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Paying the Piper But Not Calling the Tune: Litigation Financing and Professional Independence

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PAYING THE PIPER BUT NOT CALLING THE TUNE: LITIGATION FINANCING AND PROFESSIONAL INDEPENDENCE

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ABSTRACT

Most commercial litigation financing agreements are designed to create distance between the funders of the litigation and legal counsel. Our legal system demands that third party litigation financiers refrain from interfering with a client's decisions in their matter, and traditional third-party litigation financing is merely a passive profit-making opportunity. There are cases, however, where the litigation financier is not interested in making a profit, but instead wishes to participate in the litigation for political, ideological, or personal reasons. In this article, I will explore whether what I call "interested litigation financing" is an exercise of First Amendment rights or is instead a corruption of the litigation *process. It is simple to imagine a scenario where interested financiers take control of litigation; but by examining two recent cases demonstrating third-party interested litigation financing, I argue that interested litigation financing furthers the public values underlying our legal system and poses little risk to the professional responsibility obligations of lawyers.*

I. INTRODUCTION

In his 2013 Miller-Becker Lecture, Bruce Green explored the sometimes-shifting meaning of the ideal of professional independence.[1] Is it the independence of the bar, to engage in self-regulation, free from interference by legislatures and the executive branch?[2] Or, is it the independence of lawyers from other professionals, such as accountants, who may wish to form multidisciplinary practices that threaten to corrupt ideals of professionalism with the morals of the marketplace?[3] Alternatively, is the relevant sense of independence the distance maintained by individual lawyers from powerful clients, which enables them to say to a client, "Yes, the law lets you do that, but don't do it. It is a rotten thing to do"?[4] Green argues that a forgotten but important conception of professional independence is that of lawyers from the judiciary.[5] Lawyers are of course traditionally referred to as officers of the court, and the rules of professional conduct regulating lawyers are promulgated under the inherent authority of states' appellate courts.[6] As

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1. Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued*, 46 AKRON L. REV. 599 (2013).

2. *See, e.g.*, Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

3. *See, e.g.*, Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 MINN. L. REV. 1097 (2000).

4. Watergate Special Prosecutor Archibald Cox, quoted in MARY ANN GLENDON, A NATION UNDER LAWYERS 35 (1994). For accounts of the Nineteenth-Century ideal of professional independence as a brake on the anti-social conduct of powerful clients, see Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649 (2016); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

5. Green, *supra* note 2, at 620-38.

6. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 1.6, at 17-18, § 2.2.2, at 24-27

Green points out, however, excessive deference to judges threatens the autonomy that is essential to a highly fiduciary lawyer-client relationship. Lawyers who pull their punches out of "fear of judicial disfavor" compromise the duties of loyalty and zealous advocacy that they owe to clients.[7] Sometimes lawyers should be willing to disobey court orders in the pursuit of their clients' rights.[8]

In this Lecture I would like to consider one aspect of the professional independence of lawyers, which is related to, but distinct from the subject of Green's 2013 Lecture. The old aphorism, the one who pays the piper calls the tune, suggests that lawyers ought to exercise great care to ensure that the means by which they finance the representation of clients does not interfere with their judgment exercised on behalf of clients. In other words, there is a tension between the business and professional aspects of the practice of law. Third-party litigation financing is sometimes criticized for interfering with the independence of lawyers. This conception of independence is not focused on the identity of regulators (the judiciary vs. legislatures), the influence of powerful clients, or excessive deference to judges. Rather, the concern is that funders will seek to influence the handling by counsel of a claimant's lawsuit. Implicit in this critique of third-party financing is the assumption that it would be a bad thing if a non-lawyer sought to exert any control over the decisions made by either the lawyer or the client in connection with the litigation.

The question to be addressed in this Lecture is not so much whether third-party interference is likely. Most commercial litigation financing transactions are structured to create a discreet distance between funders and the lawyers representing the claimant. Litigation financing contracts expressly disclaim any right to interfere with counsel's handling of litigation,[9] and the common law doctrines of champerty and maintenance, where they are still recognized, require that a third-party funder be a purely passive investor.[10] To put it bluntly, commercial litigation

(1986).

7. Green, *supra* note 2, at 624 (*quoting* AM. B. ASS'N, CANONS OF PROF'L ETHICS, Canon 1 (1908)).

8. *Id.* at 632-33.

9. *See, e.g.*, Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co., 2016 WL 937400, at *5 (Del. Super. Ct. Mar. 9, 2016); Miller U.K., Ltd. v. Caterpillar, Inc., 17 F.Supp.3d 711, 740 (N.D. Ill. 2014) (*in camera* review of financing agreement shows no assertion of control over the case or settlement by the funder); *see also* Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 737-38 (2014) (recommending that litigation financing agreements make clear that the funder has no right to control the conduct of litigation and particularly undertakes to avoid interference with decisions regarding settlement).

10. *See, e.g.*, Abu-Ghazaleh v. Chaul, 36 So.3d 691, 693 (Fla. Dist. Ct. App. 2009); Odell v.

financing companies do not have any view one way or the other about the merits of the underlying matter, other than as a profit-making opportunity. Call this practice *disinterested* litigation financing.

There may be cases, however, in which the party financing the litigation is not aiming at turning a profit on its investment, but rather wishes to participate in the matter for political, ideological, or even personal reasons. The financier still may not exercise direct control, but the monetary support is nevertheless helpful in advancing the financier's cause. In this way, litigation financing is like donating to the fundraising committee of a candidate for political office,[11] or giving money to a public-interest organization that has as one of its characteristic activities the financing of litigation. Whether what I will call *interested* litigation financing is best understood as the exercise of a First Amendment right or corruption of a process that should remain untainted by money is one of the themes to be explored in this Lecture. Two recent cases illustrate third-party funding which is motivated by some sympathy for the ideology or legal position of the plaintiff in the underlying litigation, which is absent in ordinary, purely financially-motivated commercial funding deals.

The first case involves a lawsuit for invasion of privacy. In May 2016, the *New York Times* reported that Terry Bollea, the professional wrestler known by his *nom de guerre* Hulk Hogan, may have had undisclosed financial backing in his lawsuit against Gawker Media, an online media company, for publishing a sex tape featuring Hogan and the wife of his best friend, Bubba "The Love Sponge" Clem (really).[12] Hogan's lawyer at one point dismissed a claim for negligent infliction of emotional distress, which had the effect of letting Gawker's insurer off the hook for coverage (the sole remaining claims falling within the

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Legal Bucks LLC, 665 S.E.2d 767, 774 (N.C. Ct. App. 2008); Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 104 (Tex. App. 1st 2006); Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 221 (Ohio 2003); Toste Farm Corp. v. Hadbury, Inc., 798 A.2d 901, 906 (R.I. 2002); Kraft v. Mason, 668 So.2d 679 (Fla. Ct. App. 1996).

11. *See* W. Bradley Wendel, *Litigation Trolls*, 12 N.Y.U. J.L. & Bus. 725 (2016) (developing the analogy between litigation financing and campaign fundraising, and discussing the First Amendment arguments in *Williams-Yulee v. Florida Bar*, 575 U.S. ___, 135 S. Ct. 1656 (2015)). As Eugene Kontorovich points out, "[a]nyone who donates to the ACLU or a Legal Aid fund is basically underwriting third-party litigation." Eugene Kontorovich, *Peter Thiel's Funding of Hulk Hogan-Gawker Litigation Should Not Raise Concerns*, WASH. POST (May 26, 2016). He correctly refers to the holding in *NAACP v. Button*, 371 U.S. 415 (1963), that the application of state prohibitions on champerty and maintenance – that is, third-party financial support for litigation – may violate the First Amendment as applied to the activities of the NAACP Legal Defense Fund in that case.

12. *See* Andrew Ross Sorkin, *Gawker Founder Suspects a Common Financer Behind Lawsuits*, N.Y. TIMES (May 23, 2016). For the whole sordid story, see Jeffrey Toobin, *Gawker's Demise and the Trump-Era Threat to the First Amendment*, NEW YORKER (Dec. 19 & 26, 2016).

policy's intentional-acts exclusion). Hogan was also rumored to have turned down substantial settlement offers.[13] The financial backer of the suit was rumored to be billionaire Peter Thiel, co-founder of PayPal, who had a longstanding grudge against Gawker for attempting to out him before he was open about his sexuality.[14] Thiel was not in it for the money. He later admitted to bankrolling the litigation in the amount of about $10 million, and said that he did it not for revenge but for "specific deterrence," saying that he "saw Gawker pioneer a unique and incredibly damaging way of getting attention by bullying people even when there was no connection with the public interest."[15] The lawsuit resulted in an award to Hogan of $115 million in compensatory damages and $25 million in punitive damages[16] and a subsequent bankruptcy filing by Gawker.[17]

The second case arises out of an effort by Uruguay to adopt effective tobacco-control measures to combat one of the highest smoking rates in Latin America.[18] The tobacco company Philip Morris brought an investor-state arbitration proceeding, arguing that the regulations expropriated its investment in Uruguay and denied its right to equal and fair treatment under a bilateral investment treaty. The arbitration panel concluded that Uruguay's regulations did not indirectly expropriate the intellectual property of the tobacco company, in part because the regulations were a valid exercise of the state's police power, as recognized by customary international law.[19]

13. *See* Felix Salmon, *Peter Thiel Just Gave Other Billionaires a Dangerous Blueprint for Perverting Philanthropy*, SPLINTER, (May 25, 2016), https://splinternews.com/peter-thiel-just-gave-other-billionaires-a-dangerous-bl-1793857041 ("Hogan could have accepted a substantial financial settlement; he could also have made it much more likely that he would get paid, by suing in such a manner as to make Gawker's insurance company liable for any verdict. Instead, he refused all settlements, and withdrew the insurable complaints, to ensure that the company itself would incur as much damage as possible."); Ryan Mac & Matt Drange, *This Silicon Valley Billionaire Has Been Secretly Funding Hulk Hogan's Lawsuits Against Gawker*, FORBES (May 24, 2016).

14. *See*, *e.g.*, Mac & Drange, *supra* note 14.

15. *See* Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker*, N.Y. TIMES (May 25, 2016).

16. *See* Eriq Gardner, *Judge Upholds Hulk Hogan's $140 Million Trial Victory Against Gawker*, HOLLYWOOD REPORTER (May 25, 2016).

17. *See* Michael M. Grynbaum, *Thiel Makes a Bid for Gawker.com, a Site He Helped Bankrupt*, N.Y. TIMES (Jan. 12, 2018). Hogan and Gawker settled for $32 million. *See* Matt Drange, *Peter Thiel's War on Gawker: A Timeline*, FORBES (June 21, 2016).

18. *See* Harv. L. Rev., *International Arbitration - Investor-State Dispute Settlement - Tribunal Holds That Uruguay's Anti-Tobacco Regulations Do Not Violate Philip Morris's Investment Rights*, 130 HARV. L. REV. 1986 (2017).

19. *Id.* at 1988.

As for the claim of unfair and unequal treatment, the panel found that the regulations were a good faith, reasonable effort to address a valid public health concern.[20] For the purposes of this Lecture, the most compelling feature of the case is the prospect of a wealthy multinational corporation using the investor-state arbitration process to burden states, particularly developing countries like Uruguay, as a way of chilling the development of regulations that would be against the economic interests of the private companies. Despite a cost bill of $7 million assessed against Philip Morris, Uruguay was still stuck with $2.6 million in expenses for defending its public health regulations.[21] Threats of costly litigation against big tobacco companies apparently deterred Canada, the European Union, and New Zealand from enacting more aggressive anti-smoking regulations.[22] While the panel's decision on the substance may be viewed as "an unequivocal landmark rebuke" of the tobacco industry's litigation strategy,[23] it is noteworthy that the state of Uruguay had obtained financing from a third party to support its litigation strategy.[24] As in the Hulk Hogan case, the funder was an interested party who was not in it for the money, namely the Bloomberg Foundation's Campaign for Tobacco-Free Kids.[25]

Most litigation financing is backed by investors with frankly financial motives. For example, a number of consumer litigation funding companies were criticized in a *New York Times* article for advertising cash advances to women pursuing sexual harassment claims against their employers, which appeared to be an opportunistic attempt to profit from the #MeToo movement.[26] (One could imagine a funder making an effort to fund workplace sexual harassment claims as part of an effort to further women's equality, but some feminist critics have called this funding a

20. *Id.* at 1988-89.

21. *Id.* at 1991.

22. *Id.* (*citing* HOLLY JARMAN, THE POLITICS OF TRADE AND TOBACCO CONTROL (2015)).

23. Harold Hongju Koh, *Global Tobacco Control as a Health and Human Rights Imperative*, 57 HARV. INT'L L.J. 433, 447 (2016).

24. *See* Eric De Brabandere,*"Mercantile Adventurers"? The Disclosure of Third-Party Funding in Investment Treaty Arbitration*, *in* LITIGATION, COSTS, FUNDING AND BEHAVIOUR – IMPLICATIONS FOR THE LAW 4 n.22 (Willem van Boom ed., 2017).

25. *See id.* (citing a press release by Foley Hoag LLP, counsel for Uruguay in the arbitration proceeding,
"Government of Uruguay Taps Foley Hoag for Representation in International Arbitration Brought by Philip Morris to Overturn Country's Tobacco Regulations" (Oct. 8 2010), http://www.foleyhoag.com/news-and-events/news/2010/october/uruguay-taps-foley-hoag-for-representation [http://perma.cc/CBX2-PUFR]).

26. *See* Matthew Goldstein & Jessica Silver-Greenberg, *How the Finance Industry Is Trying to Cash In on #MeToo*, N.Y. TIMES (Jan. 28, 2018).

