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GOING BARE IN THE LAW OF ASSIGNMENTS: WHEN IS AN ASSIGNMENT CHAMPERTOUS?

Anthony Sebok*

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I. INTRODUCTION

Dr. David Capper’s paper on *The Assignment of a Bare Right to Litigate* is a response to the Irish treatment of champerty and maintenance.¹ It is judicious in its treatment of recent Irish and other common law precedent, and the conclusion it draws is a cautious one. Capper appears to sympathize with the concerns raised by courts in the United Kingdom, and elsewhere in the Commonwealth, but prefers the balance struck by the English Court of Appeal in *Simpson v. Norfolk & Norwich University Hospital NHS Trust*² and finds fault in the Irish Supreme Court’s decision in *SPV Osus Ltd. v. HSBC Institutional Trust Services (Ireland)*.³

In this short paper, I will attempt to draw some parallels between the treatment of champerty and maintenance in the United States and the Commonwealth courts and use various American approaches to illustrate the limitations of the approach endorsed by Capper.

Capper’s paper makes two major claims, although he spends the bulk of his analysis on the second. The first, which comes early in the paper, is that maintenance is less offensive to the law of champerty than the assignment of “bare” claims.⁴ The second is that the law of champerty can, and ought to,

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¹ David Capper, *The Assignment of a Bare Right to Litigate* (unpublished manuscript) (on file with author).

² *Simpson v. Norfolk & Norwich Univ. Hosp. NHS Tr.* [2011] EWCA (Civ) 1149, [2012] QB 640 (Eng.).

³ *SPV Osus Ltd. v. HSBC Institutional Tr. Servs. Ltd. & Ors* [2018] IESC 44 (Ir.).

⁴ Capper, *supra* note 1, at 3–4.

distinguish the assignment of bare claims from other types of assignment and that the historical trend of allowing the assignment of choses of action should not be extended to bare assignments.⁵ I observe that in the United States, at least, there is great resistance to the first claim. I agree with Capper's second claim but disagree (I think) with the definition of bare assignment he offers. As far as I can tell, like Lord Denning in *Trendtex Trading Corp. v. Credit Suisse*,⁶ I would go further than almost any common law court has yet been willing to go and permit assignments that are almost fully naked.

II. ASSIGNMENT AND MAINTENANCE DEFINED

An assignment is the act of transferring to another all or part of one's property, interest, or rights.⁷ While the early common law rejected all assignments of a cause of action, regardless of whether it was based in contract or tort, that restriction eventually shrank until courts could state the modern rule was that "assignability of things [in action] is now the rule; non-assignability, the exception; and this exception is confined to wrongs done to the person, the reputation, or the feelings of the injured party."⁸

Maintenance is the "assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case [or] meddling in someone else's litigation."⁹ Champerty is a species of maintenance. Champerty is "[a]n agreement between a stranger to a lawsuit and a litigant by which the stranger pursues the litigant's claim as consideration for receiving part of any judgment proceeds."¹⁰ The chief difference between maintenance and champerty is that the maintainer is not rewarded for his support of the litigant.¹¹

As Capper notes, quoting *Brownton*, often the motivation, or interest, behind maintenance and assignment is identical—to secure the legal claims

⁵ *Id.* at 5.

⁶ *Trendtex Trading Corp. v. Crédit Suisse* [1980] 1 QB 629 (Eng.).

⁷ "Ordinarily, the word 'assignment' is limited in its application to a transfer of intangible rights, including contractual rights, choses in action, and rights in or connected with property, as distinguished from a transfer of the property itself." 6 AM. JUR. 2D *Assignments* § 1 (1963).

⁸ *Webb v. Pillsbury*, 144 P.2d 1, 3 (Cal. 1943) (quoting 242 CAL. JUR. 3D § 5). In addition, most states will not permit the assignment of breach of contract claims that are of a "purely personal nature," such as promises of marriage. 6 AM. JUR. 2D *Assignments* §§ 29–30 (1963).

⁹ *Barratry*, BLACK'S LAW DICTIONARY 973 (8th ed. 2004). Barratry is also a species of maintenance: it is the practice of *frequently* exciting or stirring up suits in others. In other words, someone who engages in maintenance or champerty once has not committed barratry but may nonetheless have violated the prohibition on champerty or maintenance. *Id.* at 160.

¹⁰ *Id.* at 246.

¹¹ "[P]ut simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty." *Osprey, Inc. v. Cabana Ltd. P'ship*, 532 S.E.2d 269, 273 (S.C. 2000) (quoting *In re Primus*, 436 U.S. 412, 424 n.15 (1978)).

held by some original claimant.¹² The difference between maintenance and assignment is, technically, that in the former, the original claimant remains in control of the claim, while in the latter, the original claimant is substituted by the new party. In the common law, the general trend was to liberalize assignment first, then champerty. Ireland is an example of a common law system that has not followed this path, as the holding in *SPV Osus* illustrates.¹³

It may be the case that by now, the liberalization of champerty has progressed in England and Australia to the point where were there any limitation on assignment, a party interested in supporting litigation could find a way around by providing maintenance. This is, I believe, what Capper suggests when he observes that the assignee in *Simpson* could have supported the assignor's malpractice claim under the English law of maintenance, just as the union did in *Hill*.¹⁴ Of course, in Ireland, this solution is unavailable, since it has refused to follow other common law systems that have liberalized their law of champerty and holds that all third party maintenance by strangers (especially for profit) is illegal.

