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LEGAL PRIVILEGE AND RELATED ISSUES IN INSOLVENCY AND RESTRUCTURING MATTERS

The assertion of attorney-client privilege or work-product protection in the bankruptcy context can be compromised by complex and recurring legal issues that arise, sometimes in unexpected ways, in the bankruptcy process. The authors discuss the cases raising these issues for parent/subsidiary corporations and former officers and directors, the debtor's privilege after filing, and committee privileges in the bankruptcy. They close by examining cases dealing with the common interest doctrine.

By Christopher Harris and William Furnish *

Bankruptcy presents a uniquely complicated area for assessing legal privilege because of its mix of transactional structuring work, litigation, shifting corporate entities, alliances between parties with overlapping and rapidly changing interests, and fiduciary duties owed to multiple parties with divergent interests. In general, common law legal privileges (and other similar legal doctrines that preclude the discoverability of evidence) apply with the same force to disputes involving entities in bankruptcy.¹ But the unique bankruptcy contexts can result in unpleasant discovery

surprises for counsel and clients who do not remain vigilant of who is represented by counsel, who is privy to communications with counsel, the interests shared between those parties, and when those interests begin to diverge. In order to avoid such unpleasant surprises, this article will address the following recurring legal issues pertaining to legal privilege that confront bankruptcy practitioners: (1) pre-filing issues regarding corporate family members and privilege held against former officers and directors; (2) the debtor's privilege after filing; and (3) privileges held by committees in the bankruptcy. Before delving into these topics, it will be helpful to address basic principles of common law legal privilege.

¹ Federal Rule of Bankruptcy Procedure 9017 (providing that the Federal Rules of Evidence apply in cases brought under the Bankruptcy Code); *see also* Federal Rule of Evidence 501.

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GENERAL PRINCIPLES PERTAINING TO LEGAL PRIVILEGES

Attorney-Client Privilege

The attorney-client privilege may be asserted to prevent disclosure of a communication provided that communication is confidential, was made for the purpose of providing or obtaining legal advice, and was made in the boundaries of a privileged relationship.² The concept of “joint representation” or “co-client” privilege, which is the focal point of this article’s discussion on corporate form, also protects confidential communications between two or more persons who are jointly consulting the same attorney concerning the same matter.³

The confidentiality prong of attorney-client privilege is especially important in the bankruptcy context; if a third party is present, the communication is not confidential and not privileged.⁴ By the same token, sharing the communication with a third party will strip it (and, potentially, other communications on the same topic) of privileged status.⁵ Under some circumstances, however, the “common interest doctrine” operates as an exception to the general rule that attorney-client privilege is waived when a protected communication is disclosed to a third party, provided that the communication is made pursuant to, and in furtherance of, a common legal interest and privilege has not otherwise been waived.⁶

² See, e.g., *In re Baldwin-United Corp.*, 38 B.R. 802, 804 (Bankr. S.D. Ohio 1984).

³ See, e.g., *Teleglobe USA Inc. v. BCE, Inc. (In re Teleglobe Commc’ns Corp.)*, 493 F.3d 345, 362 – 363 (3d Cir. 2007).

⁴ *Id.* at 361.

⁵ *Id.*

⁶ Confusingly, the common interest doctrine is often referred to as the “joint defense privilege,” but courts have made clear that parties need not be represented by the same attorney for the privilege to apply. See, e.g., *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989) (the common interest doctrine “serves to protect the confidentiality of communications passing

Work-Product Protection

Work-product protection, which is not coterminous with the attorney-client privilege, shields from production documents or tangible things that were prepared in anticipation of litigation by a party or that party’s representative.⁷

One recurring question is whether the bankruptcy filing itself is deemed to be “litigation” such that any documents prepared in anticipation of the bankruptcy filing itself may receive work-product protection. Although the matter is not settled, a party may seek work-product protection for pre-filing documents when a bankruptcy case is filed to resolve litigation matters, rather than merely “address financial problems.”⁸

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from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel”); *Hunydee v. United States*, 355 F.2d 183, 184 – 85 (9th Cir. 1965) (common interest doctrine applies to meeting between two clients and respective attorneys to address legal strategy regarding pending indictment); *Teleglobe*, *supra* note 3 at 364 (distinguishing joint-representation privilege from “community-of-interest” privilege).

⁷ E.g., Fed. R. Civ. P. 26(b)(3); *Granite Partners, L.P. v. Bear Stearns & Co., Inc.*, 184 F.R.D. 49, 52 (S.D.N.Y. 1999). Whether a document was prepared in anticipation of litigation typically involves determining whether (1) subjectively, the party believed it was threatened with litigation when the material was prepared and (2) objectively, that belief was reasonable. *In re Quigley Co., Inc.*, No. 04-15739 (SMB), 2009 Bankr. LEXIS 1352 at *18 (Bankr. S.D.N.Y. Apr. 24, 2009).

⁸ *In re Quigley Co., Inc.*, *supra* note 7 at *22 – 23; see also *In re McDowell*, 483 B.R. 471, 493-94 (Bankr. S.D. Tex. 2012) (holding that work-product protection applied to questionnaire and draft schedule prepared by counsel in anticipation of Chapter 7 petition because “the filing of a bankruptcy petition constitutes the filing of a lawsuit” such that “documents prepared in anticipation of a bankruptcy filing are prepared for litigation”); *Tri-State Outdoor Media Grp., Inc. v. Off. Comm. of Unsecured Creditors to Tri-State Outdoor Media Grp. (In re Tri-State Outdoor Media Grp., Inc.)*, 283 B.R. 358, 364 (Bankr. M.D. Ga. 2002) ([T]he documents in question were created in

Because the bankruptcy process is often adversarial, documents prepared post-filing as part of the bankruptcy will frequently, but not always, satisfy the “anticipation of litigation” prong of a court’s determination regarding attorney work-product protection.⁹

Although work-product protection is heartier than privilege when it comes to third-party disclosure, it can be weakened through the deliberate disclosure of work product to an opposing party or disclosure of work product in such a way as to create a substantial risk that it would be disclosed to an adverse party.¹⁰ For example, waiver could occur if a party includes work product in a public document filed with the court.¹¹ In addition to waiver by disclosure, *factual* materials over which work-product protection is asserted may be discoverable upon a showing of substantial need for the materials in preparation of the opposing party’s case and undue hardship in procuring the substantial equivalent of those materials.¹²

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anticipation of Bankruptcy and ‘in anticipation of litigation.’”). *But see U.S. v. Naegele*, 468 F. Supp. 2d 165, 174 (D.D.C. 2007) (draft versions of bankruptcy forms not protected because the bankruptcy filing “was not itself ‘litigation’ in anticipation of which protected attorney work product can be created”).

