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Third-Party Litigation Finance

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Introduction

Third-party litigation finance is contracting, as a litigant, to obtain financial assistance from third-party funders in exchange for an interest in the potential recovery. Put simply, a third-party investor helps to finance a lawsuit. The agreement is usually non-recourse, so if the plaintiff loses the case, the funder receives nothing. This practice is also known as litigation financing and alternative litigation finance, among other terms.

Litigation finance is still relatively new to the United States. It originated in the personal injury context, but since 2010 it has expanded rapidly into areas like intellectual property, antitrust, business contracts, and commercial arbitration. The funded party is typically, though not exclusively, the plaintiff.

Litigation finance is somewhat controversial. Opponents criticize the practice for, among other reasons,

- increasing the number of cases brought, particularly weak ones;
- prolonging litigation and discouraging settlement or alternative dispute resolution (ADR);
- undercutting plaintiff and lawyer control over litigation;
- directing money away from the injured;
- constituting champerty; and
- compromising the attorney–client relationship and diminishing the professional independence of attorneys.[1]

Proponents of litigation finance point to its many benefits, including

- addressing the staggering costs of litigation, which could prevent litigants with meritorious claims from bringing suit;
- providing funding to improve the quality of litigation;
- lowering barriers of entry for qualified, but new, attorneys seeking to obtain leadership positions in class action or aggregate litigation;[2]
- off-loading risk, because the litigation is non-recourse, which means parties owe nothing for unfavorable outcomes;

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1. *See generally* U.S. Chamber Inst. for Legal Reform, Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation 1–6 (Oct. 2012), *available at* http://www.Instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf; New York City Bar Ass'n Formal Opinion 2011-2, *available at* http://www.nycbar.org/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02.

2. *See* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. Rev. 71, 121–25 (2015) ("Established law firms tend to have more assets available to fund common benefit work, which means that judges will continue to choose repeat players. Yet, financing need not impede otherwise-qualified attorneys if judges permit third-party funding arrangements.") (footnotes omitted).

- allowing companies to focus on their core business and leave the pursuit of their claims to others; and
- leveling the playing field with resource-laden defendants.[3]

Supporters of litigation finance also point out that it is not the first mechanism of its kind: Contingency fees and liability insurance are also models of shared ownership of legal claims. Many judges have looked to the robust case law in these areas for analogies to issues raised in litigation finance.

Classic litigation finance, whether consumer or commercial, is an economic instrument; investors assess risks to make a profit. There are also groups that finance litigation for non-economic reasons. For instance, investors may be interested less in the money to be gained and more in the potential legal gains of the plaintiff's case.

The impact of litigation finance on individual lawsuits is still difficult to gauge. But as a greater number of complex lawsuits receive third-party funding, they are becoming more visible, and judges are paying more attention.

This pocket guide outlines recent developments in litigation finance and offers judges suggestions on what to do if related issues are raised in their courtrooms. It provides an overview of the two basic types of litigation finance and the regulations and rules that have sprung up around the practice. It then moves on to some legal and case-management issues that judges may confront when dealing with litigation finance.

3. *See generally* Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 Cardozo L. Rev. 861 (2015); David Lat, *6 Virtues of Litigation Finance*, Above the Law, Nov. 24, 2015, http://abovethelaw.com/2015/11/6-virtues-of-litigation-finance/?rf=1; Sylvan Seidel & Sandra Sherman, *"Corporate Governance" Rules Are Coming to Third Party Financing of International Arbitration (and in General)*, *in* ICC, Doosier X: Third-Party Funding in International Arbitration 32, 35–36 (Bernardo M. Cremades & Antonias Dimolitsa eds., 2013).

Types of Litigation Finance

Judges may find it helpful to think of litigation finance as comprising mainly two types of funding: consumer and commercial. Consumer funding arrangements typically involve an individual person as the plaintiff, such as in personal injury or divorce proceedings. The claimant may urgently need funds or have another reason that makes a contingency-fee arrangement untenable. Consumer funding was the first type of litigation finance to appear in U.S. courts.