In the United States, the situation is complex and depends on individual state jurisdictions. Modern commentary in American common law often blends together the legal doctrines that place limits on assignment and maintenance, conflating the former into champerty.¹⁵ It is important to keep the two sets of limitations separate notwithstanding the fact that fear of champerty has always been the most common justification for limitations on assignment.¹⁶ If that justification were abandoned, one could still have restrictions on different forms of maintenance in a world where there were no limitations on assignment. One could argue, in fact, that this is the state of affairs towards which American law has been moving over the past century. After all, champerty is still technically illegal in almost half of American states, while, according to the United States Supreme Court, courts have

¹² Capper, *supra* note 1, at 3 (quoting *Brownton Ltd v. Edward Moore Inbucom Ltd* [1985] 3 All ER 499 (CA)).

¹³ Ireland continues to prohibit forms of third-party litigation finance that would be permitted in England, despite the fact that its law of assignment has followed a similar trajectory as England's. See *SPV Osus Ltd. v. HSBC Institutional Tr. Servs. (Ireland) Ltd.* [2018] IESC 44, ¶ 30 (citing *Persona Dig. Telephony Ltd. v. Minister for Pub. Enter.* [2017] IESC 27 (SC)); David Capper, *Third Party Litigation Funding in Ireland: Time for Change?*, 37 CIV. JUST. Q. 193 (2018).

¹⁴ Capper, *supra* note 1, at 5.

¹⁵ EDMOND H. BODKIN, *THE LAW OF MAINTENANCE AND CHAMPERTY* 6–7 (1935) (“Inseparably bound up with the historical development of the law of maintenance, although totally distinct from that law in origin, is the doctrine of the non-assignability of choses in action.”).

¹⁶ *Id.* at 7–8 (“[M]aintenance was in fact assigned by the Courts as the reason for the non-assignability of choses in action . . .”).

broadly liberalized “the rules that prevented assignments of choses in action.”¹⁷

The United States Chamber of Commerce, which represents the interests of commercial actors, is currently urging the Federal Rules Committee to adopt third party funder disclosure rules. Its arguments reflect the traditional skepticism of champerty in the United States:

[M]andatory [third-party funding] disclosure . . . is critical to the “integrity of the adversary process” because these arrangements threaten core ethical and legal principles that undergird our civil justice system. . . . [c]hamperty is a centuries-old legal doctrine that prohibits someone from funding litigation in which he or she is not a party. . . . Although the TPLF industry has promoted the view that this doctrine has become a “dead letter,” recent state and federal court decisions have given renewed vitality to champerty principles, particularly in the TPLF arena.¹⁸

The Chamber is not an isolated voice in reminding us that champerty is still viewed with suspicion in the United States: not only are states like Georgia, Kentucky, Minnesota, and Pennsylvania actively prohibiting champerty, other states, if they permit it, have taken steps to regulate it out of existence by placing it under their state usury laws.¹⁹

The conflation of assignment and champerty can be seen in two representative cases from the nineteenth century: *Poe v. Davis* (1857)²⁰ and *Metropolitan Life Insurance Co. v. Fuller* (1891).²¹ In *Poe*, the assignors, who were locked in a protracted probate battle with other putative heirs, assigned their right to the estate for \$100 to the assignees, who had no connection with the estate. The Alabama Supreme Court voided the assignment on a motion from the assignors after the probate litigation was won by the assignees. The court cited Lord Abinger’s views in *Prosser v. Edmonds*²² to support its conclusion that the estate claimed by the assignees was a “mere naked right.”²³ The court noted that although the assignees “may have acted very discreetly and fairly in the management of the litigation,” the fact that they paid \$100 for an estate worth perhaps \$1,000 (but with no

¹⁷ *Sprint Commc’ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 276 (2008).

¹⁸ See, e.g., U.S. CHAMBER INST. FOR LEGAL REFORM, *SELLING LAWSUITS, BUYING TROUBLE: THIRD PARTY LITIGATION FUNDING IN THE UNITED STATES* 4 (2009).

¹⁹ See, e.g., Tennessee and Arkansas.

²⁰ *Poe v. Davis*, 29 Ala. 676 (1857).

²¹ *Metro. Life Ins. Co. v. Fuller*, 23 A. 193 (1891).

²² *Prosser v. Edmonds* (1835) 160 Eng. Rep. 196.

²³ *Poe*, 29 Ala. at 682.

guarantee of the outcome) proved that they were speculators.²⁴ To prove that there was an impermissible speculative motive behind the assignment, the court cited the fact the assignees had offered to indemnify the assignors any potential costs that could be imposed upon them by the court at the conclusion of the suit. The court said that an assignment which “savor[ed] of maintenance” was one in which the assignee undertook to pay “for any costs, or make any advances” beyond the cost of pursuing the suit after the assignment.²⁵ In *Poe* an assignment “savored of” maintenance because the legal claim assigned was clearly sold for to another who hoped to profit from its enforcement.

