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THE CRITICAL ROLE OF *CHOSES IN ACTION*: A CALL FOR HARMONIZATION ACROSS COMMON LAW JURISDICTIONS

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The choses in action doctrine plays a rarely recognized but critical role in contemporary law. Every day, it allows for the enforcement of claims in areas such as bankruptcy, divorce, insurance, and commercial disputes. The doctrine serves as the mechanism by which the oft-discussed trend of litigation funding operates. It further makes possible a range of functions in modern commerce that can facilitate trade and enhance labor rights and environmental protections.

Few people, however, are familiar with the choses in action doctrine. Even the rapidly growing literature on litigation funding seldom if ever invokes the term.[1] Indeed, except for our own work,

1. *E.g.*, Jasminka Kalajdzic et al., *Justice For Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*. 61 AM. J. COMPAR. L. 93 (2013)

American legal scholarship has not tackled choses in action directly since the 1930s and 1940s.[2]

Given the developments in law and commerce over the past century, an up-to-date investigation of choses in action is long overdue. This is the task we take on here. Of particular interest to us are the transformations to international commercial practice that have come to link businesses, peoples, and countries through the global market. These transformations not only increase the relevance of choses in action across common law jurisdictions, but also call for consistent rules to harmonize their application.

In short, choses in action have a relatively broad definition.[3] They include debts as well as, most relevant here, causes of action.[4] They are, furthermore, considered to be a type of property.[5] As such, where a party has a cause of action against another, say for breach of contract, that party possesses a piece of personal

(making no reference to choses in action); Keith N. Hylton, *Toward a Regulatory Framework for Third-Party Funding of Litigation*, 63 DEPAUL L. REV. 527 (2014); (same); Thurbert Baker, *Paying to Play: Inside Ethics and Implications of Third-Party Litigation Funding,* 23 WIDENER L.J. 229 (2013) (same); Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty Or New Business Opportunity?*, 30 AM. BUS. L.J. 485 (1992) (same); *see also* Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT'L & COMPAR. L. 343, 354 n.32 (2011) (one reference to choses in action, in a footnote: "Traditionally, the common law doctrine of non-assignability of choses-in-action has prevented this type of market to develop."). As a notable exception see Fiona McKenna et al., *Economics and the Evolution of Non-Party Litigation Funding in America: How Court Decisions, the Civil Justice Process, and Law Firm Structures Drive the Increasing Need and Demand for Capital*, 12 N.Y.U. J.L. & BUS. 635, 652 (2016) (referring to the assignability of choses in actions as a reason for the origins of third-party litigation funding).

2. Paul W. Bruton, *The Requirement of Delivery as Applied to Gifts of Choses in Action*, 39 YALE L. J. 837 (1930); Garrard Glenn, *The Assignment of Choses in Action; Rights of Bona Fide Purchaser*, 20 VA. L. REV. 621 (1934); Melvin S. Cohn, *Contracts – Chattel Mortgages – Assignability of Chose in Action – Applicability of Chattel Mortgages Registration Act*, 21 TEX. L. REV. 643 (1943); *cf.* Kevin Sobel-Read et al., *Recalibrating Contract Law: Choses in Action, Global Value Chains, and the Enforcement of Obligations Outside of Privity*, 93 TULANE L. REV. 1 (2018).

3. W.S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*, 33 HARV. L. REV. 997 (1920).

4. *Id.*

5. Planters' Bank v. Sharp, 47 U.S. 301, 321 (1848) ("[C]hoses in action come under the category of movable goods or personal property, as they accompany the person."); *cf.* District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163, 177 (D.C. 2008) (citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982)) (determining that the cause of action at issue was "a species of property protected by due process") (internal punctuation omitted).

property in the form of a chose in action.[6] And precisely because the law considers that chose in action to be property, property law provides that it can be transferred by assignment to another.[7] Once assigned, the assignee may typically proceed against the defendant and obtain on her own behalf whatever recovery would have been available to the assignor.[8]

Choses in action are a creature of the English common law and equity. They have been inherited across the common law world, from the United States and Canada to Australia, and they remain relevant in England. Yet, because of their relative obscurity and dynamic history, the rules regarding choses in action now vary across jurisdictions.[9] Even within the United States, differences exist among states in both statutes and case law about choses in action.[10]

These differences rarely involve the definition of a chose in action. Rather, jurisdictional variation most frequently arises in regard to the *transfer* of choses in action, and, in particular, to whom they can be assigned and under what circumstances. This variation, for reasons that we discuss below, interferes with the efficacy of domestic and transnational trade and impedes the protection of labor rights and environmental standards internationally.

Harmonization of the rules regarding the transfer of choses in action would make a substantial difference toward curing these problems. This Article provides a model for harmonization across common law jurisdictions, along with a detailed explanation of our rationale. More specifically, we suggest and advocate for the adoption of the principles of transfer articulated by the English House of Lords in the *Trendtex* case.

We divide the article into three primary Parts. The first describes the historical origins of the choses in action concept. In Part I we likewise offer an overview of the transformations of the

6. *See* Rawoof v. Texor Petroleum Co., 521 F.3d 750, 762 (7th Cir. 2008).

7. *See* Titus v. Wallick, 306 U.S. 282, 288-89 (1939) ("[A]ny form of assignment which purports to assign or transfer a chose in action confers upon the transferee such title or ownership as will enable him to sue upon it. This is true even though the assignment is for the purpose of suit only and the transferee is obligated to account for the proceeds of suit to his assignor.").

8. *Id.*

9. *See infra* Part II.

10. *See infra* Section II.A.

doctrine through the 1900s to the present day. Building on this historical background, Part II provides a multi-jurisdictional overview of the status of choses in action today in the United States, Canada, England, and Australia. Here we also contextualize some of the underlying drivers and doctrines of the common law in relation to their counterparts in the civil law. Part III contains substantive analysis of developments in the global economy and explains why these developments call for the harmonization of the transfer rules governing choses in action. Part III then describes the benefits that harmonization would bring to these areas.

I. CHOSES IN ACTION

A. Overview

Choses in action are a type of incorporeal property formed through the evolution of the English common law.[11] They have been legally defined as "personal rights of property which can only be claimed or enforced by action, and not by taking [actual] physical possession."[12] The term may also be used to describe the right to bring action itself.[13] Choses in action developed progressively through both the common law and equity courts of English law,[14] therefore their complex historical development becomes relevant when attempting to create, assign, or apply a modern chose in action. Of course, the current rules governing choses in action differ slightly between and even within jurisdictions,[15] hence this Article's call for unified regulation of the creation, transfer, and cohesive application of these rules across all common law jurisdictions.

B. History and Modern Developments

Over time, the concept of chose in action has gradually extended by analogy to encompass many heterogeneous rights.[16]

11. *See generally* Holdsworth, *supra* note 3.
12. Torkington v. Magee [1902] 2 KB 427 at 430 (Eng.).
13. *Loxton v Moir* (1914) 18 CLR 360, 379 (Austl.).
14. *See* Keller v. Bass Pro Shops, Inc., 15 F.3d 122, 125 (8th Cir. 1994); *cf. Trident Gen Ins Co Lts v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 169 (Austl.).
15. Sobel-Read et. al., *supra* note 2, at 12.
16. *See* Holdsworth, *supra* note 3, at 1014.

The sixteenth century was characterized by a tendency to regard any intangible right which was not clearly an incorporeal hereditament, and any non-assignable right, even if only temporarily non-assignable, as a chose in action.[17] This eventually included the documents that were necessary evidence of such a right to action,[18] such as bonds,[19] documents of title, charters, and deeds.[20] This inclusion led to the extension of the concept to include elements of the law of contract and property, such as patents, stocks and shares, and copyrights.[21] Many different kinds of equitable interests in modern law are still classed as choses in action because lawyers of the sixteenth century showed no hesitation in asserting that equitable trusts at common law consisted only "in privity" and hence were choses in action.[22] In hindsight, it is clear that many incidents of modern choses in action are in substance incorporeal property.[23]

The seventeenth and eighteenth centuries saw the doctrine advance in both the English common law and in other jurisdictions. This involved a misalignment wherein the assignment of choses in action created no legal rights by English common law but nevertheless generated equitable rights against the liable party.[24] Common law judges slowly began to evade their own rulings on choses of action by turning to the doctrine of "power of attorney."[25] Initially courts tended to require an express power of attorney, but before long they accepted this power as implied.[26]

It was at this point in the eighteenth century that the United States began applying choses in action[27] with the 1774 Connecticut case of *Bildad v. Fowler*.[28] In 1794, the same court heard *Russel v.*

17. *Id.* at 1013.
18. *Id.* at 1011.
19. *Id.*
20. *Id.*
21. *Id.* at 1014.
22. 4 HALS. STAT. 364 (Eng.).
23. Holdsworth, *supra* note 3, at 1014.
24. JAMES BARR AMES, LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 213 (1913).
25. A.W.W. Cook, *The Alienability of Choses in Action*, 29 HARV. L. REV. 816, 827 (1916).
26. *Id.*
27. *Id.* at 826.
28. Fowler v. Harmon, A.D. (Conn. Super. Ct. 1772), *cited in* Redfield v. Hillhouse, 1 Root 63 (Conn. Super. Ct. 1774).

Cornwell,[29] providing options of both legal and equitable relief.[30] A Pennsylvania common law court refused to recognize a power of attorney where there had been an assignment of a chose in action for valuable consideration,[31] following the English case of *Carrington v. Harway.*[32] This was followed by multiple cases in the New York Supreme Court adopting English common law developments into American law with several subtle differences.[33] As we discuss further below, it is clear today that the rules regarding the transfer and application of choses in action differ between American jurisdictions, as well as with those of the English common law.

1. The Role of Maintenance and Champerty in Shaping the Attitude of the Common Law toward the Assignability of Choses in Action

The traditional rule held that a "chose in action is not assignable if the assignment savors of maintenance or champerty."[34] Maintenance occurs when a person interferes with a dispute in which they have no interest by providing assistance to one of the parties without justification.[35] Champerty is regarded as an "aggravated" species of maintenance, and occurs where the maintainer receives a portion of the proceeds of the suit for their assistance.[36] The doctrines of maintenance and champerty originated in medieval England as a response to the increasing

29. Russel v. Cornwell, 2 Root 122 (Conn. Super. Ct. 1794).

30. Cook, *supra* note 25, at 826-27.

31. McCullum v. Coxe, 1 U.S. 139 (1785).

32. Carrington v. Harway, (1378) 83 Eng. Rep. 1252.

33. Andrews v. Beecker, 1 Johns. Cas. 411, 411 (N.Y. Sup. Ct. 1800); Wardell v. Eden, 2 Johns. Cas. 258, 258 (N.Y. Sup. Ct. 1801); Littlefield v. Storey, 3 Johns. 425, 425-26 (N.Y. Sup. Ct. 1808).

34. MARCUS SMITH & NICO LESLIE, THE LAW OF ASSIGNMENT 496-97 (2d ed. 2006); see generally Paul Bond, Note, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297, 1333-41 (2002) for an overview of the state of champerty law in all 50 states, as of 2002. See also Lorde Martin, *supra* note 1, for an older but thorough analysis of champerty across US jurisdictions.

35. British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co. [1908] 1 KB 1006, 1014 (Eng.).

36. Re Trepca Mines Ltd. (No 2) (1963) 1 Ch 199, 29 (Eng.); Anthony Sebok, *Going Bare in the Law of Assignments: When Is an Assignment Champertous?,* 14 FLA. INT'L U. L. REV. 85, 91 (2020).

exploitation of, and corruption within, the judicial system.[37] Despite their archaic origins, the relevance of these doctrines continues today: "the law on maintenance and champerty has not stood still, but has accommodated itself to changing times."[38] Currently, the strictures placed by the two doctrines have relaxed considerably.[39] Where still relevant, judicial resort to champerty and maintenance is most common where there is "the prospect of trafficking in litigation [that] would be inimical to the interests of justice."[40]

Over time, the doctrines of maintenance and champerty have become inextricably linked with the law on the assignability of choses in action. In the United States, for example, the legal doctrine of non-assignability of choses in action is often conflated with the doctrines of maintenance and champerty, with champerty being one of the primary reasons for restrictions placed on assignability.[41] The Australian approach, by contrast, reflects a broader trend across common law jurisdictions. It suggests a liberalization of the doctrines of maintenance and champerty, and a corresponding relaxation of the limitations placed on the assignability of choses in action.[42]

More specifically, in Australia it is the unimpeded assignment of bare rights of action that are restricted on the basis of maintenance and champerty.[43] Despite this, there are various exceptions,[44] foremost among which—and most relevant for present purposes—is where the assignee holds a "genuine commercial interest" in the assignment.[45] However, maintenance and champerty do not always involve the assignment of a right to litigate, as illustrated by third party litigation funding arrangements which are legal in Australia.[46] The seminal High

37. PERCY HENRY WINFIELD, HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCESS 151 (Cambridge University Press ed., 1921).

38. SMITH & LESLIE, *supra* note 34, at 497 (quoting Giles v. Thompson, [1994] 1 AC 142 (HL) 164 (Eng.)).

39. *See, e.g.*, *id.* at 498.

40. *Id.* at 506.

41. Sebok, *supra* note 36, at 87-88.

42. Glen Anderson, *The* Trendtex *Principle in Australian Law: Context and Recent Developments*, 40 U.W. AUSTL. L. REV. 85, 112 (2016).

43. *Id.* at 89.

44. *Id.* at 92.

45. Trendtex Trading Corporation v. Credit Suisse [1982] AC 679 (HL) (Eng.).

46. Anderson, *supra* note 42, at 89.

Court case of *Campbells Cash & Carry Pty Ltd. v. Fostif Pty Ltd.* permitted the maintenance of litigation by funders despite their having no interest in the action other than financial gain.[47] Although the Court in *Fostif* did not deal directly with assignment, its decision reduces the scope of the doctrines of maintenance and champerty[48] and reinforces the liberalization of attitudes toward traditional restrictions on the assignment of rights to litigate.

2. The Differences between the Assignability of a Contractual Right and the Assignability of a Chose in Action

Historically, choses in action were not assignable.[49] As early as *Lampet's Case* in 1612,[50] there was a concern that such an assignment would lead to "multiplying of contentions and suits, of great oppression of the people . . . and the subversion of the due and equal execution of justice."[51] Also of concern was that courts considered the parties' identities to be essential to the contract.[52]

Today, however, choses in action are generally assignable.[53] But the term "assignment" in this regard can cause confusion because there is a distinction—both conceptual and practical—between the assignment of rights under a contract (that is to say, the right to the performance of some specific act as stated in the contract) and the assignment of a chose in action (which is, *inter alia*, the right to recover for a breach of an agreement). Among other things, the assignment of one does not mean assignment of the other. For instance, the purchase of a debt alone arising from a contract does not carry with it the right to enforce other

47. *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 ALR 58 (Austl.).

48. *See* Matthew Brady, *Assignability of Causes of Action—A Divergence Between the Federal and State Jurisdiction,* 31 HEARSAY (2008) https://www.hearsay.org.au/assignability-of-causes-of-action/ [https://perma.cc/J72Z-FXWL] (last visited Feb. 4, 2021).

49. Even under the early common law, however, claims were assignable to and from the sovereign. SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 74:2 (4th ed. 2016); see also United States v. Buford, 28 U.S. 12 (1830) (citing the application of this rule to the United States Government).

50. Lampet's Case (1612) 77 E.R. 994 (Eng.).

51. *Id.* at 997.

52. *See* WILLISTON, *supra* note 49 ("This agreement shall not be assignable without the consent of both parties, but this provision shall not prevent either party from selling, assigning, or transferring a pecuniary interest in any specific property acquired pursuant to this agreement.").

