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UNDERSTANDING COMMON-INTEREST DOCTRINE

The common-interest doctrine protects communications made between attorneys when their clients share a common legal interest. It is an exception to the general rule that privileged information shared with third parties generally waives the privilege. In this article, the authors discuss the doctrine and the various requirements and issues that it raises, citing numerous (and sometimes conflicting) cases.

By David M. Hillman, Michael T. Mervis, and Javier F. Sosa *

The attorney-client privilege protects communications between attorneys and their clients, and the work-product doctrine protects documents prepared by or for attorneys in anticipation of litigation. Privileged information shared with third parties generally waives the privilege. The common-interest doctrine is an exception to this rule. Under it, the disclosure of otherwise privileged information to one or more third parties represented by separate counsel may not result in a waiver if those parties share a common legal interest.

COMMON-INTEREST DOCTRINE GENERALLY

As an initial matter, it is important to note that the common-interest doctrine is not a free-standing privilege. Rather, it is an exception to the general rule that disclosure of privileged communications or work-product to a third-party constitutes a waiver of privilege.[1] As such, application of the common-interest doctrine requires an underlying attorney-client or work-product privilege.[2]

The common-interest doctrine protects communications made between attorneys when their respective clients share "a common legal interest."[3] Courts have generally upheld common-interest privilege claims even where communications are made in the absence of attorneys, so long as the communications are otherwise privileged.[4]

[1] *Shamis v. Ambassador Factors, Corp.*, 34 F. Supp. 2d 879, 893 (S.D.N.Y. 1999) ("The 'common-interest' rule is a limited exception to the general rule that the attorney-client privilege is

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waived when a protected communication is disclosed to a third party outside the attorney-client relationship.").

[2] *Sokol v. Wyeth*, No. 07 Civ. 8442, 2008 WL 3166662, at *5 (S.D.N.Y. Aug. 4, 2008) ("If a communication is not protected by the attorney-client privilege or the attorney work-product doctrine, the common-interest privilege does not apply.").

[3] *In re Teleglobe Commc'ns*, 493 F.3d 345, 364 (3d Cir. 2007).

[4] *See, e.g., Gucci Am., Inc. v. Gucci*, No. 07 Civ. 6820, 2009 WL 8531026, at *1 (S.D.N.Y. Dec. 15, 2008) (noting that where

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The existence of a "common legal interest" is highly fact-specific. In fact, one court has described the state of the law as "unsettled."[5] Courts differ in subtle but material ways in how they articulate the degree of commonality required to invoke the doctrine. In the Third Circuit, for example, the common legal interest need not be identical, but only "substantially similar."[6] In the First Circuit, identical or "nearly identical" legal interests are necessary to establish a common-interest.[7]

IS PENDING OR ANTICIPATED LITIGATION REQUIRED?

The historical roots of the common-interest privilege lie in criminal prosecutions against multiple co-defendants.[8] The doctrine (also known as the joint defense privilege) "allowed the attorneys of criminal co-defendants to share confidential information about defense strategies without waiving the privilege as against third parties."[9] In civil litigation, the common-interest privilege was created because civil co-defendants commonly have the same objectives.[10]

State and federal courts, however, have not adopted a uniform view on the applicability of the common-interest doctrine outside the context of a pending litigation (or an anticipated suit). New York, for example, requires that there be pending or anticipated litigation for the common-interest privilege to apply.[11] Delaware, by comparison, codified its common-interest privilege and does not require actual or pending litigation. Del. R. Evid. 502(b)(3). Federal courts are also split. A pending or anticipated litigation is not required, for example, in the Seventh Circuit, *United States v. BDO Seidman, LLP*,[12] whereas the Fifth Circuit requires litigation or a palpable threat of litigation to invoke the common-interest doctrine.[13] In at least the

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"information that is otherwise privileged is shared between parties that have a common legal interest, the privilege is not forfeited even though no attorney either creates or receives that communication"); *In re Tribune Co.*, No 08-13141 (KJC), 2011 WL 386827, at *5-6 (Bankr. D. Del. Feb. 3, 2011) (noting that limiting common-interest to attorney-prepared communications is "too restrictive" and holding that proper inquiry is "whether the subject matter of the communication at issue would be protected by the attorney-client or work-product privilege but for its disclosure to a party with the common-interest"); *Reginald Martin Agency, Inc. v. Conseco Med. Ins. Co.*, 460 F.Supp.2d 915, 919 (S.D. Ind. 2006) (common-interest doctrine may prevent waiver of otherwise attorney-client privileged communications among parties even when counsel did not participate).

