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BY PATRICK A. JACKSON, IAN J. BAMBRICK AND JACLYN C. MARASCO

Circumscribing the Attorney-Work-Product Doctrine in Chapter 11

Patrick A. Jackson
Faegre Drinker Biddle & Reath LLP
Wilmington, Del.

Ian J. Bambrick
Faegre Drinker Biddle & Reath LLP
Wilmington, Del.

Jaclyn C. Marasco
Faegre Drinker Biddle & Reath LLP
Wilmington, Del.

An earlier article in the *ABI Journal*[1] discussed a February 2021 letter opinion by Hon. **Laurie Selber Silverstein** in *In re Imerys Talc America Inc*.[2] That case held that certain communications between counsel for the plan proponents (*i.e.*, the debtors, their nondebtor parent, the tort claimants' committee (TCC) and the future claimants representative (FCR)) were shielded from discovery by plan objectors pursuant to the common-interest doctrine, while others were not. Among the latter category were certain communications between counsel for the debtors and the parent relating to the bankruptcy case generally and to the proposed chapter 11 plan and global settlements embodied therein. The court found there was no common legal interest (as opposed to a commercial interest) between the debtors and the parent prior to the date that the plan proponents reached an agreement in principle on the material terms of the plan (the "settlement date").[3]

Subsequently, the debtors and the parent continued to withhold certain documents from one of the plan objectors, taking the position that they were protected by the attorney-work-product (AWP) doctrine, even if they were not protected by the common-interest doctrine. After briefing, two separate rounds of oral argument and an *in camera* review of a sampling of the subject documents, the court issued a letter opinion[4] upholding the AWP designation as to certain of the documents, but not to others.[5] In particular, the court found that AWP protection for documents pertaining to potential alter-ego claims against the parent and the parent's proposed plan contribution in settlement of those claims had been waived because the documents were shared among the debtors' and the parent's counsel.

The court framed the questions presented as follows: (1) "[W]hether notwithstanding the adversity [of legal interests on these issues], Debtors and [parent] can act as if they are not adverse while preserving the protection of the work product doctrine?" and (2) "[C]an parties that are adverse on one issue share work product on that issue in the context of a broader exchange of information on which they are aligned?" It concluded that the answer to both questions was "no."[6]

The AWP Doctrine

The AWP doctrine is rooted in Rule 26(b)(3) of the Federal Rules of Civil Procedure. It provides, in pertinent part, that (1) "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney ...)," and (2) "[i]f the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." The AWP doctrine "promotes the adversary system by enabling attorneys without fear that their work product will be used against their clients."[7] But unlike the attorney/client privilege, which is typically waived upon disclosure of the privileged information to a third party, AWP protection can survive disclosure to a third party as long as the dis-

1 Michael Neiburg, Jacob Morton & Malak Doss, "Invoking Common-Interest Doctrine to Protect Plan Communications," XL *ABI Journal* 5, 34-35, 58-59, May 2021, *available at* abi.org/abi-journal.
2 Case No. 19-10289 (LSS), 2021 Bankr. LEXIS 428 (Bankr. D. Del. Feb. 23, 2021).
3 *Id.* at *16-17.
4 *In re Imerys Talc Am. Inc.*, Case No. 19-10289 (LSS), 2021 Bankr. LEXIS 2176 (Bankr. D. Del. Aug. 10, 2021).
5 The court also reconsidered its prior common-interest ruling as to certain categories of documents, finding that the debtors and parent had a common legal interest with respect to most aspects of the bankruptcy case leading up to the settlement date. *See id.* at *15-16.
6 *Id.* at *10.
7 *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991).

closure does not "enable an adversary to gain access to the information."[8]

The debtors and the parent identified two general categories of documents withheld from production to the objector, which (1) were prepared in anticipation of litigation and (2) disclosed the mental impressions and opinions of counsel for the debtors and/or the parent. The first category included draft and final presentations prepared by counsel to the debtors and the parent for their respective leadership concerning the timing and schedule of potential bankruptcy filings, anticipated legal issues and potential litigations in the context of the chapter 11 proceedings, and the costs and benefits of pursuing certain negotiating tactics with various parties-in-interest.[9]

This category also included correspondence reflecting similar analyses, which were "infused with" attorney assessments, proposals and conclusions as to legal strategy, and therefore fell squarely within the meaning of "core" or "opinion" work product entitled to a "near absolute protection from discovery."[10] A small subset of this category also included discussion and evaluation of certain ongoing talc litigations, including how the outcome of those litigations or motions brought within those litigations might impact the legal strategy of a planned or ongoing bankruptcy process.[11] The objector ultimately conceded, and the court found, that this category of documents was properly withheld from production under the AWP doctrine.[12]

The second category of documents withheld from production consisted of communications between in-house and outside counsel for the debtors and the parent analyzing, assessing and furthering the negotiation between the debtors and the parent on the one hand, and the TCC and FCR on the other hand, with respect to the terms of a settlement that eventually became the proposed chapter 11 plan.[13] These materials, which were created in the context of anticipated litigation against the TCC and FCR, included email summaries by counsel of negotiations, draft term sheets, discussions regarding potential parameters of contribution by the parent, suggested tactical steps, concerns and reactions of counsel during negotiations, and other factors that could inform litigation risk as against the TCC and FCR.[14] This second category proved a closer call.

