

IN THE SHADOWS:
THIRD-PARTY LITIGATION FUNDING AGREEMENTS
AND THE EFFECT THEIR NONDISCLOSURE
HAS ON CIVIL TRIALS

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ABSTRACT

Third-party litigation funding (“TPLF”) has become an increasingly common practice in the United States in recent years, especially in the field of civil litigation. In civil practice, TPLF entails a third party funding the litigation costs of an actual party to a case and in turn the third party receives a share of any damages if the suit is successful. Often, the court and jury are not aware of any TPLF agreement, as there are currently few rules requiring disclosure of the existence of such agreements or the identity of TPLF financiers. And while generally entities engaged in TPLF have no connection to the parties, in at least one high-profile case the third party financing the litigation had a personal animus against the defendants. Further, there is evidence suggesting the plaintiff’s litigation strategy in that case was driven by this animus between the third party and the defendants and had an effect on the overall outcome of the lawsuit.

This trend raises numerous concerns, namely whether TPLF arrangements should be allowed to take place in the shadows while courts and juries are none the wiser. Opponents of the practice as it currently stands argue TPLF agreements should be disclosed in the name of fairness to the parties and in the spirit of transparency. Proponents of the status quo, on the other hand, argue TPLF allows individuals who would otherwise not be able to afford the high cost of litigation to vindicate their rights and that disclosure of these agreements will have improper effects on jury verdicts. As of early 2020, Wisconsin and West Virginia are the only states with laws requiring disclosure of TPLF agreements; however, there are currently proposals in the United States Senate and in many states that would enshrine rules requiring TPLF disclosure. Similar proposals have also been made before the Federal Advisory Committee on Civil Rules of Practice and Procedure.

This Note argues for the adoption of these proposed rules requiring disclosure of TPLF agreements. It will approach this from the perspective of third parties funding the litigation costs of plaintiffs (as opposed to funding defense cases). This Note will also show that mandatory TPLF disclosure aligns more closely with the notions

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of fairness that underline the main tenets of the American civil system. And because disclosure should have no effect on the substantive facts and laws at issue in a dispute, it should thus not impact verdicts. It could, however, play a role in calculating potential punitive damages, namely in cases where the TPLF is motivated by personal animus against one of the parties. Finally, this Note will rebut arguments against mandatory disclosure by showing that any concerns regarding the adoption of such rules are outweighed by fundamental concerns for fairness and transparency.

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I. INTRODUCTION

“Parties in civil matters have the right to a *fair*, accurate and timely jury trial in accordance with law.”¹

In June 2016, Gawker Media (“Gawker”)—an online news media company—filed for bankruptcy.² This was due to a \$140 million judgment leveled against it by a Florida jury in an invasion-of-privacy suit brought by Terry Bollea (“Bollea”), better known as the wrestler Hulk Hogan.³ It was only after the trial ended that the role Peter Thiel (“Thiel”), a Silicon Valley investor and billionaire, played in the case was discovered.⁴ Despite not being an actual party to the suit, Thiel had in fact been deeply involved in the litigation.⁵ Thiel invested roughly \$10 million of his own money into Bollea’s lawsuit, all in service of his ultimate goal: to drive Gawker out of business.⁶ Thiel’s involvement was a rare example of the practice known as third-party litigation funding (“TPLF”) being publicly discovered.

TPLF is a common civil litigation practice whereby a third party not connected to a case funds the litigation costs of an actual party to the case in return for a negotiated percentage of any awarded damages should the suit be successful.⁷ The modern practice of TPLF emerged

1. PRINCIPLES FOR JURIES AND JURY TRIALS princ. 1.A at 3 (AM. BAR ASS’N 2005) (emphasis added), https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.authcheckdam.pdf [<https://perma.cc/Z3PX-DU2K>]; see also Jacob v. City of New York, 315 U.S. 752, 752 (1942) (“The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment.”).

2. Sydney Ember, *Gawker, Filing for Bankruptcy After Hulk Hogan Suit, is for Sale*, N.Y. TIMES (June 10, 2016), <https://nytimes.com/2016/06/11/business/media/gawker-bankruptcy-sale.html> [<https://perma.cc/B8N9-ALU8>].

3. *Id.*; see also Bollea v. Gawker Media, LLC, No. 522012CA012447, 2016 WL 4073660, at *1–2 (Fla. Pinellas County Ct. June 8, 2016) (court’s order of final judgment against Defendants Gawker Media, Nick Denton, and Albert Daulerio).

4. Ryan Mac & Matt Drange, *This Silicon Valley Billionaire Has Been Secretly Funding Hulk Hogan’s Lawsuits Against Gawker*, FORBES (May 24, 2016), <https://www.forbes.com/sites/ryanmac/2016/05/24/this-silicon-valley-billionaire-has-been-secretly-funding-hulk-hogans-lawsuits-against-gawker/#36af967b8d14>./ [<https://perma.cc/VP5G-A53J>].

5. *Id.*

6. Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker*, N.Y. TIMES (May 25, 2016), <https://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html> [<https://perma.cc/3WGH-BX57>].

7. Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 863 (2015); see also Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT’L & COMP. L. 343, 350–51 (2011) (defining TPLF in more detail as “the specific practice in which a third party offers financial support to a claimant in order to cover his litigation expenses, in return for a share of damages if the claim is successful, or nothing if the case is lost, ensuring the financier a passive role who assumes no control over the litigation”).

in the United States in the mid-1990s,⁸ and was originally focused on individual plaintiffs who could not otherwise afford the costs of litigation.⁹ Notwithstanding this, TPLF has become a mainstay in the American civil trial system while also growing into a billion-dollar industry.¹⁰ And yet, it remains severely under-regulated.¹¹

This lack of regulation raises questions about the fairness of lawsuits that involve TPLF. This Note focuses on current and proposed rules to regulate TPLF, at both the state and federal level,¹² and recommends for the adoption of these rules.¹³ There are currently no federal rules requiring mandatory disclosure of TPLF agreements.¹⁴ Only a handful of states have legislation even regulating the practice,¹⁵ and as of early 2020 Wisconsin and West Virginia are the only states with laws requiring disclosure of TPLF agreements.¹⁶ Senators in the 116th Congress in February 2019 filed a bill that would “increase transparency and oversight of [TPLF] in certain actions[.]”¹⁷ There was also a proposal before the 2019 Advisory Committee on Civil Rules of Practice and Procedure asking it to amend Rule 26(a)(1)(A) to require greater TPLF disclosure.¹⁸ This Note argues the lack of

8. Morpurgo, *supra* note 7, at 360; *see also id.* at 362 (discussing the development of TPLF as a viable and growing economic industry in the United States); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 55 (2004) (noting that “[l]ending money to plaintiffs to finance their lawsuits ha[d] become an industry within the last ten years”).

9. *See* VICKI WAYE, TRADING IN LEGAL CLAIMS: LAW, POLICY & FUTURE DIRECTIONS IN AUSTRALIA, UK & US 111 (2008); *see also* Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That has a Place in the United States Market*, 53 VILL. L. REV. 83, 84 (2008) (“[T]he litigation financing industry is most often recognized in the popular, professional and academic presses because of its relationships with poor individual plaintiffs.”).