In *Metropolitan Life*, the Connecticut Supreme Court upheld the assignment of an unspecified number of identical fraud claims to Fuller, the assignee. Both the assignor and the assignees had purchased life insurance policies from Metropolitan Life, which they then surrendered to the insurer for a fraction of what they claimed were the policies’ true surrender value. Fuller successfully sued the insurer in an earlier, separate case in New York and then purchased from other insureds their claims for fraud. He purchased the claims for a dollar and offered to divide the recoveries with the assignors. The insurer asked to have the assignments declared void because they were champertous and against public policy.²⁶ The court refused, noting that, although in the past, “public policy was opposed to champerty and maintenance, and therefore all contracts which savored of these vices were void. . . . modern [law] is the reverse.”²⁷ Absolute prohibition of all maintenance or champerty would not “generally promote justice” and therefore “the true inquiry may therefore be limited exclusively” to the merits of each transaction.²⁸ The court conceded that Fuller had taken “naked” or “bare” assignments, at least in the sense that these terms had been adopted by American courts following Lord Abinger’s opinion in *Prosser*.²⁹ However, the court held that earlier judicial hostility to the assignment of “a mere right of action to procure a transaction to be set aside on the ground of fraud,” had to be balanced against the positive social consequences of allowing men like Fuller to bundle together the assignors’ claims (in what was, in effect, a class action).³⁰ Unlike the *Poe* court, the *Metropolitan Life*

²⁴ *Id.* at 681.

²⁵ *Id.* at 682 (quoting 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1050h).

²⁶ *Metro. Life Ins. Co.*, 23 A. at 196.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ It would manifestly be both useful and convenient to policy-holders of the plaintiff, residing in this state, who . . . having . . . just demands, the individual enforcement of which, to any person in ordinary circumstances, would be so expensive and difficult as to amount to a practical impossibility,

court was not concerned with the fact that Fuller, who was motivated by pure, speculative greed, and that the assignors, were seeking to enjoy a reward from claims that they were not willing to pursue on their own.³¹

Poe and *Metropolitan Life* demonstrate that the struggle of the limits of assignment in the United States were indistinguishable from the struggle over the permissibility of champerty. As *Poe* demonstrates, this concern, when it was made explicit, often took the form of a censorious view of speculation in litigation. But the *Poe* court's hostility to the assignment of the estate at issue in the case reveals more than just a concern for the specter of third parties profiting from litigation. It also reveals a concern with the impermissible motives that might lay behind the original claim holder's reasons for permitting his or her claim to go forward in the hands of another person. By the time Lord Abinger set out his rule in *Prosser*, the idea that a chose in action could be transferred to a stranger in property and contract was familiar, and it certainly must have been the case that these assignments, when they occurred, reflected a speculative appetite.³² The *Poe* court's hostility to the transaction it struck down was explicitly based on its disgust at the assignor's desire to be indemnified for, and protected from, its prior decision to claim a right rather than the assignee's desire to profit from the case. The court cited approvingly Lord Abinger's observation in *Prosser* that "[a]ll our cases of maintenance and champerty are founded on the principle, that no encouragement should be given to litigation, by the introduction of parties to enforce those rights, which others are not disposed to enforce."³³ This suspicion of claims that were of such little importance to the original victims, that they would not have cared if they had been brought, can be seen in other cases contemporary with *Poe*, such as *Gruber v. Baker*,³⁴ where the court condemned as "bare" an assignment of a chose of action by a victim of fraud in a land sale in exchange for a right to recover the land if the assignee was successful.³⁵ As the *Gruber* court explained:

The reason of the rule . . . is to prevent litigation and the prosecution of doubtful claims by strangers *If the owner*

that a more fortunate person, of experience, ability and inclination, should assist them, and wait for his compensation until the suits were determined, and be paid out of the fruits of them.

Id.

³¹ "[W]hatever was the motive of the defendants, whether selfish or philanthropic . . . we can discover no rule of public policy that would be thereby violated." *Id.* at 196–97.

³² As Capper notes, "an assignee needs an incentive for taking on the risk that the case will be lost." Capper, *supra* note 1, at 6 (citing Y.L. Tan, *Champertous Contracts and Assignments*, 106 L.Q. REV. 656, 675–78 (1990)).

³³ *Poe v. Davis*, 29 Ala. 676, 681 (1857) (citing *Prosser v. Edmonds* (1835) 160 Eng. Rep. 196) (emphasis added).

³⁴ *Gruber v. Baker*, 23 P. 858 (Nev. 1890).

³⁵ As compensation for her troubles, *Gruber* was to divide the damages (if any) arising from the fraud action. *Id.* at 866.

is not disposed to attempt the enforcement of a doubtful claim, public policy requires that he should not be allowed to transfer his right to another party for the purpose of prosecution, thereby encouraging strife and litigation.³⁶

Lest I leave the impression that the conflation of champerty and certain types of assignments is an anachronistic holdover from the past century, it is easy to see the traces of the conflation in modern cases. For example, Maryland will not recognize assignments which are part of a “scheme to promote litigation for the benefit of the promoter rather than for the benefit of the litigant or the public.”³⁷ In *Accrued Financial Services*, a company with expertise in forensic accounting took assignments of the legal claims of commercial tenants in over fifty shopping malls and promised to remit to the assignors between 50–60% of any discrepancies discovered and paid to the company by the assignors’ landlords, some of which were in Maryland. The court held that this practice violated Maryland’s prohibition on champerty. It should be noted, as the dissent did, that the court had no reason to suspect that the claims brought by the assignee were weak or fraudulent; in fact, quite the opposite was probably the case; the parties complaining—the assignors’ landlords—probably were concerned that they were facing an adversary with resources and skills equal to their own.³⁸ The court ruled the assignments illegal because they were motivated by a desire to profit from the assignee’s superior position vis-à-vis the assignors:

