of any kind and injury (including death) arising out of or relating to your use of the Services, any Donation or Campaign, any User Content, your connection to the Services, your violation of these Terms of Service or your violation of any rights of another. If you are a California resident, you waive California Civil Code Section 1542, which says: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor." If you are a resident of another jurisdiction, you waive any comparable statute or doctrine. (https://www.gofundme.com/terms)

These indemnity provisions are broadly crafted and many, like this one, take account of and address specific laws impacting the validity or enforceability of the indemnity.

Tables 3 and 3a set forth the results of the study relating to indemnity provisions in platform TOUs. Of the 86 platforms in the sample, 67 (78%) included all six indemnities, and 73 (85%) include either funder or business principal indemnities favoring platforms. The bilateral nature of the indemnities observed may be evidence of the recognition on the part of platforms of their role as the lynchpin intermediary in a two-sided market. The

most prevalent type of indemnification noted in the sample was funder indemnification of platforms. Seventy-one (83%) of the 86 platforms in the sample included that provision in their TOUs. Funder indemnification of platform employees was the least common form of indemnification observed in the sample, but it is still quite prevalent. Of the 86 platforms in the sample, 67 (78%) included funder indemnification of platform employees. Among the few platform TOUs that do not include all six indemnities, no significant pattern or practice emerges as relevant.

Class Action Waivers

Given the potentially significant role that class action litigation may play in vindicating the rights of crowdfunding participants, one might expect that a common litigation risk mitigation tactic would include impediments to class action litigation. Indeed, a number of platforms do include in their TOUs a waiver of class action litigation rights, sometimes accompanied by mandatory alternative dispute resolution. For example, GoFundMe's TOUs provide for mandatory arbitration and a mutual waiver of rights to participate in class actions: "You agree that, by entering into this Terms of Service, you and GoFundMe are each waiving the right to a trial by jury or to participate in a class action." (https://www.gofundme.com/terms)

The waivers most commonly cover actions involving any or all crowdfunding participants—the platform, the businesses or projects seeking funding, and the funders. Despite their seeming importance (given the higher risk of class action claims), class action waivers are significantly less common than limitations of liabilities and indemnities. Of the platforms included in the sample, 24 (a mere 28%) have TOUs in which funders waive their rights to bring class actions and 22 (only 26%) have TOUs in which those seeking funding waive class action dispute resolution rights.

The relative scarcity of class action waivers may reflect a concern about the legal status of this type of provision. The enforceability of class action waivers is a veritable hot topic in U.S. contract law. Courts generally will not permit a contracting party to exculpate himself, herself, or itself through a class action waiver. A waiver of this kind contravenes public policy—specifically, the policy of affording consumers the ability to vindicate their legal rights in a meaningful way. The U.S. Consumer Financial Protection Bureau has been actively looking at the enforceability of class action litigation bans and waivers. Moreover, in a recent decision, *DIRECTV, Inc. v. Imburgia*, No. 14-462, 577 U.S. ___, 2015 WL 8546242 (2015), the U.S. Supreme Court confirmed that class action waivers in arbitration agreements are enforceable. Accordingly, we should expect to see class action waivers commonly used in tandem with arbitration provisions in crowdfunding platform TOUs. Indeed, all but two of the sample platforms that include class actions in their TOUs companion them with alternative dispute resolution provisions of one kind or another.

Waivers of Trial by Jury

Because jury trials often are long and expensive (in terms of the diversion of both financial and human assets) and may be less predictable than trials in front of a judge

alone, contracting parties may seek to limit the cost and unpredictability of litigation by waiving jury trials. Some, but far from all, crowdfunding platforms do include jury trial waivers in their TOUs. Among the sample platforms, 33 (38%) provide for a jury trial waiver.

The story here is much the same as it is for class action waivers in platform TOUs. In fact, jury trial waivers may be included in the same provision as class action waivers (as exemplified in GoFundMe's provision quoted in the earlier discussion of class action waivers). Some also are included in TOUs as separate waivers.

