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Malice Maintenance Is "Runnin' Wild": A Demand for Disclosure of Third-Party Litigation Funding

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A DEMAND FOR DISCLOSURE OF THIRD-PARTY LITIGATION FUNDING

INTRODUCTION

In 2012, Terry Gene Bollea, better known as Hulk Hogan, sued Gawker Media (Gawker) for publishing a ninety-second[1] clip of a sex tape of Bollea and his friend's wife.[2] Bollea won the lawsuit and a jury awarded him a $140 million verdict.[3] Three months later, Gawker filed for bankruptcy[4] and shut its website down entirely.[5] How did one man manage to successfully take down a multi-million dollar company[6] like Gawker? Third-party litigation funding.

Unbeknownst to Gawker or the court, Peter Thiel, a wealthy businessman unrelated to the Bollea lawsuit had been funding the litigation.[7] Although Thiel was not a party to the

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[1] Mathew Ingram, *Here's Why the Gawker Verdict Should Be—and Likely Will Be—Overturned,* FORTUNE (Mar. 22, 2016), http://fortune.com/2016/03/22/gawker-hogan-appeal/ [http://perma.cc/JBC8-Q439] [hereinafter Ingram, *Gawker Verdict Should Be Overturned*].

[2] Matt Drange, *Peter Thiel's War on Gawker: A Timeline,* FORBES (June 21, 2016, 1:22 PM), http://www.forbes.com/sites/mattdrange/2016/06/21/peter-thiels-war-on-gawker-a-timeline/#bd87d917e80f [http://perma.cc/L4YC-QXKV]; *see also* David Margolick, *Nick Denton, Peter Thiel, and the Plot to Murder Gawker*, VANITY FAIR (Nov. 6, 2016, 9:00 AM), http://www.vanityfair.com/news/2016/11/nick-denton-peter-thiel-plot-to-murder-gawker [http://perma.cc/BCH4-SH99].

[3] Alison Frankel, *COLUMN-Billionaire backing of Hogan won't upend $140 mln Gawker verdict: Frankel*, REUTERS (May 25, 2016, 5:55 PM), http://www.reuters.com/article/gawker-lawsuit-frankel-idUSL2N18M26V [http://perma.cc/3WAT-357V].

[4] Mathew Ingram, *Billionaire Who Helped Bankrupt Gawker Says He Would Do it Again,* FORTUNE (Aug. 15, 2016), http://fortune.com/2016/08/15/thiel-essay-gawker/ [http://perma.cc/FFY3-DY7B] [hereinafter Ingram, *Billionaire Who Helped Bankrupt Gawker*].

[5] Drange, *supra* note 2; *see also* Sydney Ember, *Gawker and Hulk Hogan Reach $31 Million Settlement*, N.Y. TIMES (Nov. 2, 2016), http://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html?_r=0 [http://perma.cc/H92H-MC8X].

[6] Alyson Shontell, *Gawker Media Generated $45 Million in Net Revenue Last Year and It's Raising $15 Million Round of Debt*, BUS. INSIDER (Jan. 28, 2015, 7:47 AM), http://www.businessinsider.com/gawker-media-raising-money-2015-1 [http://perma.cc/9TG6-6ZKT] ("the company's 2014 net revenue of $45 million").

[7] Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire Reveals Secret War with Gawker,* N.Y. TIMES (May 25, 2016), http://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html [http://perma.cc/8UPE-7NQ8] [hereinafter Sorkin, *Tech Billionaire Reveals Secret War*] ("Mr. Bollea had a secret benefactor paying about $10 million for the lawsuit: Peter Thiel, a co-founder of PayPal and one of the earliest investors in Facebook.").

lawsuit, he had a past with the media outlet: twelve years earlier, Gawker published an article outing Thiel as gay.[8] Thiel has funded multiple lawsuits against Gawker, never disclosing his involvement during the course of litigation.[9] Thiel's actions are legal—third-party litigation funding (TPLF), for whatever motive or amount, need not be disclosed to the court or opposing parties.[10]

TPLF is when a nonparty, who does not have a direct stake in litigation, funds the lawsuit.[11] There are varying motivations that drive TPLF arrangements, including investors seeking to gain a stake in the potential profit of the lawsuit or public interest groups sponsoring impact litigation.[12] "TPLF is largely unregulated,"[13] yet it is a growing practice[14] that has the potential to cause many negative ethical and legal implications. This note discusses one particular type of TPLF, referred to

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[8] *Id.*; *see also* David Streitfeld & Katie Benner, *In Silicon Valley, Gossip, Anger and Revenge,* N.Y. TIMES (May 25, 2016), http://www.nytimes.com/2016/05/26/technology/gossip-in-silicon-valley-and-the-digital-age.html [http://perma.cc/WN3P-DYNF] ("[T]he tech gossip blog said in late 2007 that Peter Thiel, who co-founded PayPal and was an early and significant investor in Facebook, was gay.").

[9] Sorkin, *Tech Billionaire Reveals Secret War*, *supra* note 7; *see also* Ryan Mac & Matt Drange, *Behind Peter Thiel's Plan to Destroy Gawke*r, FORBES (June 7, 2016, 2:51 PM), http://www.forbes.com/sites/ryanmac/2016/06/07/behind-peter-thiel-plan-to-destroy-gawker/#44abaff05848 [http://perma.cc/R9N3-EH5F] [hereinafter Ryan Mac & Matt Drange, *Behind Peter Thiel's Plan*] ("Thiel is the clandestine financier of numerous lawsuits targeting Gawker Media.").

[10] *See* Lisa A. Rickard & Mark Behrens, *OPINION: 3rd-Party Litigation Funding Needs Transparency*, LAW360 (Oct. 17, 2016, 1:46 PM), http://www.law360.com/articles/852142/opinion-3rd-party-litigation-funding-needs-transparency [http://perma.cc/4BQ9-EV69].

[11] *See* Osprey, Inc. v. Cabana Ltd. P'ship., 532 S.E.2d 269, 273 (S.C. 2000) (Third parties may fund lawsuits to "purchase an interest in the outcome of a case in which he [or she] has no interest otherwise" or "stir[ ] up quarrels and suits between other individuals".) (citing 14 C.J.S. *Champerty and Maintenance* § 17 and § 2)); *see also* Lawrence S. Schaner & Thomas G. Appleman, *The Rise of 3rd-Party Litigation Funding*, LAW360 (Jan. 21, 2011, 2:06 PM), https://www.law360.com/articles/218954/the-rise-of-3rd-party-litigation-funding [https://perma.cc/RFL2-PX38].

[12] *See, e.g.*, Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1269–70 (2011) (Steinitz provides a series of hypothetical scenarios "made possible by . . . third-party litigation funding" whereby funders may be motived by profit, personal gain, or redress for the claimants.).

[13] *Third Party Litigation Funding (TPLF)*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM (Oct. 2009), http://www.instituteforlegalreform.com/issues/third-party-litigation-funding [http://perma.cc/LW77-MX5Y]; *see also* BEISNER ET AL., SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES 4 (2009), http://www.instituteforlegalreform.com/uploads/sites/1/thirdpartylitigationfinancing.pdf [https://perma.cc/9APU-A2ZB] ("Today, third-party funding is governed in the United States by a patchwork of relatively weak laws, cases, rules, and regulations—and they are only in force in a handful of states. There does not appear to be a nationwide consensus, or even a nationwide conversation, on whether the doctrines of maintenance and champerty should be abolished, whether litigation funding should be allowed, or, if it is, how it should be regulated.").

[14] *See* Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 713 (2014).

throughout this note as "malice maintenance,"[15] whereby a third party intermeddles in a lawsuit by assisting one party "out of pure spite or malevolence towards the target of the [lawsuit]."[16] This mode of TPLF is motivated by a personal interest in the lawsuit rather than monetary gain.[17] Malice maintenance amplifies the ethical and legal implications associated with TPLF. The third-party financer is in a unique position to create a conflict of interest between litigants and their attorneys[18] by influencing the legal strategy employed and therefore limiting or completely eliminating the plaintiff's control over both the development and outcome of the lawsuit.[19] That level of control, coupled with the funder's malicious personal agenda undermines the justice system.[20] Although there are rules to prevent third parties from influencing attorneys,[21] no general rule currently exists that requires transparency in these arrangements.[22] Courts, as well as targets of malice maintenance, are therefore most likely unaware that a third-party investor is involved in the lawsuit at all.[23] Without a complete picture of what or whom they are up against and the potential ulterior motives behind the lawsuit, targets of malice maintenance are ill equipped to defend their position or adjust their legal strategy accordingly.[24] Most importantly, courts are ill equipped to address issues stemming

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[15] This term was coined by Anthony J. Sebok, Professor of Law at Benjamin N. Cardozo School of Law. *See* Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 103 (2011).

[16] *Id.*

[17] *Id.*

[18] *See* BEISNER ET AL., *supra* note 13, at 7 ("[L]itigation-financing arrangements undercut the plaintiff's control over his or her own claim because investors inherently desire to protect their investment and will therefore seek to exert control over strategic decisions in the lawsuit.").

[19] Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 863–64 (2015) ("[D]epending on the structure of the funding arrangement, the funder may legally control or influence aspects of the legal representation or may completely take over the case and step into the shoes of the original party.").

[20] *See Third Party Litigation Funding (TPLF)*, *supra* note 13.

[21] *See* MODEL RULES OF PROF'L CONDUCT r. 1.8(f) (AM. BAR ASS'N 1983) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: . . . [*inter alia*] (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship . . . .").