Patrick Jackson and Ian Bambrick are partners with Faegre Drinker Biddle & Reath LLP in Wilmington, Del. Jaclyn Marasco is an associate in the same office.

The Debtors' and Parent's Argument

The debtors argued that the second category of documents could be shared between it and the parent without waiving AWP protection because, as the documents themselves showed, "neither the Debtors nor the [parent] considered themselves to be, nor positioned themselves as, potential 'adversaries' in navigating the chapter 11 proceedings."[15] This was consistent with their prebankruptcy conduct, where they jointly defended claims in the tort system and regularly exchanged work product in connection therewith.[16]

Further, the debtors argued, the subject documents were not shared in any manner that would make it more likely that they would be disclosed to their actual adversaries in the bankruptcy (*e.g.*, the TCC, FCR, or plan objectors).[17] To the contrary, a substantial portion of the documents shared were marked "Confidential," "Attorney Work Product," and/or "Common Interest," and all were shared with the understanding that they would be kept strictly confidential.[18] According to the debtors, such protective treatment supported a finding that there had been no waiver.[19]

The parent concurred with the debtors, arguing that it and the debtors were not in fact acting as "adversaries" in exchanging the documents because from the beginning, they both wanted a consensual chapter 11 plan, and they knew that the parent's potential alter-ego liability and plan contribution would need to be negotiated with the TCC and FCR. This is due to the fact that those parties would never accept any agreement solely between the debtors and the parent on such issues (and thus, the debtors and parent were never across the negotiating table on these issues).[20]

The Plan Objector's Argument

The plan objector framed the "adversity" issue as a legal question rather than a factual question. It then asked the court to closely examine whether the debtors and the parent were properly considered "adversaries" as a matter of law on any of the issues that were covered in the subject documents.[21]

As to any documents containing analysis regarding potential alter-ego claims, the plan objector argued that the debtors and parent were, by definition, adversaries because alter-ego claims against nondebtors are generally considered property of a debtor's bankruptcy estate. Such claims may be prosecuted or settled by the debtor in possession, as estate representative. As to any documents regard-

8 *Id. See also In re Chevron Corp.*, 633 F.3d 153, 165 (3d Cir. 2011) (noting necessity to distinguish between disclosure to adversaries and disclosures to non-adversaries); *Goldenberg v. Indel Inc.*, Civ. No. 09-5202 (JBS/AMD), U.S. Dist. LEXIS 199516, at *13-14 (D.N.J. May 31, 2012) ("[P]rotection for work product is waived only when the information is disclosed in a manner inconsistent with keeping the documents from the adversary.... Furthermore, any disclosure must substantially increase the likelihood that the emails will be seen by the adversary.").

9 *See In re Imerys Talc Am. Inc.*, Case No. 19-10289 (LSS), ECF No. 3267 (debtors' letter brief) at 10.

10 *Id.* (quoting *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 663 (3d Cir. 2003)).

11 *Id.* at 9-10. *See also In re Imerys Talc Am. Inc.*, Case No. 19-10289 (LSS), ECF No. 3268 (parent's letter brief) at 5.

12 *Imerys Talc Am.*, 2021 Bankr. LEXIS 2176 at *15-16 and n.16.

13 *See In re Imerys Talc Am. Inc.*, Case No. 19-10289 (LSS), ECF No. 3267 at 10-11.

14 *Id.* at 11. *See also In re Imerys Talc Am. Inc.*, Case No. 19-10289 (LSS), ECF No. 3268 at 6.

15 *See In re Imerys Talc Am. Inc.*, Case No. 19-10289 (LSS), ECF No. 3267 at 12.

16 *Id.* at 12, n.24.

17 *Id.* at 12.

18 *Id.*

19 *Id.* at 12-13 (citing *Goldenberg*, 2012 U.S. Dist. LEXIS 199516 at *14 (finding no waiver of work-product protection where emails contained confidentiality notice "stating the privileged and confidential nature of the emails"); *Times of Trenton Publ'g Corp. v. Pub. Util. Serv. Corp.*, Civ. A. No. 03-6026 (AET), 2005 U.S. Dist. LEXIS 34624 at *16 (D.N.J. May 3, 2005)).

20 *In re Imerys Talc Am. Inc.*, Case No. 19-10289 (LSS), ECF No. 3268 at 7.