Commercial funding arrangements cover business-to-business disputes, class actions, and mass tort litigation. The funding firms are often litigation funding firms, but commercial funding vehicles are rapidly evolving—including, for example, crowd-funding in online marketplaces and marketing programs designed to locate plaintiffs. In some cases, funders sign contracts with counsel rather than the client; this is most common in class actions. In other cases, a funder may provide an outlay of capital to a law firm for a portfolio of cases, rather than one particular case.

Not surprisingly, judges are more likely to find commercial funding arrangements in complex litigation. But because consumer funding preceded commercial funding in U.S. courts, it is important to recognize that consumer funding cases often set the preliminary precedents. Of course, judges reading consumer funding cases when deciding an issue in a commercial funding case should keep in mind that the facts and reasoning underlying a decision in a consumer funding case may not apply to their own.

Regulation, Codes of Conduct, and Professional Responsibility

Supporters and opponents of litigation finance have jointly called for increased regulation and rulemaking for the industry. They want to offer clarity to lawyers and investors and protection to claim holders.[4] These calls have just begun to reach the federal level,[5] and for now, litigation funders are under no obligation to self-regulate. There is also no external regulatory body overseeing their activities.

A number of states have begun to pass legislation relating to litigation finance.[6] This legislation tends to fall within one of two categories:

1. funding agreement regulations, which place requirements or limits on the terms that may be included in a funding agreement (e.g., required disclosures, caps on financing amounts, rights of cancellation, and limits to how much control an investor may have over the course of the litigation)[7]; and
2. investor-based regulations, which require funders to obtain licenses or post bonds in order to operate in the state, or which regulate advertising and referral fees.[8]

Almost all state regulations were passed for consumer funding situations, but depending on the language of the statutes, they may apply to commercial funding situations as well. In addition, some litigation funders and other groups have begun to develop codes of conduct or best practices in an effort to promote transparency, consistency, and fairness.[9]

Bar associations, think tanks, and commentators have also focused on the attorney's role in litigation finance arrangements. They have pointed to a number of ethical issues that such arrangements have raised and have, in some instances, offered ethics opinions and revised professional responsibility rules to address them.[10]

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4. *See, e.g.,* U.S. Chamber Inst. for Legal Reform, *supra* note 1, at 1–2.

5. Most third-party funders that fund commercial litigation are private hedge funds, so they are not subject to regulation the way publicly traded companies might be. However, the SEC has initiated enforcement actions in a few cases. *See, e.g.,* In the Matter of RD Legal Capital LLC (File No. 3-17342), an administrative proceeding filed July 14, 2016.

6. The National Conference of State Legislatures performed a survey of proposed legislation for 2015. *See* Nat'l Conf. of State Legislatures, *Litigation or Lawsuit Funding Transactions 2015 Legislation* (Jan. 9, 2016), http://www.ncsl.org/research/financial-services-and-commerce/litigation-or-lawsuit-funding-transactions-2015-legislation.aspx.

7. *See, e.g.,* Tenn. Code Ann. § 47-16-104; Me. Rev. Stat. tit. 9-A, § 12-104.

8. *See, e.g.*, Ind. Code Ann. § 24-12-3-1; Vt. Stat. Ann. tit. 8, § 2254.

9. *See, e.g.,* Bentham IMF, Code of Best Practices (April 2016), *available at* http://www.benthamimf.com/docs/default-source/default-document-library/code-of-best-practices-final-10-01-14.pdf?sfvrsn=2; Alliance for Responsible Consumer Legal Funding, Industry Best Practices, http://arclegalfunding.org/industry-best-practices/; Am. Legal Fin. Ass'n, Code of Conduct, https://americanlegalfin.com/what-is-alfa/alfa-code-of-conduct/.