53. *See infra* Part II.

obligations in the underlying contract, such as an arbitration provision.[54]

Importantly, the assignment of contractual rights is subject to several restrictions, most of which do not apply to the assignment of a chose in action. For instance, where a contractual obligation involves so-called "personal services"—services expected to be performed by that particular party—such rights can almost never be assigned without the consent of the other contracting party.[55]

Most significantly, perhaps, the assignment of rights under a contract can be restricted in the contract itself.[56] In regard to choses in action, however, "[i]t is well settled that [a non-assignment] provision does not preclude the assignment of a cause of action for breach of contract."[57] This can in part be explained by the fact that "[a]n assignment does not modify the terms of the underlying contract. It is a separate agreement between the assignor and assignee which merely transfers the assignor's contract rights, leaving them in full force and effect as to the party charged."[58]

The key to assigning a chose in action, therefore, is the parties' intent.[59] Doctrine has dictated for over a century that where an

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54. Pine Top Receivables of Ill., LLC v. Banco de Seguros Del Estado, No. 12 C 6357, 2013 U.S. Dist. LEXIS 28040, at *11 (N.D. Ill. Feb. 25, 2013) (explaining that "[t]he assignment of a part does not include the whole"). But note that there is little law on the question of arbitration clauses specifically.

55. *See, e.g.,* Larry A. DiMatteo, *Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability*, 27 AKRON L. REV. 407, 411-13 (1994). DiMatteo also noted

> The court in the much cited *Boston Ice Company v. Potter*, in 1877, explained that '[a] party has a right to select and determine with whom he will contract' and that '[i]t may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book.'

Id. at 412 (quoting Boston Ice Co. v. Potter, 123 Mass. 28, 30 (1877)).

56. SMITH & LESLIE, *supra* note 34, at 521; *see also* Fluor Corp. v. Super. Ct. of Orange Cnty., 61 Cal. 4th 1175, 1218 (Cal. Sup. Ct. 2015) ("It is undisputed that an insured may not transfer *the policy itself* to another without the insurer's consent."); Illi. Tool Works, Inc. v. Com. & Indus. Ins. Co., 962 N.E.2d 1042, 1054 n.8 (Ill. App. Ct. 2011).

57. Groce v. Fidelity General Ins. Co., 252 Or. 296, 306-07 (1968) (citing Comunale v. Traders & Gen. Ins. Co., 50 Cal.2d 654, 661-62 (1958); *see* 6 AM. JUR. 2D *Assignments* § 52 (2021).

58. Citibank, N.A. v. Tele/Res., Inc., 724 F.2d 266, 269 (2d Cir. 1983).

59. "In other words, the assignment must describe the subject matter of the assignment with sufficient particularity to identify the rights assigned." Mission Valley E., Inc. v. Cnty. of Kern, 120 Cal. App. 3d 89, 96-97 (Cal. Ct. App. 1981). Thus, in *Mission Valley East*, there was ambiguity regarding whether the assignor intended to assign "excess

assignment of a chose in action is otherwise valid, "the consent or even objection of the debtor is immaterial."[60]

II. AN INTERNATIONAL OVERVIEW: KEY SIMILARITIES AND DIFFERENCES ACROSS COMMON LAW JURISDICTIONS

A. The United States

1. Introduction

The rules that apply to the transfer of choses in action vary across the United States. There is federal common law on the subject,[61] but only specifically regarding federal matters. By and large, state law is most relevant here.[62]

We begin with some broad commonality across jurisdictions. Most important in this regard is the general rule—as stated if not always as applied—that "choses in action may be freely transferred or assigned to others."[63] Following assignment, the assignee of the chose in action becomes the real party in interest.[64]

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proceeds." *See id.* at 96. The court found a valid assignment more broadly, but because of the ambiguity as to "excess proceeds," held that those particular proceeds were not part of the assignment. *Id.* at 99.

60. *The Assignability of Contract*, 20 HARV. L. REV. 423, 423 (1907); *see also* Vill. of Westville v. Loitz Bros. Const. Co., 519 N.E. 2d 37, 38-40 (Ill. App. Ct. 1988).

61. *See* Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 271 (2008) (discussing choses in action in detail in relation to the standing of assignees to bring claims in federal court); J.A. Wynne Co. v. R.D. Phillips Constr. Co., 641 F.2d 205, 208 (5th Cir. 1981) (relying on "federal law to determine whether a chose in action is property or rights to property under [federal tax statutes]").

62. *See* Cohens v. Virginia, 19 U.S. 264, 332 (1821) ("A lottery ticket *is a chose in action*, and not assignable by the common law. The State laws determine whether bonds, bills, notes, &c. are assignable or not."); Groce, 252 Or. at 302 ("In some jurisdictions, assignability appears to turn upon local statutory or decisional rules concerning the assignability of causes of action generally. In Oregon, we are free to adopt the rule that commends itself to us as the most reasonable."); Dixie Portland Flour Mills, Inc. v. Dixie Feed & Seed Co., 272 F. Supp. 826, 830 (W.D. Tenn. 1965) ("[W]e first look to state law to determine whether the assignment passed title to the chose-in-action.").

63. Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 17 (2d Cir. 1997) (citations omitted); *see* Titus v. Wallick, 306 U.S. 282, 288-89 (1939) ("[A]ny form of assignment which purports to assign or transfer a chose in action confers upon the transferee such title or ownership as will enable him to sue upon it. This is true even though the assignment is for the purpose of suit only and the transferee is obligated to account for the proceeds of suit to his assignor."); Fluor Corp. v. Super. Ct. of Orange Cnty., 61 Cal. 4th 1175, 1212 (Cal. Sup. Ct. 2015).

64. *See* Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 279 (2008).

As such, the assignee of a chose in action "stands in the shoes" of the assignor regarding the relevant claim[65] and may—or usually must —sue in the assignee's own name.[66]

A case from the California Court of Appeal, *Fink v. Shemtov*,[67] is illustrative of the absolute nature of the transfer of rights that takes place when a chose in action is assigned. In that case, Stone Center Corporation ("Stone Center") had potential claims for breach of contract and fraud against several related parties.[68] Stone Center assigned its choses in action—namely the right to collect on its breach of contract and fraud claims—to an individual, David Fink.[69] At the same time, Fink entered into a separate agreement with Stone Center wherein Fink promised, if successful in recovering on the claim, to pay to Stone Center half of the recovery.[70]

Once in possession of the relevant choses in action, Fink filed—in his own name—claims against the relevant defendants. Although not an attorney, Fink represented himself in the action. Because of the promise to pay half of the recovery to Stone Center, the Trial Court concluded that Fink and Stone Center had entered a joint venture, and as a result, Fink was unlawfully practicing law

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65. *Fluor Corp,* 61 Cal. 4th at 1210.

66. *See, e.g.*, Dean Witter Reynolds Inc. v. Variable Annuity Life Ins. Co., 373 F.3d 1100, 1110 (10th Cir. 2004). In some states, such as New Jersey and Illinois, this right is by statute; Integrated Sols., Inc. v. Serv. Support Specialties, Inc., 124 F.3d 487, 490 (3d Cir. 1997) (quoting N.J. STAT. ANN. § 2A:25-1) ("[A]ll choses in action arising in contract shall be assignable, and the assignee may sue thereon in his own name."); Rawoof v. Texor Petroleum Co., 521 F.3d 750, 762 (7th Cir. 2008) (Ripple, J., dissenting) (citing 735 ILL. COMP. STAT. ANN. 5/2–403(a)) ("Following a valid assignment, the assignee may bring an action in his own name."). Mississippi, by contrast but also by statute, specifically "allows actions to be prosecuted under the name of the *original* parties after an assignment of a chose in action." Miss. Phosphates Corp. v. Analytic Stress Relieving, Inc., 402 Fed. App'x. 866, 874 (5th Cir. 2010) (emphasis added) (citing MISS. CODE § 11-7-3 (West 2001)).

Nevertheless, it is important to keep in mind that:

> Saying that the assignee steps into the shoes of the assignor means only that the assignment removes some legal impediment, such as lack of privity, to the assignee pursuing the claim. It does not mean that the assignee takes the existing court case exactly as she finds it.

Themas v. Green's Tap, Inc., 16 N.E.3d 875, 877 (Ill. App. Ct. 2014) (holding that plaintiff, who had filed a complaint with a jury demand, was entitled to a jury even in regard to a claim that was later assigned to her by another party who had not filed a jury demand).

67. 210 Cal. App. 4th 599 (2012).

68. *Id.* at 602-05.

69. *Id.*

70. *Id.*

by bringing the claims himself.[71] The Trial Court therefore found that the underlying assignment of the choses in action was void as against public policy.[72]

The Court of Appeals reversed on this point. Because the assignment of the choses in action was absolute, Fink possessed it and was entitled to sue on it in his own name.[73] Furthermore, because the choses in action belonged to Fink, he was permitted to represent himself in court in bringing the claims.[74] Quoting the California Supreme Court, the Court of Appeal explained:

> [I]t is well established that an assignment of a chose in action for collection vests the legal title in the assignee whether or not any consideration is paid therefor. In such case the assignee may maintain a suit thereon in his own name, even though the assignor retains an equitable interest in the thing assigned.[75]

This language demonstrates not only that an assignee of a chose in action may sue in her own name, but also that the transfer of property is so complete that the assignee may even represent herself in court in bringing the assigned claim.[76] In fact, the Utah Supreme Court has even held that "a defendant can purchase claims, i.e., choses in action, pending against itself and then move to dismiss those claims."[77]

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71. *Id.* at 607.

72. *Id.* at 602.

73. *Id.* at 613.

74. *Id.* ("As Fink had legal title to prosecute assigned collection claims in his own name, it logically follows that Business and Professions Code section 6125 provides that Fink could do so in propria persona.").

75. *Id.* at 610 (internal italics omitted) (quoting Nat'l Rsrv. Co. of America v. Metro. Tr. Co. of Cal., 17 Cal. 2d 827 (1941)).

76. It must be kept in mind that there is a distinction between a power of attorney and the transfer of a chose in action:

> A provision by which one person grants another the power to sue on and collect on a claim confers on the grantee a power of attorney with respect to that claim. The grant of a power of attorney, however, is not the equivalent of an assignment of ownership; and, standing alone, a power of attorney does not enable the grantee to bring suit in his own name.

Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 17-18 (2d Cir. 1997) (internal citations and quotation marks omitted).).

77. Applied Med. Techs., Inc. v. Eames, 44 P.3d 699, 701–02 (Utah 2002).

2. Scope of Transferability

Although the general American rule embraces the free alienability of choses in action, there are differences across states in the scope of what an assignor is permitted to transfer, depending on the nature of the underlying claim. Regarding contract claims, transfers are typically allowed. This category is broadly defined and includes "cause[s] of action based on a debt, or the wrongful dishonor of a letter of credit."[78] There is more variation across jurisdictions regarding tort claims. Certainly, at least some tort claims are usually assignable,[79] but almost universally, claims regarding personal injury are not.[80]

Further, the claims that can comprise a chose in action are not limited to breaches of common law violations; statutory entitlements can also give rise to assignable choses in action. In

78. 6 AM. JUR. 2D *Assignments* § 51 (2016). As an everyday example,

> Money deposited in a general account at a bank does not remain the property of the depositor. Upon deposit of funds at a bank, the money deposited becomes the property of the depositary bank; the property of the depositor is the indebtedness of the bank to it, a mere chose in action.

Miller v. Wells Fargo Bank Int'l Corp., 540 F.2d 548, 560 (2d Cir. 1976); *see also id.* at 557 ("[T]ime deposits are assignable choses in action.").

79. *See*, *e.g.,* Hernandez v. Suburban Hosp. Ass'n, Inc., 319 Md. 226, 234 (1990) (stating that Maryland follows the "modern rule that a chose in action in tort is generally assignable, in the absence of a statutory prohibition, if it is a right which would survive the assignor and could be enforced by his personal representative" (internal quotation marks and citation omitted)); *see also* Fredrickson v. Ins. Corp. of British Columbia, 1986 CanLII 165 (Can. B.C. C.A.) (discussing the assignability of tort claims *inter alia* where they relate to the "fruits of the action" rather than the cause of action, and where "the assignee has either a pre-existing property interest or a legitimate commercial interest in the enforcement of the claim"; in this latter regard the assignment "will be valid, provided the action in tort is not based on a personal wrong, such as assault, libel or personal injury."). *But see* Missouri Bank & Trust Co. v. Gas-Mart Development Co., 35 Kan.App.2d 291, 300 (2006) ("It has long been recognized in Kansas that all choses in action, *except torts*, are assignable." (citations omitted) (emphasis added)); Integrated Sols., Inc. v. Serv. Support Specialties, Inc., 124 F.3d 487, 490 (3d Cir. 1997) ("New Jersey courts have consistently held that, as a public policy matter, tort claims cannot be assigned before judgment.").

80. *See, e.g.,* Pony v. Cty. of Los Angeles, 433 F.3d 1138, 1143 (9th Cir. 2006) ("The right to sue in tort for personal injury is non-assignable under California law." (citations omitted)); Atl. Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N. Carolina., Inc., 175 N.C. App. 339, 343, 623 S.E.2d 334, 338 (2006); *cf.* Fed. Deposit Ins. Corp. v. Main Hurdman, 655 F. Supp. 259, 268 (E.D. Cal. 1987) (holding that "under federal law an insured bank's choses in action whether for malpractice or fraud are assignable to the FDIC in conjunction with a reorganization of the bank."). Texas, however, does allow the transfer of choses in action arising out of personal injury claims. *State Farm Fire & Cas. v. Gandy*, 925 S.W.2d 696, 707 (Tex. Sup. Ct. 1996).

Lucas v. USA, Drug Enforcement Administration,[81] for example, the Second Circuit *per curium* approved of the assignability of just such a chose in action. There, a family member ("Brother 1") posted bail for another ("Brother 2"). The bail money was later forfeited. Brother 1—who had posted, and later lost, the bail money—then assigned his interest in the bail money to Brother 2. There is only a narrow statutory path in the federal system by which a party may contest forfeited bail money.[82] Although ownership of the actual money had arguably been lost (due to the forfeiture), the Second Circuit held that the assignment was valid because the statute in question creates a cause of action in the money, and that cause of action—as a chose in action—may properly be assigned. As such, Brother 2 could seek relief and contest the underlying forfeiture.[83]

That said, not *all* rights arising from the violation of a statute are assignable. In *Silvers v. Sony Pictures Entm't, Inc.*,[84] the Ninth Circuit, sitting *en banc*, refused to allow the assignee of a copyright claim to maintain an action against an alleged infringer. In this case, the assignee did not independently possess, pursuant specifically to the language of the statute, some "legal or beneficial interest in the copyright."[85]

Lastly, choses in action generally involve claims for money damages. There is, however, authority for permitting the assignment of a chose in action even where the relief requested is specific performance.[86]

81. 775 F.3d 544 (2d Cir. 2015).

82. *Id.* at 547 (citing 18 U.S.C. § 983(e)(1)(5)).

83. *Id.* at 547-48.

84. 402 F.3d 881 (9th Cir. 2005) (*en banc*).

85. *Id.* at 883, 886. The dissent, by contrast, properly recognized that "the assignment of an accrued cause of action for copyright infringement to an assignee is nothing more than [the] 'simple assignment of a chose in action'" and as such the plaintiff should have been permitted to pursue her claim. Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881, 902 (9th Cir. 2005) (Berzon, J, dissenting).

86. Realty Holding Co. v. Donaldson, 268 U.S. 398, 400 (1925) (dismissing a claim for failure to satisfy federal diversity requirements but accepting the requested relief of specific performance: "The phrase 'to recover upon any . . . chose in action,' under the decisions of this Court, includes a suit to compel the specific performance of a contract or otherwise to enforce its stipulations."). For similar support in Canada, see DiGuilo v. Boland, 1958 CarswellOnt 102, para. 17 (Can.) ("The right to specific performance was and is an equitable *chose* and the right to damages a legal *chose in action*.").