⁹ *In re Hutchins* 211 B.R. 330, 332 – 333 (E.D. Ark. 1997) (holding that employee evaluations created post-petition to evaluate debtor’s business were not shielded by work-product protection because they were not prepared in anticipation of litigation); *Asbestos Health Claimants’ Comm. v. Jasper Corp.* (*In re Celotex Corp.*), 196 B.R. 596, 601 (S.D. Fla. 1996) (holding that valuation documents that were “created post-petition in contemplation of Debtor’s confirmation in which Defendants are legally and commercially engulfed” were protected under work-product doctrine); *In re Fin. Corp. of Am.*, 119 B.R. 728, 738–39 (Bankr. C.D. Cal. 1990) (rejecting argument that work-product protection did not apply in bankruptcy where no adversary action had been commenced, but noting that documents generated after the bankruptcy filing “are not automatically subject to non-disclosure”).

¹⁰ *S.N. Phelps & Co. v. Circle K Corp.* (*In re Circle K Corp.*), Nos. 96 Civ. 5801 (JFK), 96 Civ. 6479 (JFK), 1997 WL 31197, at *10 (Bankr. S.D.N.Y. Jan. 28, 1997) (collecting cases).

¹¹ *Granite Partners, L.P.*, *supra* note 7 at 56 (holding that bankruptcy trustee waived any privilege pertaining to materials by using the materials “offensively” in the trustee’s report).

¹² *In re Quigley Co.*, *supra* note 7 at *24 – 25. By contrast, “[o]pinion work . . . enjoys near absolute immunity.” *Id.* at 25 n.5.

PRE-FILING PRIVILEGES

With the basics of the legal doctrines established, the first step is an examination of pre-filing corporate family issues that affect the assertion of privilege post-filing. Before bankruptcy becomes likely, a parent and subsidiary (particularly a wholly owned subsidiary) will often have aligned interests, have overlapping officers and directors, and use the same counsel. But once bankruptcy becomes likely, continuing to share counsel and communications, often for efficiency reasons, can undermine claims of privilege for these pre-filing communications and work product.

Corporate Form and Parent/Subsidiary Disputes

After filing, the interests between the parent and subsidiary may sharply diverge and result in disputes between corporate family members about the discoverability of communications; for instance, a debtor subsidiary may have causes of action that it wishes to file against the non-debtor parent entity.

This divergence of interest was perfectly illustrated in *In re Teleglobe Commc’ns Corp.*,¹³ in which the court was confronted with a dispute between a debtor-subsubsidiary and parent corporation over documents created by and in communication with attorneys who represented the entire corporate family. In *Teleglobe*, a non-debtor, parent entity caused its wholly owned subsidiary (intermediate entity) and that subsidiary’s subsidiaries (debtors) to incur debt; when the parent entity ceased funding the intermediate entity, the intermediate entity and the debtors filed for bankruptcy. Debtors sued the parent entity on various legal theories based on the parent’s alleged failure to honor binding commitments to fund the intermediate entity and debtors. Debtors sought to compel the production of documents that the parent entity designated as privileged based on “common interest” between the intermediate entity, debtors, and the parent entity, in part because those parties shared a centralized, in-house legal department. Engaging in a lengthy discussion of privilege, the court rejected the concept of the entire corporate family as a “single client” because it “fails to respect the corporate form.”¹⁴ Furthermore, the court stated that joint representation “only arises when common attorneys are affirmatively doing legal work for both entities on a matter of common interest” because a “broader rule would” allow the subsidiary to “access all

¹³ *Supra* note 3 at 353.

¹⁴ *Id.* at 371.

of its former parent's privileged communications."¹⁵ The court also rejected the notion that the intermediate entity, which *was* a co-client, could waive privilege over joint communications in favor of debtors, because all co-clients must join in any waiver.¹⁶ In sum, the court concluded that the parent could only be compelled to produce documents over which it claimed privilege if, on remand, the district court determined that the parent entity and debtor were "jointly represented by the same attorneys on a matter of common interest that is the subject matter of those documents."¹⁷

The lessons of *Teleglobe* were stated plainly by the court itself: in-house counsel should "take care not to begin joint representations except when necessary, limit the scope of joint representations, and seasonably . . . separate counsel on matters in which subsidiaries are adverse to the parent."¹⁸ Under such circumstances, properly defining the scope of joint representation between a parent and subsidiary is of paramount importance because doing so leaves in-house counsel "free to counsel the parent *alone* on the substance and ramifications of important transactions without risking giving up the privilege in subsequent adverse litigation."¹⁹

Former Directors and Officers

Like corporate family members, former directors and officers may also attempt to use their roles in the corporate entity to access pre-filing privileged communications after the bankruptcy filing. Whether a former director or officer is entitled to compel production of communications between corporate counsel and the corporation depends on whether the

court views the corporation and its officers as joint clients, or if it views the corporation as the sole client.

Joint Client: Where courts take the approach that directors and officers are joint clients²⁰ with the corporation, courts are more likely to conclude that those directors and officers may waive privilege. For instance, in *Kirby v. Kirby*,²¹ a non-bankruptcy case, siblings disputed the administration of a family-owned charitable foundation. In connection with claims for breaches of fiduciary duty, the plaintiff siblings moved to compel the production of documents between the foundation and counsel, some of which were prepared while the plaintiff siblings were directors of the foundation. The court required production of the documents to plaintiffs, stating that the "directors are all responsible for the proper management of the corporation, and it seems consistent with their joint obligations that they be treated as the 'joint client' when legal advice is rendered to the corporation through one of its officers or directors."²² After plaintiffs were removed as directors, however, the court stated that it would be a "fiction" to conclude that legal advice was rendered to them as joint clients and held that plaintiffs could not compel production of such documents. Although, as noted above, *Kirby* was not a bankruptcy case, practitioners who frequently encounter Delaware law should remain cognizant of its continued impact: it remains good law in Delaware²³ and may be binding on federal courts when Delaware law governs the dispute.²⁴

¹⁵ *Id.* at 379; *see also United States v. Under Seal #4 (In re Grand Jury Subpoena #06-1)*, 274 F. App'x 306, 310 – 11 (4th Cir. 2008) (stating that a number of courts "have held that close corporate affiliation, including that shared by a parent and a subsidiary, suffices to render those entities 'joint clients' or 'co-clients,' such that they may assert joint privilege in communication with an attorney pertaining to matters of common interest"); *Davis v. PMA Companies, Inc.*, No. CIV-11-359-C, 2012 U.S. Dist. LEXIS 130944, at *9 (W.D. Okla. Sept. 7, 2012) (holding that parent and subsidiary that shared counsel were co-clients for purposes of invoking attorney-client privilege).

