NOTE

Eliminating Financiers from the Equation: A Call for Court-Mandated Fee Shifting in Divorces

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Divorce can be prohibitively costly. Many struggle or simply cannot afford to pay divorce attorneys' fees, and the economic effects of divorce on women are particularly acute. In the past few years, financing firms have emerged to fund nonmonied spouses, mostly women, who cannot afford to litigate divorces from their wealthy spouses. The services provided come with a hefty price tag: firms take large fees, and their involvement may lead to unethical and potentially damaging practices. This Note explains what third-party divorce finance firms are and why the use of firms is problematic, and offers an alternative, more equitable method of financing nonmonied spouses' divorce fees. Courts, not financing firms, should address any disparities in ability to pay between spouses. Mandatory fee shifting by courts would obviate the need for these financing firms that improperly profit from divorce and whose services come with many unwelcome strings attached.

Table of Contents

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Introduction

Divorce traditionally involves two spouses, their attorneys, a judge, and perhaps children. But today, in some cases, the drama involves a new party: a divorce-financing firm. Since 2009, these firms have been investing[1] or loaning money at high rates[2] to spouses, mostly women,[3] to finance divorces. Traditional forms of funding (e.g., a standard bank loan) are often not an option for an individual whose spouse controlled the finances during the marriage and who often has no income, low credit, and little or no available collateral.[4] In addition to often having difficulty paying to litigate a divorce, women typically experience a severe decline in economic standing after a divorce.[5]

The media portrays third-party financing firms as saviors for those who cannot otherwise afford to pay for their divorce litigation. For example, reporters have dubbed one such firm and its leading attorney the "Robin

1. *See* Balance Point Divorce Funding, http://www.balancepointfunding.com (last visited Jan. 23, 2015).

2. Bridget Mallon, *Divorce Settlements: The 'Divorce Fixer' Provides Loans to Divorcés*, Huffington Post (July 9, 2013, 5:00 PM), http://www.huffingtonpost.com/2013/07/09/divorce-settlements_n_3568689.html (stating that one firm typically collects between 12 to 20 percent interest on loans).

3. *See* Binyamin Appelbaum, *Taking Sides in a Divorce, Chasing Profit*, N.Y. Times, Dec. 5, 2010, at A1, *available at* www.nytimes.com/2010/12/05/business/05divorce.html ("[C]ustomers fall into a pattern. They are women. They generally do not have jobs. They often are raising small children. And their husbands run their own businesses, making it tough to obtain financial information."); Paul Sullivan, *Divorce Funding Firms Help Spouses Expecting Big Payouts*, N.Y. Times, Feb. 28, 2015, at B4, *available at* http://mobile.nytimes.com/2015/02/28/your-money/divorce-funding-firms-help-spouses-expecting-big-payouts.html?referrer=&_r=1.

4. *See* Stephanie Taylor Christensen, *What Are Divorce Loans?*, MintLife Blog (Mar. 29, 2013), https://www.mint.com/blog/trends/what-are-divorce-loans-0313 ("Credit is often a key concern in a divorce, especially when one spouse managed most of the household finances, held financial accounts in his or her name, and served as the primary breadwinner. Likewise, when one spouse hides or moves assets, or threatens to default on shared loans and mortgages, even divorcees with plenty of income and previously stellar credit may find themselves unable to secure loans and lines of credit in the midst of divorce proceedings.").

5. Karen Winner, Divorced from Justice: The Abuse of Women and Children by Divorce Lawyers and Judges xvii (1996) ("[N]ewly divorced women find that their standard of living has plummeted, on the average, by 30 percent, and mothers' and children's available income has fallen as much as 37 percent. Meanwhile, the standard of living for their ex-husbands has risen from 10 to 15 percent."); *see also* Terry Arendell, Mothers & Divorce 36–37 (1986) (summarizing economic impact of divorce for sixty interview subjects).

Hood for divorcing women,"[6] "the fairy godmother for Manhattan divorcées,"[7] and the "divorce fixer."[8] The nonmonied spouse seeking financing for her divorce is typically a woman whose husband controlled the finances, perhaps gave her an allowance, and generally funded her lifestyle by making mortgage and credit card payments and meeting other financial obligations.[9] Divorces themselves are complex and expensive. In addition to attorneys' fees, spouses often pay for outside experts and investigators[10] to analyze a spouse's questionable behavior and value the monied spouse's business, real estate, stocks, and other assets,[11] resulting in a lengthy discovery process.

The media and scholars have not probed deeply into the ethics and economics of this growing practice to consider if more cost-effective and morally sound alternatives exist for potential clients of these firms.[12] Third-party divorce funding is distinct from traditional bank loans and credit cards for the following reasons: the financing firm is more involved in the outcome than a bank would be; there are moral implications of the firm explicitly profiting from divorce; and finally, divorce settlement is the only source of repayment. Unlike traditional loans where banks are repaid as long as their clients secure funding, *divorce settlements are the only collateral* for the third-

6. Julia Marsh, *Divorce 'Fixer' for Hire 'Lending' Soon-to-Be Ex-Wives a Hand*, N.Y. Post, July 8, 2013, at 9, *available at* http://nypost.com/2013/07/08/new-yorks-divorce-fixer-helps-soon-to-be-ex-wives-fight-for-big-settlements (internal quotation marks omitted).

7. *Id.*

8. *Id.* (internal quotation marks omitted).

9. *See* Christensen, *supra* note 4; *Good Morning America: 'Fairy Godmother' 'Levels' Financial Playing Field for Divorces* (ABC television broadcast July 9, 2013), *available at* http://abcnews.go.com/GMA/video/divorce-fairy-godmother-nicole-noonan-levels-financial-playing-19614937 ("My ex-husband controlled all of our marital finances . . . and it wasn't until we started the divorce proceedings and the bills started piling up where I realized how powerless I was.").

10. *See* N.Y. Dom. Rel. Law § 237(a)(6) (McKinney 2010). New York law on attorney's fees in divorce cases explicitly contemplates the use of experts. *See also* Appelbaum, *supra* note 3; Jeff Landers, *Four Reasons Why a Woman Needs a Vocational Expert on Her Divorce Team*, Forbes (Oct. 24, 2012, 12:25 PM), http://www.forbes.com/sites/jefflanders/2012/10/24/four-reasons-why-a-woman-needs-a-vocational-expert-on-her-divorce-team (discussing the different types of experts women seeking divorces use).

11. Winner, *supra* note 5, at 40. Financing firms only accept clients whose spouses have considerable assets. The monied spouses relevant to this Note are therefore more likely to have the sorts of complex or hidden assets requiring experts and investigators. *See infra* note 32 and accompanying text.

12. *See supra* notes 6–8; *cf.* Kingston White, Note, *A Call for Regulating Third-Party Divorce Litigation Funding*, 13 J.L. & Fam. Stud. 395, 396 (2011) ("[N]egative effects . . . are likely to occur with the continuation of unregulated divorce funding, including an increase in the quantity and cost of divorce proceedings, a heavier burden on society as a result of the increased number of divorces, and lenders influencing the litigation inappropriately and encouraging more spending than necessary. . . . [This Note] proposes a two-front solution, focusing on a call to action by state legislatures to regulate divorce funding to prevent harmful effects that will almost undoubtedly arise if left unchecked.").

party financing firms, so these firms are more invested in the strategy of how money is spent and the goal of finalizing divorces.[13]

Third-party firms finance nonmonied spouses either through nonrecourse loans or through an investment-like funding. Either of these funding arrangements, regardless of the nominal label given or the specifics of the arrangement, resemble a contingency fee arrangement when repaid in the event of a divorce settlement. This is problematic because contingency fee arrangements in which "[a] fee [is] charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court"[14] have long been banned in divorce cases.[15] Some firms give nonrecourse[16] loans whose terms explicitly tie repayment to the finalization and settlement of the divorce.[17] Other firms provide funding in a more traditional investment form and are repaid a percentage of any settlement.[18] In either case, firms are repaid from the divorce settlement, so firms may discourage clients from reconciling or reaching a compromise that the firms view as financially unfavorable.[19] Firms often charge steep rates, particularly in comparison to shifting fees, the much more economically efficient service courts can provide. Although inability to pay is a serious obstacle for many, given courts' ability to award fees to a nonmonied spouse,[20] third-party divorce funding is not an appropriate or equitable option and should be banned.

