

AMERICAN BANKRUPTCY INSTITUTE JOURNAL

The Essential Resource for Today's Busy Insolvency Professional

Co-Proponents of a Plan May Successfully Invoke Community-of-Interest Privilege

Contributing Editor:

George Klidonas¹
Baker Hostetler; New York
gklidonas@bakerlaw.com

The attorney-client privilege is typically reserved for parties who communicate with their attorneys in confidence for the purposes of obtaining legal advice. However, there are instances where different clients who are represented by one or more attorneys share confidential information to achieve a common goal. This type of protection is referred to as the common-interest, or community-of-interest, privilege. Common-interest privilege is where multiple clients hire the same counsel to represent them on a matter of common interest, while community-of-interest privilege is where clients with separate attorneys share otherwise privileged information in order to coordinate their legal activities.² The attorney/client, common-interest and community-of-interest privileges are all applicable in bankruptcy cases.



George Klidonas

In *In re Tribune*, the U.S. Bankruptcy Court for the District of Delaware recently extended the community-of-interest privilege³ to protect information shared among debtors, creditors and lenders who sought to reach a settlement arising from a leveraged buyout (LBO) and to subsequently propose a confirmation plan.⁴ Significantly, the decision expands the scope of the attorney-client privilege and the work-

About the Author

George Klidonas is an associate in Baker Hostetler's New York office, focusing on bankruptcy, corporate restructuring and creditors' rights.

product doctrine. The attorney-client privilege typically protects communications *between attorneys and clients* from compelled disclosure, so long as there is a communication made between privileged persons in confidence, and for the purposes of obtaining legal advice.⁵ The work-product doctrine, on the other hand, protects documents that were prepared for litigation purposes, where litigation could reasonably have been anticipated.⁶

Unlike the attorney-client privilege and the work-product doctrine, the invocation of the community-of-interest privilege does not necessarily require a communication between clients and attorneys,⁷ nor does it require that the parties anticipate litigation. This article examines the circumstances in which the community-of-interest privilege was recently upheld in *Tribune*, as well as the court's analysis. The article also addresses the requirements for community-of-interest privilege and the lessons of *Tribune* for future parties in interest in the context of a bankruptcy case.

Factual Background

Tribune Co., and certain subsidiaries, filed a voluntary chapter 11 petition on Dec. 8, 2008, in the U.S. Bankruptcy Court for the District of Delaware.⁸ Based on a number of settlement agreements stemming from LBO litigation, the debtors filed a proposed plan on April 12, 2010.⁹ A few weeks later, Hon. **Kevin J. Carey** directed the appointment of an examiner and approved the U.S. Trustee's selection of **Kenneth N. Klee**. The examiner conducted interviews with various parties, developed a financial analysis with the assistance of a financial adviser and examined issues relating to solvency, unreasonably small capital, the flow of funds and intercompany claims.¹⁰

Practice & Procedure

After the examiner submitted his report, the April 2010 plan was abandoned in attempts to continue negotiations with all relevant parties for the plan confirmation.¹¹ When negotiations failed, the judge appointed Hon. **Kevin Gross** as mediator to conduct nonbinding mediation relating to the terms of a reorganization plan and the resolution of the LBO litigation.¹² After a few months of mediation, the debtors reached settlement agreements with a number of parties. As a result, three competing plans were distributed for solicitation and voting: the debtor/committee/lender (DCL) plan, noteholder plan and bridge lender plan.¹³

¹ The views expressed herein are solely those of the author.

² *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 349 (3d Cir. 2007).

³ While the matter before the court fell into the "community of interest" category, the parties in the case, as well as many courts, refer to the multiple-attorney situation as "common-interest" privilege. *In re Tribune Co.*, 2011 WL 386827, at *3 n.12 (Bankr. D. Del. Feb. 3, 2011).

⁴ *In re Tribune Co.*, 2011 WL 386827, at *3.

⁵ *In re Teleglobe*, 493 F.3d at 359 (citing Restatement (Third) of the Law Governing Lawyers § 68 (2000)).

⁶ *Louisiana Mun. Police Employees Retirement Sys. v. Sealed Air Corp.*, 253 F.R.D. 300, 306-7 (D. N.J. 2008).

⁷ However, note that "[w]hen disclosure to a third party is necessary for the client to obtain informed legal advice, courts have recognized exceptions to the rule that disclosure waives the attorney-client privilege." *WebXchange Inc. v. Dell Inc.*, 264 F.R.D. 123, 126 (D. Del. 2010) (quoting *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1424 (3d Cir. 1991)).

⁸ *In re Tribune*, 2011 WL 386827, at *1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at *2.

¹² *Id.* at *2.

¹³ *Id.* at *2.

After a discovery and scheduling order for confirmation was entered by the bankruptcy court, the parties began discovery, which was followed by a number of disputes.¹⁴ Although many of the disputes were resolved through meet-and-confers, seven discovery motions were ultimately filed.¹⁵ Most notably, the noteholders sought production from the DCLs about the proposed settlement of the LBO litigation embodied in the DCL plan.¹⁶ The purpose of seeking discovery was to test the arm's-length nature and good faith of the settlement negotiations pertaining to the LBO litigation.¹⁷ The DCLs' main argument was that the documents were protected by the community-of-interest privilege.

Community-of-Interest Privilege

Judge Carey analyzed the extent to which the community-of-interest privilege applied among debtors, creditors and lenders in proposing a reorganization plan. The noteholders argued that the community-of-interest privilege did not apply because the parties did not have common legal interests.¹⁸ Specifically, the noteholders argued that the debtors' and committee's interests were in maximizing the estate, and the lenders' interests were in paying as little as possible to resolve the LBO litigation.¹⁹ The DCLs countered by arguing that the common legal interest was to attain court approval of the plan and settlement.²⁰ The bankruptcy court ultimately sided with the debtors, creditors and lenders and upheld the community of interest privilege.