¹⁶ *Teleglobe*, *supra* note 3 at 371.

¹⁷ *Id.*

¹⁸ *Id.* at 375.

¹⁹ *Id.* at 383.

²⁰ Some courts also refer to this as the "single client" approach. *See, e.g., Moore Bus. Forms, Inc. v. Cordant Holdings Corp.*, Nos. 13911, 14595, 1996 Del. Ch. LEXIS 56 at *13 n.4 (Del. Ch. June 4, 1996).

²¹ No. 8604, 1987 WL 14862 (Del. Ch. July 29, 1987).

²² *Id.* at *7.

²³ *Kalisman v. Friedman*, No. 8447-VCL, 2013 Del. Ch. LEXIS 100, at *9 (Del. Ch. Apr. 17, 2013) (citing *Kirby* for the proposition that a director is treated as a "joint client" for purposes of representation and, therefore, a corporation cannot invoke legal privilege against a director).

²⁴ *See, e.g., Barr v. Harrah's Entm't, Inc.*, No. 05-5056 (JEI), 2008 U.S. Dist. LEXIS 26018, at * 8 – 9, 18 – 19 (Mar. 31, 2008) (determining that Delaware privilege law applied to motion to compel, but distinguishing *Kirby*); *Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld, LLP*, 994 F. Supp. 202, 212 n.5 (S.D.N.Y. 1997) (collecting cases "holding that a corporate director is entitled to discovery of privileged documents he saw when a director and/or privileged documents from the period he was a director").

Corporation as Client: Outside of decisions applying Delaware state law, however, the joint client approach has been rejected by many federal courts.²⁵ Instead, federal courts have frequently taken the approach that the corporation is the sole client, thereby dramatically reducing the ability of former officers and directors to break privilege.²⁶

In *In re Brainiff*,²⁷ for instance, defendants in insolvency litigation challenging pre-petition transactions, including a leveraged buyout of the debtor, sought to compel the production of documents from debtor-plaintiff, arguing, in part, that debtor-plaintiffs could not invoke the attorney-client privilege against them as former directors and officers in litigation where their service was at issue. The *Brainiff* court rejected the application of *Kirby*, stating that debtor-plaintiff “was the only client, and any participation of the [former directors and officers] was merely that of corporate agents working on behalf of [plaintiff].”²⁸ Instead, the court applied a competing approach wherein “the availability of a corporation’s attorney-client privilege is subject to the ‘right of the stockholders to show cause why it should not be invoked in a given instance.’”²⁹ This approach required the court to balance the interest in protecting the debtor’s attorney-client privilege against that of the shareholders’ and public’s right to obtain information relevant to the litigation.³⁰ Although the former directors and officers would, “upon a proper showing,” be entitled to view otherwise privileged

documents, the court nevertheless upheld the privileged status of the documents because no such showing was made, and “the mere fact that they are former officers and directors does not require otherwise.”³¹

As *Kirby* and *Brainiff* demonstrate, the scope of legal representation and the attendant control over legal privilege vary widely by jurisdiction. Regardless of jurisdiction, disputes will arise between former directors and officers and the entities they serve after filing, and counsel should take appropriate steps to tailor the scope of representation to reflect the goals of preserving the corporation’s ability to assert legal privilege in the event that such disputes arise.

POST-FILING PRIVILEGE ISSUES: DEBTOR, TRUSTEE, AND CREDITORS’ COMMITTEE

Debtor’s Privilege Post-Filing

In addition to former members of the corporate family, other post-filing entities may strip the filing corporation of its control over the debtor’s legal privileges. Generally, a corporation that has filed for bankruptcy retains control over legal privileges that govern the admissibility of evidence in bankruptcy litigation.³² But this general principle may not apply when the corporation no longer exercises complete control over the debtor’s operations and assets.³³

Bankruptcy Trustee: Most notably, the appointment of a bankruptcy trustee may result in the debtor losing complete control over its legal privilege. In the seminal case on this issue, the Supreme Court held, in *Commodity Futures Trading Commission v. Weintraub*,³⁴ that a bankruptcy trustee has control over a debtor’s right to waive the attorney-client privilege regarding certain communications that occurred before the debtor filed its Chapter 7 petition. In *Weintraub*, shortly after debtor, Chicago Discount Commodity Brokers, filed its petition for liquidation under Chapter 7, the district court appointed a receiver who was later appointed trustee by the bankruptcy court. The

²⁵ See, e.g., *Fitzpatrick v. AIG, Inc.*, 272 F.R.D. 100, 106, 108 – 109 & n.6 (S.D.N.Y. 2010) (collecting cases and stating that *Kirby* is (1) “fundamentally inconsistent with the rationale for privilege”; (2) “ignores the unique and limited role of corporate representatives in communicating with counsel”; and (3) “allows the fiduciary’s termination of his responsibilities to trigger his ability to use the access previously granted . . . as a weapon to advance his own interests at the expense of the corporation”).

²⁶ *Id.* at 109.

²⁷ 15 B.R. 941 (M.D. Fla. 1993).

²⁸ *Id.* at 944.

²⁹ *Id.* (quoting *Garner v. Wolfenbarger*, 430 F.2d 1093, 1103 – 04 (5th Cir. 1970)).

³⁰ *Id.* As identified by the court in *Brainiff*, these factors include: (1) “the necessity of the information sought”; (2) “the availability of the information from other sources”; (3) “the extent to which the communication is identified versus fishing”; and (4) “the risk that revealing information that the corporation has an interest in protecting for independent reasons.” *Id.* (citing *Garner*, 430 F.2d at 1103 – 04).

³¹ *Id.* at 945.

³² See, e.g., *Am. Metrocomm Corp. v. Duane Morris & Heckscher LLP (In re Am. Metrocomm Corp.)*, 274 B.R. 641, 654 (Bankr. D. Del. 2002).