10. *See, e.g.,* ABA Comm'n on Ethics 20/20, White Paper on Alternate Litigation Finance 15–39 (Feb. 2012), *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;

Lawyers representing clients with third-party funders must consider a host of professional conduct concerns. These lawyers have a duty to provide their clients with independent professional judgment and must not allow a third party to interfere with the exercise of that duty. The involvement of a litigation funder can also produce conflicts of interest. It might create a financial interest for a lawyer, for example, or lawyers might find their loyalty divided between their clients and the funders. The terms of the funding agreement may give the funder incentives to settle earlier or later than the client wishes, which puts the lawyer in a particularly difficult position. These issues become further complicated if the funder is given power to control certain aspects of counsel selection or the direction of litigation. There are also referral, advertising, fee-sharing, and fee-payment issues that may need to be considered. Finally, as discussed later in the discovery section, sharing information with third-party funders risks waiving a client's confidentiality or privilege.

Judges are unlikely to be tasked with managing professional responsibility issues in court. The exception will be in class-action cases: Judges have an increased responsibility to make sure the interests of the class are protected. This will be discussed in the disclosure section.

Steven Garber, Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns (RAND Corp. 2010), *available at* http://www.rand.org/topics/third-party-litigation-funding.html.

Legal Issues Raised by Litigation Finance Agreements

Litigation finance agreements raise a number of legal issues. Judges may encounter these issues in litigation seeking to enforce the agreement itself or in the litigation for which the funding was secured.

Champerty, Barratry, Maintenance

Critics of litigation finance often attack it as a form of maintenance, champerty, or barratry. These doctrines are based on a long-held principle at common law that litigation should be solely a matter for those with interest in the dispute. This principle has led to the traditional prohibitions against maintenance and champerty. Maintenance involves a party without a bona fide interest in a lawsuit nonetheless encouraging its litigation. Champerty is a form of maintenance whereby a non-interested party provides financing to a litigant in exchange for a portion of the proceeds. A separate, but related, prohibition existed against barratry, the pursuit of vexatious litigation. Champerty, maintenance, and barratry can be prohibited by statute or case law.

For the past two centuries, these prohibitions have generally become less strict in the United States, as courts have recognized that the original reasons for them—preventing lawsuit speculation, preventing frivolous litigation, and preventing financial overreach, among others—no longer exist or are addressed by other laws. In addition, rigorous enforcement of such prohibitions can raise its own concerns regarding access to justice and free speech. Some jurisdictions have abrogated liability entirely; others have severely limited the doctrines' reach.[11]

That is not to say that champerty and maintenance are not still relevant; limited tort claims based on champerty still exist in some states, like North Carolina. Moreover, champerty and maintenance are a contract defense in many jurisdictions. So while a nonparty to the litigation finance agreement may not assert a separate claim of champerty or maintenance, a party may be able to mount a defense against payment under the agreement by arguing that the agreement is void and unenforceable because it is champertous. Courts confronting these issues will have to consult applicable state law to determine the legality of the agreements and proper remedies.

11. *See, e.g.,* Del Webb Communities, Inc. v. Partington, 652 F.3d 1145, 1153–57 (9th Cir. 2011) (rejecting tort liability for champerty and maintenance under Nevada law); Saladini v. Righellis, 426 Mass. 231, 233–37 (1997) (rejecting impropriety of investing in lawsuits and rejecting liability for common-law champerty, maintenance, and barratry under Massachusetts law). *See also* ABA Comm'n on Ethics, *supra* note 10, at 9–12 (offering a more extended discussion of maintenance and champerty's evolution in U.S. courts).

