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Application of the Common-Interest Doctrine in Bankruptcy Proceedings

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Editor's Note: *See the feature on page 32 that also discusses the* Leslie Controls *case, but delves into the aspect of the insurance-neutrality provisions of the case.*

The common-interest doctrine permits separately represented parties to share information without waiving privilege protections and has particular relevance in bankruptcy proceedings, where the various constituencies often have both common and adverse interests. The process typically works best when both parties cooperate and work through their differences to arrive at a consensual resolution of the case. The U.S. Bankruptcy Court for the District of Delaware recently extended the common-interest doctrine to pre-petition communications between the debtor and an informal committee of claimants in *In re Leslie Controls Inc.*[1]

The common-interest doctrine is not a privilege itself; it applies only if the communications fall within the scope of an established privilege and it merely expands who may have access to the communications at issue without the privilege being lost. The attorney-client privilege developed over time out of a recognized need to "encourage full and frank communications between attorneys and their clients."[2] On the other hand, since the privilege precludes the discovery of potentially relevant information, courts look to strike a balance between protecting privileged communications and the goal of full disclosure of all relevant facts.[3] The privilege generally remains intact until it has been breached or waived, which most commonly occurs when information is disclosed to third parties.[4]

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Gerald Gline

Similar to the attorney-client privilege, the common-interest doctrine stemmed from a need to encourage full disclosure from clients to their attorneys while allowing parties to cooperate in the pursuit of their common goals without waiving privilege.[5] The doctrine "allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others."[6]

The Common-Interest Doctrine Test


David Kohane

The *Leslie* decision explained the elements that a party must demonstrate to invoke the common-interest doctrine: "(1) the communication was made by separate parties in the course of a matter of common interest, (2) the communication was designed to further that effort and (3) the privilege has not otherwise been waived."[7] With respect to the separate-party requirement, it has been stated that "the [common-interest] doctrine is limited to situations where multiple parties are represented by separate counsel but share a common interest about a legal matter."[8] However, the central issue in most common-interest doctrine disputes is whether a "common interest" exists between them and whether that common interest is legal in nature.

Defining "Common Interest"

The essence of the common-interest doctrine is the *interest* over which the otherwise-adverse parties are working to achieve a common result. The fact that the parties label their interest as "com-

1 *In re Leslie Controls Inc.*, 437 B.R. 493 (Bankr. D. Del. 2010).

2 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

3 The common-interest doctrine also applies to work product protections and allows parties to share information that they may not otherwise be able to share without waiving the privilege. *See In re Circle K Corp.*, 1997 WL 31197 (S.D.N.Y. Jan. 28, 1997).

4 Disclosures made to third-party professionals (*e.g.*, accountants, experts, etc.) hired to assist with the legal representation do not result in a waiver of the privilege. *See United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961); *In re Hardwood P-G Inc.*, 403 B.R. 445, 458 (Bankr. W.D. Tex. 2006).

5 *See In re Hardwood P-G Inc.*, 403 B.R. at 459.

6 *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007); *see also Louisiana Mun. Police Employees Ret. Sys.*, 253 F.R.D. 300, 309 (D. N.J. 2008).

7 *In re Leslie Controls Inc.*, 437 B.R. at 496.

8 *Walsh v. Northrop Grumman Corp.*, 165 F.R.D. 16, 18 (E.D.N.Y. 1996); *see also In re Teleglobe Commc'ns Corp.*, 493 F.3d at 365.

mon" is not dispositive, for it "is not whether the parties theoretically share similar interests but rather whether they demonstrate actual cooperation toward a common legal goal" that determines whether the doctrine applies.[9] The burden of proof therefore falls on the parties asserting the privilege.[10]