13. After a client's loan is approved, one firm receives monthly invoices from the client's attorney and then contacts the client for approval before paying the attorney as well as "undertake[s] a quarterly review of [the] loan to ensure [the] case remains on track." *FAQs for Borrowers*, BBL Churchill Divorce Fin., http://www.bblchurchill.com/borrowers/faq (last visited Jan. 23, 2015).

14. Black's Law Dictionary 387 (10th ed. 2014).

15. Model Rules of Prof'l Conduct r. 1.5(d)(1) (2014); 23 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 62:4, at 298 (4th ed. 2002) ("A contingent fee agreement between an attorney and client, which has for its purpose the procuring of a divorce, is not valid and will not be enforced."); *see also infra* note 112 and accompanying text (discussing why contingency fees are banned in the divorce context).

16. Black's Law Dictionary, *supra* note 14, at 1220 ("Of, relating to, or involving an obligation that can be satisfied only out of the collateral securing the obligation [the divorce settlement] and not out of the debtor's other assets.").

17. *E.g.*, *Divorce Funding*, Anglo-Am. Legal Fin. Group, http://www.aalfg.com/divorce-funding.html (last visited Jan. 23, 2015).

18. *E.g.*, *Our Approach*, Balance Point Divorce Funding, http://www.balancepointfunding.com/approach.html (last visited Jan. 23, 2015).

19. For an example of a divorce finance firm executive describing an incentive to maximize settlements, see Christensen, *supra* note 4: "Thanks to [the firm's] underwriting expertise . . . a client has never gotten less than an expected settlement, and [the firm] has never been left holding the bag for a loan."

20. *See infra* note 127 and accompanying text (explaining how courts in Illinois determine whether inability to pay for the costs of divorce has been demonstrated and fees should be awarded).

Although regulation of this burgeoning industry may be tempting, it is not ideal. Providing oversight or transparency is unlikely to offset the economic inefficiency of adding a fifth party (in addition to the two spouses and their attorneys) to split the settlement and costs of litigation with. Regulation also cannot wash away the moral implications of a business model that condones capitalizing on the dissolution of individuals' marriages. Loans are already subject to usury regulations,[21] but the caps on interest rates have no effect on firms' heightened involvement in the litigation strategy and laser focus on finalizing a divorce for financial gain.[22] More stringent regulations may also drive these firms out of business without providing an alternative, leaving nonmonied spouses with no other option and unable to pay for their divorces.[23] For these reasons, court involvement through fee shifting provides a more comprehensive and equitable alternative.

This Note contends that third-party financing firms should be banned, and that courts should step in and order mandatory fee shifting to finance nonmonied spouses' divorce expenses. Part I provides background on this financing arrangement in the divorce context. Part II argues that third-party funding should be prohibited because it resembles contingency fee arrangements in divorces, banned because they may cause conflicts of interest, lead to waiver of the attorney-client privilege,[24] and result in disproportionate windfalls for attorneys because of the high rates they charge. Part III contends that the optimal way to deal with a spouse's inability to pay the astronomical costs of litigating a divorce is mandatory fee shifting by courts from the monied to the nonmonied spouse. The shifting of fees may be from the marital assets or the monied spouse's own finances. While the fees shifted may come out of the marital assets to be split by the spouses, at most the nonmonied spouse will bear 50 percent of the burden of her fees. In contrast, if a nonmonied spouse were financed by a third-party firm, she would be responsible for 100 percent of the fees arising from her settlement.

I. Third-Party Funding of Divorce Litigation

A. *Financing Basics*

Divorce financing has emerged as a niche service in the larger industry of third-party litigation funding, which has received significant attention

21. *See infra* text accompanying notes 89–90.

22. *See infra* text accompanying note 62; *supra* note 13 and accompanying text.

23. *See supra* note 4 and accompanying text.

24. Whether communication between firms and their clients is privileged is currently being litigated in the Southern District of New York in a case involving SAC Capital Advisors founder Steven A. Cohen and his ex-wife Patricia Cohen. *See* Matthew Goldstein, *Outside Financing for Ex-Wife's Feud*, N.Y. Times, Nov. 26, 2014, at B1, *available at* http://dealbook.nytimes.com/2014/11/25/steven-cohens-ex-wife-gets-outside-financing-for-lawsuit/.

from scholars,[25] advocacy groups,[26] and mass media.[27] But third-party financing has received little scrutiny in the divorce context, and not much is known about how the practice works. Unique treatment of divorce in the law is necessary because of the highly emotional and personal nature of divorce.

The process works like this: firms such as California's Balance Point Divorce Funding[28] and New York's BBL Churchill[29] front the costs for legal fees, fraud and asset investigators, and sometimes even living expenses.[30] These firms describe such funding as a "financial lifeline"[31] to cover the sky-high costs of litigating dissolution of the marriage.[32] But in reality, these firms exclusively invest in divorces, in the form of a loan or investment, of clients with high-net-worth spouses.[33] While firms are not yet financing divorces on a mass scale, these investments will likely become more common

25. *E.g.*, Geoffrey J. Lysaught & D. Scott Hazelgrove, *Economic Implications of Third-Party Litigation Financing on the U.S. Civil Justice System*, 8 J.L. Econ. & Pol'y 645, 672 (2012) (finding that third-party financing will likely increase the amount of litigation); Joanna M. Shepherd, *Ideal Versus Reality in Third-Party Litigation Financing*, 8 J.L. Econ. & Pol'y 593, 596 (2012) ("[T]hird-party financing is increasing inefficiency and threatening both the compensatory and deterrent functions of the legal system.").

26. *E.g.*, U.S. Chamber Inst. for Legal Reform, Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States (2009), *available at* http://ilr.iwssites.com/uploads/sites/1/thirdpartylitigationfinancing.pdf.

27. *E.g.*, David Stevenson, *Perfectly Legal Funding Opportunities*, Fin. Times (London), Nov. 3, 2012, at 6, *available at* http://www.ft.com/intl/cms/s/0/0d8eca56-2346-11e2-a46b-00144feabdc0.html; William Alden, *Looking to Make a Profit on Lawsuits, Firms Invest in Them*, N.Y. Times Dealbook Blog (Apr. 30, 2012, 6:07 PM), http://dealbook.nytimes.com/2012/04/30/looking-to-make-a-profit-on-lawsuits-firms-invest-in-them; Bradley T. Borden, *Third-Party Litigation Financing and the Impending Resurgence of the Legal Profession*, Huffington Post (May 4, 2013, 12:58 PM), http://www.huffingtonpost.com/bradley-t-borden/thirdparty-litigation-fin_b_3201167.html.

28. Balance Point Divorce Funding, *supra* note 1.

29. BBL Churchill Divorce Fin., http://www.bblchurchill.com/ (last visited Jan. 23, 2015).

30. *About*, Balance Point Divorce Funding, http://www.balancepointfunding.com/about.html (last visited Jan. 23, 2015); *Good Morning America: 'Fairy Godmother' 'Levels' Financial Playing Field for Divorces*, *supra* note 9; Brendan Lyle, *Finding Your Ex's Hidden Assets*, Huffington Post (Jul. 12, 2012, 3:05 AM), http://www.huffingtonpost.com/brendan-lyle/finding-your-exs-hidden-a_b_1660142.html.

31. *Good Morning America: 'Fairy Godmother' 'Levels' Financial Playing Field for Divorces*, *supra* note 9.

32. Winner, *supra* note 5, at 38–40. The cost of divorce varies based on whether the divorce is contested, the issues being litigated, and the size of the estate. In a contested divorce, the discovery process involving experts valuing the other spouse's assets including stocks, bonds, real estate, pension funds, and businesses can be quite expensive. *Id.* at 40 ("If a [spouse] chooses to conceal assets, the discovery process can be dragged out for years, [the] lawyer charging fees every step of the way, in the effort to collect and assess financial information from [the opposing side].").

33. *See, e.g.*, Appelbaum, *supra* note 3 (reporting that Balance Point Divorce Funding, one of the pioneers in this industry, loans an average of over $200,000 to clients whose marital assets total between $2 million and $15 million).

in high-net-worth divorces because this industry is lucrative and divorce rates are high.

