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CLAIM FUNDERS AND COMMERCIAL CLAIM HOLDERS: A COMMON INTEREST OR A COMMON PROBLEM?

*Michele DeStefano**

Commercial claim funding, where funders invest in business disputes in exchange for a percentage of any eventual settlement or judgment, is a growing industry in the United States. Funders may request confidential information about the claim and litigation strategy both before deciding to invest (to analyze the strength of the claim) and during the course of the financial relationship (to manage the investment). Further, these funders may work and communicate with claim holders and lawyers about the claim. However, there has been little caselaw and little in-depth analysis on whether—and in what circumstances—the attorney-client privilege and work-product doctrine can be applied to protect communications, interactions, and work shared with claim funders or developed between claim funders, lawyers, and claim holders. This Article attempts to fill that gap by exploring the way the doctrine has been applied in other contexts, including patent law, public relations, and insurance, to predict how the doctrine might be applied in the claim funding context.

Despite assumptions to the contrary, my analysis leads to two conclusions. First, there is more than one exception to waiver of the attorney-client privilege doctrine that might apply to protect communications between claim funders, claim holders, and their lawyers: the agency exception, the functional equivalence exception, and the common-interest doctrine exception may all apply. Second, despite its breadth, the work-product doctrine may be determined inapplicable depending on (1) the test and analysis the court uses to determine whether work-product protection applies, and (2) the court's approach to analyzing the common-interest doctrine—a doctrine that is more commonly associated with the attorney-client privilege but that has been used by courts to demonstrate waiver of work-product doctrine protection as well.

Understanding that interactions and communications between claim holders, funders, and attorneys can be protected by the doctrine, the

* Professor of Law, University of Miami, School of Law [formerly known as Michele DeStefano Beardslee]. I thank Sergio Campos and Gregory C. Sisk for advice and feedback on drafts. Also, I thank Rico Williams for his research assistance. Lastly, it should be noted that given my interest in and views about claim funding, I have recently provided consultancy services to a U.S. commercial claim funding company. However, the opinions and viewpoint in this Article are very much my own.

question is whether they should be. Invariably, such an inquiry could collapse into an analysis of whether we should allow claim funding at all, and, for that matter, whether privilege doctrines should exist in the corporate context. Putting those questions aside, I tackle the normative question by analyzing whether the problems commonly associated with commercial claim funding are intensified when the interactions between claim holders, funders, and lawyers are protected. Ultimately, I conclude that applying the exceptions to waiver and the work-product doctrine may, instead of increasing the risks and negative externalities of commercial claim funding, help to protect these interactions while simultaneously yielding benefits yet explored.

As a result, I conclude with two recommendations: one doctrinal and one practical. First, I recommend that courts adopt one of the more lenient interpretations of the common-interest doctrine. By doing so, both the attorney-client privilege and work-product doctrines can be consistently and predictably applied to protect communications at issue in this context. Second, I urge lawyers to carefully craft contracts so that they include nondisclosure and statements of common interest agreements.

In sum, I end with a word of caution. Despite the doctrinal support for the existence of a common interest between claim funders and claim holders, because of the common problems associated with claim funding and the common distaste for the commodification of law, claim funders, claim holders, and their lawyers should approach issues around confidentiality with caution.

INTRODUCTION

Claim funding—the provision of money to legal claim holders by third parties to fund the pursuit of legal claims¹—is an emerging industry in the United States.² This industry includes both consumer

1. ABA COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 1 (2012) [hereinafter ABA WHITE PAPER], available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf; see also STEVEN GARBER, RAND CORP., ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWN, AND UNKNOWN 1 (2010), available at http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf (explaining that alternative litigation financing is the “provision of capital (money) by nontraditional sources to civil plaintiffs, defendants, or their lawyers to support litigation-related activities”); *infra* notes 24–27 and accompanying text. Claim funding is also referred to as litigation funding, alternative litigation funding, third-party funding, and litigation finance, among other labels. ABA WHITE PAPER, *supra*, at 1 & nn.1–4. This Article will generally use the term claim funding, except when quoting different nomenclature. For the justifications for using this term over the others, see Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2796 n.22 (2012).

2. See *infra* note 36 and accompanying text.

claim funding (i.e., the outside funding of small personal claims)³ and commercial claim funding (i.e., the outside funding of sophisticated players who pursue business disputes),⁴ the latter of which is the focus of this Article. Although some states prevent claim funding by applying doctrines such as champerty and maintenance, over half allow claim funding in some form.⁵

The structure and format of contracts between claim funders and claim holders vary.⁶ Sometimes a funder has a very passive, hands-off relationship with the claim holder and the litigation. Other times, the claim funder is more involved and plays a more active role.⁷ However, claim funders commonly request information about the claim or the current or potential litigation strategy, regardless of the relationship that is negotiated and before deciding to provide funding. Indeed, funders claim they conduct “extensive research before choosing cases.”⁸ In order to evaluate the strength of the case, some funders request confidential information.⁹ Moreover, after a contract has been signed, claim funders may continue to request information that might be considered confidential in order to monitor the health of their investment.¹⁰ Further, if they have negotiated a more active involvement in the management of the claim, the level and amount of communication involving confidential information between the claim holder and funder can increase. When this happens, the question is whether the attorney-client privilege or work-product doctrine will, and should, protect from disclosure confidential information shared with the funder *before* or *after* the execution of the funding agreement.

3. This type of funding has been referred to as “law lending.” See GARBER, *supra* note 1, at 9–10.

4. See *infra* notes 32–34 and accompanying text.

5. See *infra* notes 35–53 and accompanying text.

6. See *infra* notes 54–63 and accompanying text.

7. See *infra* Part II.C (describing the different relationship types).

8. David Donovan, *Litigation Finance Is Growing, but How Comfortable Should Lawyers and Investors Be?*, N.C. LAWS. WKLY., May 17, 2013, at 1, 13 (citing Richard Fields, chairman and CEO of Juridica Capital, as stating this and that Juridica “only takes [cases] that have a high likelihood of recovery”).

9. Some scholars debate whether confidential information sharing is necessary. See *infra* notes 97–104 and accompanying text.

10. See *infra* notes 101–104 and accompanying text.

Although a few cases have carefully analyzed the application of these doctrines to the commercial claim funding context,¹¹ little scholarship on the subject exists.¹² This Article aims to fill this gap.

Currently, commentators often appear to presume that the attorney-client privilege will not apply to communications and information shared with claim funders (either before or after they have contracted to provide funds to the claim holder).¹³ They purport that the common-interest doctrine cannot apply to funders and claim holders to prevent waiver of the attorney-client privilege because funders and claim holders share only a common business interest rather than a common legal interest.¹⁴ Although this argument may have some

11. To date, only six cases have addressed these doctrines. One case only addressed the attorney-client privilege. *See* *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376–77 (D. Del. 2010) (holding that attorney-client privilege did not apply prior to investing, because there was no common interest between the claim funder and the party to the litigation). One case only addressed the work-product doctrine. *See* *Mondis Tech., Ltd. v. LG Elecs., Inc.*, Nos. 2:07-CV-565-TJW-CE, 2:08-CV-478-TJW, 2011 WL 1714304, at *1–3 (E.D. Tex. May 4, 2011) (finding that work-product doctrine protection was not waived). Four cases addressed both (but one of them rested on a technicality). *See* Memorandum Order at ¶¶ 3–4, *Walker Digital, LLC v. Google Inc.*, No. 11-309-SLR (D. Del. Feb. 12, 2013), available at http://scholar.google.com/scholar_case?case=15350591429862704883&hl=en&as_sdt=6&as_vis=1&oi=scholar (finding a common interest between a claim funder, IP Navigation Group, and the claim holder and stating that any of the claim holder’s “communications protected by the attorney-client privilege or work-product doctrine do not lose that protection simply because they have been disclosed to IPNav”); *Devon It, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012) (finding that confidential information “including legal memoranda, drafts of pleadings, motions, and briefs, and other filings” shared with the claim funder and “communications and comments on draft agreements regarding the terms of potential financing” made by the funder were protected from disclosure by the work-product doctrine and also by the attorney-client privilege doctrine via the common-interest exception); *Miller UK Ltd. v. Caterpillar, Inc.*, No. 10 C 3770, 2014 WL 67340 (N.D. Ill. Jan. 6, 2014) (finding that documents shared with claim funder for the purpose of obtaining litigation funding and communications with funder related to litigation funding were protected by the work-product doctrine but that attorney-client privilege was waived); *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, No. 6:07-cv-222-Orl-35KRS, 2008 WL 5054695, at *1–3 (M.D. Fla. Nov. 17, 2008) (denying attorney-client privilege and work-product protection to communications between a claim holder and potential third-party investor that did not subsequently invest based on procedural failure to assert protection on a question-by-question basis); *cf.* Grace M. Giesel, *Alternative Litigation Finance and the Work-Product Doctrine*, 47 WAKE FOREST L. REV. 1083, 1085 (2012) (explaining that “[a] body of law has not yet developed dealing with the application of the attorney-client privilege or work-product doctrine to the involvement of ALF entities” and that case law on the subject is “scant”); *See generally infra* notes 201–203.

12. At the time of writing this Article, an in-depth Westlaw search was conducted of the scholarship on this topic. Only one article provided a thorough analysis of the application of either of these doctrines to the claim funding context. *See generally* Giesel, *supra* note 11 (analyzing application of the work-product doctrine). Other scholars, however, have discussed the doctrines but provided only peripheral analysis. *See infra* notes 106–110, 227–231, and accompanying text.

13. *See infra* notes 106–110 and accompanying text.

14. *See infra* notes 106–110 and accompanying text.

merit based on how courts have applied the common-interest doctrine in other contexts,¹⁵ these commentators rarely, if ever, consider other attorney-client privilege waiver exceptions that might apply, such as the agency or functional equivalent exceptions.¹⁶

Many commentators and judges presume that the work-product doctrine, unlike the attorney-client privilege, *will* protect communications shared with claim funders.¹⁷ However, this stance may be too optimistic in light of the way the doctrine has been applied in other contexts and the leeway courts have to deny work-product protection.¹⁸

In short, the presumptions regarding the attorney-client privilege and the work-product doctrine appear to be a bit misguided. Analysis of these doctrines outside of the claim funding context demonstrates that the attorney-client privilege might not be waived and that work-product protection might be denied in some situations involving communications between claim holders and claim funders. Apart from the practical concerns, the normative question is whether courts should allow either, or both, doctrines to be used to protect these interactions and work created by the funder. Presuming that we, as a society, are going to allow commercial claim funding (and, hopefully, begin to regulate it more carefully),¹⁹ why should we not allow these interactions to be protected from disclosure?

Bracketing the debate over whether privilege doctrines should apply in the corporate context²⁰ and whether commercial claim funding

15. In the claim funding context, one court has held that the common-interest exception does not prevent waiver of the attorney-client privilege when confidential information is shared with a claim funder. *Leader Techs.*, 719 F. Supp. 2d at 376.

16. *See infra* Part III.A.

17. *See infra* Part III.B.

18. *See infra* Part III.B (providing other examples of how work-product protection can be denied or waived). As discussed in Part III.B, there are two components to consider when analyzing the application of the work-product doctrine to this context: (1) whether the work created by the funder is considered work product; and (2) whether work-product protection is waived when work product is shared with the funder.

19. This Article presumes that the commercial claim funding industry will continue to grow in size and acceptance. *See infra* notes 52–53 and accompanying text. This Article also assumes that regulation will mirror this growth. *See generally* DeStefano, *supra* note 1 (contending that regulation is necessary to cabin some of the risks associated with claim funding). Further, although there are controversial issues involved in the funding of claims, this Article does not attempt to address whether commercial claim funding should exist or be allowed but instead assumes that commercial claim funding exists and is here to stay.

20. The Supreme Court has consistently held that the attorney-client privilege should be applied to corporations. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389–90 (1981) (citing *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336 (1915)); *cf.* Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 81 (2002) (“[T]he privilege—including the corporate privilege—is here to stay in one form or another . . .”). Many scholars, however,

should be allowed,²¹ one way to answer that question is to determine whether protecting interactions between claim holders, funders, and lawyers will exacerbate problems commonly associated with claim funding.²² Two potential problems exist: claim funding could: (1) threaten the independence of the lawyer by enabling uninterested parties to have too much control and influence over claims and claim holders; and (2) increase the litigation of nonmeritorious claims or prolong settlement.

My analysis concludes that protecting interactions involving claim funders does not necessarily increase the threat of these risks and, to the contrary, might help prevent them. Protecting these interactions removes one of the reasons why funders might seek to become co-clients with the claim holder or acquire the claims outright.²³ More, because funders will have more information, the risk of investment in nonmeritorious claims or prolonged settlement may actually decrease. Further, such protection may enable the funder to provide more non-cash value to the claim and claim holder because the claim funder will

have debated the risks and benefits of applying the attorney-client privilege to corporations. See, e.g., Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 222–32 (1989) (outlining the debate); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 206–34 (1988) (providing reasons why the privilege should not be applied to corporations); John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 464–68 (1982) (identifying risks and benefits of a corporate attorney-client privilege). This Article begins with the assumption that the corporate attorney-client privilege should exist. Of course, there is also debate over the breadth of the corporate attorney-client privilege. Indeed, I have argued in another article that the courts have interpreted the exceptions to waiver of the attorney-client privilege in the corporate context both too narrowly and too broadly. See generally Michele DeStefano Beardslee, *The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants*, 62 SMU L. REV. 727 (2009). Re-addressing this argument is outside the scope of this Article. Instead, this Article asks first, whether the waiver exception doctrine—as written, interpreted and applied by courts today—will apply to communications between lawyers, claim holders, and funders; and second, whether it should given the potential issues related to claim funding.

21. Many scholars have analyzed whether claim funding should be allowed in the United States and have identified problems associated with allowing claim funding. See, e.g., Susan Lorde Martin, *Litigation Financing: Another Subprime Industry that Has a Place in the United States Market*, 53 VILL. L. REV. 83, 109–10 (2008); Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649 (2005); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011) (contending that claim funding should be allowed); Maya Steinitz, *Whose Claim Is This Anyway? Third Party Litigation Funding*, 95 MINN. L. REV. 1268, 1332–36 (2011); Vicki Waye, *Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs*, 19 BOND L. REV. 225, 237 & n.56 (2007) (Austl.). As mentioned *infra*, the ABA developed a task force to analyze this debate. See *infra* note 52.

22. Of course there are other ways to analyze this question. For example, an analysis based on the purpose and history of the attorney-client privilege doctrine might be appropriate. See *supra* note 20. Alternatively, an analysis could be based solely on the public's perspective and desire for truth.

23. For a discussion about why this is a good thing, see *infra* Part III.B.

have more information about the claim and more protection when sharing expertise and advice with the claim holder. Thus, I recommend that the presence or inclusion of the claim funder should not serve as a waiver to either the attorney-client privilege or the work-product doctrine.

In Part II of this Article, I provide an overview of claim funding: what it is and what functions claim funders perform that bring privilege and confidentiality issues to the forefront. I categorize the potential types of relationships that claim funders have with claim holders by the degree of influence funders have over the claim—from a more passive investment in a claim to one in which the funder essentially takes control of the claim.

In Part III, I examine the judicial treatment of the attorney-client privilege and work-product doctrines in the claim funding context. Because there is scant case law, I also look to cases from other contexts (i.e., public relations, patent law, and insurance) and analyze their potential applicability to situations involving claim funding. Utilizing the typology identified in Part II, I describe the claim funding relationships and situations that might justify the application, or denial, of privilege or work-product protection based on the doctrinal parameters. In so doing, I demonstrate that many presumptions about how courts will apply either doctrine are misplaced. Further, I show that the doctrines can be interpreted to apply in certain situations to protect communications between claim funders, claim holders, and their lawyers.

In addition to addressing the doctrinal questions, in Part IV, I address a normative inquiry: Should courts interpret the doctrines to enable such protection? In order to prevent the analysis from collapsing into one about whether commercial claim funding should be allowed or whether there should exist privilege doctrines in the corporate context, this Part attempts to determine if the common problems associated with commercial claim funding are exacerbated when communications and interactions between lawyers, claim holders, and funders are protected. I conclude that this is not necessarily the case, and to the contrary, there may be potential benefits to protecting communications between funders and claim holders.

In Part V, I conclude with doctrinal and practical recommendations. First, I recommend that the common-interest exception be interpreted so that it applies to the relationship between claim funders and claim holders. Although analysis of the doctrine demonstrates that the common-interest exception should not be applied when parties only share a commercial interest, there is plenty of support for applying it to situ-

ations in which legal and business interests are intertwined. Applying this interpretation of the common-interest exception will ensure that attorney-client privilege protection is available so that funders can make informed decisions about whether to fund a case—even before it is a case (i.e., before work-product protection may be applicable). Further, given that courts infuse the work-product determination with a common-interest analysis, such a move will enable protection when funders are evaluating whether to continue to fund a case. It will also ensure that work-product protection applies in situations where the funder is lending law-related expertise and creating work to help with the litigation.

Second, I recommend that—until more cases have been tested and the contours of the law have been better defined—claim funders, claim holders, and lawyers proceed with caution when setting up contractual agreements and sharing confidential information. While creating a more active and interactive relationship between the funder and the claim holder can increase the chances of attorney-client and work-product protection (and perhaps increase the value that the funder provides), it can also increase the chances that a court holds the funding contract void as against public policy because of the level of influence the funder has over claim management and the general distaste that many commentators and courts have expressed about claim funding.

II. BACKGROUND

A. *What Is Commercial Claim Funding?*

Claim funding (also commonly referred to as alternative litigation funding) is the provision of money to legal claim holders by third parties to fund the pursuit of legal claims.²⁴ It is generally a type of nonrecourse financing.²⁵ Parties unrelated to a lawsuit offer to provide

24. See *supra* note 1.

25. Sometimes the loans are recourse, but generally they are not. See, e.g., GEOFFREY MCGOVERN ET AL., UCLA/RAND CTR. FOR LAW & PUB. POLICY, CONFERENCE PROCEEDINGS: THIRD-PARTY LITIGATION FUNDING AND CLAIM TRANSFER: TRENDS AND IMPLICATIONS FOR THE CIVIL JUSTICE SYSTEM 1 (2010) [hereinafter CONFERENCE PROCEEDINGS], available at http://www.rand.org/content/dam/rand/pubs/conf_proceedings/2010/RAND_CF272.pdf; see also MCGOVERN ET AL., *Stakeholders and Products in Third-Party Funding Arrangements: Summary of Remarks by Selvin Seidel, Partner, Burford Advisors*, in CONFERENCE PROCEEDINGS, *supra*, at 4; MCGOVERN ET AL., *Professional Ethical Issues in Third-Party Litigation Financing: Summary of Remarks by Nathan M. Crystal, Distinguished Visiting Professor of Law, Charleston Law School*, in CONFERENCE PROCEEDINGS, *supra*, at 15; MCGOVERN ET AL., *Sources and Structures of Claim Investments*, in CONFERENCE PROCEEDINGS, *supra*, at 11.

funds to the claim holder without recourse if the claim holder loses.²⁶ If the claim holder prevails, the claim funder receives a percentage of the proceeds or settlement in return for taking on the risk of the loan.²⁷ The amount the claim funder receives is generally based on a balance between time and the value of the case²⁸ and is estimated to be 20%–50% of the damages.²⁹ Before actually funding the claim, the claim funders perform due diligence, which is sometimes referred to as “scrubbing” the case. In fact, due diligence is a key part of the process because many commercial claim funders do not have a large enough portfolio of cases to employ a diversification strategy.³⁰ Accordingly, claim funders analyze damages, liability, ability to pay, fee arrangements with the law firm, and potential expenses. They perform background checks on the lawyers and the claim holders. Claim funders also hire experts in financial modeling to predict the potential recovery against length of time of investment. Additionally, they hire experts in the subject area of the litigation to advise on the merits of the case, the strength of the evidence, and the strategy that the lawyers are taking. These experts investigate the law in the related markets to understand the risks of champerty, maintenance, or barratry, which have the effect of voiding any agreement between the claim holder and claim funder.³¹

26. ABA WHITE PAPER, *supra* note 1, at 6. For this reason, some courts have held that claim funding agreements are not loans and, therefore, not subject to usury laws. *See, e.g.*, *Dopp v. Yari*, 927 F. Supp. 814, 824 (D.N.J. 1996); *Kraft v. Mason*, 688 So. 2d 679, 683-84 (Fla. Dist. Ct. App. 1996); *Nyquist v. Nyquist*, 814 P.2d 515, 518 (Mont. 1992); *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 98-99 (Tex. App. 2006). *But see, e.g.*, *Oasis Legal Fin. Grp., LLC v. Suthers*, No. 10-CV-8380, slip op. at 6 (Colo. Dist. Ct. Sept. 28, 2011) (order granting partial summary judgment), available at http://www.coloradoattorneygeneral.gov/sites/default/files/press_releases/2011/09/29/oasis_order.pdf (holding that “the transactions” between the funder and claim holder “create debt under the plain language of the UCCC” and “are ‘loans’ governed by the UCCC”); *Lawsuit Fin., L.L.C. v. Curry*, 683 N.W.2d 233, 238-40 (Mich. Ct. App. 2004).

27. ABA WHITE PAPER, *supra* note 1, at 6.

28. JOHN BEISNER ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, *SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES 2* (2009), available at <http://ilr.iwssites.com/uploads/sites/1/thirdpartylitigationfinancing.pdf> (explaining that the share of recovery can be calculated based on the value of the case and the time estimated for the case to be resolved along with the amount originally advanced and whether the case goes to trial or settles); *see also* Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 93 (2010).

29. This estimate is based on my experience working as a consultant in the industry and discussions with other consultants and industry leaders.

30. W. Bradley Wendel, *Alternative Litigation Finance and Anti-Commodification Norms*, 63 DEPAUL L. REV. 655, 663 (2014) (explaining the extensive due diligence that commercial claim funders conduct and why it is important).

31. For descriptions of the types of due diligence, see Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 592 & n.150, 593 & n.155, 597 & nn.183–184 (2010). *See also* GARBER, *supra* note 1, at 26; Jonathan T. Molot, *A*

Claim funding is currently offered in both the consumer and commercial contexts.³² This Article focuses on commercial claim funding: sophisticated players funding business disputes involving intellectual property, patent disputes, contracts, arbitration, shareholder suits, and antitrust.³³ Two hypothetical examples illustrate commercial claim funding:

Hypothetical A: Tiny Company patents a special technology for tracking a location on a mobile device for use in a mapping app on a tablet. Big Phone Technology Company begins using the patented technology without a license. Tiny Co. does not have the resources to sue Big Phone and will go bankrupt if it tries. Commercial claim funders provide money to keep Tiny Co. afloat and help fund the lawsuit.³⁴

Hypothetical B: Small U.S. Company, founded by people with connections to the government of a foreign country with oil fields, enters into a collaboration agreement to partner with Large U.S. Petroleum Company to jointly pursue the opportunity and share any interests (30% to Small U.S. Company and 70% to Large U.S.

Market in Litigation Risk, 76 U. CHI. L. REV. 367, 387–90 (2009); Aaron Katz & Steven Schoenfeld, *Third-party Litigation Financing: Commercial Claims as an Asset Class*, PRAC. L.J., Mar. 2012, at 36, 45, available at http://www.parabellumcap.com/docs/March2012_ThirdPartyLitigation.pdf (contending that rates vary based on the strength of the claim, risk of collection, amount, and duration). Similar factors are considered in the consumer context. See *The Approval Factors for Funding Personal Injury Lawsuits*, OASIS LEGAL FIN., https://www.oasislegal.com/legal_finance_services/lawsuit_funding_approval_factors?AspxAutoDetectCookieSupport=1 (last visited Oct. 4, 2013) (listing the approval factors for funding personal injury lawsuits); see also Nicholas Beydler, Comment, *Risky Business: Examining Approaches to Regulating Consumer Litigation Funding*, 80 UMKC L. REV. 1159, 1164 (2012) (explaining that funders “vet the claim, looking at whether the plaintiff bears some responsibility for the injury that is the subject of the litigation, the physical evidence of damage and ‘bright blood’ injuries, the sum of the plaintiff’s medical and other bills associated with the injury, the result and jury verdict amounts in cases involving similar injuries, and even the skill of the attorney handling the case”).

32. This Article focuses on funding agreements in the commercial context and agreements between funders and claim holders. Alternative litigation financing is also sometimes offered to the lawyers or law firm, as opposed to the corporate or consumer claim holder. GARBER, *supra* note 1, at 1 (explaining that there are three types: nonrecourse funding provided to individual plaintiffs (consumer legal funding), loans to plaintiffs’ law firms, and investments in commercial litigation). However, when the loan is to the lawyer (as opposed to the claim holder) there may be increased ethical and public policy issues. DeStefano, *supra* note 1, at 2818 n.150 (“Commercial claim funding agreements between funders and lawyers (or law firms) are rarer and more problematic from an ethical and public policy standpoint.”).

33. Donovan, *supra* note 8, at 1. Funds can be used to support commercial litigation, arbitration, collections of judgments, etc.

34. Unlike lawyers, claim funders can advance funds to claim holders to help with living or business expenses. See MODEL RULES OF PROF’L CONDUCT R. 1.8(e) (2013) (prohibiting lawyers from advancing funds to clients except for litigation or court costs). See Wendel, *supra* note 30, at 662 (explaining a similar scenario and contending that such a “company may lack the liquidity necessary to finance litigation on an hourly fee basis, and the lawyers who are equipped to fund litigation on a contingent fee basis may be unaccustomed to handling the types of claims involved”).

