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BY NANCY A. PETERMAN, NICHOLAS E. BALLEN AND DANNY DUERDOTH

Survival of a Committee's Attorney/Client Privilege After the Committee Has Been Disbanded

Nancy A. Peterman
Greenberg Traurig LLP
Chicago

Danny Duerdoth
Greenberg Traurig LLP
Chicago

Nancy Peterman is chair of Greenberg Traurig LLP's Chicago Restructuring and Bankruptcy Practice and a past member of ABI's Board of Directors. Nicholas Ballen and Danny Duerdoth are associates in the same office.

Official committees of unsecured creditors in chapter 11 cases typically consist of the top five to seven general unsecured creditors willing to serve on the committee. The committee's role is to represent the interests of all general unsecured creditors. It is one of the main participants in the case and serves as a check on debtors, secured lenders and other parties-in-interest throughout the case, from first-day motions to confirmation and beyond. For example, the committee acts to protect the interests of general unsecured creditors with respect to, *inter alia*, debtor-in-possession (DIP) financing terms and plan terms, and often investigates the debtors and their financial affairs, including potentially valuable causes of action.

To enable the committee to function properly, the committee's discussions and communications are privileged. The attorney/client privilege between the committee as a body and its counsel is central to the committee's ability to fulfill its role in the case. However, what happens to that privilege once the committee is disbanded at the conclusion of the chapter 11 case?[1] This issue is typically not a concern — until a former committee member or former committee counsel is served with discovery after disbandment (whether as party to the bankruptcy case or some unrelated proceeding), and is attempting to determine whether to respond to such discovery requests or assert the attorney/client privilege.

Cases directly addressing this issue have been few and far between. Those courts addressing the issue often look to analogous situations, such as whether a corporation or other business entity's attorney/client privilege survives the dissolution of the entity. This article explores existing case law shedding light on this issue and its impact on the policy surrounding a committee's role in a bankruptcy case, and will propose some practical solutions. An analysis of the work-product doctrine is beyond the scope of this article, mainly because the case law is clear that the work-product doctrine survives the disbandment of a committee and can be asserted post-disbandment by former committee counsel.[2] The scope and nature of the attorney/client privilege and work-product doctrine are quite distinct, but as a practical matter, it would be important for counsel to raise both doctrines in response to the sort of discovery requests discussed at the outset.

Committee Privilege: An Overview of Applicable Case Law[3]

It is well-settled that the attorney/client privilege survives the death of a natural person.[4] However, less established is the question of whether the privilege survives the dissolution of a business entity.[5] The clear trend is that the attorney/client privilege does not survive the dissolution of a corporation or

1 This article addresses only the attorney/client privilege, not the work-product doctrine.

2 *See, e.g., In re JMP Newcor Int'l Inc.*, 204 B.R. 963, 964-66 (Bankr. N.D. Ill. 1997).

3 In a proceeding before any federal court, under Rule 501 of the Federal Rules of Evidence, the law governing the existence and continuation of the attorney/client privilege may be state law or federal common law depending on which law supplies the underlying rule of the decision. *See, e.g., SEC v. Carrillo Huettel LLP*, Case No. 13 Civ. 1735 (GBD) (JFC), 2015 U.S. Dist. LEXIS 45988, at *9 (S.D.N.Y. April 8, 2015); *ARTRA 524(g) Asbestos Tr. v. Trans. Ins. Co.*, Case No. 09-C-458, 2011 U.S. Dist. LEXIS 110272, at *14-15 (N.D. Ill. Sept. 28, 2011). Choice-of-law issues with respect to the attorney/client privilege, as with other evidentiary privilege, may require further analysis, *see, e.g., Restatement (Second) Conflicts of Law* §§ 138-139, and may vary depending on the particular circumstances and procedural posture of a case.

4 *See, e.g., Swidler Berlin v. United States*, 524 U.S. 399, 408-10 (1998).