³³ See, e.g., *Am. Int’l Specialty Lines Ins. Co. v. NWI-I, Inc.*, 240 F.R.D. 401, 405 (N.D. Ill. 2007) (observing that “the power to invoke or waive a corporation’s attorney-client privilege is an incident to control of the corporation” and collecting cases).

³⁴ 471 U.S. 343 (1985).

Commodity Futures Trading Commission (“CFTC”) subpoenaed Mr. Weintraub (the debtor’s former counsel), seeking testimony regarding suspected misappropriation of customer funds by the debtor. Weintraub refused to answer certain questions, asserting that such topics were protected by attorney-client privilege, and the CFTC moved to compel answers on those topics. Importantly, the CFTC also requested, and the debtor’s trustee waived, any attorney-client privilege the trustee held in those communications on those topics. Acknowledging that “administration of the attorney-client privilege in the case of corporations” presented “special problems,” the Supreme Court found that control over the debtor’s attorney-client privilege resided in the trustee after filing for bankruptcy, and, therefore, the trustee’s waiver of attorney-client privilege in favor of the CFTC was valid.³⁵ The Court reasoned that the trustee had such power over pre-filing communications because “the trustee plays the role most closely analogous to that of a solvent corporation’s management,” and “the debtor’s directors retain virtually no management powers.”³⁶ By contrast, “[w]hen the corporation is solvent, the agent that controls the corporate attorney-client privilege is the corporation’s management.”³⁷

The fact that the debtor’s control over attorney-client privilege passes to the trustee under certain circumstances has important effects when the debtor was jointly represented with other individuals who may seek to keep certain communications privileged. Most recently, in *In re Cutuli*,³⁸ the Bankruptcy Court for the Southern District of Florida held that the bankruptcy trustee in a Chapter 7 proceeding could, as a joint-client, obtain discovery from the law firm that had represented the debtor and her husband in connection with an adversary proceeding against the husband, pertaining to an alleged fraud upon creditors. Consistent with the Supreme Court’s holding in *Weintraub*, the court concluded that debtor’s control over attorney-client privilege passed to the trustee after debtor filed her Chapter 7 petition.³⁹ Coupled with the well-established rule that joint clients could not assert attorney-client privilege against each other in subsequent, adverse

litigation, the court held that the trustee was entitled to previously privileged communications.⁴⁰

As practitioners may readily imagine, the ability of a trustee in bankruptcy to exercise control over legal privilege previously held by the corporation implicates more than just the corporation itself. Corporate family members, former employees, and other jointly represented entities may also find documents that were previously only accessible by the debtor are now available to the trustee in bankruptcy seeking to maximize the value of the debtor’s estate.⁴¹ As with the intra-family disputes over privilege discussed in the previous section, the risk that the bankruptcy trustee’s invocation or waiver of privilege will cause collateral damage to corporate family members can be reduced by ensuring that the scope of representation is properly addressed at the outset of the relationship between corporate family members.

Court-Appointed Examiner: Although the powers of a court-appointed examiner in bankruptcy are more restricted than those of a bankruptcy trustee where such powers approach those of a trustee, an examiner may also succeed to control over attorney-client privilege. *In re Boileau*,⁴² involved a converted Chapter 11 case, in which the debtor and official committee of unsecured creditors agreed to appoint a bankruptcy examiner in lieu of a bankruptcy trustee. Two secured creditors sought to lift the automatic stay and foreclose on trust deeds securing debtor’s promissory notes. The bankruptcy examiner asserted counterclaims to set aside the deeds as fraudulent conveyances and sought production of certain documents pertaining to allegedly fraudulent conveyances made by the debtor. The court rejected debtor’s contention that the examiner lacked the authority to waive attorney-client privilege over those

³⁵ *Id.* at 348, 352 – 53.

³⁶ *Id.*

³⁷ *Id.* at 356.

³⁸ No. 11-35256-BKC-AJC, 2013 Bankr. LEXIS 3843 (Bankr. S.D. Fla. Sept. 13, 2013).

³⁹ *Id.* (citing *In re Ginn-LA St. Lucie Ltd. LLLP*, 439 B.R. 801, 807 (Bankr. S.D. Fla. 2010)).

⁴⁰ *Id.* at *10 – 11.

⁴¹ *In re Fundamental Long Term Care*, 489 B.R. 451, 455 (Bankr. M.D. Fla. 2013) (holding that bankruptcy trustee stood in the shoes of debtor’s wholly owned subsidiary and could invoke co-client exception to attorney-client privilege); *In re Equaphor Inc.*, No. 10-20490-BFK, 2012 Bankr. LEXIS 2129, at *15 – 16 (Bankr. E.D. Va. May 11, 2012) (holding that bankruptcy trustee was entitled to debtor’s files held by law firm over objections on the basis of work-product protection); *Rahl v. Bande (In re Flag Telecom Holdings Ltd. Sec. Litig.)*, No. 02-CV-3400 (WCC), 2009 U.S. Dist. LEXIS 124061, at *25 (S.D.N.Y. Jan. 14, 2009) (holding that control over attorney-client privilege pertaining to securities litigation against debtor’s former directors and officers was transferred to litigation trustee pursuing action).

⁴² 736 F.2d 503 (9th Cir. 1984).

communications, reasoning: (1) the examiner had expanded powers pursuant to a court order to “perform a myriad of functions normally carried out by a trustee” and (2) the debtor in possession’s control had been “greatly limited” by the examiner and the unsecured creditor’s committee.⁴³ The court was careful to cabin its holding so an examiner will not typically have the authority to waive attorney-client privilege on behalf of the debtor,⁴⁴ but counsel involved in bankruptcy litigation where a court-appointed examiner has taken on trustee-like powers should be aware that those powers may include control over the attorney-client privilege.

*Litigation/Liquidation Trustees:*⁴⁵ In addition to a bankruptcy trustee and examiner, other entities acting on behalf of a debtor in more narrow circumstances, including a litigation trustee, may invoke attorney-client privilege to prevent the production of privileged documents.

