By Michael Neiburg, Jacob Morton and Malak Doss

Invoking Common-Interest Doctrine to Protect Plan Communications

Michael Neiburg
Young Conaway Stargatt & Taylor, LLP
Wilmington, Del.

Jacob Morton
Young Conaway Stargatt & Taylor, LLP
Wilmington, Del.

Malak Doss
Young Conaway Stargatt & Taylor, LLP
Wilmington, Del.

Michael Neiburg is a partner, and Jacob Morton and Malak Doss are associates, with Young Conaway Stargatt & Taylor, LLP in Wilmington, Del.

Confirming a reorganization plan in a complex chapter 11 case often requires the cooperation of separately represented plan proponents. But cooperation among plan proponents often involves sharing privileged information, which might give rise to questions concerning waiver of the privilege. Fortunately, federal courts have long recognized a workaround — the "common-interest doctrine" — that allows separately represented parties who share common legal interests to exchange privileged information without waiving the privilege.[1] Determining whether and to what extent the plan proponents share common legal interests, however, is not a straightforward exercise.

In *In re Imerys Talc America Inc.*,[2] Hon. **Laurie Selber Silverstein** recently reinforced the common-interest doctrine in Delaware, holding that the doctrine can protect from disclosure certain privileged communications exchanged among plan proponents. However, the court cautioned that "context matters" and concluded that the common-interest doctrine is not available when parties' interests on certain issues are more adverse than aligned.[3]

The Common-Interest Doctrine

The common-interest doctrine is an exception to the general rule that sharing attorney/client privileged information with a third party destroys the privilege.[4] In its original form, the doctrine only protected communications between criminal co-defendants engaged in the development of defense strategies.[5] Federal courts eventually expanded the doctrine to protect all communications exchanged within a proper "community of interest."[6]

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 common interest, (2) the communication was designed to further that effort, and (3) the privilege has not otherwise been waived."[7] But plan proponents throw a wrench into the first prong of the inquiry. Although plan proponents are clearly aligned with respect to plan confirmation generally, plan proponents might be adverse with respect to various rights and obligations provided or imposed by the plan. Before *Imerys*, the U.S. Bankruptcy Court for the District of Delaware waded twice into these waters: *In re Leslie Controls Inc.*,[8] decided by Hon. **Christopher S. Sontchi**, and *In re Tribune Co.*,[9] decided by Hon. **Kevin J. Carey** (who is now retired from the bench).

Leslie Controls and *Tribune*: Setting the Groundwork

In *Leslie Controls*, the court held that the common-interest doctrine protected from disclosure certain documents exchanged between the debtor and other parties pre-petition during the development of a prenegotiated reorganization plan.[10] Thus, not only does the common-interest doctrine apply in the context of plan-related communications exchanged post-petition after the plan terms have been agreed to, but it can apply pre-petition before the parties agree to plan terms. The court reasoned that even before plan terms have been agreed to, the parties shared a common legal interest in "preserv[ing] and maximiz[ing] the insurance available to pay asbestos claims."[11] Further, the court reasoned that under the facts of the case, maximizing insurance proceeds was a legal interest because it would require the involvement of the bankruptcy court.[12]

The *Leslie Controls* court also clarified that "a matter of common interest" means "at least a substantially similar legal interest," but not necessarily a complete unity of interest.[13] Further, the court ruled that the doctrine applies even to parties with interests that "are adverse in substantial respects."[14] However, "communications relating to matters as to which they [hold] opposing interests ... lose any privilege."[15] Thus, parties negotiating a reorganiza-

