The Common Interest Privilege in Bankruptcy: Recent Trends and Practical Guidance

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I. Introduction

The common interest privilege (sometimes known as the community of interest privilege, joint defense privilege or common interest doctrine) is an important feature of civil litigation. The doctrine allows attorneys representing different clients with shared legal interests to exchange privileged information and work product with one another without waiving the attorney-client privilege or work product protection associated with such material. The common interest privilege has been applied with increasing frequency in major Chapter 11 cases in recent years as parties to complex disputes align with one another in the negotiation of plans of reorganization or resolution of contested matters. Indeed, bankruptcy proceedings can make for strange bedfellows, and debtors, official and ad hoc committees, secured and unsecured creditors, and other parties-in-interest may be aligned with or adverse to one another at various points in the life of a Chapter 11 case. Even greater complexities arise when parties are aligned on some issues, while remaining adverse with respect to others, but wish to coordinate with one another about the issues on which they are similarly situated.

Amid this landscape, bankruptcy courts have struggled to offer clear guidance as to when the common interest privilege attaches and where the boundaries of the protection end. Numerous questions have arisen. What types of parties may share a common interest privilege with a debtor? May litigation adversaries share a common interest privilege on certain issues but not others? If parties reach an agreement in principle to settle a litigation but are still negotiating the terms of the settlement, are those communications protected from disclosure? If parties agree to support a plan of reorganization but are still haggling over the details of the plan, are the continuing negotiations discoverable? Some courts have observed that such questions need to be answered on a fact-specific, case-by-case basis, making it difficult for practitioners to understand whether their own circumstances merit application of the common interest privilege.

While the question of whether the common interest privilege applies will necessarily involve an analysis of the facts of a given case, there is now enough guidance from bankruptcy courts reviewing this issue to make

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observations about trends, likely outcomes and best practices. The purpose of this article is to describe recent decisions in this area and offer practical guidance to aid bankruptcy practitioners in determining whether, when and to what extent the common interest privilege applies.

II. The Common Interest Privilege Explained

The common interest privilege "allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others."[1] Although the doctrine is commonly known as a "privilege," the protection applies only where the material being shared is already protected from disclosure by either the attorney-client privilege or work product doctrine. In this way, the common interest privilege "expands the reach of the attorney-client privilege and work product doctrine by providing that, under certain circumstance[s], the sharing of privileged [information] with third parties does not constitute a waiver of the privilege."[2]

Courts have distinguished between the common interest privilege, which "is limited to situations where multiple parties are represented by separate counsel but share a common interest about a legal matter," and the "joint defense or joint client privilege [which] applies when two or more clients are represented by the same attorney on matters of a common interest."[3]

To establish the existence of a common interest privilege, the party invoking the doctrine must demonstrate that "(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 was not otherwise waived."[4] Courts have described the ambit of the privilege in broad terms: "The common interest of the parties must be at least a substantially similar legal interest. Nonetheless, the parties need not be in complete accord . . . The privilege applies where the interests of the parties are not identical, and it applies even where the parties' interests are adverse in substantial respects. The privilege applies even where a lawsuit is foreseeable in the future between co-defendants."[5] To the extent the parties are in accord on certain issues but not on others, "the common interest applies 'only insofar as their interests [are] in fact identical; communications relating to matters as to which they [hold] opposing interests . . . lose any privilege.' "[6]

III. Application of the Common Interest Privilege in Chapter 11 Cases

In recent years, bankruptcy courts have applied the common interest privilege in a number of different contexts in Chapter 11 cases. Indeed, although the issue has been litigated several times over, courts (at least in published decisions) have repeatedly found the existence of a common interest privilege when confronted with a variety of scenarios. In doing so, courts have emphasized that the question of whether and to what extent the common interest privilege applies is a fact-specific inquiry that must be examined on a case-by-case basis. However, patterns have begun to emerge that allow bankruptcy practitioners to gain a more concrete understanding of the timing

and circumstances in which the privilege attaches, and best practices to strengthen the claim of privilege. This section contains a review of some of the leading bankruptcy cases in this area in recent years. As demonstrated below, courts have concluded that the common interest privilege may attach to documents and communications exchanged prior to the commencement of a bankruptcy case, and even prior to the time adversaries reach an agreement, so long as the parties share a common legal interest in the matters that are the subject of such materials.[7]