The Third Circuit in *Tribune* rejected a common misreading of dicta in *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345 (3d Cir. 2007), which suggested that the common-interest doctrine applied only to communications between attorneys. As the *Tribune* court noted, the formulation of the common-interest doctrine came in the context of an interpretation of Delaware Rule of Evidence 502(b)(3) and was not intended to be a general statement of law. *Tribune*, 2011 WL 386827, at *6, n.15. Moreover, the Third Circuit's interpretation of Delaware Rule of Evidence 502(b)(3) has been rejected by subsequent Delaware decisions. *See, e.g., Rembrandt Techs., L.P. v. Harris Corp.*, C.A. No. 07C-09-059-JRS, 2009 WL 402332, at *8 (Del. Super. Ct. Feb. 12, 2009).

[5] *Leader Tech., Inc. v. Facebook, Inc.*, No. 08-862-JJF, 2010 WL 2545960, at *2 (D. Del. June 24, 2010).

[6] *See, e.g., In re Teleglobe*, 493 F.3d at 365.

[7] *See, e.g., F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000) ("The term 'common-interest' typically entails an

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identical (or nearly identical) legal interest as opposed to a merely similar interest."); *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 390 F. Supp.3d 311, 327 (D.P.R. 2019) (holding that, for common-interest to attach, parties were not required to prove that they have "nearly identical interests in all respects," so long as the parties shared some identical interests).

[8] *Chahoon v. Commonwealth*, 62 Va. 822 (1871).

[9] *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 57 N.Y.3d 616, 625, (2016).

[10] *See, e.g., In re LTV Sec. Litig*., 89 F.R.D. 595, 604 (N.D. Tex. 1981).

[11] *Ambac Assurance Corp.*, 57 N.Y.3d at 631-32.

[12] 492 F. 3d 806, 816 (7th Cir. 2007).

[13] *In re Hardwood P-G, Inc.*, 403 B.R. 445, 459 (Bankr. W.D. Tex. 2009); *U.S. v. Newell*, 315 F.3d 510, 525 (5th Cir. 2002).

Fifth Circuit, bankruptcy constitutes litigation for purposes of the common-interest doctrine.[14]

WHICH LAW APPLIES?

Choice of law can be an important consideration because of substantive differences between state and federal law and the laws of each Circuit. Many states have not established a specific choice of law doctrine regarding privilege. Others favor the approach in section 139 of the Restatement (Second) of Conflict of Laws, which applies the law of the state with the "most significant relationship" to the communication at issue. Courts have held that the majority of states that do not explicitly follow the Second Restatement apply an interest-based analysis closely resembling the Second Restatement's approach.[15]

Federal courts, on the other hand, are governed by Rule 501 of the Federal Rules of Evidence. Under FRE 501, federal courts considering a claim of privilege apply federal common law to federal question claims or defenses but, when sitting in diversity, "state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Thus, in a breach of contract case where the contract was governed by New York law, a federal court applied New York law to the parties' claims that certain communications were protected by the attorney-client and common-interest privilege.[16]

Some cases present mixed federal and state law questions. In these cases, federal courts must still apply state privilege law to claims and defenses governed by state law and federal common law to federal issues.[17]

Finally, federal courts must sometimes engage in a deeper choice of law analysis to determine *which* state's laws apply to a particular claim or defense, and thus the privilege claim, under FRE 501. In *Wellin v. Wellin*,[18] a New York-based client sought a protective order over communications made with her South Carolina-based lawyers, and the issue before the court was whether to apply New York or South Carolina privilege law. The court noted that federal courts "tasked with applying state law must apply the forum state's choice of law rules," and so looked to South Carolina's choice of law rules to determine what privilege law applies.[19] Further complicating the court's analysis was the fact that South Carolina had not yet adopted a choice of law doctrine applicable to privilege issues. To resolve the issue, the court turned to the Second Restatement of Conflict of Laws as the "prevailing approach among states that have established a choice of law doctrine regarding privileges." Under Section 139 of the Second Restatement, courts consider where the communication "took place" or "was received" to determine which state has the most significant relationship to the communication. Modern communications, however, are difficult to limit to one location. Here, the client, based in New York, called and e-mailed with her lawyers in South Carolina. Unable to assign a specific location to the calls or e-mails, the court instead considered "the state where the relationship between the parties was centered" and concluded that, even though the client was at all times in New York, the "relationship" with counsel was centered in South Carolina and South Carolina privilege law should apply.[20]

APPLICATION OF THE COMMON-INTEREST DOCTRINE IN A TRANSACTIONAL CONTEXT

The common-interest doctrine can apply in a transactional context, but the "interest" common to the

[14] *In re Hardwood P-G, Inc.*, 403 B.R. at 460.