Petroleum Company). Pursuant to their contract, Small U.S. Company works jointly with Large U.S. Petroleum Company to obtain a concession from the government. After the concession is received, Large U.S. Petroleum Company secretly signs an agreement with the government but fails to give effect to Small U.S. Company's interests under the collaboration agreement. Thereafter, suit is filed in the United Kingdom. A commercial claim funding company then pays the security for costs (under the "loser pays" rule in the UK) and provides funds to continue the litigation and keep Small U.S. Company in business.

B. Status of Commercial Claim Funding in the United States

Although claim funding is prevalent and widely accepted in both the United Kingdom and Australia,³⁵ it is considered an emerging industry in the United States.³⁶ Some states completely outlaw claim funding by nonlawyers via the common law doctrines of maintenance, champerty, and barratry.³⁷ Other states have abolished these doc-

35. Wayne Attrill, Ethical Issues in Litigation Funding 1 (Nov. 12, 2008) (unpublished manuscript), available at http://www.claims-funding.eu/uploads/media/Ethical_Issues_Paper.pdf; see also *Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd.* (2006) 229 CLR 386, 486–87 (Austl.) (upholding claim funding agreement wherein the funder had a level of control and influence over case management); *Domson Pty Ltd. v Zhu* [2005] NSWSC 1070 ¶¶ 71–77 (Austl.); STANDING COMM. OF ATTORNEYS-GEN., LITIGATION FUNDING IN AUSTRALIA: DISCUSSION PAPER 4 (2006) (discussing the role of litigation funding firms); Nikki Tait, *Lawyers Test Litigation Funding Waters*, FIN. TIMES (London), Jan. 5, 2007, at 1 (“Litigation funding . . . has become more established in some overseas jurisdictions, notably Australia.”). Claim funding is also allowed in both Germany and Switzerland. See Andreas Frischknecht & Vera Schmidt, *Privilege and Confidentiality in Third Party Funder Due Diligence: The Positions in the United States and Switzerland and the Resulting Expectations Gap in International Arbitration*, TRANSNAT’L DISP. MGMT., Oct. 2011, at 1, 16, available at <http://www.chaffetzlindsey.com/wp-content/uploads/2012/03/tv8-4-article04.pdf>. For a synopsis of the state of claim funding in the United Kingdom and Australia, see DeStefano, *supra* note 1, at 2821–23.

36. ABA WHITE PAPER, *supra* note 1, at 5; see also *id.* at 39 (“The market for alternative litigation finance involves suppliers and customers who demand this form of financing. Because of this demand, and because of the complexity of regulation in various jurisdictions, the specific form of ALF transactions will undoubtedly continue to evolve.”). For trends in litigation funding, see Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 754–59, 788–97 (discussing both traditional and emerging law firm models).

37. See, e.g., *MNC Credit Corp. v. Sickels*, 497 S.E.2d 331, 333–34 (Va. 1998) (citing *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Ct. App. 1976)). See generally *In re Primus*, 436 U.S. 412, 424 n.15 (1978) (“[M]aintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty.”); ABA WHITE PAPER, *supra* note 1, at 9 (“Champerty is considered a type of maintenance.”). For a description and analysis of these doctrines in the claim funding context, see generally Richmond, *supra* note 21, at 652–69. Some courts invalidate agreements that assign the cause of action itself but approve those that assign a portion of the proceeds because they can be viewed as an enforceable equitable assignment similar to an insurance contract. See *Goodley*, 133 Cal. Rptr. at 85–87; see also *Costanzo v. Costanzo*, 590 A.2d 268, 271 (N.J. Super. Ct. Law Div. 1991). Other courts claim that there is no distinction. See, e.g., *Karp v. Speizer*, 647 P.2d 1197, 1199 (Ariz. Ct. App. 1982); *Town & Country Bank of*

trines.³⁸ However, as will be discussed in more detail in Part IV, even in the jurisdictions that allow claim funding, courts can refuse to uphold claim funding agreements for violating public policy if the funder has too much control or influence over litigation decisions.³⁹

Despite the doctrinal limitations, claim funding has been in existence—at least in some form—for quite some time, even in the United States. For example, nonrecourse loans have been offered to law firms and their clients for years.⁴⁰ Transfers of patent claims,⁴¹ insurance contracts, and claims in bankruptcy proceedings have been allowed for years.⁴² Contingency fee arrangements, which have been accepted for decades in the United States in most kinds of cases, are not unlike alternative litigation funding arrangements.⁴³ Indeed, both types of funding could be considered a share of the proceeds of a judg-

Springfield v. Country Mut. Ins. Co., 459 N.E.2d 639, 640–41 (Ill. App. Ct. 1984); *see also* Sebok, *supra* note 21, at 121–22 (“[T]he common law of the United States embraces free assignability in all choses of action except personal injury . . . legal malpractice (except when it does), and fraud (except when it does).”).

38. *See* Sebok, *supra* note 21, at 98–99, 99 n.162 (specifying that twenty-eight jurisdictions allow champerty with some limitations); *see also* Paul Bond, Comment, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297, 1333–41 (2002).

39. *See, e.g.*, Anglo-Dutch Petroleum Int’l, Inc. v. Haskell, 193 S.W.3d 87, 104 (Tex. Ct. App. 2006); *see also* OHIO REV. CODE ANN. § 1349.55(B)(3) (LexisNexis 2012); ABA WHITE PAPER, *supra* note 1, at 23 (“Even in states permitting an ALF supplier to obtain an interest in a party’s cause of action, retention by the supplier of control over the decision-making of the party and its counsel, via a contractual provision between the supplier and the party, may be deemed unlawful as champerty or maintenance.”); *infra* note 77; *infra* discussion in Part IV.A. For a thorough review of the doctrine and its history, *see generally* Sebok, *supra* note 21. For a review of recent cases and legislation related to claim funding, *see* Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 460 n.6 (2012).

40. *See* Letter from John H. Beisner, U.S. Chamber Inst. for Legal Reform, to Comm’n Members, ABA Comm’n on Ethics 20/20 (Feb. 15, 2011) [hereinafter Beisner Letter], in WORKING GRP. ON ALT. LITIG. FIN., ABA COMM’N ON ETHICS 20/20, COMMENTS: ALTERNATIVE LITIGATION FINANCING WORKING GROUP ISSUES PAPER 136, 137–38 (2011) [hereinafter WORKING GRP., COMMENTS], available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/comments_on_alternative_litigation_financing_issues_paper.authcheckdam.pdf.

41. *See* 35 U.S.C. § 261 (2006).

42. For further discussion of this analogy, *see* DeStefano, *supra* note 1, at 2838–41. *See also infra* notes 93, 206, 218–219, and accompanying text.

43. *See* Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125, 1125 (1970); *see also* William R. Towns, *U.S. Contingency Fees—A Level Playing Field?*, WIPO MAG., Feb. 2010, at 3, 3, available at http://www.wipo.int/export/sites/www/wipo_magazine/en/pdf/2010/wipo_pub_121_2010_01.pdf (claiming “contingency fee arrangements in U.S. civil litigation ha[ve] become widespread” and have been around for 100 years). The U.S. Chamber Institute for Legal Reform rejects this analogy. *See* Beisner Letter, *supra* note 40, at 138–39. For further discussion of this analogy, *see* DeStefano, *supra* note 1, at 2834–38.

ment or settlement of a legal claim.⁴⁴ In a contingency fee arrangement (like a claim funding arrangement), there is no pre-established interest rate for borrowed funds. Instead, in exchange for funds, the funder is provided only the promise of recovery of the principal along with a percentage of the profit if, and only if, the claim holder prevails.⁴⁵ In other words, it is similar to claim funding because no obligation exists to pay the money back in the event that the claim holder loses the case.

Furthermore, the claim funding industry has been funding cases for over twenty years in the United States.⁴⁶ In the consumer context, for example, some of the most well-known class action cases involving pharmaceuticals and asbestos were funded in part by third parties.⁴⁷ In the commercial context, third-party claim funders provided financing to the Ecuadorian case against Chevron.⁴⁸ Today, between thirty and eighty companies in the United States offer claim funding.⁴⁹

44. See Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813, 814 (1989) (“All [contingent fees] share the basic feature that the lawyer receives a fee for services only if there is a monetary recovery by the client. The fee is commonly based on a percentage of the recovery by the plaintiff, which could be the gross amount or a net amount recovered after litigation expenses are deducted. Alternatively, contingent fees can be hourly in nature, meaning that the lawyer bills for the total hours spent on the case only if the representation has been successful.”); see also Waye, *supra* note 21, at 262 (“[T]he funder is usually entitled to a portion of the representative plaintiff’s damages as a success fee. The success fee represents the profit due to the funder for accepting litigation risk.”).

45. Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 270 (1998) (“Thus, the lawyer effectively insures the client for the expenses associated with pursuing a claim. In addition to insuring for the out-of-pocket expenses, the lawyer also insures the value of his or her time. If the lawyer obtains no recovery for the client, the lawyer absorbs the entire opportunity cost of the time expended on the case.”); see also Jay, *supra* note 44, at 814.

46. See, e.g., Killian v. Millard, 279 Cal. Rptr. 877, 878 (Ct. App. 1991) (describing how the plaintiffs were “[u]nable to personally finance their lawsuit” and thus “syndicated it by creating 50 ‘units’ for sale at \$10,000 per unit with a 2-unit minimum per investor”); Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?*, 30 AM. BUS. L.J. 485, 498 (1992).

47. Martin, *supra* note 21, at 84 n.4 (“Nevertheless, it is fairly well known that many large lawsuits, such as the vitamins anti-trust suit, the asbestos cases and the Vioxx cases, have been supported by litigation financing companies which are funded by banks, private equity and hedge funds.”); see also Alison Frankel, *The Loan Arrangers*, AM. LAW., Oct. 1, 2005, at 74.

48. Patrick Radden Keefe, *Reversal of Fortune*, NEW YORKER, Jan. 9, 2012, at 38, 43 (stating that Burford Capital invested millions of dollars in the Ecuadorian case against Chevron); cf. *Burford Capital Profits Up 965%*, STOCK MKT. WIRE (Apr. 4, 2012, 09:02 AM), <http://www.stockmarketwire.com/article/4343538/Burford-Capital-profits-up-965pct.html> (reporting that Burford expected net profits of \$32 million after nine of its investments either concluded entirely or completed trial in 2011). For a review and analysis of Burford’s investment in this case, see Steinitz, *supra* note 39, at 465–79.

49. *Officers and Members*, AM. LEGAL FIN. ASS’N, <http://www.americanlegalfin.com/OfficersAndMembers.asp> (last visited Aug. 24, 2013) (having at least thirty-two members); see also GARBER, *supra* note 1, at 10 n.14 (noting that there might be as many as eighty).

Some, like Burford Capital Ltd., Juridica Investments Ltd., and IMF (Australia) Ltd., focus on the commercial claim industry, while others focus on consumers.⁵⁰ Insurance companies are also participating in the industry by insuring these claim funding companies against loss of the principal.⁵¹ Given its rising importance, the ABA Commission on Ethics 20/20 formed a working group to analyze the professional issues associated with alternative litigation finance.⁵² Even though alternative litigation financing is considered new, and there are legal restraints in many states, the claim funding industry could very soon be worth over \$1 billion in the United States.⁵³

C. Types of Claim Funding Arrangements

Within the commercial claim funding context, funders negotiate different investment structures in different scenarios.⁵⁴ First, contracting

50. See Michael G. Blum, *Financial Management in a Contingent Fee Practice*, FINDLAW (Mar. 26, 2008), <http://practice.findlaw.com/financing-a-law-firm/financial-management-in-a-contingent-fee-practice.html>. Hedge funds also provide claim funding. Margie Lindsay, *Third-Party Litigation Funding Finds Favour with Hedge Funds*, HEDGE FUNDS REV. (Jan. 19, 2012), available at <http://www.fullbrookmanagement.com/news/120119.html>; see also Steinitz, *supra* note 39, at 461. For example, Credit Suisse Group owns Peachtree Financial Solutions, which “purchase[s] assets including structured legal settlements, annuities, lottery winnings, sports contracts and life insurance policies.” *About Us*, PEACHTREE FIN. SOLUTIONS, <http://peachtreefinancial.com/company/> (last visited Aug. 25, 2013).

51. For example, a claim financier could pay 10%–15% of the original investment to an insurance agent to cover the loss of its principal should the claim fail, or it could set up a deal with the insurer to share the proceeds. See Steinitz, *supra* note 39, at 461–62 (explaining that sometimes these contracts are secured).

52. ABA WHITE PAPER, *supra* note 1, at 2.

53. See Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Ethics, Formal Op. 2011-2 (2011) (“As of 2011, [the third-party litigation financing] industry has continued to grow, both as to the number and types of lawsuits financed and financing provided. The aggregate amount of litigation financing outstanding is estimated to exceed \$1 billion.”); see also *New York City Bar Gives Thumbs Up to Litigation-Funding*, THOMSON REUTERS NEWS & INSIGHT (June 20, 2011), available at http://archive-com.com/page/481471/2012-10-19/http://newsandinsight.thomsonreuters.com/Legal/News/2011/06_-_June/New_York_City_Bar_gives_thumbs_up_to_litigation-funding/ (“The practice of seeking funding for cases from outside investors has been on the rise in the past 20 years, the [New York City Bar Association] said. It has moved from a cottage industry of personal-injury cases to a \$1 billion business involving a wide swath of commercial litigation.”). This growth has been predicted, in part, because of the “global recession, which has created more claims but less funds to pursue them” along with “an appetite for new, alternative assets.” Steinitz, *supra* note 39, at 459 n.2. The *Legal Profession Act of 2004* (NSW) ch 2, pt 2.6, div 2 (Austl.), which allows law firms to incorporate in Australia, and the Legal Services Act, 2007, c. 29, §§ 71-111 (U.K.), which allows outsiders to invest in law firms in the United Kingdom, have also been identified as global transformations that have helped accelerate claim funding. Steinitz, *supra* note 39, at 459 n.2.

54. For a list of types of funding, see PIA EBERHARDT ET AL., CORP. EUROPE OBSERVATORY & TRANSNAT’L INST., PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM 56–60 (2012), available at <http://corporateurope.org/sites/default/files/publications/profitting-from-injustice.pdf>.

parties may vary; the contract can be between the lawyer and the funder⁵⁵ or, more commonly, between the claim holder and the funder. Second, the amount and structure of the funder's recovery can vary. In some instances, the claim funder will negotiate a set percentage of recovery after the principal is repaid. In other cases, the funder will negotiate a recovery that is akin to a waterfall: as the rate of return increases, so does the percentage of the recovery to the funder.⁵⁶ Further, although claim funders often purchase an interest in the outcome or judgment, some will purchase the claim asset itself or a portion of it.⁵⁷ Some funders offer to provide funds in exchange for a percentage of a claim as security for the investment.⁵⁸ These funds can be used for purposes unrelated to litigation or to the claim that was used as collateral.⁵⁹ Third, funding may be provided in stages,⁶⁰ and there may be multiple parties involved in the funding. For example, funders may co-finance with other funders, and law firms may work with other law firms under co-counseling arrangements.⁶¹ Last, claim funders negotiate different levels of influence and control over the management of the litigation.⁶² In the next sub-

55. See, e.g., *Legal Asset Funding v. Veneski*, No. 3:04-CV-01156, 2006 WL 2623884, at *1–2 (M.D. Pa. Sept. 12, 2006); see also *supra* note 32.

56. For a summary of the waterfall deal that Burford Capital Ltd. had with the claim holders in the Chevron-Ecuador case, see Roger Parloff, *Have You Got a Piece of This Lawsuit?*, *FORTUNE*, June 13, 2011, at 68, 70; see also Neil Rose, *Whatever You Want*, *LAW SOC'Y GAZETTE* (Jan. 18, 2008), <http://www.lawgazette.co.uk/2326.article> (“This is very much a bespoke market.”).

57. See *supra* notes 25–27; see also Steinitz, *supra* note 39, at 461 (explaining that “these, in turn, may be directly or indirectly syndicated”). To view a claim funder's investment structuring offerings, see BURFORD CAPITAL LTD., PLACING OF 80,000,000 ORDINARY SHARES AT A PRICE OF 100 PENCE PER ORDINARY SHARE AND ADMISSION TO TRADING ON AIM 21–22 (2009) [hereinafter BURFORD ADMISSION DOCUMENT], available at <http://www.burfordcapital.com/wp-content/uploads/2012/10/burford-admission-document.pdf>.

58. See Andrew Langhoff, *Innovation in Litigation Finance: Moving Beyond Classic Litigation Funding*, ON REFLECTION (Burford Capital Ltd., New York, N.Y.), Nov. 20, 2012, at 2, available at <http://www.burfordcapital.com/wp-content/uploads/2012/11/Burford-article-Innovation-2ppV1.3web.pdf>.

59. *Id.* (explaining that this is an innovation in litigation finance). For a description of other ways claim funding is utilized, see *id.* at 1–2.

60. See Steinitz, *supra* note 39, at 467–68 (citing Treca Financial Solutions and Claimants Funding Agreement ¶¶ 2.1(a), 3(h) (Oct. 31, 2010) [hereinafter Treca Agreement]) (describing Burford's first round of investment).

61. *Id.* at 461–62. The Chevron-Ecuador case was co-funded. See Chevron's Memorandum of Law in Support of Its Motion for an Order of Attachment and Other Relief at 13–14, 14 nn.12–13, *Chevron Corp. v. Donziger*, 840 F. Supp. 2d 773 (S.D.N.Y. 2012) (No. 11-Civ-0691 (LAK)) (listing additional individuals and entities investing anywhere from \$50,000 to \$1 million).

62. See Sebok *supra* note 21, at 109 (explaining that “[t]he degree of control the investor obtained by contract can, in theory, extend over a spectrum ranging from relatively minor control (for example, control over what documents the investor can see) to almost complete control

part, I categorize the types of relationships—passive or active—that claim funders can have with claim holders.⁶³

1. *Passive*

One claim funding model is “passive investment.” In this model, a company, such as Burford Capital Ltd., Juridica Investments Ltd., or IMF (Australia) Ltd., provides funds to a claim holder to advance the claim but takes a hands-off approach after investment.⁶⁴ Essentially, the claim funder scrubs the case to ensure that it is worthy of the invested capital. It employs experts to evaluate the claim, perform due diligence and underwriting to “value” the claim, and ensure that the likelihood of success is larger than the likelihood of failure. It provides funding for the obvious wins (e.g., the airline that has been taken over by a corrupt government but cannot afford to litigate and keep its doors open).⁶⁵

In many ways, deciding to fund is like placing a bet on a horse.⁶⁶ After learning everything possible about the horse and its jockey, a

(for example, control over selection of counsel or veto power over settlement)”; *see also* Waye, *supra* note 21, at 236 (explaining that “[t]he arrangements made between litigation funders, claim holders and legal practitioners vary in the degree of control exerted by the funder over the prosecution of the claim, and in relation to the nature of financial arrangements funders make with legal practitioners”).

63. These categorizations are broad strokes. There are obviously variations, and the differences between the three identified models may not be as concrete as portrayed here but they serve as a useful lens through which to analyze the debate over privilege and work-product protection. Other scholars have in fact identified different categories. For example, Vicky Waye identifies two models of claim funding: one in which the funder takes total control and one in which the claim holder maintains control over the management of the claim and the lawyer. Waye, *supra* note 21, at 249–50. At first blush, it appears that her models map onto those in this Article, but they are slightly different. *See id.* at 243 n.82 (“Delegation of complete control may, however, still amount to de facto assignment and facilitate trafficking in legal claims, which remains contrary to public policy.”). Although Waye clearly sees the level of control on a continuum, *see id.* at 254–55, Waye’s rubric does not envision a funder that is solely passive. *Id.* at 249 (“The funder is an investor in the claim, and unlike passive shareholders in large public companies, is a careful monitor of its interests, and in some cases exerts considerable influence over claim management.” (footnotes omitted)). Instead, Waye’s second model is more akin to that described as the “active” funder here. This may be in part because it is extremely difficult for a funder to remain completely passive. *See infra* notes 74–81.

64. *See* ABA WHITE PAPER, *supra* note 1, at 23 (explaining that “some ALF suppliers disclaim any control over the decision-making of lawyers, stating that they are in an entirely passive role”); *see also* Martin, *supra* note 21, at 109 (stating that “in the United States, litigation funders merely advance money to plaintiffs to use any way they wish; they do not directly fund the litigation at all, a role that is, however, permitted for U.S. attorneys”).

65. *See* Part II.A (providing hypotheticals on “obvious wins”).

66. This is not to say that claim funding is akin to gambling. *See generally* Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DEPAUL L. REV. 453, 471 (2011) (arguing that alternative claim financing is not a form of gambling because “the fact that a contract conditions the award of money on the occurrence of an uncertain event tells us

decision is made whether to bet on the horse, and after the bet is made, the bettor sits on the sidelines and watches the race. The bettor neither coaches from the sidelines nor gets involved in decisions about how to ride the horse or manage the course or jockey. Similarly, after deciding to provide funding, a funder in this model does not get involved in choice of counsel, settlement, litigation strategy, or negotiations. Although the funder may have some influence on some of these matters simply because funders are savvy business professionals and often have years of experience as practicing attorneys⁶⁷ this model is predicated on the idea that the funder does not control any workings of the resolution of the claim.⁶⁸ To that end, claim funders assert that they do not attempt to control any aspect of the litigation strategy, settlement, or choice of lawyer.⁶⁹ And some courts have upheld agreements in part because the funder played a passive role.⁷⁰ Thus, in this model, the funder acts almost as a bystander—as a pure investor. In that respect, passive claim funding could turn legal claims into a commodity—an asset class that any outsider with the right resources can invest in.⁷¹

However, it is slightly different than what has been coined “passive investment” in the stock market. In that situation, a passive investor is one that owns stocks “because they think as a whole, over long periods of time, capitalism works, and they are likely to receive higher returns from investing in the entire stock market than by trying to pick the individual stocks which will outperform the market as a

nothing about whether, as a functional matter, the contract serves a socially useful function. I have argued further that champerty can be seen as a form of ‘after the event’ insurance for victims of wrongful losses.”).

67. See *supra* notes 31–32 and accompanying text.

68. See Martin, *supra* note 21, at 109; see also *Industry Best Practices—ALFA’s Code of Conduct*, AM. LEGAL FIN. ASS’N, <http://americanlegalfin.com/IndustryBestPractices.asp> (last visited Oct. 3, 2013). But the funder may have some influence although it is not stated or guaranteed.

69. ABA WHITE PAPER, *supra* note 1, at 23 n.82 (“Burford does not hire or fire the lawyers, direct strategy or make settlement decisions. Burford is a purely passive provider of non-recourse financing to a corporate party.” (quoting Submission of Christopher P. Bogart et al., Burford Group, LLC, to Working Grp. on Alt. Litig. Fin., ABA Comm’n on Ethics 20/20 (Feb. 15, 2011), in WORKING GRP., COMMENTS, *supra* note 40, at 29, 33)); see also *id.* (“We do not seek to control any of the decisions regarding the conduct of any litigation that we finance, nor are we aware of any other supplier in this market segment who does.” (quoting Submission from Richard W. Fields, Juridica Mgmt. Ltd., to Working Grp. on Alt. Litig. Fin., ABA Comm’n on Ethics 20/20 (Feb. 17, 2011), in WORKING GRP., COMMENTS, *supra* note 40, at 66, 71)).

70. See, e.g., *Anglo-Dutch Petroleum Int’l, Inc. v. Haskell*, 193 S.W.3d 87, 104 (Tex. App. 2006) (“[T]here is no evidence that [the ALF suppliers] maintained any control over the Halliburton lawsuit. The agreements do not contain provisions permitting [the ALF suppliers] to select counsel, direct trial strategy, or participate in settlement discussions, nor do they permit [the ALF suppliers] to look to Anglo-Dutch’s trial counsel directly for payment.”).

71. See *infra* Part IV.B.

whole.”⁷² Although investors in legal claims may approach the market in this way over time,⁷³ currently even passive investors are not *that* passive, at least not in the commercial context. Instead, a legal claim with a passive investor is more like an actively managed fund wherein the analyst researches and staffs the fund. In the passive context, cases are researched, scrubbed, and hand selected.

Further, although funders argue that they play a completely passive role and that courts rely on a funder’s passivity to justify upholding funding agreements,⁷⁴ it is not clear that complete passivity exists in practice in the commercial context.⁷⁵ First, it is only natural that the lender will want to have some influence over the litigation. As an Australian justice explained, that “a person who hazards funds in litigation wishes to control the litigation is hardly surprising.”⁷⁶ Unsurprisingly, some states have enacted legislation that requires claim funders to specify in contracts with claim holders that they will only play a passive role.⁷⁷ Second, even if the agreement stipulates that the funder does not have any power or control, the reality is that the funder likely will have some power and control because the funder is providing funds to keep the litigation (and perhaps the company) afloat⁷⁸—not to mention that funders are often former practicing at-

72. Dana Anspach, *What Is the Difference Between Active and Passive Investing?*, ABOUT.COM, <http://moneyover55.about.com/od/howtoinvest/a/activevspassive.htm> (last visited Oct. 3, 2013) (“[A]ctive investing [is] like trying to bet on who will win the Super Bowl, while passive investing would be the ability to profit as all the NFL teams collectively made money on ticket and merchandise sales.”).

73. See EBERHARDT ET AL., *supra* note 54, at 56 (“The whole theory is to take the legal system and turn it into a stock market.” (quoting John H. Beisner, Skadden, Arps, Slate, Meagher & Flom)); see also *id.* at 58 (“There is even the possibility—heaven forbid—that we could fund a case and then resell it to third parties, a bit like credit default swaps.” (quoting Selwyn Seidel, Fulbrook Management)).

