
Case Alert: In re Leslie Controls, Inc.

Last week, Judge Sontchi decided the extent to which privileged communications shared with an *ad hoc* committee prior to commencement of a chapter 11 case may be protected by the “common interest doctrine.” The decision focused primarily upon a memorandum drafted by debtors’ insurance counsel regarding an insurer’s likely positions on recoveries. In concluding that the debtors had met their burden by establishing that the protection of the memorandum under the “common interest doctrine” was warranted, the Court made the following findings regarding application of the doctrine:

1. As a condition precedent to enforcing the “common interest doctrine,” the Court must determine that the underlying information is protectable by the producing party (such as attorney/client or attorney work product privileges).
2. The party invoking the privilege 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 has not otherwise been waived.”
3. The fact that the “common interest” parties are adversaries does not necessarily mean that the parties lack commonality of interest as to the specific information disclosed, as the privilege also does not require complete unity of interest. Instead, at the time that information and/or documents are shared, the parties must have an identifiable/shared legal interest in the particular issue “even if there are separate or overlapping commercial interests” (they are not “mere bystanders”). The privilege will be limited to the extent of the parties’ common interest.
4. Until there is an agreement regarding the common interest, “it is not objectively reasonable for [the parties] to believe that a communication of privileged material ... was protected by the common interest privilege...”

*James L. Patton, Jr., Chairman of Young Conaway Stargatt & Taylor, LLP, is the Legal Representative for Future Claimants in the *Leslie Controls* cases.

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Opinion

[In re Leslie Controls, Inc., Case No., 10-12199 \(Bankr. D. Del. Sept. 21, 2010\)](#)

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