3. Sources of the Rules Regarding the Transfer of Choses in Action

In each state, the body of rules that governs the transfer of choses in action is typically determined by a *sui generis* interaction of statute and case law. In some instances, the relevant statutes restrict the earlier case law and in others they expand it.[87]

Moreover, this relationship between statute and case law regarding the transfer of choses in action is often complicated. The California Supreme Court's repeated engagement on one issue is a good example. In 2003, in *Henkel Corp. v. Hartford Accident & Indemnity Co.,*[88] the Court held that an anti-assignment provision in an insurance contract prohibited the insured from assigning a claim—even *after* the loss has occurred—without the insurer's consent.[89] In 2015 the California Supreme Court revisited that decision in *Fluor Corp. v. Superior Court of Orange County*.[90] The Court's alleged rationale for revisiting its earlier decision was that the parties here made the Court aware of a statutory provision that the parties in the earlier *Henkel* litigation had not brought to the Court's attention.[91] That provision, California Insurance Code § 520, bars an insurer from refusing to recognize an assignment after a loss.[92] Reversing its decision twelve years earlier in *Henkel*, the *Fluor* court held that, because of § 520:

> [A]fter personal injury (or property damage) resulting in loss occurs within the time limits of the policy, an insurer is precluded from refusing to honor an insured's assignment of the right to invoke defense or indemnification coverage regarding that loss. This result obtains even without consent by the insurer—and even though the dollar amount of the loss

87. For an example of the latter, see Essex Ins. Co. v. Five Star Dye House, Inc., 38 Cal. 4th 1252, 1259 (Cal. Sup. Ct. 2006) ("Although the assignability of causes of action is derived from the common law, section 954 had the effect of liberalizing restrictions on the types of actions that may be assigned to a third party.") (citing Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 464 (1929)).

88. 29 Cal. 4th 934 (Cal. Sup. Ct. 2003).

89. *See* Fluor Corp. v. Super. Ct. of Orange Cnty., 61 Cal. 4th 1175, 1180 (Cal. Sup. Ct. 2015).

90. *Id.* at 1175.

91. *Id.* at 1180.

92. CAL. INS. CODE § 520.

> remains unknown or undetermined until established later by a judgment or approved settlement.[93]

The Court stated that its holding in *Henkel* had been a "common-law-based holding," whereas the result in *Fluor*, reached after extensive discussion of the California Insurance Code and predecessor statutes as well as case law from other jurisdictions, was founded specifically on "analysis of section 520."[94] As such, both the "common-law-based holding" of *Henkel* and the statute-driven result in *Fluor* are quite narrow. Yet they nevertheless help highlight the complex interplay between statute and case law in this area.[95]

In New York, courts have finely analyzed the relationship between the state's statutes and the still-relevant common law rules that fill the many statutory gaps. In *General Elec. Capital Corp. v. New York State Div. of Tax Appeals*,[96] for instance, a financial services corporation purchased certain rights from a group of retail vendors relating to debts accumulated by customers who had obtained credit cards from those retail vendors. The petitioner financial services corporation then relied on the assignment of those rights to seek tax refunds from the State Division of Taxation for those sales taxes that the retail vendors had previously paid on behalf of the original credit card holders, but which were, according to the Petitioner, uncollectible and therefore refundable. In defense, the Division of Taxation relied on a particular tax regulation which limits the rights of assignees in relation to tax refunds: "A refund or credit is not available for a transaction which is financed by a third party or for a debt which has been assigned

93. *Fluor*, 61 Cal. 4th at 1224.

94. *Id.* at 1223.

95. Other California statutes also impact on the assignability of choses in action in the state. In Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct. of L.A. Cnty., 46 Cal. 4th 993 (Sup. Ct. 2009), the California Supreme Court addressed the requirement under California's unfair competition law that a plaintiff have "suffered injury in fact." *Id*. at 942 (quoting CAL. BUS. & PROF. CODE § 17204). The question before the Court was "whether under the unfair competition law an assignment of a cause of action can confer standing on an *uninjured* assignee." *Id.* The California Supreme Court said no. Here, according to the Court, the specific statutory threshold of an injury in fact supersedes the general common law rule permitting the assignability of a cause of action—and thus, the assignee in the case at bar lacked standing. *But see* Bluebird Partners, L.P. v. First Fidelity Bank, N.A., 97 N.Y.2d 456, 458 (N.Y. 2002).

96. Gen. Elec. Cap. Corp. v. New York State Div. of Tax Appeals, 2 N.Y.3d 249 (N.Y. App. Div. 2004).

to a third party, whether or not such third party has recourse to the vendor on that debt."[97]

The Court of Appeals accepted that under the applicable statutes,[98] "where a claim is lawfully transferred, it is generally enforceable."[99] However, the majority agreed with the Tax Division that the specific tax regulation superseded the more general freedom of transfer, and as such, the "denial of the refund claims was authorized by the sales tax statutory and regulatory scheme."[100] Similarly, in *Medical Society of the State of New York v. Serio*,[101] the Court of Appeals held that the Superintendent of Insurance may prohibit no-fault claimants from assigning benefits for non-health-related services under the state's general transfer statutes, even though no statute expressly prohibited transfer of such claims.[102]

Certainly, however, New York's transfer-friendly statutes retain some bite against other, narrowly tailored, statutory provisions. In *Quantum Corporate Funding, Ltd. v. Westway Industries, Inc.*,[103] for example, the Court of Appeals concluded that a State Finance Law provision which required the general contractor on public works projects to purchase a payment bond did *not* prohibit suit on that bond by the subcontractor's assignee.[104]

In other states, like Texas, statutes play a much smaller role in the transfer of choses in action. Although the rules of transfer in

97. 20 NYCRR 534.7(b)(3).

98. *See* N.Y. GEN. OBLIG. L. § 13-101 (stating that aside from several enumerated exceptions, "[a]ny claim or demand can be transferred"); N.Y. GEN. OBLIG. L. § 105 (providing, *inter alia*, that "[w]here a claim or demand can be transferred, the transfer thereof passes an interest, which the transferee may enforce by an action or special proceeding, or interpose as a defense or counter-claim, in his own name, as the transferrer might have done").

99. Gen. Elec. Cap. Corp., 2 N.Y.3d at 257.

100. *Id.* at 251; *see also* Weimer v. Board of Ed. of Smithtown Cent. School Dist. No. 1, 52 N.Y.2d 148 (N.Y. 1981) (holding that assignment of taxpayer's action to one not shown to be himself a taxpayer was the transfer of a claim in contravention of public policy and accordingly, the assignee was without standing to maintain action, under General Obligations Law § 13-101(3)(c)).

101. 100 N.Y.2d 854 (N.Y. 2003).

102. *Id.* at 871-72.

103. 4 N.Y.3d 211 (N.Y. 2005).

104. *Id.* at 217. The Court, did, in any event, recognize that "a subcontractor's right under Lien Law article 2 (to place a lien on the general contractor's proceeds) is *not* assignable." *Id.*

Texas do indeed contain some statutory anchoring,[105] the primary management of the scope of the doctrine has taken place through case law.[106] In this regard, Texas courts have remained firm in upholding several limitations on the rule of free alienation. In the words of the Texas Supreme Court: "the assignability of *most* claims does not mean *all* are assignable; exceptions may be required due to equity and public policy."[107] In particular, the Texas Supreme Court has highlighted four areas where, based on policy considerations, Texas courts have consistently refused to uphold the assignment of a chose in action:[108] (1) where the cause of action is for legal malpractice;[109] (2) where there is a so-called "Mary Carter agreement," that is, where a "defendant receives assignment of part of plaintiff's claim and both remain parties at trial";[110] (3) where "a tortfeasor [has taken] an assignment of a plaintiff's claim as part of a settlement agreement with the plaintiff and [attempts to] prosecute that claim against a joint tortfeasor";[111] and (4) where, in certain specific instances, the chose in action involves interests in an estate.[112]

Within each state, certain narrow trends often emerge in case law regarding aspects of transfer that that state's courts have focused on. For example, much of the chose in action litigation in Illinois has revolved around the so-called anti-assignment clauses that are common in insurance contracts.[113]

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105. *See* Mallios v. Baker, 11 S.W.3d 157, 172 (Tex. Sup. Ct. 2000); PPG Indus. v. JMB/Houston Centers Partners Ltd. P'ship, 146 S.W.3d 79, 87 (Tex. Sup. Ct. 2004).

106. As a base line, and through several detailed opinions, the Texas Supreme Court has made clear that the "[p]racticalities of the modern world have made free alienation of choses in action the general rule." State Farm Fire & Cas. v. Gandy, 925 S.W.2d 696, 707 (Tex. Sup. Ct. 1996); *see also Mallios*, 11 S.W.3d at 172 (confirming that "Texas law favors free assignment of claims") (Phillips, C.J. & Enoch, J., concurring).

107. *PPG Indus.*, 146 S.W.3d at 87 (citations omitted).

108. For an excellent overview of these four areas see *Gandy*, 925 S.W.2d at 707-11.

109. *See id.* at 707-08; *see also Mallios*, 11 S.W.3d at 170.

110. *PPG Indus.*, 146 S.W.3d at 87 (citation omitted); *see also Gandy*, 925 S.W.2d at 709.

111. *Gandy*, 925 S.W.2d at 710-11.

112. *Id.* at 711. Note, however, that the one relevant holding in this regard was very fact-specific. *See id.*

113. Unlike the California Supreme Court's curious result in *Henkel* (but consistent with the result reached by that Court, albeit on other grounds, in *Fluor*), the Appellate Court of Illinois has concluded that there is a key difference between the assignment of a right under an insurance policy before the occurrence of a loss as compared with after such an occurrence. Ill. Tool Works, Inc. v. Comm. and Indus. Ins. Co., 962 N.E.2d 1042, 1053 (2011).

4. Procedure

In regard to form, there is some variation, but generally, "[i]n order to make a valid assignment, the owner must manifest an intention to make the assignee the owner of [the] claim."[114] As such, there is usually no particular form required, "so long as the language manifests [the assignor's] intention to transfer at least title or ownership, i.e., to accomplish a completed transfer of the entire interest of the assignor in the particular subject of assignment."[115] Moreover, in many states, assignments can be oral.[116]

Notice to the obligor is not typically required. However, at the same time, an assignee will take the assignment of a chose in action "subject to all claims that accrued before the obligor had notice of the assignment."[117]

Whether consideration is necessary to assign a chose in action is "a matter of considerable controversy."[118] In short, some states require it and some do not.[119] As one treatise makes clear, however, "the better view is that consideration is not required for the assignment of a chose in action, whether the chose is legal or equitable."[120]

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114. Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 17 (2d Cir. 1997) (internal citations and quotation marks omitted); *see also* Herr v. U.S. Forest Serv., 803 F.3d 809, 821 (6th Cir. 2015) (no assignment of the chose in action in question where there was insufficient evidence of intent to assign).

115. *Advanced Magnetics, Inc*., 106 F.3d at 17 (2d Cir. 1997) (internal citations and quotation marks omitted).

116. This is the case in California. Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct. of L.A. Cnty., 46 Cal. 4th 993, 1002 (Sup. Ct. 2009). In New York, assignments may also be oral, but only where there has been consideration. Citibank, N.A. v. Tele/Res., Inc., 724 F.2d 266, 268 (2d Cir. 1983) (stating that where consideration passes, "a parol assignment of a debt, claim, or chose in action is valid.").

117. Smith v. Mallick, 514 F.3d 48, 51 (D.C. Cir. 2008); Meier v. Hess, 23 Or. 599, 603 (1893). Some states have encoded this rule in statute, e.g., N.J. STAT. ANN. § 2A:25-1.

118. SMITH & LESLIE, supra note 34, at 301.

119. For example, Florida and Indiana require consideration. Crowel v. Adm'r of Veterans' Affairs of Washington, D.C., 699 F.2d 347, 352 (7th Cir. 1983); Giles v. Sun Bank, N.A., 450 So. 2d 258, 260 (Florida Ct. App. 1984); *see also* Groce v. Fidelity General Ins. Co., 252 Or. 296, 302 (1968). By contrast, California requires no consideration. Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct. of L.A. Cnty, 46 Cal. 4th 993, 1002 (Sup. Ct. 2009). In New York, assignments under New York law must be for good consideration *or* in writing. Gen. Motors Acceptance Corp. v. Scio Volunteer Fire Dep't, 191 A.D.2d 981, 595 N.Y.S.2d 145, 146.

120. SMITH & LESLIE, *supra* note 34, at 301.

In this latter regard, as we will see below in relation to Canada as well, the historical distinction between the legal title and equitable title of a chose in action remains relevant in some US states.[121] That distinction stood at the center of two lengthy opinions by the Illinois Appellate Court in the early 2010's, both in regard to a prolonged litigation captioned *Unifund CCR Partners v. Shah*.[122] It is worth explaining this litigation in some detail in order to clarify how the legal versus equitable nature of a chose in action can be outcome determinative.

In *Shah*, a debt was sold, then sold again, then assigned for collection, and finally assigned for collection to yet another firm who brought suit to collect on the debt.[123] The relevant issue before the court involved the interpretation of a rule derived from the relevant debt collection statute.[124] That rule requires that "an assignee for collection establish that it holds legal title to a debt by pleading that it received title via a written agreement that identifies 'the accounts transferred, the consideration paid, and the effective date of the transfer.'"[125] One question in the second of this pair of decisions was whether the plaintiff needed to establish these three elements for *each* transaction in the string of sales and assignments, or instead only for the last in the string—namely the transaction by which it obtained possession of the chose in action.

To answer this question, the Court first noted that a chose in action comprises both legal title and equitable title.[126] The Court then determined that the method by which a particular debt is transferred dictates which type of title will pass: where the debt is *sold*, both legal and equitable title will pass, but where the debt is *assigned* the Court—for reasons that are not entirely compelling—found that the owner's only option is to give legal title but retain equitable title.[127]

In the case at bar, recall that the debt passed in the following path:

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121. *See generally* State Farm Fire & Cas. v. Gandy, 925 S.W.2d 696, 705-07 (Tex. Sup. Ct. 1996).

122. Unifund CCR Partners v. Shah, 946 N.E.2d 885 (Ill. App. Ct. 2011) ["*Shah I*"] and Unifund CCR Partners v. Shah, 993 N.E.2d 518 (Ill. App. Ct. 2013) ["*Shah II*"].

123. *Shah II,* 993 N.E.2d at 520.

124. *Id.*

125. *Id.* at 521 (quoting *Shah I*, 946 N.E.2d at 747).

126. *Id.*

127. *See Shah I*, 946 N.E.2d at 890; *see also Shah II*, 993 N.E.2d at 521, 524.

Party A/debtor →[sale]→ Party B →[sale]→ Party C →[assignment]→ Party D→[assignment]→ Party E/plaintiff[128]

Based on the rules of transfer that it applied, the Court therefore found that title transferred in the following way:

	→[sale]→		→[sale]→		→[assignment]→		→[assignment]→	
Party A/ debtor	legal *and* equitable title passed	Party B	legal *and* equitable title passed	Party C	*only* equitable title passed	Party D	*only* equitable title passed	Party E/ Plaintiff

On this analysis, legal title stayed with Party C, whereas equitable title passed all the way to Party E, the plaintiff. Applying this framework to the plaintiff's pleadings, the Court then held that the plaintiff had not satisfied the requirements of the debt collection statute.[129] Thus, it was the distinction between legal title and equitable title that drove the Court's analysis and determined the outcome.

5. Choice of Law

Choice of law is another area that involves competing approaches among US states, with important consequences. The differing analyses of the courts in *New Falls Corp. v. Lerner*[130] and *Conopco, Inc. v. McCreadie*[131] are illustrative. Both cases involved two parties who entered into a contract for the assignment of a chose in action. The assignment contract contained a choice of law clause choosing the law of a specific jurisdiction to govern the assignment. Based upon the law selected by the parties in their choice of law clause, the assignment would be lawful. But under the law that governed the underlying claim, the assignment would not

128. *See* discussion in *Shah II*, 993 N.E.2d at 520, 522-25.

129. *See Shah II*, 993 N.E.2d at 526-27.

130. 579 F.Supp.2d 282 (D. Conn. 2008).

131. Conopco, Inc. v. McCreadie, 826 F.Supp. 855 (D.N.J.1993), *aff'd* 40 F.3d 1239 (3d Cir.1994).

(or at least, might not) be permitted. The issue, then, was whether the assignment of the chose in action was valid.[132]

The judges in these two cases applied very different approaches to the question based on different understandings of the underlying concepts. In *Conopco*, Judge Barry took the underlying claim in the form of a piece of property, namely the chose in action, as the starting point of analysis[133] In her view, it is the law governing the claim that should drive the assignment analysis.[134] In *Conopco*, because the jurisdiction that governed the underlying claim would not allow the assignment of that claim, Judge Barry likewise considered the resulting chose in action to be unassignable. And, according to her analysis, because the chose in action was unassignable, so too the parties' contract purporting to assign the chose in action could not be effective.[135]

Judge Underhill in *New Falls*, however, saw the assignment as separate from the underlying claim. As such, the assignment was rightfully governed by a different body of law from that of the underlying claim; in other words, the assignment should always be governed by contract law—that is, the law that applies to the assignment agreement—regardless of the claim that gave rise to the chose in action in the first place.[136] In following, if the law that governs the assignment permits the assignment, the assignment (qua contract) will be valid.[137] By this analysis, if the contract containing the assignment of the chose in action is valid, then the actual chose in action may be assigned regardless of what the law governing the underlying claim would hold, subject only to public policy restrictions in, primarily, the forum jurisdiction.[138]

132. *New Falls*, 579 F.Supp.2d at 282-84; *Conopco*, 826 F.Supp. at 857-58, 863-65.