5 *See In re Grand Jury Subpoena # 06-1*, 274 F. App'x 306, 309 (4th Cir. 2008) (describing this issue as an "unsettled legal question").

other business entity, unless there is a successor, assignee, trustee or some other surviving organization or entity to which the privilege has passed.[6]

The few cases that address a committee's attorney/client privilege post-disbandment are based on the cases addressing a business entity's privilege after its dissolution. As such, a short overview of the reasoning in these cases, which rests on three main points, is warranted. First, in the context of a corporation or other business entity, the right to assert or waive the attorney/client privilege lies only with current managers or directors, as such personnel will change over time and eventually will no longer able to assert privilege on its behalf once the entity is dissolved.[7] Second, once dissolved, a business entity does not have any remaining family or relatives, or the reputational concerns of a deceased natural person.[8] Third, business entities generally cannot be sued once dissolved, unless there is an estate (*e.g.*, a bankruptcy estate) or some other successor-in-interest.[9] Thus, as far as the common law is concerned, the privilege will continue to exist when a defunct business entity has a successor or assignee or is still undergoing the dissolution or wind-down process.[10] The application of this reasoning to the attorney/client privilege of committees has resulted in the general conclusion that the privilege typically does not survive disbandment of the committee, absent language to the contrary in a plan or applicable law that allows the privilege to survive the dissolution of an entity.[11]

One case provides the most robust, and most recent, analysis. In *ARTRA*, the district court held that the privilege did not survive the committee's disbandment and could not be asserted by committee counsel or committee members post-disbandment.[12] The action was by a § 524(g) trust against an insurer of the debtor, and the insurer sought discovery — not only against the trust but also against committee counsel, including materials that would have been covered by the attorney/client privilege of the committee were it still in existence.[13] There was no dispute that under applicable law (here, Illinois law), the attorney/client privilege does not survive an entity's dissolution.[14] There was apparently no language in the plan or trust documents making the trust the committee's successor-in-interest.[15] In light of these two points, neither committee counsel nor the members of the committee (who themselves never held the committee's privilege) could assert the privilege post-disbandment.[16]

The outcomes of cases where the privilege has been held to survive disbandment have depended on circumstances that were not present in *ARTRA*. First, in *Bricker*, the district court analyzed the claim of privilege under Ohio law, which (unlike many other states) provides that the attorney/client privilege of a business entity survives its dissolution.[17] Second, in *Hardwood P-G*, the bankruptcy court determined that the trustee of a litigation trust created under a confirmed plan held — and therefore could assert — a disbanded committee's attorney/client privilege because the plan expressly provided that the trustee was the committee's successor-in-interest.[18]

Policies Surrounding the Formation of Committees

As previously noted, committees play a crucial role in chapter 11 cases, and protecting communications among counsel and committee members is central to a committee's ability to properly function. Section 1102 of the Bankruptcy Code provides that "as soon as practicable" after the petition date, the U.S. Trustee "shall appoint a committee of creditors holding unsecured claims."[19] As a practical matter, however, whether a committee is appointed depends on the extent of unsecured creditors interested in serving on the committee. The creditors, if any, that are selected are left to the discretion of the U.S. Trustee, who will typically seek to appoint members with diverse interests that adequately represent the overall body of unsecured creditors (*e.g.*, vendors and other trade creditors, bondholders, landlords, litigation claimants, etc.). Once appointed, committee members will owe fiduciary duties to the general unsecured creditors to ensure adequate representation of their interests in the case.

In addition to investigating the debtor and its financial affairs, identifying potential sources of recovery for unsecured creditors and negotiating the terms of major milestones in the case, such as the plan, the committee also serves "to advise the creditors of their rights and proper course of conduct, which requires competent and effective representation."[20] To develop strategies and positions most beneficial to the entire body of unsecured creditors, committee members and counsel must be able to engage in a robust exchange of positions and information. Without such a dialogue and the protection afforded to it by the attorney/client privilege, the committee cannot successfully synthesize and represent the interests of a diverse creditor body or perform its other functions. Consequently, and in light of the case law, counsel should consider taking proactive steps to ensure that the committee's attorney/client privilege will be preserved — even after disbandment.