In *Osherow v. Vann (In re Hardwood P-G, Inc.)*,⁴⁶ debtor and creditors’ committee asserted preference and avoidance claims that, under the plan of reorganization, became part of a litigation trust administered by a litigation trustee. In the avoidance proceedings, the litigation trustee sought an order declaring that pre-confirmation reports – prepared by a forensic accountant and counsel evaluating debtor’s avoidance and preference claims – were not discoverable. The court concluded that the debtor’s control over attorney-client privilege had transferred to the litigation trustee,

reasoning that “[a]ll of the Debtor’s assets (including those cause of action that had been asserted on behalf of the debtor estate by the Committee) were transferred to the Litigation Trust under the sole management and control of the Trustee.”⁴⁷ Therefore, the litigation trustee was entitled to assert the attorney-client privilege of the creditors’ committee, which had been consulted in connection with the preference and avoidance claims. *Hardwood P-G* is noteworthy because it extended the holding in *Weintraub* beyond that of a bankruptcy trustee and focused on the “practical consequences rather than the formalities of a particular transaction” in determining whether control over privilege had passed to the trustee.⁴⁸

Likewise, in *American International Special Lines Insurance Co. v. NWI-I, Inc.*,⁴⁹ a debtor’s successor corporations and trusts created by the plan of reorganization were embroiled in litigation with debtor’s insurer over a pollution legal liability insurance policy covering several contaminated properties formerly owned by the debtor and affiliate corporations. The insurer sought to compel the production of documents from counsel representing the debtor in bankruptcy, and the successor entities sought a protective order shielding debtor’s communications regarding the insurance policy, remediation of the contaminated properties, and the environmental settlement agreement pertaining to the properties. Reasoning that the reorganized debtor with new management “purchased substantially all” of the debtor’s business operations and continued to operate the business, “the authority to assert or waive the attorney-client privilege transferred to [the reorganized debtor].”⁵⁰ In contrast, “neither the [custodial trust] nor the [liquidating trust] emerged from bankruptcy with control of [the debtor’s] business” because the functions they retained “have no connection to the business operation” of the debtor pre-bankruptcy.⁵¹ Therefore, the liquidating trusts that succeeded to control over some of the disputed assets did not obtain control over the

⁴³ *Id.* at 506.

⁴⁴ *Id.* (limiting holding to “particular facts of this case”).

⁴⁵ The U.S. Trustee is appointed to serve as a “watchdog over the bankruptcy process.” House Report No. 989, 95th Cong., 2d Sess. at 88 (reprinted in 1978 U.S. Code Congressional & Admin. News at 5787, 5963, 6049). In contrast, a litigation trustee is a non-government official appointed to pursue the debtors’ litigation claims. *See, e.g., Kirschner v. Grant Thorton LLP (In re Refco Securities Litig.)*, 628 F. Supp. 2d 432, 435 – 36 (S.D.N.Y. 2008) (noting establishment of litigation trust and appointment of litigation trustee to pursue claims).

⁴⁶ 403 B.R. 445 (Bankr. W.D. Tex. 2009). For a more in-depth discussion of *In re Hardwood P-G*, see Ronald R. Sussman and Alex R. Velinsky, Preservation of the Attorney-Client Privilege and the Work-Product Doctrine in Bankruptcy, 19-3 NORTON J. OF BANKR. LAW & PRAC. 299 (2010). For a broad discussion of trustee and other privilege issues arising out in the bankruptcy context, see Richard B. Kapnick, Courtney A. Rosen & Clair M. Korenblit, Attorney-Client Privilege: Issues in Bankruptcy-Related Proceedings, 21 BANKR. LAW REP. 866 (Jun. 18, 2009).

⁴⁷ *In re Hardwood P-G, Inc.*, *supra* note 46 at 456.

⁴⁸ *Id.* (quoting *Sovereign Software LLC v. Gap, Inc.*, 340 F. Supp. 2d 760, 763 (E.D. Tex. 2004)) (internal quotation marks omitted).

⁴⁹ *Supra* note 33. The successor entities involved in the litigation were debtor’s liquidation trust, the unsecured creditors’ trust, the successor liquidation trust, the custodial trust, the reorganized debtor, and Newco, which consisted of “substantially all” of the debtor’s business operations and equity interests. *Id.* at 403 & n.1.

⁵⁰ *Id.* at 407.

⁵¹ *Id.*

debtors' communications because they did not control the successor entity.⁵² As these cases indicate, who inherits the debtor's privileges will turn on what the bankruptcy plan and related agreements specify regarding ownership of the documents and privileges, as well as control over the operations and communications.

Creditors' Committee: Finally, a creditors' committee that has obtained derivative standing to pursue claims on the debtors' behalf,⁵³ in contrast to a bankruptcy trustee, does not have a broad grant of authority to control the debtor's privilege. In *Official Committee of Asbestos Claimants of G-I Holdings v. Heyman*,⁵⁴ a committee comprised of asbestos claimants brought an action on behalf of the estate against the debtor's chairman and CEO for the allegedly fraudulent transfer of stock. As part of the action, the committee sought the production of documents from the debtor, its subsidiary, and the chairman/CEO. In relevant part, the court concluded that the committee did not, by virtue of the appointment of the trustee, have the authority to waive attorney-client privilege on the debtors' behalf. Similar to the liquidation trustee in *American International*, the committee had "no responsibility or authority to operate or manage the debtor corporation" and owed a "duty only to its constituent creditors," who were pursuing tort claims.⁵⁵ Accordingly, "the interests of a trustee and a creditors' committee" were not "entirely congruent," and the court declined to bestow the committee with the power granted to the *Weintraub* trustee.⁵⁶

Committee Privileges

In addition to privilege issues associated with transfer of the debtor's control over privilege, creditors' committees' abilities to assert and waive privilege also involve complicated privilege analysis. There are two main types of committees in bankruptcy: (1) official committees (e.g., the Official Committee of Unsecured Creditors) that are appointed by the U.S. Trustee pursuant to Section 1102 of the Bankruptcy Code and (2) *ad hoc* committees that are not appointed by the Trustee and are subject only to the disclosure requirements of Bankruptcy Rule 2019.⁵⁷ Unlike members of *ad hoc* committees,⁵⁸ members of the official committees owe fiduciary duties to all members of the group they purport to represent, which are distinct from the individual claims that they are asserting.⁵⁹ It is well established now that an official committee, as a legal entity, can have privileged communications with its counsel. If an *ad hoc* committee is not established as a legal entity, however, then counsel may actually be representing the individual members of the *ad hoc* committee as joint clients, rather than representing the *ad hoc* committee itself.