Many, but not all, platforms employing waivers of jury trial also provide for alternative dispute resolution in their TOUs. Jury trial waivers, like class action waivers, may be more likely to be found enforceable if challenged in a legal action if they are used in tandem with arbitration, although the correlation with alternative dispute resolution is not as strong as it is for class action waivers. Twenty-five of the 33 platforms that include jury trial waivers in their TOUs (just over 75% of those 33 platforms) also include alternative dispute resolutions provisions of some kind. The jurisdiction in which enforcement is sought may impact the enforceability of a jury trial waiver, since the strength of public policy considerations is greater in some jurisdictions than in others.

Limitations on the Time Within Which an Action May Be Brought

The law typically provides statutory limits on when specific types of claims can be brought in legal proceedings by private parties. These statutes are termed (depending on the type of limit provided) statutes of repose or statutes of limitation. The type of claim being forwarded in the proceeding (e.g., statutory or common law fraud versus a breach of contract) typically determines the statutory period in which a private enforcement action may be brought. Accordingly, claims relating to a single financing or commercial transactions may involve various statutes of repose or limitations. This complicates the calculus involved in the assessment and management of litigation risk.

Contractual provisions circumscribing the timing of actions brought on those contracts may help decrease this complexity and are, as a result, used in many contractual relationships. The TOUs of just over a third of the crowdfunding platforms in the sample include these contractual limitations on actions. Twenty-nine (34%) of the platforms in the study sample incorporate contractual limitations on the timing of legal actions arising out of the crowdfunding relationship or the TOUs.

These provisions are simple and most typically limit claims to a 12-month or one-year period following the time the claim arises. GoFundMe's provision is typical in that regard, expressing a one-year limit:

> You agree that regardless of any statute or law to the contrary, any claim or cause of action arising out of or related to use of the Services or these Terms of Service must be filed within one (1) year after such claim or cause of action arose or be forever barred. (https://www.gofundme.com/terms)

Several platforms limited claims to a 13-moth period, and one permitted actions to be brought up to two years after the claim arises.

The contractual claim limits typically limit claims more extensively than applicable statutes of repose or limitation. As a result, the enforceability of these provisions also has been tested in various courts. As a general matter, provisions shortening the applicable statute of repose or limitations in a particular jurisdiction are upheld if reasonable.

Alternative Dispute Resolution

Crowdfunding seems like an ideal commercial environment in which to employ informal and institutionalized means of alternative dispute resolution. Approaches to dispute resolution outside the judicial system include time-tested methods (e.g., contractual procedures—negotiation, third-party evaluations or determinations, mediation, and arbitration) as well as newer techniques fashioned specifically for use in Web 1.0 and 2.0 settings, including online dispute resolution—or ODR—platforms (Raymond & Stemler, 2015). Although alternative dispute resolution is reasonably common in platform TOUs, it is not as prevalent as one might expect.

Specifically, 35 (41%) of the platforms studied incorporated alternative dispute resolution into their TOUs. As previously noted, some provide for arbitration, in certain cases coincident with class action or jury trial waivers. However, other non-judicial dispute resolution mechanisms are also evidenced in the TOUs. For example, Indiegogo's TOUs provide for informal dispute resolutions between funders and businesses or projects seeking funding:

> If a Campaign Owner is unable to perform on any promise and/or commitment to Contributors, the Campaign Owner will work with the Contributors to reach a mutually satisfactory resolution, which may include the issuance of a refund of Contributions by the Campaign Owner. . . . In the event of any dispute, such as a Campaign Owner's alleged failure to comply with the Terms or alleged failure in fulfillment of a Perk, we may provide the Campaign Owner's contact information to the Contributor so that the two parties may resolve their dispute. (https://www.indiegogo.com/about/terms)

Kickstarter supports, but does not expressly provide for, informal extrajudicial dispute resolution. For instance, its TOUs "encourage you to contact us if you're having an issue, before resorting to the courts." (https://www.kickstarter.com/terms-of-use)