In re Quigley

In *Quigley*, an unofficial Ad Hoc Committee of Tort Victims (the "Ad Hoc Committee") sought the disclosure of documents shared between the debtor, Quigley Company, Inc. ("Quigley"), and its parent, Pfizer Inc. ("Pfizer").[8] Prior to filing for bankruptcy, Quigley faced significant asbestos-related liability, and "the continuing litigation threatened the common insurance shared by Pfizer and Quigley," as well as Pfizer's own assets.[9] Pfizer and Quigley coordinated with one another on a strategy to place Quigley in bankruptcy and confirm a plan under 11 U.S.C. 524(g) that would effectively discharge Pfizer from its derivative liability.[10] The parties thereafter prosecuted the bankruptcy case jointly and sought to confirm a plan of reorganization consistent with this objective.[11]

The Ad Hoc Committee objected to the plan and sought to compel the disclosure of communications between the debtor and Pfizer on the grounds that they did not share common legal interests on all issues and were in fact adverse in certain respects.[12] The bankruptcy court acknowledged that the parties had "certain divergent interests in the case," such as the debtor's fiduciary duty to creditors to maximize contributions from Pfizer to a trust for asbestos claimants, while Pfizer "obviously wants to minimize its contribution."[13] Nonetheless, the bankruptcy court held that the parties (1) "share a common interest and overall strategy geared toward the confirmation of Quigley's Plan"; (2) were co-defendants in asbestos lawsuits which "bolsters the claim of common interest"; (3) "share a common interest in resolving their joint liabilities" under the plan; and (4) "engaged in a joint strategy to prosecute a Quigley bankruptcy to achieve the common benefits of the release and channeling injunction" included in the plan.[14] The bankruptcy court also noted that the parties had entered into a joint defense agreement, giving rise to "an implicit understanding that one attorney is permitted not only to confer with another but with the other attorney's party."[15]

The bankruptcy court did not limit application of the privilege to documents created during the course of the bankruptcy case. Instead, the court noted that the "organized effort" of the parties "predated the bankruptcy filing" and that the parties had entered into the joint defense agreement a year before the petition date.[16] The court thus allowed the parties to withhold certain documents created prior to the bankruptcy filing so long as they related to the common interest shared by the parties.[17]

Quigley thus stands for the proposition that parties coordinating in support

of a plan of reorganization may not only share a common interest privilege, but that the privilege may attach long before the debtor files for bankruptcy.

In re Leslie Controls

Consistent with *Quigley*, the court in *Leslie Controls* held that a common interest attendant to bankruptcy-related negotiations may arise prior to the commencement of a bankruptcy case. As in *Quigley*, the debtor in *Leslie Controls* faced significant litigation arising from asbestos-related lawsuits and decided to file for bankruptcy to address these liabilities.[18] Prior to filing for bankruptcy, the debtor began negotiations with an ad hoc committee of asbestos claimants (the "Ad Hoc Committee") and a proposed future claimants' representative (the "Pre-Petition FCR"). During those negotiations, the debtor shared with those parties a memorandum from the debtor's insurance counsel containing legal advice regarding insurance recoveries in bankruptcy, and the three parties likewise participated in email exchanges regarding such legal advice.[19] The parties ultimately reached agreement on the terms of a plan of reorganization.[20]