133. *See id.* at 864.

134. *See id.* at 865-66.

135. *See id.* at 867.

136. *See New Falls*, 576 F.Supp.2d at 292.

137. *See id.*

138. *Id.* at 291; *cf.* Accrued Financial Services, Inc. v. Prime Retail, Inc., 298 F.3d 291, 297 (4th Cir. 2002) ("While the assignments in this case contain a choice-of-law provision providing that California law governs, the parties' choice of law provision is enforceable only to the extent that the chosen law does not violate a fundamental public policy of the forum state, Maryland.") (citing Am. Motorists Ins. Co. v. AR-TRA Group, Inc., 338 Md. 560, 659 A.2d 1295, 1301 (Md. 1995)).

Somewhat of a middle ground is reached in *Clifford v. Dylan Mortgage Inc*.[139] There, the court determined that South Carolina law applied to the relevant assignment of the chose in action. The defendant nevertheless argued that the assignments should be invalid because the assignments would violate the public policy of North Carolina, the forum jurisdiction. In response, the Court agreed that North Carolina law might not in fact allow the assignments. Nevertheless, the assignments were not so seriously harmful as to trigger North Carolina's public policy exception to choice of law questions, and the Court enforced the assignments.[140]

We suggest that the proper analysis is that of Judge Underhill in the *New Falls* case: because a chose in action is a separate legal phenomenon to the underlying contract, tort, or statutory violation, the assignability of a chose in action should be governed by the substantive law of the jurisdiction that applies to the assignment agreement. In any event, these existing and varying—indeed, conflicting—choice of law approaches are troubling and have the potential to disrupt, *inter alia*, the expectations of the parties to a contract. Harmonization would be beneficial.

B. Canada

In Canada, as in the United States, the choses in action doctrine remains deeply seeded even if seldom seen on the surface of legal practice or public conversation. Also similar to the United States, federal law in Canada has played only a small role in the doctrine since its inheritance from England. Instead, except regarding federal matters, such as the assignment of Crown debts and debts due to the Crown under payment bonds,[141] "the law . . . respecting ordinary choses in action, including their assignment, is provincial."[142]

Indeed, each of the common law provinces and territories[143] explicitly provides by statute for the transfer of certain choses in

139. Clifford v. Dylan Mortg., No. 1:04CV486, 2005 U.S. Dist. LEXIS 48754, at *27 (M.D.N.C. Sept. 21, 2005).

140. *See id.* at *29.

141. *See* Financial Administrative Act, S.C. 2021, c 68, art 102 (Can.).

142. Empire Financiers Ltd. v. Nance (1920), 16 A.R. 110 (Can.).

143. We are strong supporters of Quebec, but for present purposes we sidestep its civil law engagement with related concepts.

action.[144] In Ontario and British Columbia, for example, statutes purport to provide broadly for the assignment of any "legal chose in action."[145] In Manitoba and Saskatchewan, transfer is restricted to "choses in action arising out of contract."[146]

Much of the statutory regulation of the transferability of choses in action in Canada stems from section 25(6) of the English *Judicature Act* of 1873.[147] That historical basis has nevertheless led to diverse nuances of the modern rules. In *Black Hawk Mining Inc. v. Manitoba (Provincial Assessor)*,[148] for example, the Manitoba Court of Appeal had reason to discuss the differences between the analogous versions of the resulting legislation in Manitoba and Ontario and concluded that Manitoba's version of the legislation "is somewhat wider than the Ontario and English legislation."[149]

As may be expected, these various statutory rights across the provinces have been modified—both augmented and limited—by the common law. The full contours of the scope of the choses in action doctrine are therefore to be found in the case law. The most comprehensive discussion of this scope is given by the British Columbia Court of Appeal in *Fredrickson v. Insurance Corp. of British Columbia*.[150] The reasoning of the Court of Appeal was later unanimously affirmed by the Supreme Court of Canada[151] and the decision of the Court of Appeal has been referred to as "the leading

144. *See* R.S.A. 2000, c J-2, art 20 (Can.); R.S.B.C. 1996, c 253, art 36 (Can.); R.S.M. 1987, c L90, art 31 (Can.); R.S.N.B. 1973, c J-2, art 31 (Can.); R.S.N.W.T. 1988, c C-7, art 1 (Can.); R.S.N.S. 1989, c 240, art 43(5) (Can.); R.S.N.W.T. 1988, c C-7, art 1 (Can.); R.S.O. 1990, c C.34, art 53 (Can.); S.P.E.I. 2008, c 20, art 68 (Can.); R.S.S. 1978, c C-11, art 2 (Can.); R.S.Y. 2002, c 33, art 1 (Can.).

145. Conveyancing and Law of Property Act, R.S.O. 1990 s 53 (Can. Ont.); Law and Equity Act, R.S.B.C. 1996, c 253 s 36(1) (Can. B.C.).

146. The Law of Property Act, C.C.S.M. 1987, c L90 s 31(1) (Can. Man.); Choses in Action Act, R.S.S. 1978 c C-11 s 2 (Can. Sask.).

147. *See* Gaumont v. Luz, [1980] 5 W.W.R. 533 CarswellAlta 255, para. 23 ("The modern legislation in England is contained in s. 136 of the Law of Property Act, 1925 (15 & 16 Geo. 5), c. 20.").

148. [2002] MBCA 51.

149. *Id.* para. 66.

150. [1986], 28 D.L.R. (4th) 414 (Can. B.C.), *aff'd*, [1988] 1 S.C.R. 1089 (Can. S.C.C.).

151. Insurance Corp. of British Columbia v. Fredrikson, [1988] 1 S.C.R. 1089 (Can. S.C.C.). Note that the Plaintiff's name is spelled alternatively as Fredrickson and Fredrikson, depending on the reporter.

case in Canada on the validity of assignments of causes of action."[152]

In *Fredrickson*, an insured, Mr. Fredrickson, held claims against his own insurer arising out of underlying litigation involving an automobile accident. The question in the case at hand was whether he could assign those claims against his insurer—as part of a settlement—to the individual who was suing him as the result of that accident. Importantly, the claims in question sounded both in contract (breach of the terms of the insurance contract) and tort (negligence in defending the action).

Justice McLachlin concluded that at least some contract and tort claims are assignable under Canadian law, but subject to contrasting sets of rules. Contract claims, on the one hand, are freely assignable—subject to a list of exceptions. These exceptions, as summarized by the Court, forbid assignment in the following instances:

> 1. Contracts which expressly by their terms exclude assignment;
>
> 2. Mere rights of action (assignments savouring of maintenance and champerty);
>
> 3. Contracts which by their assignment throw uncontemplated burdens on the debtor;
>
> 4. Personal contracts;
>
> 5. Assignments void by public policy (public officers' wages or salary and alimony or maintenance agreements); and
>
> 6. Assignments prohibited by statutory provisions.[153]

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152. Ma v. Ma, 2012 ONCA 408, para. 8 (Can. Ont. C.A., 2012); Gentra Canada Investments Inc. v. Lipson, 2011 ONCA 331, 2011 CarswellOnt 2821, para. 21 ("[T]he leading Canadian case on the assignability of a cause of action in tort is *Fredrikson v. Insurance Corp. of British Columbia* (1986).").

153. *Fredrickson*, 28 D.L.R. at para 45-50. Numbers 1 (regarding exclusion by contract) and 4 (regarding personal contracts), however, are arguably misplaced here because as general rules they apply only to the assignment of *contractual* rights rather than the assignment of choses in action. Under normal circumstances, choses in action *would* be assignable in these two situations. *See supra* Section I.B. Recall the example of an insurance agreement, where there is distinct difference between the transfer of the insurance coverage itself (which is a contractual right, subject to one set of rules) and the transfer of a claim, whether in tort or contract, arising out of that coverage (which is a property right in the form of a chose in action, and which is subject to a different set of rules). *See, e.g.*, Illinois Tool Works, Inc. v. Com. And Indus. Ins. Co., 962 N.E.2d 1042, 1054 (Ill. App. Ct. 2011). For a lengthy examination of the history and application of the

According to Justice McLachlin, assignments of tort claims, by contrast, are generally *in*valid—but with exceptions in reverse such that many tort claims are in fact assignable despite the general rule. These exceptions whereby tort claims are assignable encompass claims for "the fruits of an action, as opposed to the action itself" and also claims "where the assignee has either a preexisting property interest or a legitimate commercial interest."[154] Significantly, "the categories of exceptions are not closed."[155] Instead, "[i]n each case the court must ask itself whether the assignment can fairly be seen as prompted by a desire to advance the cause of justice rather than as intermeddling for some collateral reason."[156]

Although seemingly adopting different approaches regarding contract and tort claims, these approaches can be reconciled in relation to the long-standing common law fears, noted *supra*, about maintenance in general and champerty in particular. As such, Canadian law holds that in broad terms, where these fears can be overcome, a claim can be assigned, but where such fears remain, transferability will be restricted. "Ultimately, the question of whether a cause of action in tort or contract can be assigned and enforced turns on whether the enforcement action 'savours of maintenance.'"[157]

A consistent theme through the Canadian courts' analyses of both tort and contract claims is that these fears of maintenance and champerty have no place where the assignee has a "legitimate commercial interest in the enforcement of the claim."[158] Instead, in such cases, assignment should be permitted.[159] The English *Trendtex* case, discussed in detail below, has strongly influenced recent Canadian cases.

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assignment of rights that nevertheless confuses the different rules that apply to the assignment of contractual rights and the assignment of choses in action, see Black Hawk Mining Inc. v. Manitoba (Provincial Assessor), 2002 MBCA 51 (Can. Man. C.A.).

154. *Fredrickson*, 28 D.L.R. at paras. 24, 26.

155. *Id.* para. 23.

156. *Id.* (citation omitted).

157. *See, e.g.*, *Ma*, ONCA 408 para. 28.

158. *Fredrickson*, 28 D.L.R. para. 26.

159. *See id.* para. 52 ("As in the case of causes of action in tort, where the assignee possesses a sufficient pre-existing interest in the cause of action assigned, the suggestion of maintenance is negated and the assignment is valid.") (citation omitted); *accord* Gentra Canada Investments Inc. v. Lipson, [2011] ONCA 331, 2011 CarswellOnt 2821.

As noted in *Frederickson*, "public policy" imposes a limitation on assignability regardless of the type of claim. The scope of the public policy restraint was the question that animated the Ontario Court of Appeal in *Gentra Canada Investments Inc. v. Lipson*.[160] There, the issue before the court was whether it is permissible to assign a legal malpractice claim. The defendant-appellants urged the court to refuse to recognize the assignment, arguing *inter alia* that such an assignment would "undermine the confidential relationship" that exists between lawyers and clients.[161] The *Gentra* court, however, rejected those arguments. Following *Fredrickson*, Armstrong, JA[162] concluded:

> If an assignee can show a legitimate commercial interest in the cause of action against a lawyer, such an assignment does not savour of champerty or maintenance. If the assignment meets the *Fredrikson* test, the fact that the claim arose out of a solicitor-client relationship does not render the assignment invalid as contrary to public policy.[163]

Further, the distinction between a legal assignment and an equitable assignment retains relevance across Canada. This distinction most often comes to bear regarding the question of whether an assignor need be joined in the ensuing action, that is, whether the assignee may sue in her own name.[164] The question is rendered even more complicated by the fact that Canada likewise still recognizes both *types* of choses in action, legal and equitable, as determined by how the chose in action arises. In short, where a chose in action is historically grounded in English common law courts prior to 1873, the chose in action is legal.[165] Where, by

160. *Gentra,* ONCA 331.

161. *Id.* para. 19.

162. Joined by Laskin, J.A. and Juriansz, J.A.

163. *Gentra*, ONCA 331 para. 35; *see also Fredrickson*, 28 D.L.R. para. 59 (rejecting public policy argument).

164. *See*, *e.g.*, DiGuilo v. Boland, [1958] CarswellOnt 102, para. 17 (Can. Ont. C.A.).

165. Recall the relevant chose in action statute in Ontario, the Conveyancing and Law of Property Act 1990, stating in part at § 53(1): "Any absolute assignment . . . of any debt or other legal chose in action . . . *is effectual in law*." (emphasis added). *See also DiGuilo*, CarswellOnt 102 para. 10 ("This legislation created a new type of assignments [*sic*]— legal assignments. Its effect is limited. It did not affect equitable assignments or the rules governing them.").

contrast, the chose in action is created out of the English Court of Chancery prior to 1873, the chose in action will be equitable.[166]

As a result of these two sets of distinctions, there are four possible kinds of assignment: an equitable assignment of an equitable chose in action, an equitable assignment of a legal chose in action, the legal assignment of an equitable chose in action and the legal assignment of a legal chose in action.[167] The answer to the joinder question in Canada continues to depend on this combination. As summarized by the Ontario Court of Appeal in *Nadeau*:

- where there is a legal assignment (such that satisfies the requirements of s. 53(1) of the *Conveyancing and Law of Property Act*) of either a legal or equitable chose in action, no joinder is necessary and "the assignee can sue alone";
- where there is an equitable assignment of an equitable chose in action, the assignee can likewise sue alone;
- but where there is an equitable assignment of a legal chose of action, joinder of the assignor *is* necessary *unless*, following section 5.03(3) of the Ontario *Rules of Civil Procedure*, the assignment was absolute and notice of the assignment was given in writing to the person liable in respect of the debt or chose in action that it has been assigned to the assignee.[168]

Even where the equitable assignment of a legal chose in action does *not* satisfy this or an analogous statutory threshold, the relevant rules of civil procedure may nevertheless permit the court to relieve the assignee of the obligation of joining the assignor.[169] This is the case in Ontario. As the case law demonstrates, such relief may be warranted "where the defendant does not raise the point as a matter of defence . . . or where it is clear that the assignor,

166. "Equity does not require a particular form to effect a valid assignment, but whatever form is used must clearly show an intention that the assignee is to have the benefit of the debt or chose in action assigned." Nadeau v. Caparelli, 2016 ONCA 730, para. 19 (Can. Ont. C.A.).

167. *DiGuilo*, CarswellOnt. 102 para.11.

168. *Nadeau*, ONCA 730 para. 27-30.

169. *See, e.g.,* Rules of Civil Procedure, R.R.O. 1990 Reg. 194, s 5.03(6) ("The court may by order relieve against the requirement of joinder under this rule."). *Gentra* further recognizes "the general principle of interpretation in r. 1.04(1) that '[t]hese rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.'" *Gentra*, ONCA 331 para. 65.

a company, had no interest in the chose and had ceased to exist."[170] These exceptions arise because "the purpose behind the requirement that the assignor be a party . . . is to bind the assignor so as to save the debtor from the possibility of another action against it for the same debt."[171] As such—and as was the situation in *Gentra*—where there is no such risk, the court, where permitted, may by discretion allow the assignee to proceed without joining the assignor.[172]

C. England

In England, the chose in action doctrine is perhaps better known than in North America. This may stem from the fact that the doctrine arose in English courts.