Jason Finkelstein

The common interest must be demonstrated to be a *legal* interest.[11] Although there must be more than a theoretical legal interest,[12] "it is not necessary that there be actual litigation in progress for the common-interest rule to apply."[13] The prospect and preparation for future litigation is enough of a legal interest to merit protection.[14] As applied to bankruptcy cases, courts have generally considered the bankruptcy process itself to sufficiently constitute "litigation."[15] The court in *In re Tri-State Outdoor Media Group Inc.*, while discussing documents claimed to be protected by the common-interest doctrine, explained this idea as follows: "While Bankruptcy is not entirely litigation, it is an adversarial proceeding, particularly when considering the rights of the debtor [vs.] the rights of an unsecured creditor. Thus, the documents in question were created in anticipation of Bankruptcy and 'in anticipation of litigation.'"[16]

The doctrine only applies if the legal interests unifying the parties are truly common. While "the interests of the separately represented clients need not be entirely congruent,"[17] the doctrine will apply "only insofar as their interests [are] in fact identical; communications relating to matters as to which they [hold] opposing interests would lose any privilege."[18] Parties seeking to invoke the common-interest doctrine should take precautions to limit their discussions to matters relating to the common legal interests between them, as purely ancillary communications may be discovered as nonprivileged.

A written agreement demonstrating the parties' common legal interest or strategy can help assure that their common goals are clearly articulated and delineated.[19] Although the lack of a signed agreement does not preclude parties from invoking the doctrine, "parties relying on an oral agreement run the risk that the court [cannot] determine when or if an agreement was reached."[20] The absence of a written agreement may make it more difficult for parties to meet the threshold burden of "demonstrat[ing] that prior to divulging the communication to each other, each party to the communication had agreed to pursue a [common] strategy and had agreed that such communications would be kept confidential."[21] The agreement should clearly set forth the scope, parameters and timeframe over which shared communications will be protected. While it is possible for parties to ratify post-hoc that earlier communications were intended to fall within the exception, best practices are generally for all parties to sign a written agreement before sharing any protected information. This helps ensure that all parties agree to preserve the privilege, and such an agreement can set forth practices and procedures to safeguard the privilege and address third-party efforts to compel production.

Leslie exemplifies the common-interest doctrine's broad reach in bankruptcy cases. *Leslie* involved pre-petition communications by the debtor with both an *ad hoc* committee of asbestos plaintiffs and the debtor's proposed future claimants' representative (FCR).[22] The debtor's insurance coverage counsel had prepared a memorandum analyzing the insurer's likely position on insurance recoveries under various bankruptcy scenarios. This document, along with related communications, was shared by the debtor with the committee and FCR to create a consensual reorganization plan. Later, the insurance company, which had not been privy to the communications, sought discovery of the memorandum and documented discussions. The court held that these communications were in furtherance of a common legal interest, where "the parties shared a common interest in maximizing the asset pool, which would include insurance proceeds,"[23] even though each party retained its own goal of taking the largest share of assets available from the debtor's estate. Their communications were protected under that common legal interest because the discussions were in furtherance of that common goal.

Another recent application of the common-interest doctrine was *In re Hardwood P-G Inc.*,[24] where the debtor and its counsel retained forensic accountants to investigate the estate's potential causes of action for preferential and fraudulent transfers. The accounting firm's report was shared by the debtor, its counsel, counsel for the unsecured creditors' committee and a number of lender banks, and the parties were able to use the analysis to attain approval for a successful reorganization plan. Some defendants of the ensuing preference and fraudulent-conveyance actions challenged the privilege assertions over the accounting report, arguing that they had been shared with third parties. The court ruled that the common-interest doctrine protected the accounting report from disclosure to the defendants. Even though the debtor, committee and lenders were adverse on other issues, their limited "common interest in determining and pursuing litigation that belonged to the debtors' estate"[25] permitted the doctrine to apply.

In a slightly different scenario, the district court in *In re Circle K Corp.* upheld the bankruptcy court's application of the common-interest doctrine to two documents shared between creditor groups (the committee and certain debenture holders of the debtor).[26] The documents at issue were memoranda concerning an interim order and plan, and an agreement discussing the debtor's possible reorganization plan. The district court held that the parties had a common legal interest of "ensuring that the debenture holders received some distribution under the plan."[27] Although the creditor groups differed in their stances on other aspects of the proceedings, they found common ground with respect to the valuation issues, which was found to be sufficient basis to protect any shared documents between them on that issue.