"scuzzy new low," because the funders view the plaintiffs as merely an economic opportunity, not an ally in a cause.[27])

As Section II will show, the usual case for litigation financing is an economic one, based on considerations such as leveling the playing field between litigants with differing access to capital, shifting risk to parties better able to bear it, and smoothing out cash flows related to litigation expenses. Proponents of litigation financing often analogize it to other, already generally accepted financing mechanisms, such as contingency fees and liability insurance.[28] Section III then asks whether if we accept the economic case for litigation financing, are we thereby committed to allowing interested third parties to fund lawsuits? Conversely, is one who believes, on First Amendment or similar grounds, that people ought to have the right to express their political viewpoints by financing test case litigation, required to support purely financially motivated third-party funding? The U.S. Chamber of Commerce, for example, is a fierce critic of commercial litigation financing,[29] but it also provides substantial support to parties in litigation around the country who are taking a pro-business position.[30] Is it possible to have it both ways, by opposing financing of litigation where the motivation is merely to make a profit, and where ideological considerations take a back seat to an impartial assessment of the merits of the lawsuit, while supporting "cause lawyering" on either side, for the ACLU or the Chamber of Commerce? If the answer is that these cases must be treated differently, the further question is whether it is the motives of the financier or something else, such as the degree of control exercised over the conduct of litigation by the third-party, that makes the difference in the normative analysis. Section IV sets out a theoretical account of the purposes of litigation to help answer the question of whether third-party control should be viewed as a threat. Section V argues that the ethical duties of lawyers provide a

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27. *See* Megan Reynolds, *The Finance Industry is Trying Its Best to Cash in On Sexual Harassment and #MeToo*, JEZEBEL (Jan. 19, 2018).

28. *See*, *e.g.*, W. Bradley Wendel, *A Legal Ethics Perspective on Alternative Litigation Financing*, 55 CAN. BUS. L.J. 133 (2014). Critics of litigation financing struggle to explain, without begging the question, the difference between these accepted financing techniques and commercial plaintiffs'-side funding as provided by firms like Burford and Bentham IMF. *See*, *e.g.*, Michelle Boardman, *Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation*, 8 J.L. ECON. & POL'Y 673 (2012).

29. *See*, *e.g.*, Amanda Bronstad, *US Chamber Pushes Rule to Expose Litigation Funding*, LAW.COM (June 2, 2017) https://www.law.com/nationallawjournal/almID/1202788262307/US-Chamber-Pushes-Rule-to-Expose-Litigation-Funding/ [https://perma.cc/5CHT-5GF4].

30. *See*, *e.g.*, PUBLIC CITIZEN, THE CHAMBER OF LITIGATION (2016) https://www.citizen.org/sites/default/files/chamber_litigation_report_part_1.pdf [https://perma.cc/DT9M-KA5K].

sufficient counterweight to any influence exerted by a funder. Finally Section VI considers the related issue of transparency and disclosure of litigation financing arrangements.

II. PROBLEMS TO WHICH DISINTERESTED LITIGATION FINANCING IS INTENDED AS THE SOLUTION

We are approaching the point at which it is no longer necessary to begin every paper on third-party litigation financing with a lengthy explanation of what it is. Third-party litigation financing (also known as alternative litigation financing or litigation funding) differs from contingency-fee and liability-insurance financing only in the identity of the party providing support. Instead of a liability insurer or the plaintiff's counsel, the financier is a specialized entity formed to invest in lawsuits.[31] It may be a division of a larger financial institution or it may be a freestanding company or fund. The market for investment in litigation is often described as small but growing rapidly. The New York City Bar Association estimated in 2011 that as much as $1 billion has been invested by third-party financers in lawsuits.[32] In February 2015, *Chicago Lawyer* magazine reported that Burford Capital, a large commercial litigation

31. *See generally* STEVEN GARBER, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWNS, AND UNKNOWNS (2010) https://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf [https://perma.cc/MXR2-XY9N]; Anthony J. Sebok & W. Bradley Wendel, *Duty in the Litigation-Investment Agreement: The Choice Between Tort and Contract Norms when the Deal Breaks Down*, 66 VAND. L. REV. 1831 (2013); Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL'Y 613 (2012); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011); Stephen Gillers, *Waiting for Good Dough: Litigation Funding Comes to Law*, 43 AKRON L. REV. 677 (2010). Some of the debate over litigation financing pertains to the consumer sector, which offers claimholders in small, often personal-injury cases, to monetize the expected value of a future settlement or judgment. That type of financing practice, and that sector of the industry, is largely peripheral to the issues discussed here. Issues related to consumer litigation financing are similar to those relating to other consumer-credit transactions, such as whether financing parties are failing to provide adequate disclosure, whether transactional terms are substantively fair, and whether additional regulation (and by what institution) is required. *See, e.g.*, Ronen Avraham & Anthony J. Sebok, *An Empirical Investigation of Third Party Consumer Litigation Funding*, 104 CORNELL L. REV. (forthcoming 2018); General Thurbert Baker, *Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Funding*, 23 WIDENER L.J. 229, 232 (2013); Jenna Wims Hashway, *Litigation Loansharks: A History of Litigation Lending and a Proposal to Bring Litigation Advances Within the Protection of Usury Laws*, 17 ROGER WILLIAMS U. L. REV. 750 (2012); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry that Has a Place in the United States Market*, 53 VILL. L. REV. 83 (2008); Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615 (2007); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004).

32. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2011-2 (2011).

investment firm, had $18 million in profits in 2014 and had made new investments totaling $62 million in cases in that year.[33]

The following two scenarios illustrate what all of that money is doing in the civil justice system. They both represent instances of disinterested litigation financing, in which the funder is merely in it for the money and does not have a view one way or the other on the public-policy issues presented in the litigation.

A. Scenario #1: David vs. Goliath[34]

Hydraulic excavators, backhoes, and other earth-moving machines are used in the mining and construction industries. They are versatile and can be fitted with different types of digging tools, such as buckets and hammers. The problem for operators is that changing between different types of tools is time-consuming, and on a big job, time is money. A small family-owned business with 100 employees came up with an ingenious solution—an automatic coupling device that greatly simplified the process of changing tools. A huge multinational manufacturer of construction equipment soon became its biggest customer. Eventually, the small business and the large manufacture decided to become partners. They entered into a manufacturing agreement under which the large company would manufacture and distribute the couplers based on the small company's technology. A few years later, the big manufacturer terminated the contract and began marketing its own automatic coupling devices. The small business had to lay off 75% of its workforce after the termination of the contract and the competition by the large manufacturer. The small company, believing the large manufacturer had stolen its trade secrets, filed a lawsuit, but quickly realized that the much larger and better financed defendant would do all it could to delay and drive up the costs of the litigation. The company asked— practically begged—its law firm to represent it on a contingent-fee basis, but the law firm did not allow partners to take on that much risk. And indeed, as it feared, lawyers for the large manufacturer began filing a barrage of procedural motions and

33. Roy Strom, *Numbers Never Lie – Or Do They?*, CHICAGO LAWYER (Feb. 1, 2015) https://www.chicagolawyermagazine.com/archives/2015/02/litigation-funding-business.aspx [https//perma.cc/336Z-MK6Y].

34. This problem is based on the breach of trade secrets lawsuit filed by a small British company, Miller, U.K., Ltd., against the multinational corporation Caterpillar. It led to a landmark opinion on the discoverability of documents shared with a third-party financing company. *See* Miller UK Ltd. v. Caterpillar, Inc., 17 F.Supp.3d 711 (N.D. Ill. 2014). The discussion in the *Miller* opinion of discoverability of the existence of litigation financing and the underlying "deal documents" will be considered below. *See infra* notes 167 - 78, and accompanying text.

issuing onerous discovery requests, apparently hoping to take advantage of the substantial disparity in resources between the parties.

Then the small company learned about XYZ Capital Partners. XYZ offered to invest an initial $2 million in the litigation. The small company would be contractually obligated to use the funds to pay its law firm's hourly fees. In exchange, XYZ would be entitled to receive, from any proceeds of the litigation obtained by way of judgment or settlement, on a "first money out" basis, the return of its $2 million investment plus a premium calculated as a multiplier of its investment, with the multiplier increasing over time.[35] For example, if the company obtained a favorable result within a year, XYZ would be entitled to twice (2x) its invested amount; for a result between one and three years, three times (3x); and so on, with a cap at 4x. The investment would be without recourse, meaning that if the company recovered nothing in the lawsuit, it would have no obligation to repay XYZ's investment. The company and XYZ agreed that further investments in $2 million tranches could be made, on the same terms, if both parties agreed. In the investment agreement, XYZ confirmed the right to receive periodic updates on the status of the litigation and to be consulted regarding any potential settlement. The agreement expressly stated, however, that any decisions regarding settlement were exclusively for the company to make.

The small company and XYZ entered into the investment agreement. With the client's permission, the law firm representing the small company revealed to the defendant, the large manufacturer, that they had secured litigation funding and the identity of the funder. Because XYZ had a reputation for carefully evaluating potential investments, the defendant took this as a sign that the small company's case likely had merit. It also realized that it would not be able to grind down the small company in a war of attrition. It began to reconsider its strategy in the case, and to think about whether it would be worth offering a reasonable, early settlement offer.[36]

35. *See, e.g.*, Joanna M. Shepherd & Judd E. Stone II, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919, 941-42 (2015) (describing typical features of commercial litigation financing contracts); Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455 (2012) (same).

36. In the case upon which this hypothetical is based, the parties did not settle, but the third-party funding enabled the small company to go all the way to trial, where it obtained a substantial jury verdict against the large manufacturer for misuse of its trade secrets. *See* Nate Raymond, *Caterpillar Hit with $73.6 Million Trade Secrets Verdict in U.S.*, REUTERS (Dec. 21, 2015) https://www.reuters.com/article/us-caterpillar-lawsuit-idUSKBN0U424I20151221 [https://perma.cc/V4E9-45B3]; Michal Addady, *Caterpillar Found Guilty of Stealing Trade Secrets*, FORTUNE (Dec. 22, 2015).

B. Scenario #2: Law Firm Risk Management and Access to Capital[37]

The law firm of Duncan, Ginobili & Parker is considered a large firm in its home city, but by national standards it is fairly small. Its 250 lawyers practice in a wide variety of areas, but it is best known for its litigation practice. Things appear to be going well for the firm, but the managing partner is a forward-thinking lawyer and realizes that the market for legal services is rapidly changing. Corporate clients are bringing a great deal of routine legal work in-house, clients with cases across the country are consolidating their outside counsel and relying on a small number of select law firms (often in exchange for discounted fees), and clients are exerting considerable pressure to rethink traditional hourly billing arrangements, demanding instead project-based flat fees or hybrid hourly/contingency structures that better align the interests of the client and law firm.[38]

The managing partner realizes that her firm will have to compete effectively not only for clients, but to attract and retain talented lawyers. This goal has put pressure on the firm's existing sources of financing.[39] Already the firm has moved from a lockstep compensation system to one in which partners may receive a bonus based on cases they originate. The

37. There is some talk in the legal press about the significance of litigation financing for small and boutique law firms. *See, e.g.*, Monika Mesa, *Litigation Funding Changes Legal Landscape for Boutique and Small Firms*, DAILY BUS. REV. (Nov. 22, 2017) https://www.law.com/dailybusinessreview/sites/dailybusinessreview/2017/11/20/litigation-funding-changes-the-legal-landscape-for-boutique-and-small-firms/?slreturn=20180801214506 [https://perma.cc/VAY8-NYNB]. The benefits of litigation financing are, not surprisingly, frequently touted in pitch documents prepared by funders. See, e.g., Wellfleet Advisors, *Guide to Litigation Financing* (2015), https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_spring_leadership_meeting/guide_to_litigation_financing_may_2014_charles_agee.authcheckdam.pdf [https://perma.cc/YQ4Y-QEZA]; *Finance for the Future of Law Firms: How Burford Helps Law Firms* (2018), http://www.burfordcapital.com/wp-content/uploads/2018/03/Burford_Law_Firm_Solutions_US_March_2018.pdf [https://perma.cc/QG4D-MQU5].

38. *See generally* Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978).

39. *See* Jack A. Guttenberg, *Practicing Law In the Twenty-First Century In a Twentieth (Nineteenth) Century Straightjacket: Something Has To Give*, 2012 MICH. ST. L. REV. 415, 481 (2012) ("The traditional law firm practice model requires that firms are either self-funded—the partners contribute to the capital needs of the firm by devoting a portion of each partners share to the capital needs of the firm—or the firm must borrow from outside sources, usually banks."); Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1726- 1727 (2008) (Attorneys are "restricted to the plowed-back profits and owner-manager mechanisms that financed companies in the late-nineteenth century before the advent of the modern corporation, which brought with it the separation of ownership and control and the explosion of stock markets and financial institutions that prompted significant economic growth in the first part of the twentieth century.")

firm has thus been able to keep some of its most entrepreneurial junior partners who otherwise might have been tempted to jump ship. But many of these partners have been asking to take on riskier cases, often on a full or partial contingent-fee basis, and to expand into new areas of practice such as international arbitration and *qui tam* litigation.[40]

The firm has traditionally shied away from contingent-fee work, not wanting to take on the risk of nonpayment and the delay while cases proceed to a collectable judgment or settlement. Many of the more senior lawyers in the firm have grumbled privately about what they perceive as go-getter junior partners who are willing to saddle the firm with considerable risk while they enjoy the upside of revenue from clients who insist on alternatives to the hourly billing the firm has long been accustomed to. The firm has approached commercial banks about establishing a line of credit to finance the costs of contingency-fee cases, but the banks were reluctant to consider extending ordinary secured loans using litigation proceeds as collateral, reasoning that it was impossible for bank loan officers to assign a value to the inherently uncertain results of litigation.

The managing partner recently met with representatives of Law Firm Financing, Inc. (LFFI), an investment company that specializes in providing capital to law firms. The funds can be used to pay the hard costs of litigation (such as experts and e-discovery vendors), as well as paying overhead expenses, thus keeping the firm from having its own capital deployed for a lengthy period prior to any recovery. Clients appreciate funding for litigation expenses because they can defer the cost of litigation until it is resolved.

These investments are unlike an ordinary commercial line of credit in that they are not secured by the firm's general accounts receivable and other assets. Instead, LFFI's entitlement to be repaid comes only from a portfolio of specified cases. The transaction is not in the form of a loan, but a non-recourse investment. The portfolio structure essentially cross-collateralizes LFFI's return, so that it is not dependent upon the results in any particular matter. LFFI is a purely passive investor and has no involvement in the law firm's management of litigation. Due to the greater risk involved, as compared with ordinary secured lending, the returns due to LFFI are considerably higher.

