

Case Alert: *In re: Imerys Talc America, Inc.*

March 9, 2021

The Common Interest Doctrine Protects Privileged Communications Shared Among Plan Proponents, But Only to the Extent of Their Shared Common Legal Interests

On February 23, 2021, in *In re Imerys Talc America, Inc.* (“Imerys”),¹ Judge Laurie Selber Silverstein held that the “common interest doctrine” can protect from disclosure certain privileged communications exchanged among joint plan proponents. But Judge Silverstein cautioned that “context matters,” and concluded that the common interest doctrine is not available when parties’ interests concerning certain issues related to the jointly proposed plan are more adverse than aligned.

The common interest doctrine is an exception to the general rule that, when a party shares information otherwise covered by the attorney-client privilege or work product doctrine with a third party not jointly represented, the privilege can be waived. To invoke the common interest doctrine, a party must establish that (1) the communication was made by separate parties in the course of a matter of substantially similar legal interest, (2) the communication was designed to further that effort, and (3) the privilege has not otherwise been waived.

Two prior Delaware opinions discussed the common interest doctrine in the context of plan-related discovery: *In re Leslie Controls, Inc.* (Chief Judge Christopher Sontchi) and *In re Tribune, Co.* (former Judge Kevin Carey). Judge Silverstein reinforced the guideposts established in those cases, echoing Chief Judge Sontchi’s observation in *Leslie Controls* that parties engaged in plan negotiations can sometimes share common legal interests, and embracing former Judge Carey’s cautionary note in *Tribune* that the common interest doctrine does not necessarily extend to communications shared among plan proponents. Additionally, Judge Silverstein found a Southern District of New York case, *In re Quigley Co., Inc.* (Judge Stuart Bernstein), instructive for recognizing that plan proponents can simultaneously share common and adverse interests. Ultimately, Judge Silverstein clarified that:

1. The common interest doctrine can, but does not always, apply in the plan context.
2. Parties can simultaneously share a common legal interest with respect to some issues but not others.
3. To the extent that parties share a common legal interest, the common interest doctrine only protects communications that are in furtherance of that common legal interest, and not those implicating unrelated or adverse interests.

Concerning parties who share common and adverse interests simultaneously, Judge Silverstein found that plan proponents share a common legal interest with respect to maximizing total recoveries available under a plan and confirming the plan itself. However, plan proponents share adverse legal interests with respect to the apportionment of recoveries under a plan. In other words, there is a distinction between the “size of the pie” and the “pieces of the pie.”

¹ See [Letter Opinion](#), *In re Imerys Talc Am., Inc.*, No. 19-10289 LSS (Bankr. D. Del. Feb. 23, 2021) [Docket No. 3004].