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Bankruptcy: Attorney-Client Privilege and Work Product

Protecting and Maintaining Confidentiality and the Work Product Defense

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

Alec P. Ostrow, Partner, **Becker Glynn Melamed & Muffly**, New York

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Thursday, September 30, 2010

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Attorney-Client, Work Product and Common Interest Privileges for Creditors' Committees

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Strafford - Bankruptcy & Attorney-Client Privilege Seminar

September 30, 2010

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BECKER, GLYNN, MELAMED & MUFFLY LLP

Background: Role of Committees

A critical check on the power of a debtor in possession, with the statutory ability to

- Investigate the assets, liabilities, and business operations (11 U.S.C. § 1103(c)(2))
- Consult on administrative matters (11 U.S.C. § 1103(c)(1))
- Participate in plan formulation (11 U.S.C. § 1103(c)(3))
- Request the appointment of a trustee or examiner (11 U.S.C. § 1103(c)(4))
- Raise and be heard on any issue in the bankruptcy case (11 U.S.C. § 1109(b))

Under the case law, a committee may be specially authorized to bring lawsuits on behalf of bankruptcy estate (*Official Comm. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548 (3d Cir. 2003) (en banc); *In re STN Enters.*, 779 F.2d 901 (2d Cir. 1985))

Committees – Fiduciary Duties and Immunities

In light of their functions, committees have been held to

- Owe fiduciary duties to their constituents (*In re SPM Mfg. Corp.*, 984 F.2d 1305, 1315 (1st Cir. 1993))
- Possess limited immunity from suit for actions in official capacity (*In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000); *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 514 (S.D.N.Y. 1994))

The Attorney-Client Privilege

- Asserted holder is or sought to become a client
- A communication is made
 - A member of the bar of a court or his or her subordinate
 - Who is acting as a lawyer
- The communication relates to a fact of which the attorney was informed
 - By the client
 - Without the presence of strangers
 - For the primary purpose of securing
 - An opinion on the law
 - Legal services, or
 - Assistance in a legal proceeding
 - Not for the purpose of committing a crime or tort
- The privilege has been
 - Claimed and
 - Not waived

United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass 1950); accord *In re Allen*, 106 F.3d 582, 600 (4th Cir. 1997); *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984).

Work Product Privilege - Derivation

- Proper preparation of a client's case requires protection for a lawyer's
 - Mental impressions
 - Personal beliefs
 - Legal theories
 - Strategy
- Protected materials include – interviews, statements, memoranda, correspondence, briefs

Hickman v. Taylor, 329 U.S. 495, 510-11 (1947)

Work Product Privilege - Codification

- Privilege essentially codified in Fed. R. Civ. P. 26(b)(3)
- Privilege covers materials “prepared in anticipation of litigation or for trial”
- Privilege not absolute
- Disclosure obtainable upon showing of
 - Substantial need for protected materials, and
 - Inability to obtain substantially equivalent materials without undue hardship
- Disclosure order must protect “core” work product such as
 - Mental impressions
 - Conclusions
 - Opinions
 - Legal Theories

Work Product Privilege - Application

- Case law protects non-documented mental impressions and applies the privilege in criminal proceedings (*United States v. Nobles*, 422 U.S. 225, 238 (1975))
- Privilege can be waived
 - By introducing certain evidence – such as calling an investigator as a witness
 - By disclosure to an adverse party

Common Interest Privilege - Derivation

- Developed as an exception to the rule waiving privileges upon voluntary disclosure of privileged material to someone outside of the attorney-client relationship
- Initially formulated as a “joint defense” privilege in criminal proceedings (*In re Bevill, Breseler, & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986); *In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, 406 F. Supp. 381, 388-89 (S.D.N.Y. 1975))

Common Interest Privilege - Application

- Now more generally applied to parties with a common interest in civil as well as criminal litigation (*SIPC v. Stratton Oakmont, Inc.*, 213 B.R. 433, 436 (Bankr. S.D.N.Y. 1997); *In re Megan-Racine Assocs.*, 189 B.R. 562, 570-72 (Bankr. N.D.N.Y. 1995))
- Extends both the attorney-client and work product privilege (*U.S. ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 686 (S.D. Cal. 1996); *Armento v. Superior Court*, 124 Cal. Rptr. 2d 273, 279-80 (Cal. Ct. App. 2002))

Common Interest Privilege - Elements

Valid attorney-client or work product privilege extended when

- Communication made by separate parties in the course of a matter of common interest
- Communication designed to further such effort, and
- Privilege not waived

In re Kreisel, 399 B.R. 679, 694 (Bankr. C.D. Cal. 2008); *In re Mortgage & Realty Trust*, 212 B.R. 649, 653 (Bankr. C.D. Cal. 1997); see *Bevill, Breseler*, 805 F.2d at 126 (similarly describing elements of joint defense privilege)

Common Interest Privilege – *Schwimmer* Extension

In *United States v. Schwimmer*, the Second Circuit said:

“The need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter, and it is therefore

- “[U]nnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privilege to apply.
- “Neither is it necessary for the attorney representing the communicating part to be present when the communication is made to the other party’s attorney.”