In general, returns are calculated as in the first scenario, as multiples of the amount invested, with the multiplier increasing over time. On the

40. *See* Jonathan T. Molot, *What's Wrong with Law Firms?: A Corporate Finance Solution to Law Firm Short-Termism*, 88 S. CAL. L. REV. 1 (2014).

benefit side, however, the LFFI investments substantially reduce the risk associated with contingent-fee representation. While LFFI captures some of the upside of a successfully litigated matter, the law firm retains enough interest to compensate the lawyers who pursue these cases. It therefore allows for a fairer compensation system that still gives the firm a strong position in a highly competitive marketplace. The law firm further benefits from avoiding taking on debt which, as the managing partner is well aware, was a factor in numerous recent law firm dissolutions.

C. Functions of Disinterested Litigation Financing

The two scenarios presented above are admittedly rosy, but they represent the best case for financing of large commercial lawsuits.[41] The claim is that, by assuming the financing and risk-taking function that would otherwise be performed either by claimants or their lawyers, litigation financing firms enhance access to justice.[42] Contingent-fee financing is, of course, also defended as a means of enhancing access to justice, but it requires lawyers to advance the cost of their unbilled time,

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41. Picking up on the distinction made by two sociologists between two "hemispheres" of legal practice – individual-client and corporate representation – there are two different hemispheres of the litigation financing industry. This lecture is concerned with the commercial hemisphere, which is characterized by individually negotiated investments, often with the involvement of in-house or outside counsel for the claimant; significant time and resources dedicated to conducting due diligence on a claim before an investment is made, sometimes involving sharing of documents protected by the attorney-client privilege or as attorney work product; and the likelihood of recovering significant damages – generally in the eight-figure range. The consumer hemisphere, for the most part, is oriented toward monetizing relatively low-value personal-injury claims. *See* Fausone v. U.S. Claims, Inc., 915 So.2d 626, 630 (Fla. Ct. App. 2005); *see also* Ronen Avraham & Anthony J. Sebok, *An Empirical Investigation of Third Party Consumer Litigation Funding*, 104 CORNELL L. REV. (forthcoming 2018). For example, a self-employed carpenter injured in an auto accident may face significant lost wages and medical expenses while waiting for a judgment or settlement in a tort lawsuit. Using the numbers on the Avraham & Sebok article, a consumer litigation funding company might be willing to pay, for example, $7,000 in a case with an estimated settlement value of $100,000; in exchange the funder would have a right to receive some specified amount – often computed as a percentage of the claimant's recovery – as a premium, along with recovery of the amount invested. Based on Avraham & Sebok's findings, the plaintiff in this hypothetical would owe the funder $16,000. Assuming the case settled for its expected value, the plaintiff's $100,000 recovery would be reduced by $33,000 owed to the lawyer (assuming a standard contingent-fee arrangement), some amount for costs, and $16,000 due to the funder.

42. This is the *effect* of litigation financing. The motivation of investors may simply be to make money. *See* Joanna M. Shepherd, *Ideal Versus Reality in Third-Party Litigation Financing*, 8 J.L. ECON. & POL'Y 593, 595 (2012). But this is no criticism of litigation funding. Proponents of the free market never tire of quoting Adam Smith's observation that "[i]t is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own self-interest." *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS Bk. 1, Ch. 2 (1776).

as well as paying the hard costs of litigation. Because the firm receives nothing if the client does not obtain a recovery, contingent-fee cases are quite risky. Individual lawyers can generally advance the cost of modest-sized contingent-fee cases—for example, the typical premises liability or intersection collision case that is the bread and butter for personal-injury lawyers across the country. Larger scale or riskier cases, however, demand considerably higher capital reserves and risk tolerance. Many sole practitioners and small firms cannot take on sophisticated tort cases, such as medical malpractice and products liability matters, which require a considerable outlay for experts and other expenses, or large, discovery-intensive cases like the breach of trade secrets lawsuit in Scenario #1, above. The clients of these firms are often startup or small companies who cannot afford to fund litigation out of their current working capital.[43]

The two scenarios are really two sides of the same coin: many clients with meritorious claims cannot afford to compensate law firms on an hourly basis, and the types of firms that handle contingent-fee matters are, for the most part, unwilling or unable to take on complex tort and commercial matters. The result is systematic under-litigation of certain types of claims and, correspondingly, systematic under-deterrence of wrongdoing. One does not have to be too cynical to believe that the large manufacturer may have considered the small company's trade secrets to be easy pickings. Protecting its intellectual property would require capital that the small company did not have, and it would be unlikely to find a firm that was prepared to handle the case for a contingent fee. Even more cynically, perhaps the large competitor knew that, even if it eventually lost the trade secrets lawsuit, protracted litigation would force the small company to pay out of pocket, tying up a significant amount of its current working capital in payments to lawyers. During the time the lawsuit was pending, the small company would not be using its capital to innovate and compete more effectively against the large manufacturer. Litigation financing thus offers litigants the opportunity to make more productive use of their working capital, rather than dissipating it on the expenses of litigation. Law firms could offer this service, too, by taking cases on a contingency-fee basis, but as Scenario #2 shows, there are often intra-firm

43. *See, e.g.*, Paul Barrett, *The Business of Litigation Finance Is Booming*, BLOOMBERG BUSINESSWEEK (May 30, 2017) (reporting on six-lawyer litigation boutique which can afford to take on its contingent-fee cases only with the assistance of a third-party litigation financing firm). Even where a client has the financial resources to fund litigation, for accounting reasons it may prefer to remove litigation budgets from current expenses, thus improving reported cash flow. *See* David R. Glickman, Note, *Embracing Third-Party Litigation Finance*, 43 FLA. ST. U. L. REV. 1043, 1048-49 (2016).

structural and governance barriers to law firms making increased use of contingency fees.

Normatively speaking, what is important is that third-party financing helps mitigate the impact of the parties' disparity in resources on the resolution of litigation.[44] It is well-established in the theory of tort liability that the costs of administering a liability rule may have an impact on its efficiency.[45] Simplified to its essence, the welfarist (or consequentialist, or utility-maximizing) case for fault-based liability is that an actor will compare the expected accident cost savings with the cost of taking a precaution or adopting a new safety feature aimed at mitigating a particular type of risk.[46] This comparison is expressed in the famous B<PL formula from Judge Learned Hand's *Carroll Towing* opinion.[47] A rational, risk-neutral, utility-maximizing actor will take additional precautions up to the point at which the cost of the precaution equals the expected accident cost savings.[48] Going beyond this level will result in socially wasteful over-spending on safety; better for society as a whole that potential victims take their own precautions to protect themselves, or that they simply "lump it" and self-insure against expected losses. This assumes, however, that error and administrative costs can be ignored. As Richard Epstein rightly points out, "[t]he dollars spent on judgment or settlement will be incurred only in the fraction of cases in which the D is sued and found liable."[49] The *ex ante* application of the negligence standard by actors potentially subject to liability depends on their ability to make an accurate forecast of the "L" term in the Hand formula. The error and administrative costs associated with a fault-based regime of liability is sometimes taken as a consideration in favor of strict liability.[50] Famously, Justice Traynor's concurrence in the *Escola* case appeals to the difficulty injured plaintiffs may have in proving the negligence of a

44. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) ("In truth, . . . settlement is also a function of the resources available to each party to finance the litigation, and those resources are frequently distributed unequally.").

45. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 64-69 (1987); GUIDO CALABRESI, THE COSTS OF ACCIDENTS 250-53 (1970).

46. *See, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 86, 99-106 (2002); ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 300-11 (2d ed. 2000).

47. *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

48. *See* Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE. L.J. 1055, 1057 (1972) ("Assuming injurers had the requisite foresight, [the Learned Hand test] would cause potential injurers to avoid all accidents worth avoiding, i.e., those where avoidance costs less than the accident, and to have only those accidents not worth avoiding.").

49. RICHARD A. EPSTEIN, TORTS § 4.9, at 98 (1999).

50. *See, e.g.*, Calabresi & Hirschoff, *supra* note 49; Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

manufacturer of defective products.[51] The argument need not be taken as far as that, however. The significance of the comparison with strict liability is that even market-oriented law-and-economic accounts of the public policy underlying the imposition of civil liability have to be concerned with the possibility that repeat-player defendants do not receive the right liability signals due to under-litigation of certain types of claims.

Back to the cynical interpretation of the large manufacturer's conduct in Scenario #1, an actor can also avoid the imposition of damages by driving up the cost of litigation for any prospective adversary. The deterrent impact of social cost internalization is therefore undercut by the actions of a party subject to liability which has the effect of driving down the imposition of damages. Imagine a stark, unrealistic hypothetical world in which a party is frequently sued but is able to avoid liability through some manipulation of the process. Suppose a taxicab company in an exaggeratedly corrupt city has managed to pay off all the judges in the local superior court so that every case brought against the taxicab company will be dismissed on some ground—entirely fanciful if necessary. The result would obviously be a greatly diminished deterrent effect of liability for negligence. The signal sent by the repeated dismissals would be that the company need not worry about paying damages for accidents caused by poorly maintained taxicabs or ill-trained drivers. The comparison is not meant to imply that all vigorous litigation is equivalent to corruption of the judiciary. Rather, it is only to show that factors exogenous to the legal and factual merits of a lawsuit may affect the deterrent signal sent by judgments of liability or non-liability.

Civil liability serves functions other than deterrence, including compensating injured victims, requiring the wrongdoer to rectify losses it caused,[52] providing a substitute for cruder informal means of obtaining redress,[53] sending a social message of condemnation,[54] and so on. Whether one aims to provide an interpretive or functional account of the law,[55] it is impossible to dispense with the idea of the legal merits of a plaintiff's claim. The idea of legal merit is clearest when thinking about the deterrent function of liability. A meritorious claim is represented in

51. Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

52. *See, e.g.*, Jules Coleman, *Tort Law and Tort Theory: Preliminary Reflections on Method, in* PHILOSOPHY AND THE LAW OF TORTS 183, 185 (Gerald J. Postema, ed. 2001).

53. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).

54. *See, e.g.*, Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1 (2017).

55. *See* Emily Sherwin, *Interpreting Tort Law*, 39 FLA. ST. U. L. REV. 227 (2011).

the Hand formula as the "L" term, the magnitude of the loss. The defendant is expected to forecast accurately the probability ("P") of losses of various magnitudes and use that estimate to make a rational decision whether to incur a burdensome ("B") safety precaution to prevent the harm. With sufficient information and in the absence of transaction costs, the result is optimal deterrence. If one prefers a corrective-justice, civil-recourse, or expressivist account of civil liability, however, the legal merit of the plaintiff's claim is still critical to the analysis. (Note that I am not equating all types of civil liability as necessarily involving wrongs; it may be, for example, that contract law permits a party to breach and pay damages as a kind of tax or penalty, but not be deemed a wrongdoer.[56]) Whatever the theoretical foundation of a system of legal norms imposing liability, a necessary presupposition is that it matters to the functioning of the system that claims be accurately adjudicated and that defendants pay damages only when they *ought* to, according to applicable liability rules. The best case for litigation financing, therefore, is that whatever the underlying substantive law is designed to do, providing financial support to the claimholder makes it more likely that the matter will be resolved on its merits.

Leaving aside the actual, subjective motivations of the funders, the Hulk Hogan and Uruguay cases may be defensible in these terms, as making it more likely that disputes involving public values are decided on their merits. The Hulk Hogan case raises an important issue in privacy law. Tort law in most states recognizes a right of recovery for public disclosure of private facts, protecting one's right to be free from embarrassing public dissemination of facts about one's private affairs.[57] At the same time, however, the First Amendment protects the publication of information that is not false and defamatory, as long as it pertains to matters of public interest.[58] People have to endure sometimes truly awful conduct, which otherwise would give rise to a cause of action for invasion of privacy, if the expressive conduct involved is related to an issue of public concern; consider, for example, the Westboro Baptist Church protests of military funerals, which the Supreme Court held protected by the First Amendment against claims for intentional infliction of emotional distress.[59] The question, as a Florida appellate court put it, is therefore

56. *See, e.g.*, Curtis Bridgeman, *Civil Recourse or Civil Powers?*, 39 FLA. ST. U. L. REV. 1 (2011).

57. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

58. Florida Star v. B.J.F., 491 U.S. 524 (1989); Time, Inc. v. Hill, 385 U.S. 374 (1967); Gates v. Discovery Communications, Inc., 101 P.3d 552 (Cal. 2004).

59. Snyder v. Phelps, 562 U.S. 443 (2011).

whether every aspect of a celebrity's private life is a matter of public concern.[60] Hulk Hogan made a career by seeking out publicity, but must he endure the publication of a recording of him having sex with his best friend's wife? Peter Thiel's interest in the case, whether as a personal vendetta against Gawker or as a more public-spirited effort to protect some modicum of privacy for people in the public eye, is in principle separable from the merits of the underlying case. (Thiel referred to funding the litigation against Gawker as "one of my greater philanthropic things that I've done."[61]) Similarly, the Uruguay anti-smoking regulations raised an important issue for the international law of investor-state relations. The extent of a state's police power in light of investment treaties protecting intellectual property and requiring fair treatment is a question that can be expected to recur. It is possible again to separate the merits of Philip Morris's challenge to the tobacco-control regulations from the motivations of the Bloomberg-financed NGO that provided assistance in defending the regulations.

One could take the position, which I think is fairly attractive, that as long as the underlying action has merit, there is nothing more to be said about the propriety of a third-party providing financial assistance to a litigant. This stance would apply to either disinterested or interested litigation financing. The funded parties in both the Hulk Hogan and the anti-smoking cases prevailed, so from the point of view of fair resolution of lawsuits on their merits, the impact of litigation financing appears to be neutral or even positive. As discussed below, in connection with the law of champerty, there is substantial precedent in some states supporting this position. Here, however, I want to consider whether one factor in our approval or disapproval of third-party financial support is the interests and motivations of the financier. Do we feel favorably or unfavorably toward someone like Peter Thiel or the Campaign for Tobacco-Free Kids with a personal or ideological stake in the issue? Or is it better if a funder has no horse in the race, beyond the desire to earn a reasonable return on an investment?