10. *Third Party Litigation Funding (TPLF)*, U.S. CHAMBER INST. LEGAL REFORM (Dec. 11, 2018), <https://www.instituteforlegalreform.com/issues/third-party-litigation-funding> [<https://perma.cc/7AQE-NMT7>]; *see also* BURFORD CAPITAL, 2017 INTERIM REPORT 1, 4 (stating that Burford Capital, a major litigation finance firm, as of the first half of 2017 had “\$3.1 billion invested in and available for legal finance”), https://www.burfordcapital.com/media/1527/bur-27947-interim-report-2017_web.pdf [<https://perma.cc/6Q3V-HLJP>].

11. *See* Shannon, *supra* note 7, at 864; *infra* notes 40–43. It is also worth noting that while scholarly commentary on TPLF has grown as it has grown as an industry, it remains a relatively unresearched topic in terms of empirical data and studies. *See* Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer Litigant Funding*, 104 CORNELL L. REV. 1133, 1136, 1140 (2019); *see also id.* at 1140 n.33.

12. *See infra* Part III.

13. *See infra* Part IV.

14. *See infra* Part III.A.

15. *See infra* Part III.B.

16. *See id.*

17. *See* Litigation Funding Transparency Act of 2019, S. 471, 116th Cong. (2019); *infra* Part III.C.

18. *See* Letter from Various In-House Counsel for U.S. Corporations to Rebecca Womeldorf, Secretary, Advisory Committee on Civil Rules of Practice and Procedure (Jan. 31, 2019) (discussing requirement for disclosure of TPLF agreements in civil actions), https://www.instituteforlegalreform.com/uploads/sites/1/TPLF_letter_1.31.19.pdf [<https://perma.cc/9Q7M-63BJ>]; *infra* Part III.C.

TPLF disclosure regulation hurts the legitimacy of the civil trial system by denying fairness to all parties to a lawsuit, and as a result jurisdictions should adopt rules similar to those that have been adopted and proposed.

Part I of this Note will briefly outline the history of third-party standing and TPLF. Part II will focus in detail on the *Gawker* case. Part III will look at what rules currently exist regulating TPLF and what rules are being proposed. Part IV will advocate for the adoption of the above-mentioned adopted and proposed rules. Part V will address counter arguments opposed to rules requiring forcible disclosure by showing that requiring TPLF disclosure is in line with American notions of fairness to the parties and that any concerns about forcible disclosure are outweighed by the interests in preserving fair hearings for all litigants. Part VI concludes.¹⁹

II. BRIEF HISTORY OF THIRD-PARTY STANDING AND THIRD-PARTY LITIGATION FUNDING

Article III of the U.S. Constitution “gives the federal courts jurisdiction over only ‘cases and controversies,’ and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process.”²⁰ The Supreme Court has held that “the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”²¹ The traditional rationales for standing range from preserving separation of powers,²² to rationing limited judicial resources.²³ As a result, third parties have historically been unable to litigate the rights of others

19. This Note will only address disclosure of TPLF agreements between third-party financiers and plaintiffs. Other kinds of TPLF agreements are outside the scope of this Note and are discussed elsewhere. *See, e.g.*, Shannon, *supra* note 7, at 861.

20. *Whitmore v. Arkansas*, 495 U.S. 149, 154–55 (1990); *see also* U.S. CONST., art. III, § 2 (enumerating the various cases and controversies the judicial power extends to).

21. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Court has held there are three elements to the standing doctrine:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical[.]’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Id. at 560-61 (citations omitted).

22. *See, e.g.*, Ehud Guttel, Alon Harel, & Shay Lavie, *Torts for Nonvictims: The Case for Third-Party Litigation*, 2018 U. ILL. L. REV. 1049, 1056 (2018).

23. *See, e.g.*, Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 684 (1973).

because plaintiffs must assert their own legal rights.²⁴ This prohibition, however, is not absolute, and the Court has “recogniz[ed] that there may be circumstances where it is necessary to grant a third party standing to assert the rights of another.”²⁵

Prior to the U.S. Constitution, medieval English common law also restricted the ability of third parties to become involved in litigation, namely through laws prohibiting the practices of maintenance, champerty, and barratry.²⁶ The argument for banning such practices was they were believed to incentivize frivolous lawsuits.²⁷ And while these proscriptions “traveled with English common law into the U.S.[.]” over time most jurisdictions “gradually loosened” enforcement of these doctrines;²⁸ today, many jurisdictions have abolished the bans altogether.²⁹ Generally, the reasoning for leaving these doctrines behind is they have outlived their utility and there are other legal theories better suited for preventing frivolous and fraudulent claims;³⁰ namely, the growth of legal ethics and other means of sanction for abusive litigation have helped address these needs.³¹

24. *E.g.*, *Tileston v. Ullman*, 318 U.S. 44 (1943); *Warth v. Seldin*, 422 U.S. 490 (1975); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (discussing that for an injury to be particularized, the plaintiff must have suffered in a personal and individual way). *But see Craig v. Boren*, 429 U.S. 190, 193 (1976) (upholding third-party standing on the grounds that the Supreme Court’s restrictions on third-party standing “are not constitutionally mandated, but rather stem from a salutary ‘rule of self-restraint’”).

25. *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004) (citing *Powers v. Ohio*, 499 U.S. 400, 411 (1991)); *see also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (recognizing an exception to the general ban on third-party standing where the third party has a close relationship with the aggrieved party and there is some hindrance to the right-holder’s ability to litigate his own interests).

26. *See Douglas R. Richmond, Other People’s Money: The Ethics of Litigation Funding*, 56 *MERCER L. REV.* 649, 652 (2005); *see also In re Primus*, 436 U.S. 412, 424 n.15 (1978) (“Put 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.”) (citing 4 *WILLIAM BLACKSTONE, COMMENTARIES* *128, *134-36); *see generally Max Radin, Maintenance by Champerty*, 24 *CALIF. L. REV.* 48 (1935) (tracing the development of these practices from ancient Greek and Roman law to medieval English common law).

27. *See Brian T. Fitzpatrick, Can and Should the New Third-Party Litigation Financing Come to Class Actions?*, 19 *THEORETICAL INQUIRIES L.* 109, 112 n.4 (2018).

28. *E.g.*, *Cassandra B. Robertson, The Impact of Third-Party Financing on Transnational Litigation*, 44 *CASE W. RES. J. INT’L L.* 159, 164 (2011).

29. *See Richmond, supra* note 26, at 653 (listing cases from various state courts discarding these doctrines); *see also Anthony J. Sebok, The Inauthentic Claim*, 64 *VAND. L. REV.* 61, 98–99 (2011) (listing various jurisdictions which now permit the practices of champerty and maintenance).