74. See, e.g., *Haskell*, 193 S.W.3d at 104.

75. Charles Silver, *Litigation Funding Versus Liability Insurance: What’s the Difference?*, 63 DEPAUL L. REV. 617, 633 (2014) (explaining that passive investing may more likely exist in the consumer context when the amount of lending is fairly low, but not necessarily when the investments are much larger as they are in the commercial context); see also ABA WHITE PAPER, *supra* note 1, at 24.

76. See, e.g., *Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd.* (2006) 229 CLR 386, 434 (Austl.) (asserting that funders should be able to influence and exert the same level of control over litigation as insurers).

77. See, e.g., OHIO REV. CODE ANN. § 1349.55(B)(3) (LexisNexis 2012); cf. Richmond, *supra* note 21, at 682 (“[T]he funding company should agree that it will neither attempt to direct nor regulate the attorney’s judgment in the case being funded.”). See generally *supra* note 39 and accompanying text.

78. See DeStefano, *supra* note 1, at 2827 & n.220; see also *infra* notes 206–219 (discussing similar power and sway in the insured-insurer relationship). But see Sebok, *supra* note 21, at 109 n.195 (“[B]ut in cases where a funder’s suggestions are offered gratuitously and are accepted entirely, it seems to me that, although the funder is a cause-in-fact of the change in the litiga-

torneys.⁷⁹ And regardless of ethical rules or contractual agreements, some ability to garner information and to control litigation decisions will likely follow the money.⁸⁰ Indeed, other scholars have claimed that control should follow the money.⁸¹ Therefore, although this model is labeled passive, some degree of involvement by the funder inevitably exists in the management of the claim.

2. *Active*

“Active” commercial claim funding is more active than passive because the funder is not merely providing funds to ensure that the claim can proceed but instead is providing an investment—an investment of capital *and* expertise. Accordingly, the funder wants more control. Because of its differences, active commercial claim funding may deserve a different name altogether, such as commercial claim investment. It has been referred to by the founders of BlackRobe Capital Partners, LLC (now defunct) as “Funding 2.0.”⁸² This type of funding is newer and less accepted. A handful of companies, including Fulbrook Capital Management, LLC, are beginning to provide this type of funding in the United States,⁸³ and a few companies provide this option in Australia, where the rules regulating this field are more lenient.⁸⁴

tion’s direction, she is not a proximate cause. The proximate cause is the funded party, who bears the responsibility for choosing to subject their will to that of the funder.”).

79. Some (if not all) of the founders and principals of BlackRobe Capital, Fulbrook, and Juridica hold JDs and practiced law for decades. *See supra* note 89.

80. *See* Keith N. Hylton, *Toward a Regulatory Framework for Third-Party Funding of Litigation*, 63 DEPAUL L. REV. 527 (2014).

81. *See, e.g.*, Steinitz, *supra* note 21, at 1323–24 (arguing that a funder co-owns some or part of the claim and that the law should support transfer of the rights over litigation and control that go with that portion of ownership).

82. John P. Coffey, Exec. Managing Dir., BlackRobe Capital Partners, LLC, Commercial Claim Investing: A Promising New Asset Class, Presentation at the 14th Annual Klausner, Kaufman, Jensen & Levinson Client Conference (Mar. 20, 2012).

83. There are many hurdles to providing this type of funding on paper and likely any funder that is doing so is being very careful in contracting, steering clear of language that implies the funder controls the course of the litigation or settlement. For example, the contract between Burford and the claimant’s representatives in the Chevron-Ecuador case specifically states that the lawyers will supervise the litigation and that the funder is not engaged in the practice of law or other professional activities and will “not give or interfere with counsel’s giving of legal advice.” Treca Agreement, *supra* note 60, ¶ 16.2–.3. However, as Maya Steinitz points out in a footnote, “[t]his language . . . is probably intended to avoid a charge of the unauthorized practice of law.” Steinitz, *supra* note 39, at 473 n.61.

84. *Sponsors, Fulbrook Management LLC*, GLOBAL LEGAL GROUP, <http://www.glgroup.co.uk/sponsors/fulbrook-management-llc> (last visited Oct. 5, 2013) (explaining that Fulbrook Capital Management LLC “offers a range of litigation support services, including patent evaluation, electronic discovery management and legal outsourcing”).

Essentially, in active claim funding, the funder is a claim manager that offers an entire suite of extralegal (or nonlegal) ancillary services: collecting documentary evidence; performing forensic accounting; finding, assisting, and liaising with experts; creating models for accounting losses, government relations, public relations, and marketing strategy development; advising on settlement offers; and providing general advisory services to the claim holder and the lawyers as needed. In addition to contributing capital, these investors partner with the claimant and various expert advisors across disciplines (e.g., economists, accountants, diplomats, PR specialists, and ethicists) to ensure that the extralegal aspects of the case are strategically managed.

Moreover, in the active model, funders expect to have a voice in settlement, litigation strategy techniques, and the selection of the lawyers throughout the life of the case.⁸⁵ In a recent case in Florida, the funder had the right “to approve the filing of the lawsuit; controlled the selection of the plaintiffs’ attorneys; recruited fact and expert witnesses; received, reviewed and approved counsel’s bills; and had the ability to veto any settlement agreements.”⁸⁶

As I indicated in a prior article, an apt analogy might be to the relationship that some venture capitalists have with the start-ups in which they invest.⁸⁷ The venture capitalist, also referred to as the general partner (GP), pools money from passive limited partners (generally institutional investors) into a venture capitalist fund to be

85. ABA WHITE PAPER, *supra* note 1, at 18–19, 22–23; *see also* Sebok, *supra* note 21, at 111–12; *id.* at 109 n.196 (explaining how a funder might legally contract to get practical control over settlement or control the theory of the case and describing terms of a contract illustrating different types of demands a third-party funder might make); Steinitz, *supra* note 39, at 472 (describing the Chevron-Ecuador contract as including a provision that the lawyers are “selected by the Claimants with the Funder’s approval.” (quoting Treca Agreement, *supra* note 60, ¶ 4.2)).

86. *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 693 (Fla. Dist. Ct. App. 2009); *cf.* State Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. RI-321 (2000) (describing a funding agreement in which the funder could (1) control which lawyers handled the case; (2) control which settlements were accepted or refused; (3) control whether the case was continued “under all circumstances”; and (4) inspect any document in the litigant’s (or his attorney’s) possession, irrespective of whether that inspection waived the attorney-client privilege).

87. *See* DeStefano, *supra* note 1, at 2831 n.240. For a description of venture capital and overview of the structure of venture capital funds, *see generally* Fred Dotzler, *What Do Venture Capitalists Really Do, and Where Do They Learn to Do It?*, J. PRIVATE EQUITY, Winter 2001, at 6; William A. Sahlman, *The Structure and Governance of Venture-Capital Organizations*, 27 J. FIN. ECON. 473 (1990). For an argument that the economics of venture capital are similar to that of claim funding and that claim funding could be structured similar to venture capital finance, *see generally* Steinitz, *supra* note 39 (contending that funders should obtain control of the claim for a price and that lawyers should listen to funders’ input); Maya Steinitz, *The VC Analogy*, MODEL LITIG. FIN. CONT.: LITIG. FUNDING THEORY & PRAC., <http://litigationfinancecontract.com/the-vc-analogy> (last visited Sept. 28, 2013).

invested in certain types of companies or companies at a certain stage of development.⁸⁸ The GP will sometimes have one of its members serve as a member of the board of directors at the company in which it invests.⁸⁹ This board member makes suggestions about the development, leadership, and management of the funded enterprise. Alternatively, the GP will have contracted for the right to approve important business decisions.⁹⁰ Essentially, the venture capitalists keep an involved eye on their investment and provide noncash contributions that are valuable to the start-up, such as managerial and monitoring services or marketing and reputational assistance.⁹¹ Nonetheless, the start-up often retains control of its business operations.

Active funders take a similar approach. The funder pools money from wealthy individuals and other investors. Like the start-up that continues to control and run its operation, the claim holder and the claim holder's preferred lawyers continue to control the legal aspects of the case, consistent with applicable legal and ethical rules; however, they have the benefit of a team of diverse, experienced consultants to weigh in and provide advice. These litigation funders, therefore, are actively managing their funds and, at the same time, adding value to the claim.⁹²

88. Ronald J. Gilson, *Engineering a Venture Capital Market: Lessons from the American Experience*, 55 STAN. L. REV. 1067, 1070–71 (2003) (explaining that these pools are generally blind in that the institutional investor is told the strategy behind investment, but it will not know what companies the fund will invest in and will not meddle in management of the fund).

89. Sahlman, *supra* note 87, at 506 (1990) (“Most agreements call for venture capitalist representation on the company’s board of directors. Often, the agreement calls for other mutually acceptable people to be elected to the board.” (citation omitted)).

90. Gilson, *supra* note 88, at 1074.

91. See Ronald J. Gilson, *Globalizing Corporate Governance, Convergence of Form or Function*, in CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 128, 142–43 (Jeffrey N. Gordon & Mark J. Roe eds., 2004); see also Christopher B. Barry et al., *The Role of Venture Capital in the Creation of Public Companies: Evidence from the Going-Public Process*, 27 J. FIN. ECON. 447, 449 (1990); Vance H. Fried et al., *Strategy and the Board of Directors in Venture Capital-Backed Firms*, 13 J. BUS. VENTURING 493, 494 (1998); Gilson, *supra* note 88, at 1071 (explaining that the GP’s principal contribution to the venture capital fund is expertise, not capital); Steinitz, *supra* note 39, at 479 (pointing to the provisions in the Chevron-Ecuador contract that acknowledge the noncash contributions that a funder provides around business planning, market opportunities, marketing, “ideas, know-how, knowledge, and research”).

92. Indeed, this is the positioning that some claim funding companies take when seeking funds. See, e.g., *Selvyn Seidel: Founder & Chairman at Fulbrook Management LLC*, CORP. LIVEWIRE, <http://www.corporativewire.com/profile.html?id=6f946e26bbbc095620c42c4453cbf8df7ffca1a0> (last visited July 30, 2013) (stating that Fulbrook “has a special and in some important ways unique capacity and goal to assist in enhancing the value of the claim closer to its true value”); *Company Overview of Blackrobe Capital Partners, LLC*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapid=168141224> (last visited July 30, 2013) [hereinafter *BlackRobe Overview*] (listing BlackRobe Capital, a former claim funding company, as “offer[ing] financing and strategic partnership services to claimholders to optimize recoveries in high-stakes business disputes. The company also offers

3. *Acquired*

Most often, in the passive and active context, the legal claims already exist and litigation is either already underway or imminent. The claims have been groomed by experienced and reputable lawyers and are often litigation ready. In the “acquired” context, however, the cases can be unformed and may not yet have been evaluated by a lawyer. Here the funder might, through its own investigation, find the claim and create the case. Alternatively, it may be that the case already exists but the funder acquires a controlling interest in the underlying claim or asset. For example, a funder might “buy” or acquire a dormant subrogation claim or a claim held by a liquidator or trustee.⁹³ Or, a company might purchase a patent or chose in action wherein the company becomes the party in interest. Or the level of control by the funder might get to the point that the distinction between funder and owner collapses and the contract becomes one of assignment.⁹⁴ Be-

investigative, public relations, and strategic political services.”); *Mr. Timothy D. Scranton: Managing Director, ZOOM INFO.*, <http://www.zoominfo.com/s/#!/search/profile/person?personId=1249914697&targetid=profile> (last visited Apr. 21, 2012) (providing that BlackRobe Capital “supplies capital and works with the claimholder, the claimholder’s lawyers, and professional experts to offer extra-legal management expertise and strategic insight in large-scale domestic and international litigation and arbitration”); *Sponsors, Fulbrook Management LLC*, GLOBAL LEGAL GROUP, *supra* note 84 (providing that Fulbrook Capital Management “offers a range of litigation support services, including patent evaluation, electronic discovery management and legal outsourcing”); *see also* Langhoff, *supra* note 58, at 1 (“Specialist financiers like Burford have emerged, offering users a high degree of subject-matter expertise, more efficient processes, a better assessment of risk and, therefore, a better understanding of how to price that risk.”); Steinitz, *supra* note 39, at 495 (“Although litigation finance is highly uncertain, funders may still be able to enhance value through aggregation of claims in a diversified portfolio and through noncash contributions including investment of human capital such as expertise, enhancing reputation, and monitoring. In this—as in the magnified information asymmetries and agency costs characteristic of litigation funding—litigation funding is similar to venture capital.”).

93. This is not that different from what some insurance companies do. Silver, *supra* note 75, at 635 (explaining that insurers finance subrogation lawsuits that involve claim transfers and claim-sharing). “For example, after having damage to a policyholder’s car repaired, an automobile insurer may underwrite a lawsuit against the driver thought to have caused the accident” and “the carrier may fund the subrogation action, control it, and be the real party in interest for much of the case, having stepped into the policyholder’s shoes by acquiring its right to sue.” *Id.*; *see also supra* note 42. For a discussion analogizing claim funders and claim holders to insurers and insureds, *see infra* notes 206–219 and accompanying text.

94. Arguably, the claim is no longer being maintained under maintenance doctrines but rather is being assigned. Sebok, *supra* note 21, at 82, 109–10 (making similar point and arguing that “[o]nce the maintainer assumes full control of the lawsuit, she really is an assignee and the contract that brought her control of the lawsuit is properly a contract of assignment, not maintenance”); *see also* Abu-Ghazaleh v. Chaul, 36 So. 3d 691, 693–94 (Fla. Dist. Ct. App. 2009) (treating the funder as a “party” in applying the fee-splitting statute because the funder had the contractual rights to approve filing, control attorney selection, review attorney bills, hire expert witnesses, and disapprove any settlement agreements); State Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. RI-321 (2000) (opining that the extensive control by the funder

cause the claim may not exist, the “acquired” structure raises more issues with maintenance, champerty, and barratry⁹⁵ but less ethical issues with the attorney-client relationship given that the funder is the claim holder itself.⁹⁶

III. COMMUNICATIONS BETWEEN CLAIM HOLDERS, FUNDERS, AND LAWYERS: WILL THEY BE PROTECTED?

Although some funders claim otherwise,⁹⁷ arguably some confidential information needs to be shared with claim funders at the outset in order for them to determine whether they should fund.⁹⁸ Most inves-

made the funder “in real terms, a ‘client’ with a co-equal, if not superior, decision making role” to the claim holder receiving the funding).

95. In this situation, there is increased concern that the funder is creating litigation that would not otherwise be brought and that, perhaps, was not even desired by the claim holder to be brought. Sebok *supra* note 21, at 66–69 (discussing the concern some courts and scholars have with third-party funding that occurs before a case has been filed and questioning the utility of the rules in preventing frivolous lawsuits); *see also id.* at 128 (defining the “theory of the inauthentic claim” in the context of maintenance as “the enforcement of a right to redress must be the product of the genuine desires of the party who suffered the wrong, where ‘genuine’ means either unaided or uninfluenced by a third party”).

96. To that end, the questions around privilege and work-product doctrine dissipate. Therefore, this Article will not evaluate application of the attorney-client privilege and work-product doctrine to this model. I mention this type of funding here, however, in order to provide a comprehensive view of the three models that can exist. Of course, within these models there are variations.

97. *See, e.g.,* ABA WHITE PAPER, *supra* note 1, at 30 n.117 (“Our experience is that ALF funders generally do not need access to privileged or confidential information in order to make financing decisions. We perform our due diligence by relying primarily on publicly-filed pleadings and memoranda and other non-privileged materials. We do not seek attorney-client privileged information.” (quoting Submission from Richard W. Fields, Juridica Mgmt. Ltd., to Working Grp. on Alt. Litig. Fin., ABA Comm’n on Ethics 20/20, *supra* note 69, at 68)); *id.* (“By and large, consumer legal funding companies have no need to request privileged information from attorneys regarding their clients.” (quoting Comments of Oasis Legal Fin. & Alliance for Responsible Consumer Legal Funding, to Working Grp. on Alt. Litig., ABA Comm’n on Ethics 20/20 (Apr. 5, 2011))). Some courts claim, without foundation, that outside funders do not need confidential information to conduct due diligence. *See, e.g.,* Leader Tech., Inc. v. Facebook, Inc., 719 F. Supp. 2d 373, 376–77 (D. Del. 2010); Elisha E. Weiner, *Price and Privilege*, L.A. LAW., Apr. 2012, at 20, 20 (making this point and contending that in order to evaluate the strength of a claim, financiers should have access to “nondiscoverable privileged documents and information”); Donovan, *supra* note 8, at 13 (reporting that the CEO of Juridica and the chief underwriting officer of Gerchen Keller Capital both claimed that they “are careful not to do anything that would endanger attorney-client privilege”).

98. *See, e.g.,* Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 628 (Fla. Dist. Ct. App. 2005), *aff’d*, 931 So. 2d 899 (Fla. 2006) (“[Tort plaintiff’s] attorneys also provided [the supplier] with information about her claim to assist [the supplier] in deciding whether to advance her funds.”); *see also* BEISNER ET AL., *supra* note 28, at 8 (“In order to evaluate a plaintiff’s claim and determine whether and on what terms to finance the case, a litigation financing company generally will ask to evaluate confidential, and possibly privileged, information belonging to the plaintiff.”); Lazar Emanuel, *An Overall View of the Litigation Funding Industry*, N.Y. PROF. RESP. REP., Feb. 2011, at 4 (quoting application and disclosure form provided by a consumer seeking claim funding

tors will naturally seek substantive information before investing in a case.⁹⁹ If the case is not already filed, potential investors likely will want to investigate the plaintiff's basis for filing the lawsuit and review any inside or outside lawyer assessments of the strengths and weaknesses of the case. If the case is already ongoing, the potential investors will also likely want to hear the current lawyers' assessment of the case and litigation strategy, including why certain motions or strategies were pursued or foregone. This information provides better underwriting, scrubbing, and analysis of the merits of the case, which leads to better understanding of risks, valuation, settlement posture, and chances of success.¹⁰⁰ There is also a need for continued information and communication—even in the passive context—between the funder and the claim holder as the claim progresses so that the funder can monitor its investment.¹⁰¹ Indeed, funders include provisions in their contracts that require claim holders or their lawyers to share information.¹⁰² Further, in both the passive and the active contexts,

from an ALF supplier); *Attorney FAQs*, LAW CASH, <http://www.lawcash.net/html/attorney-faqs.html> (last visited Nov. 7, 2013) (“We might ask you to provide medical reports, emergency room reports, accidents reports, expert testimony, insurance information, information about the current status of the litigation, and any other details that would help us to make our decision.”).

99. See Richmond, *supra* note 21, at 674 (“[A] litigation funding company may require a client who applies for funding to have his attorney provide the company with otherwise confidential information that will allow the company to decide whether it should fund the case.”).

100. See Molot, *supra* note 31, at 423–24; see also Waye, *supra* note 21, at 248 (“Public policy more strongly favours disclosure of information to the funder that may cause it to reconsider its position than it might favour disclosure of information to an insurer that would cause the insurer to decline to indemnify the insured. . . . One of the most significant benefits of litigation funding is the commercial objectivity funders bring to claim evaluation. Such objectivity should be supported by continued encouragement of full and frank communication between funder, claim holder and legal practitioner, even where conflicts of interest might arise.” (footnotes omitted)); Lyon, *supra* note 31, at 597–98 (arguing that claim valuation promotes certainty because first, “parties would be likely to agree on the range of settlement values for the claim because their experts would be employing a similarly sophisticated methodology and applying the same historical data to the same facts. . . . [And] [s]econd, a system of claim valuation promotes certainty because it allows parties to avoid the relative uncertainty of jury awards.” (emphasis omitted)). Juridica Investments Ltd. purports that its “claim finance process brings rational, economics-based evaluation models to commercial litigation.” *Our Public Policy Statement*, JURIDICA INVS. LTD., <http://www.juridicainvestments.com/about-juridica/our-public-policy-statement.aspx> (last visited Oct. 5, 2013).

101. Steinitz, *supra* note 39, at 482 (noting that “[c]lient or attorney communication with the financier . . . is necessary for the financier to monitor the litigation”). They, like venture capitalists, also stage investments and contract for future investments on a first right of refusal basis or make them contingent on meeting certain preset milestones. See, e.g., Gilson, *supra* note 88, at 1073.

102. In the funder agreement in the Chevron-Ecuador case, the contract states that the claim holders (1) “irrevocably instruct the Nominated Lawyers to keep the Funder fully and continually informed of all material developments . . . and to provide the Funder with copies of all material documents,” and (2) “instruct the Nominated Lawyers to provide the Funder all material documentation and material written advice provided by the Nominated Lawyers to the

funders create financial and case analysis documents and reports during the due diligence process and during the life of the case. Thus, there are at least three types of disclosures and communications of concern here: (1) confidential communications and documents shared with a funder before it contracts to provide funds; (2) the contract (and communications concerning the contract) between the funder and claim holder;¹⁰³ and (3) confidential communications and documents shared and created after a funder has provided funds. This Article focuses on one main question: Will the attorney-client privilege or work-product doctrine protect from disclosure confidential information shared with the funder and communications between the funder, lawyer, and claim holder *before* or *after* the execution of the funding agreement?¹⁰⁴

A. Attorney-Client Privilege in the Claim Funding Context

An apparent assumption is that the attorney-client privilege will not apply or will lose its protection if confidential information is shared between the lawyer, claim holder, and funder. Although only one court has upheld the waiver of the attorney-client privilege in the claim funding context,¹⁰⁵ scholarly articles, cases, and ethics opinions have included warnings that information shared with claim funders may lose its privileged status; however, these warnings are often given without detailed explanation or careful analysis of the doctrinal landscape.¹⁰⁶ Presumably, this assumption exists because the attorney-cl-

Claimants, to ‘respond to reasonable requests for material information from the Funder’ on an ongoing basis, and to inform the Funder of any form of discontinuance of the action.” Steinitz, *supra* note 39, at 474 (quoting Treca Agreement, *supra* note 60, at ¶¶ 5, 13.1(a)–(d) (alteration in original)).

103. The fact that there is a contract for claim funding is likely not protectable by either the attorney-client privilege or the work-product doctrine.

104. For an overview of the corporate attorney-client privilege doctrine and work-product doctrine, see generally Beardslee, *supra* note 20; Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN. ST. L. REV. 381 (2005).

105. *Leader Tech., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373 (D. Del. 2010) (holding that the common-interest exception did not apply and therefore the attorney-client privilege was waived); see also *infra* notes 175–181 and accompanying text (discussing this case and cases analyzing the common-interest doctrine in different contexts).

106. See, e.g., ABA WHITE PAPER, *supra* note 1, at 30 (“Such disclosures also clearly involve potential waivers of confidentiality and privilege that require the client’s consent.”); BEISNER ET AL., *supra* note 28, at 8 (claiming that privilege would be waived and that the common-interest doctrine would not apply, and noting that “[a]ttorneys advising a client at the outset of a case may be reluctant to provide the client full and candid advice in writing, knowing that any communications could be viewed by the funder as part of its diligence, and then would be available to the opposing party in discovery”); *id.* at 2 (predicting that claim funding “will require a relaxation of the rules governing attorney professional responsibility, compensation, and the attorney-

ent privilege applies only to confidential communications between a lawyer and a client for the primary purpose of attaining legal advice or services (as opposed to business purposes) and because the attorney-client privilege is waived when confidential information is shared with third parties.¹⁰⁷ Further, the attorney-client privilege is generally construed narrowly because the belief is that privileges undermine the truth-seeking process.¹⁰⁸ However, as discussed below, a blanket assumption that the attorney-client privilege does not apply (or will be waived) may be a mistake—especially in the active investor situation.¹⁰⁹ Further, commentators that have addressed the application of the privilege generally recognize the common-interest doctrine as the only possible exception to waiver despite the fact that there may be other avenues to secure attorney-client privilege protection.¹¹⁰

client privilege”); Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding—A Signaling Model*, 63 DEPAUL L. REV. 233, 238 n.20 (“The information that must be transmitted to the lending company often comes from the plaintiff’s attorney, which can lead to potential issues relating to the waiver of attorney-client privilege regarding anything shared with the third party.”); Steinitz, *supra* note 39, at 475 (stating without explanation that “the information sharing regime structured by the Agreement would potentially create a waiver of attorney-client privilege, work-product doctrine, and similar protections”); Steinitz, *supra* note 21, at 1324 (assuming that the attorney-client privilege is waived when the claim holder shares confidential information with the funder). *But see* Richmond, *supra* note 21, at 675–76 (“In any event, it is far from certain that an attorney’s disclosure of client confidences to a litigation funding company will waive the attorney-client privilege. Logic and fairness dictate that such disclosures retain their privileged status by virtue of the client’s and the funding company’s common interest in the litigation.”).

107. *See* Hickman v. Taylor, 329 U.S. 495, 508 (1947) (explaining that there is no expectation of confidentiality); Cavallaro v. United States, 284 F.3d 236, 246 (1st Cir. 2002); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000); 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (John T. McNaughton rev. ed., 1961).

108. Trammel v. United States, 445 U.S. 40, 50 (1980) (explaining that privilege doctrine is applied when it “has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth”); *see also* Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990); United States v. Nixon, 418 U.S. 683, 710 (1974); Valero Energy Corp. v. United States, 569 F.3d 626, 630 (7th Cir. 2009); United States v. BDO Seidman, LLP, 492 F.3d 806, 815 (7th Cir. 2007); Richmond, *supra* note 104, at 389 (“Courts narrowly construe the attorney-client privilege because it limits full disclosure of the truth.”).

