



Alerts

Sharing Documents With Litigation Financing Companies Waives Privilege for Those Documents

August 19, 2010

Lawyers for the Profession® Alert

Leader Technologies, Inc. v. Facebook, Inc., ___ F. Supp. 2d ___, 2010 WL 2545960 (D. Del. 2010)

Brief Summary

A federal district court upheld the decision of a magistrate judge ordering production of documents shared by plaintiff with litigation financing companies, notwithstanding plaintiff's contention that the documents were protected by the common interest exception for privileged documents.

Complete Summary

Plaintiff shared certain documents with litigation financing companies but never entered into a relationship with those organizations. Defendant sought production of the documents. Plaintiff argued that, even though it had shared the documents with third parties, the documents were still protected by the common interest exception for privileged and work product communications. A magistrate judge ordered plaintiff to produce the documents, and plaintiff filed an objection.

The district court held that plaintiff had not met its burden of establishing that the magistrate's ruling was clearly erroneous. The district court, like the magistrate judge, recognized that the law in this area is unsettled but basically approved of the magistrate's methodology. The judges recognized that common interest is an exception to the rule that attorney-client privilege and work product protection are waived upon disclosure of material to third parties. The district court considered that exception and concluded that for a communication to be protected, the common interests must be "identical, not similar, and be legal, not solely commercial." Specifically, the judges considered the apparent trend in the Third Circuit toward requiring increased commonality of interest, as well as policy considerations such as the need for litigation financing companies, and state ethical guidelines.

Significance of Opinion

This opinion should give pause to plaintiffs' lawyers considering which documents and information to share with potential litigation financing companies. It should also provide some ammunition for additional discovery by defense counsel. A strict rendering of the common interest exception, such as the one employed by the judges in this case, leaves open to potential discovery

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oral communications, e-mails, documents and other information and materials shared by counsel with such companies, at least in circumstances in which there is no ultimate contract between the plaintiff and the company.

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