[The] rights were assigned, not in exchange for an existing value, but for future fees to be determined by decisions and value judgments controlled by [the assignee], who had no interest in the underlying claims. . . . As such, [the assignee] *was given the power to mine lawsuits*, promote them, and profit off of them without regard to the interests and desires of the injured party.³⁹

In New York, a federal court recently applied New York’s statutory prohibition on assignments, New York Judiciary Law Section 489. In *BSC Associates v. Leidos, Inc.*⁴⁰ a small, family-owned computer software company was faced with a financial crisis when its largest (perhaps only) client, a defense contractor (Leidos), did not pay it due to a dispute with the ultimate customer, the U.S. Government. Rather than go bankrupt, it arranged a sale of most of its assets to another firm but carved out its potential claims against Leidos which were assigned a newly formed special purpose

³⁶ *Id.* at 862 (emphasis added).

³⁷ *Accrued Fin. Servs. v. Prime Retail, Inc.*, 298 F.3d 291, 299 (4th Cir. 2002).

³⁸ *Id.* at 306 (assignees brought “serious,” not frivolous, suits).

³⁹ *Id.* at 299 (emphasis added).

⁴⁰ *BSC Assocs. v. Leidos, Inc.*, 91 F. Supp. 3d 319 (N.D.N.Y. 2015).

vehicle owned by the family. The final resting place for the legal claims was a company called “BSC Associates,” which did not make anything and had no physical offices; it existed, one may assume, just so a family who once had a thriving software business could sue Leidos. The court held that the suit against Leidos had to be dismissed because BSC Associates had taken the claims—which were for damages arising from a breach of contract and unjust enrichment—for no other reason than to sue to collect the damages. The court said that it is one thing for a stranger to sue in order to collect a debt assigned to her by the original lender, or for a stranger to sue to enforce rights acquired in bankruptcy, or for a stranger to acquire a claim as part of a deal to acquire operating assets, but taking an assignment for a chose in action unconnected to any other property was champerty and was therefore impermissible.⁴¹

III. WHEN IS A CLAIM BARE?

If in many common-law systems third-party funding can be used to provide the funds needed to enforce a claim where assignment is prohibited, what other than choice among forms is lost in cases like *Poe*, *Accrued Financial Services*, and *BSC Associates*? The answer is, possibly very little.⁴² In New York, for example, the family who owned the company injured by the contractor in *BSC Associates* could, in theory, have availed themselves of one of New York’s many third-party funders. New York Judiciary Law Section 489 has never been interpreted to prohibit contracts to maintain litigation in exchange for a portion of proceeds *short* of assignment.⁴³ But New York could be considered a special case since its doctrines of champerty and maintenance were replaced by a statute that explicitly limits the scope of the prohibition to assignments. The other states discussed above (Maryland, Connecticut, and California) make no such distinction.⁴⁴

If in some U.S. jurisdictions third-party financing will not be able to step in and take up the slack left by the prohibition of champertous assignments, then these states would be in the same position Capper describes as the current state in Ireland. For those jurisdictions, it would be important to know

⁴¹ In another case applying New York law, the court considered a transaction remarkably similar to the transaction in *Poe* and found it champertous. *See Vardanyan v. Close-Up Int’l*, No. CV-06-2243 (DGT), 2007 U.S. Dist. LEXIS 88292, at *22 n.4 (E.D.N.Y. Nov. 30, 2007) (“Moreover, the only consideration given by plaintiff in exchange for the Abramov shares was a promise to sue Close-Up for the money allegedly owed to Abramov. . . . This arrangement bears all of the earmarks of champerty.”).

⁴² Capper’s paper makes a slightly different point. Capper starts from the acceptance by most common law jurisdictions of third-party litigation finance and then asks if assigning the right to litigate automatically follows. He expresses doubts whether it does.

⁴³ *See Fahrenholz v. Sec. Mut. Ins. Co.*, 788 N.Y.S.2d 546 (N.Y. App. Div. 2004).

⁴⁴ Neither does Pennsylvania. *See, e.g., Riffin v. Conrail Rail Corp.*, 363 F. Supp. 3d 569 (E.D. Pa. 2019).

what counts as a “bare” assignment since this category describes a space where third-party support for litigation is simply not available under any form.

First, let us look at answers offered by some of the cases reviewed by Capper. In *Simpson*, Moore-Bick LJ said an interest is sufficient to render an assignment “not bare” (or “covered”) when it is “supported by an interest of a kind sufficient to justify the assignee’s pursuit of proceedings for his own benefit.”⁴⁵ This verges on a tautology. It may be said that Moore-Bick LJ was merely trying to give a gloss on the more familiar test used by Lord Roskill in *Trendtex Trading*, which was to say that an assignment is not bare if the assignee has a “genuine commercial interest” in the resolution of the chose in action.⁴⁶ While not tautological, a lot rests on the meaning of the word “genuine.” In *Casehub*, the assignee was a commercial aggregator whose only interest was to share in a stranger’s consumer claim by returning 60% of any recovery to the assignor/consumer.⁴⁷ The interest held by the assignee was “genuinely” commercial, in the sense that it was motivated by a desire for profit, as opposed to the assignee in *Simpson*, who had a political or social interest. But it was not a commercial interest incidental to any property to which the assignee had title. Nor was it a commercial interest that pre-existed the assignment, as in *JEB Recoveries v. Binstock*.⁴⁸

Capper suggests that the assignment in *SPV Osus* should not have been condemned by the Irish court as bare, and that the result—the loss of an opportunity by unsecured creditors to receive money sooner than later in a complex insolvency—makes little sense from the perspective of public policy.⁴⁹ The test offered by the Irish court sweeps more broadly than Capper thinks is necessary or advisable. The court found the assignments bare because the assignees neither had (1) any commercial interest incidental to any property to which the assignee had title nor (2) a commercial interest that pre-existed the assignment. I agree with Capper on this point. But I am not sure that I agree with Capper’s reasons for criticizing the *SPV Osus* decision.