These firms fall into two financing models: those that make investments[34] and those that provide loans at a fixed interest rate.[35] Some investments and loans are nonrecourse.[36] Irrespective of the label placed on the funding and the particularities of the financing arrangement, funding a divorce for the sole purpose of receiving a portion of the divorce settlement is problematic.[37] Both contingency fees and third-party financing are inappropriate in the divorce context because lawyers and firms in both scenarios have a financial interest in the divorce, may be biased in favor of reaching a settlement to ensure that they are paid, and may dissuade their clients from reconciling.[38]

B. *The Process of Becoming a Client*

A shroud of mystery surrounds the application process and how firms assess risks, choose clients, and decide what rates to charge. Some firms allow potential clients to come to them with or without an attorney.[39] The applicant then proposes a budget that the firm analyzes.[40] Firms use many criteria to assess the likely payout from investing in a particular divorce litigant.[41] A firm may place funding into an escrow account while the divorce is pending.[42] A client can access this escrow account, and the firm cannot disperse any funds for attorney's fees or other payments from this account absent the client's approval.[43] The firm may require the client to account for how money is being spent and update the firm on the status of the case.[44]

These financing models greatly resemble contingency fees because they are nonrecourse, meaning repayment is dependent on reaching a divorce settlement. A firm only makes money if a client makes money, and the collateral for the investment is the divorce settlement. In the end, firms may take a percentage of the settlement based on a sliding scale that considers the

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34. *See, e.g.*, *Our Approach*, Balance Point Divorce Funding, *supra* note 18.

35. *FAQs for Borrowers*, BBL Churchill Divorce Fin., *supra* note 13.

36. *E.g.*, *Divorce Funding*, Anglo-Am. Legal Fin. Group, *supra* note 17.

37. *See infra* Part II.

38. *See infra* notes 49–50 and accompanying text.

39. Telephone Interview with Stacey Napp, Founder & CEO, Balance Point Divorce Funding (Oct. 9, 2013).

40. *Id.*

41. *See, e.g.*, BBL Churchill Grp., Inc., Brochure for Attorneys 2 (n.d.), *available at* http://www.bblchurchill.com/attorneys/new_attorneys.pdf ("Churchill considers the following factors in the underwriting process: 1. The joint net asset pool of the relationship. 2. Likely split of the assets between the parties. 3. Expected time until settlement. 4. Whether any offers have been made. 5. What the funding will be used for (legal fees, living expenses). 6. [Whether] the client changed attorneys or [has] been self-represented previously[.]").

42. Telephone Interview with Stacey Napp, *supra* note 39.

43. *Id.*

44. *See FAQs for Borrowers*, BBL Churchill Divorce Fin., *supra* note 13.

amount of money spent by a client and the size of the award granted.[45] The long-standing ban on contingency fees in divorces and the mechanics of the financing relationship in both the contingency fee and third-party financing contexts make the comparison apt. The similarities between contingency fees and third-party financing illustrate why financing firms are particularly problematic in the divorce context—both arrangements tend to create friction in the attorney-client relationship, give rise to conflicts of interest, and lead to attorneys charging unreasonable rates.

II. The Law Should Ban Third-Party Investments in Divorce

Regulating financing firms is not the ideal approach. Even though regulation is possible,[46] the more equitable, cost-efficient, and administrable approach is for courts to handle disparities in ability to pay. Courts' intervention saves clients from firms taking disproportionately large portions of their settlements.[47] Congress often fails to pass legislation that is protective of women's rights, and state legislators may not have the political willpower to pass these regulations.[48] For these reasons, rather than limiting rates, requiring disclosures about the use of firms to courts, or implementing other Band-Aid regulations, third-party investments in divorce should be banned. Section II.A argues that third-party financing resembles contingency fees, which are prohibited in divorces because a contingency fee arrangement can give rise to conflicts of interest, exacerbate the danger of exerting undue influence on vulnerable clients, and cause waiver of the attorney-client privilege. Section II.B contends that the rates charged by financing firms can be unreasonable. Section II.C illustrates how repayment to a firm from a much-needed settlement award is detrimental to clients. Contrary to the media's portrayal of firms as saviors, firms can impose a heavy burden on already overwhelmed clients.

A. *Investments Can Jeopardize Attorney-Client Relations*

The ban on contingency fees in divorce litigation is in part based on the risk that attorneys with a financial stake in a settlement may tend to disfavor

45. Telephone Interview with Stacey Napp, *supra* note 39.

46. For a Note advocating for regulation see White, *supra* note 12.

47. *See infra* Section III.D.

48. *See, e.g.*, Erika Eichelberger, *GOP Blocks VAWA*, Nation, Jan. 21, 2013, at 6, *available at* http://www.thenation.com/article/171977/gop-blocks-vawa; David S. Joachim, *G.O.P. Senators Block Pay Gap Legislation*, N.Y. Times, Apr. 10, 2014, at A14, *available at* http://www.nytimes.com/2014/04/10/us/politics/senate-republicans-block-bill-on-equal-pay.html. Some states such as Texas and Massachusetts have, or are contemplating passing, legislation to decrease the amount of alimony awarded. Jeff Landers, *In Many States, Alimony Reform Has Gone Too Far*, Forbes (July 12, 2011, 10:24 AM), http://www.forbes.com/sites/jefflanders/2011/07/12/in-many-states-alimony-reform-has-gone-too-far/ (discussing alimony reforms' detrimental effects on women).

reconciliation and exert pressure on vulnerable clients.[49] Similar concerns arise when firms make nonrecourse investments in divorce: the interests of financiers animated by their bottom line may not be in sync with the interests of a client. For example, if a client decides to reconcile, the firm will not recoup a return on the investment, losing time and resources. Thus, the firm's financial interest in a possible settlement award may create a conflict of interest when a firm inappropriately dissuades a client from reconciling.[50] A firm may also exert undue pressure by actively influencing decisions[51] that impact the outcome of the litigation, such as what bargaining strategies to use, what motions to file, and how cooperative to be.

A financing firm is a business entity with an interest in making a profit. A financing firm may therefore subvert a client's wishes in favor of ensuring repayment. There are rules in place to deal with the danger of attorneys exerting undue influence on clients. But the Model Rules of Professional Conduct do not apply to financing firms,[52] nor do the Federal Rules of Evidence concerning attorney-client privilege.[53] The dangers of conflicts of interest and undue influence are heightened in the divorce context because clients are downtrodden and vulnerable.[54] Divorce can be one of the most traumatic and difficult events in an individual's lifetime.[55] For this reason, scholars have observed, "[d]ivorce clients are typically the weaker parties in

49. Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics § 1.5-3(b), at 185 (2014-2015 ed. 2014) ("Contingent fees by their nature raise potential conflicts of interest between the attorney and client. For example, the client may wish to settle litigation while the attorney would want to press on, or vice-versa." (footnote omitted)); *see also* 23 Williston & Lord, *supra* note 15, § 62:4, at 298–99 ("[C]ontingent fee arrangements . . . [in] divorce proceedings . . . have a tendency to prevent the reconciliation of the parties.").

50. Most clients who seek a divorce and use the services of funding firms do not wish to reconcile. *See* Telephone Interview with Stacey Napp, *supra* note 39 (noting that none of her clients have reconciled). Due to this reality, financing firms likely do not incentivize divorce; however, one can infer that a firm has an incentive to dissuade clients from reconciling due to the firm's financial interest in a possible settlement.

51. *See, e.g.*, *supra* text accompanying note 44.

52. Model Rules of Prof'l Conduct pmbl. & scope (2014) (describing the scope of the rules as applied to lawyers and the legal profession).

53. Fed. R. Evid. 502 ("The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the *attorney-client* privilege or work-product protection." (emphasis added)).

54. *See* Barrelli v. Levin, 247 N.E.2d 847, 853 (Ind. Ct. App. 1969) ("Wives contemplating divorce are often distraught and without experience in negotiating contracts. Should contingent fee contracts between them and the attorneys they employ under such conditions become the usual fee arrangement, charges of overreaching and undue influence will be all too frequent."); Austin Sarat & William L.F. Felstiner, Divorce Lawyers and Their Clients 42 (1995) ("[Lawyers counsel] clients that people in the throes of a divorce are particularly vulnerable to stress and emotion. They suggest that clients ought to be suspicious of their own judgment and, by implying that such judgment is likely to be unreliable, lawyers highlight the importance of depending on them for sound guidance.").