Like Canada, England recognizes legal and equitable choses, owing to the historical distinction between common law and equitable courts. It also allows for four combinations of assignment, including an equitable assignment of an equitable chose in action, an equitable assignment of a legal chose in action, the legal assignment of an equitable chose in action, and the legal assignment of a legal chose in action.[173]

English law provides for the statutory transfer of choses in action via Section 136 of the *Law of Property Act 1925*, which is the successor to Section 25(6) of the *Judicature Act*. Although Section 136 of the *Law of Property Act*[174] refers to the transfer of "any debt or other legal thing in action," it has been held as applicable to the legal assignment of legal *and* equitable choses in action.[175]

English law retains a discretion to find assignments of choses in action void on the grounds of maintenance and champerty, but the tendency to do so has diminished in recent times. In short, although the assignment of bare rights to litigate is prohibited, there are various recognized exceptions, such as an assignment by

170. *Gentra*, ONCA 331 para. 62 (citing *DiGuilo*, CarswellOnt. 102 at 397-98).
171. *Id.* para. 61 (internal citations omitted).
172. *Id.* para. 63.
173. ROBERT MEGARRY & P. V. BAKER, SNELL'S PRINCIPLES OF EQUITY 70 (27th ed., 1973).
174. Law of Property Act, (1925) § 136(1) (Eng.).
175. *Id.;* Gustavson v. Haviland [1919] 1 Ch 38, 44 (Eng.); MEGARRY & BAKER, *supra* note 180, at 72.

an insured to an insurer,[176] an assignment by a company liquidator,[177] an assignment of property with an incidental right to litigate,[178] and, most pertinently for present purposes, the *Trendtex* genuine commercial interest principle.[179]

1. The *Trendtex* principle

The key case on the genuine commercial interest exception is *Trendtex Trading Corporation v. Credit Suisse*.[180] Trendtex,[181] a Swiss Corporation, contracted to sell cement to an English company for shipment to Nigeria. The agreement was to be financed by a letter of credit issued by the Central Bank of Nigeria, which subsequently repudiated the deal. Trendtex claimed damages of US$14 million in England against the Central Bank of Nigeria, with Credit Suisse offering to guarantee Trendtex's legal costs and fees incurred over the course of proceedings.

The claim failed at first instance but was successfully appealed.[182] While awaiting a further appeal to the House of Lords, Credit Suisse pressured Trendtex to assign to it the cause of action against the Central Bank of Nigeria under threat of bankruptcy. Trendtex agreed on the understanding that there might be a further assignment to a third party. The cause of action was eventually assigned to an anonymous third party for US$1.1 million and was settled against the Central Bank of Nigeria by the payment of US$8 million. Trendtex took subsequent action against

176. *See* King v. Victoria Insurance Co. Ltd. [1896] AC 250; Compania Colombiana de Seguros v. Pacific Steam Navigation Co. [1965] 1 QB 101, 122 (Roskill J); Morris v. Ford Motor Company Co. Ltd. [1973] 1 QB 792, 801.

177. *See* Re Park Gate Waggon Works Company [1881] 17 ChD 234; Grovewood Holdings Plc v. James Capel & Co. Ltd. [1995] Ch 80, 86.

178. Williams v. Protheroe (1829) 2 Moo. & P. 779, 787.

179. Interestingly, the assignment of a debt is not included in this list, owing to its unique classification as a right of property: Fitzroy v. Cave [1905] 2 KB 364, at 373 (Cozens-Hardy LJ (with whom Mathew LJ agreed)). Practically, however, it is an exception to the prohibition on the assignment of bare rights to litigate, even if not classified accordingly. This accounts for why common law transfer statutes such as the *Law of Property Act* refer to debts *and* choses in action separately. *See* Anderson, *supra* note 42, at 90-91.

180. [1982] AC 679; [1981] 3 All ER 520 (Eng.).

181. Much of this factual summary draws on Glen Anderson's article *The* Trendtex *Principle in Australian Law: Context and Recent Developments*, 40 U.W. AUSTL. L. REV. 85 (2016).

182. *See* Trendex Trading Corp. v. Cent. Bank of Nigeria [1977] 1 QB 529; [1976] 3 All ER 437; [1976] 1 WLR 868.

Credit Suisse, arguing that the assignment of the cause of action was invalid as it savored of maintenance.

On the application of Credit Suisse, Robert Goff J., ordered that the action be stayed with reference to a clause of the assignment which required disputes between Trendtex and Credit Suisse to be decided by a Swiss court. Trendtex appealed to the Court of Appeal which held that Credit Suisse had a genuine and substantial interest in the success of the litigation against the Central Bank of Nigeria, which was sufficient grounds to find the assignment valid.[183] However, both Lord Denning MR and Oliver LJ (with whom Bridge LJ agreed) failed to consider the effect of the introduction of the anonymous third party to the agreement.

On appeal to the House of Lords it was unanimously decided that while the assignment of the cause of action to Credit Suisse did not savor of maintenance, the subsequent assignment to the anonymous third party did and, as such, was void under English law.[184] According to Lord Roskill: "Such an agreement, in my opinion, offends for it was a step towards the sale of a bare cause of action to a third party who had no genuine commercial interest in the claim in return for a division of the spoils."[185]

Lord Roskill disagreed with Lord Denning who went so far as to claim that "the old saying that you cannot assign a bare right to litigate is gone."[186] Lord Roskill thought that this still remained a basic principle of the law but restated the law as follows:

> If the assignment is of a property right or interest, and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.[187]

In other words, "the House of Lords thus held that the prohibition on maintenance and champerty is suspended in

183. *See* Trendtex Trading Corp. v. Credit Suisse [1980] QB 629, 658 (Lord Denning MR), 675 (Oliver LJ (with whom Bridge LJ agreed)).

184. *See* Trendtex Trading Corporation v. Credit Suisse [1982] AC 679; [1981] 3 All ER 520, AC 694, 703-04.

185. [1981] 3 All ER 520, 530.

186. [1981] 3 All ER 520, AC 694, 703-04.

187. *Id.*

circumstances where an assignee can demonstrate a 'genuine commercial interest' in the assignment."[188] In this regard, the House of Lords introduced a new ground upon which a right to litigate could be assigned, thus liberalizing the previously restrictive rules against the assignment of choses in action.[189] Walters does well to point out that the diverging opinions between the House of Lords and the Court of Appeal does not undermine the significance of *Trendtex*.[190] In fact, he explains how the appeal provided a welcome opportunity to introduce cohesion to the law on two counts: "[F]irst, any suggestion that maintenance and champerty should be differentiated was decisively rejected in favor of a uniform test. Secondly, it reinvented champerty as a tool of public policy."[191]

2. Beyond *Trendtex*

Giles v. Thompson[192] furthered this shift in attitude toward a greater emphasis on public policy "as distinct from the precise nature of the transaction."[193] In that case, the plaintiffs suffered damage to their cars in road accidents for which the defendants were liable in negligence. The plaintiffs hired replacement vehicles from companies for "free" on the condition that those companies could recover the hire costs in an action in the plaintiffs' name against the defendant. The company agreed to fund this action and any additional claims by the plaintiff for other loss or damage, such as personal injury. The company also retained the right to nominate its own legal representatives to conduct the action on the plaintiffs' behalf. As one would expect, the companies involved were generally only prepared to hire out their vehicles in cases where the defendant was almost certain to be liable and was insured. At trial the defendants argued that the agreement

188. Anderson, *supra* note 42, at 95.

189. *See* Damian Reichel, *The Law of Maintenance and Champerty and the Assignment of Choses in Action:* Trendtex Trading Corporation v Credit Suisse, 10 SYD. L. REV. 166, 176-78 (1983).

190. Adrian Walters, *Foreshortening the Shadow: Maintenance, Champerty and the Funding of Litigation in Corporate Insolvency*, 17 CO. L. 165, 171 (1996).

191. *Id.* at 170.

192. [1994] 1 AC 142.

193. Walters, *supra* note 190, at 170.

between the plaintiffs and the car hire companies was champertous.[194]

The Court of Appeal, however, found the arrangements to be lawful. The Court held that there was nothing about the agreement which had the "tendency to corrupt public justice."[195] In fact, Steyn LJ concluded that there were good policy grounds for upholding the arrangements: "A ruling that the agreements are contrary to public policy may deprive thousands of individuals who have meritorious claims from effective access to civil justice and from hiring replacement cars when they reasonably need to do so."[196]

Given that the sums sought represented the cost of supply of the replacement vehicles, this was not a case in which the car hire companies had shared in the spoils of litigation.[197] On this ground, the court drew on *Trendtex* even while distinguishing the case at hand.[198] Lord Mustill, who delivered the leading opinion in the House of Lords, also adopted the liberal position of the Court of Appeal. He provided that in cases involving the assignment of a right of action, the appropriate approach is as follows:

> Unless it can be demonstrated that the arrangements under scrutiny give rise to "wanton and officious intermeddling with the disputes of others in which the [meddler] has no interest whatever and where the assistance he renders . . . is without justification or excuse" they will not be champertous at all.[199]

The decision in *Giles* thus emphasized the law against champerty in the late twentieth century as primarily a principle of public policy "designed to protect the purity of justice and the interests of vulnerable litigants."[200] However, Y.L Tan comments that while *Trendtex* has liberalized the law on champertous assignments, questions relating to the scope of the genuine commercial interest criterion remain unanswered.[201] He argues that "if *Trendtex* purports to lay down a general rule for all actions,

194. Giles v. Thompson and related appeals [1993] 3 All ER 321, 325.
195. *Id.* at 334.
196. *Id.* at 336.
197. *See id.* at 334.
198. *Giles* [1994] 1 AC 142.
199. Walters*, supra* note 190, at 171 (quoting *Giles* [1993] 3 All ER 321, 360).
200. *Id.*
201. Y.L. Tan, *Champertous Contracts and Assignments*, 106 L.Q. REV. 656, 663 (1990).

it will be inadequate . . . unless a proviso is added [outlining] the circumstances [which] should reasonably warrant assignment."[202]

Recent cases such as *Simpson v. Norfolk & Norwich University Hospital NHS Trust* have since explored what might amount to a genuine commercial interest.[203] The facts show that Simpson, the assignee, purported to take up the action not for financial reasons but to ensure that Norwich University Hospital instituted more effective infection control procedures. The Court of Appeal found that this sort of interest was insufficient to support an assignment of what would otherwise amount to a bare right of action.[204] UK courts have so far, however, declined to provide a comprehensive answer as to what constitutes a genuine commercial interest.

D. Australia

Like England and Canada, Australian law also gives effect to the assignment of legal and equitable choses in action. In general, there are here too four possible combinations of assignment, namely an equitable assignment of an equitable chose in action, an equitable assignment of a legal chose in action, the legal assignment of an equitable chose in action, and the legal assignment of a legal chose in action.[205]

Also, like England and Canada, each of the Australian states and territories explicitly provides for the statutory transfer of choses in action. In New South Wales, for instance, Section 12 of the *Conveyancing Act 1919* provides for the legal assignment of any "debt or other legal chose in action."[206] This and other equivalent sections have not deviated from Section 25(6) of the *Judicature Act*, although notably, Western Australia has allowed for the legal assignment of *part* of a debt or chose in action.[207]

Australian case law has held that Section 12 of the *Conveyancing Act 1919* and its equivalents are not restricted to the legal assignment of legal choses, but also can include the legal

202. *Id.* at 669.

203. [2011] EWCA (Civ) 1149.

204. *Id.* ¶ 24.

205. J.D. HEYON, ET AL., MEAGHER, GUMMOW AND LEHANE'S EQUITY: DOCTRINES AND REMEDIES 230 (5th ed. 2015).

206. *Conveyancing Act 1919* (NSW) s 12 (Austl.).

207. *Property Law Act 1969* (WA) s 20 (Austl.).

assignment of equitable choses.[208] In relation to the latter, however, Section 12 is regarded not as mandatory, but instead permissive.[209]

As with other common law jurisdictions, Australia maintains a prohibition on maintenance and champerty, but this has been liberalized in recent times. Although the assignment of choses in action in support of bare rights to litigate is *prima facie* prohibited, there are numerous exceptions,[210] including most relevantly for present purposes, the *Trendtex* principle.

1. Operation of the *Trendtex* principle in Australia

When considering the scope and development of the *Trendtex* principle, it is instructive to begin with *Poulton v The Commonwealth*.[211] The Australian High Court in that case considered whether tortious claims could be assigned. At trial, Fullagar J. remarked in dicta that any cause of action in tort that might have arisen in that case would not be assignable in either law or equity.[212] The Full Court dismissed the appeal for two reasons: "both because there was not in fact any purported assignment to the plaintiff of the right of action for the tort, and because, according to well-established principle, the right was incapable of assignment either at law or in equity."[213] At the time *Poulton* was decided, however, there was no guidance as to whether contractual claims (post-breach) could be assigned on the ground of a genuine commercial interest.[214]

The *Trendtex* principle was first applied by an Australian court in *Re Timothy's Pty Ltd*.[215] In that case, Timothy's Pty Ltd. (TPL) had taken action against Affiliated Holdings Ltd. (AHL) regarding a breach of lease. At that time, TPL owed Bronze Lamp Pty Ltd. (BLPL) $25,000, and so assigned its cause of action against AHL to BLPL.[216] In consideration, BLPL would release TPL of its

208. *Fed Comm'n of Taxation v Everett* (1980) 143 CLR 440 at 447 (Austl.).
209. HEYON ET AL., *supra* note 205, at 236.
210. Anderson, *supra* note 42, at 92.
211. (1953) 89 CLR 540 (Austl.).
212. *Id.* at 571.3. *See also* Brady, *supra* note 48.
213. *Poulton v Commonwealth,* 89 CLR at 602.
214. *See generally* Anderson, *supra* note 42, 102-03.
215. (1981) 2 NSWLR 706.
216. *Id.* at 824.

indebtedness. Needham J. ruled the assignment was valid based on the grounds of a genuine commercial interest:

> [W]ithout the assignment of the cause of action, [BLPL] would not be able to obtain payment of its debt. I think, in the light of the decisions of the Court of Appeal and of the House of Lords in the *Trendtex* case, that [BLPL] had a sufficient commercial interest in the proceedings to entitle it to accept an assignment of them.[217]

The *Trendtex* principle was reapplied in Australia in *Re Daley; Ex Parte National Australia Bank Ltd*.[218] The plaintiff, Daley, was the sole shareholder and guarantor of Opal Hotel Group Pty Ltd. (OHGPL) which in turn owned all the shares in Dewmask Pty Ltd. (DPL). Both companies were created for the purchase of Opal Cove Resort at Coffs Harbour and a similar resort in Surfers Paradise. In the end, the companies never purchased the properties but remained involved in the administration of the Opal Cove Resort. When Daley returned from a month overseas, it became clear that the National Australia Bank (NAB) had paid out substantial checks on both the DPL and OHGPL accounts. Daley argued that Raffin, who signed the checks, had been added to the NAB's signing mandate without his knowledge or approval, and without the proper authority of the companies.

For OHGPL and DPL to continue trading during the investigation, the Bank granted a $50,000 overdraft to the companies provided that Daley was guarantor. The two companies commenced Supreme Court proceedings to recover the money owing from the disputed checks and soon after assigned their cause of action against the Bank to Daley. Heerey J. remarked that, "[a]pplying [the *Trendtex* principle], it can hardly be denied that Mr. Daley has a genuine commercial interest in the enforcement of the claims by [OHGPL] and [DPL] against the Bank. He is the sole beneficial shareholder of the companies and has also guaranteed their liability of some $48,000 to the Bank."[219]

Though these decisions purport to favor the adoption of the *Trendtex* principle, the pertinence in Australia of the position taken

217. *Id.* at 829.
218. (1992) 8 ACSR 395; 37 FCR 390.
219. *Id.* at 400.

by the House of Lords was "far from clear."[220] Various single judges of the Federal Court declined to follow *Trendtex* and expressed that it was not appropriate to depart from the dicta in *Poulton* unless the High Court determined otherwise.[221]

The *Trendtex* principle was eventually discussed in two High Court decisions: *Campbells Cash & Carry Pty Ltd v. Fostif Pty Ltd*[222] and *Equuscorp Pty Ltd. v. Haxton*.[223] In *Campbells Cash & Carry*,[224] the issue for determination was primarily one of litigation funding, as opposed to the assignment of a cause of action. Indeed, there were no assignments of causes of action involved in that decision. The Court, however, can be seen to adopt a less restrictive view toward the dangers associated with maintenance "in the light of modern conditions, analogous legal developments, practices in particular jurisdictions and the real impediments that commonly exist to affordable access to justice."[225]

Though the High Court referred to the *Trendtex* case in detail,[226] it did not outright approve or disapprove of the House of Lords' approach. This resulted in different findings among Australian lower courts.