30. *Richmond, supra* note 26, at 653 (quoting *Osprey, Inc. v. Cabana Ltd. P’ship*, 532 S.E.2d 269, 277 (S.C. 2000)) (“[O]ther well-developed principles of law can more effectively accomplish the goals of preventing speculation in groundless lawsuits and the filing of frivolous suits” than the doctrines of maintenance, champerty, and barratry); *see also Shannon, supra* note 7, at 874 (tracing the doctrines of maintenance and champerty all the way back to Greek and Roman legal systems and discussing how they have fallen out of favor in various nations globally).

31. *See Fitzpatrick, supra* note 27, at 112 n.4.

These dated legal theories would at one time have made TPLF an untenable industry—so restrictive were the prohibitions on these practices that even something as routine as an attorney working for a contingency fee would likely have been impermissible.³² It is undeniable, however, that the trend in modern litigation is toward allowing TPLF agreements.³³ As a result, it is now generally viewed as acceptable for plaintiffs to sell or contract away a certain percentage of their potential recovery in exchange for funding by a third party.³⁴ And while some courts may still view TPLF with some skepticism,³⁵ the modern scholarly view is that such practices are ethical.³⁶ Such practices can also help even the playing field between wealthy defendants and indigent plaintiffs who would otherwise have to forego litigation if not for the availability of TPLF.³⁷

In the United States, TPLF as a viable industry began to take root in earnest in the mid-1990s.³⁸ This followed from the above-mentioned changes to the doctrinal landscape that saw more widespread acceptance of previously taboo practices, such as working off contingency fees.³⁹ Initially, the practice was pursued by those with relatively noble (i.e., non-financial) ends in mind.⁴⁰ It must be noted, however, that as TPLF has become more prevalent in American litigation, so too has the amount of money involved.⁴¹

32. See, e.g., Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 625 (2007); Richmond, *supra* note 26, at 655; Sebok, *supra* note 29, at 99–100.

33. Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding – A Signaling Model*, 63 DEPAUL L. REV. 233, 242–45 (2014) (discussing the ways and to what extent various jurisdictions have embraced TPLF).

34. Fitzpatrick, *supra* note 27, at 112 (citing AM. BAR ASS'N COMM'N ON ETHICS 20/20, WHITE PAPER ON ALTERNATIVE LITIGATIONS FINANCING 9 (2011)).

35. See Richmond, *supra* note 26, at 651 (“The emergence of litigation funding as a new financial services industry has been marked by judicial distrust.”) (citing Gary Young, *Two Setbacks for Lawsuit Financing but the Practice Is Still Alive and Well*, NAT'L L.J., July 28, 2003, at A1 (noting decisions in Ohio and North Carolina and remarking that “[t]he business of litigation finance is battered but upright after taking a beating in two courtrooms in the last year”)).

36. See, e.g., Shannon, *supra* note 7, at 875; McLaughlin, *supra* note 32, at 625; Sebok, *supra* note 29, at 107–08.

37. See Susan Lorde Martin, *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COMM. L.J. 85, 95 (2002) (discussing the benefits of litigation funding for plaintiffs who sue wealthy business defendants).

38. Morpurgo, *supra* note 7, at 362; Martin, *supra* note 8 at 55.

39. See McLaughlin, *supra* note 32, at 625.

40. See Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?*, 30 AM. BUS. L.J. 485, 507 (1992) (“The primary policy reason for permitting investors to support the litigation of others in exchange for a share of the proceeds of the litigation, if there are any, is to allow those with meritorious claims, but insufficient funds to pursue them, access to courts.”).

41. See Morpurgo, *supra* note 7, at 362 (“[A] market . . . exists . . . specifically centered on commercially-focused TPLF . . . this can be considered an ‘upper’ market, where a small

Large investment banks and hedge funds, such as Buford Capital and Bentham IMF, play an outsized role in the market.⁴² Thus, while TPLF may play a role in leveling the playing field for plaintiffs in need of funding, there is no doubt that it has become a profitable venture for the third parties doing said funding.⁴³ And while the majority of TPLF is a matter of pure business, the *Gawker* case represents an instance where an extremely wealthy individual funded litigation not for any monetary gain, but simply as a means of acting out his personal revenge.⁴⁴

III. THE GAWKER CASE

Peter Thiel is a Silicon Valley entrepreneur and billionaire, best known for cofounding PayPal and being an early investor in Facebook.⁴⁵ In 2007, on its Valleywag blog, Gawker Media revealed that Peter Thiel was a homosexual with an article headlined, “Peter Thiel is totally gay, people.”⁴⁶ From then on, Thiel sought ways of seeking revenge against Gawker for the embarrassment he suffered.⁴⁷ It was not until 2011, when Thiel was approached by someone known as Mr. A, that his plan began to see real progress.⁴⁸ Mr. A, a young acquaintance of Thiel’s, proposed that the billionaire use his considerable wealth to create a shell company whose sole purpose was funding investigators and lawyers to seek out cases that could bankrupt Gawker.⁴⁹

number of companies provide large dollar amounts to corporate actors who prefer turning to TPLF rather than risk their own assets to cover litigation costs.”); Jacob Gershman, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, WALL ST. J. (Mar. 21, 2018), <https://www.wsj.com/articles/lawsuit-funding-long-hidden-in-the-shadows-faces-calls-for-more-sunlight-1521633600> [https://perma.cc/24WM-6V6T].

42. See Fitzpatrick, *supra* note 27, at 112; see also BURFORD CAPITAL, *supra* note 10, at 4.

43. Kevin M. LaCroix, *Why Are Investors Seeking Litigation Funding Opportunities? Because Litigation Funding Is Profitable*, D&O DIARY (Mar. 20, 2015), <https://www.dandodictionary.com/2015/03/articles/litigation-financing-2/why-are-investors-seeking-litigation-funding-opportunities-because-litigation-funding-is-profitable/> [https://perma.cc/ZS5D-6WHK].

44. See Sebok, *supra* note 29, at 103 (“One can imagine a third party gratuitously supporting a stranger’s litigation with either money or non-monetary aid, just out of pure spite or malevolence towards the target of the person aided by the maintainer. This could be described as *malice maintenance*.”) (emphasis in original).

45. See Sorkin, *supra* note 6.

46. *Id.*

47. Derek Thompson, *The Most Expensive Comment in Internet History?*, THE ATLANTIC (Feb. 23, 2018), <https://www.theatlantic.com/business/archive/2018/02/hogan-thiel-gawker-trial/554132/> [https://perma.cc/CBV7-X632]; see also Mac & Drange, *supra* note 4 (reporting that Thiel referred to Valleywag as “the Silicon Valley equivalent of Al Qaeda” in 2009).

48. Thompson, *supra* note 47. It was later revealed that Mr. A is an Australian citizen named Aron D’Souza. Ryan Mac, *This Man Helped Peter Thiel Demolish Gawker*, BUZZFEED NEWS (Feb. 23, 2018), <https://www.buzzfeednews.com/article/ryanmac/this-is-the-man-who-helped-peter-thiel-demolish-gawker-mr-a> [https://perma.cc/RV3Q-AZWB].