My quibble with Capper is this: Is the basis for his critique of the *SPV Osus* decision its focus on the motive of the assignee or the fact that the assignee had no connection to the chose in action but for the assignment? The phrase “genuine commercial interest” can be read narrowly or broadly. The narrow reading would allow assignments where the assignee had no

⁴⁵ *Simpson v. Norfolk & Norwich Univ. Hosp. NHS Tr.* [2011] EWCA (Civ) 1149 [15], [2012] QB 640 (Eng.).

⁴⁶ *Trendtex Trading Corp. v. Crédit Suisse* [1982] AC 679 at 703. Capper cites to *Equiscorp Pty Ltd v Haxton*, [2012] HCA 7, for an Australian version of the same test. Capper, *supra* note 1, at 17.

⁴⁷ *Casehub Ltd. v. Wolf Cola Ltd.* [2017] 5 Costs LR 835, discussed by Capper, *supra* note 1, at 17–18.

⁴⁸ *JEB Recoveries LLP v. Binstock* [2015] EWHC 1063 (Ch).

⁴⁹ Capper, *supra* note 1, at 8.

connection to the chose in action but for the assignment, as long as the assignee's motive was to secure one a certain class of "legitimate" ends. The latter would prohibit assignments where the assignee had no connection to the chose in action under any circumstances subject to two narrow exceptions (where the assignee possessed title property connected to the chose in action or had an equitable interest connected to the chose in action that pre-existed the assignment).

Capper endorses the former reading—at least, this is the impression one gets from his treatment of *Simpson*—which he appears to approve, and *Body Corporate 160361 (Fleetwood Apartments) v. BC 2004 Ltd. & BC 2009 Ltd.*,⁵⁰ which he also appears to approve. In *Simpson*, the assignee did not have a profit-seeking motive—she took the assignment in order to secure a non-economic end—which was to improve medical safety by enforcing a stranger's otherwise valid malpractice claim. She was a classic example of Abinger's officious intermeddler, since she was seeking to enforce a claim that the assignor "was not disposed to enforce."⁵¹ The assignee's motive was illegitimate, according to Capper, because her ends were inconsistent with the "administration of justice," since the assignee was patently uninterested in resolving the claim based on the "merits of the case."⁵²

The assignee in *Body Corporate*, on the other hand, had a profit-seeking motive but took the assignment in order to secure an end that could not have been achieved had the claim remained with the original claimholder. The assignee was one of three defendants sued by the assignor. The settlement provided the plaintiff with \$1.5M NZD in exchange for a release and the assignment of the plaintiff's claims against the remaining defendants, with the understanding that the assignee would only keep \$1.5M NZD and some legal costs and pass any surplus onto the plaintiff. The court accepted the other two defendants' argument that the assignment was a scheme designed to impose onto the other non-settling defendants more of the share of the liability than would have otherwise been assigned them had there been no settlement/assignment with the plaintiff because it would permit the first defendant to evade New Zealand's rules of contribution between joint tortfeasors.⁵³ Here, the assignment was not legitimate because its end was to

⁵⁰ *Body Corporate 160361 (Fleetwood Apartments) v. BC 2004 Ltd. & BC 2009 Ltd.* [2014] NZHC 1514, [2014] 3 NZLR 758 (N.Z.).

⁵¹ See *Prosser v. Edmonds* (1835) 160 Eng. Rep 196.

⁵² Capper, *supra* note 1, at 6.

⁵³ The goal of the assignment on the part of the [first defendant] is to reduce the amount that it would otherwise have to pay after a combination of a trial leading to a judgment and then a second hearing leading to apportionment of the judgment sum under the Law Reform Act 1936. For otherwise the assignment would not have been entered into.

Body Corporate, [2014] 3 NZLR 758 (HC) at [130] (Fogarty J).

secure an economic advantage that was, according to Capper, “unmerited.”⁵⁴ In his view, the assignment was an abuse of process.

Before examining the principle that can be teased out from these cases, it must be observed that American courts have seen fact patterns that parallel cases like *Simpson* and *Body Corporate*. Lili Levi has catalogued a variety of non-economically motivated campaigns by third-party funders to burden or bankrupt media defendants who have offended wealthy political actors.⁵⁵ In one infamous example, a wealthy venture capitalist funded a privacy claim against Gawker Media.⁵⁶ Although not an assignment (since personal torts cannot be assigned in Florida), the policy concerns raised by Capper were potentially present in the third-party funding relationship, given the reports that the funder exercised control over the litigation to the point of instructing the claimant to refuse a reasonable settlement offer.⁵⁷ Third-party funding for non-economic reasons has appeared in other contexts, including, for example, the funding of a personal injury suit against the Church of Scientology.⁵⁸

On the other hand, concern about abuse of process has proven fatal to economically-motivated assignments in New York, paralleling the concern expressed by Capper about *Body Corporate*. In *Justinian Capital SPC v. WestLB AG*,⁵⁹ the assignee was the purchaser of distressed subordinated debt who sued the financial institution that managed the issuers of the notes. The New York Court of Appeals found that the agreement between the plaintiff and assignor, the original purchaser of the notes, was champertous in violation of Judiciary Law section 489 because “there was no evidence” that the plaintiff-assignee’s acquisition of the notes was for any purpose other than litigation.⁶⁰ The assignee paid nothing for assignment and promised to remit 85% of any verdict or settlement to the assignor. The Court of Appeals

⁵⁴ Capper, *supra* note 1, at 21.