[15] *In re Yasmin*, No. 3:09-md-02100, 2011 WL 1375011, at *8 (S.D. Ill. Apr. 12, 2011) (surveying all 50 states and U.S. territories and concluding that most apply the Second Restatement's "most significant relationship" test or a similar analysis to choice of privilege law).

[16] *HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 70 n.6 (S.D.N.Y. 2009); *see also Argos Holdings Inc. v. Wilimgton Trust Nat'l Assoc.*, No. 18-cv-5773, 2019 WL 1397150, at *2-3 (S.D.N.Y. Mar. 28, 2019) (applying New York privilege law to attorney-client and common-interest privilege claims because "this is a diversity action regarding a claim for which New York law supplies the rule of decision" for a transaction governed by New York law).

[17] *See, e.g.*, *Hunt v. Schauerhamer*, No. 2:15-cv-1, 2016 WL 75064, at *2 (D. Utah Jan. 6, 2016) (applying Utah privilege

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law in federal 1983 action where "discrete issue now before the court concerns the existence and interpretation of a settlement agreement" and "Utah law supplies the rule of decision on the issue"); *In re Superior Nat'l Ins. Gr.*, 518 B.R. 562, 566-67 (Bankr. C.D. Cal. 2014) (applying California privilege law to adversary proceeding in Chapter 11 bankruptcy where claims were all state law causes of action, but noting that "[i]f any of the claims were governed by federal law, then federal law of privileges would govern the entire proceeding.").

[18] 211 F. Supp. 3d 793 (D.S.C. 2016).

[19] *Id.* at 800-01.

[20] *Id.* at 805.

parties must be predominantly *legal* in nature rather than commercial.[21]

The best way to understand these cases is to recall that, in the context of a single attorney-client relationship, business advice (as opposed to legal advice) is not protected. This same distinction applies in the context of the common-interest doctrine. If the parties' common-interest is predominantly business, then the common-interest doctrine does not protect communications among them. Conversely, if the common-interest is predominantly legal, then the common-interest doctrine will protect communications among the clients. The legal standard is easy to articulate, but application can be difficult because often times the distinction between legal and business interests are blurred.

APPLICATION OF THE COMMON-INTEREST DOCTRINE IN THE BANKRUPTCY CONTEXT

The common-interest doctrine applies in bankruptcy, and often arises in context of plan confirmation discovery. In *In re Quigley Co.*,[22] certain creditors opposing confirmation of the debtor's plan sought discovery of documents shared between the debtor and its non-debtor parent related to the negotiation and development of the plan. The objecting creditors argued that the debtors and non-debtor parent held divergent interests because the debtor (as a fiduciary to all creditors) was duty-bound to procure the largest possible contribution from its non-debtor parent to fund a trust to be established under the proposed plan. The non-debtor parent, on the other hand, owed no duties to the debtor or its creditors and wanted to minimize its contributions. Despite these differences, the bankruptcy court determined that the debtor and its non-debtor parent nevertheless had a common legal interest because they (1) were defendants in numerous prepetition asbestos suits, (2) for decades had coordinated a joint defense, and (3) had engaged in joint strategy to file and prosecute the plan, which would resolve their joint asbestos-related liabilities. As a result, "they share[d] a common-interest and overall strategy geared toward the confirmation of [debtor's] plan" and the plan-related communications were therefore protected by the common-interest doctrine.[23]

In *In re Leslie Controls*,[24] the Delaware bankruptcy court addressed a confirmation discovery dispute centered around privileged memoranda prepared by the debtor's counsel concerning strategies in anticipation of possible litigation in a bankruptcy case and/or subsequent insurance coverage litigation. The debtor shared the memoranda before its bankruptcy filing with counsel for an ad hoc committee of asbestos claimants and a proposed future claims representative in furtherance of developing a consensual plan of reorganization. The objecting insurers argued that the parties did not share a common-interest with respect to insurance proceeds because, at the time the memoranda were shared prepetition, the parties were adversaries (at least until they reached agreement on a plan). The bankruptcy court rejected a *per se* rule that parties engaged in negotiations could never share a common-interest and opted instead for a case-by-case analysis. The court concluded that, notwithstanding ongoing plan negotiations and the fact that the parties had disparate interests in allocating the insurance pool, they shared a common-interest in maximizing insurance coverage.