Frequently, the fiduciary duties of an official committee's members come into conflict with the committee's interest in retaining confidentiality for litigation purposes, which raises complicated privilege issues.⁶⁰ The court in *In re Baldwin-United*

⁵² *Id.* at 407 – 409. In a noteworthy case regarding Canadian bankruptcy proceedings, a bankruptcy trustee was denied the ability to seek the production of documents from debtor's primary secured creditor and debtor's Chief Restructuring Officer ("CRO"), who had previously served as a consultant for the secured creditor. *In re TNG Acquisition Inc.*, No. 31-OR-207514-T, 2013 CarswellOnt 7582, at ¶¶ 1-14, 37, 39, 42 (Ontario Sup. Ct. May 28, 2013). The court reasoned that the CRO's role after appointment was limited to liquidating the debtor's estate and did not have any authority or responsibility over litigation between the debtor and its primary secured debtor. *Id.* at ¶¶ 47 – 51, 60 – 62.

⁵³ *Cf. In re Smart World Techs., LLC*, 423 F.3d 166 (2d Cir. 2005) (noting that creditors have an implied, qualified right to bring suits on behalf of the estate when the debtor in possession has unjustifiably failed to bring suit (internal citations and quotation marks omitted)).

⁵⁴ 342 B.R. 416 (S.D.N.Y. 2006).

⁵⁵ *Id.* at 423.

⁵⁶ *Id.*

⁵⁷ *See, e.g., In re Northwest Airlines Corp.*, 363 B.R. 701, 703 – 04 (S.D.N.Y. 2007) (noting that *ad hoc* groups "purport to speak for a group and implicitly ask the court and other parties to give their positions a degree of credibility appropriate to a unified group with large holdings" and requiring *ad hoc* committee to comply with Bankruptcy Rule 2019).

⁵⁸ Evan D. Flaschen, *Bankruptcy Rule 2019 and the Unwarranted Attack on Hedge Funds*, 26-7 AMER. BANKR. INST. J. 16 (2007).

⁵⁹ *See, e.g., In re Haskell-Dawes, Inc.*, 188 B.R. 515, 522 (Bankr. E.D. Pa. 1995) (stating that members of official creditors' committee have fiduciary obligations to act in interests of those they represent and may not use their position to advance their own individual interests).

⁶⁰ *See generally Official Comm. of Unsecured Creditors for Parker N. Am. Corp. v. Parker (In re Subpoena Duces Tecum)*, 978 F.2d 1159, 1161 (9th Cir. 1992) (noting that counsel for a creditors' committee "is best able to serve his or her client if the attorney can engage in 'full and frank communication,'" and holding that communications between members of creditors' committee and counsel for committee was privileged (internal citations omitted)).

*Corp.*⁶¹ dealt with such a conflict when addressing a motion by counsel for the unsecured creditors' committee seeking to eliminate *ex officio*, non-voting members and reclassify them as invitees. In support of its motion, counsel contended that the presence of such *ex officio* members could be deemed to waive attorney-client privilege over communications to which they were a party. Balancing the "creditors' dependence upon the committee for information, and the underlying purposes of a creditors committee," against the need for need for the committee members to engage in open discussion with counsel, the court concluded that the communications could be protected by attorney-client privilege and that a non-voting member, who was a creditor, could not be reclassified as an invitee.⁶² In addition, the court concluded that this balancing required the committee to "bear the burden of establishing good cause for not disclosing privileged information to its constituent creditors."⁶³

Bankruptcy courts have also recognized the ability of the unsecured creditors' committee to assert attorney-client privilege against creditors represented by the committee. For instance, the unsecured creditors' committee in *In re Refco*⁶⁴ sought clarification of its obligation under Section 1102 of the Bankruptcy Code to provide non-members with access to information. The court recognized the tension inherent in the "committee's need to preserve access to sensitive information (which usually is the only information of any value to unsecured creditors . . .), to protect the attorney-client privilege, and to comply with securities laws" when balanced against "the right of unsecured creditors to be informed of material developments in the case before they are presented with what in practical terms may be a *fait accompli*."⁶⁵ To properly balance these concerns, the court ordered that, in the first instance, the creditors' committee need not disclose privileged information, but invited those "seeking

protected information . . . to raise any argument to show that the Committee's need to protect specified information is not outweighed by the creditor's legitimate need to receive it."⁶⁶

In addition to having the ability to assert the attorney-client privilege over claims for disclosure from other unsecured creditors, members of the official committee of unsecured creditors may continue to assert privilege after the dissolution of the committee. In *Official Committee of Administrative Claimants v. Bricker*,⁶⁷ litigation plaintiffs moved to compel production of documents from a large number of non-parties, who were former members of a defunct committee of unsecured creditors and the professionals retained to advise the committee. Plaintiffs asserted that the former members of the committee lacked standing to assert privilege over the requested communications because the ability to assert such privilege "died" when the committee was disbanded. The court denied plaintiff's motion to compel and held that, despite the fact that the committee was no longer extant, former members of the committee and retained professionals were entitled to assert privilege on the committee's behalf.

As with all privileged communications, members of a creditors' committee (and their counsel) should not lose sight of the fact that those communications must be made for the purpose of obtaining legal advice and may not be invoked to shield the committee from disclosing wrongdoing.⁶⁸ The court in *In re Fibermark Inc.*⁶⁹ was confronted with both issues when asked to seal portions of a bankruptcy examiner's report that included purportedly privileged information regarding breaches of fiduciary duty by members of the official committee of unsecured creditors. The court found that "privilege is available to a creditors committee in a chapter 11 case" and that "privilege may not be asserted as a shield to protect against disclosure of fraud or other misconduct on the part of the committee or its attorneys."⁷⁰ Stating that "attorney-client privilege does not attach simply by reason of the relationship [between attorney and client]," the court concluded that the portions of the examiner's report pertaining to "inter-creditor disputes involving post-confirmation governance" were not protected from

⁶¹ *Supra* note 2.

⁶² *Id.* at 805 – 806 (holding that other, non-voting member was properly classified as an invitee because it was a governmental unit and could not be a member of the committee).

⁶³ *Id.* at 805.

⁶⁴ 336 B.R. 187 (Bankr. S.D.N.Y. 2006).

⁶⁵ *Id.* at 197 ("Maintaining confidentiality against unsecured creditors generally also may be necessary to preserve a committee's attorney-client privilege," which "clearly can be enforced against those who are not represented by the committee or who are standing in an adversarial relationship to the unsecured creditors as a group.").

⁶⁶ *Id.* at 198.

⁶⁷ No. 1:05 CV 2158, 2011 WL 1770113 (N.D. Ohio May 9, 2011).