109. Further, the application of the attorney-client privilege varies depending on the type of interaction that occurs between the attorney, client, and third party. *See generally* Edward J. Imwinkelried & Andrew Amoroso, *The Application of the Attorney-Client Privilege to Interactions Among Clients, Attorneys, and Experts in the Age of Consultants: The Need for a More Precise, Fundamental Analysis*, 48 HOUS. L. REV. 265, 273 (2011) (segregating attorney-client-expert interactions into (1) attorney discloses information to the expert, (2) expert provides advice and information to attorney, and (3) attorney provides advice to the client based in part on the communications with the expert). However, in any of these scenarios, if the communication is based on, discloses, or may lead to the disclosure of the confidential information then the attorney-client privilege would apply. *See infra* note 125. The question is whether or not that communication is then waived because of the presence of or sharing with the third party.

110. *See, e.g.*, ABA WHITE PAPER, *supra* note 1, at 34–35 (explaining that the only exceptions are the common-interest doctrine or that the person is actually a privileged person); *cf.* BEISNER

While it is true that the attorney-client privilege is waived when communications are shared with third parties, there are three possible exceptions.¹¹¹ Specifically, the privilege is not waived when the third party (1) is an agent of the attorney or client (often called the “agency exception”), (2) is the functional equivalent of an employee of the client, or (3) shares a common interest with the client (often called the “common-interest doctrine”). The following three subparts will analyze the applicability of these exceptions to a third-party claim funder.

1. *The Agency Exception*

In *United States v. Kovel*, the Second Circuit applied attorney-client privilege protection to communications between an attorney, client, and a third-party consultant accountant because “the complexities of modern existence prevent attorneys from effectively handling clients’ affairs without the help of others.”¹¹² The court reasoned that the attorney-client privilege should not be waived in those instances where the attorney, in order to provide more effective legal advice and services, needs help from a third-party consultant.¹¹³ Many federal courts have relied on *Kovel* to uphold attorney-client privilege protection for communications shared with various kinds of third parties, including paralegals, secretaries, law clerks, and nontestifying experts such as patent agents, economists, accountants, and public relations consultants.¹¹⁴

Many courts apply *Kovel*’s agency exception very narrowly, protecting communications with third parties only when those third parties

ET AL., *supra* note 28, at 8 & 13 n.23 (stating that “[i]f the plaintiff elects to provide the information to the financing company, any privilege protecting it likely would be waived” because the common-interest doctrine will not apply because it requires a common legal interest).

111. It is also possible that a funder, claim holder, and fee lawyer will agree that the funder will be a co-client. Silver, *supra* note 75, at 627 (“Nothing prevents a funder, a plaintiff, and a contingent fee lawyer from agreeing that the funder will be a co-client. They have the same freedom as insurers, policyholders, and defense lawyers to structure their relationship as they wish.”). If the Model Rules of Professional Conduct and state laws on maintenance and champerty do not prevent third-party funders from being co-clients with the original claim holder, this arrangement preserves the attorney-client privilege.

112. *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961).

113. *Id.* at 922.

114. See, e.g., *United States v. Schwimmer*, 892 F.2d 237, 243–44 (2d Cir. 1989) (accountants); *In re Grand Jury Proceedings*, 786 F.2d 3, 6 n.4 (1st Cir. 1986) (paralegals); *United States v. Alvarez*, 519 F.2d 1036, 1045–46 (3d Cir. 1975) (psychiatrists); *Young v. Taylor*, 466 F.2d 1329, 1332 (10th Cir. 1972) (secretaries and law clerks); *United States v. Cote*, 456 F.2d 142, 144–45 (8th Cir. 1972) (accountants); *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 161 (E.D.N.Y. 1994) (nontestifying experts and patent agents); *Golden Trade v. Lee Apparel Co.*, 143 F.R.D. 514, 518 (S.D.N.Y. 1992) (patent agents).

act as mere translators.¹¹⁵ That is, protection is only upheld when the third parties merely interpret information that the client already has (but cannot fully appreciate without the third parties' help).¹¹⁶ Under this approach, courts have commonly upheld privilege protection for paralegals, secretaries, and other ministerial assistants.¹¹⁷ Unsurprisingly, however, under this approach courts have held that the attorney-client privilege is waived when confidential communications are shared with outside consultants such as public relations consultants, accountants, and investment bankers.¹¹⁸

115. See, e.g., *United States v. Ackert*, 169 F.3d 136, 139–40 (2d Cir. 1999) (applying this narrow approach); *In re G-I Holdings Inc.*, 218 F.R.D. 428, 434 (D.N.J. 2003) (“The *Kovel* court thus carefully limited the attorney-client privilege between an accountant and a client to when the accountant functions as a ‘translator’ between the client and the attorney.”). Some courts claim to apply the narrow approach but then actually apply the broader approach. See, e.g., *Calvin Klein Trademark Trust v. Wachner*, 124 F. Supp. 2d 207, 209 (S.D.N.Y. 2000) (protecting documents shared with an external investment banker to help the attorney draft disclosure documents because the investment banker interpreted for the client and the law firm what a reasonable business person would consider “material” for disclosure purposes); *Schwimmer*, 892 F.2d at 243 (2d Cir. 1989) (applying a narrow approach and protecting communication with an accountant); *United States v. Judson*, 322 F.2d 460, 462 (9th Cir. 1963) (same); *United States v. Schmidt*, 360 F. Supp. 339, 346–48 (M.D. Pa. 1973) (same).

116. See, e.g., *FTC v. TRW, Inc.*, 628 F.2d 207, 209–12 (D.C. Cir. 1980) (explaining it would have extended *Kovel* to a research institute consultant hired to study “[a] company’s complex computerized credit reporting system” had the party shown the institute was hired to put the company’s computerized credit reporting system into a more understandable form for lawyers); *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1071 (N.D. Cal. 2002) (“*Kovel* did not intend to extend the privilege beyond the situation in which [a professional] was interpreting the client’s otherwise privileged communications or data to enable the attorney to understand those communications or that client data.”); Kathleen H. McDermott & Teena-Ann V. Sankoorikal, *Attorney-Client Privilege and Work-Product Doctrine: Potential Pitfalls of Disclosure to Public Relations Firms*, in *MANAGING COMPLEX LITIGATION 2008: LEGAL STRATEGIES AND BEST PRACTICES IN “HIGH-STAKES” CASES* 271, 281–82 (Richard W. Clary ed., 2008) (explaining both the functional equivalents and agency exceptions but claiming that the *Kovel* exception “has been viewed as a narrow ‘translator’ or ‘interpreter’ exception”).

117. *Kovel*, 296 F.2d at 921 (“[T]he privilege covers communications to non-lawyer employees with a menial or ministerial responsibility that involves relating communications to an attorney.” (internal quotation marks omitted)); see also *Dabney v. Inv. Corp. of Am.*, 82 F.R.D. 464, 465 (E.D. Pa. 1979) (“[P]rotected subordinates would include any law student, paralegal, [or] investigator”); Edward J. Imwinkelried, *The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection*, 68 WASH. U. L.Q. 19, 25 (1990) (“All courts and commentators agree that clerks and secretaries fall within the definition [of attorney’s agent].”).

118. See, e.g., *In re G-I Holdings Inc.*, 218 F.R.D. at 434 (“The *Kovel* court thus carefully limited the attorney-client privilege between an accountant and a client to when the accountant functions as a ‘translator’ between the client and the attorney.”); *ChevronTexaco Corp.*, 241 F. Supp. 2d at 1071; McDermott & Sankoorikal, *supra* note 116, at 281–82.

Although there is a trend towards the narrow approach,¹¹⁹ many courts adhere to a broader interpretation of *Kovel*.¹²⁰ Those courts have upheld attorney-client privilege protection of communications between lawyers, clients, and third-party consultants—including public relations consultants, tax consultants, investment bankers, and real estate consultants—because communications facilitated, or were necessary for, the provision of legal advice.¹²¹

119. See, e.g., *Black & Decker Corp. v. United States*, 219 F.R.D. 87, 90 (D. Md. 2003) (“Cases decided after *Kovel* have narrowly interpreted this concept of derivative privilege.”); *Comm’r of Revenue v. Comcast Corp.*, 901 N.E.2d 1185, 1198 & n.20 (Mass. 2009) (explaining that “[a] few courts have applied the *Kovel* doctrine with less rigidity,” but agreeing “with the majority of courts” that the *Kovel* doctrine only applies when the consultant acts as a translator); Kim J. Gruetzmacher, Comment, *Privileged Communications with Accountants: The Demise of United States v. Kovel*, 86 MARO. L. REV. 977, 978 (2003) (“Over the past four decades, courts have repeatedly narrowed the holding in *Kovel*. As a result, there is very little protection left for communications with accountants, and the little protection remaining is often confusing and unpredictable.”); cf. ABA WHITE PAPER, *supra* note 1, at 33 (“Experts retained by the lawyer to facilitate the representation, such as accountants and economists, may be considered privileged persons if they facilitate the client-lawyer communication—in effect acting as translators of technical material.”).

120. Arguing this exception should exist and which interpretation is the better one is outside the scope of this Article. For a thorough analysis of the two approaches, see generally Beardslee, *supra* note 20 (arguing that the broad approach has been interpreted too broadly and that the narrow approach has been interpreted too narrowly). Cf. Imwinkelried, *supra* note 117 (analyzing attorney-client privilege and work-product protection in the context of litigation and non-testifying experts); Imwinkelried & Amoroso, *supra* note 109 (arguing that the attorney-client privilege should not apply to interactions between clients, attorneys, and expert consultants, and that “necessity” cannot be the right test); *id.* at 311 (contending that “[t]he application of the legal privilege to external consultants permits the client to suppress any unfavorable opinions and consequently encourages the client to “shop” for a favorable opinion. Worse still, this broad view of the privilege enables wealthy clients to monopolize the leading experts.”). For an argument that the corporate attorney-client privilege should grow with the scope of legal practice and should apply to nonlegal attorney communications that are intertwined with communications made to attain legal advice, see generally Gregory C. Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 GEO. J. LEGAL ETHICS 201 (2010).

121. See, e.g., *United States v. Alvarez*, 519 F.2d 1036, 1045–46 (3d Cir. 1975); *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972) (protecting communications with accountant because accountant was “a necessary aid to the rendering of effective legal services to the [noncorporate] client”); *Smithkline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 476–77 (E.D. Pa. 2005) (applying protection to jury consultant expert); *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, No. 02-Civ-7955 (DLC), 2003 U.S. Dist. LEXIS 14586, at *9–10 (S.D.N.Y. Aug. 25, 2003); *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003) (protecting communications with external PR consultants because attorneys “were not skilled at public relations” and “need[ed] outside help” to provide legal advice, and the consultants “ha[d] a close nexus to the attorney’s role in advocating the client’s cause before a court or other decision-making body” (first alteration in original)); *Byrnes v. Empire Blue Cross Blue Shield*, No. 98-Civ-8520 (BSJ) (MHD), 1999 WL 1006312, at *1 (S.D.N.Y. Nov. 4, 1999); *H.W. Carter & Sons, Inc. v. William Carter Co.*, No. 95-Civ-1274 (DC), 1995 U.S. Dist. LEXIS 6578, at *6–8 (S.D.N.Y. May 16, 1995) (privileging all communications between a PR consultant, attorney, and client in a discovery suit related to trademark litigation and sale of branded watch); *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 161 (E.D.N.Y. 1994); *Golden Trade v. Lee Apparel Co.*, 143 F.R.D. 514, 518–19 (S.D.N.Y. 1992) (protecting communications with patent

For example, in *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, the Southern District of New York addressed the question of whether the attorney-client privilege extends to communications between a prospective criminal defendant, her lawyers, and public relations executives hired by the lawyers in an effort to avoid an indictment.¹²² This high-profile case received a great deal of press about the investigation and the target of the investigation. The public relations firm was hired to “neutralize the environment in a way that would enable prosecutors and regulators to make their decisions and exercise their discretion without undue influence from the negative press coverage.”¹²³ The public relations firm communicated with the target and her lawyers together and separately about defense strategies and other issues in controversy.¹²⁴ The court began its analysis by explaining that the attorney-client privilege protects communications both from client to attorney and from attorney to client.¹²⁵ The court then turned to the

agents); *Willemijn Houdstermaatschaap BV v. Apollo Computer, Inc.*, 707 F. Supp 1429, 1446 (D. Del. 1989); *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 202 (E.D.N.Y. 1988); *Eglin Fed. Credit Union v. Cantor, Fitzgerald Sec. Corp.*, 91 F.R.D. 414, 418 (N.D. Ga. 1981) (“If the accountant is consulted in connection with the client’s obtaining legal advice, the privilege extends to cover confidential documents in the accountant’s possession. If the documents were turned over to the accountant for reasons totally unrelated to seeking legal advice, the accountant is viewed as an unrelated third party and the attorney-client privilege as to these formerly confidential documents is waived.” (internal citation omitted) (citing *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973); *Kovel*, 296 F.2d at 922)); *In re Tri-State Outdoor Media Grp., Inc.*, 283 B.R. 358, 362–63 (Bankr. M.D. Ga. 2002) (determining that communications with financial bankruptcy advisor should be protected but ultimately concluding that the attorney-client privilege was waived for other reasons); see also *infra* note 268 and accompanying text.

122. See, e.g., *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d at 322 (also addressing the work-product doctrine).

123. *Id.* at 323.

124. *Id.* at 324.

125. *Id.* Generally, communications from attorney to client are covered when they constitute legal advice or are based on or might disclose or lead to the disclosure of client confidences. *United States v. Neal*, 27 F.3d 1035, 1048 (5th Cir. 1994); see also *United States v. Defazio*, 899 F.2d 626, 635 (7th Cir. 1990) (privileging communication from attorney to client as long as it is legal advice or directly or indirectly reveals confidential information); *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) (“[A]dvice prompted by the client’s disclosures may be further and inseparably informed by other knowledge and encounters. . . . [T]he privilege cloaks a communication from attorney to client based, *in part at least*, upon a confidential communication [to the lawyer] from [the client].” (alteration in original) (quoting *Brinton v. Dep’t of State*, 636 F.2d 600, 604 (D.C. Cir. 1980) (internal quotation marks omitted)); *United States v. Ramirez*, 608 F.2d 1261, 1268 n.12 (9th Cir. 1979); *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1069 (N.D. Cal. 2002) (“[I]t is widely accepted that the privilege encompasses not only (qualifying) communications *from the client* to her attorney but also communications *from the attorney* to her client in the course of providing legal advice.”). There is, however, some debate over this. See *Imwinkelried & Amoroso*, *supra* note 109, at 268–69. Some courts require that confidential information actually be disclosed in order to protect the communications. See, e.g., *United States v. Silverman*, 430 F.2d 106, 122 (2d Cir. 1970) (“[A] communication from an attor-

Kovel agency exception and explained that in this case the lawyers “need[ed] outside help, as they were presumably not skilled at public relations.”¹²⁶ It explained that the key inquiry was whether the attorneys needed this help as it related to the provision of legal advice.¹²⁷ Evidently, in this case, there was immense public pressure on the regulators to prosecute the target.¹²⁸ The attorneys sought the help of PR consultants to neutralize public opinion so as to ease the pressure on the regulators to prosecute.¹²⁹ The court believed that the “ultimate issue” was whether the attorneys’ actions to seek help from PR consultants were sufficiently important enough to the provision of legal services so as to justify application of the privilege.¹³⁰

In analyzing this question, the court pointed out that the role of attorneys has broadened and now includes duties beyond the courtroom.¹³¹ It explained that “in some circumstances, the advocacy of a client’s case in the public forum will be important to the client’s ability to achieve a fair and just result in pending or threatened litigation” and that such advocacy cannot “prudently be conducted in disregard of its potential legal ramifications.”¹³² The court held that the *Kovel* agency exception to waiver applied because the “ability of lawyers to perform some of their most fundamental client functions . . . would be undermined seriously if lawyers were not able to engage in frank dis-

ney is . . . privileged . . . [if] it has the effect of revealing a confidential communication from the client to the attorney.”). For a review of federal cases privileging communications from lawyer to client, see *Thurmond v. Compaq Computer Corp.*, 198 F.R.D. 475, 480–82 (E.D. Tex. 2000).

126. *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d at 326 (alteration in original) (internal quotation marks omitted).

127. *Id.* (explaining that “[t]he government in any case concedes that consultants engaged by lawyers to advise them on matters such as whether the state of public opinion in a community makes a change of venue desirable, whether jurors from particular backgrounds are likely to be disposed favorably to the client, how a client should behave while testifying in order to impress jurors favorably and other matters routinely the stuff of jury and personal communication consultants come within the attorney-client privilege, as they have a close nexus to the attorney’s role in advocating the client’s cause before a court or other decision-making body”).

128. *Id.*

129. *Id.*

130. *Id.* at 329 (characterizing the issue as “whether a lawyer’s public advocacy on behalf of the client is a professional legal service that warrants extension of the privilege to confidential communications between and among the client, the lawyer, and any public relations consultant the lawyer may engage to advise on the performance of that function”).

131. *Id.* (“An attorney’s duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. . . . A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.” (quoting *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1043 (1991) (plurality opinion))).

132. *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d at 330.

cussions of facts and strategies with the lawyers' public relations consultants."¹³³

In another case, the Eighth Circuit held that the attorney-client privilege extended to a memo created by an accountant at the attorney's request.¹³⁴ In that case, the parties were told that their tax returns were being examined.¹³⁵ Their attorney hired an accountant to carry out an audit.¹³⁶ After reviewing the audit, the attorney advised the clients to file amended returns for the years in question.¹³⁷ The IRS attempted to summon the accountant's papers, but the client refused to produce them. The district court held that the papers had to be produced because the work was not performed under the "direct control" of the attorney and was not "prepared to assist counsel in giving legal advice."¹³⁸ The Eighth Circuit disagreed, finding that the privilege should attach because the accountant's work aided the lawyer in providing legal advice and "was an integral part of it."¹³⁹ The court explained that the test is "whether the accountant's services are a necessary aid to the rendering of effective legal services to the client."¹⁴⁰

As shown by these examples, these courts hold that privilege protects both the confidential information shared with the third party and the communications between the third party and the attorney or claim holder because the attorney needs the information from the third party in order to provide effective legal advice to the client.¹⁴¹ For

133. *Id.*; cf. *H.W. Carter & Sons, Inc. v. William Carter Co.*, No. 95-Civ.-1274 (DC), 1995 WL 301351, at *3 (S.D.N.Y. May 16, 1995) (holding that the attorney-client privilege was not waived by the presence of a public relations consultant at a meeting between the defendant and its counsel because the consultant "participated to assist the lawyers in rendering legal advice, which included how defendant should respond to plaintiff's lawsuit"). Note that courts have held that "the attorney-client privilege does not require an attorney to have either authored or received the document at issue in order to maintain the privilege." *High Point SARL v. Sprint Nextel Corp.*, No. 09-2269-CM-DJW, 2012 WL 234024, at *13 (D. Kan. Jan. 25, 2012); cf. *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d at 331 (explaining that the attorney-client privilege also protected communications between the firm and the target even when the lawyers were not present as long as the communications were for the purpose of giving or obtaining legal advice).

134. *United States v. Cote*, 456 F.2d 142, 144-45 (8th Cir. 1972) (concluding after application of the privilege, however, that it had been waived by the disclosure of the protected information to the IRS).

135. *Id.* at 143.

136. *Id.*

137. *Id.*

138. *Id.* at 144.

139. *Id.* (explaining that "the taxpayers did not consult Murphy for accounting advice. His decision as to whether the taxpayers should file an amended return undoubtedly involved legal considerations which mathematical calculations alone would not provide.").

140. *Cote*, 456 F.2d at 144.

141. See *supra* note 121.

claim holders, therefore, there is an argument that the lawyer communicated with the funder in order to secure funding but also to assess the viability of the case and determine how it should proceed—e.g., to move forward or settle. Indeed, in some situations, the lawyer and claim holder may communicate with the funder because without the funder's investment, the case cannot proceed—or, if it could, it would proceed in a very different way. Further, there is value in the analysis that funders provide. Sometimes, funders spend up to three months scrubbing and analyzing cases, and this process is not just a matter of running financials.¹⁴² The funders are assessing the merits of the case, the credibility of the witnesses, and the value of the evidence. Plus, they have top notch experienced lawyers and multidisciplinary professionals on their teams.¹⁴³ That these external claim funders are often ex-lawyers with vast litigation experience also supports this argument.¹⁴⁴ Thus, their assessment could prove invaluable to the lawyers and clients regardless of whether funding is ultimately extended to finance the case.¹⁴⁵ The argument would be that the funders helped the lawyer provide legal advice to the client as to whether to file the claim, proceed with trial, settle the case, or counteroffer at a certain level.

This argument could be made in the passive context, but it has more sway in the active context considering that the relationship is expected to be one of consultation and not merely financing. From the beginning, a passive funder is considered to be a more hands-off credit line. This is not the case with an active funder. The active funder sells not merely its capital but also its consultancy expertise. For example, BlackRobe Capital Partners, LLC, a former claim funding company, claimed to offer public relations consulting along with other “strategic political services.”¹⁴⁶ A claim holder and lawyer that communicated with a funder could make an argument similar to the one made by the defense attorneys in the case described above.¹⁴⁷ This is especially true after the contract with the claim funder has been made and if the contract states that it is also for the nonlegal but litigation-related ser-

142. See *supra* note 31.

143. See *supra* note 31.

144. See *supra* note 79.

145. See *supra* notes 92 and accompanying text (discussing the noncash benefits); see also DeStefano, *supra* note 1, at 2828–33 (discussing the potential noncash value add of litigation funders). Some believe that the mere existence of a litigation finance contract signals the strength of the merits. See Avraham & Wickelgren, *supra* note 106, at 235 (arguing that litigation finance contracts should be admissible in court).

146. *BlackRobe Overview*, *supra* note 92.

147. Cf. *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003).

vices the funder can provide. However, this is not a slam-dunk argument by any means. First, this argument will likely only hold sway with those courts that apply a broad interpretation of *Kovel*. It would be very hard to argue that the narrow exception to waiver could apply. Albeit, one could argue that financial modeling documents created by the funder enable lawyers to understand aspects of clients' businesses and cases that could otherwise not be understood—in this sense, the funder could be acting as a “translator.”¹⁴⁸ However, this argument likely would not be successful because a key component of the application of the narrow interpretation of *Kovel* is that the third party does not add any new information in the translation.¹⁴⁹

Second, the privilege doctrine makes clear that the primary purpose of the communication must be to facilitate legal advice as opposed to determining whether the funder should provide capital or other business advice.¹⁵⁰ Although communications that mix business and law can be protected,¹⁵¹ in this context (like in the context of in-house

148. *But see, e.g.*, *United States v. Ackert*, 169 F.3d 136, 139–40 (2d Cir. 1999) (denying privilege because the investment banker did not merely translate client communications, nor did he enable counsel to understand aspects of the client's own communications that could not otherwise be appreciated).

149. *See, e.g.*, *Blumenthal v. Drudge*, 186 F.R.D. 236, 243 (D.D.C. 1999) (denying protection because litigation consultant “was retained for the value of his own advice, not to assist the defendant's attorneys in providing their legal advice”); *Occidental Chem. Corp. v. OHM Remediation Servs. Corp.*, 175 F.R.D. 431, 437 (W.D.N.Y. 1997) (rejecting application of privilege to engineering consultants in part because consultants relied on information not obtained from client); *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 162 (E.D.N.Y. 1994); *see also supra* notes 115–118 and accompanying text. However, it is likely impossible for any third-party consultant to merely translate information into a more understandable form without adding any of her own knowledge or expertise into that translation. *See Imwinkelried, supra* note 117, at 36–37 (explaining that experts “add[] an important increment of [their own] knowledge to evaluate the client's communications and other case-specific information” and that “[t]he expert creates new information and thereby becomes an independent source of information about the case” (footnote omitted) (internal quotation marks omitted)); *see also* Beardslee, *supra* note 20, at 761–62.

150. *Zenith Radio Corp. v. Radio Corp. of Am.*, 121 F. Supp. 792, 794 (D. Del. 1954) (“When he acts as an advisor, the attorney must give predominantly legal advice to retain his client's privilege of nondisclosure, not solely, or even largely, business advice.”); *see also* *High Point SARL v. Sprint Nextel Corp.*, No. 09-2269-CM-DJW, 2012 WL 234024, at *11 (D. Kan. Jan. 25, 2012) (“[L]egal advice must predominate for the communication to be protected. The privilege does not apply where the legal advice is merely incidental to business advice.”); *New Jersey v. Sprint Corp.*, 258 F.R.D. 421, 444 (D. Kan. 2009); *Waye, supra* note 21, at 248 n.105. Of course, the line between what is business versus legal advice is blurry at best. *See* Michele DeStefano Beardslee, *Taking the Business Out of Work Product*, 79 *FORDHAM L. REV.* 1869, 1874–81 (2011) (discussing the “illusive distinction between business and law”); *see also infra* note 241 and accompanying text.

151. *See, e.g.*, *McCaugherty v. Siffermann*, 132 F.R.D. 234, 240 (N.D. Cal. 1990); *United States v. Int'l Bus. Machs. Corp.*, 66 F.R.D. 206, 212 (S.D.N.Y. 1974); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950) (“[T]he privilege of nondisclosure is not lost

counsel¹⁵²) proving that primary purpose will be very contentious. It will be very hard to prove that documents shared with the funder were prepared and shared in order to secure legal advice and not to further a business transaction.¹⁵³ This is especially true to those courts that interpret *Kovel's* use of the word “necessary” more narrowly.¹⁵⁴ Indeed, the mere involvement of a nonlawyer may signal to the court that the purpose of the communication was not for predominantly legal purposes but instead for business advice.¹⁵⁵

Third, as I have argued in a different article, commentators’ and judges’ stances on how this exception should be applied may mirror their view of the proper role of the corporate attorney and what should be included in the provision of legal advice.¹⁵⁶ Courts appear to be more willing to interpret the attorney-client privilege as not waived if they have a broader view of the role of the corporate attorney¹⁵⁷—that is, if they share a view similar to the court’s in *In re County of Erie*:

The complete lawyer may well promote and reinforce the legal advice given, weigh it, and lay out its ramifications by explaining: how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collat-

merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.”).