[21] *Compare Schaeffler v. U.S.*, 806 F.3d 34, 41 (2d Cir. 2015) (holding that common-interest doctrine protected tax analyses prepared for a client company and shared with a consortium of lenders in the context of a corporate refinancing and restructuring transaction because the lenders and the company shared a common legal interest in the tax treatment of the transaction and such treatment would likely involve a "legal encounter with the IRS"); *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 115 F.R.D. 308, 309 (N.D. Cal. 1987) (holding disclosure by prospective seller of patent of legal opinion letter regarding the validity and possible infringement of patent was covered by the common-interest privilege, even where one reason for disclosure was to persuade the prospective buyer, where buyer and seller faced likelihood of joint litigation over the patent); *with Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189, 190 (D. Del. 2004) (holding that communications made during negotiations between two corporations were not privileged because they were made for the purpose of persuading one corporation to invest in the other); *TIFD III-E Inc. v. U.S.*, 223 F.R.D. 47, 50 (D. Conn. 2004) (holding that communications shared between parties entering into a transaction to form partnership were not covered by common-interest privilege because they were exchanged in furtherance of a business goal, not a legal goal); *Katz v. AT&T Corp.*, 191 F.R.D. 433, 438 (E.D. Pa. 2000) (patent licensing company had to disclose documents relating to negotiation of sublicensing agreement because negotiating parties never shared a common legal interest until the sublicense agreement was signed).

[22] No. 04-15739 (SMB), 2009 WL 9034027, at *4 (Bankr. S.D.N.Y. Apr. 14, 2009).

[23] *Id*.

[24] 437 B.R. 493 (Bankr. D. Del. 2010).

In *In re Tribune*,[25] the Delaware bankruptcy court addressed discovery in the context of competing plans. Specifically, certain noteholders (who proposed a competing plan) sought discovery from the debtors, the creditors' committee, and certain lenders with respect to their negotiation of an LBO-related litigation settlement in their own plan (the "DCL Plan"). The noteholders argued that the debtor and committee did not have a common legal interest with the lenders because (1) the debtor and the committee sought to maximize the payment from the lenders while (2) the lenders sought to pay as little as possible to resolve the litigation claims. The bankruptcy court disagreed and held that once the proponents of the DCL Plan agreed upon material terms of a settlement, they shared a common legal interest of obtaining approval of the settlement through plan confirmation.

Finally, in *Imerys Talc America, Inc.*,[26] certain creditors sought discovery of plan-related communications (1) among the joint plan proponents (the debtors, the tort claimants committee, and the future claimants representative) and (2) between the debtor and its non-debtor parent. The Delaware bankruptcy court held that plan-related communications among the plan proponents and non-debtor parent *after* they 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." The bankruptcy court, however, permitted discovery of communications between the debtor and its non-debtor parent *before* they reached agreement on a settlement to fund a plan trust. To reach this conclusion, the court distinguished *Quigley*, which applied the common-interest doctrine to protect pre-plan communications between the debtor and its non-debtor parent. Unlike *Quigley*, there was no evidence in *Imerys* that the non-debtor parent and debtor were co-defendants in pre-bankruptcy asbestos suits or a decades-long coordinated defense. Thus, they had a commercial interest (as parent and subsidiary), but not a common legal interest. The bankruptcy court also found that the common-interest doctrine did *not* protect communications among the plan proponents regarding trust-distribution procedures ("TDPs") because TDPs address how a trust's assets will be distributed among claimants and, therefore, implicate adverse of interests among the plan proponents rather than commonality. These distinctions illustrate that the determination of commonality is fact-specific and not a one-size-fits-all approach.

WHEN DOES THE COMMON-INTEREST DOCTRINE TAKE EFFECT?

It is common in complex Chapter 11 cases for one-time adversaries to become allies during the course of the case. Where adversaries have become allies, a common-interest privilege may apply to their communications at such time as a court determines the parties shared a common legal interest. Courts have varied in determining what that point of time should be, however.[27]

In the transactional context, the common-interest privilege may apply before the parties reach a final written agreement regarding the transaction and even if the parties never ultimately come to an agreement or pursue a joint enterprise.[28]

[25] No 08-13141 (KJC), 2011 WL 386827, at *1 (Bankr. D. Del. Feb. 3, 2011).

[26] No. 19-10289, ECF No. 3004 (Bankr. Del. Feb. 23, 2021) (Letter Opinion).