In litigation during the bankruptcy case, two insurance companies (collectively, the "Insurers") argued that the debtor had waived the attorney-client privilege and work product protection associated with the legal memorandum by sharing it with the Ad Hoc Committee and Pre-Petition FCR prior to reaching an agreement.[21] The Insurers urged the court to effectively adopt a "*per se* rule that parties engaged in negotiations can never share a common interest."[22] The court disagreed, stating that "imposition of a black-line rule is inappropriate" and that "commonality must be measured on a case by case basis."[23] The bankruptcy court concluded that even though plan negotiations were ongoing, disclosure of the memorandum before an agreement was reached did not waive the privilege as to the Insurers, which the court referred to as the parties' "common enemy."[24] The court reasoned that although the parties "had a conflicting interest relating to the distribution of the Debtors' assets . . . the parties shared a common interest in maximizing the asset pool, which would include insurance proceeds."[25] Because the documents related to the size of the asset pool — involving potential recoveries from the Insurers — the court found that a common interest existed, even as to documents and communications that were exchanged while the parties were still negotiating with one another prior to the petition date.

In re Tribune

The *Tribune* decision contains an extensive discussion of the privilege and the point at which it attaches. *Tribune* was a heavily contested Chapter 11 proceeding in Delaware that involved significant litigation over a failed leveraged buyout that precipitated the bankruptcy filing. After months of discovery and negotiations, the *Tribune* debtors (the "Debtors") reached a settlement agreement with the official committee of unsecured creditors (the "Committee") and the secured lenders (the "Lenders"). The resulting plan of reorganization — supported by these three constituencies — is referred to in the opinion as the DCL Plan. The DCL Plan was contested by certain of the Debtors' noteholders (the "Noteholders") who argued, among other things,

that the plan was not negotiated at arm's length or in good faith.[26] To support those allegations, the Noteholders sought to discover communications between the plan proponents during the months leading up to the settlement and thereafter, arguing that the parties did not share a common interest because the Debtors and Committee were obligated to maximize the value of the estate while "the Lenders' interest is in paying as little as possible to resolve" the claims relating to the failed leveraged buyout.[27]

The bankruptcy court rejected the Noteholders' argument and held that a common interest existed between the plan proponents. The court stated that although the plan proponents' "interests are not completely in accord, they share the common legal interest of obtaining approval of their settlement and confirmation of the DCL Plan, thereby resolving the legal disputes between and among them."[28] The bankruptcy court emphasized that the common interest privilege "can apply to parties whose interests are not totally in accord."[29]

The court then turned to the question of when the privilege arose. The DCL Plan proponents argued that the privilege arose when the court-appointed mediator filed a term sheet with the court reflecting the material terms of the settlement that would later be reflected in the DCL Plan.[30] The Noteholders argued that the privilege could not arise until the DCL Plan itself was filed with the court, because until that point the parties were negotiating major terms of the plan as adversaries.[31] The bankruptcy court rejected the Noteholders' argument and agreed with the plan proponents that the privilege attached on the date the mediator's term sheet was filed with the court: "Once the DCL Plan Proponents agreed upon material terms of a settlement, 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."[32] The court noted, however, that its ruling "does not mean that every communication between the DCL Plan Proponents occurring after those dates is privileged" — rather, each communication must still relate to the matter on which the parties have the common interest and be "designed to further that effort."[33]

Unlike *Quigley* and *Leslie Controls*, the *Tribune* court did not expressly address the question of whether a common interest privilege could arise among negotiating parties prior to the commencement of a bankruptcy case, but nothing in the decision forecloses that result. For example, if a debtor and key creditors — either in the context of a pre-packaged bankruptcy or otherwise — agree prior to the Chapter 11 filing to settle claims against one another and to file a plan of reorganization that reflects the terms of the settlement, the principles of *Tribune* support the conclusion that the common interest arises from the time the parties "agreed upon material terms" of the settlement,[34] even if the agreement was reached prior to the petition date.

In addition, while the *Tribune* decision involved parties that had reduced their agreement to writing in the form of a term sheet — thus clearly demarcating the date on which an agreement on material terms was reached — the decision does not foreclose application of the common interest privi-

lege to a scenario in which there is clear evidence that the parties had reached an agreement on a certain date, even without reducing the agreement to writing.