To successfully invoke the protection of the common-interest privilege (or a community-of-interest privilege), the court explained that three requirements must be met. First, the communication must have been made by separate parties in the course of a matter of common interest.²¹ Second, the communication must have been designed to further that effort.²² Finally, the privilege cannot otherwise have been waived.²³ The interests of the parties need not be in complete accord,²⁴ but they must be substantially similar.²⁵ In this case, although the DCLs' interests

were not in complete accord, they did share a common legal interest of obtaining approval of the LBO settlement and confirmation of the DCL plan.²⁶

The purpose of the community-of-interest privilege is to allow attorneys who represent different clients with similar interests to share information without having to disclose it to others.²⁷ The privilege effectively expands the reach of the attorney/client privilege and work-product doctrine by providing that the sharing of privileged communications with third parties does not constitute a waiver of the privilege.²⁸ However, the community-of-interest privilege is applicable only if the underlying privilege has been established.²⁹ There is no need to have pending litigation to invoke the community-of-interest privilege. The privilege applies where the communication was made to facilitate the rendition of legal services to each of the clients involved.³⁰ In fact, the community-of-interest privilege would even apply in the transactional context.³¹ Courts have also extended the privilege to parties who "shared information regarding 'preserving and maximizing insurance available to pay asbestos claims' during the plan negotiation process."³²

The bankruptcy court later analyzed the question of when the privilege arose. The DCLs argued that the privilege arose when Judge Gross filed his term sheet, while the noteholders argued that it arose when the plan was actually filed with the court.³³ The court agreed with the DCLs because it was reasonable to conclude that the parties would share privileged information in furtherance of their common interest of obtaining approval of the settlement through confirmation of a plan.³⁴ However, the court made it clear that the communications are all subject to the underlying attorney-client privilege or work-product doctrine, and therefore, the parties must show that the three-part common-interest test must be satisfied to invoke the community of privilege.³⁵

The bankruptcy court, at the end of its opinion, emphasized the biggest difference between community-of-interest privilege and work-product and attorney/

client privilege. Sharing information with nonattorneys does not necessarily destroy the privilege.³⁶ Although sharing privileged information with nonattorneys may destroy the attorney/client privilege or work-product doctrine, the appropriate inquiry for community-of-interest privilege "is whether the subject matter of the communication at issue would be protected by the attorney/client or work-product privilege but for its disclosure to a party with the common interest."³⁷

Lessons of Tribune

Judge Carey warned that the decision should not be read too broadly. The court indicated that "[a] determination involving whether a community-of-interest privilege applies is an intensely fact-and-circumstance-driven exercise."³⁸ In the bankruptcy process, judges usually balance a number of tensions among various parties to achieve an equitable result. Although the facts and circumstances in the *Tribune* case warranted the invocation of the community-of-interest privilege by co-proponents of a plan, the court qualified its conclusion by explaining that not all instances warrant the upholding of the privilege,³⁹ nor can the privilege ever be automatically invoked unless the circumstances involve the proposal of a joint plan or a settlement resulting from mediation.⁴⁰ The decision paves the way for parties in interest to join forces in reaching a mutually beneficial resolution in the bankruptcy process without the fear of waiving privilege. It is also thoughtful support for any argument that the community of legal interest can likely be found where parties collectively are seeking approval of a settlement and subsequent confirmation of a plan. ■

Reprinted with permission from the ABI Journal, Vol. XXX, No. 5, June 2011.

The American Bankruptcy Institute is a multi-disciplinary, nonpartisan organization devoted to bankruptcy issues. ABI has more than 13,000 members, representing all facets of the insolvency field. For more information, visit ABI World at www.abiworld.org.

¹⁴ *In re Tribune*, 2011 WL 386827, at *3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *In re Tribune*, 2011 WL 386827, at *3.

²⁰ *Id.*

²¹ *Id.* at *4 (quoting *In re Mortg. & Realty Trust*, 212 B.R. 649, 653 (Bankr. C.D. Cal. 1997)).

²² *Id.* (quoting *In re Mortg. & Realty Trust*, 212 B.R. at 653 (quotations omitted)).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at *4 (quoting *In re Teleglobe*, 493 F.3d at 365 (quotations omitted)).

²⁶ *Id.* at *4.

²⁷ *Id.* (quoting *Louisiana Mun. Police Emp. Ret. Sys. v. Sealed Air Corp.*, 253 F.R.D. 300, 309 (D. N.J. 2008) (quotations omitted)).

²⁸ *Id.* at *4 (quoting *Sealed Air Corp.*, 253 F.R.D. at 309 (quotations omitted)).

²⁹ *Id.*

³⁰ *Id.* at *4 (quoting *In re Mortg. & Realty Trust*, 212 B.R. at 653 (quotations omitted)).

³¹ *Id.* at *5. The Third Circuit has extended the privilege in the transactional context. *In re Teleglobe*, 493 F.3d at 365.

³² *Id.* at *5. (quoting *In re Leslie Controls Inc.*, 437 B.R. 493, 502 (Bankr. D. Del. 2010)).

³³ *Id.* at *5.

³⁴ *Id.*

³⁵ *Id.* at *5, n. 13.

³⁶ *Id.* at *6.

³⁷ *Id.*

³⁸ *Id.* at *9.

³⁹ *Id.*

⁴⁰ *Id.*