Loan and Usury Claims

The other primary way that parties may attack the enforceability of a litigation finance agreement is by labeling it usurious. Like the champerty inquiry, this inquiry will vary significantly from state to state.[12]

If a funding agreement is deemed to constitute a loan rather than an investment, it may be subject to significant regulation under state laws, including licensing and disclosure requirements as well as usury laws. Some state courts have held that if the case underlying a litigation finance agreement has such a low risk of failure that repayment is all but inevitable, the financing constitutes a loan with an absolute repayment obligation. In such circumstances, the agreement cannot list a rate higher than the relevant usury laws; courts will either void the agreement or rewrite it with the appropriate rate.[13]

Other Clauses

Judges may also encounter traditional contract disputes over litigation finance agreements. For example, these agreements may contain forum selection, choice-of-law, or arbitration clauses. Courts encountering these clauses in finance agreements tend to analyze them as they would in any circumstance; again, state law will often be relevant.[14]

12. *See* ABA Comm'n on Ethics, *supra* note 10, at 12–13.

13. *See, e.g.,* Lawsuit Fin., LLC v. Curry, 261 Mich. App. 579, 588–91 (Mich. Ct. App. 2004) (voiding agreement); Echeverria v. Estate of Lindner, No. 018666/2002, 2005 WL 1083704 (N.Y. Sup. Ct. Mar. 2, 2005) (rewriting agreement to comply with state usury threshold). *But see* Kelly, Grossman & Flanagan, LLP v. Quick Cash Inc., No. 04283-2011, 2012 N.Y. Misc. 1460, at *5 (N.Y. Sup. Ct. Mar. 29, 2012) (refusing to read an agreement as ambiguous on the question of usury because of the sophistication of the parties); Anglo-Dutch Petroleum Int'l Inc. v. Haskell, 193 S.W.3d 87, 98–99 (Tex. App. 2006) (rejecting the argument that a high likelihood of success constituted incontrovertible evidence of noncontingency).

14. *See, e.g.*, Rucker v. Oasis Legal Fin., LLC, 632 F.3d 1231 (11th Cir. 2011) (forum selection clause analysis); MoneyForLawsuits V LP v. Rowe, No. 10-CV-11537, 2012 WL 1068760 (E.D. Mich. Mar. 29, 2012) (choice-of-law provision analysis); S & T Oil Equip. & Mach., Ltd v. Juridica Invs. Ltd., 456 F. App'x 481 (5th Cir. 2012) (arbitration clause analysis). These types of clauses and others are included in Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 Iowa L. Rev. 711 (2013). The article includes a model contract assembled through the use of a web-based platform, which allows both supporters and opponents of litigation finance to weigh in.

Initial Disclosures and Discovery

Because of the relative newness of litigation finance in federal courts and the lack of regulation surrounding it, it can sometimes be unclear how much information about the financing arrangement is discoverable and how much the judge might need to know in order to manage the case effectively. Those questions are the subject of this section, which offers examples of when judges might elicit disclosures about litigation finance and what sorts of issues judges may encounter in discovery.

Disclosures

There are currently no federal rules requiring disclosure of the use of third-party funding in any particular litigation. There have been calls to amend the Federal Rules of Civil Procedure to make disclosures about third-party funding part of the initial disclosures under Rule 26, but so far, this has not happened. However, the Judicial Conference Advisory Committee on Civil Rules has stated "that judges currently have the power to obtain information about third-party funding when it is relevant in a particular case."[15]

There are a host of reasons judges may find information about litigation finance agreements relevant. Judges may need to know the identities of funders in order to assess potential conflicts of interest the judges themselves may have, such as financial conflicts. Information about litigation funders may also be relevant when assessing fiduciary duties, calculating attorneys' fees, or ensuring effective case management. A judge may also be called upon to resolve allegations of financing abuses or overreaching in consumer funding situations.

If a judge is overseeing a potential class action, there are additional reasons information about litigation finance agreements may be relevant. In class actions, the funders often contract with counsel rather than the client, so the funder will have no duty to class members. Furthermore, since judges appoint class counsel, judges have an increased responsibility to ensure the appropriateness of representation. Knowledge of litigation finance agreements may be relevant when a judge considers a host of factors under Federal Rule of Civil Procedure 23(g)(1), including, most obviously, the resources committed and the counsel's ability "to fairly and adequately represent the interests of the class."[16] This information may also prove important in assessing the fairness of settlement agreements under Rule 23(e).