55. Arendell, *supra* note 5, at 3 ("In national studies that examine people's views on life experiences, divorce has consistently been ranked second among forty-two stressful life events.").

their relationship with their lawyers."[56] This power dynamic stems from the differential positions of the lawyer and client, specifically the "entrenched position of lawyers—their turf, their rules, their vernacular—and the enhanced vulnerability of clients—high stakes, high affect [sic], and inadequate resources."[57]

Firms, by virtue of needing the attorney's assessment of a case and providing payment for the attorney's services, create an environment that may lead an attorney to compromise her obligation to her client and more generally the ethics of the legal profession. Of course, attorneys are ethically bound to represent their clients' best interests,[58] but financing firms add one more weight to the scale, tipping attorneys toward a gray area where they might impermissibly place a financing firm's interest ahead of their clients' interests.

As discussed earlier, an attorney may not take a divorce case on a contingency fee basis.[59] If an attorney's client is working with a financing firm, the attorney is *facilitating* the financing of the divorce on a contingency fee basis and the attorney is eventually paid through this arrangement, albeit indirectly. This is problematic because attorneys may not facilitate the actions of other parties that conflict with an attorney's obligations under the Model Rules of Professional Conduct.[60] Use of such a loophole is one of several ethical issues that may arise when third-party financing firms are involved. Third-party investments in divorce increase the already existing tension between a lawyer's desire to serve a client's needs and her need to make a profit.[61]

1. Conflicts of Interest

Divorce-financing firms' involvement could create confusion regarding whom the attorney is working for and may lead to conflicts of interest. The

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56. *See, e.g.*, Sarat & Felstiner, *supra* note 54, at 83 (providing a window into the divorce attorney-client relationship based on the authors' observations of actual meetings between divorce attorneys and their clients).

57. *Id.* at 84.

58. *See* Model Rules of Prof'l Conduct pmbl. & scope, at para. 9 (2014) ("[The] principles [underlying the Rules] include the lawyer's obligation zealously to protect and pursue a *client's legitimate interests*, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system." (emphasis added)).

59. *See supra* notes 15, 49 and accompanying text.

60. Model Rules of Prof'l Conduct r. 8.4(a) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, *knowingly assist or induce another to do so, or do so through the acts of another*." (emphasis added)).

61. *See* Lynn Mather et al., Divorce Lawyers at Work 133 (2001) ("The ideology of legal professionalism includes a commitment to altruism. The realities of practice, however, place limits on selflessness. Scholars of the professions see as a core problem of professional practice 'the tension between the provision of affordable and conscientious service to others, and the economic interest of those who provide it.' " (quoting Eliot Freidson, Professionalism Reborn 199 (1994))).

third-party financing arrangement raises ethical issues because an attorney has an ethical obligation to her client, not to a third party. This line becomes blurred when the financing firm is substantially involved in the litigation strategy and is the financial power driving the attorney-client relationship.[62] In general, third-party litigation funding has been criticized because of this tendency to "create confusion concerning the party who controls the lawsuit and concerning the attorney-client relationship."[63] Given the delicate nature of divorces and the potential to profit from the dissolution of a marriage, third-party involvement can heighten the danger that a client's interests will be subverted.

In addition to the risk that financing firms and attorneys may disincentivize reconciliation,[64] financier and client interests can diverge in several other ways. For example, clients may want to make certain strategic decisions that the firm disagrees with, or may decide to concede valuable assets that the financing firm would be interested in receiving a portion of. Payment of attorney's fees by third-party investors can cause confusion for the attorney as to who the client is, and whose needs the attorney should be serving.[65] Some financing firms clear attorneys' billed hours with clients before paying attorneys.[66] This involvement dilutes the extent to which the attorney can focus on the client's needs because she has to be responsive to a new party.

Financing firms' payments to lawyers may also violate the Model Rules of Professional Conduct. These rules mandate that lawyers may only accept compensation for representing a client from someone other than a client if "(1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6."[67] In the divorce context, involving a financing firm in decisionmaking undermines the lawyer's ability to make independent judgments, favorable to her client, about how to proceed. "Since the . . . company pays the attorney's fee and are [sic] in a position to provide future business, there is an ever-present danger that a lawyer will subordinate his duties to the [client] to pander to the [financiers]."[68] Therefore, when a third-party financier becomes involved there is serious potential that the client's best interests will become secondary to those of the financing firm or the client's attorney.

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62. *See supra* note 13 and accompanying text.

63. Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 Cardozo J. Int'l & Comp. L. 343, 367 (2011).

64. *See supra* note 49 and accompanying text.

65. *See* John W. Toothman & William G. Ross, Legal Fees 121–23 (2003) (discussing the concept of a "fee triangle" that is created when the third party becomes involved).

66. *See supra* note 13.

67. Model Rules of Prof'l Conduct r. 1.8(f) (2014).

68. Toothman & Ross, *supra* note 65, at 122 (discussing triangle-fee arrangements in the insurance context).

2. Compromising Attorney-Client Privilege

Another problem that can arise when a third-party financier is involved is waiver of the attorney-client privilege. The dynamics between a firm and a client differ from the dynamics between a client and a bank giving out a traditional loan. Unlike the financing provided by a firm, a bank's loan is subject to usury laws[69] and is recourse (and therefore repayment is not contingent on a settlement being reached). When individuals seek bank loans, they are not required to discuss the likelihood of their success in securing a divorce settlement or other litigation strategies—the bank is not interested. A bank has far less incentive to be involved in the details of how a client uses money or her legal strategy, because she will repay the loan regardless of the outcome. Funding firms, on the other hand, must do due diligence on the merits of the case to ensure that a potential client has significant marital assets, and these firms often have significant oversight over the litigation.[70] In order to assess the risks and benefits of working with a potential client, a firm may try to speak to a client's attorney.

These discussions between a third-party firm and a client's attorney can lead to an involuntary waiver of the attorney-client privilege, which is protected by common law and state rules of evidence. Some divorce-financing firms require applicants to consent to the firm contacting their attorneys. For example, one firm's application for funding requires clients to sign the following statement: "I hereby authorize and instruct my attorney to provide BBL Churchill with all reasonable information required in order to assess this application."[71] It is unclear what constitutes "all reasonable information" or whether the firm apprises clients of the potential effects of signing such an agreement. But the communications authorized by such agreements are likely to lead to disclosure of an attorney's strategy and a client's likelihood of success because that is what firms are interested in learning, resulting in a waiver of attorney-client privilege. Although divorce attorneys use other types of consultants, such as psychologists, accountants, and private mediators, attorneys do not typically divulge the likelihood of success and general legal strategy to these individuals. In contrast, firms considering investing in divorce cases are interested in strategy and the merits of the case, rather than a narrow topic such as any fraud committed by one of the spouses. The type of information disclosed to financing firms may thus be more likely to cover privileged information.

Such a waiver of attorney-client privilege can have significant, negative ramifications for clients. This type of disclosure, which may result in an attorney revealing his or her strategy, can seriously impact a client's odds of

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69. *See infra* notes 87–91 and accompanying text.

70. *See, e.g.*, *FAQs for Borrowers*, BBL Churchill Divorce Fin., *supra* note 13 ("Churchill will also undertake a quarterly review of your loan to ensure your case remains on track.").

71. BBL Churchill Divorce Finance, Application Form (n.d.), *available at* http://www.bblchurchill.com/download/BBL_Application-Form.pdf.

success. Clients seeking a divorce are often "distraught and without experience in negotiating contracts" and dealing with attorneys.[72] As a result, many clients are probably unaware of the existence of attorney-client privilege altogether,[73] let alone the repercussions of waiver.[74] While some attorneys may advise their clients well and warn them about waiving attorney-client privilege, not all practitioners will properly advise their clients. Even well-meaning attorneys may not be able to shield a client who, without her attorney's knowledge, speaks with a third-party firm about the case and strategy, thereby waiving the privilege. Although extending the attorney-client privilege rules to cover third-party financing firms is tempting, such regulation is not a viable solution because the law involving third parties is muddled and unsettled.[75] Extending privilege "may be justified only if there is a transcendent public good that outweighs the search for truth."[76]

B. *Divorce-Financing Fees Are Unreasonable and Potentially Usurious*

In addition to the ethical problems, the fees charged by divorce-financing firms are themselves often unreasonable and morally questionable. Contingency fees and third-party financing are two arrangements in which another party profits from a divorce, a private and highly personal matter. This reality makes contingency fees and third-party financing in divorces

72. *See* Barrelli v. Levin, 247 N.E.2d 847, 853 (Ind. Ct. App. 1969) (finding contingency fee contracts for wives seeking divorce void as contrary to public policy).

73. Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226, 1232 (1962) ("[M]ost people were either unaware of the attorney-client privilege or believed that it extended to other professional relationships as well.").

74. *See* 81 Am. Jur. 2d *Witnesses* § 325 (2004) ("[The attorney-client privilege] protects disclosures that a client makes to his or her attorney, in confidence, for the purpose of securing legal advice or assistance."); *id.* § 334 ("[I]nformation subject to the attorney-client privilege retains its privileged character until a client has consented to its disclosure.").

75. *See* 1 Paul R. Rice, Attorney-Client Privilege in the United States § 4:36, at 518–20 (2012 ed. 2012) ("There is no clear standard for measuring the community of interests that must exist for the [attorney-client] privilege to apply. Although courts have spoken generally of 'common issues,' these cases, for the most part, have involved situations where the participants were actual or potential coparties in litigation. In these instances, the rule has been denoted the 'joint defense' rule. When coparties are in the midst of or preparing for litigation through a joint defense strategy, courts have virtually assumed (without focusing on the nature of each party's interests and how they might diverge) that a sufficient community of interests exists, because of the common positions in the litigation, to justify the sharing of otherwise privileged communications without that disclosure constituting a waiver of the privilege." (footnotes omitted)). *See generally* The Attorney-Client Privilege in Civil Litigation: Protecting and Defending Confidentiality (Vincent S. Walkowiak et al. eds., 5th ed. 2012) (describing various types of communications and related privilege protections).

76. Ronald Goldfarb, In Confidence: When to Protect Secrecy and When to Require Disclosure 32 (2009) ("In considering the evolution of new privileges, the federal courts are conservative, as they should be, about condoning impediments to the judicial process.").

problematic. The law requires that contingency fees be *reasonable* in all contexts.[77] Despite this requirement, contingency fees in practice tend to be excessive and "disproportionate to the effort required to secure the favorable outcome."[78]

Firms ought to be compensated to a reasonable extent for the liability that they take on, yet they receive a disproportionate windfall. The fees charged by firms may not be commensurate to the limited risk the firms take in providing funding.[79] That a client gets a large settlement in a divorce does not mean that the attorney, or the financing firm, worked extremely hard or was creative. For example, in the context of property settlements, the nature of equitable division of property regimes often results in a client being awarded half of the property in an estate, irrespective of the amount of work done by either her attorney or the firm.[80] The fees of the firm that are paid in a contingency-like manner may not have anything to do with the amount or quality of work that went into a case. And even though proponents may argue that no work would be done at all if nonmonied spouses did not have the funding to hire a divorce attorney in the first instance, other, more cost-effective alternatives exist, making this financing scheme inequitable, inefficient, and unnecessarily costly.[81]

The inequity and inefficiency is especially acute if the firm uses a sliding scale for payment where the rate charged rises as the size of the settlement increases.[82] Current regimes for regulating contingency fees, where they are allowed in other contexts, require the opposite payment scheme.[83] The financing firm's "contribution" makes it a five-way division of the

77. Model Rules of Prof'l Conduct r. 1.5(a) (2014).

78. *In re* Cooper, 344 S.E.2d 27, 31 (N.C. Ct. App. 1986).

79. For example, if a firm provides a loan of $200,000 to a client who ultimately receives a home worth $1,000,000 in a settlement through the equitable division of the property, *see infra* notes 80, 103–106 and accompanying text, and the rate charged for the investment is 30 percent, the firm gets back the $200,000 plus $300,000 for a division of the property assets with little risk involved.

80. *See* Douglas E. Abrams et al., Contemporary Family Law 474 (3d ed. 2012) (defining equitable division of property regimes as those in which each spouse is entitled to a fair share of property acquired during the marriage, regardless of how the property is titled); *supra* note 79; *infra* note 104.

81. *See infra* Part III.

82. *See supra* text accompanying note 45.

83. In the states with caps on contingency fees in the personal injury and medical malpractice contexts, fees are based on a sliding scale system under which the maximum percentage that can be charged *decreases* as the award increases. *E.g.*, N.Y. Judiciary Law § 474-a (McKinney 2005). ("[A] contingent fee in a medical, dental or podiatric malpractice action shall not exceed . . . 30 percent of the first $250,000 of the sum recovered; 25 percent of the next $250,000 of the sum recovered; 20 percent of the next $500,000 of the sum recovered; 15 percent of the next $250,000 of the sum recovered; 10 percent of any amount over $1,250,000 of the sum recovered."); N.Y. Comp. Codes R. & Regs. tit. 22, § 806.13 (2014) ("In any claim or action for personal injury or wrongful death . . . in which the compensation of claimant's or plaintiff's attorney is contingent . . . (1) 50% of the first $1,000 of the sum recovered, (2)

nonmonied spouse's financial pie, and the firms often take a large slice.[84] Firms may receive an undeserved windfall by taking a huge percentage of the eventual settlement, capitalizing on a divorcing spouse's misfortune and vulnerability. Since there is no requirement to disclose the use of a financing firm or the resulting fee arrangement to the court,[85] there is no transparency, oversight, or court evaluation of the reasonableness of fees charged, as there would be with judicial fee shifting.[86]

It is difficult to determine how reasonable the fees charged by firms are because there are no published standard rates for this particular industry. Regulations capping some types of funding provide a barometer for reasonableness, but not all of the financing instruments used by firms are subject to regulation. A loan is subject to state usury laws that limit the rate of interest that may be charged.[87] By contrast, the ultimate value of an investment—the investor's recovery—is not limited by state law. This is problematic because of the high rates charged by these firms.[88] Financing firms' investments are not subject to usury laws despite the high returns—even though usury laws are specifically enacted to protect individuals from high loan rates.[89] Many jurisdictions have usury laws that prohibit excessive interest.[90] There are four elements of usury: "a loan or forbearance, interest exceeding the statutory maximum, absolute repayability of loan and interest, and a lender with a willful intent to enter into a usurious transaction."[91] The

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40% on the next $2,000 of the sum recovered, (3) 35% on the next $22,000 of the sum recovered, (4) 25% on any amount over $25,000 of the sum recovered [shall be deemed reasonable].").

84. *See supra* note 79 and accompanying text.

85. *Cf.* Telephone Interview with Stacey Napp, *supra* note 39 (stating that her firm does not require clients to disclose their working with the firm to the court, as this decision is left to her clients).

86. For example, Ms. Napp would not reveal her sliding scale of percentages charged, *see infra* note 93 and accompanying text, and there is no information available to the public regarding how the firm's payments are calculated.

87. *See, e.g.*, *FAQs for Borrowers*, BBL Churchill Divorce Fin., *supra* note 13 ("Q: Is BBL Churchill governed by any regulations? A: Yes. Unlike many lenders in the legal industry, BBL Churchill complies with each State's usury cap."); *see also infra* note 91.

88. *See infra* notes 90–94 and accompanying text.

89. *See, e.g.*, Press Release, Senator Richard J. Durbin, Senate Democrats Crack Down on Excessive Interest Rates and Fees (Apr. 9, 2013), *available at* http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=0bb9dfb6-aa7d-4120-a174-5a007674f499 ("The [proposed] bill would create an interest rate and fee cap of 36% for all consumer credit transactions, putting an end to the excessive rates which can top 300%.").

90. 9 Williston & Lord, *supra* note 15, § 20:1.