Cases such as *TS and B Retail Systems Pty Ltd. v. 3Fold Resources Pty Ltd (No 3)*[227] and *Toisch v. Tasman Investment Management Ltd.*[228] embraced a more liberal interpretation, suggesting *Campbells Cash & Carry*[229] endorsed the *Trendtex* principle, while other cases, such as *Salfinger v. Niugini Mining (Australia) Pty Ltd. (No 3)*,[230] continued to follow the precedent in *Poulton v. Commonwealth*.[231]

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220. *EWC Payments Pty Ltd & Others v Commonwealth Bank of Australia* (2014) VSC 207 at ¶ 35.

221. *Brady, supra* note 48 (citing *Park v. Allied Mortgage Corp. Ltd.* (1993) ATPR (Digest) 46-105; *Nat'l Mutual Prop. Servs. (Austl.) Pty. Ltd. v. Citibank Savings Ltd.* (1995) 132 ALR 514).

222. *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 431, 484 (Austl.).

223. *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 525, 533, 558 (Austl.).

224. *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, ¶ 9 (Austl.).

225. *Id.* at ¶ 125.

226. *Id.* at ¶ 79.

227. *TS & B Retail Systems Pty Ltd v 3Forld Resources Pty Ltd* (2007) 158 FCR 444 (Austl.); [2007] FCA 151, ¶ 81.

228. *Tosich v Tasman Investment Mgmt Ltd* [2008] FCA 377, ¶ 33.

229. *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR ¶¶ 259, 260.

230. *Salfinger v Niugunu Mining Pty Ltd* [2007] FCA 1532, ¶ 117 (Austl.).

231. *Poulton v Commonwealth* (1953) 89 CLR 540 (Austl.).

The High Court resolved the confusion with *Equuscorp Pty Ltd. v. Haxton*.[232] In that case, the respondents invested in a blueberry farming project. Each of the respondents established a loan agreement with Rural Finance Pty Ltd. to meet the ongoing expenses resulting from their investment. When the project failed, Rural Finance assigned the rights it held against the investors to Equuscorp Pty Ltd. The primary issue was whether restitutionary claims were capable of assignment. Without referring to *Poulton,*[233] the justices stated that the decision in *Trendtex* widened the criteria for assignability of causes of action.[234] In a separate judgment, Gummow and Bell JJ referred to the *Trendtex* principle with approval, stating that:

> [T]he Assignment was not open to the objection that it dealt with no more than 'bare' rights of action and so attracted the statements of principle in *Poulton v The Commonwealth*. It has long been held that an exception exists where the assignee has an interest in the suit, and a genuine and substantial commercial interest is now regarded as sufficient.[235]

There can be no doubt then that the exception outlined in *Trendtex Trading Corporation v. Credit Suisse* must now be treated as good law in Australia.[236] The focus in more recent decisions has rested on the question of what *constitutes* a genuine commercial interest.

Present authorities suggest that any assignee must have more than a mere personal interest in profiting from the proceedings.[237] This was aptly demonstrated in *Monk v. ANZ Banking Group Ltd.*[238] where the assignee, Monk, had attempted to claim the assignment of a cause of action against ANZ Bank. Monk argued that he held a "genuine commercial interest" given that there was a possibility he might become a creditor of the defendant bank. It was hoped this would then allow the plaintiff to claim a set-off in relation to a judgment debt recovered by the ANZ Bank against him. Cohen J.

232. *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, ¶¶ 525, 533, 558 (Austl.).
233. *Poulton v Commonwealth* (1953) 89 CLR 540 (Austl.).
234. *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, ¶ 51 (Austl.).
235. *Id.* ¶ 79.
236. *EWC Payments Pty Ltd & Others v Commonwealth Bank of Australia* [2014] VSC 207, ¶ 62; Anderson, *supra* note 42, at 98.
237. *Monk v ANZ Banking Group Ltd* (1994) 34 NSWLR 148 (Austl.); *see also* Anderson, *supra* note 42, at 99; Brady, *supra* note 48.
238. *Monk v ANZ Banking Group Ltd* (1994) 34 NSWLR 148 (Austl.).

found that this was not a genuine commercial interest and went on to outline situations where the criterion had been satisfied:

> [T]he assignee was already a substantial creditor of the assignor with a right to enforce the debt (*Trendtex*, *Re Timothy's*) or where the assignee was the sole shareholder who was guarantor of the overdraft of the assignor (*Re Daley*) or where the assignee was a debenture holder with an interest in protecting the value of his security (*First City Corporation*).[239]

Cohen J then attempted to state the requirement in more general terms as "an interest by the assignee in the assignor or its business affairs or activities which the assignment may in some way protect."[240] According to Anderson, "this alludes to the need for the interest to be commercial in nature, or, in other words, related to a business activity which will supersede any personal interest attaching to the assignee."[241]

It is also established principle that the whole of the transaction must be examined to determine whether an assignee has a genuine commercial interest.[242] It accords that what will constitute a genuine commercial interest will invariably depend on the individual circumstances of each case.[243]

Additional questions considered in recent Australian decisions include whether an assignee must have a pre-existing enforceable right against the assignor,[244] and whether the *Trendtex* principle extends to causes of action in tort.[245] Prevailing case law indicates that a pre-existing enforceable right is unnecessary,[246] and that causes of action in tort can be assigned, provided they meet the genuine commercial interest criterion.[247]

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239. *Id.* at 8.

240. *Id.*

241. Anderson, *supra* note 42, at 99.

242. *See Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, 228, ¶ 109 (Austl.); Brownton Ltd v Edward Moore Inbucon Ltd [1985] 3 All ER 509 (Eng.); Trendtex Trading Corp. v. Credit Suisse [1982] AC 703 (Eng.).

243. Anderson, *supra* note 42, at 100.

244. *See Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd* [2007] 158 FCR 417 (Austl.).

245. *See Monk v ANZ Banking Grp Ltd* (1994) 34 NSWLR 148 (Austl.).

246. *See Deloitte Touche Tohmatsu v JP Morgan Portfolio Servs Ltd* [2007] 158 FCR 417; *Dower v Lewkovitz* [2013] NSWCA 452, ¶ 23 (Austl.).

247. *See WorkCover Queensland v AMACA Pty Ltd* [2012] QCA 240 ¶¶ 16, 62, 66 (Austl.).

E. Beyond the Common Law: Perspectives from European Civil Law

The common law tradition reveals many differences in both approach and outcome in relation to how choses in action are treated. Expanding the lens to include non-common law legal systems, including Europe's civil law, shows an even greater diversity of approaches regarding the underlying ideals, goals, and functions that choses in action implicate.

In European civil law jurisdictions, terms such as maintenance, champerty, and chose in action are in themselves non-existent and it is difficult to articulate a shared overarching doctrine.[248] At the same time, due to global economic integration and development there is a strong tendency toward allowing the free assignment of claims in civil law as well, at least in fields such as securities law, despite major conceptual differences in underlying legal systems.[249]

We do not have space here for an in-depth comparison. However, a momentary shift in focus from the common law to the civil law offers important perspective. Because of the lack of a shared foundation or glossary for the assignment of claims between common law and civil law, we utilize a functional-comparative approach to forefront the differences in approach between the common and civil law families.[250] To follow on some of the prominent themes discussed in relation to the common law, our focus in this brief comparative excursion is on assigning claims with a view to litigation, followed by a few words on efforts toward harmonizing differences between legal systems. This brief excursion is necessarily eclectic and limited but, we hope, provides comparative insight while also presenting ideas and prospects for future research and more in-depth engagement.

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248. *See, e.g.*, Caroline Lebon, *Property Rights in Respect of Claims*, *in* CASES, MATERIALS AND TEXT ON PROPERTY LAW (Sjef Van Erp & Bram Akkermans eds., Hart Publishing 2012); BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, FINAL REPORT: STUDY ON THE QUESTION OF THE EFFECTIVENESS OF AN ASSIGNMENT OR SUBROGATION OF A CLAIM AGAINST THIRD PARTIES AND THE PRIORITY OF THE ASSIGNED OR SUBROGATED CLAIM OVER THE RIGHT OF ANOTHER PERSON (2011).

249. Teemu Juutilainen, *Law-Based Commodification of Private Debt*, 22 EUR. L.J. 743, 743 (2016).

250. *See* Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 340, 342 (2006).

As a starting point, as noted, under European civil law claims are typically freely assignable so long as they are not considered "personal."[251] What is deemed "personal" can be defined among other ways through contractual arrangements or statute. Generally, they may include for instance social security benefits or other claims related to one's person. For one example, the ruling *NJA 2017 s. 343* from the Swedish Supreme Court focuses on a claim for compensation for defamation.[252] The claimant transferred the claim to a third party before a verdict had been reached. The court found that the general rule under Swedish law allows for the free assignment of claims but that exceptions may be made for special reasons, such as protecting societally relevant interests, with the right to one's salary prior to it maturing being an example. In following, despite the main rule of free assignment, a claim for compensation based on defamation could not be assigned due to its strongly personal character.

Two further Swedish cases help highlight the tension between the free assignment of claims and other societal interests from a litigation-funding perspective. Sweden, along with many other jurisdictions, follows the "loser pays" rule under which the losing party in litigation is required to pay the costs of the winning party unless certain mitigating factors exist.[253] Thus, in considering an opportunity to bring a claim in litigation, a prospective plaintiff must not only focus on how to fund her own litigation costs but is also subject to pressure to ensure that the litigation does not lead to prohibitive costs from the other side in the event that the claim is lost.

In the Swedish Supreme Court case *NJA 2014 s. 877*,[254] two individuals had interests in companies that had undertaken

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251. On the general tendency, see PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) 260 (Christian von Bar et al. eds., 2009) [hereinafter DCFR].

252. Högsta Domstolen [HD] [Supreme Court] 2017-04-18 T 462-16 (Swed.), https://www.domstol.se/globalassets/filer/domstol/hogstadomstolen/avgoranden/2017/t-462-16.pdf [https://perma.cc/PAK7-DPXP].

253. On costs in civil procedure in Sweden, see generally Henrik Bellander, *Rättegångskostnader: Om Kostnadsbördan i Dispositiva Tvistemål* (Iustus Förlag 2017).

254. Högsta domstolen [Supreme Court] 2014-12-11 T 2133-14 (Swed.) https://www.domstol.se/globalassets/filer/domstol/hogstadomstolen/avgoranden/2014/t-2133-14.pdf [https://perma.cc/QCX3-M63L]; *see* Johan Adestam, *Ansvarsgenombrott Och Aktieägares Personliga Ansvarsfrihet - En Analys Mot Bakgrund Av NJA 2014 s. 877*, 2015 NY JURIDIK 7 (2015). Our focus here is on balancing the freedom of assigning claims.

transactions leading to considerable tax repercussions. The companies entered bankruptcy proceedings and, in 2004, legal claims were filed for some SEK 64 million in compensation against Deloitte who had advised on the transactions. The claims were then transferred to a limited liability shell company that the individuals acquired a few months earlier. The claim failed. Pursuant to the "loser pays" rule, Deloitte claimed reimbursement of its costs from the shell company which, however, had no recoverable assets. Deloitte then sued the individuals who owned the shell company. The Swedish Supreme Court allowed the piercing of the corporate veil and recovery of the relevant litigation costs from the owners themselves. This was because the "loser pays" rule was seen as a crucial control against frivolous or abusive lawsuits and because the company was a shell intended only for driving the lawsuit and without any other activities.

Local rules for the allocation of litigation costs, along with jurisdictionally permitted possibilities for litigation-funding, are both crucial in considerations of whether to pursue transnational litigation.[255] An example of this in the Swedish context is provided by the Swedish appeals court ruling in *Arica Victims KB* v. *Boliden AB*.[256] In that case, Chilean citizens alleged that the Swedish company Boliden had in the 1980s negligently outsourced toxic sludge processing to a Chilean company and that the sludge had harmed local citizens. Ultimately the claim failed because a Swedish appeals court concluded that a) Swedish law applied to the claim and that b) a comparatively restrictive Swedish limitation period time-barred the case.

At the same time, the subject of veil piercing is hotly debated on its own. For the case in that context, see Wiktor Brandell, *En Principiell Analys Av Ansvarsgenombrottets Existens i Svensk Rätt*, 2018 JURIDISK TIDSKRIFT VID STOCKHOLMS UNIVERSITET 3 (2018).

255. *See* Cees van Dam, *Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights,* 2 J. EURO. TORT L. 221, 228 (2011); Richard Meeran, *Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States*, (2011) 3 C. U. HONG KONG L. REV. 1, 5 (2011); Michael D Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127, 132-35 (2013).

256. Arica Victims KB v. Boliden Mineral AB, for the appeals court ruling see Arica Victims KB v. Boliden Mineral AB [Appeals court for Övre Norrland], Mar. 27, 2019, T 294-18 HOVRÄTTEN FÖR ÖVRE NORRLAND (Swed.). For the trial court ruling, see Skellefteå tingsrätt [Skellefteå trial court] Mar. 8, 2018, T 1012-13. For a brief description in English *prior* to the trial court or appeals court decisions, see Rasmus Kløcker Larsen, *Foreign Direct Liability Claims in Sweden: Learning from Arica Victims KB v. Boliden Mineral AB?,* 83 NORDIC J. OF INT'L L. 404 (2014).

However, for our purposes, the claim is more interesting from a procedural perspective. A focal question from this perspective was how around 800 Chilean citizens could be effectively represented in Sweden, whose rules restrict many forms of class action. In the case in question the individuals' claims were transferred first to a Chilean limited liability company and then further to a Swedish limited partnership company ('kommanditbolag'). The general partner of the limited partnership company (which, under Swedish law, is liable in full toward the company's debtors) was the Chilean limited liability company. The defendant Boliden, after winning the case, sought to enforce its costs award against the limited partnership company, which consequently entered bankruptcy. Based on rules not relevant here, it was practically impossible for the defendant Boliden to recover costs from the Chilean limited liability company by piercing the corporate veil, and—probably for reasons of image and reputation—Boliden declared it had no intention of attempting to recover from the alleged victims themselves.[257]

An alternative would have been for Boliden to attempt to recover costs from the lawyers who had represented the limited partnership company. Boliden claimed to reserve this right while filing a complaint about the limited partnership's legal counsel to the Disciplinary Committee of the Swedish Bar Association. After taking up the case, the Disciplinary Committee issued a warning to counsel.[258] This was on the one hand due to a contingency fee arrangement leading to the lawyers having an inappropriate economic interest in the case and, on the other hand, for pursuing a case driven by a shell company that had no business other than pursuing the claim against Boliden. Despite this, the bar for recovery of costs from legal counsel would probably be higher than in the destined-to-fail veil-piercing avenue mentioned above.

Certainly, an argument might be made for the claimants in that they had no other option for pursuing their case and indeed,

257. Boliden Mineral AB's Response to a Letter from UN Special Rapporteurs dated 23 March 2021, U.N. Doc. AL OTH 90/2021 (May 21, 2021) https://spcommreports.ohchr.org/TmSearch/RelCom?code=SWE%202/2021 [https://perma.cc/NSA6-8ZQ7].

258. Boliden Mineral AB v. Arica Victims Kommanditbolag, Decisions of Sveriges advokatsamfundets disciplinnämnd (Swedish Bar Associations Disciplinary Committee), D-2020/1472 and D-2020/1960, 23 September 2021).

from a human rights perspective, the matter has received international prominence. UN special rapporteurs on human rights engaged in discussion with Boliden about the potential chilling effects that claims against human rights defenders might have on the enforcement of human rights.[259] At least at that point, Boliden stated they had not pursued recovery of costs from the claimants' legal counsel.

We note the case because it raises several pertinent questions related to litigation funding in the field of transnational human rights litigation. In this narrow context it might be debatable whether the approach of the claimants in *Arica Victims KB v. Boliden* might be a de facto requirement for Global South citizens pursuing litigation against multinational enterprises domiciled in Sweden. At the same time, such arrangements would not normally be entertained under Swedish law.