1 *See, e.g., United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989); *Eisenberg v. Gagnon*, 766 F.2d 770, 787-88 (3d Cir. 1985), *cert. denied sub nom., Weinstein v. Eisenberg*, 474 U.S. 946 (1985); *In re Megan-Racine Assocs. Inc.*, 189 B.R. 562, 571 (Bankr. N.D.N.Y. 1995). Courts label the common-interest doctrine variously as the common-interest rule, the common-interest privilege or the joint-defense privilege (the latter is often used in criminal cases), among other terms.
2 *In re Imerys Talc Am. Inc.*, No. 19-10289 LSS (Bankr. D. Del. Feb. 23, 2021), ECF No. 3004 (letter opinion) [hereinafter "Letter Opinion"].
3 Letter Opinion at 3.
4 *See In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007), as amended (Oct. 12, 2007).
5 *Id.*
6 *Id.* (citing *Restatement (Third) of the Law Governing Lawyers* § 76); *In re Leslie Controls Inc.*, 437 B.R. 493, 496 (Bankr. D. Del. 2010).
7 *Leslie Controls* at 496.
8 *Id.* at 493.
9 *In re Tribune Co.*, No. 08-13141 KJC, 2011 WL 386827 (Bankr. D. Del. Feb. 3, 2011).
10 *Leslie Controls* at 493.
11 *Id.* at 500 (quoting debtor's letter brief; alterations in original).
12 *Id.*
13 *Id.* at 496 (quoting *Teleglobe*, 493 F.3d at 365).
14 *Id.* at 497 (quoting *In re Mortg. & Realty Tr.*, 212 B.R. 649, 653 (Bankr. C.D. Cal. 1997)).
15 *Id.* (quoting *In re Rivastigmine Patent Litig.*, No. 05 MD 1661 (HB/JCF), 2005 WL 2319005, *4 (S.D.N.Y. Sept. 22, 2005)) (alterations in original).

tion plan may invoke the common-interest doctrine before the parties agree to plan terms, even though, at such time, the parties have competing interests concerning the apportionment of the debtor's asset pie.

The court's opinion in *Tribune* adopted and extended the reasoning of *Leslie Controls* to resolve a discovery dispute between proponents of *competing* reorganization plans, but cautioned against a broad reading of its decision, instead advocating a fact-specific inquiry.[16] The three proponents of one of the competing plans — the debtors, the official committee of unsecured creditors and certain lenders — were engaged in mediated settlement discussions to resolve certain causes of action arising from the leveraged buyout of the debtors. The proponents of another plan argued that the debtors, unsecured creditors' committee and certain lenders shared no common interest, because the debtors' and committee's interests were in maximizing the estate, while the lenders wanted to resolve the causes of action arising from the leveraged buyout by paying the least amount possible.[17]

Although the debtors, unsecured creditors' committee and certain lenders did not share complete unity of interest, the court found that the parties' shared 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 common-interest doctrine. Declining to issue a black-letter rule, the court noted that its ruling was "not to say that parties who are co-proponents of a plan ... are always entitled to assert this privilege."[18]

Leslie Controls and *Tribune* cemented the common-interest doctrine in the plan-related discovery context. Although the court declined to issue any black-letter rules in either case, *Leslie Controls* and *Tribune* provided useful data points that practitioners could analyze to assess the applicability of the common-interest doctrine to protect communications shared among plan proponents.

Imerys: Further Clarifying the Common-Interest Doctrine

In *Imerys*, the joint plan proponents — the debtors, tort claimants committee and future claimants representative — invoked the common-interest doctrine to shield plan-related communications from numerous discovery requests propounded by Johnson & Johnson, Johnson & Johnson Consumer Inc. and a personal-injury law firm. The debtors also separately asserted a common legal interest between themselves and their nondebtor parent "over communications that discuss or address legal issues related to a proposed plan" prior to March 5, 2020, and over communications "regarding the bankruptcy action from at least [the petition date]."[19]

In ruling on the applicability of the common-interest doctrine, Judge Silverstein reinforced the guideposts established in *Leslie Controls* and *Tribune*, echoing Chief Judge Sontchi's observation in *Leslie Controls* that parties engaged in plan negotiations can sometimes share common legal interests. Judge Silverstein also embraced former Judge Carey's cautionary note in *Tribune* that the common-interest doctrine does not necessarily extend to communications shared among plan proponents.[20] In addition, Judge Silverstein found *In re Quigley Co. Inc.*, decided by Hon. **Stuart M. Bernstein**, instructive for recognizing that plan proponents can simultaneously share common and adverse interests.[21] Ultimately, the court 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; and (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.[22]

Concerning parties who share common and adverse interests simultaneously, Judge Silverstein found that the joint plan proponents shared a common legal interest with respect to maximizing total recoveries available under a plan and confirming the proposed plan itself. However, plan proponents were adverse with respect to the apportionment of recoveries under the plan.