152. See Beardslee, *supra* note 20, at 752 (explaining that it is exceptionally difficult for in-house attorneys to prove that a communication was primarily for the purpose of legal versus business advice because they usually play more than one role in the corporations in which they work).

153. *Miller UK Ltd. v. Caterpillar, Inc.*, No. 10 C 3770, 2014 WL 67340, at *12 (N.D. Ill. Jan. 6, 2014). In *Miller*, the court reluctantly found that the original materials provided to the lawyers for further submission to prospective funders were protected by the attorney-client privilege. *Id.* at 12. The court pointed out that the other side had the better argument, but proceeded to the waiver analysis nonetheless. *Id.* Ultimately the court found that the attorney-client privilege was waived when these documents were shared with the claim funders and that the common-interest exception did not apply to prevent waiver. *Id.* at 12–17.

154. For example, some courts define necessary by noting that “[t]he available case law indicates that the ‘necessity’ element means more than just useful and convenient, but rather requires that the involvement of the third party be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications.” *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, No. 08-Civ.-7508 (SAS), 2011 WL 4716334, at *3 (S.D.N.Y. Oct. 3, 2011) (quoting *Nat’l Educ. Training Grp., Inc. v. Skillsoft Corp.*, No. M8-85 (WHP), 1999 WL 378337, at *4 (S.D.N.Y. June 10, 1999) (internal quotation marks omitted). Thus, where the third party’s presence is merely “useful” but not “necessary,” the privilege is lost.

155. See Beardslee, *supra* note 20, at 753 (explaining that the involvement of an external third-party nonlawyer “adds another layer of complexity” to making the legal-versus-business distinction).

156. Beardslee, *supra* note 150, at 1889–90.

157. *Id.* at 1189–90, 1909–22.

eral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances. So long as the predominant purpose of the communication is legal advice, these considerations and caveats are not other than legal advice or severable from it.¹⁵⁸

Those that have a narrower view of the corporate attorney's role and the importance of mixing business with legal advice are less apt to believe that the broader interpretation of this exception should be adopted. Even when a judge acknowledges that "[a]ttorneys frequently give to their clients business or other advice,"¹⁵⁹ she decides that "[w]hen an attorney is consulted in a capacity other than as a lawyer, as (for example) a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged."¹⁶⁰ To that end, some courts decide waiver-exception questions based on the type of consultancy the third party provides.¹⁶¹ Indeed, some scholars recommend that only certain types of consultants should be able to garner the *Kovel* agency exception to waiver.¹⁶² Given the distaste that many courts have for claim funding in general,¹⁶³ a court might decide that these services are not special enough to justify extending the privilege. In sum, it appears that in some circumstances there may be an argument for the agency exception to cover two of the three types of communications in question.

158. *In re Cnty. of Erie*, 473 F.3d 413, 420 (2d Cir. 2007).

159. *Colton v. United States*, 306 F.2d 633, 638 (2d Cir. 1962).

160. *In re Cnty. of Erie*, 473 F.3d at 421 (citing *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998)).

161. Beardslee, *supra* note 20, at 754; *see also, e.g.*, *Haugh v. Schroder Inv. Mgmt. N. Am., Inc.*, No. 02-Civ-7955 (DLC), 2003 U.S. Dist. LEXIS 14586, at *7-9 (S.D.N.Y. Aug. 25, 2003) (indicating that if the PR consultant only provided standard public relations services then the exception would not apply); *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 329 (S.D.N.Y. 2003) (applying the *Kovel* exception to communications with PR firm and distinguishing a case denying privilege to communications with a PR consultant because in that case the PR firm provided ordinary PR advice).

162. *See, e.g.*, Steven B. Hantler et al., *Extending the Privilege to Litigation Communications Specialists in the Age of Trial by Media*, 13 COMM'LAW CONSPECTUS 7, 9 (2004) (claiming that the privilege should only cover litigation communication specialists and highlighting the skills and tasks that make these specialists "experts" compared to regular PR consultants); Ann M. Murphy, *Spin Control and the High-Profile Client—Should the Attorney-Client Privilege Extend to Communications with Public Relations Consultants?*, 55 SYRACUSE L. REV. 545, 590-91 (2005) (contending that the attorney-client privilege should not apply to communications with PR consultants); Gruetzmacher, *supra* note 119, at 994 (discussing the importance of attorneys having confidential communications with accountants in order to provide competent legal advice to clients). *See generally* Richmond, *supra* note 104 (attempting to demonstrate how the narrow construction of the attorney-client privilege impedes the provision of legal assistance).

163. *See infra* notes 341-345 and accompanying text.

2. *The Functional Equivalent Exception*

In *Upjohn Co. v. United States*, the Supreme Court provided broad protection to lawyer communications with corporate employees, reasoning that lawyers need to be able to talk openly with corporate employees in order to do their job effectively.¹⁶⁴ *Upjohn* has been applied to protect communications with third-party consultants who act as “functional equivalents” of employees of the corporation. The narrow interpretation of the functional equivalency would likely bar application to active or passive third-party investors. This is because in determining whether the functional equivalent exception applies, courts taking the narrow approach

look to whether the consultant had primary responsibility for a key corporate job, [] whether there was a continuous and close working relationship between the consultant and the company’s principals on matters critical to the company’s position in litigation, [] and whether the consultant is likely to possess information possessed by no one else at the company.¹⁶⁵

However, some courts apply the functional equivalent test in the same manner they would apply a weak common-interest test, requiring merely that the third party had information or advice that was important for the attorney to be able to provide legal advice or services.¹⁶⁶ Indeed, in one extreme case, the court applied the functional equivalent exception to protect communications between the client and a litigation consultant who was a former employee of the opposing party specifically hired to provide information.¹⁶⁷

Although this exception would only be available in rare instances, one might be able to argue that the client hired the third-party investor and that the investor (depending on the nature of the relationship and day-to-day dealings with the client) is a functional equivalent of the client. Consider, for example, the first hypothetical described in Part II. In that scenario, presumably Tiny Co. has few employees, let

164. *Upjohn Co. v. United States*, 449 U.S. 383, 390–94 (1981); see also Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1726 (2005) (“[T]he Supreme Court [in *Upjohn*] has endorsed broad protection of the corporate privilege”); Bufkin Alyse King, Comment, *Preserving the Attorney-Client Privilege in the Corporate Environment*, 53 ALA. L. REV. 621, 632 (2002); Brian E. Hamilton, Note, *Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege*, 1997 ANN. SURV. AM. L. 629, 632–33.

165. *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, No. 08-Civ.-7508 (SAS), 2011 WL 4716334, at *3 (S.D.N.Y. Oct. 3, 2011) (alterations in original) (quoting *Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper, Ltd.*, 232 F.R.D. 103, 113 (S.D.N.Y. 2005)).

166. See, e.g., *In re Bieter Co.*, 16 F.3d 929, 938–39 (8th Cir. 1994); *Twentieth Century Fox Film Corp. v. Marvel Enters.*, No. 01-Civ.-3016 (AGS), 2002 WL 31556383, at *2 (S.D.N.Y. Nov. 15, 2002).

167. *Baxter Travenol Labs., Inc. v. Lemay*, 89 F.R.D. 410 (S.D. Ohio 1981).

alone an internal legal department. Tiny Co. realizes that the incentives between its company and outside law firms are not aligned because it wants to minimize costs and law firms want to make money. Tiny Co. wants more control of litigation but it does not have the legal expertise or manpower to assert control. Then Tiny Co. hires the claim funder not only to fund the claim but to play this role and to manage the claim. That is, the company hires the claim funder to actively manage the claim (including leading internal investigations, hiring outside counsel, etc.) and to provide consultation of different types to Tiny Co. as the case proceeds. In that scenario, the claim funder would have information (like an internal employee would) that is important to litigating the case and determining litigation strategy.¹⁶⁸ As such, there might be an argument (albeit a weak one) that the claim funder is the functional equivalent to a client employee and that the attorney-client privilege should not be considered waived.¹⁶⁹

The functional equivalent exception is a far less viable option for privilege protection than the agency exception. However, the point is that there should not be a black box assumption that the attorney-client privilege will not apply to communications between claim funders, lawyers, and claim holders.

3. *The Common-Interest Exception*

Last, there is the argument that the investor and the client share a common interest and therefore the attorney-client privilege is not waived.¹⁷⁰ To be clear, the common-interest exception is not a separate doctrine that protects communications. As courts have pointed out, “in order for the common interest doctrine to apply to a communication, the attorney-client privilege must exist first.”¹⁷¹ Instead, it is

168. Cf. Imwinkelried & Amoroso, *supra* note 109, at 298–99 (“[T]he dispositive question is which natural person meaningfully associated with the corporation possesses the information that the corporate counsel requires. In the age of outsourcing, sometimes that person will not be a formal employee on the payroll. Occasionally, it will be an independent contractor who is not technically an employee.” (footnotes omitted)).

169. For a detailed description and analysis of the functional equivalent exception to waiver of the attorney-client privilege, see generally Beardslee, *supra* note 20. Suffice it to say here, however, that some circuits have adopted the functional equivalent test, wherein “communications between a company’s lawyers and its independent contractor merit protection if, by virtue of assuming the functions and duties of full-time employee, the contractor is a *de facto* employee of the company.” *Abu Dhabi Commercial Bank*, 2011 WL 4716334, at *2 (quoting *Exp.-Imp. Bank of the U.S.*, 232 F.R.D. at 113) (explaining that the Eighth Circuit has adopted this stance).

170. This is also an argument made to preclude waiver in the context of the work-product doctrine. See *infra* notes 271–303 and accompanying text.

171. *Sokol v. Wyeth, Inc.*, No. 07-Civ.-8442 (SHS) (KNF), 2008 WL 3166662, at *9 (S.D.N.Y. Aug. 4, 2008); see also *High Point SARL v. Sprint Nextel Corp.*, No. 09-2269-CM-DJW, 2012 WL 234024, at *5 (D. Kan. Jan. 25, 2012) (“Rather than being a separate privilege, this doctrine is an

an exception to the general principal that communications with non-privileged parties waive the privilege.¹⁷² Essentially, this exception protects from disclosure confidential communications between multiple parties that share a common interest in the matter.¹⁷³ Courts are quick to point out that an essential component of this exception is that the participants have a reasonable expectation that information disclosed would be confidential between them.¹⁷⁴

The main question is: What is a common interest? Currently, this area of law is very unsettled.¹⁷⁵ There have been only four cases that have addressed the common-interest doctrine in the claim funding context—which have not made consistent findings—and only one analyzed the doctrine at any length.¹⁷⁶

In general, when considering the doctrine, many courts require that the parties have a common *legal*, rather than commercial, interest¹⁷⁷ and that “the disclosures are made in the course of formulating a common legal strategy.”¹⁷⁸ For example, in *Leader Technologies, Inc. v.*

exception to the general rule that the attorney-client privilege is waived following disclosure of privileged materials to a third party.”). This is also true in the work-product doctrine context. *See id.* at *10; *see also* *Marciano v. Atl. Med. Specialties, Inc.*, No. 08-CV-305-JTC, 2011 WL 294487, at *3 (W.D.N.Y. Jan. 27, 2011) (“The common interest doctrine does not provide an independent source of protection from disclosure; it is inapplicable to documents not otherwise protected by the attorney-client privilege or work product doctrine.”).

172. *See* *Union Carbide Corp. v. Dow Chem. Co.*, 619 F. Supp. 1036, 1047 (D. Del. 1985); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(1) (2000).

173. *See* *Union Carbide Corp.*, 619 F. Supp. at 1047. The common-interest doctrine is not limited to joint defendants or even formal parties. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 cmt. b.

174. *See, e.g., High Point SARM*, 2012 WL 234024, at *6; *In re CV Therapeutics, Inc. Sec. Litig.*, No. C-03-3709 SI(EMC), 2006 WL 1699536, at *5, *7 (N.D. Cal. June 16, 2006); *OXY Res. Cal. LLC v. Superior Court*, 9 Cal. Rptr. 3d 621, 636–37 (Ct. App. 2004); *see also* *Richmond*, *supra* note 104, at 423–24.

175. *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010) (admitting that the area of law is unsettled but deciding to adhere to three prior opinions standing for the proposition that the common-interest doctrine does not apply when the party’s interest in litigation is commercial, like that of an investor); *see also* *In re State Comm’n of Investigation Subpoena No. 5441*, 544 A.2d 893, 896 (N.J. Super. Ct. App. Div. 1988); *LaPorta v. Gloucester Cnty. Bd. of Chosen Freeholders*, 774 A.2d 545, 549 (N.J. Super. Ct. App. Div. 2001) (explaining that “[t]he boundaries of the common interest exception are not perfectly defined” in either the attorney-client or work-product contexts).

176. *See* *Leader Techs., Inc.*, 719 F. Supp. 2d 373; Memorandum Order ¶¶ 3–4, *Walker Digital, LLC v. Google Inc.*, No. 11-309-SLR (D. Del. Feb. 12, 2013), *available at* http://scholar.google.com/scholar_case?case=15350591429862704883&hl=en&as_sdt=6&as_vis=1&oi=scholar; *Devon It, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012) (order granting motion for protective order and to quash third-party subpoenas); *Miller UK Ltd. v. Caterpillar, Inc.*, No. 10 C 3770, 2014 WL 67340 (N.D. Ill. Jan. 6, 2014); *see also supra* note 11 (describing holdings); *LaPorta*, 774 A.2d at 549.

177. *See, e.g., In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996).

178. *Sokol v. Wyeth, Inc.*, No. 07-Civ.-8442 (SHS)(KNF), 2008 WL 3166662, at *5, *8 (S.D.N.Y. Aug. 4, 2008) (denying attorney-client privilege protection and explaining that the

Facebook, Inc., one of the four cases to specifically address the common-interest doctrine as it relates to claim funding, the court, despite remarking on the “need for litigation financing companies and the truth-seeking function of litigation,” found that a litigation financier did not share a common interest with the patentee claim holder simply because the two shared an interest in financing the litigation.¹⁷⁹ The court suggested that the correct test to determine whether a common interest exists is whether “the disclosures would not have been made but for the sake of securing, advancing, or supplying legal representation.”¹⁸⁰ Further, like other courts in other contexts, the court in *Leader Technologies* explained that for a communication to be protected, the interests must be “identical, not similar, and be legal, not solely commercial.”¹⁸¹

Courts of this view place emphasis on whether both parties are “directly involved in the claims against the defendants.”¹⁸² For example, in *Grochocinski v. Mayer Brown Roes & Maw LLP*, the court distin-

common-interest exception did not apply because “Sokol’s counsel engaged Livingston as a ‘consultant,’ who will provide ‘technical expertise,’ demonstrat[ing] that the purpose of the engagement was to assist Sokol’s counsel with rendering legal advice to Sokol, not to formulate legal strategy that would be common to Sokol and Livingston in their respective litigations, which would further their common enterprise”); *accord* *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995); *Miller UK*, 2014 WL 67340, at *12–14 (holding that the common-interest exception was not applicable because the common interest must be legal, and explaining that “there was no legal planning with third-party funders to insure [sic] compliance with the law. . . . [Claim holder] was looking for money from prospective funders, not legal advice or litigation strategies” and the funders “were interested in profit”).

179. *Leader Techs. Inc.*, 719 F. Supp. 2d at 376–77 (compelling disclosure of documents shared with claim funding companies during discussions about potential financing). One court, in analyzing whether there is First Amendment protection against disclosing the source of claim funding in the commercial context wherein there are allegations that funding was made for anticompetitive reasons, indicated that it believed that the funder and the claim holder do not share the same goals that an attorney and client share. *Conlon v. Rosa*, Nos. 295907, 295932, 2004 WL 1627337, at *2 n.6 (Mass. Land Ct. July 21, 2004) (“These types of concerns do not exist in contingency cases, where the attorney and client share the same goals and ethical safeguards exist, nor when defendants are funded by third parties, where the goals are defensive.”).

180. *Leader Techs., Inc.*, 719 F. Supp. 2d at 376 (quoting *In re Regents of Univ. of Cal.*, 101 F.3d at 1389).

181. *Id.* (quoting *In re Regents of Univ. of Cal.*, 101 F.3d at 1389); *accord* *High Point SARL v. Sprint Nextel Corp.*, No. 09-2269-CM-DJW, 2012 WL 234024, at *7 (D. Kan. Jan. 25, 2012) (“[F]or the common interest doctrine to attach, most courts . . . insist that the two parties have in common an interest in securing legal advice related to the same matter and that the communications be made to advance their shared interest in securing legal advice on that common matter. The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial.” (alteration in original) (quoting *Sawyer v. Sw. Airlines*, Nos. Civ.A.01-2385-KHV, Civ.A.01-2386-KHV, 2002 WL 31928442, at *3 (D. Kan. Dec. 23, 2002))); *Corning, Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189, 190 (D. Del. 2004); *Katz v. AT&T Corp.*, 191 F.R.D. 433, 437 (E.D. Pa. 2000); *see also In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982); *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 580 (N.D. Cal. 2007).

182. *Grochocinski v. Mayer Brown Rowe & Maw LLP*, 251 F.R.D. 316, 327 (N.D. Ill. 2008).

guished another case wherein the common-interest doctrine was held to apply based on the fact that the creditor (as opposed to the claim holder) had pursued claims on behalf of the claim holder.¹⁸³ In the case before the court, however, the claim holder (as opposed to the creditor) brought the claim—as is the case in claim funding (except in the acquired context). The claim holder is still the plaintiff and brings the claim. Further, the court noted that the attorney did not represent both the claim holder and the creditor—as is the case in claim funding (except in the acquired context). The attorney does not represent both the claim holder and the funder. In denying the applicability of the common-interest exception, the court explained that “[i]f the Court adopts Plaintiffs’ assertion, that the common-interest doctrine applies whenever one has a financial interest in the outcome of a case, then the doctrine would apply to privileged documents disclosed by a trustee to any bankruptcy creditor.”¹⁸⁴ Thus, courts holding this view find that there is no common legal interest in the claims if the nonrepresented party merely wants to win in the litigation to recoup its investment.¹⁸⁵ Under this interpretation of the common-interest doctrine, a court would be hard pressed to find a common interest between a funder and claim holder.

However, some courts do not require such a stringent connection. Instead, they require that the “third party and the privilege holder are engaged in some type of common enterprise and [that] the legal ad-

183. *Id.* (distinguishing *Dexia Credit Local v. Rogan (Dexia IV)*, 231 F.R.D. 287 (N.D. Ill. 2005)). In *Dexia*, the creditor and claim holder had a funding agreement stipulating that the creditor would retain 85% of the recovery on the claims. *Dexia Credit Local v. Rogan (Dexia II)*, 231 F.R.D. 261, 271 (N.D. Ill. 2004). Further, in *Dexia*, lawyers were acting on behalf of both the parties in question and so the court held that the “management companies may not assert privilege against each other.” *Dexia IV*, 231 F.R.D. at 289.

184. *Grochocinski*, 251 F.R.D. at 327–29 (finding documents were protected by the work-product doctrine).

185. *Id.* at 327 (“Thus it appears that SC and CMGT have a joint financial interest rather than a joint legal interest. The only interest SC has in the litigation is that it hopes it wins so that it can get money, not because it has an actual legal interest in any of the claims. It is the common legal interest, not business interest, that is central to the application of the common interest doctrine.” (quoting *Dexia IV*, 231 F.R.D. at 294) (internal quotation marks omitted)); see also *Nidec*, 249 F.R.D. at 580 (explaining that a common legal interest meant anticipated joint litigation; “It was not, for instance, a communication coordinating the defense in this case. Rather, Defendants provided the litigation abstract in order to facilitate the TPG fund’s and other potential bidders’ commercial decision whether to buy the majority share in JVC. Thus, it was designed to further not a joint defense in this litigation, but to further a commercial transaction in which the parties, if anything, have opposing interests. The litigation abstract thus would not qualify for the common interest exception.”).

vice relates to the goal of that enterprise.”¹⁸⁶ For example, in one case, the court found that “the common legal interest binding [the parties] was their agreement to enforce and exploit the . . . patents through litigation.”¹⁸⁷ As another court explained,

The common-interest rule “is not limited to parties who are perfectly aligned on the same side of a single litigation.” Rather, the parties who assert a common interest as the basis for their assertion of privilege (where otherwise it would not exist due to the shared communications), must simply demonstrate “actual cooperation toward a common legal goal” with respect to the documents they seek to withhold.¹⁸⁸

Thus, these courts do not require an identical legal interest but instead require a “substantially identical” legal interest in the subject of the communication.¹⁸⁹ Under this interpretation, claim funders and holders have a better chance at having the common-interest doctrine prevent waiver of the attorney-client privilege.

There is more support for application of the common-interest exception in the claim funding context. Interestingly, even courts that have required an identical legal interest in other cases have made exceptions to this rule based on the context of the case.¹⁹⁰ For example, a federal district court that required identical legal interests in other contexts has held in the context of patent law that the common legal interest need not be identical but only “substantially identical,”¹⁹¹ and that it is acceptable if some interests between the two parties are adverse.¹⁹² In that case, a patent holder disclosed confidential “documents, including emails containing patent analyses and other patent-related information . . . to affiliated companies and other prospective

186. *Rembrandt Techs., L.P. v. Harris Corp.*, No. 07C-09-059-JRS, 2009 WL 402332, at *7 (Del. Super. Ct. Feb. 12, 2009) (quoting *Fresenius Med. Care Holdings v. Roxanne Labs., Inc.*, No. 2:05-cv-0889, 2007 WL 895059, at *1 (S.D. Ohio Mar. 21, 2007)).

187. *Id.*

188. *Dexia II*, 231 F.R.D. at 273 (quoting *Cadillac Ins. Co. v. Am. Nat'l Bank of Schiller Park*, Nos. 89-C-3267, 91-C-1188, 1992 WL 58786, at *5 (N.D. Ill. Mar. 12, 1992); *Strougo v. BEA Assocs.*, 199 F.R.D. 515, 520 (S.D.N.Y. 2001)).

189. *In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1390 (Fed. Cir. 1996).

190. *High Point SARL v. Sprint Nextel Corp.*, No. 09-2269-CM-DJW, 2012 WL 234024, at *9 (D. Kan. Jan. 25, 2012) (“Although the Court has previously required a party invoking the common interest exception to privilege waiver to show that the nature of the legal interest to be identical, those cases were not patent cases.” (footnote omitted)).

191. *Id.* at *9 (“Instead, the Court will require Avaya to show a substantially identical legal interest in the subject of the communication with the entity receiving the privileged material, as used in the Federal Circuit’s decision” (citing *In re Regents of Univ. of Cal.*, 101 F.3d at 1390)).

192. *Id.*

patent purchasers”¹⁹³ in order to “allow the third parties to evaluate [the claim holder’s] litigation strategy.”¹⁹⁴ In emphasizing that the claim holder had shared information confidentially after executing confidentiality and common-interest agreements, the court held that “[a]lthough [the claim holder] and the other companies had adversarial interests when they were negotiating the possible transfer of the patents, they still had a common legal interest in the validity, enforceability, and potential infringement of the patents-in-suit” sufficient to invoke the common-interest exception.¹⁹⁵

Other courts justify applying the common-interest exception leniently because they believe that courts should not be erecting procedural doctrines that impede business deals.¹⁹⁶ For example, in *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, the Northern District of California denied a discovery request for an attorney opinion letter that had been provided to a potential buyer of the claim holder’s company during negotiations.¹⁹⁷ It concluded that the buyer and seller had a common interest in the outcome of the patent litigation because the value of the company would be affected by the result of the litigation.¹⁹⁸ The court reasoned:

Legal doctrine that impedes frank communication between buyers and sellers also sets the stage for more lawsuits, as buyers are more likely to be unpleasantly surprised by what they receive. By refusing to find waiver in these settings courts create an environment in which businesses can share more freely information that is relevant to their transactions. This policy lubricates business deals and encourages more openness in transactions of this nature.¹⁹⁹

In a subsequent case, the same court explained that if the disclosed communication helps facilitate a commercial deal between the parties, the common-interest doctrine can apply as long as the disclosed com-

193. *Id.* at *6; *see also id.* at *9 (explaining that the claim holder argued that “although the negotiating parties may have been ‘on opposite sides of the deal’ during the negotiations, they shared a common interest in the patents’ validity, enforceability, and infringement” and that “at the time of the information exchange, the negotiating parties were discussing a possible transaction that would . . . result in infringement litigation”).

194. *Id.* at *9.

195. *Id.*

196. *See, e.g., Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 115 F.R.D. 308, 311 (N.D. Cal. 1987) (“Unless it serves some significant interest courts should not create procedural doctrine that restricts communication between buyers and sellers, erects barriers to business deals, and increases the risk that prospective buyers will not have access to important information that could play key roles in assessing the value of the business or product they are considering buying.”).

197. *Id.* at 312.

198. *Id.* at 311.