⁵⁵ Lili Levi, *The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism*, 66 AM. U. L. REV. 761 (2017).

⁵⁶ Ryan Mac & Matt Drange, *This Silicon Valley Billionaire Has Been Secretly Funding Hulk Hogan’s Lawsuits Against Gawker*, FORBES (May 24, 2016, 7:29 PM), <https://www.forbes.com/sites/ryanmac/2016/05/24/this-silicon-valley-billionaire-has-been-secretly-funding-hulk-hogans-lawsuits-against-gawker/#33926c528d14>.

⁵⁷ See Felix Salmon, *Peter Thiel Just Gave Other Billionaires a Dangerous Blueprint for Perverting Philanthropy*, SPLINTER (May 25, 2016, 10:30 PM), <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.”).

⁵⁸ *Estate of McPherson v. Church of Scientology Flag Serv. Org.*, 815 So. 2d 678 (Fla. Dist. Ct. App. 2002).

⁵⁹ *Justinian Capital SPC v. WestLB AG*, 65 N.E.3d 1253, 1255 (N.Y. 2016).

⁶⁰ *Id.* at 1257, 1259.

focused on its findings that the plaintiff was a shell company, with little or no assets, that acquired the notes following the assignor's determination not to sue in its own name for political reasons since it received funding from the German government, which was also a part owner of the defendant.

IV. THE DIFFERENCE BETWEEN IRRATIONAL ASSIGNEES AND COLLUSIVE ASSIGNEES

The test for legitimacy sketched out by Capper's sympathetic treatment of *Simpson* and *Body Corporate* is unsatisfactory because it endeavors to address two different concerns without explaining how they are related. The concern addressed in *Simpson* is that the "normal" operation of civil litigation will be derailed by abnormal interests, such as the desire to use the litigation as a platform to publicize a matter of public importance, such as medical negligence. This is related, but not identical, to the concern that one might have in the American third-party funding cases against Gawker and the Church of Scientology, where the abnormal interest appears to be a desire to punish, not to secure compensation. In all of these cases, the chief characteristic of the illegitimate motive is that the assignee is not susceptible to a settlement offer that is rational from the perspective for a rational actor.

The concern addressed in *Body Corporate* is that the "normal" operation of civil litigation will be derailed by pretextual use of rules that are written in general terms but require good faith for their application. The reason for the court's hostility to the assignment in *Body Corporate* is identical to the reason for the court's hostility to the assignment in *Justinian*. In both cases, the assignor and the assignee took advantage of the law of assignment to achieve an end in tension with other parts of the law. In *Body Corporate*, the assignees wanted to evade the equitable rules of contribution among joint tortfeasors, while in *Justinian* the assignees (apparently) wanted to evade identification as the real party in interest.

It is not clear what these two concerns have to do with each other, and, more importantly, it is not clear why they should be treated with the same legal prophylactic or even labeled under the same legal category. I am unpersuaded that assignments motivated by non-economic ends of the sort in *Simpson* cause such "undue prejudice to defendants" that they pose a significant risk to the administration of justice.⁶¹ As Eugene Kontorovich has observed, while the volume of dollars directed to suits for non-economic reasons is small, the role played by third-party funders who were motivated by political and social concerns in the decline of champerty in the United States cannot be ignored: "One of the final blows for the doctrine was the Supreme Court's decision in *NAACP v. Button*, 371 U.S. 415 (1963), holding

⁶¹ See Capper, *supra* note 1, at 6-7.

Virginia's champerty and maintenance laws violated the First Amendment, because litigation—and the sponsorship of it—is a vehicle for expressing viewpoints.”⁶² This is not to deny that stubborn assignees might not refuse to settle at a price that would satisfy an assignee or her agent who was motivated purely by a desire to maximize their welfare. Thus, it is surely right that the assignment of claims in *Simpson* (or in the *Gawker* or *Scientology* cases) would lead to cases taking more time, resulting in higher costs for the defendant without any commensurate welfare gains for the original claimant. But it is not clear why the baseline for evaluating the administration of justice ought to be that of a profit maximizer, such as an insurer to whom a claim has been subrogated, as opposed to a party seeking to enforce a valid claim for reasons other than economic reasons.⁶³

In the United States, while some opponents like the US Chamber of Commerce have focused on the potential costs arising from additional (and putatively frivolous) litigation resulting from the liberalization of the laws relating to champerty, others have focused on the specific risk arising from third-party funding's opacity. Maya Steinitz has argued that there may be a public interest in disclosure of third-party funding.⁶⁴ As she put it, “not-for-profit funders, may be concerned with (their version of) the public interest but, of course, what constitutes and furthers the ‘public’s interest’ is often a contested matter.”⁶⁵ She provided this illustration:

In March of 2016, documents revealed . . . that agricultural groups—including the Iowa Farm Bureau Federation, the Iowa Soybean Association, the Iowa Corn Growers Association (ICGA) and the Iowa Drainage District Association—secretly funded the defense of the Iowa lawsuit through a 501(c)3 nonprofit, the Agricultural Legal Defense Fund. According to Internal Revenue Service documents . . . fertilizer and other agricultural company officials make up the bulk of the nonprofit’s officers and directors, including representatives from Smith Fertilizer,

⁶² Eugene Kontorovich, *Peter Thiel’s Funding of Hulk Hogan-Gawker Litigation Should Not Raise Concerns*, WASH. POST (May 26, 2016, 8:19 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/26/peter-thiels-funding-of-hulk-hogan-gawker-litigation-should-not-raise-concerns/> (characterizing Thiel’s action as fitting into the modern paradigm of ideological litigation). As Professor Capper has pointed out to me, in England and Wales third-party funders whose motives are political or altruistic are less likely to be required to pay the costs of the successful party than funders trying to make a profit. See *Hamilton v Al Fayed (No 2)* [2003] QB 1175.

⁶³ There may be some reason to doubt that settlement is preferred by economically rational actors, all things being equal. See Ezra Friedman & Abraham L. Wickelgren, *No Free Lunch: How Settlement Can Reduce the Legal System’s Ability to Induce Efficient Behavior*, 61 SMU L. REV. 1355 (2008).

⁶⁴ Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. DAVIS L. REV. 1073, 1103–04 (2019).

⁶⁵ *Id.* at 1104.

Monsanto Co., Growmark, Cargill, Koch Agronomics, DuPont Pioneer and the United Services Association.⁶⁶

The administration of justice may very well be threatened by third-party efforts like the one described by Steinitz, but if it is, the appropriate response should be disclosure, not prohibition.⁶⁷ If Peter Thiel, the NAACP, and Big Agribusiness want to force a claim to go to trial, in order to prove a point about some matter of social or political importance, they should be able to do so as long as their role is open to the court and (perhaps) the public.

Simpson stands in a different relation to the administration of justice than the American cases. Because it is easier to assign causes of action in England, the malpractice claim at issue could be assigned (whereas it could not be in the *Gawker* case) and so the identity of the champertor was not concealed. That being the case, it is not clear that there were any public policy reasons to prohibit the assignment. To my mind, assigning the malpractice action was *more* legitimate than arranging for third-party funding because assignment insured more transparency about whose interests were being promoted. The fact that the assignee might be less inclined to settle than the original claimholder is not one that weighs heavily on one side or the other of the question of public policy.

On the other hand, the pretextual use of civil litigation in *Body Corporate* and *Justinian* raises concerns that are different from those raised by *Simpson* and the *Gawker* case. But it is important to define those concerns with care. It is true that in both cases the assignor sought to evade an undesirable outcome by avoiding being identified as the real party in interest, and it is true that the assignee was rewarded—paid, really—for lending itself to the assignor. One might even describe the assignee in *Justinian* in a “sock puppet” for hire. While the assignee in *Body Corporate* was not exactly a “sock puppet,” it did act as a mechanism for “laundering” the legal identity of the claimholder for no purpose other than avoiding the rules of contribution.

V. TOWARDS A TEST FOR BARE ASSIGNMENTS, BARELY

What distinguishes the assignments in *Justinian* and *Body Corporate* from the assignments in *Poe*, *BSC Associates*, *Accrued Financial Services*, or *SPV Osus*, all of which were, in my opinion, incorrectly deemed to be “bare” assignments? All of these cases involved commercial motives on the

⁶⁶ Llewellyn Hinkes-Jones, *Open Records Request Exposes Rare Litigation Finance Document*, BLOOMBERG BNA (Feb. 23, 2017), <https://web.archive.org/web/20170223223237/https://www.bna.com/iowa-pollution-suit-n57982084227/>.

⁶⁷ This was Kontorovich’s suggestion. See Kontorovich, *supra* note 62.

part of the assignor and assignee; that is a trivial observation at this point. Here is one suggestion: the difference between *Justinian* and *Body Corporate*, on the one hand, and *Poe*, *BSC Associates*, *Accrued Financial Services*, or *SPV Osus*, on the other, is that in the first set of cases, the assignee profited from doing something with the claim that the assignor would not, or could not do, whereas in the second set of cases the assignee profited from giving the assignor the discounted value of the claim. In *Justinian*, the court was very disturbed by two features of the deal; first, that the assignor was to receive most of the recovery, with very little going to the assignee, and second, that the assignee paid nothing out-of-pocket for the claim and would only pay for the claim if it recovered proceeds. This meant, of course, that the assignor did not have the “bird in the hand,” as Capper described the unsecured creditors’ position in *SPV Osus*.⁶⁸ In *Body Corporate*, the reward to the assignee was not the profit it would make from pursuing the assigned claim (since, like in *Justinian*, it had to give all the surplus to the assignor) but something else: a decrease of its liability.