III. INTERESTED LITIGATION FINANCING AND THE CONTROL CRITIQUE

These questions are often raised indirectly through insistence on a core value of legal ethics, namely the independent professional judgment of lawyers. Seen in this way, the question can be asked whether a greater

60. Gawker Media, LLC v. Bollea, 129 So.3d 1196 (Fla. Dist. Ct. App. 2014).
61. *See* Sorkin, *supra* note 16.

threat to independence is the purely financially motivated investment in the small company's trade-secrets case, in the hypothetical above, as compared with Peter Thiel's very public attempt to take down Gawker. In turn, the answer may depend on deeper underlying beliefs about the function of the civil justice system. Does it matter whether we think of the litigation process as an arena for citizen participation in political debate? The Supreme Court's *NAACP v. Button* case,[62] and the widespread practice of interest groups on the right and left funding "cause" or "impact" litigation,[63] support a conception of litigation as a political process. It has long been understood, however, that the motivations of the funder may diverge from those of the litigants, and this may create tricky crosscurrents, and even conflicts of interest, for the lawyers involved.[64] Representing a claimant funded by a purely passive investor, which has contractually undertaken not to involve itself in decision-making related to the litigation, may be less of a headache for a lawyer. The following section takes up these questions, beginning with the criticism of third-party financing as interfering with the independence of lawyers, and proceeding through the sometimes arcane law of champerty and maintenance.

Business-oriented groups, many of whom are also active in the tort-reform movement, have spearheaded the opposition to commercial litigation financing.[65] The Institute for Legal Reform, a project of the U.S. Chamber of Commerce, has vociferously argued that litigation financing should be subject to onerous regulations clearly designed to hobble or kill off the industry.[66] It argues that litigation financing increases the rate of

62. 371 U.S. 415 (1963).

63. *See, e.g.*, ANN SOUTHWORTH: LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008); DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE (1994); MARK TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987).

64. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

65. Different criticisms, most emphasizing consumer-protection concerns, have been raised in connection with consumer litigation financing. For example, the calculation of the return due to the funder is so complicated that even a fairly mathematically savvy consumer would have trouble determining the cost of the funds received. *See* Avraham & Sebok, *supra* note 32. In the commercial sector, where sophisticated parties haggle over the terms of the investment, opacity of contract terms is not an issue.

66. U.S. CHAMBER OF COMMERCE, INSTITUTE FOR LEGAL REFORM, STOPPING THE SALE OF LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION (2012) [hereinafter, "STOPPING THE SALE"]. Specifically, the Chamber argues for the establishment of a new federal agency, within the Federal Trade Commission, to regulate litigation financing. *See id.* at 10. You read that right—the *U.S. Chamber of Commerce* is advocating for the creation of a new federal regulatory agency. Note, too, that the subtitle of the report talks about a proposal to regulate third-

frivolous litigation,[67] which itself is practically a frivolous claim, since no rational investor would make a non-recourse investment in a claim that was unlikely to result in a recovery.[68] (Hulk Hogan's claim against Gawker was far from frivolous; it resulted in a damages claim so large that it drove the defendant into bankruptcy.) But the Chamber also claims to be concerned with the integrity of the attorney-client relationship. It argues that the presence of third-party financing will inevitably affect decision-making by the claimant and its counsel:

> As an investor in the plaintiff's lawsuit, the TPLF [third-party litigation financing] company presumably will seek to protect its investment, and can be expected to try to exert control over the plaintiff's strategic decisions. The plaintiff's lawyer, as the person being paid by – and possibly even retained by – the investor, may accede to those efforts. Even when the TPLF provider's efforts to control a plaintiff's case are not overt, the existence of TPLF funding naturally subordinates the plaintiff's own interests in the resolution of the litigation to the interests of the TPLF investor.[69]

There is a lot going on in this passage. First is an assumption that the financing company's efforts to protect its investment will not come through case selection and due diligence, but must take the form of attempting to control strategic decision-making. Second is that funders will seek to exercise overt control over the plaintiff's case. Third is a tacit premise that litigation financing is different from bank lending and liability insurance in the extent of control exercised by the financier; in reality, it may be that conventional financing agreements with commercial banks include covenants that permit the lender to exercise a significant degree of control over the law firm's operations.[70] And fourth, that there is something about the structure of litigation financing transactions that inevitably subordinates the plaintiff's interests to those of the investor. All of those assertions turn out to be unsupported by the practices of the litigation financing community, but focus for now on the second claim, that a funder will attempt to control the conduct of the litigation by the plaintiff's law firm. In fact, litigation financing contracts are quite careful

party litigation financing, but the main title more frankly states the goal as *stopping* third-party investment in lawsuits.

67. *Id.* at 4.

68. As the Texas Court of Civil Appeals recognized, "An investor would be unlikely to invest funds in a frivolous lawsuit, when its only chance of recovery is contingent upon the success of the lawsuit." Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 105 (Tex. App. 1st 2006).

69. STOPPING THE SALE, *supra* note 67, at 4-5.

70. *See* Anthony J. Sebok, *Selling Attorney's Fees*, U. ILL. L. REV. (forthcoming 2018).

to disclaim expressly and unequivocally any right to interfere with counsel's handling of litigation.[71] Given the Chamber's seemingly plausible assertion that an investor would want to exercise control over the handling of litigation, it is worth exploring some of the reasons that this in fact is not done.

The first reason is that the Chamber apparently does not think very highly of the commitment of lawyers to comply with their ethical obligations. A fundamental, foundational principle of legal ethics is the independence of lawyers from control or influence, overt or subtle, by other clients, payors or guarantors of legal fees, personal interests, or third parties.[72] This principle is embodied in the concurrent conflicts rule,[73] various provisions of the rule prohibiting personal-interest conflicts,[74] and an overarching requirement that lawyers exercise independent professional judgment in the representation of clients.[75] Considering the permissibility of the involvement of a third-party financing company in the representation of a client, the New York City Bar Association emphasized the lawyer's duty of independence, "[w]hile a client may agree to permit a financing company to direct the strategy or other aspects of a lawsuit, absent client consent, a lawyer may not permit the company to influence his or her professional judgment in determining the course or strategy of the litigation . . ."[76]

As Stephen Gillers has argued—also in a Miller-Becker Lecture—there are numerous opportunities for third parties to interfere in the lawyer-client relationship, yet we tolerate the risk of interference because

71. *See, e.g.*, Charge Injection Techs, Inc. v. E.I. Dupont De Nemours & Co., 2016 WL 937400, at *5 (Del. Super. Ct. 2016); Miller U.K., Ltd. v. Caterpillar, Inc., 17 F.Supp.3d 711, 740 (N.D. Ill. 2014) (*in camera* review of financing agreement shows no assertion of control over the case or settlement by the funder).

72. *See* Green, *supra* note 2.

73. MODEL RULES OF PROF'L CONDUCT, r. 1.7 (AM. BAR ASS'N 1983).

74. *Id.* at r. 1.8(a) (business transactions with clients), 1.8(d) (acquiring media rights in the subject matter of a representation), 1.8(f) (allowing third party payor of fees to interfere with the lawyer's independent judgment).

75. *Id.* at r. 2.1.

76. Ass'n of the Bar of the City of N.Y., Formal Op. 2011-2 (2011). A recent New York State Bar ethics opinion warned that lawyers may not be on both sides of a litigation financing transaction, again for reasons related to professional independence. *See* N.Y. State Bar Ass'n, Comm. on Prof'l Ethics. Op. 1145 (2018). The State Bar's focus on independence is appropriate, but the committee makes a significant mistake in its analysis when it states that a litigation financing transaction gives the investor (whether a lawyer or non-lawyer) a proprietary interest in the subject matter of the litigation. *See id.* ¶¶ 14, 18 (citing N.Y. RULES OF PROF'L CONDUCT, Rule 1.8(i)). That is incorrect. Litigation financing transactions create a contingent property right in the proceeds of the litigation, which is distinct (as a matter of commercial law) from a right in the cause of action itself. *See* Sebok, *supra* note 71.

we believe lawyers have sufficient fortitude to stay focused on the fiduciary obligations they owe to clients.[77] Insurers, banks, and officers of corporate clients may seek to influence the way a lawyer carries out the representation of a client. These situations can be tricky to navigate, and the existence of triangular relationships between lawyers, clients, and non-clients to whom some duties are owed (like liability insurers) create some of the knottiest problems in professional responsibility doctrine.[78] Lawyers do handle these situations all the time, however, as part of their commitment to fulfilling their duties of loyalty, competence, and independent judgment that are owed to clients.

The second reason to think the Chamber's concerns about interference with the attorney-client relationship are overblown relates to the old common-law doctrines of maintenance and champerty. Allowing interference by a third party may subject the lawyer to tort liability for champerty or may result in the investment agreement being invalidated as contrary to public policy.[79] A lawyer wishing to avoid these consequences will be extremely careful not to intrude into the decision-making process involving the claimant and its counsel. For example, the purchase of a claim was held not to constitute champerty where the purchaser did not have the purpose of stirring up strife and did not acquire any "control, input, influence, right or involvement of any kind" in the conduct of the litigation.[80] Similarly, in a vigorously litigated Delaware case, the trial court held that a third-party financing agreement did not constitute

77. *See* Gillers, *supra* note 32, at 680-82

78. The late Professor Hazard's article on triangular relationships is one of the classics in the field. *See* Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15 (1987). The most familiar "triangle" problem is that created by a lawyer's duty to an insured client and either a dual client relationship with the insurer or the position that the insured is the lawyer's sole formal client but some professional duties are nevertheless owed to the insurer. *See, e.g.*, Ellen Smith Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part II – Contested Coverage Cases*, 15 GEO. J. LEGAL ETHICS 29 (2001); Ellen Smith Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part I – Excess Exposure Cases*, 78 TEX. L. REV. 599 (2000); Tom Baker, *Liability Insurance Contracts and Defense Lawyers: From Triangles to Tetrahedrons*, 4 CONN. INS. L.J. 101 (1997); Thomas D. Morgan, *What Insurance Scholars Should Know About Professional Responsibility*, 4 CONN. INS. L.J. 1 (1997); Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475 (1996); Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583 (1994); Robert O'Malley, *Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed*, 66 TUL. L. REV. 511 (1991).

79. *See, e.g.*, Osprey, Inc. v. Cabana, L.P., 532 S.E.2d 269, 273 (S.C. 2000) ("A champertous agreement is unlawful and void where the rule of champerty is recognized, and the tainted agreement is unenforceable," although the doctrine is no longer recognized in South Carolina); *see also* Del Webb Communities, Inc. v. Partington, 652 F.3d 1145 (9th Cir. 2011).

80. Odell v. Legal Bucks LLC, 665 S.E.2d 767, 774 (N.C. Ct. App. 2008).

champerty or maintenance because the funder did not have the contractual right to control the litigation, nor did it have *de facto* control over the conduct by counsel of the litigation.[81] The Chamber apparently fails to appreciate that prohibitions on champerty and maintenance have had their desired effect, and have prevented the assertion by third-party litigation funders of rights to control litigation.

Champerty and maintenance may be unfamiliar to many lawyers. In the ancient world, the intervention in disputes by strangers was viewed with great suspicion.[82] The parties themselves, personal friends, and the court were the only people who had any business being involved with disputes. English common law picked up from classical sources the mistrust of disinterested parties and blended it with a general attitude of aversion toward litigation. The result was prohibitions on certain forms of assistance to litigants by third parties. Blackstone defined the public wrong of maintenance as "intermeddling in a suit that no way belongs to one."[83] The prohibition was really aimed, however, at wealthy men who bought an interest in a lawsuit over land, hoping to obtain a share of a landed estate as part of the recovery in the lawsuit; combined with medieval abhorrence of usury and speculation, the prospect of men with capital but no land elbowing their way into the properties classes accounts for much of the force of the common law prohibition on maintenance and champerty.[84] In modern times, maintenance is defined as "officious intermeddling in a suit which in no way belongs to the intermeddler,

by. . . assisting either party to the action, with money or otherwise, to prosecute or defend it."[85] Champerty is a subset of maintenance –

81. Charge Injection Techs, Inc. v. E.I. Dupont De Nemours & Co., 2016 WL 937400, at *5 (Del. Super. 2016).

82. See the classic and fascinating historical account in Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48 (1935).

83. 3 WILLIAM BLACKSTONE, COMMENTARIES *134.

84. Radin, *supra* note 83, at 60-61; *see also* Charge Injection Techs, Inc. v. E.I. Dupont De Nemours & Co., 2016 WL 937400, at *2 (Del. Super. 2016). The Delaware court gave a helpful concise history of these doctrines: "The common law doctrines of champerty and maintenance originated in Medieval England in response to the practice of feudal lords and other wealthy individuals financing other individuals' legal claims, usually against the financier's political or personal enemies, in exchange for a share of the results. These 'champertors' enlisted paid retainers – known as 'maintainers' – who would prosecute the suits ruthlessly on the champertors' behalf. Such claims often involved title to land, which meant that the champertor would grow richer by becoming a joint owner of the landed estate."

85. Charge Injection Techs, Inc. v. E.I. Dupont De Nemours & Co., 2016 WL 937400, at *3 (Del. Super. 2016); Kraft v. Mason, 668 So.2d 679, 682 (Fla. Ct. App. 1996); Giambattista v. Nat'l Bank of Com., 586 P.2d 1180, 1187 (Wash. App. 1978). *See also* ILL. COMP. STAT. 5/32-12 (defining maintenance as "officiously intermeddl[ing] 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

"maintaining a suit [i.e. providing financial assistance] in return for a financial interest in the outcome."[86] Or, as the leading modern academic treatment of these doctrines defines them: "[C]hamperty occurs when the intermeddler provides something of value to a party in a lawsuit in return for a portion of the recovery."[87]

Readers in Ohio will be better acquainted than most with maintenance and champerty, because it was an Ohio Supreme Court decision that rather abruptly dusted off these doctrines and returned them to the concern of practicing lawyers in the *Rancman* case.[88] The plaintiff in a lawsuit against an insurance company sought to monetize the value of her claim against the defendant, so she obtained advances totaling $7,000 from two funding companies. When her case settled, she refused to pay the amounts owed to the funding companies and initiated an action seeking to rescind the transactions. At trial, the magistrate found that the transactions were loans and the returns due the funders violated state usury limitations. On appeal, the funding companies argued that the transactions were investments, not loans, but the Ohio Supreme Court took the case in a wholly unexpected direction by finding that the financing contracts were void as champerty and maintenance. The court had some unkind things to say about these practices, quoting a case from 1823 stating that maintenance "is an offense against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression."[89] Not only that, said the court, but the financing contracts created a disincentive for the plaintiff to settle the case against the insurance company. The first advance of $6,000 gave the funding company the right to the first $16,800 in proceeds. If the plaintiff had a 30% contingency fee agreement with her attorney, she would accordingly have an absolute disincentive to settle for anything less than $24,000, because she would keep the $6,000 advance if there were no judgment or settlement in her favor. For any settlement offer, the court reasoned, the plaintiff would require a premium of $18,000 in order to settle. This adverse incentive "can prolong litigation and reduce settlement incentives—an evil that prohibitions against maintenance seek

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action, with a view to promote litigation").