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15. Judicial Conference of the United States, Report of Advisory Comm. on Civil Rules 4 (Dec. 2, 2014). Some districts have also considered adding disclosures of third-party financing to their local rules. *See, e.g.,* Taryn Phaneuf, *District Court in California Considers Litigation Funding Disclosure Rule*, Northern California Record (November 23, 2016), http://norcalrecord.com/stories/511045596-district-court-in-california-considers-litigation-funding-disclosure-rule.

16. Securities class actions, administered under the Private Securities Litigation Reform Act (PSLRA), provide additional challenges. Judges report that in the lead plaintiff and lead counsel application process, some parties have pointed to the fact that securing the third party's funding was the ground for selection; funders may not agree to come through with the funding without their preferred counsel or plaintiff making decisions for the class.

If judges decide that they do need information about the funder, they will have to decide when in the action to elicit it. Some judges ask for the information at the Rule 16 conference or in the scheduling order promulgated thereafter. Others wait until class certification.

A judge will need to ask the right questions to determine what competing incentives might exist. Professor Bert Huang has worked with some judges to compile a list of relevant questions,[17] which includes the following:

1. questions about the financing structure:
   - Who is funding the litigation, who arranged for it, and to whom have the terms been disclosed?
   - How will the funder be paid, and from what portion of the recovery?
   - Is there a fixed amount or a variable one? Is it paid in stages or all at once?
2. questions about how the funding influences the conduct of litigation:
   - Does the funder have formal or de facto control over litigation decisions, such as through the ability to withdraw funding?
   - Does the funder have the power to influence or veto settlement negotiations?
   - Under the terms of the agreement, does the funder have different incentives than the client in terms of settlement?
   - How much control does the funder have over appointment of counsel?
   - Are some subsets of plaintiffs (e.g., named plaintiffs) treated differently than others?

Finally, judges will have to decide whether such disclosures should be made only to the judge or shared with the other party (and the public) as well. This decision is closely aligned with questions of discovery discussed in the next section.

Discovery

Judges may also encounter situations in which parties seek discovery of materials relating to litigation funding, including communications with potential and secured funders, documents shared with potential or secured funders, and drafts or the final funding agreement.[18] Potential funders understandably perform due diligence before deciding whether to finance a litigation, and they want to review various materials in order to assess the wisdom of investment.[19] Lawyers will have to

17. *See* Bert I. Huang, *Litigation Finance: What Do Judges Need to Know*? 45 Colum. J.L. & Soc. Probs. 525, 529–32 (2012).

18. *See, e.g.,* Devon IT, Inc. v. IBM Corp., No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012) (outlining five types of documents related to third-party funding sought in discovery).

19. It is even possible that a funder who enters into an agreement and later discovers that information it believes it should have been privy to was withheld will file a fraud suit.

balance a duty of transparency with zealous advocacy and preservation of confidentiality for their clients.[20] In addition, after a funder has been secured, the funder may seek status reports or other types of updates that raise the same issues.

The first discovery issue judges will contend with is what aspects of litigation finance are discoverable at all. According to Federal Rule of Civil Procedure 26(b)(1), material is generally discoverable if it "is relevant to any party's claim or defense and proportional to the needs of the case." Parties have argued for the relevance of litigation finance materials on a number of bases, including

- to raise the supposed illegality of the funding contract as a defense in the case;
- to identify the party in interest under Federal Rule of Civil Procedure 17(a);
- to determine whether the funder is making enough decisions to render it the real party in interest;
- to uncover potential information relevant to a statute-of-limitations defense;
- to answer questions about loyalty to the class and triangulated conflicts of interest; and
- to assess the adequacy of the representation of counsel under Federal Rule of Civil Procedure 23(g).[21]

