

California Federal Court Holds Buyer and Seller Protected by Common Interest Privilege

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[Morvil Technology, LLC v. Ablation Frontiers, Inc., Slip Copy, 2012 WL 760603 \(S.D. Cal. 2012\)](#)

Brief Summary

The U.S. District Court for the Southern District of California held that two companies that shared attorney-client privileged documents during negotiations between them for an acquisition did not waive either company's privilege because they shared common interests in avoiding litigation as well as in assessing the validity and enforceability of the acquiree's patents.

Complete Summary

During the course of negotiations in which one company (acquirer) sought to acquire another company (acquiree), the two companies shared attorney-client privileged information which had been prepared by their respective lawyers. There was no written "common interest" agreement. The privileged documents pertained to, *inter alia*, the enforceability and scope of acquiree's patents. Plaintiff in the instant action against both acquirer and acquiree (defendants) sought production of the documents, arguing that each party had waived privilege by sharing the documents with the other party. Defendants, however, asserted that the documents were protected by the common-interest privilege.

The U.S. District Court for the Southern District of California held that the documents were protected by the common-interest privilege because defendants shared the documents to further the companies' common interest in avoiding or reducing litigation. The court cited authority from the Northern District of California for the proposition that a buyer and seller are protected by the common interest privilege when they jointly anticipate litigation. Because it was unclear whether defendants here had actually anticipated litigation, the Southern

District also cited authority from the Federal Circuit indicating that the common interest privilege applies to joint efforts to avoid or reduce litigation, which was ultimately the rule the Southern District relied on.

The court alternatively held that the documents were protected by the common interest privilege because defendants had a common legal interest in determining whether acquiree's patents were valid and enforceable.

Significance of Opinion

This opinion highlights a circumstance in which documents shared outside of litigation—even by companies on opposite sides of a transaction—can remain protected by the attorney-client privilege. The common-interest doctrine is technically an exception to waiver of the attorney-client privilege and is most commonly present in a litigation setting when parties with aligned interests seek to share information without waiving privilege. Here, it appears that the court was willing to recognize a very broad scope of protection, so long as the privileged communications were shared in an effort to anticipate, avoid or reduce litigation, or to ensure the efficacy of the intellectual property at the core of the transaction.

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