199. *Id.*; *accord High Point SARL*, 2012 WL 234024, at *8 (quoting *Hewlett-Packard Co.*, 115 F.R.D. at 311).

munication helps “further a common legal strategy in connection with the instant litigation.”²⁰⁰

Further, there are two cases that hold that the common-interest doctrine applies to communications between claim holders and funders. For example, in *Devon It, Inc. v. IBM Corp.*, the court found that the common-interest doctrine applied to confidential communications shared with the commercial claim funder and the comments made to the claim holder about those confidential communications and related financial information.²⁰¹ It reasoned that “Burford and Devon now have a common interest in the successful outcome of the litigation which otherwise Devon may not have been able to pursue without the financial assistance of Burford.”²⁰² Essentially, it applied a very lenient interpretation of “common interest.” In *Walker Digital, LLC v. Google, Inc.*, the court held that a patent commercial claim funder had a common legal interest with the patent holder.²⁰³ Admittedly, these courts do not spend a great deal of time analyzing the doctrine or explaining their reasoning for finding the common-interest exception applicable.²⁰⁴ Nevertheless, these cases open the door for claim funders to garner attorney-client protection of documents shared by claim funders that contain confidential litigation strategy and information. It could be argued that the potential claim funder had a common interest directly related to the instant litigation because recovery of its principal and profit is directly affected by the strategies used during litigation, which can hasten or slow judgment in both positive and negative ways. This argument of a shared interest in the instant litigation is even stronger once the funder has committed funds to the claim holder, but it may also be persuasive before a contract is signed and funding is extended.²⁰⁵ As described above, courts

200. *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 580 (N.D. Cal. 2007). The court distinguished the case as having involved anticipated joint litigation between the buyer and the seller regarding the validity of the patent. The situation is different when the third party is “simply considering buying a majority share of [the claim holder’s business].” *Id.* at 579.

201. *Devon It, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012) (holding that the work-product doctrine also applied).

202. *Id.*

203. Memorandum Order ¶¶ 3–4, *Walker Digital, LLC v. Google Inc.*, No. 11-309-SLR (D. Del. Feb. 12, 2013), available at http://scholar.google.com/scholar_case?case=15350591429862704883&hl=en&as_sdt=6&as_vis=1&oi=scholar (holding that the work-product doctrine was also not waived). One might label this a patent law case as opposed to a claim funder case. However, the company involved positioned itself as a claim funder of patent law disputes. Therefore, I include it as one of the claim funding cases that addresses the privilege doctrine.

204. Likely, if appealed, more analysis will be conducted. However, it is not clear that an appeal will occur given that the damage will have already been done.

205. A common-interest argument may also be stronger in the active context. For example, in *Miller UK Ltd. v. Caterpillar, Inc.*, when explaining that the claim holder and funder did not

have protected information shared with prospective buyers of companies.

Further, a contextual analogy can be made, and those courts that justify a broader interpretation because of the context might also do so in the claim funding context. For example, it appears that application of the common-interest doctrine in the patent law context supports an argument of a common interest between a claim holder and claim funder. The relationship between the claim funder and claim holder is analogous to that between a patent owner and a company that invests in patent lawsuits in return for a percentage of any eventual settlement or judgment.

Additionally, some courts have held there is a common interest between the insurer and the insured.²⁰⁶ This lends support to the application of the exception in the claim funding context. First, there is a strong analogy between claim funding agreements and insurance contracts.²⁰⁷ The relationship between the claim holder and funder is very similar to that between the insured and the insurer in terms of structure, degree of control, and influence.²⁰⁸ Moreover, the main arguments against claim funding are those that were originally made

share a common legal interest, the court emphasized that the claim holder was merely seeking funds and not “legal advice or litigation strategies” from the claim funder. *Miller UK Ltd. v. Caterpillar, Inc.*, No. 10 C 3770, 2014 WL 67340, at *13 (N.D. Ill. Jan. 6, 2014). In the active context, the relationship between the funder and claim holder is more involved and the claim holder may be looking to the funder to provide its views on litigation strategies and to help manage the lawyers and interpret the lawyers’ legal advice.

206. See *Waste Mgmt., Inc. v. Int’l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 328 (Ill. 1991) (holding that “both insurers and insureds had a common interest either in defeating or settling the claim against insureds in the Miller litigation”); see also *Neth. Ins. Co. v. Nat’l Cas.*, 283 F.R.D. 412, 416–18 (C.D. Ill. 2012) (citing *Waste Mgmt., Inc.*, 579 N.E.2d 322); *Alit (No. 1) Ltd. v. Brooks Ins. Agency*, No. 10-2403, 2012 WL 959332, at *7 (D.N.J. Mar. 21, 2012) (“[Defendant insurer] argues that, [i]n the specific context of the insured/insurer relationship, courts in this District have recognized that where[,] as here, counsel for an insured has been paid for by the insurer, the common interest doctrine protects communications between those parties because of the common interest in defeating the third-party claim against the insured.” (second and third alterations in original) (internal quotation marks omitted)).

207. See, e.g., *Steinitz*, *supra* note 21, at 1332–36 (analogizing funding agreements to insurance contracts); *Waye*, *supra* note 21, at 235 (analogizing to insurance contracts); cf. *Sebok*, *supra* note 21, at 99–100 (considering contingency fees a form of maintenance). But see *Michelle Boardman, Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation*, 8 J.L. ECON. & POL’Y 673 (2012) (drawing a conceptual line between litigation funding and liability insurance).

208. See *Martin*, *supra* note 21, at 109–10 (“The same rules that protect defendants from being poorly represented by lawyers paid by insurance companies should be able to protect plaintiffs from having litigation funders exert pressure on their lawyers.”); see also *DeStefano*, *supra* note 1, at 2838–40. But see *Miller UK Ltd.*, 2014 WL 67340, at *11 (pointing out that a key difference is that a claim funder will never be paid by the claim holder for its losses and a claim funder will “never be a plaintiff seeking indemnification from the opponent”).

against liability coverage.²⁰⁹ A very similar triangular relationship exists among a liability insurance company, an insured, and the lawyer retained by the insurance company to defend the insured. The possible conflicts of interest that exist due to the divergent interests between the insurer and the insured raise the same questions around lawyer's duty of loyalty when the interests do not align.²¹⁰ Moreover, courts have held that when a lawyer is hired by an insurance company to defend an insured, the lawyer's duty of loyalty lies with the insured.²¹¹ This holds true in the claim funding context as well given that the lawyer only represents the claim holder. Further, there exists a relationship between the lawyer and the insurer much like that between the claim funder and the lawyer because the insurer pays for legal defense and is responsible for the underlying lawsuit if the insured is found liable.²¹² Similarly, the funder pays for the claim holder's litigation and is not repaid if the claim holder loses. And as in the claim funder context, the insurer has contractual rights to control certain aspects of the defense and settlement of the case that require cooperation between the insurer and the insured,²¹³ much like that between a funder and a claim holder. Even without the contractual stipulations, the claim funder exerts some influence over litigation strategy and settlement. Thus, in practice in both contexts, the third-party-paid attorney may behave as if she represents both the claim holder and the third party. And for this very reason (function versus form) courts have held the common-interest doctrine to apply be-

209. See Silver, *supra* note 75, at 617 (arguing that the main arguments against litigation funding have also been made against liability coverage); see also Weiner, *supra* note 97, at 20 (contending that in order to evaluate the strength of a claim, "financers should have access to . . . nondiscoverable privileged documents and information").

210. See generally 16 GREGORY C. SISK WITH MARK S. CADY, IOWA PRACTICE SERIES: LAWYER AND JUDICIAL ETHICS.

211. See, e.g., Henke v. Iowa Home Mut. Cas. Co., 87 N.W.2d 920, 923, 925 (Iowa 1958); see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-450, at 7 (2008) (the contractual rights of the insurer to control settlement of the case do not "undermine[] the insured's right to expect that the lawyer will abide by Rule 1.6 and withhold from the carrier information relating to the representation that is damaging to the insured's interests under the policy"); Steinitz, *supra* note 21, at 1334 ("In certain relatively limited circumstances, insurance law imposes on the insurer a duty to hire independent counsel for the insured."); Waye, *supra* note 21, at 235.

212. See Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co., 579 N.E.2d 322, 328-29 (Ill. 1991); see also Casaccio v. Curtiss, 718 S.E.2d 506, 513 (W. Va. 2011). The insurer may also be vicariously liable in the event the insured is found liable in the lawsuit.

213. See generally RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.7-6(n)(1) (2009); Thomas D. Morgan, *What Insurance Scholars Should Know About Professional Responsibility*, 4 CONN. INS. L.J. 1 (1997).

tween insureds and insurers.²¹⁴ According to one court, this is because “[i]t is the commonality of interests which creates the exception, not the conduct of the litigation.”²¹⁵ Essentially, regardless of form, in function attorneys for the insured represent both parties because “insurers [are] ultimately liable for payment if the plaintiffs in the underlying action receive[] either a favorable verdict or settlement.”²¹⁶ Courts in this camp believe that “a less flexible application of the doctrine effectively defeats the purpose and intent of the parties’ agreement.”²¹⁷

A similar argument could be made in the claim funding context. The funder has a relationship with the claim holder, much like the insurer’s relationship with the insured.²¹⁸ As in the insurer-insured context, in some litigation agreements the claim holder (like the insured) may agree to delegate control over claim resolution strategies. The claim holder may also provide informed consent to the claim funder to settle on certain or any terms. In the claim funding context, however, there are even more protections to the claim holder than to the insured in the insurer-insured context. For example, often the claim holder still uses its choice of counsel and has more power to contract at the outset to maintain or delegate decision-making power without forfeiting the funding (i.e., it can still get the “insurance” in the form of financial backing, although the amount or the level of recovery may differ depending on the level of control ceded). Arguably, those arguments are even stronger in the active funding context be-

214. See, e.g., *Waste Mgmt., Inc.*, 579 N.E.2d at 329 (explaining that it would also be against public policy, which “require[s] encouragement of full disclosure by an insured to his insurer”); see also *id.* (holding that insurers are entitled to production of the files on two grounds: (1) the contractual agreements around cooperation and disclosure of all information in litigation, and (2) the common-interest doctrine); *id.* at 327–28 (explaining that the terms of the insurance contract required cooperation on the part of the insured in the conduct of suits and required to “give all such information and assistance as the insurers may reasonably require” and that this cooperation agreement is intended to protect the insurers’ interests). In this case, the court essentially held that the duty to cooperate was “so broad so as to operate as a waiver of the insured’s attorney-client privilege in coverage litigation with its insurer.” Richmond, *supra* note 104, at 439–40 (explaining that *Waste Management, Inc.* is the leading case on point and that only a few courts have adopted this position).

215. *Waste Mgmt., Inc.*, 579 N.E.2d at 329.

216. *Id.*

217. *Id.*

218. See *supra* notes 42 and 93 and accompanying text (discussing analogy to the insured-insurer context). But see Boardman, *supra* note 207, at 681–87 (arguing that the differences between insurance and claim funding are great and describing several ways in which liability insurance and claim funding are different, including that insurers are required to defend a claim, that insurance contracts provide for indemnification and payment of defense costs, and that the defendant has a contractual duty to cooperate with the insurer). Of course, the similarities do not exist in the prospective funder situation.

cause there is closer alignment of interests and a stronger relationship between the funder and the claim holder as opposed to the passive context.²¹⁹

There remain, however, three notes of caution. First, a successful argument for the common-interest exception may defeat an argument for a *Kovel* agency exception. As one court explained, that the claim holder's

counsel engaged [the third party] as a "consultant," who will provide "technical expertise," demonstrates that the purpose of the engagement was to assist [the claim holder's] counsel with rendering legal advice to [the claim holder], not to formulate legal strategy that would be common to [the claim holder] and [the third party] in their respective litigations, which would further their common enterprise.²²⁰

Second, in making this decision, courts also consider whether the party took "steps to preserve the confidentiality of the materials and [whether] counsel was involved in the exchanges."²²¹ These steps include external lawyers drafting agreements and parties entering into some type of confidentiality or nondisclosure and common-interest agreement.²²² For example, in *Devon*, the court emphasized that "[t]he documents turned over to Burford were done so under a Confidentiality, Common Interest and NonDisclosure Agreement. 'Common Interest Material' [was] specifically described in the Agreement"²²³

Third, as mentioned earlier, courts admit that the area is unsettled.²²⁴ In sum, although applicability of the privilege is not a shoo-in, arguably there should not exist a presumption that the attorney-client privilege is waived, and in the active context, the arguments are even stronger that some of these exceptions to waiver will apply.²²⁵

219. See *supra* Part II.C.2.

220. *Sokol v. Wyeth, Inc.*, No. 07-Civ.-8442 (SHS) (KNF), 2008 WL 3166662, at *8 (S.D.N.Y. Aug. 4, 2008) (denying attorney-client privilege protection and explaining that the common-interest exception did not apply for this reason).

221. *High Point SARL v. Sprint Nextel Corp.*, No. 09-2269-CM-DJW, 2012 WL 234024, at *9 (D. Kan. Jan. 25, 2012).

222. *Id.*; see also *In re CV Therapeutics, Inc. Sec. Litig.*, No. C-03-3709 SI(EMC), 2006 WL 1699536, at *7 (N.D. Cal. June 16, 2006) (explaining that a nondisclosure agreement can also help establish that the third party is an "agent" of the attorney, even if hired by the client if such client "has retained certain third party experts as consultants who are held to the same, if not higher, standard of confidentiality to which Board members and employees are held").

223. *Devon It, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012).

224. See, e.g., *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010).

225. At least one other scholar has claimed that waiver is "far from certain" and that the attorney-client privilege *should* protect disclosure of client confidences to a claim funding company. Richmond, *supra* note 21, at 675-76; see also *supra* note 106 and 205.

B. The Work-Product Doctrine in the Claim Funding Context

There are two pertinent questions with respect to work-product protection applicability in the claim funder context: first, is the work created by the funder considered work product? And second, will work-product protection be waived if work product of the attorney or the claim holder's other representatives is shared with the claim funder?²²⁶ Generally, scholars and judges state that work-product protection will be applicable.²²⁷ However, for reasons discussed below, it is not clear that this presumption is as strong as it seems.

To date, it appears that only one other scholar has attempted to deeply analyze whether and in what circumstances the work-product doctrine will apply in the claim funding context.²²⁸ That said, a few scholars have addressed the topic peripherally and claimed that there is a strong argument that the work-product doctrine protects work created by a third-party litigation funder.²²⁹ They claim this because “[t]he information exchanged and the calculations generated by the finance company are clearly created (a) for a party and (b) with litigation in mind.”²³⁰ Under this view, the financing contract between the funder and claim holder would be protected by the work-product doctrine, as would the financial models and case assessments.²³¹ In actuality, the analysis may be a bit more complicated, and the application of work-product protection may not be such a foregone conclusion.

The work-product doctrine protects from discovery tangible and intangible material²³² that is developed to help a client prepare for liti-

226. This question presumes that the work shared will be considered work product in the first place. However, work product is not necessarily protectable by the attorney-client privilege and information protected by the attorney-client privilege may not be considered work product (for example if it is not performed in anticipation of litigation).

227. Lyon, *supra* note 31, at 605 (“It seems likely that courts will ultimately find that communications with third-party litigation lenders are protected by the work product rule, but not by attorney-client privilege.”); *cf.* Avraham & Wickelgren, *supra* note 106, at 261–62 (addressing in a footnote whether the contract between funder and claim holder is protectable under the work-product doctrine and concluding that it likely is protectable). *See generally* Giesel, *supra* note 11 (providing a detailed analysis).

228. *See supra* note 12.

229. *See, e.g.*, Lyon, *supra* note 31, at 605. *See generally* Giesel, *supra* note 11.

230. Lyon, *supra* note 31, at 605.

231. Avraham & Wickelgren, *supra* note 106, at 261 (remarking that it is “possible that the funder’s evaluation of the plaintiff’s case” and the funding contract may be covered by the work-product doctrine); *see also* Miller UK Ltd. v. Caterpillar, Inc., No. 10 C 3770, 2014 WL 67340, at *4, *9 (N.D. Ill. Jan. 6, 2014) (finding that the funding contract itself was not relevant to the claims or defenses and therefore not discoverable).

232. Both intangible and tangible materials are protectable by the work-product doctrine. FED. R. EVID. 502(g)(2) (“‘[W]ork-product protection’ means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.”); *see also* Hickman v. Taylor, 329 U.S. 495, 511–12 (1947) (protecting intangible

gation or some other type of adversary proceeding.²³³ These materials can be “prepared by or for a representative of a party, including his or her agent.”²³⁴ Both opinion and non-opinion work product are protected by the work-product doctrine, although protection is generally greater for opinion than non-opinion work product.²³⁵

materials such as attorney recollection); *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) (“It is clear from *Hickman* that work product protection extends to both tangible and intangible work product.” (citing *Hickman*, 329 U.S. at 510–11)); *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 87(1) (2000) (stating that work-product protection applies to both intangible and tangible materials); Beardslee, *supra* note 150, at 1895 n.137 (explaining the reasoning behind protecting intangible materials); Jeff A. Anderson et al., Special Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 841 (1983) (explaining that *Hickman* applied protection to intangible materials). Interestingly, Federal Rule of Civil Procedure 26 does not exempt intangible materials, largely reflecting “the fact that the underlying standard of Rule 26(b)(1) permits discovery of ‘books, documents, or other tangible things.’” Claudine Pease-Wingenter, *Prophetic or Misguided?: The Fifth Circuit’s (Increasingly) Unpopular Approach to the Work Product Doctrine*, 29 REV. LITIG. 121, 134 (2009) (quoting FED. R. CIV. P. 26(b)(1)).

233. This Article focuses on the how federal courts interpret the work-product doctrine. However, some state courts apply the work-product doctrine more narrowly. *See, e.g.*, *Agovino v. Taco Bell* 5083, 639 N.Y.S.2d 111, 112–13 (N.Y. App. Div. 1996) (only protecting work product when it is “prepared exclusively for litigation”). For example, some do not apply work-product protection to materials prepared for proceedings before an administrative agency. *See, e.g.*, *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 39–40 (Tex. 1989).

234. *Occidental Chem. Corp. v. OHM Remediation Servs. Corp.*, 175 F.R.D. 431, 434 (W.D.N.Y. 1997); *accord* FED. R. CIV. P. 26(b)(3); *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 128 (N.D.N.Y. 2007) (“[P]repared by or for a party, or by or for his representative, may be cloaked by this doctrine as well.”); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 221 (S.D.N.Y. 2001).

235. *See NXIVM Corp.*, 241 F.R.D. at 127–28; *see also* Beardslee, *supra* note 150, at 1893 n.122 (describing the two types of work product). Although some state courts interpret it otherwise, *see, e.g.*, *Leonen v. Johns-Manville*, 135 F.R.D. 94, 100 (D.N.J. 1990) (applying state law); *Payton v. N.J. Tpk. Auth.*, 678 A.2d 279, 288 (N.J. Super. Ct. App. Div. 1996), the attorney-client privilege is absolute. *See Imwinkelried, supra* note 117, at 37. Work-product protection, however, is not absolute. *United States v. Nobles*, 422 U.S. 225, 239 (1975); *see also In re Grand Jury Proceedings*, 219 F.3d 175, 190–91 (2d Cir. 2000); *NXIVM Corp.*, 241 F.R.D. at 127–28, 138; *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, No. 02-Civ.-7955 (DLC), 2003 U.S. Dist. LEXIS 14586, at *10–12 (S.D.N.Y. Aug. 25, 2003). An opposing party can gain access to non-opinion work product by showing a substantial need and undue hardship or prejudice. *Hickman*, 329 U.S. at 512 (“[T]he general policy against invading the privacy of an attorney’s course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order.”); *see also NXIVM Corp.*, 241 F.R.D. at 126–27. Some courts do not allow opinion work product to be pierceable. *See, e.g., In re Grand Jury Proceedings*, 473 F.2d at 848 (providing absolute protection to personal recollections, notes, and memoranda related to attorney’s discussion with witnesses); *Williamson v. Superior Court*, 582 P.2d 126, 129 (Cal. 1978); *see also Imwinkelried, supra* note 117, at 21 (explaining that some state courts “confine absolute work product protection to written material reflecting the attorney’s personal mental impressions and legal theories”). Others allow it but require a highly persuasive showing. *See, e.g., In re Grand Jury Proceedings*, 219 F.3d at 190–91; *Haugh*, 2003 U.S. Dist. LEXIS 14586, at *10–13; *NXIVM Corp.*, 241 F.R.D. at 126–27. For a review of the

Federal Rule of Civil Procedure 26(b)(3) makes clear that a lawyer does not necessarily need to help prepare the materials in order to garner work-product protection.²³⁶ Significantly, the rule is not named the “attorney” work-product doctrine. Since its adoption, courts interpreting the rule have explained that consultants and other agents of the attorney can create protectable work product.²³⁷ The question is whether work created by the claim funder (such as financial and litigation analysis or other work that might be developed during due diligence, case monitoring, or active claim management) can be protected by the work-product doctrine.²³⁸ Specifically, courts use two tests to determine whether work was created in anticipation of litigation: the less popular “primary motivating purpose” test and the more commonly applied “because of” test.²³⁹

types of work product and showing required to pierce work-product protection, see generally Anderson et al., *supra* note 232.

236. In 1970, the Advisory Committee to the Federal Rules of Civil Procedure attempted to codify the *Hickman* work-product doctrine in Rule 26(b)(3). See FED. R. CIV. P. 26(b)(3)(B) (providing that the work-product doctrine protects “the mental impressions, conclusions, opinions, or legal theories of [the] attorney or other representative concerning the litigation”); cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 87 cmt. a (2000) (stating that work-product protection applies to work product prepared by an attorney but acknowledging that “[f]ederal and state discovery rules accord work-product protection to others, including personnel who assist a lawyer, and to litigation preparation of a party and the party’s representatives”); Beardslee, *supra* note 150, at 1907.

237. See *In re Cnty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007); see also *id.* at 422 (“When a lawyer has been asked to assess compliance with a legal obligation, the lawyer’s recommendation of a policy that complies (or better complies) with the legal obligation—or that advocates and promotes compliance, or oversees implementation of compliance measures—is legal advice.”); Beardslee, *supra* note 150, at 1907; cf. FED. R. CIV. P. 26 advisory committee’s note.

238. One scholar claims that the work-product doctrine will only apply to the claim funder if it is “a representative of the party,” and making such a showing “would be a difficult task indeed. Thus materials prepared by a litigation funder would appear to have no work-product protection.” Giesel, *supra* note 11, at 1124. This analysis appears to be off the mark because the doctrine does not require that a representative of the party create the work product. Instead, work-product protection can be provided by representatives, consultants, or agents of the attorney. See *supra* note 237 and accompanying text. And this protection is not contingent on who hires or pays for the consultant. See *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972) (explaining that it is immaterial who hired the consultant or if the consultant had previously provided services); see also *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961); Beardslee, *supra* note 20, at 751 (making same point in the attorney-client privilege context). In its first rendition, the work-product doctrine extended to materials “prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).” FED. R. CIV. P. 26(b)(3) (emphasis added). Further, protectable materials can be “prepared by or for a representative of a party, including his or her agent.” *Occidental Chem. Corp.*, 175 F.R.D. at 434.

239. Beardslee, *supra* note 150, at 1903. The majority of federal districts apply the because of test, including the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits. See *id.* at 1903 n.191 (listing cases in support of this conclusion).

1. “Primary Motivating Purpose” Test

The primary motivating purpose test only protects material when the “primary motivating purpose” behind the creation of the work is to assist in pending or anticipated litigation.²⁴⁰ This serves to limit work-product protection because courts are forced to decipher whether the work was created primarily for business or legal purposes—a distinction very difficult to make.²⁴¹

If the court applies this narrower and less common test, then it might find that the work developed by a litigation funder was created *primarily* so that the funder could determine the merit and value of the case to help it decide whether to provide funding (or to continue to fund)—not to help the claim holder and lawyer further the adjudication of its claim—even if that is an additional benefit of the work. The risk that this would be so is likely greater in the passive funding context than in the active, because the funder in the latter context could more likely be creating documents and conducting analyses to help the claim holder and lawyer with some aspect of anticipated litigation. Further, a court applying the primary purpose test might even question whether the work created by the claim holder and the lawyer (that was later shared with the funder) was actually work product. Consider for example, *Mondis Technology, Ltd. v. LG Electronics, Inc.*, a case in which it appears the court did not actually apply the primary purpose test.²⁴² There, the holding company sought investors to “fund its efforts to license and litigate its various patent programs.”²⁴³ The holding company provided potential investors with “slide presentations and other documents that contained disclosures of [the holding company’s] licensing and litigation strategies and also estimates of licensing and litigation revenues.”²⁴⁴ The first question

240. *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985) (“If the primary motivating purpose behind the creation of the document is not to assist in pending or impending litigation, then a finding that the document enjoys work product immunity is not mandated.”); *see also* *United States v. Adlman*, 134 F.3d 1194, 1197–98 (2d Cir. 1998) (explaining that some courts protect documents if they were “prepared because of expected litigation,” but that others do so only if they were prepared “primarily or exclusively to assist in litigation,” which is a higher standard (internal quotation marks omitted)); *United States v. El Paso Co.*, 682 F.2d 530, 542–43 (5th Cir. 1982).

241. *See* Beardslee, *supra* note 150, at 1910 (making similar point about the primary motivating test); *see also* Beardslee, *supra* note 20, at 751–55 (making similar point about the law-versus-business distinction).

242. *Mondis Tech., Ltd. v. LG Elecs., Inc.*, Nos. 2:07-CV-565-TJW-CE; 2:08-CV-478-TJW, 2011 WL 1714304 (E.D. Tex. May 4, 2011).

243. *Id.* at *2 (also finding that work-product protection was not waived by sharing this material with the potential investors).

244. *Id.*

the court addressed was whether the created materials could be considered work product under the Fifth Circuit's primary purpose test.²⁴⁵ Although it held that the documents created by the corporate client and the lawyer "with the intention of coordinating potential investors to aid in future possible litigation" were "work product,"²⁴⁶ it is not clear that other courts applying the primary purpose test would come to the same conclusion. Another court applying the primary purpose test may have given more weight to the fact that "[a]ll of the documents were prepared . . . with the intention of coordinating potential investors" essentially to secure continued funding of its business, its patents, and the litigation of its patents.²⁴⁷ Instead of being created primarily to *assist* in litigation, they were prepared primarily for the purpose of *funding* the litigation.