Both the platform study underlying this paper and Raymond & Stemler (2015) provide evidence that few, if any, crowdfunding platforms have adopted ODR processes to settle crowdfunding controversies. Raymond & Stemler recommend the use of ODR mechanisms for "awards-based crowdfunding" (labeled reward crowdfunding in this paper) for a variety of reasons. Raymond & Stemler's proposal is intriguing for a number of reasons related to the management of litigation risk. For example, the co-authors suggest

that the use of ODR platforms in crowdfunding may, among other things, simplify the calculus of litigation risk because "an ODR-provision can all but eliminate jurisdictional issues, choice of law dilemmas, and non-existent or outdated consumer-based regulatory schemes" (Raymond & Stemler, 2015, p. 367). It will be interesting to see whether platforms integrate ODR into their dispute resolution toolkits in the future.

Other Potentially Significant TOUs

Table 4 summarizes the incidence of other TOUs that may have significance to litigation risk. These additional TOUs include integration clauses, severability clauses, anti-assignment clauses, and claims releases. Each is briefly described below. The presence of these TOUs may indicate (among other things) a higher level of attention to detail and sophistication about the contractual elements of litigation risk.

Integration clauses acknowledge that the agreement between or among the parties to a contract is the full embodiment of their agreement and supplants any prior agreements as between or among them on that subject matter. For instance, GoFundMe's TOUs provide: "These Terms of Service constitute the entire agreement between you and GoFundMe and govern your use of the Services, superseding any prior agreements between you and GoFundMe with respect to the Services." (https://www.gofundme.com/terms) These clauses are used by contracting parties in practice and in litigation to narrow their obligations under a fully executed written contract to those provided for in that written contract. Of the crowdfunding platforms included in the study, 52 (60%) include integration clauses.

Severability clauses instruct contracting parties and those interpreting and enforcing their otherwise valid and binding agreements on how to handle specific terms of the agreement that may be or be rendered invalid or otherwise unenforceable. GoFundMe's TOUs resolve this issue in favor of what is known as a blue pencil rule—allowing the invalid or unenforceable term to be carved out of the contract, leaving the rest intact.

> If any provision of these Terms of Service is found by a court of competent jurisdiction to be invalid, the parties nevertheless agree that the court should endeavor to give effect to the parties' intentions as reflected in the provision, and the other provisions of these Terms of Service remain in full force and effect. (https://www.gofundme.com/terms)

Seventy (81%) of the 86 platforms in the study include severability clauses.

An anti-assignment clause in a contract prohibits or limits a party from assigning rights under the contract to someone else unless consent has been obtained from the other party or parties to the contract. For example, GoFundMe's TOUs include the following sentence along these lines: "You may not assign these Terms of Service without the prior written consent of GoFundMe." (https://www.gofundme.com/terms) Like third-party

beneficiary waivers, anti-assignment clauses restrict those who may have rights under the contract to those in a relationship of privity with each other under the contract. Interestingly, significantly more crowdfunding platforms—46 (53%) of the study sample—include anti-assignment clauses in their TOUs than third-party beneficiary waivers.

Claims releases, the last type of TOU provision identified and described here, are a specialized form of liability limitation. They occur in platform TOUs with less frequency than the limitation of liability provisions described and illustrated above. If valid, binding, and enforceable, a claims release terminates all or some of the liability of a specified contracting party to the party granting the release. The GoFundMe claims release reads in pertinent part as follows:

> YOU EXPRESSLY UNDERSTAND AND AGREE THAT NEITHER GOFUNDME NOR ITS AFFILIATES WILL BE LIABLE FOR ANY… DAMAGES… WHETHER BASED ON *CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY OR OTHERWISE . . . .*

A smaller (but still significant) number of crowdfunding platforms include claims releases in their TOUs. Specifically, 38 (44%) of the platforms in the study incorporate this type of provision. The different level of commonality of these provisions may indicate less comfort with the typical breadth of claims releases or its enforceability on specific facts.