⁶⁸ See, e.g., *In re Refco*, *supra* note 64 at 198 n.13; *In re Baldwin-United Corp.*, *supra* note 2 at 805 n.1.

⁶⁹ 330 B.R. 480 (Bankr. D. Vt. 2005).

⁷⁰ *Id.* at 498 n.6.

disclosure.⁷¹ Such communications were not privileged because they were not communications with the committee and were not “directed at protecting the interests of the Committee or its constituents, but rather at advancing or reconciling the needs of individual Committee members.”⁷² However, the court concluded that portions of the examiner’s report containing privileged communications between counsel and the creditor’s committee regarding the member’s obligation to disclose violations of a trading order pertained to the committee’s obligations to its constituents and were privileged.

Common Interest Doctrine

As the foregoing discussion demonstrates, the interactions between parties with overlapping interests lends itself to the exchange of privileged communications and the argument that privilege has therefore been waived. This alignment of interest, however brief, may allow the cooperating parties to invoke the common interest doctrine, which is an exception to the general rule that privilege has been waived for communications between attorneys, provided that: (1) the communication is made pursuant to a joint legal interest with that third party; (2) the communication furthers the common interest; and (3) privilege is not otherwise waived.⁷³

Practitioners must always remember that the common interest doctrine applies when aligned interests are *legal* interests rather than mere business interests.⁷⁴ Unsurprisingly, therefore, application of the common interest doctrine will frequently hinge on whether the

interest is “legal.” Much ink has been spilled on this issue, but many courts have held that the existence of a shared commercial interest between the parties will not trump the assertion of a common interest, provided the basis is not solely commercial.⁷⁵ Therefore, the following discussion addresses recurring relationships in which courts have recognized and rejected the application of the common interest doctrine.

The Debtor and Creditors’ Committees: The concept of interests that merge and separate is particularly true as it relates to communications between the debtor and creditors’ committees: Both parties have fiduciary duties with which they must comply, and both tend to find that cooperation at certain times of the bankruptcy case obtains the best results for both constituents. For instance, in *Value Property Trust v. Zim Co. (In re Mortgage & Realty Trust)*,⁷⁶ the bankruptcy court was required to determine whether communications between an executive of the debtor, bankruptcy counsel for the debtor, and counsel for the official committee of unsecured creditors were privileged under the common interest doctrine. The court recognized that, as a general matter, both the debtor and committee owe a duty to maximize the debtor’s estate and that, under some circumstances, the debtor “must be able to provide information to the committee free of the risk that the committee may be forced to disgorge such information to adverse third parties.”⁷⁷ The court held that disclosure to the creditors’ committee did not waive privilege, because (1) the communications at issue dealt with legal procedures and strategies concerning potential litigation by the debtor and (2) the creditors stood to become the equity owners of the reorganized debtor. The court concluded that “the debtor and the committee shared a common legal interest” that was furthered by the communication.⁷⁸

Parties frequently invoke a common interest in seeking to obtain court approval of a settlement or of a

⁷¹ *Id.* at 499.

⁷² *Id.* at 499 – 500.

⁷³ The common interest doctrine also applies to work-product protection. *See, e.g., In re Leslie Controls*, 437 B.R. 493, 496 (Bankr. D. Del. 2010) (“[The common interest doctrine] expands the reach of the attorney-client privilege and work-product doctrine by providing that, under certain circumstance[s], the sharing of privileged communications with third parties does not constitute a waiver of the privilege.”). As with ordinary legal privileges, the common interest doctrine is not a blanket protection for all communications; appropriate protection must be established for each communication. *In re Velo Holdings, Inc.*, 473 B.R. 509, 517 – 518 & n.8 (Bankr. S.D.N.Y. 2012).

⁷⁴ *See, e.g., Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc. (In re Megan-Racine Assocs. Inc.)*, 189 B.R. 562, 573 (Bankr. N.D.N.Y. 1995) (“[A]though a total identity of interest is not necessary [under the common interest doctrine], the parties must have a common *legal* interest.”).

⁷⁵ *See, e.g., In re Velo Holdings, supra* note 73 at 515 – 516 (discussing cases and noting that “[w]hile grounded in the parties’ commercial relationship . . . [the parties] shared a common legal interest in crafting a strategy to prevent the termination of the . . . agreements.”). *But see, e.g., Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995) (common interest does not encompass “a joint business strategy which happens to include as one of its elements a concern about litigation”).

⁷⁶ 212 B.R. 649 (Bankr. C.D. Cal. 1997).

⁷⁷ *Id.* at 653.

⁷⁸ *Id.* at 653 – 54.

disputed issue in a bankruptcy proceeding. As *In re Tribune Co.*⁷⁹ demonstrates, however, bankruptcy practitioners must be mindful of the timing of the communications over which they wish to assert a common interest. In *Tribune*, proponents of a competing plan of reorganization sought to compel production of communications from the debtor and other proponents of the debtor's plan, which included the creditors' committee. With respect to the existence of a common interest, the court concluded that "it is reasonable to conclude that the parties might share privileged information in furtherance of their common interest of obtaining approval of the settlement through confirmation of the plan."⁸⁰ Notably, the bankruptcy court concluded that the common interest between the debtor and the other plan proponents did not arise until after they had agreed to a mediation settlement regarding certain causes of action "and became proponents of a joint plan." The court therefore set the date upon which common interest arose as the date upon which the debtor and the mediation parties submitted the mediation term sheets.⁸¹

As with official committees, the debtor may share a common interest with members of *ad hoc* committees. The *In re Leslie Controls*⁸² court was asked to determine whether privileged communications shared between the debtor and an *ad hoc* committee of plaintiffs remained privileged in the face of a discovery request in

subsequent insurance litigation. The court noted that the parties asserting the privilege "need not be in complete accord," with the caveat that the common interest doctrine would only protect communications on topics in which the interests are identical.⁸³ Declining to characterize the interest between the debtor and the *ad hoc* group as purely "commercial," the court concluded that the interest served at the time the documents were shared was in "presenting and maximizing the insurance available to pay asbestos claims," which was "an inherently legal question" involving "an analysis of the insurance documents, as well as contract, insurance, and bankruptcy law."⁸⁴ The bankruptcy court noted that the interests between the debtor and *ad hoc* committee were not completely aligned (they were negotiating the terms of a plan of reorganization), the shared communications were undoubtedly related to "the parties common legal interest against their 'common enemy'" (*i.e.* the insurer).⁸⁵ Taken together, the decisions in *Leslie Controls* and *Tribune* illustrate the importance of the timing and scope of common interest to successfully defending attorney-client privilege in the face of possible waiver.