91. 44B Am. Jur. 2d *Interest and Usury* § 81 (2007). For an example of a statutory maximum, see Cal. Civ. Code § 1916-1 (West 2010) ("The rate of interest upon the loan or forbearance of any money, goods or things in action or on accounts after demand or judgments rendered in any court of this state, shall be *seven dollars upon the one hundred dollars for one year and at that rate for a greater or less sum or for a longer or a shorter time*; but it shall be competent for parties to contract for the payment and receipt of *a rate of interest not exceeding twelve dollars on the one hundred dollars for one year* and not exceeding that rate for a greater or

shroud of mystery veiling the fee structures in divorce-financing arrangements makes it difficult to determine whether the rates charged are usurious. Yet, the 20 percent interest charged by a loan company such as BBL Churchill[92] or a return on investment approaching 33 percent[93] is likely to be viewed as unreasonable by a court or state law.[94] Imposing more usury laws and other such regulations capping rates, however, cannot stamp out the conflicts of interest, privilege waiver, and moral questions that arise when firms are involved.

Some may counter that financed clients are better off, despite the high rates charged, because the nonmonied spouse ultimately gets more than she could have without the means provided by a firm to pursue the divorce in the first place.[95] But nonmonied spouses should not have to pick between the best of two evils—especially when courts have the authority and the ability to properly deal with the disparity in financial power between two spouses securing a divorce.[96]

C. *High Rates Detract from Divorce Settlements*

Perhaps the most worrisome part of third-party investments in divorce is that, after a settlement is reached, the payment to the firm comes solely from the nonmonied spouse's portion of the settlement. There are three typical financial consequences of a divorce: (1) spousal alimony (also referred to as maintenance), (2) awards of property, and (3) child support.[97]

less sum or for a longer or shorter time, in which case such rate exceeding seven dollars on one hundred dollars shall be clearly expressed in writing." (emphasis added)).

92. Mallon, *supra* note 2 (reporting that BBL Churchill typically collects between 12 and 20 percent interest on loans).

93. Telephone Interview with Stacey Napp, *supra* note 39. Ms. Napp would not explain her sliding scale of how she charges clients but explained that when deciding her rates, the closest model was personal injury, in which the rates are between 33 percent and 60 percent. She said she never wants to take more than a client takes, because it is bad business for a client to get less than the firm. She decided the rate had to be at least lower than 50 percent but the goal is significantly lower than 33 percent. Ms. Napp's contentions and reasoning about personal injury fees are simply false. Many states have a statutory cap on personal injury attorney's fees commonly set at one-third of the damages. *E.g.*, Mich. Ct. R. 8.121(B) (West 2011) ("The maximum allowable fee for [any claim or action for personal injury or wrongful death] is one-third of the amount recovered.").

94. In the personal injury context, an area of the law in which attorneys are frequently paid on a contingency fee basis, the maximum fee that attorneys can charge is typically between 30 and 40 percent. *E.g.*, Fla. Rules of Prof'l Conduct r. 4-1.5(f)(4)(B) (allowing for contingency fee payments in personal injury cases of up to 40 percent of any recovery, up to $1,000,000).

95. *Good Morning America: 'Fairy Godmother' 'Levels' Financial Playing Field for Divorces*, *supra* note 9 (statement of a BBL Churchill employee) ("It levels the playing field for our clients . . . It gives them the ability to go into court, to not be backed into a settlement that is less than what they deserve.").

96. *See infra* Part III.

97. Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony, and Child Support Awards*, 28 UCLA L. Rev. 1181, 1183 (1981).

All of these awards are calculated, in part, based on a court's careful determination of the nonmonied spouse's *need* after the divorce is finalized.[98] Payment to a financing firm, however, is sourced from at least one of the nonmonied spouse's awards rather than the joint marital assets (as would be the case if the court required the monied spouse to pay the nonmonied spouse's fees).[99] Payment of the return on investment depletes the much-needed funds that a client receives.[100] Regardless of which of these three sources fund payments back to a firm, the ultimate payment is unnecessary because courts can provide funding to nonmonied spouses directly, *free of any premium*, by shifting fees.[101]

Property settlements are often the most substantial portion of a divorce settlement and a client is likely to pay her lawyers and financing firm out of these awards.[102] State residency governs marital property during the marriage and property division at divorce.[103] All states adhere to either an equitable distribution regime[104] or a community property regime,[105] both of which "lead to virtually indistinguishable results" with marital assets divided roughly congruently.[106] A financing firm's involvement in a divorce, however, undermines this equitable division by increasing the number of people who must share the nonmonied spouse's property. A firm paid with a client's property award is taking away a valuable part of a client's settlement.

Alimony payments are awarded to fulfill the needs of a former spouse "who is unable to support himself or herself through appropriate employment."[107] Courts determine alimony based on a combination of theories, including compensation for the spouse's role in the marriage (based on the duration of the marriage, among other factors), lifestyle expectations, and the financial *need* of the former spouse.[108]

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98. *Id.* at 1184 ("No-fault divorce laws have shifted the focus of the legal process from moral questions of fault and responsibility to economic issues of ability to pay and financial need." (footnote omitted)).

99. *See infra* Section III.C.

100. Similar concerns animate the ban on contingency fees. *See* McInerney v. Massasoit Greyhound Ass'n, 269 N.E.2d 211, 218 (Mass. 1971).

101. *See infra* Part III.

102. *See Good Morning America: 'Fairy Godmother' 'Levels' Financial Playing Field for Divorces*, *supra* note 9 ("We get paid at the end of the day," [a founder of BBL Churchill said]. "We get paid out of the sale of a property. We get paid out of a split in the IRA.").

103. Abrams et al., *supra* note 80, at 471.

104. *Id.* at 474 ("'Equitable distribution . . . entitl[es] each spouse to a fair share of the property acquired during the marriage, regardless of how it is titled. . . .' Today, 42 states and the District of Columbia are equitable distribution jurisdictions at divorce, but apply title theory during the course of the marriage." (citation omitted) (quoting White v. White, 324 S.E.2d 829, 832 (N.C. 1985))).

105. *Id.* at 473 ("Under the [eight states with] community property regime[s], each spouse has a present, vested one-half interest in all property acquired during the marriage.").

106. *Id.* at 474. *See generally* Unif. Marriage & Divorce Act § 307 (amended 1973); Lee R. Russ, Annotation, *Divorce: Equitable Distribution Doctrine*, 41 A.L.R. 4th 481 (1985).

107. Schenk v. Schenk, 880 A.2d 633, 640 n.7 (Pa. Super. Ct. 2005).

108. Abrams et al., *supra* note 80, at 551.

A nonmonied spouse may use alimony to pay back an investment firm in order to avoid having to sell her most valuable asset such as a home,[109] but doing so undermines the purpose and policy underlying alimony. A client receives inherently less than her court-determined need if she pays a firm with alimony. This is especially problematic because the majority of firms' clients are women, and "[j]udges systemically lowball property awards to women[, while] [a]limony is based on judges' subjective opinions and personal value judgments concerning what women should get, rather than on what women deserve or need."[110] The imprecise and often subjective nature of alimony awards increases the danger that a nonmonied spouse, living off of already insufficient alimony payments,[111] will be left with even less than she needs when she uses these funds to pay back a firm. It is inequitable to have individuals use court-awarded living expenses to repay firms, especially when there are less costly alternatives such as fee shifting.

This risk of leaving a nonmonied spouse with inadequate funds is one of the principal reasons that contingency fees are banned in the divorce context. One court noted that contingency fees are disfavored in domestic relations cases because they "may deprive a spouse or child of a regulated stream of funds carefully awarded by the court for support or living expenses; to allow the scheduled payments to be bargained away in advance is against public policy."[112]

Payment of a firm's fees from alimony can exacerbate the already difficult financial circumstances a client finds herself in post-divorce. Like contingency fees, which are "an obstacle to the court's duty to set up an equitable property settlement as among the parties to the marriage and any children,"[113] these investments ultimately lead to an inequitable outcome.[114] Merely informing courts of the use of firms so that courts may consider

109. *See* Winner, *supra* note 5, at 39.

110. *Id.* at 41.

111. *See* Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce*, 19 Duke J. Gender L. & Pol'y 41, 42–43 (2011) ("The terms 'need,' 'ability,' and 'fair' are highly subjective in this context. . . . [S]ubjective standards and unpredictable results [typify] alimony disputes [in the United States]."); Laura W. Morgan, *Current Trends in Alimony Law: Where Are We Now?*, Fam. Advoc., Winter 2012, at 8, 9 ("The alimony provision of the UMDA provided that alimony could be awarded only if the party seeking support 'lacks sufficient property to provide for his reasonable needs,' and 'is unable to support himself through appropriate employment.' By stressing that property division is the primary method of support, this language suggests that support is not necessary where a reasonable amount of property is awarded to each spouse. Moreover, the second prong of this test is vague on the most important point: the definition of 'reasonable needs.' One can reach very different figures for a spouse's 'needs,' depending on whether those needs are measured at a subsistence level, a level the court believes to be objectively reasonable, or the actual subjective standard-of-living from the marriage." (citation omitted)).