In other words, there is a distinction between the "size of the pie" and "pieces of the pie." On the one side of this distinction, the joint plan proponents in *Imerys* shared common interests. On the other side, they did not. Applying the foregoing rubrics and insights, the court made various determinations regarding the reach of the common interest doctrine in *Imerys*, categorizing plan-related communications that could be protected by the common-interest doctrine and those that could not.

Communications Protected by the Common-Interest Doctrine

Specifically, the court found that the common-interest doctrine could extend the attorney/client privilege to three categories of plan-related communications. *First*, Judge Silverstein reasoned that general communications regarding plan confirmation once the plan proponents reached an agreement on the plan's material terms were protected by the common-interest doctrine because, as of that date, the plan proponents shared "a common legal interest in confirming the Plan."[23] *Second*, communications regarding the approval of certain settlements within the context of the debtors' plan were held protected by the common-interest doctrine, as the plan proponents shared a common legal interest in the approval of their respective settlement agreements to promote plan confirmation.[24] *Third*, the court concluded that the common-interest doctrine protected communications between the plan proponents regarding maximizing assets, which go to the size of the pie, rather than the pieces of the pie available to individual claimants, as such communications manifest an alignment of interests among plan proponents.[25]

16 *See Tribune*, 2011 WL 386827, at *9 ("A determination involving whether a community of interest privilege applies is an intensely fact-and-circumstance-driven exercise. The balancing of tensions [that] arise during the search for truth may, depending upon the particular circumstances involved, fall either way.").
17 *Id.* at *3.
18 *Id.* at *9.
19 Letter Opinion at 9.
20 *Id.* at 2-3.
21 *Id.* at 4 (discussing with approval *In re Quigley Co. Inc.*, No. 04-15739 (SMB), 2009 WL 9034027 (Bankr. S.D.N.Y. April 24, 2009)).
22 *Id.*
23 *Id.* at 8.
24 *Id.* at 10.
25 *Id.* at 11.

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Communications Not Protected by the Common-Interest Doctrine

Conversely, the court found that the common-interest doctrine could not protect from disclosure two categories of plan-related communications. *First*, communications regarding trust-distribution procedures (TDPs) were held to be not protected by the common-interest doctrine, given that the TDPs address how a trust's assets will be distributed among claimants and, therefore, implicate adversity of interests rather than commonality. In other words, the TDP terms speak to the pieces of the pie, not the size of the pie. *Second*, the court held that communications between the debtors and their nondebtor parent regarding a global settlement agreement incorporated into the plan were not made in the course of a matter of common *legal* interest until March 5, 2020.[26]

On March 5, the plan proponents reached an agreement on the material terms of the proposed plan, which included a global settlement agreement to resolve disputes with the debtors' parent. Drawing a distinction between common legal interests and purely commercial interests, the court reasoned that the debtors and their nondebtor parent did not share common legal interests in the development of the global settlement agreement before March 5, 2020, because (1) the debtors and their parent were not co-defendants in the prepetition litigation at issue in the settlement; (2) the parent did not share derivative liability with the debtors; and (3) there was no evidence of a joint defense agreement between the debtors and their parent, nor any evidence "of decades-long coordinated defense efforts."[27] Accordingly, before March 5, 2020, when the plan proponents agreed on the terms of the proposed plan, including the global settlement agreement, the debtors and their parent shared only a commercial interest in the resolution of disputes with the debtors' parent.

Conclusion

After *Imerys*, it is well settled in Delaware that the common-interest doctrine can apply in the context of plan-related discovery. *Imerys* further clarifies that a complete unity of interests is not necessary for parties to invoke the common-interest doctrine. Indeed, parties having both aligned and adverse interests may invoke the doctrine. However, when parties' interests are simultaneously adverse and aligned, the common-interest doctrine only protects communications concerning the parties' aligned interests. For these reasons, the applicability of the common-interest doctrine remains a fact-intensive, case-by-case inquiry.

One clear takeaway emerges from *Imerys* (and its two predecessor cases): plan proponents' interests are generally aligned with respect to maximizing the debtors' asset pie under a reorganization plan, but their interests are adverse with respect to apportioning the pie among constituencies. Accordingly, when plan proponents cooperate for the purpose of negotiating or confirming a plan, they should bear in mind that communications shared in furtherance of asset apportionment, as opposed to asset maximization, might not be covered by the common-interest doctrine. abi

26 *Id.* at 9.

27 *Id.*