86. Osprey, Inc. v. Cabana, L.P., 532 S.E.2d 269, 273 (S.C. 2000) (quoting In re Primus, 436 U.S. 412, 424 n.15 (1978)). *See also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 8.13, at 489-90 (1986) ("Champerty is simply a specialized form of maintenance in which the person assisting another's litigation becomes an interested investor because of a promise by the assisted person to repay the investor with a share of any recovery.").

87. Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 98 (2011).

88. Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217 (Ohio 2003).

89. *Id.* at 220 (*quoting* Key v. Vattier (1823), 1 Ohio 132, 136).

to eliminate."[90] Although the Ohio legislature quickly overruled the *Rancman* decision by passing a statute permitting consumer litigation financing,[91] the case remains important and influential. In particular, the argument that a transaction is prohibited as champerty and maintenance if and to the extent that it creates a disincentive to settle remains helpful as an analytical tool.

The concern about interference with the settlement incentives of the parties reappeared in a more recent champerty case, arising in Illinois but applying Minnesota law.[92] Like *Rancman*, the case arose out of a consumer litigation funding transaction, which in substance was the purchase of a share of the proceeds of the recovery in a wrongful death lawsuit. (The court incorrectly refers to the transaction as a loan,[93] and at one point lists usurious interest rates among the mischief targeted by the prohibition on champerty.[94]) When the plaintiff in the underlying action refused to pay the funder pursuant to its contract, the funder sued her and obtained a default judgment. Finding that judgment uncollectable, the funder then sued the lawyer who had represented the plaintiff in the tort litigation. The plaintiff had issued a letter of direction to her lawyer, which he signed to acknowledge, instructing him to hold the proceeds of the lawsuit in his trust account, but the lawyer instead had disbursed the funds to the plaintiff.[95] But the lawyer paid over the funds to the client, apparently believing the agreement (which he had a hand in negotiating) was unenforceable. In agreeing with the lawyer that the agreement was unenforceable because it constituted champerty, the court offered very little analysis. The Minnesota case it cited, however, considered the apparent national trend toward abolishing champerty and maintenance,

90. *Id.* at 221.

91. Ohio Rev. Code § 1349.55 ("Non-Recourse Civil Litigation Advance Contracts").

92. *See* Prospect Funding Holdings, LLC v. Saulter, 2018 IL App (1st) 171277, 2018 WL 1364716 (Ill. Ct. App., March 13, 2018).

93. *Id.* at ¶ 8, 2018 WL 1364716, at *2 (referring, incoherently, to "a purchase agreement detailing the terms of the loan").

94. *Id.* at ¶¶ 28-29, 2018 WL 1364716, at *4-5.

95. *Id.* at ¶ 10, 2018 WL 1364716, at *2. The Illinois Rules of Professional Conduct include a provision identical to that in the ABA Model Rules, which requires a lawyer to hold property in a trust account if two or more persons claim an interest in that property. *See* ILLINOIS RULES OF PROF'L CONDUCT, Rule 1.15(e). A concurring judge rightly pointed out that the lawyer had contractually agreed to hold the proceeds in trust, and the funder in all likelihood would not have entered into the transaction without this assurance. *Prospect Funding*, 2018 IL App (1st) 171277, at ¶ 41, 2018 WL 1364716, at *7 (Mason, J., concurring). After the dispute arose between the lawyer's client and the funder to whom the lawyer had given assurances, the proper course of action under Rule 1.15(e) would have been to stay out of the dispute between the parties and leave the funds in the trust account until that dispute was resolved.

both as separate torts and as defenses to enforceability of a litigation investment contract.[96] The highest court in states including Massachusetts[97] and South Carolina[98] had concluded that goals such as avoiding the filing of frivolous lawsuits or speculation by third parties in lawsuits could be avoided using other doctrines and procedural devices, so that champerty and maintenance had become a kind of fifth wheel on the regulation of the civil litigation process. The Minnesota court, however, relied on *Rancman* and cases from other states in concluding that champerty and maintenance were not dead yet. The Illinois court therefore held unenforceable the contractual assignment by the plaintiff to the funding company of the proceeds of the litigation.[99]

The Illinois court listed a number of ill effects on the litigation system that justify the prohibition on champerty. They include (1) encouraging people to sue, (2) giving control over the litigation to third parties, (3) creating a disincentive to settle, (4) permitting strangers to profit from the litigation of others, and (5) allowing a financier to make an end-run around interest-rate caps provided by usury statutes.[100] None of these arguments holds up to scrutiny. As for (1), the plaintiff had already filed a wrongful death lawsuit; no "encouragement" was provided by the funder.[101] Although it is not entirely clear from the opinion, many consumer users of litigation financing services need short-term access to capital while awaiting the conclusion of the litigation. As the concurring judge notes, it may very well have been the case that financial exigencies could have compelled the plaintiff to accept a lowball settlement offer.[102] There is certainly nothing in the court's opinion to suggest that the plaintiff filed her lawsuit only after securing third-party financing. Consideration (2) is purely speculation, and makes no sense given the economics of consumer-sector litigation financing. Unlike commercial funding, which occurs only after extensive due diligence and negotiations with counsel for the claimant, most consumer funding transactions are routinized and designed to minimize transaction costs.[103] Funders would lose money if they engaged in extensive *ex ante* scrutiny of transactions, so they use diversification strategies to lower their overall risk.

96. Johnson v. Wright, 682 N.W.2d 671 (Minn. Ct. App. 2004).
97. Saladini v. Righellis, 687 N.E.2d 1224 (Mass. 1997).
98. Osprey, Inc. v. Cabana L.P., 532 S.E.2d 269 (S.C. 2000).
99. *Prospect Funding*, 2018 IL App (1st) 171277, at ¶ 29, 2018 WL 1364716, at *5.
100. *Id.* at ¶¶ 28-29, 2018 WL 1364716, at *5.
101. *Id.* at ¶ 7, 2018 WL 1364716, at *2.
102. *Id.* at ¶ 41, 2018 WL 1364716, at *7 (Mason, J., concurring).
103. Avraham & Sebok, *supra* note 32.

Monitoring ongoing cases and pestering claimants' lawyers about tactics and settlement decisions would drive up costs even further. Argument (3), as the concurring judge points out, may be a feature and not a bug of litigation financing. A plaintiff in a personal-injury action may have an incentive to settle in order to obtain funds to pay medical and living expenses; knowing this, a defendant may offer an amount lower than the expected outcome at trial would warrant.[104] If the plaintiff's ability to monetize the future value of a judgment or settlement enables the plaintiff to hold out for an amount closer to the actual expected value of her claim, so much to the good. Factor (4) is hard to understand, given that lawyers, liability insurers, court reporters, e-discovery vendors, and Mercedes-Benz dealers all "profit from the litigation of others"; something else must be going on here.[105] It may be that there is something a bit creepy or off-putting about valuing legal rights in monetary terms, but the court should have recognized the irony that the underlying litigation was for wrongful death. The plaintiff was already seeking to put a dollar value on the life of

104. *See, e.g.*, Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 CHI.-KENT L. REV. 11 (2014); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem,* 99 GEO. L.J. 65, 72 (2010) (contending that consumer litigation financing helps reduce the likelihood that a "risk-averse, one-time plaintiff may dispose of a claim for too little because he is forced to sell to a repeat-player, risk-neutral defendant that is in a much stronger bargaining position"). For example, a plaintiff in a sexual harassment case against her employer reported that an advance on the value of her settlement helped her avoid having her car repossessed and gave her the wherewithal to decline a lowball settlement offer. *See* Matthew Goldstein & Silver-Greenberg, *supra* note 27.

105. The *Rancman* court said something similar: "[A] lawsuit is not an investment vehicle. Speculating in lawsuits is prohibited by Ohio law. An intermeddler is not permitted to gorge upon the fruits of litigation." Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 221 (Ohio 2003). Imagery of pollution and defilement is a theme in the history of prohibitions on champerty and maintenance. The South Carolina Supreme Court, for example, said that "[t]he temple erected and consecrated to Justice is not, however, to be polluted with impunity, by those who would prostitute the rules regulating its police to base and unworthy purposes." State v. Chitty, 17 S.C.L. (1 Bail.) 379, 399-401 (1830). I have written that the references to prostitutes or pigs gorging on fruit is a shorthand way of making an argument that money is an inappropriate means of valuing some activity or good. *See* W. Bradley Wendel, *Alternative Litigation Finance and Anti-Commodification Norms*, 62 DEPAUL L. REV. 655 (2014). *See also* ROBERT SKIDELSKY & EDWARD SKIDELSKY, HOW MUCH IS ENOUGH? MONEY AND THE GOOD LIFE (2012); MICHAEL SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS (2012); MARGARET J. RADIN, CONTESTED COMMODITIES (1996); ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993). One who objects to litigation financing using metaphors of pollution and defilement is seeking to locate litigation within a non-market domain of value. But that ship has long since sailed, and the civil litigation system routinely uses money as a rough approximation of the value of harms such as pain, suffering, and loss of companionship and society. The law also permits other practices that tend to blur the line between market and non-market modes of valuation, such as the purchase of life insurance policies from terminally ill patients. *See, e.g.*, Andy Rich, *Viatical Settlements: The Visceral Reaction, the Existing Market, and a Framework for Regulation*, 29 QUEEN'S L.J. 283 (2003).

a loved one. Finally, argument (5) assumes the transactions are, in substance, loans and not investments or purchases. The Supreme Court of Colorado, interpreting that state's Uniform Consumer Credit Act, has held that consumer litigation financing transactions are subject to state usury caps.[106] Whether the Colorado case is an outlier or rightly decided, it has no application to the commercial-sector litigation financing cases that are the subject of this Lecture.

Rancman and *Prospect Funding* are a bit unusual in taking a categorical, highly formalistic approach to champerty. If there is *literally* an agreement by a claimant and a third party, under which the third party provides financial assistance in exchange for a financial interest in the outcome of the lawsuit, there is champerty. The rules of professional conduct governing lawyers had to define contingency fees by fiat as not constituting champerty, although of course they do under the universally accepted definition of champerty as providing assistance to a litigant in exchange for a share of the outcome.[107] This stipulative definition of contingent fees as non-champerty in the Model Rules shows that the traditional elements of champerty sit uneasily, at best, with the realities of modern litigation. Many states have abolished the doctrines of champerty and maintenance,[108] but in those that have not, courts do not use a literal analysis, looking at whether a third-party received a financial benefit for providing assistance in litigation. What factors are used by courts to determine whether a transaction constitutes champerty tells us a great deal not only about champerty and maintenance, but also about judicial attitudes toward litigation and the way it is financed.

In New York, for example, champerty is defined as an investment made for at least the primary purpose, if not the sole purpose, of bringing suit.[109] A purchaser of distressed debt seeking to profit from the transaction does not commit champerty just because it may need to resort

106. Oasis Legal Finance Group, LLC v. Coffman, 361 P.3d 400 (Colo. 2015).

107. *See* ABA MODEL RULES OF PROF'L CONDUCT, Rule 1.8(i)(2). Comment [16] to the rule explains that it "has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation," but that contingency fees are allowable despite falling within the definition of champerty.

108. *See, e.g.*, Osprey, Inc. v. Cabana L.P., 532 S.E.2d 269 (S.C. 2000); Saladini v. Righellis, 687 N.E.2d 1224 (Mass. 1997). California never adopted the doctrines of champerty and maintenance. *See* Martin v. Freeman, 216 Cal. App. 2d 639, 641-42, 31 Cal. Rptr. 217, 218 (1963). The Ninth Circuit, applying Nevada law, has concluded that the consistent trend across the country has been to limit the scope of the doctrines of champerty and maintenance. *See* Del Webb Communities, Inc. v. Partington, 652 F.3d 1145, 1156 (9th Cir. 2011).

109. Bluebird Partners, L.P. v. First Fid. Bank, N.A., 731 N.E.2d 581, 586-87 (N.Y. 2000).

to litigation in order to realize the value of its investment.[110] As the Court of Appeals subsequently clarified, there is a difference between acquiring a right in order to make money on it, and acquiring a right in order to enforce it.[111] An intent to sue on a claim does not transform a permissible transaction into champerty. "[I]f a party acquires a debt instrument for the purpose of enforcing it, that is not champerty simply because the party intends to do so by litigation."[112] A recent Court of Appeals decision showed that the analysis really does turn on intent, and not something else, such as the legal merit of the underlying claim.[113] In that case, one German company wanted to sue another, claiming malfeasance in the management of two investment vehicles. The would-be plaintiff was concerned, however, that the German government would withdraw financial support if it sued the other company, which was partly owned by the government. The would-be plaintiff therefore worked out an arrangement with a third party to act as stalking horse, and remit the proceeds to the would-be plaintiff.[114] Because "there was no evidence, even following completion of champerty-related discovery, that Justinian's acquisition of the notes was for any purpose other than the lawsuit it commenced almost immediately after acquiring the notes,"[115] the court concluded that summary judgment for the defendant was appropriate on the issue of champerty.

On New York's intent-based approach to champerty, both Peter Thiel and the Bloomberg Foundation Campaign for Tobacco-Free Kids would presumably be permitted to provide financial assistance to the litigants in the underlying lawsuits. Both were completely uninterested in making money. Thiel wanted to bring down Gawker, and the Bloomberg group was seeking to help promote public health in the developing world. This seems like an odd approach, however, if the purpose of champerty is to protect the litigation system from the influence of non-parties. If a third party is rich enough to be indifferent to the financial returns of litigation, it can invest in a lawsuit, but a more ordinary financial institution, concerned with making a reasonable profit, could potentially be excluded. To put the point differently, if the purpose of prohibitions on champerty and maintenance is to protect the litigation process from meddling by third

110. *Id.* at 588.

111. Trust for the Certificate Holders of the Merrill Lynch Mortg. Inv'rs, Inc. v. Love Funding Corp., 918 N.E.2d 889 (N.Y. 2009).