Judges have come to different conclusions about these arguments, but by and large, they agree that if the arguments are based on sheer speculation, rather than having some foundation, they most likely will not be sufficient to warrant discovery.[22] In contrast, if the circumstances of the litigation raise concerns about the adequacy of counsel, the court may grant discovery.[23]

If a judge determines that the litigation finance materials are generally discoverable, the next issue becomes whether they are privileged. Courts have found many materials relating to litigation finance to be privileged as work product.[24] Federal Rule of Civil Procedure 26(b)(3)(A) protects materials "prepared in anticipation of litigation" unless the other party can show "substantial need" for them. A majority of federal courts apply a "because of" test: if materials were prepared because of the prospect of litigation, they will qualify as work product.[25] Although the materials may primarily have been prepared for a business purpose, that is, securing funding,

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20. It is worth noting that a confidentiality agreement between a party and a funder will not prevent discovery of information that is otherwise discoverable. *See In re* Int'l Oil Trading Co., 548 B.R. 825, 830 n.2 (Bankr. S.D. Fla. 2016).

21. *See, e.g.*, Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 724 (N.D. Ill. 2014); Kaplan v. S.A.C. Capital Advisors, L.P., No. 12-CV-9350, 2015 WL 5730101, at *3 (S.D.N.Y. Sept. 10, 2015); Doe v. Society of Missionaries of Sacred Heart, No. 11-CV-02518, 2014 WL 1715376, at *2 (N.D. Ill. May 1, 2014); *In re Int'l Oil Trading Co.*, 548 B.R. at 829.

22. *See, e.g.*, *Kaplan*, 2015 WL 5730101, at *5.

23. *See* Ogola v. Chevron Corp., No. 14-0713, Doc. No. 159 (Order Granting in Part Def.'s Motion to Compel) (N.D. Cal. Aug. 5, 2016).

24. *See generally* J. Maria Glover, *Alternative Litigation Finance and the Limits of the Work-Product Doctrine*, 12 N.Y.U. J.L. & Bus. 911 (2016).

25. *See Miller UK Ltd.*, 17 F. Supp. 3d at 735. A minority of federal courts require that litigation was the "primary reason" the requested materials were created. *See, e.g.*, United States v. Gulf Oil Corp., 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985).

the fact that an impending litigation caused the need to secure funding has led many courts to conclude that privilege applies.[26]

Judges may exclude litigation finance documents from discovery in their entirety, or they may order parties to provide them with appropriate redactions. Most courts distinguish between work product that consists purely of facts and work product that contains mental impressions, conclusions, opinions, or legal theories.[27] Factual work product may be discoverable if there is a substantial need for it and the other party is unable to obtain the equivalent by other means, but opinion work product is hardly ever discoverable, so judges must pay particular attention to ensure against unwarranted disclosure.[28]

Materials related to litigation finance will often include analysis regarding the merits of the case, discussion of available defenses, and assessments of risk. When ensuring that mental impressions and legal theories are not inappropriately disclosed, judges should be aware that many terms in the agreement that may not appear to be included in these categories often have strategic information underlying them. Such terms can include

- the financing premiums or percentages the funder will receive;
- the appropriate conditions for settlement; and
- the timing of the funding or later agreements (which may reveal when exactly a party has run out of money).[29]

In a similar vein, there may be instances in which a standard privilege log might prove unduly burdensome or might reveal the very information sought to be protected. For example, a privilege log entry detailing the date of an e-mail with the subject "Executed Finance Agreement Addendum" might provide important strategic information.[30] In such instances, judges might consider allowing categorical privilege logs or other alternatives to be used.[31]

Another point to consider is the possibility of loss of privilege or waiver. Courts must analyze whether sharing information with potential or secured litigation funders will cause otherwise privileged information to lose its privileged status. The question will apply not only to the actual materials shared, but also potentially to all related information under the broad subject-matter waiver rules in some jurisdictions.