49. Thompson, *supra* note 47.

Thiel finally hit on a promising lead in 2012, when Gawker obtained a videotape from 2006 showing Terry Bollea, known to the world as the wrestler Hulk Hogan, engaged in sexual activities with the wife of his best friend: a Florida radio shock jock named Todd Clem (better known as Bubba the Love Sponge).⁵⁰ Gawker published the video online with the headline “Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed is Not Safe for Work but Watch it Anyway.”⁵¹ Following the publication, Bollea filed multiple lawsuits against Gawker: first in federal court seeking an injunction—which was ultimately dismissed⁵²—and then, after changing legal teams, in state court alleging, *inter alia*, invasion of privacy, intentional infliction of emotional distress, and a violation of the Florida Security and Communications Act.⁵³

As the litigation commenced, Gawker’s lawyers were unaware—and remained unaware throughout the trial—that Bollea had a silent partner in the lawsuit: Thiel.⁵⁴ While there was some speculation in the media that a silent investor could be funding Bollea’s litigation costs,⁵⁵ Thiel’s involvement only came to light after the trial ended.⁵⁶ The jury, unaware of Thiel’s involvement, ultimately awarded Bollea \$140 million in damages: \$115 million in compensatory damages jointly and severally against Gawker Media, Gawker chief executive and founder Nick Denton (“Denton”), and former Gawker editor-in-chief Albert Daulerio (“Daulerio”); \$15 million in punitive damages against Gawker; \$10 million in punitive damages against Denton; and \$100,000 in punitive damages against Daulerio.⁵⁷

50. *Id.*

51. *Id.*

52. *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1331 (M.D. Fla. 2012).

53. Thompson, *supra* note 47.

54. *Id.* This was not the first lawsuit Thiel had funded against Gawker, he had in fact been “the clandestine financier of numerous lawsuits targeting Gawker Media.” Ryan Mac & Matt Drange, *Behind Peter Thiel’s Plan to Destroy Gawker*, FORBES (June 29, 2016), <https://www.forbes.com/sites/ryanmac/2016/06/07/behind-peter-thiel-plan-to-destroy-gawker/#43dd3f980f4/> [<https://perma.cc/GW5G-ZC25>].

55. Dan Abrams, *Might a Gawker Hater be Covering Hulk Hogan’s Legal Bills?*, LAW & CRIME (Mar. 9, 2016, 12:06 PM), <https://lawandcrime.com/high-profile/might-an-anti-gawker-benefactor-be-covering-hulk-hogans-legal-bills/> [<https://perma.cc/4CBK-FC9L>].

56. Mac & Drange, *supra* note 4.

57. *Bollea v. Gawker Media, LLC*, No. 522012CA012447, 2016 WL 4073660, at *1–2 (Fla. Pinellas County Ct. June 8, 2016); *see also* Nick Madigan, *Jury Tacks on \$25 Million to Gawker’s Bill in Hulk Hogan Case*, N.Y. TIMES (Mar. 21, 2016), <https://www.nytimes.com/2016/03/22/business/media/hulk-hogan-damages-25-million-gawker-case.html> [<https://perma.cc/J6T7-CSFQ>].

Shortly after the judgment Gawker filed for bankruptcy,⁵⁸ and eventually sold itself to fellow media company Univision.⁵⁹ Two months after the sale, Gawker settled with Bollea for \$31 million.⁶⁰ However, the fallout was not limited to just Gawker: Denton also had to file for personal bankruptcy,⁶¹ and Daulerio was embroiled in further litigation as Bollea's legal team sought to freeze his assets.⁶² Following the sale and settlement, Univision removed any Gawker articles related to the litigation and the flagship website, *Gawker.com* was shut down.⁶³ This was likely out of an abundance of caution as Bollea's lawyer, Charles Harder ("Harder"), was also at the time representing other plaintiffs suing Gawker.⁶⁴

Prior to the reveal of Thiel's involvement, Denton spoke with the *New York Times* about his suspicion that there may have been ulterior motives behind Bollea's lawsuit, especially as even more lawsuits were being brought against Gawker and its writers.⁶⁵ Denton actually believed a figure from Silicon Valley was likely funding the litigation, telling the paper, "[i]f you're a billionaire and you don't like the coverage of you, and you don't particularly want to embroil yourself any further in a public scandal, it's a pretty smart, rational thing to fund other legal cases."⁶⁶ Harder, for his part, refused to reveal whether someone other than Bollea was paying the litigation costs he was accruing while representing his client.⁶⁷ However, certain

58. Ember, *supra* note 2.

59. Sydney Ember, *Gawker Is Said To Be Sold to Univision in a \$135 Million Bid*, N.Y. TIMES (Aug. 16, 2016), <https://www.nytimes.com/2016/08/17/business/media/gawker-sale.html> [<https://perma.cc/7T2J-EHFK>].

60. Sydney Ember, *Gawker and Hulk Hogan Reach \$31 Million Settlement*, N.Y. TIMES (Nov. 2, 2016), <https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html> [<https://perma.cc/E8BW-8UL8>].

61. See Sydney Ember, *Nick Denton Files for Bankruptcy, Just Weeks After Gawker Did*, N.Y. TIMES (Aug. 1, 2016), <https://www.nytimes.com/2016/08/02/business/media/nick-denton-gawker-bankruptcy.html> [<https://perma.cc/N7CD-JQZQ>].

62. Matt Drange & Ryan Mac, *Ex-Gawker Editor on the Verge of Bankruptcy After Hulk Hogan's Lawyers Freeze His Assets*, FORBES (Aug. 11, 2016), <https://www.forbes.com/sites/mattdrange/2016/08/11/835/#2ce27e275d38/> [<https://perma.cc/BND8-KRGL>].

63. Ember, *supra* note 60.

64. See Mac & Drange, *supra* note 4.

65. See Andrew Ross Sorkin, *Gawker Founder Suspects a Common Financer Behind Lawsuits*, N.Y. TIMES (May 23, 2016), <https://www.nytimes.com/2016/05/24/business/dealbook/gawker-founder-suspects-a-common-financer-behind-lawsuits.html> [<https://perma.cc/HD8T-SBBA>].

66. *Id.*

67. *Id.*

actions taken during the lawsuit may have tipped Harder's hand, all but confirming that the lawsuit was not entirely motivated by purely financial desires.⁶⁸

There is evidence that had Gawker's legal team known of Thiel's involvement it would have adopted a different litigation strategy.⁶⁹ Because Thiel was allowed to remain in the shadows, not only was Gawker's legal team unable to mount a maximally effective litigation strategy, but (perhaps more importantly) the jury was also kept in the dark about the personal animus driving the lawsuit.⁷⁰ And while this information arguably would not (and should not) have changed the jury's verdict regarding the compensatory damages related to the underlying legal claims, it is not unthinkable that such information would have played a role in the punitive damages calculation.⁷¹ Unfortunately for Gawker, no such rule requiring disclosure of TPLF currently exists in Florida.⁷²

68. *Id.* Some of these actions include dropping the claim for negligent infliction of emotional distress ("NIED") since it was the one claim whose defense costs Gawker's insurance company was required to cover as well as pay any potential settlement payouts. *Id.* This is combined with the fact that Bollea's legal team turned down numerous settlement offers, was seen as an odd strategy by legal commentators, especially for a plaintiff ostensibly paying his lawyer on a contingency fee. *Id.*

69. *See, e.g.,* Thompson, *supra* note 47.