Finally, the court in *Tribune* cautioned at the conclusion of the opinion that the determination of whether a common interest applies "is an intensely fact-and-circumstance-driven exercise," and thus:

> This is not to say that parties who are co-proponents of a plan or parties who reach settlements arising from mediation are always entitled to assert this privilege. Neither should it be said that the privilege can never be invoked unless the circumstances involve the proposal of a joint plan or a settlement resulting from mediation.[35]

Notwithstanding this note of caution, the principles set forth in *Tribune* — and cases decided before and since — may be used to develop a set of best practices for parties who wish to build a strong case for application of the common interest privilege in bankruptcy. These observations are discussed in the section below.

In re Cherokee Simeon Venture I, LLC

The court in the *Cherokee Simeon* matter held that the common interest privilege does not require that the parties reach a formal agreement, nor is the privilege limited to communications among counsel.[36]

In *Cherokee Simeon*, the debtor's sole asset was a parcel of property that was the subject of complex remediation efforts due to contamination.[37] The parcel was deeded to the debtor by Zeneca Inc. ("Zeneca"), which remained liable for a significant portion of ongoing remediation efforts.[38] Zeneca initially funded the debtor's Chapter 11 case but ultimately ceased to do so, resulting in the debtor filing a motion to dismiss; the debtor's primary secured creditor, EFG-Campus Bay, LLC ("EFG"), likewise filed a motion to dismiss for bad faith.[39] At the hearing on the motions to dismiss, EFG attempted to elicit privileged information from the debtor's authorized representative, who was appointed by Zeneca, regarding communications between Zeneca and the debtor.[40] The bankruptcy court held that such communications were protected from disclosure by the common interest privilege.[41]

In reaching this conclusion, the bankruptcy court held that "the privilege does not require a formal agreement reduced to writing" and that a "meeting of the minds is sufficient provided communications were given in confidence and the clients reasonably understood them to be so given."[42] The court rejected EFG's argument that communications must be solely among counsel and that a client's participation destroys the privilege, instead holding that such communications were protected so long as they are part of an ongoing and joint effort to set up a common defense strategy.[43] The court concluded that communications between the debtor and Zeneca "were in furtherance of their common effort both to prosecute the case and then to defend against EFG's bad faith claim" and were thus protected from disclosure.[44]

IV. Guidance for the Bankruptcy Practitioner

The above cases and others like them involve specific facts, but the fol-

lowing principles have emerged that offer useful guidance to bankruptcy practitioners seeking to determine whether the common interest privilege is applicable to a given circumstance, and when the privilege arises.

- *The common interest privilege may be applicable in any circumstance in which parties share a common legal interest*. While the most commonplace application of the common interest privilege in the bankruptcy context may be among parties jointly supporting (or opposing) a plan of reorganization, the privilege may apply in numerous other contexts as well. Examples include parties that share a common interest with the debtor as to insurance proceeds; litigants coordinating with one another (either as defendants or plaintiffs) in an adversary proceeding; or a debtor and an official committee coordinating with one another regarding maximizing the value of assets of the estate. Put differently, applications of the common interest privilege in bankruptcy are as varied as they are in non-bankruptcy litigation.
- *Even if parties share a common legal interest, not every communication between them will be protected*. As a threshold matter, the material at issue must already be subject to the attorney-client privilege or work product doctrine; the common interest privilege is merely an exception to the general rule that sharing such material with another party waives the privilege. The common interest privilege extends only to materials that are related to the common legal interest between the parties. For example, plan proponents coordinating with one another over a plan of reorganization may assert the privilege only with regard to their discussions concerning the plan; litigants coordinating over the defense or prosecution of an adversary proceeding may protect only those communications relating to the adversary proceeding; and parties aligned with a debtor or committee on a set of legal issues may only protect communications regarding those issues. That said, as a practical matter, the application of the common interest privilege will often shield numerous other communications as well, because the parties may reach discovery agreements that carve out time periods during which the common interest existed.
- *The common interest privilege may attach long before a bankruptcy filing*. Given that plan-related or other negotiations frequently occur prior to the commencement of a bankruptcy case, parties may begin to share a common interest privilege before the petition date — sometimes long before. While it is true that serious negotiations among adversaries and settlements often occur after a bankruptcy filing — in which case the common interest among plan proponents would arise later — the petition date appears to have little relevance to the common interest analysis. The common interest privilege attaches when parties begin to share a common legal interest, whenever that occurs.
- *Parties asserting the common interest privilege may not need to enter into a formal agreement, though such agreements are helpful*. Bankruptcy courts have found the existence of a common interest privilege