[22] Shannon, *supra* note 19, at 903 ("Currently, litigation funding takes place largely in secret, and there is no general rule that the parties or their legal counsel must disclose identities of funders."); *see also* Rickard & Behrens, *supra* note 10.

[23] *See* Rickard & Behrens, *supra* note 10 ("Courts trying to settle cases may be unaware that their efforts may be complicated by an entity that is not even in the room.").

[24] *See id.* ("[T]he funder's presence can unreasonably prolong cases and frustrate settlements.").

from third-party funding when the existence of the third-party funder is unknown.[25]

The most troubling aspect of malice maintenance is intuitive—it gives wealthy individuals the power to instigate litigation based on their own whims.[26] Malicious maintainers have no interest in the lawsuits they fund other than their own personal agenda.[27] They may choose to bring a lawsuit to slow progress of competition within their industry, or they may simply wish to stir up strife against certain individuals, businesses, or corporations with whom they disapprove or disagree. In either scenario, the lawsuits need not be successful for the third-party funders to accomplish their intended objective.[28] By prolonging litigation or funding multiple suits at one time or over a period of time, there is still the potential to tarnish the reputation of the target or cause the target to expend excessive amounts of money. Essentially, wealthy individuals have free range to finance litigation, in secret and driven by personal ulterior motives, without any legal consequences.[29]

Due to a complete lack of transparency under the current law, wealthy individuals are empowered to instigate and influence litigation to advance their personal interests without the risk of consequences.[30] This note proposes amending Rule 26(a)(1) of the Federal Rules of Civil Procedure to require initial disclosure of third-party funders of a lawsuit to both the court and opposing parties.[31] Part I recounts the ancient legal history of maintenance under British common law and discusses the evolution of maintenance in the United States. Part II examines *Bollea v. Gawker*, a recent and controversial example of secret third-party funding of litigation. Part III explores the policy considerations related specifically to malice maintenance. Part IV provides a framework for regulating TPLF that will address

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[25] *Id.* ("Courts trying to settle cases may be unaware that their efforts may be complicated by an entity that is not even in the room.").

[26] *See* Sebok, *supra* note 15, at 102.

[27] *See id.*

[28] Consider the case of *Bollea v. Gawker Media.* It was not necessary for the plaintiff of the lawsuit, Terry Bollea, to win the lawsuit in order to accomplish his funder's objectives. *See infra* Part II.

[29] *See generally* BURFORD, ETHICS ARTICLE NO. 3: DISCLOSURE OF LITIGATION FUNDING FINANCING NOT REQUIRED BY COURT RULES, http://www.burfordcapital.com/wp-content/uploads/2015/01/Ethics-Article-3-Disclosure-Not-Required.pdf [http://perma.cc/M6FG-JUKQ].

[30] *See* Rickard & Behrens, *supra* note 10.

[31] *See* U.S. CHAMBER INST. FOR LEGAL REFORM, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION 2 (2012) http://www.instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf [http://perma.cc/HU76-LENJ].

some of the potential negative effects of malice maintenance and promote transparency.

I. LEGAL HISTORY OF MAINTENANCE

An understanding of the British common law doctrine prohibiting maintenance is critical in evaluating the dangers of malice maintenance. The United States' treatment of maintenance has evolved over time, with a trend toward limiting prohibitions in order to guarantee equal access to the justice system. The underlying ethical concerns related to the practice, however, remain today. Where third-party funders are known to the court—whether public interest groups, individual attorneys, or investment companies—courts are careful to note *who* is funding the lawsuit and *why*.

A. British Common Law Doctrine

British common law prohibited three types of third-party litigation funding: barratry, champerty, and maintenance.[32] "Barratry" is defined as "frequently exciting and stirring up quarrels and suits between other individuals," while "champerty" is defined as funding a lawsuit to get a portion of the proceeds.[33] Since "maintenance" is defined as "an officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend [the suit],"[34] both champerty and barratry are considered forms of maintenance.[35]

The prohibition on maintenance originated during the feudal era[36] due to the common practice of wealthy feudal lords funding the legal disputes of underprivileged members of society against a third party who was often a "personal or political enemy" of the lord.[37] In return for funding, the lords acquired a portion of the proceeds if the lawsuit was successful.[38] These arrangements allowed powerful individuals to take advantage of

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[32] Osprey v. Cabana Ltd. P'shp*,* 532 S.E.2d 269, 272–73 (S.C. 2000).

[33] *Id.* at 273.

[34] *Id.* (quoting 14 C.J.S. *Champerty and Maintenance* § 2(b); 14 AM. JUR. 2D *Champerty and Maintenance* § 2.).

[35] *Id.*

[36] *Id.* at 274; *see also* Max Radin, *Maintenance by Champerty,* CAL. L. REV. 48, 64 (1935) ("But the maintenance is that against which the Star Chamber Act of 1487 and the Statute of Liveries of 1504 were specifically directed, *i.e.,* the support given the feudal magnate to his retainers in all their suits, without any reference to their justification." (footnote omitted)).

[37] Del Webb Cmtys., Inc. v. Partington, 2:08-cv-00571-RCJ-GWF, 2009 U.S. Dist. LEXIS 85616, *1, *10 (D. Nev. Sept. 17, 2009).

[38] *Id.*

the court system by using unsavory tactics such as "the employment of bullies to prevent an opponent from appearing in court at a critical moment,"[39] to influence the outcome of lawsuits with the goal of maximizing their own personal and political interests.[40] Maintenance essentially became a "means by which powerful men aggrandized their estates and the background was unquestionably that of private war."[41] In response to this practice, England codified a law criminalizing maintenance[42] in order to prevent the "stirring up" of frivolous or vexatious litigation.[43]

B. Maintenance in the United States

Many of the states that currently prohibit maintenance adopted the British common law prohibition over a century ago.[44] Throughout the twentieth century, however, the attitude towards litigation shifted, as did American courts' treatment of maintenance.[45] Litigation emerged as a tool "for changing the *status quo,* for challenging the powerful, for rearranging the economic and political landscape for . . . achieving social change."[46] Part of the shift in thinking can be attributed to the emergence of numerous state agencies, the Legal Aid Society, and civil rights groups that provided assistance to indigent clients.[47] As the principles underlying public interest litigation rose in favor, limitations on maintenance began to fall away.[48]

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[39] *Osprey*, 340 S.C. at 273–74.

[40] *See id.*

[41] Radin, *supra* note 36, at 64.

[42] *Id.* at 65.

[43] Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation,* 58 U.C.L.A. L. REV. 571, 575 (2010) (quoting 14 AM. JUR. 2D *Champerty, Maintenance, and Barratry* § 1 (2009)).

[44] Christy B. Bushnell, *Champerty is Still No Excuse in Texas: Why Texas Courts (and the Legislature) Should Uphold Litigation Funding Agreements*, VII HOUS. BUS. & TAX L.J. 358, 369 (2007) ("Many of the states that absolutely prohibit champertous agreements have followed the English common law prohibition for over a century . . . ."); *see also* Lyon, *supra* note 43, at 581 ("Maintenance and champerty found their way into American jurisprudence via common law . . . .").

[45] Lyon, *supra* note 43, at 587. In 1935, Max Radin, an American legal scholar that published a well-known study of maintenance, claimed that the common law doctrines did not align with the American public's perception about litigation and were "largely dead" in practice. *See generally* Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48 (1935).

[46] Lyon, *supra* note 43, at 587 (alteration in original) (quoting Stephen C. Yeazell, Brown, *The Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 2000–01 (2004)).

[47] *Id.* at 582. In 1929, Judge Cardozo distinguished between "maintenance inspired by charity or benevolence" and maintenance inspired by "spite or envy or the promise or hope of gain." *In re* Gilman 167 N.E. 437, 439 (N.Y. 1929). He acknowledged the importance of maintenance to assist indigent individuals but warned against the dangers of "oppressive intermeddling of wealth or officialdom for publicity or profit." *Id.* at 440.

[48] Lyon, *supra* note 43, at 582.

Prohibitions on maintenance remained intact, however, as related to restraints on an attorney's right to stir up lawsuits through solicitation of clients.[49] Until the 1960s, antimaintenance statutes prohibited lawyers and legal organizations from funding and maintaining lawsuits.[50] The landmark Supreme Court case *NAACP v. Button* struck down a Virginia antimaintenance statute and caused a major shift in the United States' position on TPFL.[51] In *Button*, the Supreme Court held that the First Amendment protected the National Association for the Advancement of Colored People (NAACP) lawyers' solicitation of clients to fund and maintain civil rights claims.[52] The Court determined that Virginia's interest in prohibiting TPLF could not overcome the constitutional right of the NAACP lawyers to engage in expressive and associational activities, both through civil rights litigation as well as advocacy work.[53]

Justice Brennan, however, was careful to clarify the type of litigation the Court was concerned about protecting under the First Amendment: "Resort[ing] to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain."[54] Justice Brennan was concerned with ensuring indigent litigants' equal access to the justice system, finding that public-interest-motivated collective action is necessary to achieve that objective.[55]

Fifteen years after *Button*, in *In Re Primus*, the Court extended its holding to protect individual attorneys acting on behalf of an organization as long as their actions are driven by political expression.[56] On the same day the Court decided *In Re*

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[49] *Id.*

[50] *Id.*

[51] *See* Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, at 439 (1963) ("However valid may be Virginia's interest in regulating the traditionally illegal practices of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed by the record."). The NAACP brought suit to invalidate a Virginia antimaintenance statute that prohibited "the improper solicitation of any legal or professional business." *Id.* at 419.