If you're fighting Hulk Hogan alone, you file motions and drag it out to be as painful as possible for Hogan, in the hopes that he'll settle. But if you're fighting a billionaire, what you do not do is try to drag out the trial as long as possible. That won't work. If Gawker suspected Thiel's involvement, they should have publicly cast aspersions and even make a case to the jury that a billionaire was behind the whole thing. If you are being hounded by a billionaire, you want to make yourself as sympathetic as possible. But I suspect the Gawker team simply didn't realize what was happening until it was too late.

Id. (emphasis omitted).

70. *See* Sebok, *supra* note 29, at 103. At least one state supreme court has observed that malice maintenance is indistinguishable from malicious prosecution, i.e., abuse of process. *Id.* (citing Wolford v. Tankersley, 695 P.2d 1201, 1222 (Idaho 1984) (Bistline, J., dissenting)).

71. *See infra* Part IV.B.

72. *See infra* Part III.B; note 85. As of early 2020, lawmakers in Florida are considering legislation that would require state regulation of litigation funding companies. *See* Jim Sams, *Litigation Funding Bills Crop Up in State Houses Across the Country*, CLAIMS J. (Feb. 18, 2020), <https://www.claimsjournal.com/news/national/2020/02/18/295539.htm> [<https://perma.cc/BKP6-E29G>].

IV. SURVEY OF EXISTING RULES AND PROPOSALS FOR THIRD-PARTY LITIGATION FUNDING

A. Federal Rules

As of early 2020, there are currently no federal rules requiring mandatory disclosure of TPLF agreements.⁷³ While six federal circuit courts of appeal have local rules requiring identifying TPLF financiers,⁷⁴ none of these local rules require the disclosure of the actual TPLF agreement itself.⁷⁵ Despite these circuits expanding disclosure beyond Federal Rule of Appellate Procedure 26.1, their local rules are nonetheless not identical to each other.⁷⁶ No federal district court requires mandatory disclosure of TPLF agreements.⁷⁷ However, of the ninety-four federal district courts, twenty-four require disclosure of the identity of TPLF financiers, either through a local rule—fourteen districts—a required disclosure statement form—ten districts—or a standing order to all judges in that district—two districts.⁷⁸ One district in particular, the Northern District of California, stands out because in 2016 it amended its standing order to require TPLF disclosure in class action lawsuits, effective January of 2017.⁷⁹

73. See Shannon, *supra* note 7, at 867; see also ADVISORY COMM. ON CIV. R. PRAC. & PROC., MEMORANDUM ON THE SURVEY OF FEDERAL AND STATE DISCLOSURE RULES REGARDING LITIGATION FUNDING 209 (Feb. 7, 2018) (memorandum surveying relevant federal and state laws dealing with TPLF disclosure), <https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf> [<https://perma.cc/FXA2-JHWY>].

74. See MEMORANDUM, *supra* note 73, at 208.

75. *Id.*; see also *id.* at 219–21 (Appendix A listing federal Circuits with local rules requiring some form of TPLF disclosure); 3d Cir. L. R. 26.1.1(b); 4th Cir. L. R. 26.1(2)(B); 5th Cir. L. R. 28.2.1; 6th Cir. L. R. 26.1(b)(2); 10th Cir. L. R. 46.1(D); 11th Cir. L. R. 26.1-1(a)(1); 11th Cir. L. R. 26.1-2(a).

76. See Memorandum, *supra* note 73, at 209–10. Compare 3d Cir. L. R. 26.1.1(b) (requiring only parties to an appeal to file disclosure statements), with 11th Cir. L. R. 26.1-1(a)(1) (requiring both parties to an appeal as well as amicus curiae to file disclosure statements).

77. See Memorandum, *supra* note 73, at 210.

78. *Id.*; see also *id.* at 223–29 (Appendix B listing federal District Courts with local rules requiring some form of TPLF disclosure); D. Ariz. Form – Corporate Disclosure Statement; C.D. Cal. L. R. 7.1-1; N.D. Cal. L. R. 3–15; Standing Order for all N.D. Cal. Judges; M.D. Fla. Interested Persons Order for Civil Cases; N.D. Ga. L. R. 3.3; S.D. Ga. L. R. 7.1; N.D. Iowa L. R. 7.1; S.D. Iowa L.R. 7.1; D. Md. L. R. 103.3(b); E.D. Mich. L. R. 83.4; W.D. Mich. Form – Corporate Disclosure Statement; D. Nev. L. R. 7.1-1; E.D.N.C. L. R. 7.3; M.D.N.C. Form – Disclosure of Corporate Affiliations; W.D.N.C. Form – Entities with a Direct Financial Interest in Litigation Form; N.D. Ohio L. Civ. R. 3.13(b); N.D. Ohio Form – Corporate Disclosure Statement; S.D. Ohio L. R. 7.1.1; E.D. Okla. Form – Corporate Disclosure Statement; N.D. Okla. Form – Corporate Disclosure Statement; N.D. Tex. L. R. 3.1(c); N.D. Tex. L. R. 3.2(e); N.D. Tex. 7.4; N.D. Tex. L. R. 81.1; W.D. Tex. L. R. CV-33; W.D. Va. Form – Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation; W.D. Wis. Form – Disclosure of Corporate Affiliations and Financial Interest.

79. See Memorandum, *supra* note 73, at 211.

B. State Rules

In April of 2018, Wisconsin became the first state to pass a law requiring the disclosure of TPLF agreements.⁸⁰ Upon its passage, one commentator remarked that this statute “appear[ed] to be the first law of its kind in the United States, and comes amid a continued push by litigation finance opponents to increase transparency in the industry.”⁸¹ The U.S. Chamber of Commerce’s Institute for Legal Reform referred to the law as “groundbreaking.”⁸² West Virginia, in 2019, became only the second state to regulate TPLF in a similar fashion to Wisconsin, laying out clear registration requirements for TPLF financiers as well as strict requirements for the contracts these companies execute with plaintiffs.⁸³ And, in contrast to the federal courts, no state court (excluding Wisconsin and West Virginia) requires the disclosure of TPLF financiers.⁸⁴ That said, eight states have enacted some form of TPLF regulation, the majority concerned with making sure TPLF financiers do not impermissibly interfere with the course of litigation, and more look ready to follow Wisconsin and West Virginia’s lead.⁸⁵

80. WIS. STAT. § 804.01(2)(bg) (2018).

Third party agreements. Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.

Id.

81. Ben Hancock, *Litigation Funding Deals Must Be Disclosed Under Groundbreaking Wisconsin Law*, NAT’L L.J. (Apr. 04, 2018), <https://www.law.com/nationalallawjournal/2018/04/04/wisconsin-litigation-funding/> [https://perma.cc/A4R5-S5Y6].