in the absence of any formal agreement documenting the common legal interest shared by the parties. Indeed, courts have protected information from disclosure even where parties are still negotiating with one another over the terms of a plan of reorganization, so long as they share a common legal interest as against other parties. That said, agreements documenting the material terms of a settlement or the scope of a common legal interest may serve as useful evidence that a common legal interest has arisen. This is especially so where adversaries agree to settle their disputes, and there is later a question as to when the common legal interest between them arose. Whether in the form of a term sheet setting forth the details of an agreement to settle a litigation; or a plan support agreement that reflects an agreement among plan proponents with respect to a plan of reorganization; or a common interest agreement stating that parties share a common legal interest regarding specified topics; such documentation may serve as powerful evidence that a common legal interest has attached.

- *Policy considerations support application of the common interest privilege in bankruptcy*. To the extent bankruptcy courts wish to foster consensual negotiations and settlement, the common interest privilege may play an important role in fostering consensus. If aligned parties are given the ability to coordinate with one another over a plan of reorganization without fear that every communication among them or legal analysis they share will be subject to disclosure, such parties will be better positioned to strategize with one another and conduct negotiations to resolve disputes. Indeed, the fact that bankruptcy courts have repeatedly confirmed the existence of a common legal interest in a variety of contexts in bankruptcy cases suggests that judges recognize the value of promoting coordination and dialogue in multiparty disputes.

V. Conclusion

The common interest privilege applies in bankruptcy cases as it does in non-bankruptcy civil and criminal litigation. Bankruptcy courts analyzing the application of the privilege often conduct an extensive factual analysis before concluding that a common legal interest exists, but the principles these courts have applied from case to case have been relatively consistent in recent years. These principles demonstrate that the common interest privilege is available in a wide variety of circumstances in bankruptcy, and may attach even prior to the commencement of a Chapter 11 case. While bankruptcy practitioners may take comfort from this guidance, parties should nonetheless proceed with caution when the extent of the common interest in a given case is less than clear, or when parties are aligned on some issues but not others.

NOTES:

[1]In re Teleglobe Communications Corp., 493 F.3d 345, 364 (3d Cir. 2007), as amended,

(Oct. 12, 2007); HSH Nordbank AG New York Branch v. Swerdlow, 259 F.R.D. 64, 71 (S.D. N.Y. 2009) (same).

[2]In re Leslie Controls, Inc., 437 B.R. 493, 496 (Bankr. D. Del. 2010).

[3]In re Quigley Co., Inc., 2009 WL 9034027 (Bankr. S.D. N.Y. 2009), supplemented, 2009 WL 2913450 (Bankr. S.D. N.Y. 2009) (internal quotation marks omitted) (noting that "courts sometimes use 'joint defense' and 'common interest' interchangeably").

[4]In re Tribune Co., 54 Bankr. Ct. Dec. (CRR) 84, 2011 WL 386827, at *4 (Bankr. D. Del. 2011) (citing Leslie Controls, 437 B.R. at 496–98).

[5]In re Tribune Co., 2011 WL 386827 at *3 (citations omitted); see also Quigley, 2009 WL 9034027, at n.3 (noting that "parties asserting the common interest privilege need not share identical interests" but "need only share a common interest about a legal matter") (quotation marks and citations omitted).

[6]In re Tribune Co., 2011 WL 386827, at *4 (quoting In re Rivastigmine Patent Litig., No. 05 MD 1661, 2005 WL 2319005, at *4 (Bankr. S.D.N.Y. Sept. 22, 2005)).

