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Bankruptcy can considerably complicate the evaluation of legal privilege, due to the presence of shifting corporate control, parties with rapidly changing stakes, and fiduciary duties owed to multiple entities with differing interests. Though common law legal privilege and other comparable doctrines generally apply to disputes that arise in bankruptcy (see Federal Rule of Bankruptcy Procedure 9017 (providing that the Federal Rules of Evidence apply in cases brought under the Bankruptcy Code); see also Federal Rule of Evidence 501), unsuspecting counsel and clients may encounter disagreeable discovery surprises if they are not attentive to who is represented by counsel, who is privy to communications with counsel, and when interests between parties begin to diverge. This article will endeavor to briefly highlight common legal privilege perils that might arise in the bankruptcy context through examining (1) pre-filing issues relating to the assertion of privilege against corporate family members or former officers and directors, and (2) issues pertaining to the debtor's privilege post-filing.

Pre-Filing Privilege Issues

Counsel should consider that pre-filing corporate family interactions may affect the assertion of privilege post-filing. Prior to a bankruptcy, related entities will often use the same counsel due to aligned interests and overlapping officers and directors. Once bankruptcy becomes likely, however, the continued sharing of counsel and communications can frustrate claims of privilege.

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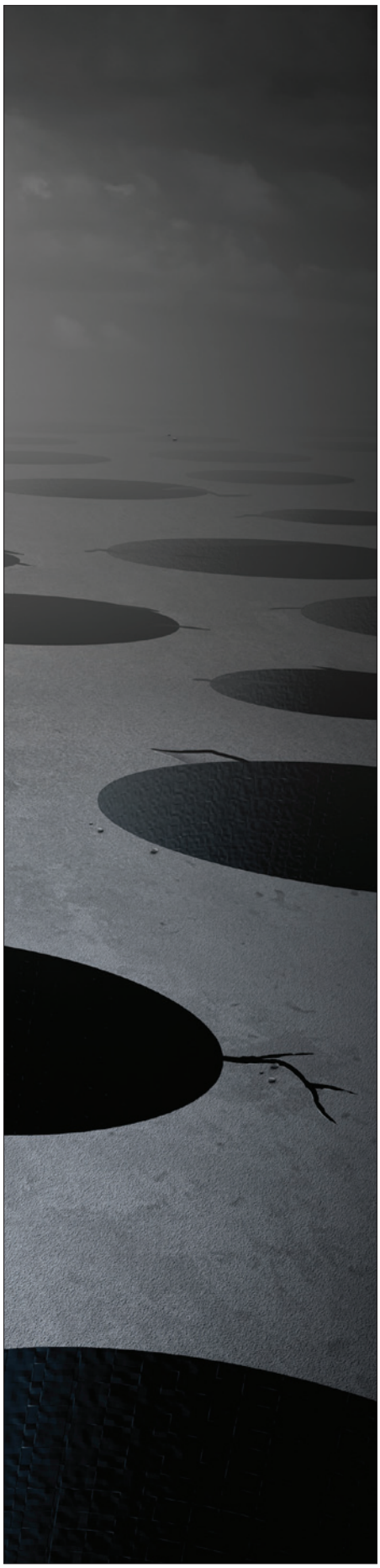
Parent/Subsidiary Disputes: When bankruptcy becomes likely, the interests between the parent and subsidiary may diverge—for example when a debtor subsidiary has causes of action against the non-debtor parent—which might result in a dispute regarding the discoverability of their prior shared communications.

In re Teleglobe Commc'ns Corp. exemplified such a dispute between a debtor-subsidiary and its parent corporation over documents created by and in communication with attorneys who represented the entire corporate family. See *Teleglobe USA v. BCE (In re Teleglobe Commc'ns)*, 493 F.3d 345, 353 (3d Cir. 2007). The court concluded that the parent could be compelled to produce documents over which it claimed privilege if, on remand, the district court determined that the parent entity and debtor were "jointly represented by the same attorneys on a matter of common interest that is the subject-matter of those documents" (id.)—which the subsequent district court found that they did not. See *In re Teleglobe Commc'ns*, 392 B.R. 561 (Bankr. D. Del. 2008). Thus, as the court in *Teleglobe* notes, in-house counsel should "take care not to begin joint representations except when necessary, limit the scope of joint representations, and seasonably to separate counsel on matters in which subsidiaries are adverse to the parent." *Teleglobe USA*, 493 F.3d at 375.