For the purposes of this Article, however, such discussion is beyond the point. Instead, our motive is to show that even though common law doctrines such as maintenance, champerty, and choses in action might sound strange and archaic from a civil law perspective, similar considerations are very much alive and valid in current practice. In sum, while the transfer of claims is generally allowed in the civil law, considerations that are related to the personal nature of claims, as in the first Swedish case, or that undermine the basic notions of procedural fairness, for example by avoiding the "loser pays" rule and thus opening the door for potentially frivolous or abusive legal proceedings, as in the latter two Swedish cases, may serve to balance the open-ended general rule through the counterweights of drastic measures such as the piercing of the corporate veil or the possibility of recovering litigation costs from legal counsel. Thus, while champerty, maintenance, and choses in action are probably unknown concepts to most continental civil law lawyers, avoiding the abuse of law is an overriding functional principle that allows for a variety of expressions from different dogmatic starting points in different legal systems.

259. *See* Letter from UN Special Rapporteurs to Boliden Mineral AB, U.N. Doc. OTH 90/2021 (Mar. 23, 2021), and the response from Boliden Mineral AB (May 21, 2021) https://spcommreports.ohchr.org/TmSearch/RelCom?code=SWE%202/2021 [https://perma.cc/C67F-GHJB].

Further, as our discussions have indicated, there is a complex relationship in each individual legal system between the assignment of claims and other doctrines of that legal system, such as procedural fairness. In Europe, there have been several studies with a view to comparing these rules[260] and there is considerable interest toward harmonization.[261] The so-called Draft Common Frame of Reference on the principles, definitions and model rules of European private law provides one recent prominent example, and its Book 3, Chapter 5 focuses on assignment of claims.[262] The Draft Common Frame of Reference is primarily intended as an academic endeavor, but it is also intertwined with ideas of harmonization of private law and provides a possible starting point for a political harmonization process. It might also be compared with the more transnationally focused UNIDROIT Principles of International Commercial Contracts[263] or Trans-Lex Principles.[264] Despite such endeavors, substantive harmonization *across* legal systems for now seems far away, in part due to the complexity of steering the foundational parameters of legal systems with different evolutionary histories toward a common objective without simultaneously causing systemic disturbances in the individual legal systems.

Nevertheless, even if complete harmonization across legal systems is still some time away, there is still all the more reason to be considering—and developing—harmonization within each system. As we focus on here, the common law is ideally poised for such harmonization. In addition to the benefits within the common law system itself, such harmonization will have flow-on effects, for

260. For example, the idea behind the 'Ius Commune' casebooks is to "uncover common principles already underlying existing laws" in Europe. *The Project,* IUS COMMUNE CASEBOOKS FOR THE COMMON LAW OF EUROPE, http://www.casebooks.eu/project/aim/ [https://perma.cc/G45D-N7UB]. For property law, see CASES, MATERIALS AND TEXT ON PROPERTY LAW (Sjef Van Erp & Bram Akkermans eds., Hart Publishing 2012).

261. *See, e.g.,* Juutilainen, *supra* note 249.

262. DCFR, *supra* note 251.

263. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2016), https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf [https://perma.cc/J26J-J4X2].

264. *Trans-Lex Principles*, TRANS-LEX.ORG, http://www.trans-lex.org/principles [https://perma.cc/MP3K-2WSK]. *See* Klaus Peter Berger, *The Lex Mercatoria (Old and New) and the TransLex-Principles*, TRANS-LEX.ORG, http://translex.uni-koeln.de/the-lex-mercatoria-and-the-translex-principles_ID8 [https://perma.cc/9CJ3-2FHV].

example regarding the civil law in Europe in certain instances where the common law and civil law meet. Conflict of laws principles (also referred to as private international law) represent one such area. Indeed, efforts are moving forward to harmonize conflict of laws rules in the EU in relation to the assignment of claims, with a European Commission proposal for the regulation of conflict of laws rules applicable to the third-party effects of assignment of claims under legislative debate.[265]

III. A PROPOSAL FOR JURISDICTIONAL HARMONIZATION: APPLYING THE TRENDTEX *PRINCIPLE*

A. Changes in the Global Economy

Across the common law, choses in action, of course, do not exist in a vacuum. Rather, they have over time developed in tandem with the corresponding advances that have animated both the economy and the law.[266] A re-evaluation of the role of choses in action in the contemporary environment is, by consequence, long overdue.

Broadly speaking, there is no question that the global political economy has changed dramatically, especially over the past several decades. Today, the value of global trade stands at more than $23 trillion, two-thirds of which is conducted by multi-national corporations.[267] Most trade, therefore, now takes place through "global value chains."[268]

The difference between what was traditionally referred to as a "global supply chain" and what is now meant by "global value

265. Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims, COM(2018) 96 final (Brussels, 12.3.2018), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0096&from=EN [https://perma.cc/4QQT-FPV9].

266. *Cf.*, Sprint Communications Co., L.P. v. APCC Services, Inc., 554 U.S. 269, 276 (2008) (suggesting that "the 'common law' was 'induced' to change because of 'considerations of mercantile convenience or necessity'") (quoting W.S. Holdsworth, *supra* note 3, at 1021–22).

267. WORLD TRADE ORGANIZATION, WORLD TRADE REPORT 2014: TRADE AND DEVELOPMENT: RECENT TRENDS AND THE ROLE OF THE WTO 1 (2014) http://wto.org/english/res_e/booksp_e/world_trade_report14_e.pdf [https://perma.cc/DQ4N-CWET].

268. Kevin Sobel-Read, *Global Value Chains: A Framework for Analysis*, 5 TRANSNAT'L LEGAL THEORY 364 (2014).

chain" is important. The key to the distinction is the relationships that exist between the relevant parties.

As of the beginning of the 1900s, most large companies were vertically integrated, meaning that all aspects of production were owned in-house. Ford, for example, designed, built, and sold its cars.[269] As the 1900s unfolded, however, several crucial things occurred. First, advances in shipping technology greatly reduced the cost of transporting goods internationally. Second, developments in communication technology made it possible, for the first time, to conveniently communicate globally, allowing companies to coordinate in real time regardless of distance. And third, political changes caused tariffs and other trade barriers to drop dramatically, freeing the movement of goods across borders without the imposition of cost-prohibitive surcharges.[270]

Collectively, these developments had two effects on the earlier established dominance of vertically integrated corporate organization. First, companies began to "offshore" some aspects of their production. Rather than producing all parts and components in-house, these companies increasingly moved that production overseas where labor costs were cheaper and, even coupled with shipping fees, there were overall significant cost savings. Second, companies started to "outsource" those aspects of their operations that were not central to their core business. This means that rather than performing those tasks—whether accounting or assembly—in-house, companies would contract with a third party to complete the tasks instead.[271]

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269. Ronald J. Gilson et al., *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431 (2009).

270. *See generally* STEFANO PONTE, HANDBOOK ON GLOBAL VALUE CHAINS (Edward Elgar Publishing, 2019); RENÉ A. HERNÁNDEZ ET AL., GLOBAL VALUE CHAINS AND WORLD TRADE: PROSPECTS AND CHALLENGES FOR LATIN AMERICA (ECLAC Books, 2014).

271. Gary Gereffi & Joonkoo Lee, *Economic and Social Upgrading in Global Value Chains and Industrial Clusters: Why Governance Matters*, 133 J. BUS. ETHICS 25, 25 (2016). Among other things, contracting with a third-party carries with it a range of benefits. For one, the third party—again, whether the task is accounting or assembly—can often develop greater competence by specializing than a larger company could achieve in-house. Contracting also allows for greater flexibility, a phenomenon of which corporate lawyers are well aware. Instead of maintaining a huge in-house legal department, most companies prefer to hire outside counsel for representation in larger matters. The company can thus simply engage outside counsel as necessary rather than needing to hire and fire based on current demand.

From the combination of offshoring and outsourcing, global *supply* chains were born. Significantly, these chains largely comprised strings of one-to-one relationships: each firm in the chain had a contract with the next firm, but there was neither contract nor organizational structure that unified all of them together.

It is the transformation of these relationships that makes global *value* chains different. In the ever-developing dynamics of global commerce, several factors caused substantial changes to the form and function of traditional global supply chains. First, as a result of the intensification of global competition, it is no longer the case that lead *firms* compete against each other (*e.g.*, Nike versus Adidas, or Target versus Walmart), but rather now it is the *chains* that compete.[272] This makes sense because, of course, every cost savings that can be introduced *anywhere* in the chain can permit lower – and therefore more competitive – sale prices of the ultimate goods. There is thus a continuing drive to raise efficiency across every chain.

Second, the reputation of lead firms is to an even greater degree dependent on the reputation of its suppliers; or at least, in a nutshell, bad press regarding any part of the chain is increasingly damaging to the lead firm.[273] Lead firms, therefore, now must manage a range of aspects of their chains – such as compliance by suppliers with labor and environmental standards—which are separate to, and over and above, the actual work being performed by the suppliers. Third, lead firms are today also often competing not just on price but also on *differentiation*. Fair trade coffee and organic cotton in clothing are two examples where companies seek to gain extra profits (so-called "rents"), not because products are cheaper but rather because they possess some special quality that consumers are willing to pay extra for.[274] In order to confirm to consumers that the given attribute is true—say, that coffee is fair

272. Fabrizio Cafaggi et al., *Accessing Global Value Chain in a Changing Institutional Environment: Comparing Aeronautics and Coffee* (Inter-American Development Bank, 2012).

273. Frederick Mayer & John Pickles, *Re-Embedding Governance: Global Apparel Value Chains and Decent Work* (Int'l Labour Rev., Working Paper 2010/01, 2011) https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1987573_code1050353.pdf?abstractid=1987573&mirid=1 [https://perma.cc/52NG-JQVF].

274. Raphael Kaplinsky, *Spreading the Gains from Globalisation: What Can be Learned from Value-Chain Analysis?*, 47 PROBLEMS OF ECON. TRANSITION (2004).

trade or that cotton is organic—lead firms must maintain a close watch on every link in their chain.

Fourth and finally, governments have slowly introduced regulations that force lead firms to monitor and engage with their chains in greater intimacy. These regulations range from food safety tracing requirements to reporting obligations regarding slave labor.[275]

As a result of these four factors, lead firms are increasingly driven to coordinate processes and activities across the entire chain, from core work to, as noted, compliance with labor and environmental standards.[276] The effect is that chains are no longer comprised of one-to-one relationships. Rather—and this is in relevant part what is meant by the phrase "global value chain"[277] —chains are now integrated, with the activities of each firm impacting the activities of the others.

This increasingly integrated nature of the global economy invites the transfer of choses in action across jurisdictions. But existing inconsistencies in the rules regarding such transfers create uncertainty and, for reasons discussed below, raise risks to parties and stakeholders alike.

B. The Resulting Need for Harmonization, and a Proposal to Achieve It

1. The Changing Dynamics of Global Commerce and the Role of Choses in Action within Them

The inconsistencies regarding the rules for transferring choses in action are easy enough to chart. For instance, some jurisdictions permit the assignability of tort claims whereas others do not; some jurisdictions insist on distinctions between the transfer of legal and equitable choses in action whereas others do not. The list goes on and on.

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275. Li-Wen Lin, *Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. (2009).

276. Raru Mares, *The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments*, 79 NORDIC J. OF INT'L L. (2010).

277. Gary Gereffi, *A Global Value Chain Perspective On Industrial Policy And Development In Emerging Markets*, 24 DUKE J. COMP. & INT'L L. 433, 434 (2014); Sobel-Read, *supra* note 268.

If the use of choses in action was limited to transfers within a given jurisdiction, then inconsistencies between the rules might not have much consequence. In the context of global commerce, however, where choses in action can be and are transferred not only within but also across jurisdictions, these inconsistencies risk "destabiliz[ing] the network."[278]

This risk is especially acute because of the competing approaches to the choice of law questions that determine the transfer of a given chose in action. Choice of law questions are complicated enough in their own right; as we described above, choice of law rules regarding the assignability of choses in action are particularly complex across common law jurisdictions, not to mention the conflict of laws rules across legal systems. Recall that some common law jurisdictions look to the law chosen by the parties as the law to govern the assignment of a chose in action, whereas others insist that the law governing the underlying claim will apply. These different approaches are, as noted, potentially outcome determinative.[279]

Regarding many other areas of global commerce, a contractual choice of law provision will allow the parties to manage their contract according to the rules of the jurisdiction that they prefer. But the competing approaches regarding choses in action rob the parties of that certainty. Harmonization would remove these barriers.[280]

Moreover, in addition to the different rules that apply in various jurisdictions, there are also inconsistencies in the *types* of chose in action cases that the courts in each jurisdiction tend to focus on. Some courts, like the Texas Supreme Court, frequently

278. Fabrizio Cafaggi, *Introduction, in* CONTRACTUAL NETWORKS, INTER-FIRM COOPERATION AND ECONOMIC GROWTH 18 (Fabrizio Cafaggi, ed., Edward Elgar Publishing 2011).

279. *See, e.g.,* Stichtung ter Berhartiging van de Belangen van Oudaandeelhouders in het Kapitaal van Saybolt Intn'l B.V. v. Schreiber, 407 F.3d 34 (2d Cir. 2005) (certifying the question of the proper choice of law approach to the New York Court of Appeals precisely because of the centrality of the question in reaching an outcome to the case).

280. We do not propose that each forum jurisdiction harmonize its choice-of-law rules. Rather, we assert that once the rules for the transfer of choses in action are harmonized, choice-of-law analyses will no longer have the potential to disrupt the outcome of a case. This is because the rules of transfer in any two jurisdictions will be identical. The same is true in regard to each individual jurisdiction's decision as to whether to maintain a distinction between legal and equitable choses in action; what matters here is the rules of their transfer.

advertise the free alienability of choses in action but largely review and enforce limitations on that alienability. Other courts, like those in Illinois, primarily address the assignability of choses in action in an insurance context. These narrow narratives enrich the common law of each jurisdiction on those specific questions. But such enrichment is of little assistance across the many other areas implicated by choses in action, causing most jurisdictions to lack comprehensive coverage of the doctrine. Harmonization would expand the scope of relevant cases and facilitate the adoption of judicial reasoning across jurisdictions.

Moreover, the context within which choses in action operate is especially important. There is no question that commercial disputes—both in contract and in tort, in court as in arbitration—with growing frequency involve rules from multiple jurisdictions. The multi-jurisdictional aspect of many modern disputes amplifies the existing differences in the relevant choses in action rules.

Indeed, these differences matter in the present day in a way that they historically never have. As we discussed directly above, the systematic nature of global value chains is transforming the operation of supply chains—now global value chains—worldwide. In sum, lead firms are increasingly exerting control across entire chains. But because of the problem of privity, lead firms are unable to do so by means of contract law.

Contract law, as noted, developed to regulate one-to-one relationships. The doctrine of privity is in fact intended to ensure that contractual obligations do not extend beyond the parties to the agreement. Privity, therefore, is the Achilles' heel of supply chain relationships which necessarily stretch across multiple – sometimes hundreds or thousands – of firms. Because of privity, a given company can only legally control suppliers with whom it has a direct contract relationship. To manage entire supply chains, lead firms have had to resort to non-legal measures, with only varying degrees of effectiveness. The same problem has hindered small suppliers from protecting themselves from labor and environmental violations by large companies.[281]

281. For an example of where tort law has likewise been inadequate to provide recovery against a lead firm to factory workers injured on the job, see *Das v George Weston Limited*, [2017] ONSC 4129 (Can. Ont. Sup. Ct. J.) (concluding that there was no duty of care by the lead firms because the court found that there was no proximity between the defendants and the plaintiffs' injuries).

In a companion Article to this one,[282] we demonstrate how the chose in action doctrine makes it possible for companies to exert legal control across all participants in a chain. Companies may do this regardless of one-to-one privity restraints. The means for doing so is simply the managed transfer of choses in action.

Imagine, for instance, a scenario where several companies are in a supply chain relationship: A ← B ← C ← D ← E. Here A has a contract with B, B has a contract with C, and so on. Assume for present purposes that A is the seller of the final product, with the other firms serving as suppliers. Imagine, further, that there is a contractual failure in some part of the chain; regardless of where that failure occurs, the result may be the same for A: A cannot sell the products in question, or is delayed in doing so, whether because of some defect in the products themselves or because A receives them late or not at all.