Relationship of Litigation Risk to Transaction Pricing and Reputation

The general platform litigation risk analysis and study of non-financial TOU provisions set forth in the two preceding parts of this paper, taken together, offer a foundational picture of the litigation risk profile of crowdfunding and crowdfunding platforms. In future work, this depiction can be enriched with more detail and updated with new information. Assuming the continued relevance of crowdfunding to personal and business finance, capturing information about crowdfunding platform litigation risk and litigation risk in crowdfunding more generally is a worthy standalone project.

The corporate finance literature linking litigation risk to transaction pricing and intermediary reputation provides, by analogy, another possible use of crowdfunding litigation risk information provided in this paper and in other works. Pricing may be an easier link to make in the short term than reputation because transactional price information typically is more concrete (and therefore simpler to capture) once it has been made available than information about platform reputation. Despite intriguing parallels between the public offering market and process and crowdfunding, in neither case (pricing nor reputation) is the analogy between public securities offerings and crowdfunding a perfect one.

In typical firm commitment public offerings of securities, underwriters work with and advise issuer management on the public offering price and other terms, within the bounds of regulatory guidelines. Underwriters purchase the public offering shares from the issuer at a discount and resell those shares to the public at the public offering price. The spread between the price paid by the underwriters and the higher public offering price

constitutes the underwriters' compensation. The cost of intermediation (in the form of underwriter compensation) is factored into the observations and analyses made in papers that address interactions between litigation risk and public offering pricing and reputation. Because of the nature of these offerings and applicable regulatory requirements, all of the information necessary to a study of litigation risk and transaction pricing is interconnected, standardized, and public, making the study of a nexus between litigation risk (uncertain as it may be) and transaction pricing relatively straightforward.

In crowdfunding, while the aggregate size of the campaign and the pricing of the platform's services are interrelated and public, disclosures are not standardized. Moreover, the platform does not advise the principals of the business or promoters of the project being funded on how to arrive at price and terms—including, e.g., the way in which the tiers of funding are established in a rewards crowdfunding campaign. As a result, some of the observed connections between litigation risk and transaction pricing in the public offering context are not necessarily transferable to the same connections in the crowdfunding context. This difference, while important, does not mean that transaction pricing in crowdfunding is unrelated to litigation risk. It does, however, mean that the nature and quality of the relationship may be different and the data may not be as comparable.

In fact, platform litigation risk may affect the pricing of platform services, which may (in turn) impact the aggregate amount of funding required by businesses and projects desiring crowdfunded financing and the structure of the crowdfunding campaign. Although the fee structures of crowdfunding platform services may and do differ from platform to platform and context to context, researchers observe that most platforms (especially those that do not deal in securities) charge fundraisers, but not funders, a fee. (Belleflamme & Lambert, 2014) Typically, this fee is a percentage of the total dollar value of the offering. (Hogue, 2016) Processing fees also may be separately charged. If sufficient comparable data were made available about even this subset of platforms, it would be possible to make observations about correlations between the level of a particular platform's litigation risk and the pricing of its services. A study of this kind alsio would require establishing a means of quantifying relative litigation risk. The information provided in this paper may suggest ways of undertaking (or at least help inform) that task.

The connection between litigation risk or transaction pricing and crowdfunding platform reputation also is a promising area of study. In theory, platform litigation risk profiles (including litigation history, prospects, and TOUs), together with other business practices, may generate or diminish trust and confidence in platforms, which desire to be trusted intermediaries. (Belleflamme & Lambert, 2014) The level of trust and confidence that the market has in a particular platform should contribute to its reputation; and the reputation of a platform may help determine both the interest of businesses and projects in using that platform for their fundraising and the interest of funders in particular crowdfunding campaigns. Moreover, that perceived trust and the corresponding anticipated business volume may impact aggregate campaign size, offering increments, and other elements of transaction pricing. Pricing (and other terms) in a crowdfunded offering

therefore may both reflect and signal platform reputation, yet the crowdfunding market may be too young for us to know how accurate that depiction and signaling may be.