112. *Id.* at 894.

113. Justinian Capital SPC v. WestLB AG, 65 N.E.3d 1253 (N.Y. 2016).

114. *Id.* at 1254-55.

115. *Id.* at 1257.

parties, it seems backwards to permit investment only by those third parties with a non-pecuniary motive. In fairness to the Court of Appeals, the three cases discussed above all deal with financial transactions, and the court was likely not thinking about anything like the Hulk Hogan and Uruguay cases.[116] Its approach in the 2009 case, emphasizing that a financial investment for the purpose of enforcing the underlying right, would be a better way to respect the policies underlying the doctrines of champerty and maintenance.

Florida has a more straightforward, easier to apply test that better tracks the relevant policies. It asks whether the financier instigated the litigation or whether there was a preexisting lawsuit.[117] The case involved an antitrust lawsuit being prosecuted by Kraft, who was running out of money. He obtained a loan from his sister, Mason, for $100,000 in exchange for specified shares of any amount recovered. Kraft repudiated the contract after the antitrust case was settled for over $5 million, and Mason sued for breach of contract. Kraft defended on the grounds that the contract was void under the doctrine of champerty. The court first discussed the doctrines of maintenance and champerty as they existed at common law. But it then noted that the original doctrines had become antiquated, and preferred the modern definition of champerty in which an essential element is "officious intermeddling," further defined as "offering unnecessary and unwanted advice or services; meddlesome, esp. in a highhanded or overbearing way."[118] As an example of officious intermeddling, the court cited a case in which a widow was persuaded by a third party that a trustee of property was mishandling his management of the property; the trustee was eventually exonerated and, when the plaintiff sued the widow for payment for his services, the court concluded that the contract was champertous.[119] In the *Kraft* case, however, there was no officious intermeddling because Mason, the sister/lender, did not instigate the litigation and did not involve herself in the conduct of the lawsuit. Significantly, she did not "concern herself with the antitrust litigation or impose her views upon the attorneys or the litigants once she provided the loan."[120] She was a purely passive investor, just like a commercial litigation financing firm.

116. A New York statute exempts transactions valued in excess of $500,000 from the definition of champerty. *See* N.Y. JUD. L. § 489(2). Thus, even financially-motivated transactions that would otherwise constitute champerty may fall within the statutory safe harbor.

117. Kraft v. Mason, 668 So.2d 679 (Fla. Dist. Ct. App. 1996).

118. *Id.* at 682.

119. *See id.* at 682-83 (citing Brown v. Dyrnes, 109 So.2d 788 (Fla. Dist. Ct. App. 1959)).

120. *Id.* at 682.

The Hulk Hogan case is a close call on the analysis in terms of whether the funder, Thiel, was an officious intermeddler. There were rumors that Hogan had turned down a substantial settlement offer because Thiel wanted to go to trial and obtain an even larger award against Gawker, with the aim of driving the company out of business.[121] If the Florida test asks merely whether the lawsuit had already been commenced before the funder became involved, then Thiel's investment would not be champerty.[122] In ordinary usage, however, it is hard to think of anyone who is more of an officious intermeddler than Thiel. He admitted to looking around for a lawsuit filed by a plaintiff with the financial wherewithal to turn down reasonable settlement offers and take the case to trial. Granted, he may have had some sympathy for Hogan, having himself been victimized by the public disclosure of a private fact. From his public statements, at least, Thiel appears much less interested in making good law (from his point of view) on the relationship between privacy torts and the First Amendment. If Thiel had done nothing other than bankroll the litigation, however, there would be no argument that he was an officious intermeddler, particularly in light of the fact that the lawsuit had already been filed. Similarly, the Campaign for Tobacco-Free Kids was in the position of passively investing in Uruguay's defense of its anti-smoking regulations, and was not an officious intermeddler.

IV. WHAT IS LITIGATION FOR?

In the classic article *Against Settlement*, Owen Fiss argued against a purely private conception of litigation, in which the paradigm is a property dispute between neighbors, and it is regrettable that they have been unable to work out some kind of agreement among themselves.[123] Where courts must be involved, it is a second-best solution to what is essentially a problem of private ordering. The controversy arises between the parties, and if after filing a bunch of pleadings and motions, reviewing documents, and taking depositions, they are satisfied with an arrangement to resolve the dispute, it is of no concern of courts. Except in certain types of cases, including class actions, consent decrees, and litigation involving minor

121. *See* Salmon, *supra* note 14. Thiel said only that he had been looking for a plaintiff who would not be tempted to accept a low settlement offer, presumably because the money was a matter of indifference. *See* Sorkin, *supra* note 16. Presumably a wealthy celebrity like Hulk Hogan was the perfect plaintiff from Thiel's point of view.

122. *See also* Odell v. Legal Bucks LLC, 665 S.E.2d 767, 775 (N.C. Ct. App. 2008) (champerty under North Carolina law requires that the purchaser of a claim act "with a purpose of stirring up strife and continuing litigation").

123. Fiss, *supra* note 45, at 1089.

children, a settlement from the court's point of view is accomplished by the plaintiff filing a motion for voluntary dismissal with prejudice of the action. The court does not decide on the reasonableness of the parties' agreement. On a larger scale, law in general can be understood as a second-best solution, where informal controls on behavior and spontaneous ordering do much of the stabilizing work in society.[124] The law performs a marginal or gap-filling role where individuals, the dynamics of cooperative action, and decentralized norm-development have failed to settle on an outcome. The law is superfluous in cases where private ordering is sufficient.

On this conception of litigation, it is hard to see what could be wrong with any third-party financial assistance to one of the parties. Even if the financier insists on being quite intimately involved with the conduct of litigation by the party and its lawyer, what could be the ground to object, if what is at stake is of concern only to the parties themselves? Suppose Owen and Robert are neighbors who are locked in a dispute about the appropriate use of their property. Owen runs a candy factory, which requires the use of a large industrial grinding machine; Robert is a physician, who practices out of his house, which adjoins Owen's factory.[125] Robert would like Owen to confine the use of his machine to hours in which Robert is not seeing patients; Owen would prefer the freedom to conduct his candy-making operations at any time he pleases. Every first-year law student learns, in Property or Torts, about an influential view that the law ought to be involved only if the parties are unable to bargain to a mutually agreeable solution, due to strategic behavior or other transaction costs.[126] Owen may agree to pay Robert $500 per month to compensate for the loss of revenue from seeing patients during a specified time period during the day, but of course he need not make that offer unless Robert has an entitlement to the "quiet enjoyment" of his property and a damages remedy he can assert to force Owen to the bargaining table.[127] The law and the legal process (including lawyers, courts, the rules of procedure, and so on) are instrumentally valuable as a way of dealing with the holdout problems and imperfect information that might otherwise stand in the way of a mutually beneficial solution to the problem created by Owen and Robert's proximity to one another.

124. ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991).

125. Based on the classic nuisance case, Sturges v. Bridgman, 11 Ch. D. 852 (C.A. 1879).

126. *See, e.g.*, A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 17-27 (3d ed. 2003); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

127. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

Suppose the efficient outcome is that Owen continue to operate his factory and pay Robert $500 in compensation. But suppose further that Robert is single-mindedly dedicated to the practice of medicine and, while finding the grinding noises annoying, is not particular motivated to pursue negotiations or litigation against Owen. But Robert has a friend, Champ R. Tee, who is a lawyer. Champ makes Robert an offer: "Sell me whatever right you may have against Owen, I'll bring the lawsuit, and we'll split the proceeds." Leaving aside doctrines like standing, anti-assignment rules, and of course champerty, what is wrong with this transaction, from the normative point of view, if the value of law is entirely instrumental? True, Robert would not have brought the lawsuit without the assistance of Champ, but Robert's entitlement existed in any event. Owen is no worse off, with respect to the rights and duties he has under law, because Champ has entered the picture. More to the point, if Owen, Robert, and Champ are all satisfied with the outcome, in which Owen makes $500 monthly payments, continues running his factory, and Champ receives $250 out of Robert's compensatory payments, then there is literally no standpoint from which to criticize Champ's involvement. Owen may be disappointed that he now has to make the payments, but he never had a *right* not to. Owen was receiving a windfall from Robert's indifference to litigation, but his loss of that windfall is not something about which he can legitimately complain. Champ's involvement may have increased the transaction costs of bargaining, because he will want to ensure that his half share of the proceeds is worth enough to justify spending time pursuing the claim. Champ knows, however, that he cannot demand more than the expected value of a judgment at trial. Perhaps Owen has reason to worry that the judges or juries in the locality are capricious and likely to award Robert more than he is entitled to. Even if that fear is justified, however, the risk to Owen arises from the defect in the system, not from Champ's involvement.

Fiss—who as far as I know has no specific views on litigation financing—would object to this way of characterizing the function of litigation. He sees legal rights as not belonging only to the parties, but as part of a public, political scheme of ordering that "belongs," in a sense to all of us: "Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals."[128] Robert and Owen clearly have an interest in resolving their conflict, but society as a whole also has an interest in knowing what is regarded as a reasonable use of land, in the context of surrounding uses. "An oft-forgotten virtue

128. Fiss, *supra* note 45, at 1089.

of adjudication is that it ensures the proper resolution and application of public values. In our rush to embrace alternatives to litigation, we must be careful not to endanger what law has accomplished or to destroy this important function of formal adjudication."[129] One could take this too far, of course, and standing doctrines limit the participation of truly uninterested parties in litigation. But the critique of settlement, which could be extended to the widespread use of arbitration agreements to resolve claims involving issues of public importance such as workplace discrimination, is that it impedes the ability of other citizens to learn about the rights and duties that they have with regard to one another. From the point of view of theoretical legal ethics, Daniel Markovits has argued for an understanding of litigation as a kind of retail-level process of self-government.[130] In order for the exercise of state power to be legitimate, he contends, the subjects of legal authority must take ownership of political outcomes.[131] Taking ownership comes only through an *affective* engagement with the political process, which transforms citizens from subjects to members of a democratic sovereign.[132] Most people participate in the political process only in very indirect and attenuated ways, such as by voting or donating to causes. Markovits claims, however, that litigation offers an opportunity for citizens to become transformed through participation in the process of "transforming brute demands into assertions of right."[133] The idea of "brute demands" in Markovits's theory corresponds with the private conception of litigation criticized by Fiss. Indeed, Markovits sounds very much like Fiss when he writes that "[t]he legal process does not achieve legitimacy by reaching settlements that satisfy the aims that the participants bring to the process . . ."[134] Legitimacy requires transformation of private ends into assertions of public rights.

Markovits's emphasis on affective engagement and transformative participation seems to suggest that third parties have no business meddling in the lawsuits of others. If participation is a political value, however, there seems to be no reason to limit the range of participants to the parties formally joined by the pleadings. In Markovitsian terms, Peter Thiel

129. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676 (1986).

130. DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE (2008).

131. *Id.* at 175-77.

132. *Id.* at 180.

133. *Id.* at 188-89.

134. *Id.* at 188.

started out with a brute demand. He had a grudge against Gawker for outing him, and wanted revenge. He was fortunate enough, however, to be able to transform that brute demand into an assertion of right to privacy, to establish as a principle of law that there are limits to the exposure and humiliation that individuals must tolerate, even if they are in the public eye. He brought that claim on behalf of Hulk Hogan, not himself, but if participation and the establishment of public rights is the function of the litigation system, it is hard to see why Thiel's participation should not be welcomed, or even encouraged. The same can be said of the Bloomberg Foundation's defense of the Uruguayan anti-tobacco regulations, although that litigation necessarily expands the scope of citizenship and sovereignty to international litigation. The Foundation, like many non-governmental organizations, takes positions on matters of public importance. Those positions may be nothing more than brute demands – compare the usual critique of "special interests" – but they may also be capable of transformation into assertions of rights. Markovits might therefore cautiously approve *interested* litigation financing, while remaining skeptical of participation by third parties who care about nothing more than making a buck. The latter class of disinterested financiers would, in Markovits's terms, simply be seeking to profit from a brute demand, which can be criticized in ethical terms with reference to the function of the litigation system.

V. WHAT INTERESTED AND DISINTERESTED LITIGATION FINANCING REVEALS ABOUT PROFESSIONAL INDEPENDENCE

Section IV provided a functional account of the litigation system, but the Lecture as a whole set out to focus on lawyers' professional independence, and the integrity of the lawyer-client relationship. The question is whether this functional analysis can be extended to explain and justify features of the lawyer-client relationship, including professional independence. Markovits makes an argument along these lines, contending that in order to further the end of the participatory engagement of their clients, lawyers must refrain from judging their clients' causes and allow them to participate in an unmediated way (providing only technical expertise) in the litigation process.[135] In order to do this, a lawyer must possess the virtue of *negative capability*. Negative capability means effacing one's own personal beliefs about the justice of the causes of one's

135. *Id.* at 197.

clients, serving literally as a mouthpiece for clients' positions.[136] A lawyer with this character trait is capable of "being in uncertainties . . . without any irritable reaching after fact & reason" and "remaining content with half knowledge."[137] Negative capability is valuable because it enhances the capacity of clients to participate in the process of transforming "wholesale" political rights into the authoritative establishment of "retail"-level legal entitlements that embody general principles as concrete outcomes.[138] An ethical lawyer is thus literally a mouthpiece, contributing nothing by way of restraint or critique to the positions advanced by the client. This is a kind of fiduciary relationship, but a very unusual and strong one, in which the duty of loyalty requires reducing the distance between its subject and object as close to zero as is practical.[139]

Professional judgment, for Markovits, is therefore the antithesis of ethical lawyering. It must be said that this is a radical view. Markovits presents it as an alternative to the existing American law governing lawyers, which he thinks licenses pervasive lying and cheating by lawyers,[140] but he does not wish to eliminate lying and cheating from litigation. Instead, he offers his ideal of negative capability as a redescription of these vices as the virtue of adversarial advocacy.[141] On this account, there is no room for professional independence. Lawyers are a special type of fiduciary, however. Their duty of loyalty does not require self-effacement or maximal identification with the client's ends. Rather, a lawyer must be able to represent the client with competence and diligence within the bounds of the law. Critics excessive identification of lawyers with their clients like to quote an aphorism from Elihu Root, who said that "[a]bout half the practice of a decent lawyer consists in telling would-be clients they are damned fools and should stop."[142] Lawyers do not need to

136. *Id.* at 93-94.