In *Poe*, *BSC Associates*, *Accrued Financial Services*, or *SPV Osus*, the focus of the courts was on the assignee’s gain from enforcing the claim—either the fact that it was disproportionate to the price paid for the assignment or simply that it could be “traded on” to other strangers. The *Poe* court held that it was significant that the assignor accepted 10% of the claim’s value and promised to indemnify the assignee’s costs; the court concluded from this that the claim was so speculative that the assignor, being unwilling to enforce, was happy to give it away.⁶⁹ The court in *Accrued Financial Services*, almost 150 years later, emphasized a similar point. It stressed that the assignors had no idea what the true value of their claims was and that this indicated that they were not genuinely interested in enforcing their claims, regardless of their merit.⁷⁰ *Laurent v. Sale* and *In re Trepca Mines Ltd. (No 2)* are common law decisions in which concern over the speculative nature of the underlying claims assigned “scuppered” (in Capper’s words) what otherwise would have been conventional assignments choses of action attached to debt.⁷¹ In both cases, the courts compared the price paid by the assignee for the value received. Like in *Accrued Financial Services*, the courts focused on the fact that when the assignments were made the value of the claims were hard to define (e.g., they were speculative) and, as such, it could be assumed that the assignors did not view them as holding much value.

⁶⁸ See Capper, *supra* note 1, at 4.

⁶⁹ *Poe v. Davis*, 29 Ala. 676, 683 (1857).

⁷⁰ *Accrued Fin. Servs. v. Prime Retail, Inc.*, 298 F.3d 291, 299 (4th Cir. 2002) (“[T]he tenants, who were the real parties in interest, assigned rights in litigation of which they had no knowledge. . . . Because the rights were assigned before their nature, costs and benefits could be assessed, . . . the tenants . . . had no opportunity to evaluate whether their prosecution was in [their] interest.”).

⁷¹ Capper, *supra* note 1, at 13–15.

If the concern with the price paid by the assignee is rooted in a concern for the assignor's interests, the basis for this concern is both ill-founded and obscure. It is unfounded because there is no evidence that the assignors were not able to protect themselves or were not fully aware of their own interests when selling their claims. As the dissent in *Accrued Financial Services* put it, "[t]here is every reason to believe that the [assignors], who are large outlet store[s] . . . were able to bargain with [the assignees] on equal footing."⁷² It is obscure because it is not clear why the courts should be concerned with claims being given away too cheaply. If there is a problem with the assignee paying £1 in *Simpson*, it is not that the original victim of malpractice deserved to be paid more for the claim. The suggestion that a low price indicates a weak claim is inconsistent with other cases, such as *Metropolitan Life* where the assignee—having already proven his claim—brought identical claims for \$1.⁷³

The concern identified by Capper in *SPV Osus*—that the intent of the assignee was to continue to sell the claims on to other investors—is simply the concern expressed by the House of Lords in *Trendtex* over the trafficking in litigation.⁷⁴ It should be clear that nothing is added to the analysis by using the word “trafficking” other than to imply that the profit resulting from the assignment will go to someone without a legitimate interest, which is a tautology unless independent meaning can be given to the word “legitimate.” *BCS Associates* is instructive in this regard. The circumstances that led the assignor to give its claims away were not detailed by the court, but it seems that the family who owned the company that suffered the original claims was left with no assets after their secured creditors were finished exercising their rights. Why the assignor did not declare bankruptcy is irrelevant. It is not clear why, under those circumstances, a transfer to a complete stranger of litigation assets—the only assets left to the original victim—is against the public interest. Again, the stranger's motives for buying the chose in action are irrelevant unless, as in *Justinian* or *Body Corporate*, the fact that the assignee is being used by the assignor to secure an advantage that would have been unavailable to the assignor had the chose in action remained in his or her hands. As *Justinian* and *Body Corporate* illustrate, the legal device of assignment can be used to facilitate transactions that are inconsistent with the administration of justice, but the question is not whether a certain legal device can be abused, but whether it is especially susceptible to abuse. It is not obvious that this conclusion can be drawn about assignment between strangers driven by either economic or non-economic motives.

⁷² *Accrued Fin. Servs.*, 298 F.3d at 306 (“[T]he majority's argument that the assignments serve AFS's interests more than its clients' (the tenants') interests is without any foundation.”).

⁷³ *Jackson v. Deauville Holding Co.*, 27 P.2d 643 (1933); *Wikstrom v. Yolo Fliers Club*, 274 P. 959 (1929); *McCord v. Martin*, 166 P. 1014, 1015 (1917).

⁷⁴ *Trendtex Trading Corp. v. Crédit Suisse* [1982] AC 679, at 694.

VI. CONCLUSION

The right to redress is central to a legitimate interest held by the assignor, and if it cannot be freely alienated, then its value is reduced. It would seem that in order to respect the legitimacy of the assignor's rights in private law, the identity of the assignee should not matter in defining when an assignment is bare, unless the identity of the assignee tends to reveal something about the motives of the parties that is relevant to a decision to categorically prohibit the transaction. I have argued that identity is irrelevant and that, if the courts must prohibit assignments on a categorical basis, the focus should be narrowly focused on the motives of the parties.

In Section 4, I indicated that a distinction exists between irrational assignees—the sort that were barred by the court in *Simpson* and (perhaps) the *Gawker* case—and collusive assignees—the sort that were barred in *Body Corporate* and *Justinian*. To the extent that Capper thinks that common law courts are correct to treat both types as bare assignments, we disagree. Further, the reason why collusive assignments ought to be barred is the motive of the assignor. To the extent that the assignee is a willing cooperator in the assignor's scheme and takes a payment or shares in the wrongful surplus secured by the assignment on behalf of the assignor, the assignee's motive matters. But the focus should be on the assignor, not the assignee. For this reason, I think that cases in the United States such as *BSC Associates* and *Accrued Financial Services*, as well as *SPV Osus* in Ireland, are wrongly decided.