[7]This is not to say that the case law interpreting the common interest privilege is completely uniform. While bankruptcy courts have consistently recognized a common interest privilege in a variety of bankruptcy contexts, courts have differed on important aspects of the privilege, such as whether counsel may communicate directly with the client of the other party, or the degree to which the common interests must be identical or merely similar. This article focuses on a line of cases in New York and Delaware that demonstrates recent trends and a consistent set of conclusions, but practitioners seeking to rely on the doctrine are advised to confirm that the law in a given jurisdiction is in accord.

[8]In re Quigley Co., Inc., 2009 WL 9034027, at *1.

[9]In re Quigley Co., Inc., 2009 WL 9034027, at *1.

[10]In re Quigley Co., Inc., 2009 WL 9034027, at *1.

[11]In re Quigley Co., Inc., 2009 WL 9034027, at *1.

[12]In re Quigley Co., Inc., 2009 WL 9034027, at *2.

[13]In re Quigley Co., Inc., 2009 WL 9034027, at *2.

[14]In re Quigley Co., Inc., 2009 WL 9034027, at *4.

[15]In re Quigley Co., Inc., 2009 WL 9034027, at *4.

[16]In re Quigley Co., Inc., 2009 WL 9034027, at *4.

[17]E.g., In re Quigley Co., Inc., 2009 WL 9034027, at *9.

[18]In re Leslie Controls, 437 B.R. at 496.

[19]In re Leslie Controls, 437 B.R. at 496.

[20]In re Leslie Controls, 437 B.R. at 496.

[21]In re Leslie Controls, 437 B.R. at 496. As a threshold matter, the bankruptcy court reviewed the memorandum and related communications in camera and concluded that the materials were privileged because they "reflect insurance coverage counsel's legal analysis and mental impressions concerning insurance issues and strategies in anticipation of possible litigation with the Insurers in a bankruptcy proceeding and/or subsequent coverage litigation." In re Leslie Controls, 437 B.R. at 497.

[22]In re Leslie Controls, 437 B.R. at 501.

[23]In re Leslie Controls, 437 B.R. at 501–502.

[24]In re Leslie Controls, 437 B.R. at 502.

[25]In re Leslie Controls, 437 B.R. at 502.

[26]In re Tribune Co., 2011 WL 386827, at *3.

[27]In re Tribune Co., 2011 WL 386827, at *3.

[28]In re Tribune Co., 2011 WL 386827, at *4.

[29]In re Tribune Co., 2011 WL 386827, at *4.

[30]In re Tribune Co., 2011 WL 386827, at *5.

[31]In re Tribune Co., 2011 WL 386827, at *5–6.

[32]In re Tribune Co., 2011 WL 386827, at *5.

[33]In re Tribune Co., 2011 WL 386827, at n.13.

[34]In re Tribune Co., 2011 WL 386827, at *5.

[35]In re Tribune Co., 2011 WL 386827, at *9.

[36]In re Cherokee Simeon Venture I, LLC, 2012 WL 12940975, at *3 (Bankr. D. Del. 2012).

[37]In re Cherokee Simeon Venture I, LLC, 2012 WL 12940975, at *1.

[38]In re Cherokee Simeon Venture I, LLC, 2012 WL 12940975, at *1.

[39]In re Cherokee Simeon Venture I, LLC, 2012 WL 12940975, at *1.

[40]In re Cherokee Simeon Venture I, LLC, 2012 WL 12940975, at *2.

[41]In re Cherokee Simeon Venture I, LLC, 2012 WL 12940975, at *2–3.

[42]In re Cherokee Simeon Venture I, LLC, 2012 WL 12940975, at *2 (citations omitted).

[43]In re Cherokee Simeon Venture I, LLC, 2012 WL 12940975, at *3 (internal quotation marks and citation omitted).

[44]In re Cherokee Simeon Venture I, LLC, 2012 WL 12940975, at *3.