This part of the paper inspires and enables the generation of a number of potential hypotheses involving platform litigation risk, transaction pricing, and platform reputation. To the extent that the crowdfunding market continues to be viable, it should be possible to gather more data and accumulate more experience, both of which will help illuminate the connections among these factors (and, no doubt, other related elements of the crowdfunding puzzle) more clearly. This paper offers a starting point—food for thought and perhaps fodder for debate (especially as to industry best practices).

Conclusion

This paper identifies and describes crowdfunding platform litigation risk and responses to elements of that risk in platform TOUs. A principal purpose of the paper is to lay a foundation for future theoretical and empirical research as more data becomes available and more knowledge of and experience with crowdfunding is generated. Transaction pricing and reputation emerge as promising potential new aspects of that future research.

However, in the interim, the information provided in this paper may be of use to existing and potential future platform operators and other crowdfunding participants as a snapshot of current platform business models and practices and how they may relate to litigation risk in the crowdfunding context. Knowledge gained from a review of the litigation risk landscape—in terms of the legal substance underlying potential claims and the procedural aspects of those claims in the crowdfunding context, as well as litigation risk management TOUs—offers participants in crowdfunded financings an opportunity to assess existing platform business models and begin to develop firm-oriented and industry best practices. With this knowledge comes more power and responsibility in determining the future of crowdfunding.

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TABLE 1: SUMMARY OF KEY RESULTS		
	TOTAL SURVEYED (GLOBAL)	
N = 86	**count**	**percentage**
LIMIT ACTIONS ON LIABILITY	79	92%
WARRANTY DISCLAIMERS	76	88%
DISCLAIMERS OF THIRD-PARTY BENEFICIARY STATUS	21	24%
INDEMNITY: BY FUNDERS	71	83%
INDEMNITY: BY BUSINESS PRINCIPALS	69	80%
CLASS ACTION WAIVERS: BY FUNDERS	24	28%
CLASS ACTION WAIVERS: BY BUSINESS PRINCIPALS	22	26%
JURY TRIAL WAIVERS	33	38%
TIME LIMITS ON LEGAL ACTION	29	34%
ALTERNATIVE DISPUTE RESOLUTION REQUIREMENT	35	41%

TABLE 2: LIMITATIONS OF LIABILITY					
platform	**management**	**employers**	**make use of at least one form of liability limitation**	**make us of all three forms of liability limitation**	**N = 86**
79	61	61	79	61	**count**
92%	71%	71%	92%	71%	**percentage**

TABLE 3:
INDEMNITIES

		platform	management	employers	make use of at least one form of indemnity	make use of all three forms of indemnity	N = 86
CATEGORY OF INTEREST CLASS	BY FUNDERS	71	68	67	71	67	count
		83%	79%	78%	83%	78%	percentage
	BY BUSINESS PRINCIPALS	69	68	68	69	68	count
		80%	79%	79%	80%	79%	percentage

TABLE 3a:
INDEMNITIES

	platform	management	employers	N = 86
AT LEAST ONE FORM OF INDEMNITY IRRESPECTIVE OF CATEGORY OF INTEREST CLASS (FUNDERS OR BUSINESS PRINCIPALS)	67	67	67	count
	78%	78%	78%	percentage
AT LEAST ONE FORM OF INDEMNITY FROM EACH CATEGORY OF INTEREST CLASS (FUNDERS AND BUINESS PRINCIPALS)	73	69	68	count
	85%	80%	79%	percentage
MAKE USE OF ALL SIX FORMS OF INDEMNITY ACROSS BOTH CATEGORIES OF INTEREST CLASS (FUNDERS AND BUINESS PRINCIPALS)			67	count
			78%	percentage

TABLE 4: OTHER TERMS WITH POSSIBLE IMPACT ON LITIGATION RISK		
	TOTAL SURVEYED (GLOBAL)	
N=86	**count**	**percentage**
Integration Clause	52	60%
Severability Clause	70	81%
Anti-Assignment Clause	46	53%
Claims Release(s)	38	44%