112. *In re* Cooper, 344 S.E.2d 27, 33 (N.C. Ct. App. 1986).

113. McInerney v. Massasoit Greyhound Ass'n, 269 N.E.2d 211, 218 (Mass. 1971).

114. *See* Arendell, *supra* note 5, at 12 ("High legal costs thus contributed greatly to the economic hardship they experienced after divorce. In general, the more community property there was, the higher the legal costs became. Legal fees were often paid out of a woman's share

repayment to the firm in the equation would be insufficient. Telling the court at the end of the proceedings would not prevent the possible problems between attorney and client from arising,[115] and would not have the same impact on preventing scorched-earth tactics.[116] Courts are already prone to give inadequate settlements[117] and may not credit the need for the firm in the first place as a legitimate cost.

Finally, a client in a desperate financial position may opt, impermissibly, to use child support payments to cover payments to the firm. Child support is governed by state law,[118] and is granted based on the actual need of the child and the ability of the parties to pay.[119] Child support is intended to fulfill, and must be rationally related to, the needs of the child, "taking into account the lifestyle to which the child was accustomed and the standard of living the child enjoyed before the divorce, and must reasonably relate to the obligor's ability to pay for those needs."[120] Any child support funds not used to advance the interests of the child is an improper use of the funds. Third-party funding of divorce can lead the nonmonied spouse, often the custodial mother,[121] to use child support funds to pay back the third-party financier. This outcome also exacerbates resentments of child-support-paying parents, many of whom already argue that funds are misused.[122] Although the parent would ultimately be responsible for an impermissible use of child support, the existence of financing firms is one more weight that could tip the scale and cause a parent to make this unfortunate choice.[123]

A firm's services end up being more costly than is at first apparent. A client who is funded by a firm may compromise the loyalty of her attorney, waive the attorney-client privilege, and ultimately, after paying back the firm, be left with less of the divorce settlement than she needs and deserves. Putting courts in charge of equalizing fees captures the good aspects of the

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of the community property settlement, which thus reduced her starting capital for life after divorce.").

115. *See supra* Section II.A.

116. *See infra* note 124 and accompanying text; *infra* Section III.D.

117. *See supra* notes 108–111 and accompanying text.

118. *See* 42 U.S.C. § 667(a) (2012) (laying out guidelines for state child support law).

119. *See, e.g.*, N.J. Stat. Ann. § 2A:34-23(a) (West 2010).

120. 24A Am. Jur. 2d *Divorce and Separation* § 939 (2008).

121. *See* Timothy S. Grall, U.S. Census Bureau, Custodial Mothers and Fathers and Their Child Support: 2009 1 (2011), *available at* http://www.census.gov/prod/2011pubs/p60-240.pdf ("[In 2009,] [a]bout 1 in 6 custodial parents were fathers . . . [and] [o]ver half (60.3 percent) of custodial parents received some type of noncash support from noncustodial parents on behalf of their children.").

122. *See, e.g.*, Jocelyn Elise Crowley, Defiant Dads: Fathers' Rights Activists in America 129 (2008). One father notes: "If they put together a system that this money is spent on the children, I think most parents who are paying the child support wouldn't have too much of a problem. In my case, my main problem is my money is not spent on my children, but is spent on other things." *Id.*

123. The pressures created are much like those on the lawyer who impermissibly places a financing firm's interest ahead of the client's. *See supra* text accompanying note 58.

services provided by investment firms while eliminating all of the problems identified in Part II. Admittedly, individual regulations could be deployed to deal with specific concerns raised by third-party financing, but it would be tedious to write one coherent law that could fix these issues. Regulation, as discussed in the Introduction, also cannot deal with the exploitative nature of this financing arrangement and the addition of a fifth entity with whom the settlement must be split.

III. Courts Can and Should Shift Fees

Unlike firms, courts are neutral third parties with no financial stake in divorces. A court can give a nonmonied spouse access to funding without creating a conflict of interest, without waiving any privileges, and without requiring the receiving spouse to bear the costs of the litigation all by herself. Fee shifting may lead to the marital assets shrinking, resulting in a smaller settlement for the nonmonied spouse; however, the nonmonied spouse will be left with the entirety of her portion of the ultimate settlement and will shoulder at most 50 percent of the costs instead of 100 percent as when she must pay a firm back on her own. The shared interest in keeping fees low also encourages cooperation and is likely to make the process more expeditious given the financial stake in maintaining the marital assets.

Divorce can be a very contentious, drawn-out process. Some lawyers "use so-called scorched earth tactics against wives in a campaign to wear them down and starve them out. They attempt to outspend the wife by legally obstructing the proceedings and delaying an agreement until she finally runs out of money and patience and gives up."[124] If costs are shared with the monied spouse, dragging out the proceedings means shrinking the pot that both spouses will share. The monied spouse knows that he is paying for his spouse's attorney's fees and that the less the nonmonied spouse has to spend on the litigation, the better it is for the monied spouse as there will be more left over to split.

Most significantly, courts can shift fees in all cases, not only in divorces involving large marital assets that draw the interest of firms chasing a profit. Courts should always mandate shifting of fees—where the monied spouse pays for the nonmonied spouse's fees—when there is a demonstrated inability by one party to pay for the costs of divorce.[125] Doing so would obviate the need for third-party financing of divorces.

Section III.A describes the mechanics of fee shifting by courts and argues that after finding a disparity in the financial positions of the spouses, courts should order shifting of reasonable fees to the nonmonied spouse from the monied spouse. Section III.B emphasizes that compared with private firms, courts can help more individuals and are in a position to incentivize both parties to settle quickly. Section III.C notes that when courts shift fees the nonmonied spouse is guaranteed a fair proceeding and comparable

124. Winner, *supra* note 5, at 58.

125. *See infra* Section III.A.

representation to the monied spouse. Section III.D underscores that fee shifting leaves the nonmonied spouse with the entirety of her settlement, and highlights the effect that fee shifting may have on the use of "scorched-earth" tactics. The framework proposed is optimal because inability to pay for a divorce is a problem that plagues many, not only spouses of wealthy persons whom investment firms view as desirable clients. Court fee shifting is favorable to any regulation and third-party financing as it stands because it avoids the waiver issues, is cost-efficient, promotes quicker adjudication of the divorce claims, and facilitates solving disparities in financial bargaining power in a neutral, transparent forum.

A. *The Mechanics of Fee Shifting*

By shifting fees, courts have the ability to put spouses on equal footing with respect to the financing of a divorce. In most states, courts have *discretion* to award spouses *reasonable* fees.[126] Courts weigh several factors in determining whether a spouse has a demonstrated inability to pay for the costs of divorce and should be awarded fees. For example, Illinois courts consider the following:

> (A) the income and property of each party . . . ;
> (B) the needs of each party;
> (C) the realistic earning capacity of each party;
> (D) any impairment to the present earning capacity of either party . . . ;
> (E) the standard of living established during the marriage;
> (F) the degree of complexity of the issues . . . ;
> (G) each party's access to relevant information; [and]
> (H) the amount of . . . payments made or reasonably expected to be made to the attorney for the other party . . . .[127]

Every state, through common law, statute, or a combination, has rules governing how courts should determine reasonable attorney's fees. For example, in New York, a party can move to receive attorney's fees under New York Domestic Relations Law Section 237.[128]

The parties must disclose the financial payments to and arrangements with attorneys to the court.[129] Since there is no formula for assessing reasonableness of an attorney's fees, courts may consider several factors including the following: "skill, time, and labor involved, the fee customarily charged in

126. *E.g.*, Cal. Fam. Code § 2030 (West 2004 & Supp. 2014); *see also* Andrea G. Nadel, Annotation, *Authority of Divorce Court to Award Prospective or Anticipated Attorneys' Fees to Enable Parties to Maintain or Defend Divorce Suit*, 22 A.L.R. 4th 407 (1983) ("[A] trial court may in its discretion order a party to pay prospective attorneys' fees to enable the opposing party to maintain or defend the action."); Wenona Y. Whitfield, *Where the Wind Blows: Fee Shifting in Domestic Relations Cases*, 14 Fla. St. U. L. Rev. 811, 813 (1987).