[52] *Id.* at 439–45.

[53] *Id.*

[54] *Id.* at 443.

[55] *Id.*; *see In re* Primus, 436 U.S. 412, 426 (1978).

[56] In *In Re Primus*, an attorney working for the American Civil Liberties Union (ACLU) sent a letter to a woman who had been sterilized due to long-term medical treatment, and offered to take on all costs of a suit against the doctor who performed the procedure. Primus was accused of engaging in unlawful solicitation. *In re Primus*, 436 U.S. at 412. The Court reasoned that the record reflected no "undue influence, overreaching, misrepresentation, or invasion of privacy" or "a serious likelihood of conflict of interest." *Id.* at 413, 435–36. Focusing on the ACLU's clear political objective to only enter into cases where "substantial civil liberty questions are involved," the Court

Primus, the Court also decided *Ohralik v. Ohio State Bar Ass'n*, finding Ohio's indefinite suspension of an attorney reasonable because the attorney's solicitation of litigants was largely motivated by monetary gain.[57] The Court clarified that outside of political expression or an exercise of associational freedom, an attorney's in-person solicitation to instigate a lawsuit for financial gain is not entitled to First Amendment protection.[58] The Court's holdings in *In Re Primus* and *Ohralik*, suggest that the purpose for instigating and maintaining the lawsuit—whether for personal gain or the vindication of the rights of an actual party to the lawsuit—is still of concern to the Court.[59]

C. Current Status of the Law

Though the First Amendment protects certain solicitation and lawsuit funding, the treatment of maintenance still varies across the United States.[60] Some states have upheld the common law doctrines of maintenance while others have limited their scope and application or abolished the doctrines outright.[61] Currently, twenty-eight out of fifty-one jurisdictions have abolished total prohibition of champerty.[62] Despite varying interpretations,[63]

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found that Primus's actions fell within the scope of the protection of the First Amendment. *Id.* at 427 (quoting *Button*, 371 U.S. at 440 n.19).

[57] *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 449 (1978). Ohralik, a member of the Ohio Bar, received information about an automobile accident of a young woman and visited her in the hospital to offer his services in exchange for one-third of her recovery from the lawsuit. *Id.* at 449–50.

[58] *See id.* at 467–68.

[59] *See In re Primus*, 436 U.S. at 438–39; *see also Ohralik*, 436 U.S. at 468.

[60] Jaqueline Sheridan, *Champerty and Maintenance*, DINSMORE (Jan. 22, 2016), http://www.dinsmore.com/publications/champerty-and-maintenance-in-the-modern-era/ [http://perma.cc/RU2Z-5FYH].

[61] *Id.*

[62] Sebok, *supra* note 15, at 98–99.

[63] The American Bar Association reports that a number of other states, including "Arizona, California, Connecticut, New Jersey, New Hampshire, New Mexico and Texas" never adopted common law champerty prohibitions. ETHICS COMM. OF THE COM. AND FED. LITIG. SECTION OF THE N.Y. S. BAR ASS'N, REPORT ON THE ETHICAL IMPLICATION OF THIRD-PARTY LITIGATION FUNDING 12 (2013), https://www.benthamimf.com/docs/default-source/default-document-library/nys-bar—-opinion-of-ethical-implications-04-16-13.pdf?sfvrsn=2 [http://perma.cc/C32Y-FZ4L]. Other states such as Massachusetts and Florida have explicitly abolished the common law prohibitions on champerty they had previously adopted from England. *Id.* at 12. In *Kraft v. Mason*, the Florida appellate court strayed away from the more stringent original common law champerty, and held that "officious intermeddling is a necessary element of champerty." Kraft v. Mason, 668 So. 2d. 679, 682 (4th Dist. Fla. Ct. App. 1996). In 1997, the Massachusetts Supreme Court struck down champerty laws finding that these doctrines are no longer necessary "to protect against the evils once feared." Saladini v. Righellis, 687 N.E.2d. 1224, 1226 (Mass. 1997).

however, "[t]he consistent trend across the country is toward limiting, not expanding" prohibitions.[64]

Most recently, champerty has been analyzed by the courts in the context of third-party litigation funding agreements. Modern maintenance has evolved from a tool for feudal lords[65] to a complex business transaction between litigants and companies created solely to invest in lawsuits.[66] *Saladini v. Righellis* is one of the earliest cases to consider the validity of third-party litigation lending agreements.[67] In *Saladini*, in exchange for a certain percentage of the settlement funds that remained after paying attorney's fees, a third-party funder lent money to the litigant to pursue a lawsuit.[68] When the litigant eventually settled his dispute, he did not inform the third-party funder or provide any portion of the money owed.[69] The third-party funder sued for enforcement of the contract and the trial court decided the contract was champertous and thus unenforceable.[70] On appeal, however, the Supreme Judicial Court of Massachusetts reversed the lower court's holding and abolished the prohibition on champerty in Massachusetts.[71] The court stated that Massachusetts has "long abandoned the view that litigation is suspect, and [has] recognized that agreements to purchase an interest in an action may actually foster resolution of a dispute."[72] The court reasoned that abolishing champerty is no longer "needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of a superior bargaining position," finding that there are other tools that "more effectively accomplish these ends."[73]

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[64] Del Webb Cmtys. Inc. v. Partington, 652 F.3d 1145, 1156 (9th Cir. 2011).

[65] Del Webb Cmtys, Inc. v. Partington, No. 2:08-cv-00571-RCJ-GWF, 2009 U.S. Dist. LEXIS 85616, at *10 (D. Nev. Sept. 18, 2009).

[66] Alexis Keenan Weed, *Do Investing and Justice Mix? Companies that Fund Lawsuits are Hailed—and Blasted*, CNN MONEY (Apr. 20, 2016, 11:58 AM), http://money.cnn.com/2016/04/15/investing/litigation-finance/index.html [http://perma.cc/74DP-BV4W].

[67] Lyon, *supra* note 43, at 584.

[68] *Saladini*, 687 N.E.2d. at 1224–25.

[69] *Id.* at 1225.

[70] *Id.*

[71] *Id.* at 1226–28.

[72] *Id.* at 1226.

[73] *Id.* at 1226–27. The court elaborated on what was meant by tools:

> Our rule governing contingent fees between attorneys and clients is based on the principle that an attorney's fee must be reasonable. We also recognize a public policy against the recovery of excessive fees. Additional devices include [Massachusetts state laws that] provid[e] sanctions for misconduct, and regulat[e] the bringing of frivolous lawsuits, and the doctrines of

Six years after *Saladini*, the Supreme Court of Ohio considered the same issue of litigation funding with the opposite result, finding the litigation funding contract at issue void as maintenance and champerty.[74] The court reasoned that "a lawsuit is not an investment vehicle,"[75] concluding that these types of agreements "give[] a nonparty an impermissible interest in a suit, impede[] the settlement of an underlying case, and promote[] speculation in lawsuits."[76] Two years later the Supreme Court of Nassau County, New York upheld a similar litigation-funding agreement,[77] but noted that they "tend[] to agree with the policy considerations adopted by [the Ohio Supreme Court]."[78] The Nassau County Court recognized that "part of the policy behind [prohibitions on] Champerty is to prevent non-interested third parties from taking part in litigation" in order to "prevent[] strife, discord, and harassment."[79] The court further acknowledged the potential for a funder to take total control of the lawsuit, although they determined that was not the case in the arrangement at issue.[80]

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unconscionability, duress, and good faith, establish standards of fair dealing between opposing parties.

Id. at 1227 (internal citations omitted).

[74] *See* Rancman v. Interim Settlement Funding Corp. 789 N.E.2d 217, 221 (Ohio 2003). In *Rancman,* the plaintiff (Rancman) was seriously injured in a car accident and filed suit against her insurance company. *Id.* at 218. Rancman did not want to wait for her case to settle before receiving any of the proceeds, and decided to contact the defendant, Interim Settlement Funding Corp (Interim), seeking an advance payment. *Id.* Rancman received $6,000 in exchange for a certain rate of return from her future settlement funds contingent on the length of time until resolution of her suit. *Id.* at 218–19. After settling her lawsuit for $100,000 within twelve months, Rancman refused to make her payments and filed suit against Interim seeking rescission of the contract. *Id.* at 219.

[75] *Id.* at 221. In the opinion, the court noted that "[t]he ancient practices of champerty and maintenance have been vilified in Ohio since the early years of our statehood," and are considered "offense[s] against public justice, as [they] keep[] alive strife and contention, and pervert[] the remedial practice of the law into an engine of oppression." *Id.* at 220 (quoting Key v. Vattier, 1 Ohio 132, 136 (1823)).

[76] *Id.* at 221.

[77] Echeverria v. Estate of Lindner, No. 018666/2002, 2005 WL 1083704, *1,*5 (N.Y. Sup. Ct. 2005). In *Echeverria*, the plaintiff was injured in a scaffolding accident and entered into an agreement with LawCash, whereby the plaintiff would receive $25,000 in exchange for the repayment of this principal amount at an interest rate of 3.85 percent compounded monthly from any judgment rendered. *Id.* at *1–3. The court held that LawCash's loan or investment was not champertous because its primary objective was not based on a claim to a portion of the judgment, but "simply to profit from its loan or investment." *Id.* at *5. The court ultimately decided that, "Champerty law was not written to deal with the situation that has developed from this modern form of business which advances plaintiffs' funding for their lawsuit in exchange for a portion of the judgment." *Id.* at *6.

[78] *Id.* at *7.