Former Directors and Officers: Similar to corporate family members, former directors and officers may also attempt to use their roles in the corporate entity to access pre-filing privileged communications. Whether a former director and officer is entitled to compel production of such communications depends on whether the court views the corporation and its officers as joint clients or not. Although federal courts have frequently taken the approach that the corporation is the sole client, thereby dramatically reducing the ability of former officers



and directors to break privilege (see *Fitzpatrick v. AIG*, 272 F.R.D. 100, 106, 108-09 & n.6 (S.D.N.Y. 2010) (collecting cases)), the scope of legal representation, and the attendant control over legal privilege, varies widely by jurisdiction. (For instance, in *Kirby v. Kirby*, a non-bankruptcy case, the court required production of documents to plaintiffs/former directors, stating that the "directors are all responsible for the proper management of the corporation, and it seems consistent with their joint obligations that they be treated as the 'joint client' when legal advice is rendered to the corporation through one of its officers or directors." No. 8604, 1987 WL 14862, at *7 (Del. Ch. July 29, 1987). Although *Kirby* was not a bankruptcy case, practitioners who frequently encounter Delaware law should remain cognizant of its continued impact: It remains good law in Delaware, and may be binding on federal courts where Delaware law governs the dispute.)

Post-Filing Privilege Issues

Aside from former members of the corporate family, other post-filing entities may appropriate control of the debtor's legal privileges. Generally, a corporation that has filed for bankruptcy retains control over legal privileges that govern the admissibility of evidence in bankruptcy litigation. But this general principle may not apply when the corporation no longer exercises complete control over the debtor's operations and assets. See, e.g., *Am. Int'l Specialty Lines Ins. Co v. NWI-I*, 240 F.R.D. 401, 405 (N.D. Ill. 2007) (observing that "the power to invoke or waive a corporation's attorney-client privilege is an incident to control of the corporation" and collecting cases). Some examples of when such control could shift include:

Bankruptcy Trustee: Most notably, the appointment of a bankruptcy trustee can result in management losing complete control over its ability to assert legal privilege. For instance, the Supreme Court has held that a bankruptcy trustee has control over a debtor's right to waive the attorney-client privilege regarding certain communications that occurred before the debtor filed for a Chapter 7 petition. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, (1985).

Court Appointed Examiner: Although the powers of a court appointed examiner in bankruptcy are more restricted than that of a bankruptcy trustee, where those powers approach those of a trustee, an examiner may also succeed in gaining control over attorney-client privilege. See, e.g., *In re Boileau*, involving a converted Chapter 11 case in which the debtor and official committee of unsecured creditors agreed to appoint a bankruptcy examiner. Though the court was careful to cabin its holding so an examiner will not typically have the authority to waive-attorney client privilege on behalf of the debtor, such control may exist where they have taken on trustee-like powers. 736 F.2d 503 (9th Cir. 1984).

Litigation/Liquidation Trustees: In addition to a bankruptcy trustee and examiner, other entities acting on behalf of a debtor in more limited circumstances, including a litigation trustee, may invoke attorney-client privilege to prevent the production of privileged documents. In *Osherow v. Vann (In re Hardwood P-G, Inc.),* the court concluded that the debtor's control over attorney-client privilege had transferred to the litigation trustee, reasoning that "[a]ll of the Debtor's assets (including those cause of action that had been asserted on behalf of the debtor estate by the Committee) were transferred to the Litigation Trust under the sole management and control of the Trustee." *Osherow v. Vann (In re Hardwood P-G*), 403 B.R. 445, 456 (Bankr. W.D. Tex. 2009).

Creditors' Committee: Finally, note that in contrast to a bankruptcy trustee, a creditors' committee that has obtained derivative standing to pursue claims on the debtors' behalf generally does not have a broad grant of authority to control the debtor's privilege. (In *Official Committee of Asbestos Claimants of G-I Holdings v. Heyman*, the court concluded that the committee did not, by virtue of the appointment of the trustee, have the authority to waive attorney-client privilege on the debtors' behalf, as the committee had "no responsibility or authority to operate or manage the debtor corporation" and owed a "duty only to its constituent creditors," who were pursuing tort claims. Accordingly, "the interests of a trustee and a creditors' committee" were not "entirely congruent," and the court declined to bestow the committee with the power granted to the *Weintraub* trustee. 342 B.R. 416, 423 (S.D.N.Y. 2006).)

As the aforementioned indicates, who inherits the debtors' privileges will often turn on what the bankruptcy plan and related agreements specify regarding ownership of the documents and privileges, as well as control over the operations and communications.

Conclusion

Counsel should be aware of the relevant parties' interests at all times, the scope of representation of joint clients and common interests, and anticipate how those interest can diverge in the future. Counsel should always be mindful once bankruptcy becomes possible of the risk that changing corporate structures and interests can result in privilege finding of waiver in in subsequent bankruptcy litigation against both corporate family members and former directors and officers. After filing, the debtor may find that it has lost the ability to invoke or waive privilege, which instead belongs to a trustee, examiner, or even a litigation trustee.