127. 750 Ill. Comp. Stat. 5/501(c-1)(1) (2012).

128. N.Y. Dom. Rel. Law § 237 (McKinney 2010).

129. *Id.* ("Both parties to the action or proceeding and their respective attorneys, shall file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing

the locality for similar services in 'high end' divorce actions, the likelihood that plaintiff's counsel's time commitment to this case precluded other employment, the amount in question and the results achieved, [and] the expense incurred."[130]

Courts' power to shift fees should be broadened and made mandatory. Although some courts do not award enough,[131] this is still a preferable arrangement to the high rates that financing firms charge. Regardless of whether a party moves for an award of fees, courts should always determine whether fee shifting is necessary. Instead of attorneys needing to request fees, the court should automatically inquire into need and mandatorily shift fees when there is a demonstrated inability to pay.

B. *Courts Fill a Tremendous Need by Shifting Fees*

Obtaining a divorce can be extremely costly, especially when contested, even for those without substantial assets who firms are not interested in catering to.[132] Firms investing in divorce are businesses and only take on clients who are divorcing very wealthy spouses, a minute fraction of the number of the nonmonied spouses who need financial help to pursue divorces. Businesses are unlikely to finance a spouse seeking a divorce who has little or no marital assets because investing in such a case would not be lucrative. Courts on the other hand treat all divorce litigants the same, since they have no stake in the financial assets at issue. Unlike firms, courts do not have bottom lines and therefore can provide a service to the public by helping nonmonied spouses finance their divorces. Fee shifting would thus be more equitable for the entire range of nonmonied spouses.

C. *Equalizing Fees Guarantees a Fair Adjudication and Representation for Both Spouses*

There is more transparency[133] and the process is uninfected by the financial interests of an unnecessary third party if courts deal with the fiscal

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thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses.").

130. Olson v. Olson, 671 N.W.2d 64, 74 (Mich. Ct. App. 2003).

131. *See, e.g.*, Jan Maiden, Comment, *Winning by Financial Attrition: A Study of Attorney Fees Under California Family Code Sections 2030 and 2032*, 38 Cal. W. L. Rev. 311, 312–13 (2001) ("'[D]espite Paula's complete lack of resources and Kip's stipulated ability to pay, the trial court awarded her only $44,963.34 in fees and costs out of the total of $115,663.42 requested.' This amount was only thirty-nine percent of the actual fees and costs incurred by Paula's attorneys, or a payment the equivalent of only $65 per hour. In comparison, Kip paid his attorneys $167,000, an average hourly rate of $219 per hour." (footnotes omitted) (quoting Petition for Review at 11, Ruisi v. Thieriot, 53 Cal. App. 4th 1197 (1997) (Nos. A071958, A073925))).

132. *See* Laura Seldon, *How Much Does the Average Divorce Really Cost?*, Huffington Post (May 30, 2013, 3:50 PM), http://www.huffingtonpost.com/galtime/how-much-does-the-average_b_3360433.html.

133. Records of court proceedings and filings allow for transparency and public access to information regarding the details of divorces litigated in court.

disparities between spouses. This transparency can help prevent vulnerable, sometimes unsophisticated, nonmonied spouses from being taken advantage of and from making unfavorable tactical decisions such as waiving the attorney-client privilege. In equalizing fees, courts must award reasonable fees to the nonmonied spouse. Fees should be shifted in this way partly because the assets from which the monied spouse pays may be *joint* marital assets, *and* partly because both parties having proper representation is equitable.

By requiring the monied spouse to pay the fees of the nonmonied spouse from the marital estate that they control when the divorce is pending, courts can ensure that both spouses receive legal guidance and can litigate the divorce. "The adversary system presumes advocates of equal skill, [who make] use of court procedures and sophisticated knowledge of law to advance their clients' interests."[134] Unfortunately, ability to pay largely dictates how hard an attorney will work and what tools she will utilize in litigating a case. "[H]aving clients with few financial assets prompts attorneys to limit sharply what they do in the average case, while having clients with deeper pockets encourages . . . increased use of the formal legal process. Attorneys thus vary widely in their understanding of what constitutes 'good representation.'"[135] While comparable counsel is not guaranteed even in criminal cases, a system that aims to afford spouses similar representation is a worthwhile endeavor. When courts shift fees, spouses have proper legal guidance, are able to afford to litigate the divorce, and will not fall prey to firms.

D. *Equalizing Fees Leaves the Nonmonied Spouse with the Entirety of the Ultimate Settlement and May Prevent the Use of Scorched-Earth Tactics*

The fees for the divorce costs for both spouses can be funded from the marital estate.[136] The nonmonied spouse is not indebted to anyone when fees are shifted; the fees are covered with no strings attached. This is desirable because it ensures that the nonmonied spouse will get what she and any children involved *need* to move on after the divorce. Unlike when fees are paid without court supervision, through fee shifting the court can require both parties to detail attorneys' hourly rates and time spent litigating the divorce.[137]

Since the funding for both sides comes from the marital assets, the wealthier party is incentivized not to drag out the proceedings and is unable

134. Mather et al., *supra* note 61, at 43.

135. *Id.* at 142.

136. *See, e.g.*, 2 Timothy M. Tippins, New York Matrimonial Law and Practice § 17:35 (2d ed. 2004 & Supp. 2013) ("In order that the parties be on relatively equal footing, the court may direct one party to contribute to the 'war chest' of the other so that each may be championed by a well-trained legal gladiator.").

137. *See, e.g.*, N.Y. Dom. Rel. Law § 237 (McKinney 2010).

to deplete the marital assets only to fund his own legal costs.[138] At the same time, the nonmonied spouse has an equal incentive not to drag out litigation because her settlement will be equally affected. Put simply, both parties are interested in keeping fees low. Further, attorneys may not be as tempted to drag out their representation as when a financial giant with deep pockets such as a third-party financing firm is involved. Fee shifting may ultimately impact the award given to the nonmonied spouse, but at least both parties are equally sharing the burden of a costly divorce. Additionally, equalized fees afford both parties comparable amounts of money to spend, so "starving out" the nonmonied spouse through protracted divorce litigation is less feasible and would be the equivalent of self-starvation. The monied spouse has no power to launch a war of financial attrition because both parties have comparable spending power, until they both have nothing. In this way, the two parties' priorities are aligned: they both want the divorce finished quickly and to preserve as much of the marital assets as possible.[139]

Conclusion

The recent wave of firms financing divorces is troublesome and creates many costs that outweigh the possible benefits. Mandatory shifting of reasonable fees by courts provides a workable and effective solution to deal with some individuals' inability to pay the costs of divorce that third-party financiers purport to address. Fee shifting by courts prevents conflicts of interest, waivers of the attorney-client privilege, and other problems that are endemic in third-party financing of divorces.

Courts are able to help not only the wealthiest spouses seeking a divorce, but anyone who demonstrates a need for help and has a spouse with enough assets to cover her fees. Fee shifting by courts is transparent, attempts to provide adequate representation for the nonmonied spouse, and compromises far less of the ultimate settlement that is desperately needed by the nonmonied spouse.

Unlike regulation of firms, banning this practice outright prevents turning divorce into a source of profit on which businesses can capitalize, and sends a powerful and important message to society: we will not permit big business to exploit the vulnerabilities of people struggling through a divorce. For these reasons, third-party financing of divorces should be banned and displaced by the preferable, simpler solution of mandatory shifting of reasonable fees by courts.

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138. Sarah C. Acker, Note, *All's Fair in Love and Divorce: Why Divorce Attorney's Fees Should Constitute a Dissipation of Marital Assets in Order to Retain Equity in Marital Property Distributions*, 15 Am. U. J. Gender Soc. Pol'y & L. 147, 164 (2006) ("When a spouse's expenditure on attorney's fees reduces the estate value, the expenditure inevitably reduces the amount the other spouse can claim from the remaining estate.").

139. This Note does not address possible situations in which a vindictive spouse (either nonmonied or monied) wishes to prolong the proceedings despite the negative impact on her own financial interests. Instead, this Note assumes that both parties are rational actors.