[79] *Id.*

[80] *Id.* ("While LawCash has not had any control over the litigation, part of the policy behind Champerty is to prevent non-interested third parties from taking part in

In response to the *Rancman* decision, the Ohio legislature adopted a bill that regulated "non-recourse civil litigation advances," which effectively overturned the court's decision and sanctioned the use of litigation-funding companies.[81] After passing this bill, Ohio became the only state apart from Maine to pass legislation to regulate this practice.[82] Some of the regulations in the bill included requiring certain disclosures in the contracts, such as the dollar amount to be advanced to the consumer and "written acknowledgment by the attorney representing the consumer in the civil action or claim."[83] Most importantly, the bill prohibits legal funding companies from having any right to influence legal decisions.[84]

Only two states currently follow the early English common law approach, and prohibit *any* form of maintenance: Mississippi and Illinois.[85] Discussion about the legality of maintenance and champerty, however, are still relevant in the court system today.[86] In 2016, the Superior Court of Pennsylvania found a litigation funding arrangement as champertous.[87] There, a third-party litigation funding company loaned money to fund a lawsuit whereby the attorney would be paid via expected counsel's fees.[88] The court recognized that "the common law doctrine of champerty remains a viable defense in Pennsylvania,"[89] and found that the attorney's agreement to pay Litigation Fund Investors out of his fees was invalid as champertous because the third-party funders

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litigation . . . While LawCash is not bringing suit or action based on its claim to the judgement, there is potential for this to become a problem in the future.").

[81] Lyon, *supra* note 43, at 586 (citing Mark M. Bello, *Lawsuit Funding—New Legislation in Ohio,* OHIO TRIAL, 28, 29 (2009), https://www.lawsuitfinancial.com/files/ohio.pdf) [http://perma.cc/946P-QZY3]).

[82] Bello, *supra* note 81, at 29.

[83] *Id.*

[84] *Id.*

[85] 720 ILL. COMP. STAT. ANN 5/32–12 (LexisNexis 2012) ("If a person officiously intermeddles in an action that in no way belongs to or concerns that person, by maintaining or assisting either party, with money or otherwise, to prosecute or defend the action, with a view to promote litigation, he or she is guilty of maintenance and upon conviction shall be fined and punished as in cases of common barratry. It is not maintenance for a person to maintain the action of his or her relative or servant, or a poor person out of charity."); MISS. CODE ANN. § 97–9–11 (2013) ("It shall be unlawful for any person . . . either before or after proceedings commenced: (a) to promise, give, or offer, or to conspire or agree to promise, give, or offer, (b) to receive or accept, or to agree or conspire to receive or accept, (c) to solicit, request, or donate, any money . . . or any other thing of value, or any other assistance as an inducement to any person to commence or to prosecute further, or for the purpose of assisting such person to commence or prosecute further, any proceeding in any court or before any administrative board or other agency.").

[86] *See* WFIC, LLC v. Donald LaBarre, Jr., 148 A.3d 812, 818 (Pa. Super. Ct. 2016) ("[W]e conclude that the 2008 Fee Agreement is champertous and, therefore, invalid.").

[87] *Id.* at 819.

[88] *Id.* at 814–16.

[89] *Id.* at 818 (quoting Frank v. TeWinkle, 45 A.3d 434, 438 (Pa. Super. Ct. 2012)).

had no legitimate interest in the lawsuit, but loaned their money solely to invest it in the proceeds of the litigation.[90] Although common law prohibitions of maintenance and champerty have mostly been phased out of state law, the underlying ethical concerns with third-party funding still remain.[91]

II. *BOLLEA V. GAWKER*—SOMETIMES THE CAMERA ISN'T THE ONLY THING HIDDEN

This Part begins with a brief background of *Bollea v. Gawker* and an introduction of the third-party funder's role in the lawsuit. An analysis of this case as a modern example of malice maintenance follows.

A. Brief Background of Bollea v. Gawker

In a highly-publicized lawsuit, Bollea sued Gawker Media for publishing a ninety-second clip of his sex tape on its website.[92] Gawker published footage of Bollea with his friend's wife on October 4, 2012; the video subsequently gained over seven million views.[93] The following day, Bollea's personal attorney, David Houston, demanded that Gawker remove the tape from its website.[94] By October 5, 2012, Bollea had obtained a new lawyer, Charles Harder, who filed a claim against Gawker[95] in federal court seeking an injunction, which was dismissed.[96] Shifting his legal strategy, Bollea next filed suit in state court[97] which proved fruitful for him: a six-person Florida jury awarded him a $140 million verdict.[98] Three months after the verdict, Gawker filed for bankruptcy[99] and the case ultimately

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[90] *Id.* at 819.

[91] *See supra* Sections I.A–B.

[92] Ingram, *Gawker Verdict Should Be Overturned*, *supra* note 1.

[93] Drange, *supra* note 2.

[94] *Id.*

[95] *Id.* ("Hulk Hogan's new lawyer, Charles Harder, files a lawsuit against Gawker in a Florida court.").

[96] *See* Bollea v. Gawker Media, LLC, 913 F. Supp. 2d 1325, 1331 (M.D. Fla. 2012) (The district court, however, denied his preliminary injunction on the grounds that Bollea failed to introduce any "evidence establishing that he would suffer irreparable harm in the copyright sense absent preliminary injunctive relief.").

[97] *See* Nathan McAlone, *Everything you need to know about the Hulk Hogan sex-tape lawsuit that could cost Gawker over $155 million*, BUS. INSIDER (Mar. 20, 2016, 8:49 AM), http://www.businessinsider.com/hulk-hogan-versus-gawker-lawsuit-explained-2016-3 [http://perma.cc/TN2M-FDM6] (Unsuccessful in obtaining a preliminary injunction in federal court, Bollea then filed suit against Gawker Media in Florida state court.).

[98] *See* Bollea v. Gawker Media, No. 12012447 CI-011, 2016 Fla. Cir. LEXIS 4710, *1, *1–2 (Fla. Pinellas County Ct. 2016); *see also* Frankel, *supra* note 3 ("Hogan . . . won a $140 million verdict in March against the online news gossip company Gawker Media.").

[99] Ingram, *Billionaire Who Helped Bankrupt Gawker*, *supra* note 4.

settled for $31 million.[100] Univision Communications bought Gawker which included several websites for $135 million[101] and announced the decision to specifically shut down the Gawker website that published Bollea's sex-tape indefinitely.[102] Nick Denton, the founder of Gawker, and a named defendant in the lawsuit, personally filed for bankruptcy in August of 2016.[103]

B. Bollea's Secret Weapon

Unbeknownst to Gawker during the trial, Peter Thiel, a third party unrelated to the lawsuit, had been funding Bollea's lawsuit in secret.[104] Although Thiel was not a party to the lawsuit, he did have a personal connection to Gawker—twelve years earlier, Gawker published an article that outed Thiel as gay.[105] In a 2009 interview with PE Hub Network, Thiel expressed his disdain for Gawker, stating that the news outlet has "the psychology of a terrorist, where it's purely destructive" and comparing it to "the Silicon Valley equivalent of Al Qaeda."[106] Seven years later, Thiel explained his involvement with Bollea's lawsuit to the *New York Times*, stating that his actions were "less about revenge and more about specific deterrence."[107] Through funding litigation against Gawker, Thiel sought to deter Gawker from publishing articles that, in Thiel's opinion, have "no connection with the public interest[]" and are "painful and paralyzing for people who [are] targeted."[108]

Despite Thiel's proclaimed altruistic justifications for his actions, this case has gained a great deal of media attention and has aroused questions about the role of "big money" in the court

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[100] Ember, *supra* note 5.

[101] Univision kept running several websites under the ambit of Gawker Media including Gizmodo, Jezebel, and Deadspin. Univision executives, however, did decide to remove at least six articles from those websites due to pending litigation. *See* Nicole Hensley, *Univision Deletes Seven Gawker Media Stories on Jezebel, Deadspin and Gizmodo due to active litigation*, N.Y. DAILY NEWS (Sept. 11, 2016, 2:29 AM), http://www.nydailynews.com/news/national/univision-deletes-gawker-stories-due-active-litigation-article-1.2787121 [http://perma.cc/K3KG-YS3Z]; *see also* Ember, *supra* note 5.

[102] Drange, *supra* note 2.

[103] *Id.*

[104] Sorkin, *Tech Billionaire Reveals Secret War*, *supra* note 7 ("Mr. Bollea had a secret benefactor paying about $10 million for the lawsuit: Peter Thiel, a co-founder of PayPal and one of the earliest investors in Facebook.").

[105] *Id.*; *see also* Streitfeld & Benner, *supra* note 8 ("[T]he tech gossip blog said in late 2007 that Peter Thiel, who co-founded PayPal and was an early and significant investor in Facebook, was gay.").

[106] Connie Loizos, *Peter Thiel on Valleywag: It's the "Silicon Valley Equivalent of Al Queda,"* PE HUB (May 18, 2009), https://www.pehub.com/2009/05/peter-thiel-on-valleywag-its-the-silicon-valley-equivalent-of-al-qaeda/ [http://perma.cc/AU77-ZTFA].

[107] Sorkin, *Tech Billionaire Reveals Secret War*, *supra* note 7.