Debtor's Corporate Family: The bankruptcy filing often fractures the corporate family structure and triggers litigation between or regarding former corporate family members. Therefore, debtors may also seek to assert the common interest doctrine over communications shared with former corporate family members to shield those communications from discovery. For instance, in *In re Quigley Co., Inc.*,⁸⁶ an *ad hoc* committee sought the discovery of communications between the debtor and its parent corporation pertaining to the debtor's plan of reorganization in connection with the committee's objection to confirmation of the debtor's plan. The court observed that the debtor and parent had divergent interests in that the debtor sought to maximize the estate and the parent "obviously wants to minimize its contributions" to the estate.⁸⁷ Balanced against this, however, the debtor and parent shared a common interest in the confirmation of the debtor's plan, were co-defendants in many lawsuits based on the same alleged wrong that they sought to be resolved by channeling the *ad hoc* committee's claims into a litigation trust, and had

⁷⁹ No. 08-13141 (KJC), 2011 Bankr. LEXIS 299 (Bankr. D. Del. Feb. 3, 2011). This holds true under Canadian bankruptcy law. *In re TNG Acquisition Inc.*, *supra* note 52 at ¶¶ 63 – 67 (holding that former consultant's status as CRO did not dissolve any "common interest privilege" between consultant and former employer over communications regarding the debtor's litigation with employer prior to appointment as CRO).

⁸⁰ *Id.* at *5.

⁸¹ See also *In re Almatris B.V.*, No. 10-12308 (MG), 2010 Bankr. LEXIS 6377 at *5 (Bankr. S.D.N.Y. June 21, 2010) (holding that common interest arose between debtors, senior lenders, and senior coordinating committee upon signature of the plan support agreement); Transcript of Record at 15, *In re Lyondell Chem. Co.*, No. 09-10023 (REG) (Bankr. S.D.N.Y. Jan. 7, 2010) [ECF No. 3592] (rejecting claim of common interest between debtor and financing party defendants over communications regarding settlement subject to Rule 9019 motion on the basis that, prior to settlement approval, communications between the parties were "not in the nature of defending a common interest," but rather in "achieving . . . private commercial objectives").

⁸² *Supra* note 73.

⁸³ *Id.* at 496 – 97.

⁸⁴ *Id.* at 500.

⁸⁵ *Id.* at 501 – 502.

⁸⁶ *Supra* note 7.

⁸⁷ *Id.* at *13.

executed a formal joint defense agreement.⁸⁸ Accordingly, the court determined that the debtor and parent did not waive privilege by sharing communications with each other but required them to demonstrate that subsequent disclosure to the official committee of unsecured creditors and other future claimants did not waive such privilege.⁸⁹

More recently, in *In re Cherokee Simeon Venture I, LLC*,⁹⁰ the bankruptcy court concluded that a debtor and its managing entity could assert a common interest over post-filing communications pertaining to environmental litigation over a parcel of land that was the debtor's sole asset. Debtor's sole secured creditor sought to dismiss the chapter 11 case for bad faith filing, and sought to elicit testimony to support its allegation that the managing entity retained control of the land and had compelled debtor to file for bankruptcy to reduce potential clean-up costs. In concluding that the communications fell within the common interest doctrine, the court noted that the communications "were in furtherance of their common effort both to prosecute the case and then to defend against [the secured creditor's] bad faith claim," and that this was the purpose of the communications.⁹¹ The lesson from *Cherokee* is that counsel should carefully monitor the pre- and post-filing interests of debtors and their corporate family members, because such interests may allow for communications arising out of those joint interests to be protected.

Creditors' Committees and Other Creditors: Just as creditors' committees and the debtor may have sufficiently aligned interests to assert a common interest over certain communications, members of the creditors' committees and unsecured creditors not on the committee may also assert common interest. For instance, debenture holders in *In re Circle K Corp.*⁹² commenced an adversary proceeding against the reorganized debtor to revoke the plan confirmation order, alleging that the order was fraudulently procured.

Defendants in the adversary proceeding alleged that certain documents over which counsel to the official committee of unsecured creditors – which represented a constituency that included current and former debenture holders – asserted work-product protection were discoverable because they had been shared with the debenture holders, who were not committee members. The district court, affirming the bankruptcy judge, held that work-product protection had not been waived, in part, because the committee and the plaintiff debenture holder had a common interest in "ensur[ing] that the debenture holders received some distribution under the confirmation plan" and were, therefore, "on the same side in these proceedings."⁹³ Notably, the district court observed that the committee's role "was to represent debenture holders such as" the plaintiff, and that the committee and the debenture holder "need not have identical interests to have a common interest."⁹⁴

CONCLUSION

These cases demonstrate the need for counsel to be aware of the relevant parties' interests at all times, and the scope of representation of joint clients and common interests, and anticipate how those interests can diverge in the future. They further highlight several key contexts where the unique nature of bankruptcy litigation can prey on the unwary. Counsel should always be mindful, even prior to filing, of the risk that changing corporate structures can result in the waiver of privilege in subsequent bankruptcy litigation against both corporate family members and former directors and officers. After filing, the debtor may find that it has lost the ability to invoke or waive privilege, which instead belongs to a trustee, examiner, or even creditors' committee. Similarly, the make-up of the official creditors' committees and the obligations they owe to their constituents will often result in tension between maintaining confidential communications and obligations to keep those constituencies informed. ■

⁸⁸ *Id.* at *14 – 15; *see also id.* at *27 – 28 (concluding that work-product protection was not waived by sharing documents between parent and debtor).

⁸⁹ *Id.* at *17.

⁹⁰ No. 12-12913 (KG), 2012 Bankr. LEXIS 6194 (Bankr. D. Del. May 31, 2012).

⁹¹ *Id.* at *10 – 11.

⁹² *Supra* note 10.

⁹³ *Id.* at *11. The court also noted that, unlike the attorney-client privilege, attorney work-product protection is waived only when disclosed to an adversary or in such a manner reasonably expected to be revealed to an adversary, which was not the case in the disclosure to the debenture holder. *Id.* at *10.

⁹⁴ *Id.* at *11; *see also Bricker, supra* note 67 at *3 (holding that the common interest doctrine preserved attorney-client privilege over communications between official committee of unsecured creditors and other creditors' committees because creditors shared common interest in "the monetary pursuit of recovery for the debtor's estate").