892 F.2d 237, 243-44 (2d Cir. 1989) (internal quotations and citations omitted)

Privileges and Committees

- Committee has attorney-client privilege (*In re Subpoena Duces Tecum Dated March 16, 1992*, 978 F.2d 1159, 1161 (9th Cir. 1992); *In re Refco Inc.*, 336 B.R. 187, 197 (Bankr. S.D.N.Y. 2006))
- Such privilege cannot shield committee or members from fraud or misconduct (*In re Fibermark, Inc.*, 330 B.R. 480, 498 n.6 (Bankr. D. Vt. 2005); *In re Baldwin-United Corp.*, 38 B.R. 802, 804-05 (Bankr. S.D. Ohio 1984))
- Work product privilege applies in bankruptcy litigation (Fed. R. Civ. P. 26 made applicable in bankruptcy matters by Fed. R. Bankr. P. 7026, 9014; *In re Travelstead*, 212 B.R. 505, 508-09 (Bankr. D. Md. 1997))
- Common interest privilege applied to certain communications between debtors and creditors' committees (*Mortgage & Realty Trust*, 212 B.R. at 653-54; see *In re Kaiser Steel Corp.*, 84 B.R. 202, 205-06 (Bankr. D. Colo. 1988))

Breadth of Committee Privileges

Work Product Privilege – Materials Prepared in Anticipation of Litigation or Trial

- Court hearings for authorizations - “notice and a hearing” - for
 - Sales outside the ordinary course of business (11 U.S.C. § 363(b))
 - Obtaining credit outside the ordinary course of business, especially secured credit (11 U.S.C. § 364)
 - Assumption, rejection, assignment of executory contracts (11 U.S.C. § 365)

Breadth of Committee Privileges

Work Product Privilege – Materials Prepared in Anticipation of Litigation or Trial

- Court hearings in adversarial litigations (adversary proceedings or contested matters)
 - Lien disputes – validity, extent and priority (Fed. R. Bankr. P. 7001(2))
 - Contested confirmation of plans (11 U.S.C. §§ 1128-1129)
 - Committee intervention in adversary proceedings as of right (*In re Caldor Corp.*, 303 F.3d 161, 176 (2d Cir. 2002); *In re Marin Motor Oil*, 689 F.2d 445, 449 (3d Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983))

Breadth of Committee Privileges

Work Product Privilege – Materials Prepared in Anticipation of Litigation or Trial

- It has been observed that
 - “[A]n official committee may consider and challenge virtually everything that a debtor undertakes.” (*Revco*, 336 B.R. at 197 n.5)
- Under the *Schwimmer* extension (for the common interest privilege),
 - It is unnecessary for there to be an actual litigation in progress
- Is it a fair conclusion that?
 - Almost all materials coming before a committee are therefore prepared in anticipation of litigation or trial

Breadth of Committee Privileges

- Other questions for further discussion and development – Presence of attorneys
 - Must an attorney be present when the debtor communicates with the committee or a committee member to maintain an otherwise valid common interest privilege?
 - Must an attorney be present when members of a committee communicate among themselves on official committee business?
 - Or stated differently, are communications between committee members on official committee business themselves privileged?

Thank you

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Bankruptcy: Attorney-Client Privilege and Work Product

Protecting and Maintaining Confidentiality and the Work Product Defense

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Attorney-Client Privilege

- ▶ Outside bankruptcy: assertion of the attorney-client privilege on behalf of a corporation is the domain of the managers of the corporation, and this power shifts when control of the corporation shifts to new management.
 - ▶ See *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985).

- ▶ In bankruptcy: when all of a corporation's property is transferred to the bankruptcy estate, the trustee or debtor in possession ("DIP") succeeds to the role of prepetition managers and has the authority to assert or waive the attorney-client privilege on behalf of the Debtor corporation.
 - ▶ See, e.g., *In re Harwood P-G*, 403 B.R. 445 (Bankr. W.D. Tex. 2009).