[108] *Id.*

system and the emergence of TPLF.[109] Thiel spent roughly $10 million of his own funds to pay Bollea's litigation expenses.[110] During the trial, there was speculation in the legal community that the lawsuit may have been funded by someone other than Bollea due to several suspicious legal decisions made during the course of the lawsuit.[111] Legal experts found Bollea's legal strategy to prevent an insurance payout unusual because it is typically considered intuitive for a plaintiff to favor an insurance company payout because it creates the potential for a larger settlement.[112]

C. Modern-Day Malice Maintenance

It is undisputed that Thiel used his wealthy status to interfere with a lawsuit to which he was not a party—the precise definition of maintenance.[113] Thiel was not motivated by a financial interest—he stated that he did not expect to make money from the *Bollea* suit and that he did not consider his decision to fund the lawsuit a "business venture."[114] In addition, Thiel openly admits that his own negative experience with Gawker influenced his decision to donate millions of dollars to fund litigation against the media outlet.[115] He considers his actions "philanthropic" because he used his resources to help other "victims" that have been harmed by Gawker.[116] Although he would not reveal any details of other cases he has funded against Gawker, Thiel admits that "[i]t's safe to say [Bollea's lawsuit] is not the only one."[117] Though he justifies his actions as charitable and altruistic, it remains true that Thiel has specifically chosen to target Gawker on a number of occasions[118] because of his disapproval of the type of news that the media outlet disseminated.[119]

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[109] *Id.*

[110] *Id.; see also* Michael Hiltzik, *Peter Thiel, Gawker and the Risks of Making the Courthouse a Private Sandbox for the Wealthy, and the Courts*, L.A. TIMES (May 25, 2016, 2:55 PM), http://www.latimes.com/business/hiltzik/la-fi-hiltzik-thiel-gawker-20160525-snap-story.html [https://perma.cc/4VFH-CX5A].

[111] Andrew Ross Sorkin, *Gawker Founder Suspects A Common Financer Behind Suits,* N.Y. TIMES (May 23, 2016), http://www.nytimes.com/2016/05/24/business/dealbook/gawker-founder-suspects-a-common-financer-behind-lawsuits.html [http://perma.cc/2NTU-UAHE] [hereinafter Sorkin, *Gawker Founder*] ("[Q]uestions were provoked by several strategic decisions on Mr. Hogan's side that didn't appear economically rational.").

[112] *Id.*

[113] *See supra* Section I.A.

[114] Sorkin, *Tech Billionaire Reveals Secret War*, *supra* note 7.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] Mac & Drange, *Behind Peter Thiel's Plan*, *supra* note 9 ("Thiel is the clandestine financier of numerous lawsuits targeting Gawker Media.").

[119] Sorkin, *Tech Billionaire Reveals Secret War, supra* note 7.

The potential for personal interests of a funder to influence the outcome of a lawsuit is concerning.[120] Third-party funders motivated by malice may influence legal strategies in a manner that amplifies their own objectives rather than in a manner that vindicates the rights of the actual party to the lawsuit. In the case of *Bollea v. Gawker*, a key decision that courts should scrutinize is the decision not to allow Gawker Media's insurance company to pay part of the settlement.[121] If Thiel had exerted any influence over that decision, it would have been a serious ethical violation.[122] This is because it may not have been in the best interest of Bollea—who could have maximized his profits with an insurance payout.[123] By dropping the claim of negligent infliction of emotional distress,[124] Gawker's insurance company was precluded from paying for Gawker's defense or any part of the damages awarded to Bollea.[125] Gawker was unable to "leverag[e] the deep pockets of an insurer" to help settle the case.[126] Precluding insurance payouts can have a crippling effect on a company, and it did here—Bollea rejected multiple settlement offers[127] until Gawker filed for bankruptcy.[128] This type of legal strategy looks a lot less like specific deterrence or vindication of this particular plaintiff's rights and a lot more like revenge against Gawker.

As an early investor in Facebook[129] and member of its board of directors,[130] Thiel has been criticized for playing an

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[120] Julie Triedman, *Arms Race: The Litigation Funding Boom*, AM. LAW. (Dec. 25, 2015) ("Funders are increasingly encouraging plaintiffs to pick firms they approve of; other times, they team up with firms to fund portfolios of cases. As the law firm-funder relationship gets closer, some lawyers worry that the interests of a client and a firm could diverge.").

[121] *See* Sorkin, *Gawker Founder, supra* note 111 ("Several legal experts said that it was particularly unusual for a plaintiff using a lawyer being paid on a contingency basis not only to turn down settlement offers (several sizable settlements were proffered by Gawker) but also to pursue a strategy that prevented an insurance company from being able to contribute to a settlement.").

[122] *See* MODEL RULE OF PROF'L CONDUCT r. 1.8(f) (AM. BAR ASS'N 1983) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: . . . [*inter alia*] (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship . . . .").

[123] Mac & Drange, *Behind Peter Thiel's Plan, supra* note 9 ("Why didn't he accept several settlement offers? And why did he drop his claim involving negligent infliction of emotional distress—thus freeing the real deep pockets, Gawker's insurance company, from paying any part of a potential recovery?").

[124] *Id.*

[125] Sorkin, *Tech Billionaire Reveals Secret War, supra* note 7.

[126] *Id.*

[127] Mac & Drange, *Behind Peter Thiel's Plan*, *supra* note 9.

[128] Ingram, *Billionaire Who Helped Bankrupt Gawker, supra* note 4.

[129] Sorkin, *Tech Billionaire Reveals Secret War, supra* note 7.

[130] Jack Shafer, *Peter Thiel Does the Impossible!,* POLITICO (May 25, 2016), http://www.politico.com/magazine/story/2016/05/gawker-peter-thiel-fourth-estate-213918 [http://perma.cc/W3DZ-P8PG].

instrumental role in a lawsuit that ultimately destroyed one of Facebook's competitors.[131] Indeed, the fact that Gawker and Facebook are both part of the media industry raised concerns regarding conflict of interest.[132] Critics even called for the removal of Thiel from Facebook's board of directors due to his involvement in the *Bollea* lawsuit.[133] Thiel's actions may set a very dangerous precedent—one that "could have a chilling effect on the media business, providing a blueprint by which wealthy individuals can covertly litigate against publications they find hurtful or unpleasing."[134]

It cannot be determined with certainty whether Thiel was focused on vindicating the rights of Bollea, or if this was simply another opportunity for him to destroy Gawker. Speculation is inevitable, however, because TPLF does not currently require any form of disclosure.[135] But the Gawker case sheds light on the many potential legal and ethical issues related to malice maintenance. A funder, without disclosing personal involvement, can shift legal strategy to preserve the funder's own personal interests rather than to obtain justice for the individual harmed—all while the court is uninformed and ill equipped to take remedial action.[136]

On November 2, 2016, Denton announced the decision not to appeal Bollea's judgment as Gawker had originally planned.[137] He wrote in his blog, "[a]fter four years of litigation funded by a billionaire with a grudge going back even further, a settlement has been reached. The saga is over."[138] Although Gawker had been confident that they would prevail on appeal,

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[131] *Id.* ("Both Gawker and Facebook are media entities, competing with one another for online ad revenue.").

[132] *Id.*; *see also* Ryan Mac & Matt Drange, *Mark Zuckerberg Decides to Keep Peter Thiel on Facebook's Board,* FORBES (June 20, 2016, 2:29 PM), http://www.forbes.com/sites/mattdrange/2016/06/20/zuckerberg-thiel-board/#6a931ba45dd2 [http://perma.cc/LC46-3P33] [hereinafter Ryan Mac & Matt Drange, *Mark Zuckerberg*] (Facebook has recently "attempt[ed] to court news organizations and convince them that its platform is an open and trustworthy place to publish and distribute information. Critics of Thiel said that his actions could have a chilling effect on the media business, providing a blueprint by which wealthy individuals can covertly litigate against publications that they find hurtful or unpleasing.").

[133] Ryan Mac & Matt Drange, *Mark Zuckerberg*, *supra* note 132. A petition filed by the Writers Guild of America stated that "[a] person committed to silencing journalism he doesn't like should not sit on the board of a company that serves as the portal to digital news for tens of millions of people." *Id.*

[134] *Id.*

[135] *See* Rickard & Behrens, *supra* note 10 ("Courts trying to settle cases may be unaware that their efforts may be complicated by an entity that is not even in the room.").

[136] *See id.*

[137] Nick Denton, *A Hard Peace*, BLOG (Nov. 2, 2016), https://nickdenton.org/a-hard-peace-e161e19bfaf#.1aewt2czo [http://perma.cc/8RA9-DJ4Q].

[138] *Id.*

the "all out legal war with Thiel would have cost too much, and hurt too many people, and there was no end in sight."[139] Denton's statements demonstrate the impact that third-party funding of litigation can have on the legal decisions of the opposing party when they have knowledge that a funder exists.

But the Gawker "saga" may be far from over. On January 11, 2018, Thiel submitted a bid to purchase Gawker's remaining assets, including its domain names and roughly 200,000 archived articles.[140] This purchase would provide access to all of Gawker's content and the opportunity to remove any or all of the articles from the Internet indefinitely.[141] Former Gawker employees attempted to raise money through a Kickstarter to bid on Gawker themselves but failed to reach the $500,000 goal.[142] Thiel's continued interest in Gawker further demonstrates the very personal nature of his litigation funding.

III. POTENTIAL ETHICAL AND LEGAL IMPLICATIONS OF MALICE MAINTENANCE

Malice maintenance empowers wealthy individuals to decide who and what is worthy of a lawsuit. This Part explores the potential ethical and legal implications related to this practice of third-party funding. Where a third-party funder is motivated by a personal vendetta or bias, there are unique conflict of interest issues that can interfere with legal decisions. The lack of transparency under the current state of the law serves to exacerbate all of the issues inherent in malice maintenance.