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26. *See, e.g.*, Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A., No. CV 7841-VCP, 2015 WL 778846, at *9 (Del. Ch. Feb. 24, 2015); Devon IT, Inc. v. IBM Corp., No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012); Mondis Tech., Ltd. v. LG Elecs., Inc., No. 2:07-CV-565, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011); *In re Int'l Oil Trading Co.*, 548 B.R. at 835–36.

27. *See* Doe v. Society of Missionaries of Sacred Heart, No. 11-CV-02518, 2014 WL 1715376, at *3 (N.D. Ill. May 1, 2014).

28. *See* Fed. R. Civ. P. 26(b)(3)(B).

29. *See, e.g.*, *Carlyle Inv. Mgmt. L.L.C.*, 2015 WL 778846, at *9.

30. *See* Glover, *supra* note 24, at 940–41.

31. *See, e.g.,* Charge Injection Techs, Inc. v. E.I. DuPont De Nemours & Co., No. 07C-12-134, 2015 WL 1540520, at *3 (Del. Super. Ct. Mar. 31, 2015) (accepting preliminarily a redacted agreement with a cover letter explaining redactions).

Judges will have to consider whether the third-party funder is a privileged person and whether the disclosure creates a "substantially increased opportunity for potential adversaries to obtain the information," which can constitute waiver under the work-product doctrine.[32] Many courts have held that the existence of a confidentiality or nondisclosure agreement between a party and a potential or secured funder can defend against such risk and leave the privilege intact.[33]

If documents that were previously protected by attorney–client privilege were shared with a litigation funder, judges may also have to consider whether a common interest exists that allows for the disclosure and exchange of information without the loss of that privilege.[34] Federal courts have ruled on both sides of the issue.[35] Judges assessing common-interest-doctrine arguments may need to distinguish between commercial interests and legal interests; the former may not be protected. Furthermore, common interest may not be established until after an agreement has been signed, leaving materials generated beforehand vulnerable.[36]

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32. Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 736 (N.D. Ill. 2014) (internal quotation marks, emendations, and citations omitted).

33. *See, e.g.,* Doe v. Society of Missionaries of Sacred Heart, No. 11-CV-02518, 2014 WL 1715376, at *4 (N.D. Ill. May 1, 2014); Mondis Tech., Ltd. v. LG Elecs., Inc., No. 2:07-CV-565, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011).

34. Attorney–client privilege usually will not attach to original communications between the funder and the party or the party's counsel, as the funder is not the client. Similarly, parties may make a joint defense argument, but the doctrine usually only applies when each party has separate counsel, which is not the traditional litigation finance model.

35. *See, e.g.,* Berger v. Seyfarth Shaw LLP, No. C 07-05279, 2008 WL 4681834 (N.D. Cal. Oct. 22, 2008) (finding no common legal interest and therefore exception to waiver did not apply); Leader Techs., Inc. v. Facebook, Inc., 719 F. Supp. 2d 373, 376–77 (D. Del. 2010) (same); *Miller UK Ltd.*, 17 F. Supp. 3d at 732–34 (same). *But see* Devon IT, Inc. v. IBM Corp., No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012) (finding that the communications with the potential funder, who became the funder, waived neither work-product protection nor, because of a common interest, attorney–client privilege); *In re* Int'l Oil Trading Co., 548 B.R. 825, 833 (Bankr. S.D. Fla. 2016) (finding that communications between funder, client, and counsel were necessary to obtain informed legal advice and limited to that common cause).

36. Parties have argued that a common legal interest was created earlier, because the litigation finance companies were interested in financing the litigation when they received the materials. *See Leader Techs., Inc.,* 719 F. Supp. 2d at 376. In that case, the judge upheld the magistrate judge's ruling that no common interest existed to prevent waiver of privilege.