82. Lisa A. Rickard, *Wisconsin Forward: State Enacts Groundbreaking Litigation Funding Transparency Law*, U.S. CHAMBER INST. LEGAL REFORM (Apr. 03, 2018), <https://www.instituteforlegalreform.com/resource/wisconsin-forward-state-enacts-ground-breaking-litigation-funding-transparency-law> [https://perma.cc/KU2H-JDLU].

83. W. VA. CODE § 46A-6N-1-6N-9 (2019); *see also* Nicholas Mooney, *WV Legislature Amends Consumer Protection Statute to Regulate and Impose Restrictions on Litigation Financiers*, JD SUPRA (Nov. 5, 2019), [jdsupra.com/legalnews/wv-legislature-amends-consumer-21470/](https://www.jdsupra.com/legalnews/wv-legislature-amends-consumer-21470/) [https://perma.cc/A33V-X5E7].

84. *See* W. VA. CODE § 46A-6N-2-6N-3; WIS. STAT. § 804.01(2)(bg); *see also* Memorandum, *supra* note 73, at 215.

85. Memorandum, *supra* note 73, at 215; *see also id.* at 217 (Table 1 listing states that have enacted some form of TPLF regulation); ARK. CODE ANN. §§ 4-57-104, 4-57-109; IND. CODE §§ 24-4.5-1-201.1, 24-4.5-1-301.5, 24-4.5-3-110, 24-4.5-3-110.5, 24-4.5-3-202, 24-4.5-3-502, 24-12; ME. REV. STAT. tit. 9-a, §§ 12-101 to -107; NEB. REV. STAT. § 25-3301 to 3309; OHIO REV. CODE § 1349.55; OKLA. STAT. tit. 14-A, §§ 3-801 to 3-817; TENN. CODE §§ 47-16-101 to -110; VT. STAT. tit. 8, §§ 2251-2260. The states that as of early 2020 are considering legislation to regulate TPLF and require greater disclosure are Florida, New York, and Utah. *See* Sams, *supra* note 72. Seven bills have been introduced in New York’s state Assembly, one each in Florida’s House of Representatives and Senate, and one in Utah’s House. *Id.*

C. Proposed Rules

Beginning in late 2018 and continuing into 2019, the U.S. Chamber of Commerce's Institute for Legal Reform advocated on behalf of two different proposals that would require disclosure of TPLF agreements to all parties to a lawsuit.⁸⁶ The first is the Litigation Funding Transparency Act, initially introduced in the Senate in 2018 and then reintroduced in 2019.⁸⁷ While a laudable start, the Act would only require disclosure of TPLF agreements for class actions and multidistrict litigation suits, as well as when a TPLF agreement involved cash financing between the third party and the plaintiff.⁸⁸ The other proposal goes further and is a recommendation forwarded to the 2019 Advisory Committee on Civil Rules of Practice and Procedure for the federal courts, seeking an amendment to Rule 26(a)(1)(A).⁸⁹ If adopted, this change to Rule 26(a)(1)(A) would require "the disclosure of agreements giving a non-party or non-counsel the contingent right to receive compensation from proceeds of the litigation."⁹⁰ There have been various arguments made both in favor of and against adopting these proposed rules. Parts IV and V of this Note examine these arguments in greater depth.

V. ARGUMENTS IN FAVOR OF ADOPTING RULES REQUIRING THIRD-PARTY LITIGATION FUNDING DISCLOSURE

This Note posits that regulation is desperately needed regarding TPLF disclosure for two principal reasons: first, as a matter of fairness to the parties involved, and second, TPLF disclosures should not affect

86. Lisa A. Rickard, *Third-Party Litigation Funders Fight Hard to Stay in the Shadows*, N.Y. L.J. ONLINE (Aug. 27, 2018), <https://www.law.com/newyorklawjournal/2018/08/27/third-party-litigation-funders-fight-hard-to-stay-in-the-shadows/> [https://perma.cc/SBK2-7BDT].

87. See Litigation Funding Transparency Act of 2019, S. 471, 116th Cong. (2019). See also Ross Todd, *Republican Senators Reintroduce Bill Pushing for Disclosure of Litigation Funding*, NAT'L L.J. (Feb. 13, 2019), <https://www.law.com/nationllawjournal/2019/02/13/republican-senators-reintroduce-bill-pushing-for-disclosure-of-litigation-funding/> [https://perma.cc/T5RM-BTVT].

88. See Todd, *supra* note 87.

89. Letter from Thirty In-House Counsel for U.S. Corporations, *supra* note 18. This letter was signed by in-house counsel representing the Allstate Corporation, AT&T, Inc., Bayer U.S., BP America, Inc., the Charles Schwab Corp., Chevron Corp., Comcast Corp., CVS Health, Eli Lilly and Company, Ford Motor Company, General Electric, GlaxoSmithKline, LLC, Google, Honeywell Int'l, Inc., ITT, Inc., the Home Depot, Johnson & Johnson, Liberty Mutual Holding Co., Inc., MassMutual, Merck & Co., Inc., Microsoft Corp., Phillips 66, RiverStone, RPM Int'l, Inc., Shell Oil Co., State Farm Mutual Automobile Insurance Co., Verizon Wireless, Westfield, and Zurich North America. *Id.*

90. *Id.*; see also Letter from Thirty Corporate and Defense Counsel Organizations to Rebecca Womeldorf, Secretary, Advisory Committee on Civil Rules of Practice and Procedure (July 1, 2017) (an earlier letter akin to the 2019 letter proposing a similar amendment to Rule 26), https://www.uscourts.gov/sites/default/files/17-cv-o-suggestion_ilr_et_al_0.pdf [https://perma.cc/JJ8F-83N6]. The 2017 letter notes that many of the signatory organizations had proposed these changes going all the way back to 2014. *Id.*

verdicts since they will not change the substantive facts and laws at issue. However, TPLF could deter juries from leveling unnecessarily steep punitive damages against defendants when a TPLF agreement is motivated purely by malice. The lack of current regulation leaves open the possibility of individuals funding lawsuits purely out of personal animus against a defendant, as seen in the *Gawker* case.

A. *Third-Party Litigation Funding Disclosure
Creates a Fairer Playing Field*

The proponents behind the above-mentioned proposed rules argue they only seek disclosure of TPLF agreements to even the playing field, not as a means of unnecessarily regulating the practice to the point it is no longer feasible.⁹¹ Their rationale is that disclosure would create a similar scheme of disclosure for TPLF that Rule 26(a)(1)(A)(iv) currently requires of all insurance agreements in civil cases.⁹² Rule 26 mandates that parties must 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.”⁹³ Courts have construed Rule 26 as “clearly designed for parties to produce documentation of any insurance policies that give rise to an insurer’s obligation to indemnify or hold its insured harmless for a judgment. Likewise, the legislative history supports this interpretation.”⁹⁴ Thus, a mirror provision for TPLF agreements would only be fair when a third party is funding the defense’s case.