A. Conflict of Interest

Third-party litigation financing introduces an outsider to the attorney-client relationship.[143] According to the U.S. Chamber Institute for Legal Reform, "TPLF investments compromise the attorney-client relationship and diminish the professional independence of attorneys by injecting a third party into

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[139] *Id.*; *see also* Peter Thiel, *Peter Thiel: Online Privacy Debate Won't End With Gawker,* N.Y. TIMES (Aug. 15, 2016), http://www.nytimes.com/2016/08/16/opinion/peter-thiel-the-online-privacy-debate-wont-end-with-gawker.html [http://perma.cc/TF9S-896Y] (Peter Thiel states: "I will support [Bollea] until his final victory—Gawker said it intends to appeal—and I would gladly support someone else in the same position.").

[140] Jessica, DiNapoli, *Peter Thiel Submits Bid for Gawker, Faces Challenges*, REUTERS (Jan. 11, 2018, 3:55 PM), https://www.reuters.com/article/us-gawker-thiel/peter-thiel-submits-bid-for-gawker-faces-challenges-idUSKBN1F02V2?il=0 [http://perma.cc/3FPA-7QC9].

[141] *Id.*

[142] *Id.*

[143] *See* BEISNER ET AL., *supra* note 13, at 1.

disputes."[144] An individual involved in funding a lawsuit must have *some* stake in the outcome of litigation.[145] That stake may be financial, charitable, or malicious. Regardless of the motivation, however, the addition of a third party creates the potential for conflict of interest issues. The U.S. Chamber Institute for Legal Reform advocates for stringent reform in the regulation of third-party litigation finance because "[a]rrangements such as these make a mockery of our system of justice by placing the interests of outside investors ahead of the interests of the parties in court."[146] The fear is that the focus of the legal strategy will not be vindication of the plaintiff's rights but achievement of the third-party funder's objectives[147]—and that fear is justified.

There is no doubt that individuals who lack resources to independently bring claims to court can benefit from third-party funding.[148] There is additional risk, however, when a third-party funder is one person with a personal agenda.[149] An individual "is much more likely to have an agenda driven by revenge or personal dislike or wanting to prove a point."[150] The Supreme Court, in *Button*, explicitly recognized that "[r]esort[ing] to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain."[151] The TPLF protected by the First Amendment is driven by the litigant and the funder's motivation for bringing and funding the lawsuit.[152] The Court protects TPLF as a form of political expression by public interest groups.[153] The malicious maintainer, however, may be motivated by revenge, the desire to destroy competition, or simply by disdain for the target—but what is even more troubling than those nefarious objectives is the likelihood that the funder will manipulate the legal strategy so that it is in alignment with those objectives.[154]

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144 U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 31.

145 *See supra* Part I (Third-party funders may be motivated to initiate lawsuits for profit, personal gain, or altruism.).

146 *Third Party Litigation Funding (TPLF)*, *supra* note 13.

147 *See id.*

148 *See* Lyon, *supra* note 43, at 582 (Through third-party funding "[n]umerous state agencies and legal aid societies . . . provide aid to indigent litigants, a practice which would have been unthinkable at common law.").

149 *Id.*

150 Sorkin, *Tech Billionaire Reveals Secret War, supra* note 7 (quoting Roy D. Simon, a professor emeritus of legal ethics at Hofstra University School of Law).

151 Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 443 (1963).

152 *See id.* at 437–43.

153 *Id.* at 439–45.

154 For example, in the Gawker case, Thiel likely influenced the decision to dismiss Bollea's negligent infliction of emotional distress claim, thereby removing the insurance company from the suit. *See supra* Section II.C.

At the foundation of the ancient British common law doctrine was the desire to circumvent the ability of powerful individuals to take advantage of the court system to maximize their own personal and political interests.[155] The same concerns remain today.[156] The idea that one wealthy, powerful individual has the potential to destroy an entire company or organization fueled by a personal vendetta or moral standard is antithetical to the modern legal system's goals of transparency and efficiency.[157] In order to achieve the goals of the third-party funder, attorneys may engage in unsavory legal tactics.[158] For example, there may be a greater potential for prolonged litigation in these types of arrangements in the interest of the third-party funder.[159] Prolonged litigation is possible because the funder essentially absorbs the risks of litigation,[160] allowing the actual party to the suit to take on "a more aggressive stance, and [to] reject what otherwise may be a fair settlement offer under traditional litigation funding structures."[161]

The danger of prolonged litigation is even greater in the case of malice maintenance because the third-party funder need not be concerned with the settlement at all. Unlike a litigation investment company, for example, the malicious maintainer has no interest in a financial return on their investment. With enough money, the malicious maintainer can extend the lawsuit until the target's funds are drained or their reputation is destroyed—in either case, settlement is not necessary to achieve that result.[162]

In the case of *Bollea v. Gawker,* Thiel openly expressed that his desire to become involved in the lawsuit was driven in part by the fact that Gawker posted stories that were, in Thiel's opinion,

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[155] Del Webb Cmtys, Inc. v. Partington, No. 2:08-cv-00571-RCJ-GWF, 2009 U.S. Dist. LEXIS 85616, at *10 (D. Nev. Sept. 18, 2009).

[156] *See* Mac & Drange, *Mark Zuckerberg, supra* note 132 (For example, "[c]ritics of Thiel said that his actions could have a chilling effect on the media business, providing a blueprint by which wealthy individuals can covertly litigate against publications that they find hurtful or unpleasing.").

[157] *Id.*

[158] *See* Rickard & Behrens, *supra* note 10.

[159] *Id.* ("Further, the funder's presence can unreasonably prolong cases and frustrate settlements.").

[160] *Id.* ("If a party is obligated to pay some of its settlement to a funder, that party may have a strong incentive to reject an otherwise reasonable offer and hold out for more money.").

[161] Sheridan, *supra* note 60.

[162] *See* Roger Royse, *Hulk Hogan's Gawker Lawsuit Reignites Debate Over Third Party Litigation Funding*, ROYSE L. BLOG (June 14, 2016, 11:37 AM), http://royselawblog.com/hulk-hogans-gawker-lawsuit-reignites-debate-over-third-party-litigation-funding/ [http://perma.cc/58Y3-FLP4] ("Without disclosure, a well-funded plaintiff could afford to prolong litigation to hurt defendant(s).").

"incredibly damaging" with "no connection with the public interest."[163] This begs the question: who should be able to decide what is in the public's interest? Denton expressed concern about the weight that one powerful individual's opinion can have:

> Just because Peter Thiel is a Silicon Valley billionaire, his opinion does not trump our millions of readers who know us for routinely driving big news stories including Hillary Clinton's secret email account, Bill Cosby's history with women, the mayor of Toronto as a crack smoker, Tom Cruise's role within Scientology, the N.F.L. cover-up of domestic abuse by players and just this month the hidden power of Facebook to determine the news you see.[164]

The clear discrepancy between Denton's and Thiel's assessment of the "value" of Gawker Media simply serves to demonstrate the potential danger of allowing wealthy individuals to inject themselves into lawsuits based on their opinion of the target. Imagine a wealthy individual targeting an organization like Planned Parenthood in order to smear its reputation or cause the organization to lose funding. Now imagine a scenario where a political operative funds a lawsuit against his opponent to generate bad press during the critical months of a campaign. Tweaking the facts of *Bollea v. Gawker*—further suppose it was a wealthy campaign contributor to the President of the United States secretly funding lawsuits against a news outlet, such as the *New York Times*, that published unfavorable articles about his or her policies. The current status of the law does not sufficiently protect against wealthy individuals secretly funding these arrangements with an oppressive or malicious intent.[165]

B. Lack of Transparency

The lack of transparency involved in TPLF is of particular concern where individuals have a malicious ulterior motive for financing a lawsuit. Most cases end in settlements,[166] and determining what each party wants out of the lawsuit is essential to the settlement process. The vindictive hidden interests of a malicious third-party investor will inherently affect the negotiation process—either preventing settlement or a proper appeal process. For example, returning to the Gawker

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[163] Sorkin, *Tech Billionaire Reveals Secret War, supra* note 7.

[164] *Id.*

[165] *See generally* BURFORD, *supra* note 29.

[166] *How Courts Work: Steps in Trial,* AM. B. ASS'N. http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/cases_settling.html (Jan. 28, 2018) [http://perma.cc/4CDB-K2XK] ("Relatively few lawsuits ever go through the full range of procedures and all the way to trial. Most civil cases are settled by mutual agreement between the parties.").

case, Nick Denton specifically refused to appeal the case because of Thiel's funding despite his confidence that Gawker would succeed on appeal.[167]

These arrangements also make it particularly difficult for targets of malicious maintenance to defend their position. Unlike a funder motivated by maximizing profits—a strategy that the opposing party is likely to anticipate—here, the legal strategy to personally harm the target may certainly come as a surprise. The issue may be best explained by Denton in a blog post:

> It's a shame the Hogan trial took place without the motives of the plaintiff's backer being known. If there is a lasting legacy from this experience, it should be a new awareness of the danger of dark money in litigation finance. And that's surely in the spirit of the transparency Gawker was founded to promote.[168]

There is no real downside for wealthy funders—malicious maintainers can stop providing funds whenever they want, or in the alternative, they can continue to fund lawsuits in secret until their objectives are realized.[169]

In the circumstances where there is misconduct,[170] courts must be aware of the presence of the third-party funders in order to properly determine if sanctions, limiting instructions, or adverse inferences are appropriate.[171] With the current lack of disclosure, wealthy individuals can solicit suits and target individuals or companies that they want to harm without any backlash, and attorneys may not be held accountable for violating their ethical obligations. Moreover, without disclosure it is impossible to accurately determine how often this practice even takes place.[172]

C. Current Rules Are Inadequate

While there are rules meant to protect parties from such abuses, these safeguards are not effective in cases where third-

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[167] *See supra* Section II.C.