21 *In re Imerys Talc Am. Inc.*, Case No. 19-10289 (LSS), ECF No. 3318 at 6 (objector's letter brief).

ing the potential parameters of the parent's plan contribution, the plan objector noted that this would go to "expanding the pie" of estate assets, an issue on which the debtors, TCC and FCR would be aligned but the parent would not (at least, as to itself). At a very high level, the parent's singular goal in the bankruptcy cases may have been to obtain a release of claims against it for as little consideration as possible, while the debtors' interests should have been exactly the opposite on this issue.[22]

The plan objector also noted that finding that the debtors and parent were "non-adversaries" by virtue of their friendliness with each other would be difficult to reconcile with the concept of "adversity" as applied elsewhere in the Bankruptcy Code. For example, if a single law firm proposed to represent both a chapter 11 debtor and its nondebtor parent *concurrently in the bankruptcy case*, the firm would clearly "represent an interest adverse to the estate" for purposes of 11 U.S.C. § 327(a), which would preclude it from representing the debtor.[23] How, then, the objector queried, could a debtor and its nondebtor parent be viewed as "non-adversaries" when represented by *different* counsel, so as to fully occupy the same tent for privilege purposes on any and all issues, irrespective of any community of interest (or lack thereof) on those issues?[24]

The Court's Decision

As a threshold matter, the court noted the apparent absence of authority on what constitutes an "adversary" for purposes of the AWP doctrine.[25] However, it found informative the Third Circuit's decision in *In re Teleglobe Communications Corp*.[26] This decision examined the common-interest privilege and use of in-house counsel in the context of a parent/subsidiary situation, and it cited insolvency as one of several examples where parents' and subsidiaries' legal interests become so divergent that retention of outside counsel for the subsidiary is appropriate.

Against this backdrop, the court concluded that the debtors and the parent were "sufficiently adverse" on some issues well before the bankruptcy filing, when the debtors and the parent had transitioned from representation by a single outside law firm (now debtors' counsel) to separate outside law firms.[27] While the court noted that retention of separate outside law firms was not necessarily conclusive on a determination of adversity, it found other indicia of adversity on at least the issues of alter-ego liability and the parent's potential plan contribution, including, particularly, a statement in the debtors' disclosure statement indicating that the debtors had "conducted extensive investigations into potential claims against" the parent and had formed a view that the proposed settlement of those claims in exchange for the parent's plan contribution was "fair and equitable and in the best interest of the Debtors."[28]

The court "disagree[d] with the Debtors' position that the primary focus of the work-product-doctrine analysis should be on how the parties conducted themselves," which suggests that parties can "choose their adversaries." The court also noted that there was no authority for the proposition that "parties can ignore with impunity their theoretical or legal alignments," and that in both *Westinghouse* and *Chevron*, the party asserting AWP protection did not consider itself adverse to the entity with whom it shared documents, yet the Third Circuit found those entities to be adversaries.[29] Accordingly, the court concluded that the debtors and parent were adverse with respect to potential alter-ego claims and the parent's plan contribution, such that the sharing of AWP between them with respect to those issues had resulted in a waiver of the AWP protection that might otherwise have applied.

Conclusion

Taken together, the *Imerys Talc America* rulings on the common-interest and AWP doctrines underscore the importance of identifying issues of *legal* adversity between members of a corporate family in the context of a member's planned or pending chapter 11 proceedings, and limiting discussion and disclosure of documents relating to such issues among the family members and their respective advisors. While counterintuitive (and perhaps cumbersome) where the family members consider themselves to be in alignment commercially or strategically, observing strict protocols around the discussion and disclosure of privileged and AWP materials will increase the likelihood that those materials may be shielded from discovery in subsequent litigation. abi

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22 *Id.* at 7.
23 *Id.* at 7, n.7 (citing 11 U.S.C. § 327(a); *In re NNN 400 Cap. Ctr. 16 LLC*, 619 B.R. 802, 814 (Bankr. D. Del. 2020) (noting "adverse interest" under § 327(a) includes "any economic interest that would tend to ... create an actual or potential dispute in which the estate is a rival claimant" and any "predisposition under circumstances that render such a bias against the estate" (internal quotation marks, citations omitted)).
24 *See Imerys Talc Am. Inc.*, Case No. 19-10289 (LSS), ECF No. 3356 at 25:1-25 (Hr'g Tr. April 7, 2021).
25 *Imerys Talc Am.*, 2021 Bankr. LEXIS 2176 at *8.
26 493 F.3d 345, 373 (3d Cir. 2007).
27 *Imerys Talc Am.*, 2021 Bankr. LEXIS 2176 at *11-12.
28 *Id.* at 13 (internal quotation marks omitted).
29 *Id.* at 14-15 (citing *Westinghouse*, 951 F.2d 1414; *Chevron*, 633 F.3d 153).