Attorney-Client Privilege – Who Can Assert it?

- ▶ Committees: Under certain circumstances where Committees step into the shoes of the Debtor to pursue various causes of action on behalf of the estate, the Committee may be in a position to assert the attorney-client privilege on behalf of the debtor.
- ▶ Trustees:
 - ▶ Litigation Trustees: When a litigation trustee succeeds to the interest of a bankruptcy estate, the trustee may also succeed to the privilege of the DIP or bankruptcy trustee.
 - ▶ Liquidating Trustee: When a liquidating trust is formed to succeed a bankruptcy estate, the liquidating trustee may succeed to the privilege of the DIP or bankruptcy trustee.

Waiver Issues – Communications With Professionals

- ▶ Generally, disclosure to parties outside the attorney-client relationship of otherwise privileged information or documents results in waiver of the attorney-client privilege.
- ▶ Kovel exception: The general waiver-by-disclosure rule does not apply to accountants and other professionals hired to assist lawyers in providing legal advice when the following factors are met:
 - ▶ 1. The third party must be an agent of the attorney.
 - ▶ 2. The third party must facilitate the communication between the attorney and the client for legal advice.
 - ▶ 3. Communications with the third party must be kept confidential.
 - ▶ 4. The privilege must not have been previously waived by disclosure.
 - ▶ *See United States v. Kovel, 296 F.2d 918, 921 (2d. Cir. 1961)*

Beyond *Kovel*: Waiver Issues in Bankruptcy Case Representation – Practice Points

- ▶ Always consider the possibility that even amicable partnerships, joint interests, and promising negotiations may break down and result in contentious litigation/contested proceedings in complex multi-party bankruptcy cases.
- ▶ Do not be afraid to memorialize a common interest retroactively, either through written correspondence or in a formal agreement identifying the litigation threat and the common interest *nunc pro tunc* to an earlier date.

Beyond *Kovel*: Waiver Issues in Bankruptcy Case Representation – Practice Points

- ▶ When the committee is pursuing litigation on behalf of the debtor, complicated attorney-client privilege and work product issues often arise, in part, simply because of the number of parties involved together with all of their professionals.
- ▶ Example: When pursuing a derivative avoidance action on behalf of the debtor's estate, the committee may need to interview employees of the debtor or review documents that are subject to the debtor's attorney-client privilege.
- ▶ In this situation, the committee is a third party to the debtor's attorney-client relationship.
- ▶ Common law principals including the common interest doctrine can be used to extend the privilege to cover the committee and its professionals.

Beyond *Kovel*: Waiver Issues in Bankruptcy Case Representation – Practice Points

- ▶ Rather than rely on common law principals alone, practical steps can be taken to ensure information and communications remain protected by the attorney-client privilege and work product doctrine.
 - ▶ Negotiate a stipulation that includes the following terms:
 - ▶ Privilege extends to the designees, representatives, and agents for the committee and the debtor, including consulting experts and financial advisors;
 - ▶ The committee and the debtor are acting in furtherance of a common interest;
 - ▶ Limit the ability of parties to waive, intentionally or unintentionally, the privilege of another party; and
 - ▶ Exchange of privileged documentation between the Committee and the Debtor shall not constitute waiver.

Beyond *Kovel*: Waiver Issues in Bankruptcy Case Representation – Practice Points

- ▶ In complex litigations, parties will often engage multiple professionals in preparation for trial, including both consulting experts and testifying experts.
- ▶ Effective Dec. 1, 2010, FRCP 26 will be amended to extend work-product protection to the drafts of expert reports.
- ▶ The amendments to FRCP 26 still leave certain communications subject to discovery, including:
 - ▶ (1) compensation for the expert's study or testimony;
 - ▶ (2) facts or data provided by the lawyer that the expert considered in forming opinions; and
 - ▶ (3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion.

Beyond *Kovel*: Waiver Issues in Bankruptcy Case Representation – Practice Points

- ▶ Counsel must carefully consider whether it is necessary to negotiate additional limits to discovery of information shared among professionals retained in connection with any given litigation.
- ▶ Possible further limitations that can be stipulated by the parties include:
 - ▶ Limiting the requirements for the written report described in FRCP 26(a)(2)(B) to contain only the facts or data relied on rather than considered by the testifying expert.
 - ▶ Extending the new protection accorded to drafts of the written report to include the testifying expert's notes, working papers, models or calculations, unless such materials are relied upon in forming the testifying expert's opinions.
 - ▶ Extending the protection accorded to communications between a party's attorney and a testifying expert under amended FRCP 26 to include communications between a party or a litigation consultant (including non-testifying experts), on the one hand, with a testifying expert, on the other hand, (unless such information is relied upon by the testifying expert in forming the testifying expert's opinions).
 - ▶ Extending the protection to cover facts or data that the party's attorney provided to the testifying expert unless such facts or data as are actually relied upon by the testifying expert.