[168] Denton, *supra* note 137.

[169] *See* Rickard & Behrens, *supra* note 10.

[170] Misconduct could be violations of Rule 11, which includes bringing lawsuits "being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." *See* FED. R. CIV. P. 11(b)(1). Misconduct could also be violations of American Bar Association Rule 1.8 which states that "[a] lawyer shall not accept compensation for representing a client from one other than the client unless: . . . [*inter alia*] (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship . . . ." *See* MODEL RULE OF PROF'L CONDUCT r. 1.8(f) (AM. BAR ASS'N 1983). These rules are explained in more detail in the following section. *See infra* Section III.C.

[171] *See infra* Section III.C.

[172] *See infra* Section III.C.

party funders are involved. For example, sanctions against attorneys are appropriate under Rule 11(b)(1) of the Federal Rules of Civil Procedure where representations to the court are "being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."[173] But a court does not have a full picture of what is happening in the courtroom when the "efforts [to settle are] complicated by an entity that is not even in the room."[174] In the circumstance where a third-party funder is involved in secret, it is difficult to determine where sanctions are appropriate[175] and if certain actions have improper purpose or are meant to "harass[] [or] cause unnecessary delay," as per Rule 11(b)(1).[176] In the case of malice maintenance, this is particularly concerning. It would be difficult, if not impossible, for the court to realize that a party's actions have been influenced by a third-party funder's improper personal agenda where the existence of a third-party funder is unknown to the court.

Although funders in these types of arrangements do not have any ethical obligations to preserve the interests of the claimants,[177] there are safeguards in place to prevent *attorneys* from acting in the interest of a third party rather than their client. For example, American Bar Association Rule 1.8(f) states that "[a] lawyer shall not accept compensation for representing a client from one other than the client unless: . . . [*inter alia*] (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship."[178] Enforcement of these guidelines is impossible, though, where the third-party funder is financing the lawsuit in secret.[179] Without the court or the opposing party being aware that a third party is financing a suit there is no way to know that a claimant's rights have been compromised. Therefore, the non-disclosure of the third-party funder curtails the effectiveness of ABA Rule 1.8(f). Since the majority of states permit maintenance,[180] there is a real danger that third-party funders have the ability to secretly manipulate the

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[173] FED. R. CIV. P. 11(b)(1).

[174] Rickard & Behrens, *supra* note 10.

[175] *Id.* ("Where sanctions are appropriate for misconduct, courts need to know about the presence of a third-party in the litigation to determine how to impose sanctions or other costs.").

[176] FED. R. CIV. P. 11(b)(1).

[177] *Id.*

[178] *See* MODEL RULE OF PROF'L CONDUCT r. 1.8(f) (AM. BAR ASS'N 1983) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: . . . [*inter alia*] (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship . . . .").

[179] *See generally* BURFORD, *supra* note 29.

[180] *See supra* Section I.C.

outcome of the suit, potentially to the detriment of the claimant, despite the rules in place to prevent those abuses.[181]

IV. RECOMMENDATION FOR REGULATION OF THIRD-PARTY LITIGATION FUNDING

Given the inherent risks of malice maintenance in third-party litigation funding, the Federal Rules of Civil Procedure (Federal Rules) should be amended to allow uniform regulation at the federal level. Since disclosure is not currently required, there is no data related to how often malice maintenance occurs, which makes it difficult to specifically regulate.[182] Thus, a general disclosure rule is the best method to address the negative effects of TPLF and allow courts to make individual rulings to prevent or sanction misconduct.[183]

The support in the legal community for transparency in third-party litigation funding gives an added incentive for the Federal Rules to be amended. Various legal associations have advocated for amendments to the Federal Rules that would require disclosure of third-party litigation funding.[184] In addition, courts appear receptive to disclosure of third-party funding in lawsuits—a 2014 survey conducted for the Law and Economics Center at George Mason University's Antonin Scalia Law School revealed that a disclosure rule for litigation finance would be favored by both federal and state judges.[185] In addition, the Northern District of California Rules Committee recently moved to expose third-party litigation funding in a proposed amendment to

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[181] *See* BEISNER ET AL., *supra* note 13, at 1–2.

[182] Rickard & Behrens, *supra* note 10 ("[B]ecause third-party funding of lawsuits occurs in secrecy, the proof needed to support reform is elusive.").

[183] *Id.*

[184] Those groups include the U.S. Chamber Institute for Legal Reform, American Insurance Association, American Tort Reform Association, and National Association of Manufacturers and Lawyers for Civil Justice. *See* Lisa A. Rickard, *Third Party Litigation Funding in US Enters Mainstream, Leading to Calls for Reform*, FINANCIER WORLDWIDE (Nov. 2016), http://www.financierworldwide.com/third-party-litigation-funding-in-us-enters-mainstream-leading-to-calls-for-reform#.WBtpSeErLR2 [http://perma.cc/K6JP-ASHW]; *see also* Letter from John H. Beisner of Skadden, Arps, Slate, Meagher & Flom LLP to Jonathan C. Rose, Sec'y of the Comm. on Rules of Practice and Procedure of the Admin. Office of the U.S. Courts (Oct. 28, 2014), http://www.lfcj.com/uploads/3/8/0/5/38050985/letter_from_j_beisner_to_j_rose__10-28-14_.pdf [http://perma.cc/BJ3E-XUFX].

[185] The survey involved 357 federal and state judges across the country "with an average experience of over 17 years on the bench." Almost two-thirds of the judges surveyed agreed that "they would prefer to know if litigation funding is being employed in cases before them" and "[t]wo-thirds . . . also reported that they believe the practice of litigation funding is not acceptable and will increase the number of lawsuits." Rickard & Behrens, *supra* note 10.

Local Rule 3-15 that would require attorneys to disclose to the court when their case is backed by a third-party investor.[186]

A. Proposed Amendment to Rule 26 Duty to Disclose

An amendment to Federal Rule 26 that requires initial disclosure of third-party funders of a lawsuit to both the court and opposing parties will address the legal and ethical concerns related to malice maintenance. Rule 26, titled "Duty to Disclose" (Rule 26) currently requires numerous initial disclosures including the name, address, and telephone number of any individual with discoverable information, a copy—or description and location—of all discovery "that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses," as well as damage calculations. [187] In addition, Rule 26 requires that a defendant disclose "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment."[188] Some of the underlying policies behind these disclosure requirements are elimination of the "surprise" element in litigation, reduction of litigation costs, and encouragement of fair outcomes.[189] What Rule 26 does not require, however, is that a party disclose the existence of a third-party funder to the court or opposing parties.[190]

This note's proposed amendment would add subsection (F), requiring initial disclosure of a third-party funder to the court, and subsection (G), requiring disclosure to opposing parties. The proposed Rule 26 (a)(1)(F) is modeled after the California Local Civil Rule 3-15, which requires disclosure of "[n]on-party interested entities or persons."[191] Under the California Rule, the certificate of interested entities or persons is filed as part of the public record, and does not apply to any

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[186] *Northern District of California Rules Committee Moves to Expose Third-Party Litigation Funding*, U.S. CHAMBER INST. FOR LEGAL REFORM (Nov. 1, 2016), http://www.instituteforlegalreform.com/resource/northern-district-of-california-rules-committee-moves-to-expose-third-party-litigation-funding [https://perma.cc/FWJ9-9E3X]. As of January 2018, however, Rule 3-15 was not ultimately amended to explicitly include third-party funders. *See* N.D. Cal. Civil L.R. 3-15.

[187] *See* FED. R. CIV. P. 26(a)(i)–(iii).

[188] *Id.* at (a)(iv).

[189] *See* FED. R. CIV. P. 26 advisory committee's note to 1970, 2000, and 2006 amendment.

[190] *See* FED. R. CIV. P. 26.

[191] N.D. Cal. Civil L. R. 3-15.

governmental agencies or entities.[192] In comparison, the proposed Rule 26 (a)(1)(F) will explicitly require disclosure of third-party funders to the court under seal and does not exclude any form of third-party funders. In addition, subsection (G) will require limited disclosure to opposing parties. The proposed Rules 26 (A)(1)(F) and (G) could read as follows:

> Rule 26 Duty to Disclose; General Provisions Governing Discovery
>
> (F) Disclosure of Third-Party Funders to the Court
>
> > (i) All parties must disclose the name, address, and telephone number of any third party to the lawsuit, either entity or individual, providing funding to a party of the lawsuit.
> >
> > (ii) All parties must submit to the court a brief description of the third party's interest in the legal dispute, including any financial or personal interest, or any interest that would be affected by the outcome of the lawsuit.
> >
> > (iii) If a party has no disclosure to make pursuant to subparagraph (a)(1)(F)(i), that party must submit to the court a certification that no third-party funder is involved. A party has a continuing duty to supplement its submission if a third-party funder becomes involved at any point in time during the lawsuit.
> >
> > (iv) The court has discretion to disclose any or all information to opposing parties that is critical to the settlement or appeal process.
>
> (G) Disclosure of Third-party Funders to Opposing Parties
>
> > (i) All parties must provide notice of the existence of third-party funders to opposing parties.
> >
> > (ii) Notice does not require the name of the third-party funder or any personal or additional information related to the third-party funder.
> >
> > (iii) Notice should be provided at any point during the lawsuit when a third-party funder becomes involved.

