THE CORPORATE COUNSELOR

NOVEMBER 2013

Third-Party Litigation Investing and Attorney-Client Privilege

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Civil litigation is potentially expensive, and achieving lucrative outcomes is not without risk. In recent years, companies with viable claims have looked to diversify their risk by partnering with third-party investors. Successful investment relationships require substantial due diligence and communication. This communication may include claim-holder materials that are subject to the attorney-client privilege or that are considered attorney work product.

A claim-holder's communications with its investors, or potential investors, introduces the risk of privilege waiver and the potential exposure of sensitive information to an adverse party in later litigation. An attractive discovery subject for any defendant may be the materials shared between the plaintiff and its investor. The plaintiff's evaluation of its claims would provide good information for cross-examination. Thus, the issues of privilege and work product protection arise when a plaintiff shares otherwise protected information.

Case law addressing whether these communications destroy the privilege is limited and inconsistent. Courts are divided on whether the claimed commonality in such a relationship — a financial interest — is enough to preserve privilege. Still, the claim-holder will need to communicate some information to an investor to obtain investment in the prosecution of its claims. This article considers recent case law addressing privilege challenges and third-party investment relationships, and provides suggestions on how to minimize the risk of destroying any privilege through the provision of sensitive information in such relationships.

The Attorney-Client Privilege and Work Product Doctrine

The attorney-client privilege applies to communications (oral or written) between a client and an attorney when the attorney is acting

to provide legal advice. The privilege may also extend to communications between agents of the client and the client's attorney. The communicating parties must intend for the communication to be confidential. There are limited exceptions to the privilege, such as the crime-fraud exception, that may compel disclosure, but absent application of an exception the privilege protects any disclosure of the attorney-client communication. The privilege does not prevent the disclosure of underlying facts, but a fact cannot be obtained if only available through a protected communication. The privilege of an attorney-client communication can be waived by the client, but not by the attorney.

Separate from the attorney-client privilege is the attorney work product doctrine. This is broader in scope than the attorney-client privilege because the doctrine protects materials prepared by attorneys and their agents in the anticipation of litigation that may not be communicated to the client. The litigation need not be active for the doctrine to apply; the doctrine may also cover materials developed before a lawsuit is filed. Work product may cover materials where the client has no direct involvement. The work product doctrine is intended to shield the opinions of counsel from discovery to allow for case preparation.

Interplay of the Common Interest Doctrine

The separate "common interest doctrine" appears in opinions considering whether disclosure of otherwise attorney-client communications or attorney work product (collectively "attorney-associated information") to a third-party investor resulted in a waiver. Sometimes mislabeled as a separate "privilege," the common interest doctrine is a rule for determining whether a privilege is preserved when materials are shared between non-related parties. It is not, in itself, a distinct form of privilege.

A common interest may exist if the parties to the communication share a common interest, the disclosing party has a reasonable expectation that the communication would remain confidential, and the disclosure is reasonably necessary. In the context of third-party investors, courts have identified two separate common interests — a common legal interest to a claim and a common financial interest in the outcome of prosecuting a claim. Courts disagree about whether a financial common interest alone satisfies the common interest requirement. Courts have also addressed whether the disclosing party, invariably the claim-holder/plaintiff, had a reasonable expectation that the information would remain confidential.

Case Law

Courts are mixed on whether disclosure of attorney-associated information to a third-party litigation investor waives the privilege. In an early opinion on the subject, a Delaware federal court in *Leader Technologies, Inc. v. Facebook, Inc.*, held that the plaintiff waived its attorney-client privilege on certain documents that it shared with litigation financing companies during the companies' evaluation of the investment opportunity. 719 F. Supp. 2d 373, 376-77 (D. Del. 2010). The defendant moved to compel the production of the attorney-associated information exchanged between the plaintiff and its financing companies. The plaintiff argued that there was no privilege waiver because the subject documents were only exchanged after a finance company and itself established a common interest. The argued common interest was the financing company's interest in funding the litigation. The court disagreed, finding that a common interest arising from only a commercial relationship was not sufficient to allow the common interest exception to waiver to apply. The court compelled the plaintiff to produce the subject documents.

In contrast to *Leader Technologies* is *Mondis Technology, Ltd. v. LG Electronics, Inc. et al.*, where a Texas federal court held there was no waiver when the plaintiff shared similar types of information with prospective investors. 2011 U.S. Dist. LEXIS 47807 (E.D. Tex. May 4, 2011). The shared information included litigation and licensing strategy and financial returns from implementing the strategy. On a defendant's motion to compel production of this information, the court held that the materials created for potential investors were work product, and that the sharing did not waive the protection. Significant to the court's holding was the existence of nondisclosure agreements in place between the plaintiff and potential investors before the plaintiff shared the information. The court reasoned that the plaintiff had a reasonable expectation of confidentiality based on the nondisclosure agreements. The disclosure would not "substantially increase the likelihood that an adversary would come into possession of the materials." *Id*. at *16-17.The court did not consider whether a financial interest between the plaintiff and the potential investors was sufficient to find that there is a common interest.