137. *Id.* at 94 (quoting John Keats, Markovits' inspiration for the value of negative capability).

138. *Id.* at 184-86.

139. George Fletcher argues that this maximalist conception of loyalty—"thou shalt be one with me"—is necessarily nonrational, based on deep emotional commitments. *See* GEORGE P. FLETCHER, LOYALTY 61-62 (1993). Markovits does not attempt to ground the fiduciary duties of lawyers in emotional attachments, but relies instead on considerations of personal integrity. *See* W. Bradley Wendel, *Methodology and Perspective in the Theory of Lawyers' Ethics: A Response to Professors Woolley and Markovits*, 60 U. TORONTO L.J. 1011 (2010).

140. MARKOVITS, *supra* note 131, at 34-35.

141. *Id.* at 162-69. Markovits has almost nothing to say about counseling clients on compliance with the law or transactional representation. This is a flaw in the book as a whole, but not relevant to its application here, since the core of Markovits's conception of ethical lawyering pertains to representing the parties in civil litigation.

142. GERALD W. GAWALT, THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 4 (1984); 1 PHILLIP C. JESSUP, ELIHU ROOT 132-33 (1938). Root also famously stated: "The client

tell their clients that they are fools, but they must be able to assess when their clients' interests lie outside the boundaries of their entitlements under applicable law.[143] In the language of the Restatement of the Law Governing Lawyers, the lawyer's fiduciary duty is to "proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation."[144] The key concepts here are *both* the client's objectives (which Markovits relies upon exclusively) and their lawfulness, the assessment of which requires some independent judgment by lawyers. Lawyers are prohibited by both rules of professional conduct and rules of civil procedure from pursuing a claim that is not sufficiently well grounded in law and fact, including a good faith argument for the extension, modification, or reversal of existing law.[145]

Third-party litigation financing is believed to threaten the lawyer's ability to stay true to the course prescribed by the law governing lawyers. With respect to disinterested financing, the concern would be that the obligation to repay the funder may take precedence in the lawyer's mind over the pursuit of the client's lawful objectives. This concern underlies the prohibition on lawyers splitting their fees with non-lawyers.[146] The fee-splitting rule, along with some states' interpretations of champerty and maintenance prohibitions, has led to a fairly strong norm among commercial litigation financing companies of disclaiming any permission to control the exercise of professional judgment by counsel for the claimant whose case has been funded.[147] Commercial funders therefore rely on case-selection and due-diligence procedures to protect the value of their investment.[148] After the financing transaction closes, the company

never wants to be told he can't do what he wants to do; he wants to be told how to do it, and it is the lawyer's business to tell him how." ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS, 1819-1947, at 667 (1946). Given Root's robber-baron clientele, it is likely that the second maxim is more representative of his understanding of lawyer professionalism. Legal historian Lawrence Friedman contends that lawyers always served first themselves, then their clients, and last "their conception of that diffuse, nebulous thing, the public interest." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 639 (2d ed. 1985).

143. *See* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010).

144. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (2000).

145. *See* ABA MODEL RULES OF PROF'L CONDUCT, Rule 3.1; FED. R. CIV. P. 11(b).

146. ABA MODEL RULES OF PROF'L CONDUCT, Rule 5.4(a). *See also* W. Bradley Wendel, *Making Sense of the Fee-Splitting Rule*, JOTWELL (Feb. 27, 2018), https://legalpro.jotwell.com/making-sense-fee-splitting-rule/ [https://perma.cc/TUL7-LXU2] (reviewing Sebok, *supra* note 32).

147. *See supra* note 32.

148. *See, e.g.*, Bentham IMF's description of the funding process and the information considered in due diligence. *Funding Overview*, BENTHAM IMF, https://www.benthamimf.com/docs/default-source/default-document-library/bentham-funding-overview_20170822.pdf [https://perma.cc/5W89-7FV2].

is a purely passive investor. The claimant's lawyer remains obligated by common-law malpractice and fiduciary duty rules to pursue the client's objectives within the constraints of adequate foundation in law and fact. Litigation financing is without recourse, meaning that if the litigation yields no proceeds in the form of a judgment or settlement, neither the claimant nor the lawyer has any obligation to repay the funder. The client will have whatever motives and incentives it has with respect to recovery. It may be willing to accept an early, low settlement offer, or it may want to go to trial. That decision is for the client alone to make.[149] Underscoring this division of authority, courts and ethics opinions prohibit any indirect effort by lawyers to gain control over settlement decisions, such as providing in the engagement agreement that a contingent fee will convert to hourly if the client does not take the lawyer's advice regarding settlement.[150] The U.S. Supreme Court has said that there is no "ethical dilemma" created by a defendant's offer to settle a lawsuit where one of the conditions is that the lawyer waive any statutory entitlement to fees:

> [A] lawyer is under an ethical obligation to exercise independent professional judgment on behalf of his client; he must not allow his own interests, financial or otherwise, to influence his professional advice. Accordingly, it is argued that a lawyer is required to evaluate a settlement offer on the basis of his client's interest, without considering his own interest in obtaining a fee; upon recommending settlement, he must abide by the client's decision whether or not to accept the offer.[151]

The point simply is that disinterested litigation financing does not provide any additional pressure on the independence of lawyers, over and above that which lawyers are already accustomed to dealing with.

Interested litigation funders, by contrast, may present a different type of risk to professional independence. My own view is that lawyers' ethical commitments are, in most cases, robust enough to safeguard against this risk, but it is nevertheless one which lawyers should take very seriously. The Model Rules regulate the possibility that one who pays the piper may

149. *See* ABA MODEL RULES OF PROF'L CONDUCT, Rule 1.2(a).

150. *See*, *e.g.*, ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT ¶ 31:1107; Morris Law Office, P.C. v. Tatum, 388 F. Supp. 2d 689 (W.D. Va. 2005) (fee agreement unenforceable to the extent it expands the right to compensation beyond *quantum meruit* in the event of discharge); Jones v. Feiger, Collison & Killmer, 903 P.2d 27 (Colo. Ct. App. 1994), as modified on denial of reh'g (Feb. 2, 1995), rev'd, 926 P.2d 1244 (Colo. 1996) (conversion of contingent to hourly fee arrangement impermissible); N.Y. County Bar Ass'n Ethics Op. 736 (2006) (contingent fee agreement may not convert to hourly if client refuses "reasonable" settlement offer); Oregon Bar Ass'n Ethics Op. 2005-54 (similar to NYCLA); Phila. Bar Ass'n Ethics Op. 2001-1 (similar); Conn. Bar Ass'n Comm. on Prof'l Ethics Op. 95-24, at *2 (July 6, 1995) (similar).

151. Evans v. Jeff D., 475 U.S. 717 (1986).

wish to call the tune. Rule 1.8(f) permits third-party payments of a lawyer's fee – as is common when a liability insurer or employer pays for the defense of an insured or employee – but the lawyer is required to ensure that there will be no interference with the lawyer's professional judgment as a result.[152] In the investor-state arbitration matter, for example, lawyers representing Uruguay can accept payment from the Bloomberg Foundation, as long as they are free to do whatever they believe (in consultation with their client, of course) is in the best interests of the state of Uruguay. If the Minister for Public Health, or other government official supervising the law firm's conduct of the litigation, believes that a settlement that left in place only some of the proposed regulations is in the best interests of the government, the lawyers must accept their client's instructions, even if the Bloomberg Foundation believes it would be better for global public health if the Uruguayan government had fought for other anti-smoking regulations. This is why the rumors (and, so far, that is all they are) that Peter Thiel persuaded Hulk Hogan's lawyer to reject a reasonable settlement offer are disturbing. Lawyers must respect their clients' wishes regarding settlement. However, if Thiel, Hogan, and Hogan's lawyer had a three-way conversation in which Thiel managed to persuade Hogan that it was in his (Hogan's) best interests to reject the settlement offer and proceed to trial, there would be no violation of the rule requiring the lawyer to accept the client's decision regarding settlement. One may wonder, of course, how much coercion might be present in that type of interaction, but Hogan's wealth, fame, and many years in the public eye probably equip him to stand up to pressure from the funder of his lawsuit. From the point of view of legal ethics it is, at least in principle, conceivable that a funder and a claimant could agree among themselves that the claimant would take the funder's interests as his own, and instruct the lawyer to pursue them.[153] As discussed above, an arrangement of that sort may raise concerns under

152. ABA MODEL RULES OF PROF'L CONDUCT, Rule 1.8(f).

153. The Restatement's equivalent to Model Rule 1.8(f) explicitly permits a client to delegate to a third party the right to make decisions with respect to the litigation. The Restatement provides:

> A lawyer's professional conduct on behalf of a client may be directed by someone other than the client if:
>
> (a) the direction does not interfere with the lawyer's independence of professional judgment;
>
> (b) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and
>
> (c) the client consents to the direction under the limitations and conditions provided in § 122.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134(2) (2000).

champerty and maintenance doctrines, but would not threaten the independence of the lawyer representing the claimant.

VI. LET THE SUNSHINE IN? MANDATORY DISCLOSURE OF LITIGATION FINANCING?

The primary focus of this Lecture is the attorney-client relationship and the ethical duties owed by the lawyer to the client. Recently, however, a spirited debate has emerged over the issue of disclosure of third-party financing to the opposing party or the court. In January 2017, the U.S. District Court for the Northern District of California adopted, as a provision of its Standing Order, a rule requiring disclosure of third-party litigation financing arrangements, but only in class actions.[154] Later in the same year, the Advisory Committee on Rules of Civil Procedure considered a renewed proposal by the U.S. Chamber of Commerce Institute for Legal Reform, to amend Fed. R. Civ. P. 26(a)(1)(A) to add a new provision requiring mandatory disclosure of "any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise."[155] And in May 2018, three Republican Senators introduced a bill called the Litigation Funding Transparency Act of 2018, which would require disclosure of third-party financing in class actions and multidistrict litigation.[156]

Proponents of mandatory disclosure make a simple and powerful argument: Greater transparency is to be favored in litigation, because it will enable judges to protect the system from abuse. Senator Charles Grassley, one of the sponsors of the Senate bill, uses ominous language to

154. *See* Ben Hancock, *Northern District, First in Nation, Mandates Disclosure of Third-Party Funding in Class Actions*, RECORDER (Jan. 23, 2017), https://www.law.com/therecorder/almID/1202777487488/Northern-District-First-in-Nation-Mandates-Disclosure-of-ThirdParty-Funding-in-Class-Actions/ [https://perma.cc/We67-2YS3].

155. *See* MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES AGENDA BOOK, Washington, D.C., November 7, 2017 [hereinafter "ADVISORY COMMITTEE AGENDA BOOK"], http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-november-2017 [https://perma.cc/4PUU-JQ4M]. Materials on litigation financing are behind Tab 7B, beginning on p. 343. As the Advisory Committee observes, the Chamber initially made a proposal for mandatory disclosure of litigation financing in 2014. *See id.* at 345.

156. Litigation Funding Transparency Act of 2018, S. 2815, 115th Cong. sponsored by Senate Judiciary Committee Chairman Chuck Grassley and Senators Thom Tillis and John Cornyn, available at https://www.judiciary.senate.gov/imo/media/doc/115.xxx%20-%20Litigation%20Funding%20Transparency%20Act%20of%202018.pdf [https://perma.cc/Q9WD-5BYP].

describe litigation financing as existing in the shadows and, hence, dangerous:

> For too long, obscure litigation funding agreements have secretly funneled money into our civil justice system, all for the purpose of profiting off someone else's case. The courts and opposing parties should know whether there are undue pressures and secret agreements at play that could unnecessarily drag out litigation or harm the interest of the claimants themselves. No one's saying that litigation funding should be prohibited at this time. But a healthy dose of transparency is needed to ensure that these profiteers aren't distorting our civil justice system.[157]

Who can be opposed to a "healthy dose of transparency"? Grassley's press release also repeats familiar anti-commodification rhetoric,[158] labeling litigation financing firms as "profiteers" who are seeking to make money "off *someone else's* case." (It is always puzzling to hear Republican lawmakers, who in many other ways are almost religiously committed to the free market and capitalist values, muttering about "profiteering.") However, the primary thrust of the argument, and the bill itself, is disclosure and transparency.

Transparency is not valuable for its own sake, but as a means to some other end. The most obvious end is that which is also served by the discovery rules – namely, obtaining information that will lead to admissible evidence at trial.[159] But the ways the parties finance litigation is peripheral to the claims and defenses they raise. The Federal Rules of Civil Procedure Advisory Committee's notes on the 2017 proposed amendment discuss other goals unrelated to the presentation of evidence at trial. These include:

- Learning whether the plaintiff has the financial wherewithal to decline reasonable settlement offers and unnecessarily

157. COMMITTEE ON THE JUDICIARY, *Grassley, Tillis, Cornyn Introduce Bill to Shine Light on Third Party Litigation Financing Agreements* (May 10, 2018), https://www.judiciary.senate.gov/press/rep/releases/grassley-tillis-cornyn-introduce-bill-to-shine-light-on-third-party-litigation-financing-agreements [http://perma.cc/P2TL-SZX5].

158. *See supra* note 106 (summarizing scholarship on commodification). A spokesperson for the Chamber's Institute for Legal Reform touts the proposal for "pull[ing] back the curtain on third parties 'gambling' on the outcome of class action lawsuits and federal multi-district litigation, a practice that turns our courtrooms into casinos and plaintiffs into little more than poker chips." *See* Amanda Bronstad, *What Are People Saying About Senate's New Lit Funding Bill?*, NAT'L L.J. (May 14, 2018) (quoting Lisa Rickard). Whether the imagery of gambling, casinos, and poker chips is an apt criticism of litigation financing turns on its social meaning which, as one may sometimes forget, is contestable. Now familiar and uncontroversial financing practices such as life insurance and exchange-traded futures contracts for agricultural commodities were once regarded as illicit gambling. *See* Wendel, *supra* note 147, at 681 & n.111.