B. Benefits of Amending Rule 26

With the court finally aware of the presence of the third-party funder, it will have the opportunity to address any

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[192] *Id.* The California Committee's Drafting of Rule 3-15 explicitly included "litigation funders" as persons or entities that attorneys are required to disclose. *See* PROPOSED N.D. CAL. CIVIL L. R. 3-15 (proposed June 2016), *available at* http://pdfserver.amlaw.com/ca/ndcal_proposal.pdf [http://perma.cc/8ALX-ZTNW]. The proposed rule would have "explicitly cover[ed] litigation agreements in the routine disclosures about interested parties that lawyers must submit when filing a case." Ben Hancock, *Move to Expose Third-Party Case Funding Stirs Debate in Northern District*, RECORDER (Oct. 31, 2016, 3:08 PM), https://www.law.com/therecorder/almID/1202771211351/ [http://perma.cc/W88E-LJR4].

suspicious legal strategies and hold lawyers accountable.[193] Requiring disclosure of any personal interest in the lawsuit will ensure that the court is privy to any improper personal agenda or serious conflicts of interest.[194] Disclosure will also serve to deter malice maintenance because the identities of funders will be revealed to the court at the outset of the suit. Without an element of secrecy, funders will be less likely to intervene in suits where they have a personal vendetta or bias against the target. In addition, attorneys are far less likely to allow third-party funders to influence legal strategy. With the court aware of third-party funders, consequences for violations to ABA Rule 1.8(f) on Conflict of Interest and Federal Rule of Civil Procedure Rule 11(b)(1) as related to harassing, frivolous, or prolonged litigation can be properly enforced.[195]

Rule 26 currently requires disclosure of insurance coverage to opposing parties.[196] The Advisory Committee of the 1970 Amendment of Rule 26 clarified the policy considerations for including insurance disclosure such as enabling both parties to realistically appraise their cases, promoting transparency in settlement and litigation strategies, and avoiding prolonged litigation.[197] The policy considerations that the committee described are the same underlying concerns that support disclosure of third-party funders.[198] Providing notice to opposing parties will minimize the unfair disadvantage for the entities targeted by malice maintenance by increasing transparency and allowing parties to better defend their position.[199] As the Rules Committee succinctly explained—disclosure "will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on

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193 *See* Rickard & Behrens, *supra* note 10.

194 *See* Shannon, *supra* note 19, at 904 ("Disclosing the name of the funder to the judge or arbitrator, however, is essential to maintaining the integrity and independence of decisionmakers.").

195 *See* FED. R. CIV. P. 11(b)(1); MODEL RULE OF PROF'L CONDUCT r. 1.8(f) (AM. BAR ASS'N 1983) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: . . . [*inter alia*] (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship . . . .").

196 FED. R. CIV. P. 26(a)(1)(A)(iv) (Litigants are required to disclose "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgement.").

197 "Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect." FED. R. CIV. P. 26 advisory committee's note to 1970 amendment.

198 *Id.*

199 *See* Rickard & Behrens, *supra* note 10.

knowledge and not speculation."[200] This will mitigate the danger of unnecessarily prolonged litigation and expenditure of excessive amounts of funds.[201]

The Rules Committee distinguished insurance coverage from other disclosures related to the defendant's financial status, "(1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy."[202] Third-party litigation funders should be disclosed for the same reasons that the Rules Committee advocated that insurance coverage be disclosed. First, although it would depend on the specifics of the third-party funder financing agreement to determine whether the third-party funder is an "asset,"[203] third-party funders and insurance companies still essentially serve the same purpose. The same way an insurer provides financial assistance,[204] a third-party funder is an external source of funding that covers any or all of the applicable party's expenses during the lawsuit. Second, as an external source of capital, a third-party funder operates like an insurer and also has the potential to control the course of the litigation.[205] Third, exactly like insurance coverage, the information related to the third-party funder is only available from the applicable party and their third-party funder.[206] Finally, requiring disclosure of only the existence of a third-party funder is not a significant invasion of privacy, and would still benefit opposing counsel by encouraging transparency and fair outcomes.

Armed with the knowledge that a third-party funder exists, opposing counsel will be able to appeal to the court if any potential conflicts of interest or questionable legal strategies are detected.[207] Pursuant to the proposed Rule 26 (a)(1)(G), the court

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[200] FED. R. CIV. P. 26 advisory committee's note to 1970 amendment (emphasis added).

[201] *Id.*

[202] *Id.*

[203] *Asset,* INVESTOPEDIA, http://www.investopedia.com/terms/a/asset.asp [http://perma.cc/6MFC-R23L] ("[A] resource with economic value that an individual, corporation or country owns or controls with the expectation that it will provide a future benefit.").

[204] Andrew Weiner & Joseph Saka, *The Basics of Commercial General Liability Policies*, AM. BAR ASS'N., http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/the_basics_of_commercial_general_liability_policies.html [http://perma.cc/C535-DP9Q] ("The insuring agreement gives the insurer the right and imposes upon the insurer the duty to defend any suit seeking covered damages from the policyholder.").

[205] *See Third Party Litigation Funding (TPLF)*, *supra* note 13.

[206] *See generally* BURFORD, *supra* note 29.

[207] *See* Rickard & Behrens, *supra* note 10.

will already have the information related to the third party necessary to effectively address the situation and make a proper determination.[208] In addition, in the unique situation where disclosure of additional information related to the third-party funder is critical to settlement, the court has the discretion to disclose that information to opposing parties.[209]

Disclosure will regulate third-party funding in a manner that will address the potential negative implication of malice maintenance and help regulate issues with third-party litigation in the future. Given the current state of the law, it is unknown how often this practice occurs, but requiring disclosure will allow data to be collected that could help determine the most concerning issues with this practice and how widespread it truly is.[210]

CONCLUSION

Malice maintenance amplifies the legal and ethical concerns related to TPLF by empowering wealthy individuals to instigate and influence litigation for personal interests without consequences.[211] Maintenance was abolished from British common law precisely because these types of arrangements allowed powerful individuals to take advantage of the court system for purely personal and political gain.[212] Although some states have abolished antimaintenance laws, [213] the underlying ethical concerns related to the instigation of oppressive spiteful lawsuits remain today.[214]

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[208] *See supra* Section IV.A.

[209] *See supra* Section IV.A. (The Proposed Rule 26 (a)(1)(F)(iv) allows the court discretion to disclose any or all information to opposing parties that is critical to the settlement or appeal process.).

[210] *See* Rickard & Behrens, *supra* note 10. This proposed amendment is only one step to help solve the issues with malice maintenance. Once there are rules in place requiring these disclosures, more steps will likely have to be taken to continue to help protect the legal system, but we cannot take those steps until this issue is less hidden.

[211] *Id.*

[212] Del Webb Cmtys, Inc. v. Partington, No. 2:08-cv-00571-RCJ-GWF, 2009 U.S. Dist. LEXIS 85616, at *10 (D. Nev. Sept. 18, 2009).

[213] Sheridan, *supra* note 60.

[214] *See* Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 443 (1963) ("Resort[ing] to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain."); *see also In re* Primus, 436 U.S. 412, 436 (1978) (The record reflected no "undue influence, overreaching, misrepresentation, or invasion of privacy" or "[any] serious likelihood of conflict of interest"); *see also* Rancman v. Interim Settlement Funding Corp. 789 N.E.2d 217, 220 (Ohio 2003) ("[M]aintenance is 'an offense against public justice, as it keeps alive stride and contention, and perverts the remedial practice of the law into an engine of oppression'".) (quoting Key v. Vattier, 1 Ohio 132, 136 (1823)); Echeverria v. Estate of Lindner, No. 018666/2002, 2005 WL 1083704, *7 (N.Y. Sup. Ct. 2005) ("While [the defendant] has not had any control over the litigation,

By requiring disclosure of third-party funders, courts will be able to manage the very serious implications of malice maintenance. Disclosure will enable better enforcement of the existing rules that prohibit improper or harassing legal tactics and third-party interference with legal strategy.[215] An amendment to Rule 26 requiring initial disclosure of third-party funders of a lawsuit to both the court and opposing parties will eliminate the "surprise" element of third-party funding, reduce the risk of excessive prolonged litigation, and encourage fair outcomes.[216] The proposed amendment will provide a necessary check on malice maintenance, which is otherwise unregulated and unknown to the courts. Disclosure will help prevent malice maintenance from "runnin' wild,"[217] and thwart billionaires that abuse the court system to maximize their own personal and political interests.

Anusheh Khoshsima[†]

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part of the policy behind Champerty is to prevent non-interested third parties from taking part in litigation.").

[215] *See* F. R. CIV. P. 11(b)(1)–(2); MODEL RULES OF PROF'L CONDUCT r. 1.8 (AM. BAR ASS'N 1983) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: . . . [*inter alia*] (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship . . . .").

[216] *See* FED. R. CIV. P. 26 advisory committee's note to 1970, 2000, and 2006 amendment.

[217] Chris Mueller, *Pro Wrestling's 15 Greatest Catchphrases of All Time,* Bleacher Rep. (Nov. 5, 2011), http://bleacherreport.com/articles/925970-pro-wrestlings-15-greatest-catchphrases-of-all-time [https://perma.cc/U7AR-7SYJ] ("Arguably the most recognizable face in pro wrestling is Hulk Hogan, naturally he would have one of the most recognizable catchphrases of all time . . . [Hogan's] catchphrase eventually became 'Hulkamania is running wild, Brother' and soon after it began to appear on shirts, lunchboxes and posters for the red and yellow hero.").

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