Although A is harmed by this failure that occurred earlier in the chain, the privity rule dictates that A can only recover in contract directly against B. If the failure was not caused by B but by C, D, or E, then A cannot recover in contract directly against any of those firms, even though A's ultimate injury is the same. In the traditional framework, it is only B who can enforce a contract claim against C, and only C who can enforce against D, and D against E. It is, of course, possible for A to sue B on the expectation that B then sue C – et cetera – with the hope that the remedy is passed back through the chain to A. But the risks of non-recovery, not to mention the costs to A and to the chain, are significant and often prevent enforcement.

The transferability of choses in action, however, solves this problem. If E caused the failure in our example, then D would possess a valid cause of action for breach of contract against E. Because that claim is a transferable chose in action, D can assign the cause of action to A and A can thereby—notwithstanding the traditional privity rule—enforce the claim directly against E. The same is true no matter how long the chain is; any firm can assign a cause of action to any other in the chain, whether at the beginning, the end, or anywhere in between. The assignee should then be able to sue on the claim in its own right. The potential impact on the operation of global commerce is considerable.

282. Sobel-Read et al., *supra* note 2.

As shown throughout the present Article, these tools already exist—but simply need to be recognized and understood. The result is not only more effective and efficient supply chains but also much stronger mechanisms for the enforcement of human rights and the protection of the environment. At the same time, these possibilities make clear that there is a significant untapped role for choses in action throughout global commerce. Discrepancies in the rules regarding their transfer, however, set roadblocks for the movement of choses in action across jurisdictions. Harmonization of these rules would facilitate the smooth transfer of choses in action without inhibiting local jurisdictions from otherwise maintaining locally specific contract law variations.

The rules regarding choses in action have developed hand-in-hand with the changing dynamics of commerce. It is these changing dynamics that transformed the default rule of *non*-assignability—via the doctrines of maintenance and champerty—to a widespread rule of *permitting* assignability. So just as commerce has entered a new era of both scope and substance, so too should the rules that anchor that commerce adapt and respond to the novel challenges of their time. In light of these driving factors, there are several benefits that result from harmonizing the chose in action doctrine across common law jurisdictions. We are, furthermore, unable to determine any significant disadvantages in doing so.

2. The Strengths and Benefits of the *Trendtex* Decision

For purposes of harmonization, and as a baseline, we suggest that the principles developed by the English House of Lords in the *Trendtex* decision provide a solid and reasonable basis to frame the transfer of choses in action across common law jurisdictions worldwide. Recall that under *Trendtex* a chose in action may be transferred where "the assignee [has] *a genuine commercial interest* in taking the assignment and in enforcing it for [his or her] own benefit."[283]

There are several reasons why this standard is the most compelling, productive, and manageable, and should be incorporated into courts' common law reasoning not only in

283. *Trendtex* Trading Corp. v. Credit Sussie [1981] UKHL J1022-1, [1982] 1AC (HL) 679 (appeal taken from Eng.) ¶ 41 (emphasis added).

England but also across the United States, Canada, Australia, and beyond.

First, in setting a "genuine commercial interest" as the lynchpin, the *Trendtex* principle aligns consistently with the realities of integrated global commerce. As we explained above, the framework of global commerce has transformed over the past several decades. Whereas transnational trade once took place through multiple series of one-to-one relationships, the firms in a global value chain are now systemically integrated. Indeed, the factors of the global political economy today demand that integration. Within global value chains, a failure anywhere in the chain harms the entire chain. Consequently, an effort to enforce an obligation anywhere in the chain means that a given firm necessarily possesses a "genuine commercial interest" in the resulting claim. Therefore, that firm always stands to benefit from the enforcement of the underlying obligation or to exact a remedy for its breach.

Further, as *Trendtex* makes clear, the evaluation of the transfer of a chose in action requires that a court "look at the totality of the transaction."[284] This aligns well with contemporary networks of integrated commercial relationships. The *Trendtex* principle therefore recognizes the integration of global value chains and properly permits the transfer of choses in action within this new paradigm of global commerce.

Second, the adoption of the *Trendtex* principle effectively diffuses the fears that still linger in common law decisions regarding maintenance and champerty.[285] These fears are often unfounded. In some cases, these fears have served to void what arguably should have been the valid transfer of the given chose(s) in action.

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284. *Id.*

285. *See, e.g.,* State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 711 (Tex. 1996) ("The common law's concerns about alienability of choses in action, voiced by Lord Coke and Holmes, echo in our own decisions. In widely different contexts we have invalidated assignments of choses in action that tend to increase and distort litigation. We have never upheld assignments in the face of those concerns."); *see also* Ma v. Ma, [2012] ONCA 408, ¶ 28 (Can. Ont. C.A.) ("Ultimately, the question of whether a cause of action in tort or contract can be assigned and enforced turns on whether the enforcement action 'savours of maintenance.'").

In *Accrued Financial Services, Inc. v. Prime Retail, Inc.*,[286] for example, decided under Maryland law, a lease auditing company (AFS) contracted with tenants in commercial buildings and malls to provide certain auditing services on behalf of the tenants. Pursuant to the contracts, AFS also promised that in the event the resulting audits brought to light any moneys owed to the client by their landlord, AFS would seek to recover those moneys, retaining a percentage of the recovery as its fee. For this arrangement to work, each tenant also assigned to AFS, by separate contract, any lease-related claims that it had against the landlord.

In one instance, AFS discovered that a particular landlord, Prime Retail, "had made improper charges and reserve assessments which could not be explained as mere errors or even aggressive billing practices" and that the "errors were systematic and pervasive."[287] On behalf of seventeen tenants, AFS brought suit and Prime Retail defended on the ground that the assignments were void because they were champertous. Even though AFS was simply seeking to recover funds that apparently were rightfully owed to the tenants, and was doing so as part of its broader contractual obligations to the tenants, the Fourth Circuit agreed with Prime Retail:

> Because we see these broad assignments as *nothing more than arrangements through which to intermeddle and stir up litigation for the purpose of making a profit*, we conclude that they violate Maryland's strong public policy against stirring up litigation and are therefore void and unenforceable in Maryland.[288]

It is difficult to discern—as the strong dissent explains in detail[289]—how AFS's actions which, indeed, served to benefit the assignors and remedy wrongdoing, could qualify as improperly "intermeddl[ing]" and "stir[ring] up litigation."

The application of the *Trendtex* principle here would have provided clear guidance. In particular, the broader contracts between AFS and the tenants gave AFS a "genuine commercial

286. Accured Fins. Servs., Inc. v. Prime Retail, Inc., 298 F.3d 291 (4th Cir. 2002).

287. *Id.* at 295.

288. *Id.* at 298 (emphasis added).

289. *See, e.g., Accrued Fin. Servs.*, 298 F.3d at 305 ("AFS thus did not solicit its clients to make litigious claims. In this case in particular, litigation became necessary only because Prime shut down an audit and refused to negotiate.") (Michael J., dissenting).

interest" in the subject matter of the suit. As one court adopting the *Trendtex* principle has described:

> A property interest ancillary to the cause of action assigned is sufficient to support an assignment, but not essential. A genuine pre-existing commercial interest will suffice. The term "commercial interest" is used in the sense of financial interest; it need not arise from commercial dealings in the narrow sense.[290]

As applied to the *Accrued Financial Services* case, their actions vis-à-vis Prime Retail were not champertous and the assignments in question should have been valid.[291]

The 2009 decision of the New York Court of Appeals in *Trust for the Certificate Holders of Merrill Lynch Mortgage Investors, Inc. v. Love Funding Corp*,[292] provides additional insight. There, a commercial mortgage-banking company made representations regarding a loan. Following an assignment and a sale, that loan was later pooled and securitized along with others and a trust was established for the holders of the resulting certificates. As part of a settlement with one of the earlier holders of the loan, related claims against the original mortgage banking company were assigned to the plaintiff Trust. When the plaintiff Trust sought to enforce those claims, however, the defendant mortgage-banking company argued that the transfer of the claim violated New York's champerty statute, Judiciary Law § 489.[293]

The dispute gave the New York Court of Appeals the opportunity to explore the boundaries of the State's champerty restrictions in some detail. The result, nevertheless, is far from clear because the Court takes two different approaches to the

290. Fredrickson v. Ins. Corp. of British Columbia [1986] 3 B.C.L.R. 2d 145, para. 37 (Can. B.C. C.A.). *Accord* Israel Aircraft Indus., Ltd. v. Standard Precision, 559 F.2d 203, 209 (2d Cir. 1977) ("Maintenance cannot be charged against one having an interest in the subject matter of a suit.").

291. *Accrued Financial Services*, 298 F.3d at 302 ("The majority is wrong, I respectfully suggest, because three conditions must be present before Maryland will refuse to apply, for public policy reasons, the law selected by the parties to a contract. None of these conditions are present in this case.") (Michael J., dissenting).

292. Tr. For the Certificate Holders of Merrill Lynch Mortg. Invs., Inc. v. Love Funding Corp., 918 N.E.2d 889 (N.Y. 2009); *see supra* Section III.B.1.

293. N.Y. JUD. L. § 489(1). This provision, and its companion provision in Section 488, specifically regulating attorneys in a related context, derive from New York's former Penal Law. *Tr. for the Certificate Holders*, 918 N.E.2d at 893. All of these, of course, are progeny of the centuries' old English law that came before them. *Id.*

question of champerty. On the one hand, the Court states that New York law draws a distinction "between one who acquires a right in order to make money from litigating it and one who acquires a right in order to enforce it."[294] In this regard, the Court makes clear that "the critical issue" in a champerty analysis is "the *purpose* behind [a plaintiff's] acquisition of rights that allowed it to sue."[295] In other words, where an assignee's purpose is the enforcement of a right—rather than simply to make money—then the champerty statute is not triggered and the assignment will be permissible.

On the other hand, the Court's actual holding is that, in the case at bar, a "preexisting proprietary interest" was sufficient to defeat the reach of the Statute. The static *possession* of an interest is of course quite different from "the *purpose* behind [a plaintiff's] acquisition of rights that allowed it to sue." For present purposes, it is not the Court's conclusions that matter *per se*, but rather the justices' difficulty in articulating and applying a concise, manageable standard. The *Trendtex* principle would not only have served as a clean, clear template for the Court here, but would also have been consistent with the Court's underlying reasoning and ultimate decision. It is therefore appropriate to adopt the *Trendtex* principle and to clarify that a "genuine commercial interest" necessarily negates any allegation of maintenance or champerty.[296]

Third, the *Trendtex* principle gives a firm set of contours to public policy questions. Although they are related, questions of maintenance/champerty and those of public policy are in fact distinct, with the latter providing a broader scope by which to void transfers.[297] "Public policy," however, is a notoriously vague

294. *Tr. for the Certificate Holders*, 918 N.E.2d at 894.

295. *Id.* at 893 (emphasis added).

296. Note that in a similar way, the *Trendtex* principle offers a productive and reasonable way to reconcile the assignability of choses in action regarding both contract and tort obligations.

297. *See, e.g.,* Hager v. Swayne, 149 U.S. 242, 248 (1893) ("At common law, the transfer of a mere right to recover in an action at law was forbidden as violating the rule against maintenance and champerty; and, although the rigor of that rule has been relaxed, an assignment of a chose in action will not be sanctioned when it is opposed to any rule of law or public policy."). Indeed, the free assignability of choses in action is *itself* a public policy. *See, e.g.*, Bolz v. State Farm Mut. Auto. Ins. Co., 274 Kan. 420, 425 (2002) ("In addition to the public policy favoring assignability of choses in action, we note that restraints on the alienation of property are strictly construed against the party urging the restriction."); Rooftop Restoration, Inc. v. Ohio Sec. Ins. Co., No. 15-cv-00620-LTB-KTM,

mechanism by which to resolve important legal questions.[298] In the context of choses in action, the failure to clearly define public policy boundaries is especially significant because public policy is a possible ground for prohibiting the assignment of *any* chose in action, no matter its type or the character of its recipient.[299]

The vagueness of the public policy standard, and the seriousness of its application or misapplication, call for a careful approach. The *Trendtex* principle brings clarity to this area of the law because, similar to the situation with champerty and maintenance, the satisfaction of the *Trendtex* principle equates to a satisfaction of public policy concerns. To be sure, public policy is not *removed* as a general protection available to the courts of each jurisdiction. Rather, the *Trendtex* principle provides a reasonable threshold that can serve as a benchmark regarding the transfer of choses in action.[300]

In sum, the existing discrepancies in the rules regarding the transfer of choses in action are not always great. But they needlessly create uncertainty and risk and, indeed, can be outcome determinative. The adoption of the *Trendtex* principle across common law jurisdictions would remedy these disadvantages while calibrating commerce, leaving intact other local regulation, and remaining consistent with the broader policy approaches of each jurisdiction.

2015 U.S. Dist. LEXIS 168846, *9 (D. Colo. Dec. 17, 2015) (stating that "public policy favors the free alienability of choses in action").

298. *See, e.g.,* Milton v. IIT Rsch. Inst., 138 F.3d 519, 523 (4th Cir. 1998) ("The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection.") (quoting Patton v. United States, 281 U.S. 276, 306 (1930)).

299. *See, e.g.,* N.Y. GEN. OBLIG. L. § 13–101 (prohibiting the transfer of "any claim" where such transfer "would contravene public policy"); Scarfe v. Lorom, 141 N.Y.S.2d 196, 197-98 (Sup. Ct. 1955) ("The law favors the free assignability of choses in action . . . unless the nature of the cause of action is such that there are strong reasons in public policy against its transferability.") (citation omitted); Fredrickson v. Insurance Corp. of British Columbia [1986] 28 D.L.R. (4th) 414 (Can. B.C. S.C.R.) para. 59 (evaluating "public policy" argument as a separate, independent category distinct from "assignability" arguments); Accrued Fin. Serv., Inc. v. Prime Retail, Inc., 298 F.3d 291, 298 (4th Cir. 2002) (voiding assignment for violation of Maryland's "strong public policy against stirring up litigation").

300. For an example of the successful adoption of the *Trendtex* principles in this regard, see *Fredrickson*, 28 D.L.R. (4th) 414 para. 59 (rejecting public policy arguments and permitting the assignment of both tort and contract causes of action pursuant to *Trendtex* reasoning).

IV. CONCLUSION

Choses in action are little known but frequently invoked across the common law world. With the expansion of the global economy, it is likely that choses in action will take on an even greater role.[301]

Throughout the common law world, choses in action share their heritage in centuries of incubation in the common law and equity of England. The rules that apply to the transferability of choses in action, however, have developed with inconsistent nuances across the United States, Canada, the United Kingdom, and Australia—and no doubt elsewhere as well. We gave, above, an overview of the operation of choses in action in these jurisdictions. Our goal is less to create a catalog of rules than to paint a picture of trends as they relate to modern legal practice.

The inconsistencies in the rules regarding choses in action, coupled with modern changes in global commerce, call for a harmonization of the rules governing the transfer of choses in action. We suggest that the well-reasoned decision by the English House of Lords in the *Trendtex* case offers clear guidance to businesses, judges, and legal practitioners alike. The *Trendtex*

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301. In terms of global economics, the expanding litigation funding industry is another area where choses in action are implicated. That industry, after all, depends on choses in action as the technical means that make it possible. Debates about litigation funding, however, turn almost exclusively on its ethical aspects and *funding* mechanisms, rather than on the role of choses in action as the underlying *legal* mechanism for transferring claims. Our proposal for harmonization might, theoretically, facilitate the technical aspects of litigation funding across jurisdictions. But our proposal is unlikely to affect litigation funding more broadly because that process is primarily regulated at other levels. For instance, Victoria Shannon suggests three relevant categories, none of which is implicated here:

> With respect to the transactional category, law firms are regulated, and attorney retainer agreements have legal and ethical requirements and restrictions in the Model Rules of Professional Responsibility. With respect to the procedural category, lawyers' participation in litigation and arbitration is heavily regulated through various rules of procedure and evidence. With respect to the ethical category, lawyer ethics are also heavily regulated through the state versions of the Model Rules of Professional Responsibility and state bar licensing entities. Thus, while society may still view lawyers negatively, overall, the network of regulations surrounding lawyers will help protect society and dispute resolution from bad lawyering and will punish offenders appropriately.

Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 883-84 (2015). We take no stance here on whether litigation funding is beneficial or harmful.

principle likewise properly reflects current trends in global commerce and provides a path to further facilitate that commerce.