Control and Transfer of the Attorney-Client Privilege in Bankruptcy

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Who Controls Attorney-Client Privilege in Bankruptcy: Business Bankruptcy

- *Commodity Futures Trading Commission. v. Weintraub*, 471 U.S. 343, 351-52 & 355 (1985), is seminal case.
 - “Because the attorney-client privilege is controlled, outside of bankruptcy, by a corporation’s management, the actor whose duties most closely resemble those of management should control the privilege in bankruptcy, unless such a result interferes with policies underlying the bankruptcy laws.”
 - The Court reasoned further that “[i]n light of the Code's allocation of responsibilities, it is clear that the trustee plays the role most closely analogous to that of a solvent corporation's management.”
- Debtor as Debtor in Possession – As DIP has most rights, functions and duties of a statutory trustee, DIP normally retains control of the privilege. See 11 U.S.C. § 1107(a).
- Debtor Out of Possession (*i.e.*, with Chapter 7 or Chapter 11 Trustee) – Control of privilege normally passes to statutory trustee. *Weintraub*, 471 U.S. at 358.

Who Controls Attorney-Client Privilege in Bankruptcy: Individual Bankruptcy

- Supreme Court in *Weintraub* expressly stated that the rationale for its holding giving trustee control of privilege in corporate bankruptcy cases was inapplicable to individual bankruptcies. *Weintraub*, 471 U.S. at 356.
- Courts since *Weintraub* have divided on whether the trustee may waive privilege of an individual debtor in a chapter 7 bankruptcy case.
 - Representative cases holding that trustee may not waive privilege: *McClarty v. Gudenau*, 166 B.R. 101, 102 (Bankr. E.D. Mich. 1994); *In re Hunt*, 153 B.R. 445, 451-52 (Bankr. N.D. Tex. 1992).
 - Representative cases granting trustee control over privilege: *In re Foster*, 217 B.R. 631, 635 (Bankr. D. Colo. 1997), *rev'd other grounds*, 180 F.3d 1259 (10th Cir. 1999) (giving trustee over privilege as to debtor's prepetition causes of action against third parties); *Whyte v. Williams (In re Williams)*, 152 B.R. 123, 129 (Bankr. N.D. Tex. 1992) (granting liquidation trustee under plan of individual chapter 11 debtor control over privilege in connection with avoidance actions assigned to trust under plan).

Other Parties to Whom Control of Attorney-Client Privilege Can Pass in a Bankruptcy Setting

- ❑ Purchaser of assets in Section 363 sale
- ❑ Plan Administrator and/or Litigation Trustee
- ❑ Examiner

Contractual Transfers and Allocations of Control of Attorney-Client Privilege (1)

- Absent agreement between the parties, when does the privilege pass to the successor?
 - If transaction involves discrete assets and not operating business, privilege will generally remain with the transferor.
 - *See, e.g., Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, No. 01 C4366, 2003 WL 21911066 (N.D. Ill. Aug. 7, 2003) (sale of discrete assets not enough to effectuate transfer of privilege control)
 - If the “practical consequences” of the transaction are to transfer control of the business and continuation of the business under new management, then control of the privilege will pass to the transferee.
 - *See, e.g., Soverain Software LLC v. GAP, Inc.*, 340 F. Supp. 2d 760, 763 (E.D. Tex. 2004) (“If the practical consequences of the transaction result in the transfer of control of the business and the continuation of the business under new management, the authority to assert or waive the attorney-client privilege will follow as well.”).

Contractual Transfers and Allocations of Control of Attorney-Client Privilege (2)

- Can parties contractually dictate who will control privilege?
 - Limited precedent and courts disagree.
 - *American Int'l Specialty Lines Ins. Co. v. NWI-I, Inc.*, 240 F.R.D. 401, 407 (N.D. Ill. 2007) – Overruling the parties' attempt to contractually allocate control of some elements of debtor's attorney-client privilege in agreement for successor litigation trust.
 - *Postorivo v. AG Paintball Holdings, Inc.*, Nos. 2991-VCP, 3111-VCP, 2008 WL 343856 (Del. Ch. Feb. 7, 2008) – Rejecting *NWI-I*, and upholding, under New York law, validity of provisions of asset purchase agreement allocating attorney-client privilege in connection with sale of assets.