Advocates for adoption also point out that commercial litigation finance has grown by 414% between 2014 and 2017, a statistic not disputed by TPLF financiers.⁹⁵ And while some do not see this as cause for concern,⁹⁶ others see the unchecked rise in TPLF as a troubling trend across the legal landscape, especially because there has not been an analogous rise in regulation designed to appropriately check TPLF.⁹⁷ After all, TPLF has become a billion-dollar industry and the largest TPLF firms raise millions in investment funding.⁹⁸ And yet,

91. See Letter from Thirty In-House Counsel for U.S. Corporations, *supra* note 18.

92. *Id.*

93. Fed. R. Civ. P. 26(a)(1)(A)(iv).

94. See, e.g., *Excelsior College v. Frye*, 233 F.R.D. 583, 585 (S.D. Cal. 2006).

95. David Perla, *Control: A Common Question About Litigation Finance*, N.Y. L. J. ONLINE (Aug. 14, 2018), <https://www.law.com/newyorklawjournal/2018/08/14/control-a-common-question-about-litigation-finance/> [<https://perma.cc/VD6P-TTCU>].

96. See *id.*

97. See Rickard, *supra* note 86.

98. See Gershman, *supra* note 41. As of Dec. 31, 2017, Longford Capital had raised \$550 million in total capital; Parabellum Capital had raised \$250 million; Bentham IMF had raised \$233 million; Lake Whillans had raised \$190 million. *Id.* Burford Capital, another

because of the astounding lack of overall regulation, the individuals running these firms are allowed to remain in the shadows, depriving courts and juries from the knowledge of who is actually financing litigation costs.⁹⁹

The American civil trial system is premised on tenets of equality and fairness between the parties.¹⁰⁰ The very first Federal Rule of Civil Procedure states the purpose of the Rules is to “secure the *just*, speedy, and inexpensive determination of every action and proceeding.”¹⁰¹ The Seventh Amendment enshrines the right to jury trial in civil actions.¹⁰² And jurists throughout the history of this nation have fully embraced this notion of a right to a fair trial, from Justice Oliver Wendell Holmes,¹⁰³ to Justice Owen Roberts,¹⁰⁴ to Chief Justice Earl Warren.¹⁰⁵ Many of the problems plaguing the current TPLF practice would be remedied by greater disclosure.¹⁰⁶ The simple truth is that the current rules in place, or lack thereof, are simply not adequate in curbing the potential for abuse of TPLF.¹⁰⁷

B. Third-Party Litigation Funding Disclosure Could Potentially Affect Punitive Damages Calculations

The *Gawker* case supports the argument that while TPLF disclosure should not have substantial effects on jury verdicts, by withholding TPLF information it can and does fatally alter the course

major finance litigation firm, had raised \$3.1 billion as of the first half of 2017. BURFORD CAPITAL, *supra* note 10, at 4.

99. Gershman, *supra* note 41.

100. See, e.g., PRINCIPLES FOR JURIES AND JURY TRIALS princ. 1.A at 3 (AM. BAR ASS'N 2005), https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.authcheckdam.pdf [<https://perma.cc/8NSV-5UAW>].

101. FED. R. CIV. P. 1 (2018) (emphasis added).

102. U.S. CONST. amend. VII.

103. See *Frank v. Magnum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting) (“Whatever disagreement there may be as to the scope of the phrase ‘due process of law,’ there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.”).

104. See *Lisbena v. California*, 314 U.S. 219, 236 (1941) (“The aim of the requirement of due process is . . . to prevent fundamental unfairness . . .”).

105. See, e.g., Roger J. Traynor, *Chief Justice Warren’s Fair Question*, 58 GEO. L. REV. 1, 5 (1969) (“Chief Justice Warren impressed upon the Supreme Court of his time, and hence upon the country, the nobility summed up in his eternal question: *Is it fair?*”) (emphasis in original).

106. Michael German, *Perspectives from a Litigation Funder: The Case for Sensible Disclosure*, N.Y. L. J. (Jan. 31, 2019), <https://www.law.com/newyorklawjournal/2019/01/31/perspectives-from-a-litigation-funder-the-case-for-sensible-disclosure/> [<https://perma.cc/SH4S-TQ83>]; see also Louis D. Brandeis, *What Publicity Can Do*, HARPER’S WKLY., Dec. 20, 1913, at 10 (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).

107. See Lisa A. Rickard & Mark A. Behrens, *OPINION: 3rd-Party Litigation Funding Transparency*, LAW360 (Oct. 17, 2016), <http://www.law360.com/articles/852142/opinion-3rd-party-litigation-funding-needs-transparency> [<https://perma.cc/S93T-XXCE>].

of litigation resulting in serious consequences.¹⁰⁸ Thiel admitted he had no interest in actually profiting off of Bollea's suit, rather he saw it as a business venture.¹⁰⁹ Thiel's motives surrounding the lawsuit, had they come to light, would likely have been deemed unethical and possibly incurred sanctions for Bollea's attorney, Harder.¹¹⁰ It is not improbable to think that had the jury known the full picture they would not have awarded Bollea such a hefty punitive damages award.¹¹¹

Our trial system is premised on the notion that interested parties marshal their arguments in order to best vindicate their interests.¹¹² However, TPLF motivated by personal animus raises ethical questions about the validity of such agreements.¹¹³ Because TPLF financiers are allowed to remain in the shadows, it is difficult for a court or jury to truly know how much influence they wield on the litigation.¹¹⁴ In cases such as *Gawker*, with millions of dollars on the line and punitive damages at play, it is only right that the court and jury be fully armed with the facts before leveling any judgments.

Further, had the *Gawker* legal team known of Thiel's involvement in the suit, they likely would have pursued an extremely different legal strategy.¹¹⁵ And this information would have been relevant for the jury when calculating punitive damages. Given the two justifications for punitive damages—to punish behavior that offends moral values and to deter such behavior in the future by making it unacceptably risky to pursue¹¹⁶—there is a chance the jury would have declined to level the additional \$25 million in punitive damages on the defendants.¹¹⁷ Had the jury known that Bollea was not truly in control of his own, putative lawsuit, it would likely have had an effect on their

108. See Sorkin, *supra* note 6.

109. See *id.*

110. See MODEL RULES OF PROF'L CONDUCT r. 1.8(f) (AM. BAR ASS'N 1983) (restricting lawyers from accepting payment from someone other than the client unless "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship"); see also FED. R. CIV. P. 11.

111. Madigan, *supra* note 57.

112. *E.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

113. See, *e.g.*, JOHN BEISNER, JESSICA MILLER, & GARY RUBIN, *SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES* 4 (2009), <https://www.instituteforlegalreform.com/uploads/sites/1/thirdparty litigation financing.pdf> [<https://perma.cc/E2HN-JU5F>].

114. See Shannon, *supra* note 7, at 903.

115. *Cf.* Thompson, *supra* note 47.

116. NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 305 (1st ed. 2007).

117. Madigan, *supra* note 57.

deliberations, especially if they had also known the entire reason for the litigation was because a billionaire wanted revenge on a media company that angered and embarrassed him.