Consider a case in the public relations context: *Rattner v. Netburn*.²⁴⁸ After learning that the plaintiff was going to publish a defamatory letter, the defendants met with their attorneys to seek advice on how to respond.²⁴⁹ Likely believing that public relations professionals would not be able create a press release that would not distort the truth or prevent the use of certain defenses in the future, the attorneys drafted a public announcement and shared it with their client confidentially.²⁵⁰ The court acknowledged that one of the purposes of drafting the press release was to help the proponents to continue to litigate their case and that the defendants might be forced to

245. *Id.* at *3. Arguably, even if the work created by the claim holder or lawyer would be considered protected by the attorney-client privilege, but the privilege would be waived unless one of the exceptions to waiver applied.

246. *Id.* ("Although the documents may not have been prepared in connection with ongoing litigation, the documents were at a minimum created for possible future litigation. Some documents reveal [the claim holder's] overall litigation and licensing strategy and others provide information—such as balance sheets including licensing and litigation revenues—that show the implementation of that strategy. All of the documents were prepared, however, with the intention of coordinating potential investors to aid in future possible litigation."). This case, although in the claim funding context, is a bit different from the typical claim funding scenarios addressed in this Article. Instead of attempting to secure money for an existing claim, the lawyers and claim holders were attempting to "secur[e] funding with respect to the acquisition of the patents-in-suit and the formation of Mondis," which would pursue litigation in support of the patents. *Id.* at *1.

247. *Id.* at *3.

248. *Rattner v. Netburn*, No. 88-Civ.-2080 (GLG), 1989 WL 223059 (S.D.N.Y. June 20, 1989). The district court applied the primary motivating purpose test. *Id.* at *6. However, after this case was decided, the Second Circuit adopted the because of test. *United States v. Adlman*, 134 F.3d 1194, 1198–1203 (2d Cir. 1998).

249. *Rattner*, 1989 WL 223059, at *3.

250. *See id.*

settle without a properly worded response.²⁵¹ Nevertheless, the court ultimately decided that the primary purpose of drafting the press release was “to shore up the [defendants’] political position with their constituents.”²⁵² While this assessment may be accurate, a different court arguably could have determined that the primary motivating purpose behind drafting the press release was, for example, to protect its litigation strategy.²⁵³ The point is not to say that this assessment was inaccurate but instead that the primary purpose test is limiting and gives courts substantial leeway to deny work-product protection.²⁵⁴ Thus, under the primary purpose test, not only is the funder’s work at potential risk, but so is the work created by the lawyer or client for the purposes of securing the funding.

2. “Because of” Test

Under the because of test, material prepared because of existing or expected litigation is considered work product.²⁵⁵ Therefore, under this test, the following circumstances would likely warrant work-product protection²⁵⁶: work created by (1) the lawyers or client to secure funding from potential investors like that in *Mondis Technology*; (2) the funder in the process of scrubbing the case and performing due

251. *Id.* at *6 (“[A]lthough this is surely an understandable goal, and indeed one that might make it easier for the [defendants] to continue to spend large sums on its lawsuits, it cannot be said that the document was for use in litigation.”).

252. *Id.* (finding that defendants did not meet their burden of showing that the primary motivating purpose was “to assist in pending or impending litigation”).

253. *See* Beardslee, *supra* note 150, at 1912.

254. *See infra* notes 267–269 regarding how a court’s view of the proper confines of corporate practice might impact how it applies work-product protection.

255. *United States v. Adlman*, 134 F.3d 1194, 1198 (2d Cir. 1998); *see also* *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1082 (N.D. Cal. 2002).

256. *See infra* note 263 and accompanying text. In most situations, the anticipation of litigation requirement will be met when claim financiers are not approached until after a claim is filed or about to be filed. Also, that the third-party funder created the work should not bar application of the work-product doctrine. *See supra* note 238. Although some courts require that the third party be supervised or directed by the attorney, case law and doctrine indicate that the work-product doctrine protects materials by nonlawyers. Beardslee, *supra* note 150, at 1907–08; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 87 cmt. a (2000). *See generally supra* note 238. Further, the doctrine *seems* to place more importance on why the person prepared the work than who prepares the work. Beardslee, *supra* note 150, at 1907–08. The *Restatement of the Law Governing Lawyers* states that “[f]ederal and state discovery rules accord work-product protection to others, including personnel who assist a lawyer, and to litigation preparation of a party and the party’s representatives.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 87 cmt. a (“This Section defines the work-product immunity as it applies to lawyers.”). Federal Rule of Civil Procedure (26)(b) also does not state that a lawyer even has to be involved with the preparation of the work. Instead, it states that a “representative,” i.e., “[a] party’s attorney, consultant, surety, . . . or agent” might produce protected work product. FED. R. CIV. P. 26(b)(3)(A).

diligence; and (3) the funder in the passive context to monitor its investment or in the active context to help with litigation management.²⁵⁷ If the work would have been prepared regardless of litigation, however, then it will not be protected.²⁵⁸ But if the anticipated litigation was in any way a motivating factor for preparing the materials, then it can be protected under the because of test.²⁵⁹

Although the because of test lends the most support to claim funders, there are at least three risks in relying on it. First, although funders could argue that the work would not be created but for the litigation, the funders' business is to fund; therefore, courts might find that the ordinary business exception applies.²⁶⁰ That is, a court might find that the work was created in the ordinary course of business because funders, in their ordinary course of business, generally scrub cases to determine their merit and value and develop reports around the financial strength of cases. This argument is not very strong but might have some teeth if the claim has not yet been filed at the time the funder decides whether to fund. Although funders could argue that the work would not be created but for the litigation, if the funder decides not to fund, there might not be any litigation. Therefore, courts might find that because the funders' business is funding litigation, the ordinary business exception applies.²⁶¹ That said, some courts recognize an exception when the ordinary course of business is itself in anticipation of litigation.²⁶²

257. A caveat might be if the funding is being pursued before the case is really a case and there is a question of whether the documents were disclosed in anticipation of litigation. *Cf.* *Miller UK Ltd. v. Caterpillar, Inc.*, No. 10 C 3770, 2014 WL 67340, at *16 (N.D. Ill. Jan. 6, 2014) (rejecting argument that work product-protection should be applied to work "prepared in order to permit the client to determine whether to undertake a business transaction," and pointing out that such an argument "does not apply here since litigation antedated the business transaction—i.e., the funding").

258. *Adlman*, 134 F.3d at 1195, 1204–05.

259. *Id.*

260. Essentially, the ordinary business exception applies if the work "would have been prepared irrespective of the anticipated litigation." *Id.* at 1205. On the other hand, if the anticipated litigation was in any way part of the impetus for creating the work, then the work can be protected under the because of test. *Id.* at 1198.

261. *Cf.* *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 665 (S.D. Ind. 1991) (presuming that adjuster reports are not prepared in anticipation of litigation); *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134–35 (S.D. Ga. 1982) (holding that courts must decide on a case-by-case basis if the insurer's activities "shift" from the ordinary course of business to preparation for litigation, but finding that the motivation for the report is not litigation if it predates the making of a claim). Often claim funding is sought after the claim is already being litigated. Other times it is sought as a prerequisite to file a claim. Thus, this determination would depend on the court's view of the "in anticipation" requirement. Some courts take a very narrow view. *See* *Beardslee*, *supra* note 150, at 1901–03.

262. *See* *McCullough v. Standard Pressing Machs. Co.*, 39 Va. Cir. 191, 195 (1996) ("Because liability insurance, unlike first party insurance, essentially constitutes 'litigation insurance,' many

Second, courts that are in districts that have adopted the because of test²⁶³ sometimes infuse a primary purpose test into the analysis and decide the case based on whether the attorney-client privilege is applicable—that is, whether the primary purpose for the communication was for legal advice.²⁶⁴ For example, when applying this exception to work completed by public relations consultants, “some courts infuse the ‘ordinary course of business’ analysis with a ‘primary purpose’ component, even if the court sits in a jurisdiction that has adopted the ‘because of’ test.”²⁶⁵

Third, courts sometimes deny work-product protection because the work was created by nonlawyer professionals, despite the fact that the Federal Rules of Civil Procedure and the original work-product case make clear that materials prepared by nonlawyers are protectable.²⁶⁶ Essentially, some judges attempt to make a distinction between business and law, and when the professional that is consulted is a typical business consultant (e.g., a public relations consultant), the judge refuses to apply work-product protection.²⁶⁷ Evidently, the judge does so because she either views the role of the lawyer very narrowly or believes that the business advice could not help or affect the lawyer’s provision of legal advice or services.²⁶⁸ Essentially, as courts explain,

courts have held that adjuster reports prepared on behalf of liability insurers are prepared in anticipation of litigation and constitute privileged work product.” (citation omitted) (citing *Kandel v. Tocher*, 256 N.Y.S.2d 898, 900 (App. Div. 1965)); *see also, e.g., Weitzman v. Blazing Pedals, Inc.*, 151 F.R.D. 125, 126 (D. Colo. 1993); *Pete Rinaldi’s Fast Foods, Inc. v. Great Am. Ins. Cos.*, 123 F.R.D. 198, 201 (M.D.N.C. 1988); *Fontaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89, 92–93 (E.D. Mo. 1980); *Ashmead v. Harris*, 336 N.W.2d 197, 201 (Iowa 1983); *Kandel*, 256 N.Y.S.2d at 900 (“[O]nce an accident has arisen there is little or nothing that the insurer or its employees do with respect to an accident report except in contemplation and in preparation for eventual litigation or for a settlement which may avoid the necessity of litigation. In this connection, therefore, it is immaterial whether attorneys have actually been assigned or employed by the insurer to represent the insured in the settlement or defense of the claim. For parallel reasons, it is immaterial whether the action based on the claim has been begun or not.”).

263. *Adlman*, 134 F.3d at 1198 (explaining that under the because of test, documents are protected if they were prepared because of existing or expected litigation); *see also United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1082 (N.D. Cal. 2002) (explaining that Rule 26(b)(3) does not “state that a document must have been prepared to aid in the conduct of litigation in order to constitute work product, much less primarily or exclusively to aid in litigation. Preparing a document ‘in anticipation of litigation’ is sufficient.” (quoting *Adlman*, 134 F.3d at 1198)); *Beardslee*, *supra* note 150, at 1903–04 n.191; *id.* at 1905–07 (describing the broader because of test and comparing it to the primary motivating purpose test).

264. *See Beardslee*, *supra* note 150, at 1915–17, 1922–25 (making same point and describing decisions in support of claim).

265. *Id.* at 1917.

266. *Id.* at 1913–15; *see also FED. R. CIV. P.* 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495, 508 (1947).

267. *Beardslee*, *supra* note 150, at 1913–15 (providing examples).

268. *Id.* at 1914–15.

“how far work product protection extends turns on a balancing of policy concerns rather than application of abstract logic.”²⁶⁹

The argument that the work created by the funder is protected by the work-product doctrine is weaker in the passive funding context than in the active context. It is also weaker before funding, as opposed to after funding has been extended, and it is weaker before the case has been filed.²⁷⁰ The argument for work-product protection in the active context is stronger because active funders are asked to analyze cases and provide advice and consultation to the lawyer and the claim holder on a variety of aspects of the case in order for the lawyer to determine not just *if* it can proceed with litigation (by securing the necessary funding) but whether it *should* proceed and *how*. These are all considerations that help the lawyer prepare for anticipated litigation and provide better legal advice to the client.

3. *Is Work-Product Protection Waived When Work Product Is Shared with Claim Funders?*

This question should be an easy one to answer. This is because the work-product doctrine, unlike the attorney-client privilege, is designed to embrace collaboration between lawyers and outsiders. Thus, the general mantra is that work-product protection is only waived by sharing it with a third party when such disclosure is to an adversary or “substantially increases the opportunity for potential adversaries to obtain the information.”²⁷¹ Courts state that “[a] disclo-

269. *United States v. Textron Inc.*, 577 F.3d 21, 26 (1st Cir. 2009) (citing the primary motivating purpose test with approval but applying a “prepared primarily for use in litigation test”). *Textron* may be an outlier case. *See, e.g.*, *United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010) (sharply disagreeing with the decision in *Textron* because “a document can contain protected work-product material even though it serves multiple purposes, so long as the protected material was prepared because of the prospect of litigation”). However, if other courts were to begin to apply a “primarily for use in litigation” test, arguably, this would not bode well for finding work-product protection in the claim funding context.

270. *See supra* note 257.

271. *In re Grand Jury Subpoenas Dated December 18, 1981 & January 4, 1982*, 561 F. Supp. 1247, 1257 (E.D.N.Y. 1982); *accord United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 687 (1st Cir. 1997) (“The [attorney-client] privilege . . . is designed to protect confidentiality, so that any disclosure outside the magic circle is inconsistent with the privilege; by contrast, work product protection is provided against ‘adversaries,’ so only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection.”); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, No. 08-Civ-7508 (SAS), 2011 WL 4716334, at *4 (S.D.N.Y. Oct. 3, 2011) (“Rather, work product protection is waived only when documents are used in a manner contrary to the doctrine’s purpose, or when disclosure substantially increases the opportunity for potential adversaries to obtain the information. Protection is thus forfeited when work product materials are either given to an adversary or used in such a way that they may end up in the hands of an adversary.” (internal quotation marks omitted) (footnotes omitted)); *Gutter v. E.I. Dupont de*

sure made in the pursuit of . . . trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege.”²⁷² The reasoning is that

impressions and strategies are not always created in a vacuum, but, rather are generated in cogent discourse with others, including the clients and agents. Further, the exchange of such documents and ideas with those whose expertise and knowledge of certain facts can help the attorney in the assessment of any aspect of the litigation does not invoke a waiver of the doctrine.²⁷³

Presumably, such reasoning ensures that work product (including litigation strategies) shared with a claim funder would not lose its protection because of such disclosure. This reasoning is applicable after a contract has been signed and funding has been committed because a funder would have no interest in sharing confidential information with adversaries.²⁷⁴ However, such reasoning is less applicable before funding has been secured if the claim funder decides to forego the investment opportunity. In that situation, the disclosure might enhance the possibility that the information would be disclosed to an adversary.²⁷⁵

Further complicating the analysis is that some courts, in determining whether the disclosure increased the opportunity for a potential adversary to obtain the work, analyze whether the third party shares a common interest with the party²⁷⁶—despite the fact that the common-interest doctrine is, by and large, an exception to waiver of the attorney-client privilege.²⁷⁷ Essentially, if a common interest exists between a party and third party, then the court finds that disclosure of

Nemours & Co., No. 95-CV-2152, 1998 WL 2017926, at *3 (S.D. Fla. May 18, 1998) (“While disclosure to outside auditors may waive the attorney-client privilege, it does not waive the work product privilege . . .”); see also 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2024 (3d ed. 2010) (citing cases).

272. *Am. Tel. & Tel. Co.*, 642 F.2d at 1299.

273. *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 128 (N.D.N.Y. 2007).

274. See Giesel, *supra* note 11, at 1138.

275. See *id.* at 1137–38 (making similar point but arguing that a nondisclosure agreement might solve this problem).

276. See *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 445–46 (S.D.N.Y. 2004); see also, e.g., *Am. Tel. & Tel. Co.*, 642 F.2d at 1297–99 (applying a common-interest analysis to determine work-product protection); *Ariz. Indep. Redistricting Comm’n v. Fields*, 75 P.3d 1088, 1100 (Ariz. Ct. App. 2003) (explaining that “[t]he purpose of the common interest doctrine is to permit persons with common interests to share privileged attorney-client and work-product communications in order to coordinate their respective positions without destroying the privilege”); *D’Ippolito v. Cities Serv. Co.*, 39 F.R.D. 610 (S.D.N.Y. 1965). See generally *Richmond*, *supra* note 104, at 414 (“Although developed in the context of the attorney-client privilege, the common interest doctrine has been expanded to protect against the waiver of work product immunity.”).

277. See *supra* notes 170–225 and accompanying text.

work product to that third party would not waive work-product protection.²⁷⁸ This is intuitive. If the third party shares a common interest, then the third party is likely neither an adversary nor likely to share the protected information with an adversary.²⁷⁹ By the same token, if some commonality of interest does not exist with the third party, the sharing of information may risk disclosure to adversaries.²⁸⁰ For example, if a company disclosed information to an accountant, the accountant may have been required by law or other professional obligations to share this information with potential adversaries.²⁸¹

However, the difficulty lies in what type of “common interest” a court requires. When infusing a common-interest analysis into the decision around work-product protection, some courts take a narrow approach as described earlier in this Article.²⁸² Others require the third

278. See, e.g., *Marciano v. Atl. Med. Specialties, Inc.*, No. 08-CV-305-JTC, 2011 WL 294487, at *3 (W.D.N.Y. Jan. 27, 2011); *In re Pfizer Inc. Sec. Litig.*, No. 90-Civ.-1260 (SS), 1993 WL 561125, at *7 (S.D.N.Y. Dec. 23, 1993).

279. See *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 115 (S.D.N.Y. 2002) (“Such use of work product serves the parties’ litigation interests and does not ‘substantially increase[] the opportunity for potential adversaries to obtain information.’” (alteration in original) (quoting *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 221 n.6 (S.D.N.Y.2001))); see also *Wi-Lan Inc. v Acer, Inc.*, Nos. 2:07-CV-473-TJW, 2:07-CV-474-TJW, 2010 WL 4118625, at *5 (E.D. Tex. Oct. 18, 2010) (explaining that in another case “the court held that information shared with a government agency having a common interest against a third party did not constitute waiver of the work product privilege because the governmental agency was not an adversary and the disclosure of the information to the governmental agency did not substantially increase the likelihood that an adversary would come into possession of the information” (citing *Am. Tel. & Tel. Co.*, 642 F.2d at 1290)); Giesel, *supra* note 11, at 1110 (“Some courts, in determining whether a party’s disclosure has waived the work-product doctrine, go no further than the common interest analysis. This is perfectly logical; these courts have no need to go further in the analysis because once a court finds a common interest, the court concludes that there has been no waiver.” (footnote omitted)). This reasoning is complicated, however, by the fact that some courts find a common interest exists even if the parties have some interests that are adverse. See *supra* note 192.

280. However, as courts have pointed out, although it might increase the risk of disclosure, the absence of a common interest does not equate to an adversarial relationship. See *United States v. Deloitte LLP*, 610 F.3d 129, 140–41 (D.C. Cir. 2010); see also *Trs. of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 266 F.R.D. 1, 14–15 (D.D.C. 2010) (“The disclosure instead must be to a party who is an adversary or does not have a common interest with the party claiming the privilege.”); *Schanfield v. Sojitz Corp. of Am.*, 258 F.R.D. 211, 216 (S.D.N.Y. 2009); Giesel, *supra* note 11, at 1110.

281. *Merrill Lynch & Co.*, 229 F.R.D. at 446.

282. See, e.g., *D’Ippolito v. Cities Serv. Co.*, 39 F.R.D. 610, 610 (S.D.N.Y. 1965) (taking a narrow approach and limiting protection to co-parties); *Ariz. Indep. Redistricting Comm’n v. Fields*, 75 P.3d 1088, 1100 (Ariz. Ct. App. 2003) (requiring that communications “furthered legal interests of both parties” and explaining that “[a]lthough the IRC and NDC may share a common goal of drafting a legally viable redistricting plan, they do not share a common legal interest, as the IRC contends”). See generally *supra* notes 189–197 and accompanying text.

party to have at least some litigation objectives in common.²⁸³ These courts find that having “a joint business strategy that happens to include as one of its elements a concern about litigation” is not sufficient.²⁸⁴ Their reasoning is that disclosure of work product to “a third-party with no legal interest in the ongoing litigation[] increases the risk that the documents could end up in the hands of a potential adversary.”²⁸⁵ These courts would find waiver. Others take a broader approach.²⁸⁶ Those courts require only that the party and third party share common business objectives²⁸⁷ or a common interest in the outcome of the litigation.²⁸⁸ They reason that disclosure of information to a third party (that is not an adversary) does not substantially increase the risk that an adversary would be able to obtain the information.²⁸⁹ Indeed, “[the third party] is contractually obligated not to disclose business information—including legal advice—concerning [the defendant company] to [others].”²⁹⁰ Two of the four cases addressing the work-product doctrine in the claim funding context relied on the common-interest doctrine to justify work-product protection. One simply stated without explanation that the two companies share a common legal interest.²⁹¹ The other peripherally explained that the two had a common interest in the outcome of the litigation and that the claim

283. See, e.g., *Marciano*, 2011 WL 294487, at *4 (holding that work-product protection was waived because the third party (although sharing a common business interest) did not “ha[ve] any legal interest in the pending litigation with plaintiffs”); *Doctor’s Assocs., Inc. v. QIP Holders LLC*, No. 3:06-CV-01710 (VLB), 2009 WL 1668573, at *2–3 (D. Conn. June 15, 2009) (finding the existence of a legal, rather than commercial, common interest is critical); *Bank of Am., N.A. v. Terra Nova Ins. Co.*, 211 F. Supp. 2d 493, 497 (S.D.N.Y. 2002) (finding that merely working towards a common commercial goal cannot prevent waiver).

284. *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995).

285. *Marciano*, 2011 WL 294487, at *4.

286. See, e.g., *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (explaining that it will “not consider the strict standard of waiver in the attorney-client privilege context . . . to be appropriate for work product cases”).

287. See *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 221 & n.6 (S.D.N.Y. 2001) (holding that a company and a public relations firm shared a common interest and that “[d]isclosure of work product to a party sharing common interests is not inconsistent with the policy of privacy protection underlying the doctrine”); see also *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1975).

288. *Devon It, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012).

289. *Cellco P’ship v. Nextel Commc’n, Inc.*, No. M8-85 (RO), Civ. A. 03-725-KAJ, 2004 WL 1542259, at *1 (S.D.N.Y. July 9, 2004) (finding that work-product protection was not waived because defendant company and advertising agency had a shared common business interest).

290. *Id.*

291. Memorandum order ¶ 3, *Walker Digital, LLC v. Google Inc.*, No. 11-309-SLR (D. Del. Feb. 12, 2013), available at http://scholar.google.com/scholar_case?case=15350591429862704883&hl=en&as_sdt=6&as_vis=1&oi=scholarrr.

holder would not have been able to litigate but for the claim funder's investment.²⁹²

Further, as when considered in the context of waiver of the attorney-client privilege,²⁹³ some courts take into account whether the third parties signed a nondisclosure agreement (NDA).²⁹⁴ At least one court decided against waiver in the claim funding context even though the parties shared information in the early stages of the litigation.²⁹⁵ In that case, the court found that documents containing licensing and litigation strategies shared with potential third-party commercial claim funders "do not create a waiver because they were disclosed subject to nondisclosure agreements and thus did not substantially increase the likelihood that an adversary would come into possession of the materials."²⁹⁶ For this court, the fact that the parties were willing to sign an NDA was a powerful defense to any suggestion that sharing confidential information with the claim funder in the early stages creates any meaningful risk that the information will be shared with an adversary. In keeping with that, one court has found waiver of work-product protection because the claim funder did not take protective measures such as making oral or written confidentiality agreements with prospective funders.²⁹⁷ The other two courts applying work-product protection also based their decisions in part on the existence of an NDA and common-interest agreement between the claim holder and funder.²⁹⁸ Thus it appears that courts taking this broader view of the common-interest doctrine would likely hold that work-product protection was not waived when work was shared be-

292. *Devon It, Inc.*, 2012 WL 4748160, at *1 n.1.

293. *See supra* note 222.

294. *See, e.g.*, *Mondis Tech., Ltd. v. LG Elecs., Inc.*, Nos. 2:07-CV-565-TJW-CE; 2:08-CV-478-TJW, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011); *Wi-Lan Inc. v. Acer, Inc.*, Nos. 2:07-CV-473-TJW; 2:07-CV-474-TJW, 2010 WL 4118625, at *5 (E.D. Tex. Oct. 18, 2010) ("Additionally, the existence of the non-disclosure agreement and the limitations on copying or removing documents from the Data Room make it clear that the disclosure of the Driessen Report to Broadcom did not substantially increase the likelihood that an adversary would come into possession of the Driessen Report or other privileged information disclosed to Broadcom in the Data Room.").

295. *Mondis Tech., Ltd.*, 2011 WL 1714304, at *3.

296. *Id.*; *see also supra* notes 243–247 and accompanying text.

297. *See Miller UK Ltd. v. Caterpillar, Inc.*, No. 10 C 3770, 2014 WL 67340, at *16–19, *20–21 (N.D. Ill. Jan. 6, 2014) (protecting information provided to funders with whom the claim holder had oral or written confidentiality agreements, but waiving work-product protection for those with whom it did not).

298. *Devon It, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012); Memorandum Order ¶ 3, *Walker Digital, LLC v. Google Inc.*, No. 11-309-SLR, at *2 (D. Del. Feb. 12, 2013), available at http://scholar.google.com/scholar_case?case=15350591429862704883&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

tween funders, lawyers, and claim holders in the passive or active context—especially if the parties signed an NDA.

However, it is also difficult to predict which approach a court will apply, because courts do not necessarily define the term “common interest” in the same way in the attorney-client privilege context as they do in the work-product doctrine context.²⁹⁹ For example, in the attorney-client privilege context, a court might require that there be a shared legal and business interest in order to escape waiver of the attorney-client privilege; however, in the work-product context, the same court may only require a shared business interest to meet common-interest standards.