Contractual Transfers and Allocations of Control of Attorney-Client Privilege (3)

- Additional cases recognizing ability to transfer privilege control by contract:
 - *Osherow v. Vann (In re Harwood P-G, Inc.)*, 403 B.R. 445, 455-57 (Bankr. W.D. Tex. 2009). The court held that the plan and implementing trust documents were effective to transfer control of the privilege from the debtor *and* the committee to litigation trustee established under the plan.
 - *In re Hechinger Investment Co. of Del.*, 285 B.R. 601, 610-13 (D. Del. 2002). The court held that the plan and implementing trust documents were effective to transfer privilege from debtor to liquidation trustee under plan. The court specifically rejected arguments by former directors that they maintained joint control of privilege, noting absence of evidence of any prior joint representation with the debtor.
 - *In re American Metrocomm Corp.*, 274 B.R. 641, 654 n. 10 (Bankr. D. Del. 2002) – The court held that the debtor's agreement assigning its interests in certain litigation claims, including attorney-client privilege related thereto, to creditor was effective to create a shared privilege between the debtor and the assignee that was effective against the debtor's former lawyers.

Contractual Transfers and Allocations of Control of Attorney-Client Privilege (4)

- Particular need to allow for freedom of contract in this area.
 - Not uncommon for a debtor to transfer substantially all of its assets to a purchaser in a section 363 sale but retain causes of action.
 - The complex negotiations leading to confirmation of a plan often can result in the right to pursue causes of action being severed from the go forward business.
 - Causes of action can be assigned to litigation trust for the benefit of lenders or unsecured creditors.
 - Who should control the privilege? The reorganized debtor that has no interest in the litigation? *NWI-1* approach would dictate yes.

Contractual Transfers and Allocations of Control of Attorney-Client Privilege (5)

- Practice pointers for dealing with these difficult issues.
 - This non-economic deal point is often overlooked.
 - Often will be best to expressly specify who will control privilege.
 - Even in jurisdictions following *NWI-1* approach of not allowing parties' intent to control, in a close case, an expression of the parties' intent may influence the outcome.
 - Convenient place to deal with this is in section of agreement governing access to information as between buyer and seller and retention of documents.
 - When drafting for plans and section 363 asset sales, don't stop at addressing this issue in the underlying agreements. May be worthwhile to have the Court decree disposition of the privilege in the Sale Order or Confirmation Order, as applicable.

Example of APA and Sale Order Provisions Concerning Allocation and Preservation of Privilege: APA Provisions (1)

- Pre-Closing Access to Information: “The Sellers agree that, prior to the Closing Date, the Purchaser shall be entitled, through its officers, employees, consultants and representatives (including, without limitation, its legal advisors and accountants), to make such investigation of the properties, business and operations of the Sellers and such examination of the books and records and financial and operating data of the Sellers, the Business, the Purchased Assets and the Assumed Liabilities, and access to the officers, key employees, accountants and other representatives of the Sellers, as it reasonably requests and to make extracts and copies of such books and records. Any such investigation and examination shall be conducted upon reasonable advance notice and under reasonable circumstances and shall be subject to restrictions under applicable Law. The Purchaser and its representatives shall cooperate with the Sellers and their representatives and shall use their reasonable efforts to minimize any disruption to the Business. ***Notwithstanding anything herein to the contrary, no such investigation or examination shall be permitted to the extent that it would require the Sellers to disclose information subject to attorney-client privilege.***”

Example of APA and Sale Order Provisions Concerning Allocation and Preservation of Privilege: APA Provisions (2)

