



## Case Alert: In re Tribune Company, et. al

In connection with a complex discovery dispute amongst the proponents of competing plans, Chief Judge Kevin Carey was called upon to make a series of rulings concerning the community of interest privilege (a/k/a the "common interest privilege") including (i) existence and scope of the privilege, (ii) when such privilege commenced, and (iii) the extent to which communications that occurred during a court-mandated mediation process would be afforded protection pursuant to the Local Delaware Bankruptcy Rules and Federal Rule of Evidence 408. Although acknowledging in his "Epilogue" that "[a] determination involving [whether] the community of interest privilege applies is an intensely fact-and-circumstance-driven exercise," the Court analyzed the applicable facts and circumstances surrounding the noteholders' demand for discovery from the Tribune debtors, the official committee of unsecured creditors and certain lender parties who were co-proponents of a competing plan of reorganization.

The threshold for Chief Judge Carey's ruling hinged upon the applicability of the community of interest privilege. While the noteholder objectors argued that the privilege could not apply to parties with divergent economic interests, the Court rejected the position and adopted the ruling by Judge Sontchi in Leslie Controls that "the party invoking the protection of the common interest doctrine must establish: (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 was not otherwise waived." 437 B.R. 493, 496 (Bankr. D. Del. 2010). Applying the test to the facts, Chief Judge Carey found that the parties' joint interest in resolving the disputes among them by "obtaining approval of their settlement and confirmation of [their] plan" was sufficient to warrant enforcement of the community of interest privilege. Specifically, the Court ruled that the community of interest privilege commenced when the relative term sheets were completed and filed with the Court.

Next, the Court turned to the scope of the privilege. The objecting noteholders argued that the privilege should only encompass communications made or written by lawyers. The Court rejected this restrictive approach, finding that the privilege applies to communications that are subject to the work product and attorney-client privilege doctrines. As such, the Court agreed with the proponents of the privilege that "the appropriate inquiry is whether the subject matter of the communications would be protected by the attorney-client or work product privilege but for its disclosure to a party with the common interest."

The Court was then left to decide the extent to which communications related to court-mandated mediation should remain privileged under the Local Delaware Bankruptcy Rules, Fed.R.Evid. 408 and applicable case law. The objecting noteholders argued that the proponents put otherwise non-discoverable information "in issue" by arguing that the settlement was fair because it was the result of a judicial mediation process. The Court ultimately acknowledged that a general limitation on mediation communications was appropriate. However, Court held that the "mediation privilege" would only protect communications between the mediating parties on a mediation day and only with parties who were present at the mediation (either in-person or off-site).

As with any discovery dispute, and as acknowledged by Chief Judge Carey, the facts will overwhelmingly dictate the result in such disputes. However, the decision in Tribune provides additional guidance regarding the enforceability and scope of the community of interest privilege.

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### Opinion

[In re Tribune Company, et. al](#),  
Case No. 08-13141, 2011 Bankr.  
LEXIS 299 (Bankr. D. Del. 2011),  
Carey, Chief Judge

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