159. FED. R. CIV. P. 26(a).

prolong litigation,[160] or whether the financial arrangement between the funder and the plaintiff (e.g. the funder's right to return of first dollars from the proceeds of a settlement) will have the effect of deterring settlement.[161]

- Ascertaining the extent to which a funder exercises control over matters such as settlement, disclosure of information protected by the attorney-client privilege or work-product doctrine, and selection of counsel or expert witnesses.[162]
- Uncovering potential attorney conflicts of interest or reasons to doubt the adequacy of representation by class counsel.[163]
- Supporting the ethical obligations of judges to recuse themselves from participating in cases in which they have a financial interest.[164]

In response to these arguments, the Advisory Committee concluded, with admirable candor, that it lacked information sufficient to make the difficult judgments required to determine whether a rule amendment would further the policies underlying the Rules of Civil Procedure.[165]

The Advisory Committee is acting in a legislative capacity, considering general rules to govern a wide range of situations. District judges presiding over litigated matters have the advantage of a well-developed factual record bearing on the goals of disclosure. In two recent cases, the court has concluded either that details of a third-party financing arrangement are irrelevant to any of the goals described above, or that these goals may be achieved by limited, carefully tailored disclosure.

One of those cases, *Miller U.K., Ltd. v. Caterpillar, Inc.*,[166] is the inspiration for the David v. Goliath scenario in Section II.A. The large, much better financed party in that case sought discovery from the smaller party of the transactional documents executed by the small party and the financing firm, as well as any information shared with the financier that would otherwise be privileged or subject to work product protection.[167]

160. ADVISORY COMMITTEE AGENDA BOOK, *supra* note 156, at 348.
161. *Id.* at 349.
162. *Id.* at 348-49, 353.
163. *Id.* at 351-52.
164. *Id.* at 352-53.
165. *Id.* at 346.
166. 17 F. Supp. 3d 711 (N.D. Ill. 2014).
167. The issue of waiver of the attorney-client privilege and work-product protection in the context of litigation funding has been actively litigated. Because the analysis in this section pertains to the value of transparency, it will focus on the first set of arguments in *Miller*, concerning the relevance of the "deal documents," and will not consider the waiver issues presented in the case. *See id.* at 721.

The claimed grounds for producing the transactional documents was to give the court an opportunity to inquire into whether the financing constituted prohibited champerty and maintenance, and thus would provide a ground for voiding the contract, and whether the transaction turned the financing firm into a real party in interest.[168]

As for maintenance, the magistrate judge observed that a third-party financer does not violate the Illinois statutory prohibition on maintenance unless it is an "officious intermeddler" in the litigation.[169] As for what constitutes officious intermeddling, recall that the distinction between interested and disinterested funders turns on whether the funder has a non-financial interest in the outcome of the litigation. Under the approach taken by Florida courts, a disinterested funder is, by definition, not an officious intermeddler.[170] The magistrate judge in *Miller* took a different approach to the definition of officious intermeddling, looking to whether the funder had any role in "wickedly and willfully" stirring up the litigation in the first place or fomenting baseless litigation solely for the purpose of harassment.[171] Under Illinois law, the definition of maintenance therefore turns not so much on the funder's purpose, or whether the funder shares the litigant's ideology or goals in the litigation, but whether the dispute would have occurred anyway, without the institution of someone who is "engaged in exciting or stirring up any suit or quarrel between the people of this state with a view to promote strife or contention."[172] Under either approach to officious intermeddling, however, the further problem with the request for production of the deal documents was that champerty and maintenance are irrelevant to the trade-secrets issues in dispute in the litigation.[173] As the magistrate judge rightly noted, if a court is concerned about stirring up meritless litigation or needlessly prolonging lawsuits, there are other tools available that are better suited to controlling these abuses.[174]

The second argument in *Miller* might be raised in an effort by Gawker to discover the fact that Peter Thiel is the financier behind Hulk Hogan's lawsuit, and thus dismiss the lawsuit for failure to prosecute it in the name of the real party in interest.[175] A real party in interest is defined

168. *Id.* at 719.
169. *Id.* at 725.
170. Kraft v. Mason, 668 So.2d 679 (Fla. Dist. Ct. App. 1996).
171. *Miller*, 17 F. Supp. 3d at 725-26.
172. *Id.* at 726 (quoting People v. Davis, 199 Ill.2d 130, 135, 766 N.E.2d 641, 644 (2002)).
173. *Id.* at 727.
174. *Id.* at 727-28.
175. *See* FED. R. CIV. P. 17(a).

as "the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery."[176] Most commercial litigation funding agreements include terms similar to those in the agreement between the small company and the funder, under which the funder has no legal interest of its own in the underlying litigation, but merely provides funds to a party in exchange for a contingent interest in a share of the proceeds of the litigation. After reviewing the deal documents *in camera*, the magistrate judge in *Miller* found that the funder was not analogous to an insurer or assignee, which has its own interest to protect and (although this was not explicit), a right to control the conduct of the litigation.[177] The logic of the *Miller* decision may suggest that a funder acting as a true puppet master, pulling the strings of a nominal party, could have its own right to protect in the lawsuit. But it is important to keep the focus on the substantive right being asserted in the litigation.[178] A trustee, subrogee, or third-party beneficiary of a contract truly stands in the shoes of the nominal plaintiff's rights. Similarly, the assignee of a patent is a proper party who may sue for infringement.[179] But Thiel has merely a rooting interest in the success of the privacy action against Gawker. The media company never violated *his* privacy rights. Interested litigation funders do not become real parties in interest just because they attempt to exert some control over the conduct of the litigation. They must have their own substantive right at stake in order to be proper parties, and thus for discovery of their identity to be appropriate. *A fortiori* the existence of a passive, disinterested funder is not discoverable for the purpose of making an argument that the action should be dismissed for failure to join a real party in interest.

The other district court order on disclosure is from a forum nearby to the University of Akron. It arises out of the consolidated multidistrict litigation (MDL) proceedings in the Northern District of Ohio in the prescription opioid drug litigation. On May 7, 2018, U.S. District Judge Dan Aaron Polster ordered that attorneys representing plaintiffs in the MDL proceedings disclose to the court the identity of any third-party funders, along with affidavits from both the financier and counsel stating that the funding arrangement does not:

> (1) create any conflict of interest for counsel, (2) undermine counsel's

176. *Miller*, 17 F. Supp. 3d at 728 (quoting Farrell Constr. Co. v. Jefferson Par., La., 896 F.2d 136, 140 (5th Cir. 1990)).

177. *Id.* at 729.

178. *See* JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE § 6.3, at 340 (4th ed. 2005).

179. Waterman v. Mackenzie, 138 U.S. 252 (1891).

> obligation of vigorous advocacy, (3) affect counsel's independent professional judgment, (4) give to the lender any control over litigation strategy or settlement decisions, or (5) affect party control of settlement.[180]

Significantly, the disclosure must be made *in camera* to the court, and the court refused to allow discovery by opposing parties into litigation financing.[181] While this order lacks the thorough reasoning of *Miller*, the Ohio district court is in line with the Illinois district court in *Miller* in its skepticism toward broad-brush arguments that litigation financing threatens the integrity of the judicial system. The Ohio district court instead focuses specifically on the impact on the professional duties of lawyers representing the plaintiffs. Moreover, by ordering *in camera* review of the documents, the court diminishes the incentive the defendants might otherwise have to engage in discovery for the purpose of harassing the plaintiffs and their counsel.

Defendants often assert in a broad, conclusory manner that third-party litigation financing tends to create conflicts of interest or give the funder control over decision-making in the litigation. In the Ohio MDL proceedings, the required *in camera* review ensures that these are not merely speculative allegations. Presumably the parties obtaining funding, and the funders, will use their affidavits to point out features of the financing documents that protect the independence of counsel. The funder may specifically disclaim any right to influence settlement or have a say with respect to other decisions that must be made in the course of the litigation. Beyond these sorts of representations and warranties, the financial arrangement between the parties may be structured to minimize conflicts of interest. For example, funders who are interested in protecting the independence of the lawyers representing plaintiffs will avoid including a provision in the financing agreement that provides an incentive to settle early.[182] A funder may be entitled to notice of a settlement offer, and the plaintiff's may value the advice of an experienced party who can give the terms of the offer a "second look," but the financing documents should not give the funder the right to approve the settlement offer before it is accepted by the plaintiff.[183] This

180. *See* Order Regarding Third-Party Contingent Litigation Financing, In re Nat'l Prescription Opioid Litig., No. 1:17-MD-2804, 2018 WL 2127807 (N.D. Ohio May 7, 2018).

181. *Id.*

182. *See* Steinitz & Field, *supra* note 10, at 737-38.

183. *Id.* at 741. Steinitz and Field argue that, as a normative matter, a funder should be permitted to give value to the plaintiff in exchange for the right to exercise control over the litigation. *See id.* at 738. I am in complete agreement with this view, but also believe (along with the authors) that the

limitation on control by the funder may inhibit interested third-party financing, because a funder will seek to avoid an overt assertion of control over the litigation. An interested third party may be limited to funding claims by parties who share the funder's non-financial goals and are equally committed to realizing them.

One curiosity in the Ohio district court order is the judge's warning that "[t]he Court will deem unenforceable any [third-party contingent litigation] financing agreements that are not compliant with this Order."[184] Federal district courts, like any trial-level tribunal, have the inherent authority to regulate the conduct of the parties and their counsel in connection with pending litigation.[185] For example, a federal court may regulate admission to its own bar and discipline attorneys practicing before it, enforce standards of courtroom decorum, vacate its own judgments upon proof of fraud and, in limited circumstances, award attorneys' fees as a sanction for bad faith, vexatious, or oppressive conduct.[186] However, the court's inherent power should not extend to invalidating contracts between a party and a funder. As the district court in *Miller* noted, court decisions invalidating litigation funding agreements on the grounds of champerty and maintenance arose in connection with an action to enforce the contract.[187] It is doubtful that the Ohio court could make good on its threat to invalidate a financing agreement for non-compliance with the court's order, although it would still be an extremely bad idea for the parties to provoke the judge's wrath.

VII. CONCLUSION

The vast majority of litigation financing is purely profit-motivated; in the terms used in this Lecture, it is disinterested financing. It presents little danger to the fair and efficient functioning of the civil justice system. In fact, disinterested financing promotes the interest in ensuring that lawsuits are decided on their merits, without regard to the parties' financial wherewithal. To the extent disinterested funding does present

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safest course of action for the parties is to ensure that financing documents make clear that the funder has no right to control decision-making, and particularly influence decisions regarding settlement. *See* Sebok & Wendel, *supra* note 32, at 1839-40, 1856-57.

184. Order Regarding Third-Party Contingent Litigation Financing at *1, In re Nat'l Prescription Opioid Litig., No. 1:17-MD-2804, 2018 WL 2127807 (N.D. Ohio May 7, 2018).

185. *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

186. *Id.* at 43-46.

187. Miller, U.K., Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 726 (N.D. Ill. 2014) (citing Rancman v. Interim Settlement Funding Corp., 99 Ohio St.3d 121, 125, 789 N.E.2d 217 (2003)); Johnson v. Wright, 682 N.W.2d 671, 681 (Minn. App. 2004).

risks, they can be mitigated by existing rules of procedure, such as the prohibition on bringing baseless lawsuits; by prohibitions on champerty and maintenance, applied, as in New York and Florida, in a way that respects the purposes of the doctrines; by narrowly tailored disclosure orders, such as the one entered in the Northern District of Ohio MDL proceeding; and by reliance on lawyers' compliance with their ethical obligation to protect their independent judgment. A more substantial risk of interference is presented by interested funding, like Peter Thiel's participation in the Gawker litigation. Interested funding, however, strongly resembles political participation by means such as donating to repeat-player litigants like the NAACP Legal Defense Fund and the Sierra Club. As a form of political participation, interested funding can claim at least *prima facie* protection by the First Amendment. It may be that Thiel's support of Hulk Hogan, and the support by the Bloomberg Foundation of Uruguay's defense of its anti-smoking regulations, ensured that important public values were fully litigated. Opponents of litigation financing, like the U.S. Chamber of Commerce, often themselves are interested funders, seeking to influence the outcome of litigation for ideological reasons. The irony is that interested litigation financing appears to present a greater danger to the litigation system than the disinterested funding that is the usual target of the Chamber's lobbying efforts (which themselves, one should note, also represent an intervention in the litigation system on behalf of large corporate defendants).

As for the professional independence of lawyers, which was the major theme of this Lecture, it once again proves to be a rather protean value. If independence is understood as independence from the interests and demands of clients – enabling the lawyer to serve as an officer of the court, ensuring that only claims with adequate legal and factual grounding are pursued – then litigation financing is a matter of indifference. If the ideal of independence is meant to reinforce the lawyer's fiduciary obligations to the client, and to buck up the lawyer to resist interference by third parties, then litigation financing may be seen as a risk, but a manageable one. The lawyer's fiduciary duties can be quite demanding, and often require the lawyer to act against her own financial interests. But litigation financing is no different in this respect than the risks presented by hourly and contingency fees, both of which create their own characteristic misalignment of interests. Finally, if one takes the radical position of Daniel Markovits with respect to professional independence, the lawyer should see her client's interests as only one view among many to be promoted in a "retail" resolution of competing political principles. An interested funder, like Thiel or the Bloomberg Foundation, has the same political rights as a client, if litigation is seen as serving an essentially public function.

My own view is that professional independence should be understood as an ideal related to the lawyer's dual role as a fiduciary of clients and as an officer of the court. A lawyer's fundamental ethical obligation is to pursue, on behalf of a client, those rights which are allocated to the client by the legal system.[188] Of course, the scope and content of the client's entitlements are frequently contestable or uncertain, and a lawyer representing a client in litigation is permitted to take a partisan stance on behalf of the client. Nothing about third-party litigation financing – either disinterested or interested – necessarily presents a risk to lawyers' compliance with this basic ethical obligation. If Hulk Hogan agreed to have his lawsuit funded by Peter Thiel because of a shared antipathy toward Gawker, his lawyer is not caught between two incompatible positions regarding the conduct of the litigation. And if a small company agrees to share some of the proceeds of a judgment or settlement with a funder, because it believes that is the best way to vindicate its rights against a much larger adversary, there is no threat to the lawyer's ability to act on behalf of that client. While one might imagine a nightmare scenario in which a litigation funder calls the tune, the actual cases that have arisen, including those involving interested funders, show that third-party litigation financing generally furthers the public values underlying the legal system.

188. *See* WENDEL, *supra* note 144.