- **Preservation of Records.** “The Sellers or their successors and the Purchaser agree that each of them shall preserve and keep the records held by them or their Affiliates relating to the Purchased Assets for two years after the Closing Date (except as provided below) and shall make such records (as well as former employees of any Seller that are then employed by the Purchaser) available to the other as may be reasonably required by such party in connection with, among other things, the Sellers’ (or any subsequently appointed fiduciary of any Seller’s estate) administration of the Bankruptcy Case, the investigation and pursuit of Estate Claims, any insurance claims by, Legal Proceedings or Tax audits against or governmental investigations of the Sellers or the Purchaser or any of their Affiliates or in order to enable the Sellers or the Purchaser to comply with their respective obligations under this Agreement and each other agreement, document or instrument contemplated hereby. In the event the Sellers or the Purchaser wish to destroy such records before or within two years, such party shall first give ninety (90) days prior written notice to the other and such other party shall have the right at its option and expense, upon prior written notice given to such party within such ninety (90) day period, to take possession of the records within one-hundred and eighty (180) days after the date of such notice. Access pursuant to this Section 8.5 shall be afforded by the party in possession of such records, upon receipt of reasonable advance notice, during normal business hours and at the expense of the requesting party; **provided, however, that** (i) any review of such records shall be conducted in such a manner as not to interfere unreasonably with the operation of the business of any party, **(ii) no party shall be required to take any action that would constitute a waiver of the attorney-client privilege** and (iii) no party shall be required to supply the other party with any information which such party is under a legal obligation not to supply. The party exercising this right of access shall be solely responsible for any costs or expenses incurred by it pursuant to this Section 8.5.”

Example of APA and Sale Order Provisions Concerning Allocation and Preservation of Privilege: Sale Order Provision

- “The transfer of Records to the Purchaser under the Purchase Agreement and granting of any rights of access to such Records and to any employees of Purchaser (including former employees of the Debtors) contemplated by the Purchase Agreement do not and will not waive as to third parties any otherwise applicable rights of confidentiality or attorney-client privilege.”

How Does Privilege Pass to Examiner and What Are Consequences Thereof? – Introduction

- There is no explicit statutory grant of authority in the Bankruptcy Code for an examiner to control the attorney-client privilege.
 - Examiners are not parties in interest under 11 U.S.C. § 1109(b).
- Real question about whether an examiner has the power to waive a debtor's attorney-client privilege, even with the debtor's consent.

How Does Control of Privilege Pass to Examiner and What Are Consequences Thereof? – Arguments for Power to Waive Privilege

- Arguments for power to waive:
 - Giving examiner power to waive privilege is consistent with examiner's duty to investigate under 11 U.S.C. § 1106(b). Can rely on 11 U.S.C. § 105(a) reserve of equitable power to aid examiner in fulfilling this duty.
 - Giving such authority to the examiner is consistent with the view that the privilege is in the nature of property of the estate under 11 U.S.C. § 363 and, therefore, transferrable.
 - Granting such authority to examiner is justified in certain circumstances by need for independent fiduciary, which was an important consideration to *Weintraub* Court.

How Does Control of Privilege Pass to Examiner and What Are Consequences Thereof – Arguments against Power to Waive Privilege

- Arguments against power to waive:
 - *Weintraub* Court reasons that privilege passes to the trustee, but examiner is not otherwise imbued with powers of trustee.
 - 11 U.S.C. § 1106, while stating duties of examiner, does not grant an examiner any specific powers that could be basis for authority to waive.
 - Treating control of the privilege as section 541 estate property is unsound and can have adverse consequences, especially when applied to individual debtors.

How Does Control of Privilege Pass to Examiner and What Are Consequences Thereof? – Real World Application (1)

- Debtors and other bankruptcy constituents sometimes consent to allow control of privilege with respect to certain subject matter to pass to the examiner because it is perceived as a more desirable choice than appointment of trustee.
 - Appointment of trustee means: (a) total loss of control over reorganization versus ability to more narrowly circumscribe examiner's role; and (b) trustee has unfettered ability to waive business debtor's privilege versus more limited ability to waive debtor's privilege that examiner obtains by consent.
 - The order appointing an examiner in the *Enron* bankruptcy provided that the examiner would have "the power to waive, on an issue-by-issue basis, the attorney-client privilege of the debtors' estates with respect to pre-petition communications relating to matters to be investigated by the Examiner hereunder.... Such a waiver shall be a limited and not a general waiver...." *In re Enron*, Case No. 01-16034 (AJG) (Bankr. S.D.N.Y. Apr. 8, 2002), at 3.

How Does Control of Privilege Pass to Examiner and What Are Consequences Thereof? – Real World Application (2)

- More common that the debtor retains control of the privilege but court orders that disclosure to examiner of privileged communications and work product will not destroy protected character as to third parties. *See, e.g., In re Washington Mutual, Inc.*, 08-12229 (MFW), Order, dated August 10, 2010 (D.I. 5258).
- Critical that the scope of delegation to examiner of power to waive privilege be carefully delineated *and* that the bankruptcy court expressly decree that disclosure to examiner does not destroy privileged character of communications as to third parties.