VI. REBUTTAL TO ARGUMENTS AGAINST ADOPTING RULES REQUIRING THIRD-PARTY LITIGATION FUNDING DISCLOSURE

Those in favor of keeping the TPLF status quo have voiced their concern with the proposed rules.¹¹⁸ Their defense generally focuses on the idea that a TPLF financier does not control the litigation, unlike a scenario where an insurance company is helping to fund a defendant's case.¹¹⁹ As such, proponents of the current system argue “[c]ommercial litigation financiers, as a general rule, are never in control of the litigation, and each deal is usually set up to make that explicit.”¹²⁰ And although there is validity to the idea that in theory TPLF financiers are forbidden from meddling in the litigation,¹²¹ because there are no rules requiring transparency it makes monitoring these ethical rules extremely difficult in reality.¹²²

As a further rebuke to advocates resisting change, there have been recent instances where courts have required some level of TPLF disclosure to preserve fairness in the case. In the Northern District of Ohio, a judge ordered the parties in an opioid litigation case to disclose the details of any TPLF agreements to the court in camera.¹²³ In another instance, a court in Pennsylvania dismissed a case because it concluded a TPLF agreement was champertous and thus

118. See LETTER FROM TPLF FINANCIERS TO REBECCA WOMELDORF, SECRETARY, ADVISORY COMMITTEE ON CIVIL RULES OF PRACTICE AND PROCEDURE (Feb. 20, 2019), <https://drive.google.com/file/d/1FSB9z-IcH6PcNDP31GJbpvOn0VxoGg7I/view>. This letter was signed by officers from Therium Capital Management, Bentham IMF, and Buford Capital, three of the largest TPLF firms.

119. See Perla, *supra* note 95.

120. See *id.*

121. See MODEL RULES OF PROF'L CONDUCT r. 1.8(f) (Am. Bar Ass'n 1983).

122. Shannon, *supra* note 7, at 903 (“[L]itigation 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 107 ([B]ecause [TPLF] . . . occurs in secrecy, the proof needed to support reform is elusive.”).

123. See *In re Nat'l Prescription Opiate Litigation*, No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018); Kevin LaCroix, *Federal Judge Orders Litigation Funding Disclosure to the Court, Rather than to Opposing Parties*, D&O DIARY (May 8, 2018), <https://www.dandodiary.com/2018/05/articles/litigation-financing-2/federal-judge-orders-litigation-funding-disclosure-court-rather-opposing-parties/> [https://perma.cc/BEZ5-R7XT].

unenforceable.¹²⁴ And in 2018, a federal court in Delaware granted a motion to compel disclosure of litigation-funding documents, finding such disclosure relevant.¹²⁵

The takeaway from these cases is that clear regulation is desperately needed in the field of TPLF, as the lack of rules leaves it open to exploitation due to the only patchy framework that currently exists. “The aim of the liberal discovery rules is to make trial ‘less a game of blindman’s bluff and more a fair contest.’”¹²⁶ The inequity between defendants who are left blindly attempting to organize their litigation strategy versus plaintiffs who are permitted to have wealthy financiers bankroll their suits shows this is an instance where, as multiple courts have recognized in the past, ‘what is good for the goose is good for the gander.’¹²⁷

VII. CONCLUSION

TPLF agreements have become common in the civil trial system, with both outside investment firms and wealthy individuals helping to bankroll litigants who, they argue, would otherwise not be able to defend their rights in court due to the insurmountable costs of litigation. Those who defend this system argue it levels the playing field, namely by allowing less financially-affluent individuals access to the justice system in return for a small share of rewards to the financiers. However, given the current lax state of regulation—both in federal and state courts—opponents argue TPLF allows wealthy

124. *WFIC, LLC v. LaBarre*, 148 A.3d 812, 819 (Pa. Super. Ct. 2016) (“The requisite elements of champerty have all clearly been met in the present case. The [TPLF firms] are completely unrelated parties who had no legitimate interest in the [litigation].”).

125. *See Acceleration Bay LLC v. Activision Blizzard, Inc.*, No. 16-453-RGA, 2018 WL 798731, at *1, *3 (D. Del. Feb. 9, 2018). *Contra Kaplan v. S.A.C. Capital Advisors, L.P.*, No. 12-CV-9350 (VN) (KNF), 2015 WL 5730101, at *1 (S.D.N.Y. Sept. 10, 2015) (denying a motion to compel litigation-funding documents, finding the defendants did not demonstrate that the documents were relevant).

126. *Fed. Deposit Ins. Corp. v. Cherry, Bekaert & Holland*, 131 F.R.D. 202, 204 (M.D. Fla. Mar. 1, 1990) (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346, 1346 (5th Cir. 1978)). *Accord Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (finding that parties to a civil suit should “consistent with recognized privileges . . . obtain the fullest possible knowledge of the issues and facts before trial”).

127. *See Fridman v. Safeco Ins. Co. of Ill.*, 185 So. 3d 1214, 1225 (Fla. 2016) (“Truly, this is an appropriate example of the classic adage ‘what is good for the goose is good for the gander.’”). *Accord Fried v. JP Morgan Chase & Co.*, 850 F.3d 590, 599 (3d Cir. 2017); *Ariza v. Loomis Armored US, LLC*, No. 3:13-00419-JWD-EWD, 2016 WL 297702, at *1 n.2 (M.D. La. Jan. 22, 2016); *Lakah v. UBS AG*, No. 07cv2799-MGC-FM, 2015 WL 13680552, at *1 (S.D.N.Y. Apr. 15, 2015); *Kropf v. Celebrity Cruises, Inc.*, No. 14-CV-21599, 2014 WL 6682533, at *3 (S.D. Fla. Nov. 25, 2014); *Travelers Indem. Co. v. Northrop Grumman Corp.*, No. 12 Civ. 3040(KBF), 2014 WL 464769, at *6 (S.D.N.Y. Jan. 28, 2014); *Lopez v. Asmar’s Mediterranean Food, Inc.*, No. 1:10cv1218 (JCC), 2011 WL 98573, at *1 (E.D. Va. Jan. 10, 2011); *Younkin v. Blackwelder*, No. 5D18-3548, 2019 WL 847548, at *1 (Fla. 5th DCA Feb. 22, 2019).

financiers to remain in the shadows and pull the strings of litigation, impermissibly affecting the course of litigation and drawing out suits unnecessarily.

This Note argued jurisdictions should adopt currently proposed rules requiring disclosure of TPLF agreements. There are two main reasons these rules should be adopted. First, doing so is more in line with American fundamental notions of fairness and transparency. Second, such disclosures will not affect compensatory damages but may have an effect on punitive damages, especially if a TPLF agreement exists due to personal animus of a financier against one of the parties to a suit.

Although those not in favor of such disclosures argue that this information is irrelevant, the interests favoring fairness and due process outweigh their arguments. The American trial system is premised on the idea that both parties must be on a level playing field. And while this thought may seem a truism given the modern realities of litigation, open and transparent disclosure of TPLF agreements is one way to flatten this disparity and maintain fairness for all. Sunlight is always preferable to the shadows.¹²⁸

128. *E.g.*, Charles Swain, *Youth and Age*, THE LITERARY GAZETTE, Mar. 16, 1850, at 205, Column 1 (“The sun still face to face we meet—The shadow falls *behind!*”) (emphasis in original).