That said, at least one court has pointed out that the definition of common interest may be tied to which of the two tests the appellate court applies to determine whether something is work product.³⁰⁰ It explained that if the appellate court has adopted the broader because of test, “work product protection extends to documents prepared in anticipation of litigation even if they are ‘intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation.’”³⁰¹ “Thus, the fact that [the defendant company] and [third-party funder] do not share a common litigation interest is of no moment.”³⁰² Indeed, these courts may not consider work-product protection waived unless there is a “a tangible adversarial relationship.”³⁰³ However, if the court applies the primary purpose test, the definition of common interest may be interpreted more narrowly and waiver may be found more readily. In sum, a presumption that the work-product doctrine will not be waived when work product is shared with claim funders may be misplaced.

299. *But see* Russo v. Cabot Corp., Nos. Civ.A 01-2613, Civ.A 01-2775, Civ.A 01-2776, 2001 WL 34371702, at *2–5 (E.D. Pa. Oct. 26, 2001) (applying the common-interest doctrine and the same waiver analysis). Additionally, some courts apply and analyze the work-product and attorney-client privilege doctrine questions together. *Id.* at *2 n.6 (“While the cases deal with attorney-client privilege and not specifically with the work product doctrine, we see no reason to treat these principles differently for purposes of waiver.”); *see also* Weiner, *supra* note 97, at 22 (“Under California law, waiver of both the attorney-client privilege and the work-product privilege are analyzed together using common law waiver principles.”).

300. *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 447 n.9 (S.D.N.Y. 2004).

301. *Id.* (quoting *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998)).

302. *Id.* at 447.

303. *Id.*

IV. COMMUNICATIONS BETWEEN CLAIM HOLDERS, FUNDERS, AND LAWYERS: SHOULD THEY BE PROTECTED?

The preceding analysis fills a gap in the literature and law by providing an in-depth analysis of the potential applicability of the attorney-client privilege and work-product doctrine in the claim funding context. It demonstrates that given the way both of the doctrines have been interpreted, presumptions that either will or will not apply are misplaced. That said, it is clear from the foregoing analysis that there exist circumstances in which the doctrine can be interpreted to protect communications between and material created by claim holders, lawyers, and claim funders. It is not clear, however, that just because the doctrine *can* enable such protection, that it should be applied to do so. Instead of attempting to answer this normative inquiry by analyzing the history and purpose behind the two respective protective doctrines,³⁰⁴ this Part considers whether protecting these interactions from disclosure exacerbates the common problems associated with claim funding and explores the potential benefits that might flow from extending protection thereto.³⁰⁵ Although there may be other arguments against claim funding, two common problems are identified by commentators and courts: (1) the claim funding relationship threatens the sanctity of the attorney-client relationship in that claim funders might try to manipulate and control the lawyer, litigation, and claim holder; and (2) claim funding increases litigation of nonmeritorious claims or prolongs settlement.³⁰⁶

304. To review arguments in favor of applying the attorney-client privilege and work-product protections to interactions with third parties in certain situations, see generally Beardslee, *supra* note 20; Beardslee, *supra* note 150.

305. That said, as will be discussed, these benefits are related to the purposes behind the attorney-client privilege and work-product doctrines.

306. Richmond, *supra* note 21, at 651–52 (identifying these as the common problems); see also, e.g., Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 220 (Ohio 2003) (same but addressing consumer context); Oliver v. Bd. of Governors, Ky. Bar Ass'n, 779 S.W.2d 212, 215 (Ky. 1989); *Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd.* (2006) 229 CLR 386, 487 (Austl.) (remarking on the issue of control); ABA WHITE PAPER, *supra* note 1, at 1 nn.1–4 (same); BEISNER ET AL., *supra* note 28, at 6–7 (identifying plaintiff's control as a key issue); Avraham & Wickelgren, *supra* note 106, at 235 (making point about control and accuracy, and arguing that funding contracts should be admitted in courts and that doing so will improve accuracy and decrease rates charged by funders); Giesel, *supra* note 11, at 1095 (listing attorney independence and conflict of interest as two of the main problems associated with claim funding); Paul H. Rubin, *Third-Party Financing of Litigation*, 38 N. KY. L. REV. 673 (2011) (arguing that claim funding will increase litigation in a way that will be harmful).

A. *Independence of the Lawyer and the Funder's Level of Control*

Fearing that lawyers will be negatively influenced by nonlawyers, ABA Model Rule of Professional Conduct 5.4 prohibits lawyers and nonlawyers from sharing legal fees and from forming a partnership “if any of the activities of the partnership consist of the practice of law.”³⁰⁷ As a result, outside investment in, or ownership of, law firms is prohibited in the United States, along with multidisciplinary partnerships between lawyers and nonlawyers.

Opponents of third-party claim funding argue that funding agreements between the claim holder and funder interfere with a lawyer's ability to provide independent legal advice as required under Model Rule 5.4(c), and that the lawyer's duty of loyalty might become subordinated to the claim funder, creating a conflict of interest.³⁰⁸ Indeed, the ABA fears that attorneys will lose their ability to provide independent judgment regardless of the way the funding contracts are structured and regardless of the funder's level of involvement.³⁰⁹ It believes that issues will arise around “who actually owns the claim, who controls the lawsuit, the role (if any) of the [funder] participating in significant decision-making during the litigation, and how to resolve conflicts between the client's directive, the [funder's] financial expectations, and the lawyer's assessment of the client's best interests.”³¹⁰ Further, opponents argue that “litigation-financing arrangements undercut the plaintiff's control over his or her own claim because investors inherently desire to protect their investment and will therefore seek to exert control over strategic decisions in the lawsuit.”³¹¹

Although it would be hard to prove that this issue dissipates by protecting interactions with and work created by claim funders, it (at the very least) takes away one of the motivations for funders to acquire the claim outright or seek to become co-clients to the litigation—both of which would enable protection of the interactions in question.³¹² In both of these scenarios, as either the “new” claim owner or the co-client of the claim holder, funders would gain a great deal of control

307. See MODEL RULES OF PROF'L CONDUCT R. 5.4(a)–(b) (2013).

308. See *Oliver*, 779 S.W.2d at 215 (“[A]n attorney's primary loyalty will, as a practical matter, rest with the person or entity who pays him.”).

309. See, e.g., ABA WHITE PAPER, *supra* note 1, at 26 (making this claim as it relates to requirements for consent of the funder to settle).

310. ABA Comm'n on Ethics 20/20, White Paper on Alternative Litigation Financing 26 (Oct. 19, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111019_draft_alf_white_paper_posting.authcheckdam.pdf (earlier draft of ABA WHITE PAPER, *supra* note 1).

311. BEISNER ET AL., *supra* note 28, at 7.

312. See *Silver*, *supra* note 75, at 636–638 (discussing this as a possibility).

and influence over the claim holder and management of the litigation.³¹³ Further, in both of these scenarios, the risk of affecting the lawyer's independent judgment with respect to the "real" or "original" claim holder may increase. This is because the claim holder is no longer the only client or, in the claim-acquisition scenario, even the "claim holder." Thus, it seems that by not protecting communications, incentives to acquire the claim or convince the claim holder to be a co-client with the claim funder increase—thereby enlarging the risk that the lawyer will not be protecting the claim holder's interest and that the funder will be able to have significant control over litigating the claim. Further, if the claim funder acquires the claim outright, some of the noncash benefits described above might not accrue since the original claim holder's voice may be squashed.³¹⁴

B. Nonmeritorious Claims and Prolonged Settlement

Opponents to claim funding commonly argue that it increases the litigation of nonmeritorious claims and prolongs settlement.³¹⁵ However, withholding privilege and work-product protection may actually contribute to this risk. As others have argued, claim holders and their lawyers may be less apt to share materials and confidential information with claim funders if doing so will destroy the potential for protection against disclosure by either the attorney-client privilege or work-product doctrine.³¹⁶ Claim funders, as well, will be less apt to ask for these materials because waiver could prove harmful to the value of the litigation that they are considering investing in (or have already invested in).³¹⁷ This means less information will be shared and therefore less information will form the basis for funding. On the flip side, proponents of claim funding have claimed that it has the potential to increase the pursuit of meritorious claims and settlement on the merits.³¹⁸ If this is true, this benefit may be enhanced by a doc-

313. *Id.* at 630 ("When funders are co-clients, as they may be but rarely are, plaintiffs' attorneys may take guidance from the law governing co-client relationships, which regulates, among other things, whether confidential information may be shared.").

314. *See supra* notes 89–92 and accompanying text (discussing the noncash benefits); *infra* Part IV.C (discussing the potential benefits to enhancing privilege protection); *see also* DeStefano, *supra* note 1, at 2828–30 (discussing the value add of claim funders and their potential influence on litigation, claim management, and claim finance); *infra* note 320 and accompanying text.

315. *See, e.g.*, Beisner Letter, *supra* note 40, at 138.

316. *E.g.*, Giesel, *supra* note 11, at 1086.

317. *Id.*

318. *See, e.g.*, Molot, *supra* note 28, at 73 (making this contention related to settlement based on the fact that weaker parties that cannot bear the costs settle lower because of the risk); DeStefano, *supra* note 1, at 2833 ("Claim funders can provide information to the marketplace

trine that more definitively provides protection. This is because funders will have more information before investing and more information when negotiating the levels at which it is willing to let the claim holder settle.³¹⁹

One of the potential added values of having a third-party claim funder involved is that it can provide a monitoring function between the lawyer's and the claim holder's diverging interests.³²⁰ This value add is enhanced when there is less information asymmetry.³²¹ As another scholar pointed out, "a lack of such communication creates information asymmetries between the attorney and the funder and lowers the funder's ability to supervise the attorney's work," thereby significantly reducing the potential to have an "agents-watching-agents" effect, namely the potential cross-monitoring of the lawyers

about claim value and resolution statistics that will enhance transparency and likely lead to more and earlier settlements."); Giesel, *supra* note 11, at 1084 ("[Claim funding] provides access to the playing field and also ensures that the teams show up at the field with the same equipment."); *see also Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd.* (2006) 229 CLR 386, 468 (Austl.) (explaining that claim funding contracts improve access to justice because "[a] litigation funder . . . does not invent the rights. It merely organises those asserting such rights so that they can secure access to a court of justice that will rule on their entitlements one way or the other, according to law."); *id.* at 442 (emphasizing that "the alternative is that very many persons . . . are unable to recover upon those claims in accordance with their legal rights"); *Domson Pty Ltd. v Zhu* [2005] NSWSC 1070 ¶ 78 (Austl.) ("It sits ill in the mouth of [the plaintiff] to submit that the agreement could have given rise to an abuse of process" since "[t]he funding arrangement . . . assisted [the plaintiff] in ultimately establishing a meritorious claim.").

319. Similar benefits have been purported to accrue from aggregate litigation (and similar issues with conflicts of interest). *See, e.g.,* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.05 (2010). *But see* Nancy J. Moore, *The Absence of Legal Ethics in the ALI's Principals of the Law of Aggregate Litigation: A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717, 719 (2011) ("[T]he *Principles'* failure to address ethical rules governing communication and conflicts of interest outside the context of aggregate settlements makes it likely that mass tort lawyers will continue to treat their clients as if they were absent members of a class, without the protections afforded a class."); Nancy J. Moore, *The American Law Institute's Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 396 (2008).

320. DeStefano, *supra* note 1, at 2829–30; *cf.* Steinitz, *supra* note 21, at 1276, 1322–25 (contending that funders "provide monitoring services" but that a "fragmentation of the triangular attorney-client-funder relationship," can reduce the possibility of having "agents-watching-agents"). As others have pointed out, "in the lawyer-client relationship it is assumed that the rational self-interested client's preference will be to maximize claim value whereas the rational self-interested lawyer's interest will be to maximize fees and to minimize effort." Waye, *supra* note 21, at 229. Then again, the funder and claim holder might also have divergent interests. *See* DeStefano, *supra* note 1, at 2830 n.231.

321. Steinitz, *supra* note 39, at 516 ("[T]he more inclusive the attorney-client arrangement is of the funder—for example, if the client authorizes certain types of information to be divulged to the funder either in the retention agreement or ad hoc during the course of the representation—the more all parties can enjoy enhanced efficiency generated by the agents-watching-agents effect.").

and funders.³²² Although this enhanced monitoring function may not prevent a funder from prolonging settlement, it could help prevent a contingency fee lawyer from doing so or from creating a situation that invariably prolonged settlement from an efficiency standpoint.

C. Value Add

As argued elsewhere,³²³ claim funders could be a value add. They could add to legal case management by (1) increasing our understanding of the value of the claim, and (2) serving a financial-monitoring function.³²⁴ They could also be a source of innovation for legal services by providing a different type of expertise and consultancy in litigation strategy.³²⁵ This value will likely only be enhanced by increased access to information before and after investing.³²⁶ As another scholar has pointed out, “The more lawmakers protect attorney and/or client communication with the funder under such doctrines as the common-interest doctrine, the more clients and others will benefit.”³²⁷

322. Steinitz, *supra* note 21, at 1324–25, 1325 n.200; *see also* Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 850 (1992) (identifying the concept of “[a]gents [w]atching [a]gents”); John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 342 (2010) (providing examples in which attorneys and funders have counterbalancing self-interests).

323. *See* DeStefano, *supra* note 1, at 2830 (contending that there are general benefits to having claim funders involved in the claim such as added value services, expertise, and potential for innovation, along with specific benefits to claim funders’ involvement in claims such as “(1) an increased understanding of the value of the claim; (2) optimized settlement levels; (3) financial monitoring that decreases shirking and increases efficiency; (4) better alignment between out-of-pocket expenditures and the value of the claim; (5) innovation in billing structure; and (6) increased transparency on all financial aspects of claim management”); *see also* Steinitz, *supra* note 39, at 498 (arguing that increasing communication and the level of control litigation funders have might enable litigation funders to provide value by assisting in case development, providing subject matter expertise, and monitoring). “It is obviously in the self-interest of the entrepreneur or plaintiff to overstate the quality and likely outcome of the company or of the litigation.” *Id.* at 505; *cf. id.* at 506 (arguing for staged investing and explaining that “[t]he information asymmetry is even more pronounced in the litigation funding context than in the VC context because of the limitations on communication set by the attorney-client privilege and because of the value-diminishing effect that any disclosure of communication between the attorney and the client to the funder would have if privilege is not extended”).

324. DeStefano, *supra* note 1, at 2830.

325. *See* DeStefano, *supra* note 1, at 2793 (discussing the value of collaboration between multidisciplinary and diverse groups of people); *see also* Fried et al., *supra* note 91, at 493 (noting that “[o]ne of the most significant value-added activities of the venture capitalist is involvement with strategy”); Steinitz *supra* note 39, at 516–17.

326. This presumes that confidential information will not be shared to the same extent if the doctrine does not provide protection.

327. Steinitz, *supra* note 39, at 516–17.

V. PRELIMINARY RECOMMENDATIONS

The preceding Part attempted to demonstrate that the common problems associated with commercial claim funding would not necessarily be exacerbated by protecting interactions between claim funders, claim holders, and lawyers. To the contrary, these problems might be lessened by doing so. This conclusion, along with the conclusion that both the attorney-client privilege and work-product doctrines can be interpreted to protect these interactions, leads to the recommendations in this Part. To that end, the following subparts provide a preliminary doctrinal and practical recommendation.

A. *A Doctrinal Recommendation*

First, I recommend that courts interpret the common-interest exception to apply to the relationship between claim funders and claim holders. Claim holders and claim funders do not share only a common commercial interest. Instead, their common interest is a combination of shared legal and business interests.³²⁸ Courts have found a common interest in other contexts when this is the case.³²⁹ Further, courts have applied a more lenient test in certain contexts, such as the patent context.³³⁰ Given the similarities between investing in a claim and investing in patent prosecution, the claim funding context may be an apt one for which to recognize an exception. This would ensure that the common-interest doctrine does not apply to all situations in which the party has a financial interest in the outcome of a case (e.g., to privileged documents disclosed by a trustee to a creditor in a bankruptcy dispute³³¹). Further, given the amount of similarities between the relationship between claim holders and claim funders and insureds and insurers, finding a common interest in this context is not outside the scope of the doctrine.

Specifically, therefore, I recommend that for commercial claim funders, courts adopt the test set forth by the Northern District of California in *Nidec Corp. v. Victor Co. of Japan*: If the disclosed communication helps facilitate a commercial deal between the parties, the common-interest doctrine can apply as long as the disclosed communication helps “further a common legal strategy in connection with the instant litigation.”³³² This test is not as lenient as that applied by

328. See *supra* Part III.A.3.

329. See *supra* Part III.A.3.

330. See *supra* Part III.A.3.

331. See *Grochocinski v. Mayer Brown Roes & Maw LLP*, 251 F.R.D. 316, 327–29 (N.D. Ill. 2008) (finding documents were protected by the work-product doctrine).

332. *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 579–80 (N.D. Cal. 2007).

courts that only require “a common legal goal with respect to the documents they seek to withhold.”³³³ It is also, however, not as narrow as those that require common identical legal interests.³³⁴ Further, it keeps with the purposes of the common-interest doctrine. As one court explained, “The purpose of the common interest doctrine is to ‘foster communication’ between parties that share a common interest and to ‘protect the confidentiality of communications . . . where a joint . . . effort or strategy has been decided upon or undertaken by the parties and their respective counsel.’”³³⁵

From a practical standpoint, applying this interpretation of the common-interest doctrine will ensure that both the attorney-client privilege and the work-product doctrine are available for protection. This is important because they provide different levels of protection, and in different situations.³³⁶ This recommendation bridges that gap because the common-interest exception can be used in analyzing either doctrine. Thus, under this interpretation, communications with funders that further informed decisions—even before a court might find that litigation was anticipated—can be protected under the attorney-client privilege (applying this new common-interest exception) when they might not be under work-product protection. And communications after funding (e.g., where the funder is providing expertise and consultation in addition to evaluating whether to provide more funds) can be protected under the work-product doctrine, given that courts utilize a common-interest analysis as a short cut to determining work-product protection. This recommendation, combined with an appropriate level of regulation and transparency around the control of and recovery by the funder, could enable the benefits of commercial claim funding to accrue without aggrandizing the potential problems.³³⁷

333. *Dexia Credit Local v. Rogan (Dexia II)*, 231 F.R.D. 268, 273 (N.D. Ill. 2004) (internal quotation marks omitted); cf. *In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1390 (Fed. Cir. 1996) (requiring a “substantially identical” legal interest).

334. See *supra* Part III.A.

335. *Dexia II*, 231 F.R.D. at 273 (alterations in original) (quoting *United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997)).

336. See *supra* note 235 (making point that the attorney-client privilege is absolute while the work-product doctrine can be pierced). Also, there may be situations where a potential investor will be approached before a case has started and before a court might determine that it was “in anticipation of litigation” as required by the work-product doctrine. See *Beardslee*, *supra* note 150, at 1900–03 (exploring how courts provide a narrow interpretation of “in anticipation of litigation”).

337. See *Martin*, *supra* note 21, at 115 (recommending regulating third-party funding so that there is more transparency); see also *DeStefano*, *supra* note 1, at 2829–45 (arguing that with the right level of regulation, the inherent benefits of claim funding may outweigh the risks). Evidently, in three state legislatures (Indiana, Oklahoma, and Mississippi), legislation to regulate claim funding was introduced or is pending. S.B. 378, 118th Gen. Assemb., 1st Reg. Sess. (Ind.

B. Practical Recommendations

On a practical level, I recommend that claim funders, claim holders, and lawyers (1) sign nondisclosure and common-interest agreements, and (2) proceed cautiously in contract negotiations that set up relationship boundaries and communication flow protocol. I make this recommendation for a few reasons.

First, the current doctrine providing exceptions to waiver of the attorney-client privilege and work-product protection is in flux.³³⁸ Second, the very few cases that have addressed the claim funding context do not necessarily lend a great deal of support to the argument that interactions between, and documents created and shared by, claim funders, claim holders, and lawyers will be protected by either the attorney-client privilege or the work-product doctrine. And the few cases that do indicate that having an NDA can be helpful.³³⁹

Third, although in some circumstances having the funder take a more active approach can provide more support for attorney-client and work-product protection (and perhaps the value that funding can bring), it can also increase the chances of a contract being held void as against public policy. This is because courts are reluctant to uphold contracts that enable too much control or influence by the claim funder over claim strategy.³⁴⁰

Fourth, there has been evidence of public policy concerns in scholarship, articles in the popular media, case law, and ethics opinions on claim funding. As W. Bradley Wendel points out, there exists “a sentiment that there is something fishy, even distasteful, about [alternative litigation funding].”³⁴¹ For example, even in states where champerty and maintenance do not bar claim funding, courts express concern and reluctance to uphold funding agreements.³⁴² They inti-

2013); H.B. 503, 128th Leg., Reg. Sess. (Miss. 2013) (bill died in committee); S.B. 2378, 128th Leg., Reg. Sess. (Miss. 2013) (bill died in committee); S.B. 1016, 54th Leg., 1st Sess. (Okla. 2013). A 2010 Delaware House Bill passed out of committee, but went no further. H.B. 422, 145th Gen. Assemb., Reg. Sess. (Del. 2010).

338. See *supra* Part III.

339. See *supra* notes 222–223, 294–296, and accompanying text.

340. See, e.g., *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 104 (Tex. App. 2006); see also DeStefano, *supra* note 1, at 2825–26; *supra* Part III; *supra* note 39 and accompanying text.

341. Wendel, *supra* note 30, at 503 (exploring the historical distaste of the commodification of litigation and arguing that this distaste applies to claim funding but making the point that the “ick-factor” objections should not be taken seriously); cf. Richmond, *supra* note 21, at 651 (explaining that “[t]he emergence of litigation funding as a new financial services industry has been marked by judicial distrust” because of concerns about lawyers’ independent judgment and funder control over plaintiff).

342. See DeStefano, *supra* note 1, at 2824–25.

mate that claim funding—in general—is inappropriate and displeasing.³⁴³ Further, although claim funding is not necessarily barred by state law (in states where champerty and maintenance have been abolished), the problems associated with commercial claim funding are the problems commonly used by the bar to prevent influence by nonlawyers on lawyers and protect the sanctity of the relationship between lawyers and their clients. These common problems include: the risk to lawyer independence, the unauthorized practice of law, the potential threat to the reputation of the legal profession, and lawyers' supposed monopoly of the legal services marketplace.³⁴⁴ Thus, it is not unfathomable that the courts' general distaste for claim funding and appetite for keeping nonlawyer influence to a minimum will seep into their analysis of whether to apply the attorney-client privilege and work-product protection in this context.³⁴⁵

VI. CONCLUSION

Commercial claim funding is a growing industry in the United States. Both before deciding to invest (to analyze the strength of the claim) and during the course of the financial relationship (to manage the investment), funders may request confidential information about the claim or the litigation strategy, and may work and communicate with claim holders and their lawyers. However, there is little case law and little in-depth analysis on whether and in what circumstances the attorney-client privilege and work-product doctrines can be applied to protect communications, interactions, and work developed between claim funders, lawyers, and claim holders—both before the funder has invested and afterwards. This Article fills that gap by exploring the way the doctrine has been applied in other contexts (including patent law, public relations, and insurance) to predict how the doctrine might be applied in the claim funding context.

343. See, e.g., Steinitz, *supra* note 39, at 484 (describing the “distaste for nonparty profiteering from litigation, a concern about commodification of causes of action, and an objection to the use of the taxpayer-funded court system for investment purposes”); Stephen B. Presser, A Tale of Two Models: Third Party Litigation in Historical and Ideological Perspective 18 (Sept. 25, 2009) (unpublished paper presented at the Third Party Financing of Litigation Roundtable, Searle Ctr., Northwestern Univ. Law Sch., Sept. 2009) (on file with the Pritzker Legal Research Center, Northwestern University Law School); see also VICKI WAYE, TRADING IN LEGAL CLAIMS: LAW, POLICY & FUTURE DIRECTIONS IN AUSTRALIA, UK, & US 48 (2008) (discussing commodification of legal claims).

344. See generally DeStefano, *supra* note 1.

345. Avraham & Wickelgren, *supra* note 106, at 257 (“[I]t is worth mentioning that courts have long been influenced by factors that are not technically admissible in court. For example, it is often stated that judges consider an attorney’s reputation when evaluating his or her legal argument.”).

Despite assumptions to the contrary, my analysis leads to two conclusions. First, there is more than one exception to the attorney-client privilege doctrine that might apply to protect communications between claim funders, claim holders, and their lawyers: the agency exception, the functional equivalent exception, and the common-interest doctrine. Second, despite its breadth, the work-product doctrine might not be interpreted to apply depending on the test the court uses and also the court's approach to analyzing the common-interest doctrine—a doctrine that is more commonly associated with the attorney-client privilege but that has been used by courts to demonstrate waiver of work-product protection as well.

Understanding that interactions and communications between claim holders, funders, and attorneys can be protected by the attorney-client privilege and work-product doctrines in certain circumstances, the question is whether they *should* be. Invariably, such a question could collapse into an analysis of whether we should allow claim funding at all—and for that matter whether there should exist any privilege doctrines in the corporate context. Therefore, I tackle the normative question by analyzing whether the problems commonly associated with claim funding are intensified when the interactions between claim holders, funders, and lawyers are protected. Ultimately, I conclude that applying the exceptions to waiver and the work-product doctrine to protect these interactions may, instead of increasing the risks and negative externalities of claim funding, perhaps help protect against them while at the same time potentially yield benefits yet unexplored.

As a result, I conclude with doctrinal and practical recommendations. First, I recommend that courts adopt one of the more lenient interpretations of the common-interest doctrine. By doing so, both doctrines (the attorney-client privilege and work-product) can be consistently and predictably applied to protect communications at issue in this context. Second, I urge lawyers to carefully craft contracts so that they include nondisclosure and statements of common-interest agreements. In sum, I end with a word of caution. Despite the doctrinal support for the existence of a common interest between claim funders and claim holders, because of the common problems associated with claim funding and the common distaste for the commodification of law, claim funders, claim holders, and their lawyers should approach issues around confidentiality with care.