Practical Applications

Unfortunately, there is most likely no viable way to predetermine which state law (if any) will apply to a claim of privilege, as the question depends on the law giving rise to the underlying cause of action. However, there are some other practical strategies for asserting that privileged materials arising from committee representations remain protected after the committee has been disbanded.

6 The same results follow from the text of various rules of evidence. *See, e.g.*, Del. R. Evid. 502(c) (tracking Univ. R. Evid. 502(c)). *See, e.g., Affiniti Colo. LLC v. Kissinger & Fellman PC*, 461 P.3d 606, 613-17 (Colo. App. 2019) (collecting cases); *Red Vision Sys. Inc. v. Nat'l Real Estate Info. Servs. LP*, 108 A.3d 54, 64-70 (Pa. Super. Ct. 2015) (similar); *Carrillo*, 2015 U.S. Dist. LEXIS 45988, at *4-11.

7 *See, e.g., Affiniti*, 461 P.3d at 615; *Red Vision*, 108 A.3d at 65.

8 *See, e.g., Affiniti*, 461 P.3d at 615; *Red Vision*, 108 A.3d at 67-68.

9 *See, e.g., Affiniti*, 461 P.3d at 615; *Red Vision*, 108 A.3d at 65-67.

10 *See, e.g., Affiniti*, 461 P.3d at 615-17; *Red Vision*, 108 A.3d at 65.

11 *See ARTRA*, 2011 U.S. Dist. LEXIS 110272, at *14-19; *Off. Comm. of Admin. Claimants v. Bricker*, Case No. 05-CV-2158, 2011 U.S. Dist. LEXIS 49504, at *7-10 (N.D. Ohio May 9, 2011); *In re Hardwood P-G Inc.*, 404 B.R. 445 (Bankr. W.D. Tex. 2009); *JMP Newcor*, 204 B.R. at 964.

12 *ARTRA*, 2011 U.S. Dist. LEXIS 110272, at *16-18.

13 *See id.* at *2-9, 15-16.

14 *Id.* at *17-18.

15 *See id.* at *16-18.

16 *See id.*

17 *See Bricker*, 2011 U.S. Dist. LEXIS 49504, at *7-10.

18 *See Hardwood*, 404 B.R. at 451.

19 11 U.S.C. § 1102(a)(1).

20 *Marcus v. Parker (In re Subpoena Duces Tecum)*, 978 F.2d 1159, 1160 (9th Cir. 1992).

Conclusion

As in *Hardwood*,[21] negotiating language in a plan that expressly preserves the committee's privilege would be ideal. This works well when, as in *Hardwood*, there is a litigation trust, liquidating trust or other similar body created under the plan, especially if committee counsel will represent such an entity after consummation. In the absence of any organizational successor to the committee, the plan could instead provide that the committee's members will be its successor with respect to the attorney/client privilege. It may also be possible to simply provide that the committee's attorney/client privilege will survive confirmation and the disbandment of the committee. However, given the reasoning previously discussed, language that specifically identifies who will hold and be able to assert the privilege post-disbandment seems more likely to succeed.

Similarly, the committee bylaws adopted after its organization could also provide that the members intend that the attorney/client privilege will survive disbandment and be transferred to each individual member post-disbandment. Moreover, the bylaws could also contain robust confidentiality provisions prohibiting individual members or committee counsel from disclosing any materials or information that would have been covered by the committee's attorney/client privilege during its existence (although such a confidentiality provision could in theory be even broader). To protect committee communications, either of these solutions, based on the case law, will bolster the ability of a committee member or counsel to assert the attorney/client privilege after disbandment. abi

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21 404 B.R. at 451.