The Common-Interest Doctrine's Role in Bankruptcy

The nature of bankruptcy practice—especially chapter 11 restructurings

9 *North River Ins. Co. v. Columbia Cas. Co.*, 1995 WL 5792, at *4 (S.D.N.Y. Jan. 5, 1995).
10 *See generally In re Megan-Racine Assocs. Inc.*, 198 B.R. 562, 571-72 (Bankr. N.D.N.Y. 1995).
11 *See, e.g., In re Rivastigmine Patent Litig.*, 2005 WL 2319005, at *2 (S.D.N.Y. Sept. 22, 2005) (stating that "the shared interest must be legal rather than commercial and identical rather than merely similar").
12 *Id.* at *2.
13 *In re Fed. Trade Comm'n*, 2001 WL 396522, at *3 (S.D.N.Y. April 19, 2001).
14 *See, e.g., In re Mortgage & Realty Trust*, 212 B.R. 649, 653 (Bankr. C.D. Cal. 1997) (holding that "pending litigation is not necessary to invoke the common-interest extension of the attorney-client privilege" because it applies to whether litigation is being considered or has already begun).
15 *See In re Forth Worth Osteopathic Hosp. Inc.*, 2008 Bankr. LEXIS 3156, at *44 (Bankr. N.D. Tex. Nov. 14, 2008); *see also In re Hardwood P-G Inc.*, 403 B.R. at 460.
16 *In re Tri-State Outdoor Media Group Inc.*, 283 B.R. 358, 364 (Bankr. M.D. Ga. 2002).
17 *In re Teleglobe Commc'ns Corp.*, 493 F.3d at 365 (quoting *Restatement (Third) of the Law Governing Lawyers* § 76).
18 *In re Rivastigmine Patent Litig.*, 2005 WL 2319005, at *4.
19 *Id.* at *4-5.
20 *Id.* at *4 (quoting *Power Mosfet Tech. v. Siemens AG*, 206 F.R.D. 422, 425 (E.D. Tex. 2000)).
21 *In re Megan-Racine Assocs. Inc.*, 198 B.R. at 572.
22 *In re Leslie Controls Inc.*, 437 B.R. 493.
23 *Id.* at 502.
24 *In re Hardwood P-G Inc.*, 403 B.R. 445.
25 *Id.* at 462.
26 *In re Circle K Corp.*, 1997 WL 31197.
27 *Id.* at *10.

and reorganizations—lends itself particularly well to invoking the common-interest doctrine. Alliances frequently shift and parties often share common goals with respect to one aspect of the reorganization, while having opposing positions on other issues. For example, the secured lender may share a common interest with the debtor to pursue claims that would be part of the lender's collateral, yet they may have conflicting positions on the extent of the lender's security interest in other collateral. Allowing the parties to keep their communications toward this singular effort protected under the common-interest doctrine encourages full and frank discussions that underlie the goals of the attorney-client privilege. With bankruptcies in particular, in order to allow the creditors' committee to best investigate, negotiate, litigate and provide necessary checks and balances on the debtor's reorganization efforts, "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."[28]

Conclusion

The common-interest doctrine permits parties who could not otherwise receive privileged communications without breaking the privilege to maintain confidential conversations and share privileged documents without the fear of having to turn them over in the course of discovery. The doctrine is particularly useful in bankruptcy proceedings where parties are encouraged to work together and pursue a successful reorganization. As a measure of precaution, to assure that shared privileged communications remain confidential, counsel should carefully delineate the common legal interests in a written agreement signed by all parties prior to disseminating otherwise-privileged information. ■

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28 *In re Mortgage & Realty Trust*, 212 B.R. at 653.