In *Devon IT, Inc. v. IBM Corp*., a Pennsylvania federal court reached a similar conclusion. The court held that the disclosure of attorney-associated information to a potential investor did not waive any privilege because a separate common interest and nondisclosure agreement existed between the parties. 2012 WL 4748160, *1 n.1

(E.D. Pa. Sept. 27, 2012). The plaintiff moved for a protective order and to quash a third-party subpoena served by the defendant on third parties who had received the information from the plaintiff. The latter had provided the information subject to the nondisclosure agreement, but before executing a funding agreement. The court granted the plaintiff's motions, holding that the information was work product or attorney-client privileged. The court further held that the common interest doctrine prevented waiver in view of the existing common interest agreement. The common financial interest in the case outcome, and that there was no other recognized interest between the parties, was sufficient for the common interest doctrine to apply.

Two federal courts in Delaware have also considered the issue of privilege waiver for documents shared with third-party consultants. In *Walker Digital, LLC v. Google, Inc.*, the court held that attorney-associated information exchanged between the plaintiff and its patent monetization consultant was protected under the common interest doctrine. Civ. No. 11-309-SLR, ECF No. 280 (D. Del. Feb. 12, 2013). The court relied on an agreement between the plaintiff and the consultant providing for a common interest between them. The opinion is not specific on the timing of the communications and exchange of information, for example whether the disclosure was before or after execution of the agreement.

Similarly, in *Intellectual Ventures I LLC v. Altera Corp.*, the court upheld the plaintiff's privilege claim to patent acquisition materials shared with a third-party contractor. C.A. No. 10-1065-LPS, ECF No. 415 (D. Del. Jul. 25, 2013). The plaintiff argued that communications and materials shared between the plaintiff's employees and a contractor tasked with identifying patents for acquisition by the plaintiff did not destroy applicable privileges because there was a common interest. The court agreed. While the *Intellectual Ventures* and *Walker Digital* opinions do not address third-party investors, in view of the *Leader Technologies* opinion they may reflect a split within the district that a common financial interest, without more, may be enough for the common interest doctrine to apply.

How to Minimize the Risk of Privilege Waiver

The small number of courts that have considered the privilege waiver issue in the third-party investing context, coupled with the split in opinions, introduces uncertainty to whether shared communications are protected from disclosure. The opinions do not present a consistent trend, and there is some gloss over the treatment of different categories of documents exchanged and the significance of

nondisclosure agreements. The decisions may reflect regional preferences to preserving privilege and applicable of the common interest doctrine — the opinions originate from only two (Third and Fifth circuits) of the federal court system's 13 circuit regions.

Claim-holders and investors should be cognizant of the risk that their communications and information could be seen by an adverse party. Thus, if a claim-holder must disclose attorney-associated information to obtain investment, or to manage an investment relationship, the claim-holder can implement several practices to reduce the chance of privilege waiver.

First, attorney-client communications only between a party and its attorney are off-limits for sharing. This prohibition applies regardless of whether the investor is evaluating the opportunity or has made a commitment. In communicating with the third-party investor, neither the client nor its attorney should volunteer separate attorney-client communications.

Second, obtain non-disclosure agreements in addition to any investment agreement. Completing a non-disclosure agreement should be the first task of any investing relationship, and regardless of the final outcome of an investing evaluation. An investor will likely need to evaluate confidential business information of the party seeking investment. Absent an appropriate agreement, a disclosure may accidentally waive the confidentiality claim. Further, any agreement should i4clude within its scope statements of recognition that the parties have a common interest in the outcome of the litigation. It is easier to argue that a claim-holder has a reasonable expectation that sensitive information will not be disclosed if there is a supporting agreement.

Third, a party should plan that information shared with an investor is information that would be responsive to a fact discovery request in litigation. Underlying factual information cannot be shielded from an adverse party. It is likely that the adverse party will at least ask for any factual information that formed that basis of the investing relationship. Thus, a party's written communications accompanying disclosures to an investor should be sensitive to this issue. The communications may also be subject to production.

Fourth, if a party is sharing information with an investor, and before any investment agreement is reached (potentially the most risky of positions), limit disclosures to necessary information. Limit or altogether avoid casual electronic communications and other writings

about the disclosed information. These casual communications may be produced in later litigation, and such communications may be used and misinterpreted by an adverse party.

Fifth, assume that any attorney-associated information that is shared with an investor may at least be seen by a judge. An aggressive opponent will challenge privilege claims by a motion to the court. The party asserting privilege has the burden to establish that the communication is privileged. To resolve the challenge the judge may examine each document individually to evaluate if the document contains privileged information, or if the document must be produced. Regardless of whether the privilege challenge is successful, the information may still influence the evaluating judge. This influence may not be beneficial to the privilege-claiming party as the case progresses, or it may leave the court with the desire to level the field on a different motion.

Conclusion

The task of obtaining third-party litigation funding presents unique privilege preservation issues to a claim-holder when sharing information with an investor. Through some simple steps, however, the claim-holder may mitigate the risk of an unintended waiver. Privilege preservation is only one of several related challenges in third-party funding relationships. Other challenges are also present, including attorney representation ethics and practical management of client/investor relationships. Claim-holders should address these challenges with advanced planning and attorney consultation.

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