

Delaware Bankruptcy Court Sheds Light on The Common Interest Doctrine Preventing The Waiver of Privileged Communications

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The United States Bankruptcy Court for the District of Delaware (the "Delaware Bankruptcy Court"), recently in *In re Leslie Controls, Inc.*, Bankr. D. Del., Case No. 10-12199, expounded on whether attorney-client and attorney work-product privileged documents remained protected from discovery under the common interest doctrine. The common interest doctrine permits counsel representing different clients with similar legal interests to share information without having to disclose that information to others. That is, the common interest doctrine expands the attorney-client privilege and attorney work-product doctrine under certain circumstances because the sharing of such privileged communications does not constitute a waiver of the privilege. Specifically, in *Leslie Controls*, the Delaware Bankruptcy Court addressed whether 26 communications between a Debtor and its counsel that were shared prior to the bankruptcy petition with an ad-hoc committee of asbestos plaintiffs (the "Ad Hoc Committee") and the Debtor's proposed future claimants' representative (the "Pre-Petition FCR") remain protected from discovery under the common interest doctrine. The Delaware Bankruptcy Court held that all of the communications were protected from discovery.

The initial question in applying the common interest doctrine is whether the underlying communications or documents are indeed privileged. If not, the common interest doctrine is not applicable. Here, the Delaware Bankruptcy Court determined, based upon a review of the documents in question, that those documents constituted privileged communications. The court held that the documents reflected "insurance coverage counsel's legal analysis and mental impressions concerning insurance issues and strategies in anticipation of possible litigations with the Insurers in a bankruptcy proceeding and/or subsequent coverage litigation."

If the documents at issue constitute attorney-client privileged communications or attorney work product, the next question is whether common interest doctrine is applicable to the facts of the case. A party invoking the protection of the common interest doctrine must establish: (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. The Insurers argued that the Debtor failed to meet that burden for two reasons.

First, the Insurer argued that the Debtor, the Ad Hoc Committee and the Pre-Petition FCR only shared a commercial interest—not the requisite sharing of a legal interest. The Delaware Bankruptcy Court rejected this argument. The court held that the interest of the Debtor, the Ad Hoc Committee and the Pre-Petition FCR at the time the documents were shared was to preserve and maximize the insurance available to pay certain asbestos claims, which the court held is an inherently legal question. The court reasoned that the Ad Hoc Committee and the Pre-Petition FCR were not merely third-party bystanders; rather, they were representatives of the ultimate beneficiaries of a portion of the insurance proceeds and were working with the Debtor to maximize the insurance coverage available.

Second, the Insurer argued that the Debtor, the Ad Hoc Committee and the Pre-Petition FCR did not share a common interest because they were adversaries on the issue of the insurance coverage. The Delaware Bankruptcy Court also rejected this argument. The court explained that commonality must be determined on a case-by-case basis, noting, for example, that even parties in merger negotiations may share a common interest. Here, the court held that, while the Debtor, the Ad Hoc Committee and the Pre-Petition FCR had a conflicting interest relating to the distribution of the insurance proceeds, they nevertheless shared a common interest in maximizing the asset pool, which included the insurance proceeds. The court found that this was sufficient to invoke the protections of the common interest doctrine.

In sum, it is important for parties and their counsel to consider the common interest doctrine as a way of preventing the waiver of privileged documents both during and prior to litigation.

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