[27] *See, e.g., Tribune*, 2011 WL 386827, at *18 (finding common-interest privilege attached to communications after court filing of term sheet setting forth material terms of agreement among previously adverse parties); *see also In re Leslie Controls*, 437 B.R. at 502-503 (holding common-interest privilege attached to communications among debtor, committee and future claimants' representative because they shared common legal interest once they began working together to recover insurance proceeds for the estate, even though they remained adverse as to how to divide the proceeds); *In re Imerys Talc America, Inc.*, Case No. 19-10289, Dkt. 3004 at 8 (plan proponents shared a common legal interest upon reaching an agreement in principle on the material terms of Chapter 11 plan); *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17-04780, ECF No. 1652 (D.P.R. Oct. 10, 2019) (noting, in context of Rule 9019 motion to approve a settlement, that the settling parties maintained a common interest at the point of their written preliminary agreement, even though it was not binding and the parties had not yet agreed on "all" material terms); *In re Almatis B.V.*, No. 10-12308, 2010 Bankr. LEXIS 6377 at *5 (Bankr. S.D.N.Y. June 21, 2010) (holding that common-interest privilege arose among debtors, lenders and committee upon execution of plan support agreement).

[28] *See, e.g., Katz v. AT&T Corp.*, 191 F.R.D. 433, 437-38 (E.D. Pa. 2000) (noting that common-interest privilege may apply even if there is no final agreement or the parties do not ultimately pursue the enterprise over which they shared a common interest); *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308, 310 (N.D. Cal. 1987) (holding that common interest applied to communications in anticipation of litigation about proposed merger even though the parties did not ultimately merge and litigation never occurred).

MUST THE CLAIMED COMMON-INTEREST BE MEMORIALIZED?

There is no requirement that the parties have a final, formal agreement to advance a particular legal interest, but such an agreement or similar written markers aid in proving the existence of a common legal interest.[29]

BURDEN OF PROOF

The party asserting the common-interest privilege has the burden of first establishing the underlying claimed privilege and then establishing that the parties had the requisite shared legal interest.[30] The showing "must be based on competent evidence, usually through the admission of affidavits, deposition testimony or other admissible evidence."[31] As such, the "burden cannot be met by 'mere conclusory or ipse dixit assertions' in unsworn motion papers authored by attorneys."[32]

CONCLUSION

While there are no bright line rules, parties who intend to assert the protection of the common-interest doctrine should keep in mind the following:

- an underlying privilege must be established, *i.e.*, attorney-client privilege and/or work-product doctrine;
- parties must share a common legal, not just business, interest, and this legal interest may not be applied broadly, but rather decided on an issue-by-issue basis given the specifics of the parties' relationship;
- which privilege law will apply, given the subtle but important differences between the laws of different circuits and different states;
- depending on the applicable law, the common legal interest must be "nearly identical" or "substantially similar";
- whether it is necessary for there to be pending or anticipated litigation depends on the applicable law;
- one-time adversaries can share common legal interests when they settle their dispute, but courts have varied in determining when the common interest arises; and
- although an executed common-interest agreement is not required, written evidence, *e.g.*, marking communications and documents as being subject to a common legal interest, may support a finding of common-interest privilege. ■

[29] *See, e.g.*, *Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272, 282 (4th Cir. 2010) (written agreement explained parties' shared interest in limiting scope of any injunction in pending litigation, and clearly manifested agreement to work together toward that end); *HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 72, n.12 (S.D.N.Y. 2009) (noting that common-interest doctrine may apply where a party has demonstrated the existence of an agreement to pursue a common legal strategy but the agreement need not be in writing); *In re Cherokee Simeon Venture I, LLC*, 2012 WL 12940975, at *2 (Bankr. D. Del. 2012) (holding that common interest does not require a formal written agreement and a "meeting of the minds is sufficient provided communications were given in confidence and the clients reasonably understood them to be so given."); *Longview Power, LLC et al. v. First American Title Ins. Co.*, No. 14-50369 (BLS) at *4 (Bankr. D. Del. Dec. 10, 2014) (Letter Ruling) (finding "common-interest" markers on communications when sent were indicative of parties' intent at the time communication were made and supported argument that the parties were developing a common legal strategy, even in the absence of a formal common-interest agreement).

[30] *Waymo LLC v. Uber Technologies, Inc.*, 870 F.3d 1350, 1360 (Fed. Cir. 2017) ("[T]o invoke the common-interest doctrine, a party first must demonstrate the elements of privilege and then must demonstrate that the communication was made in pursuit of common legal claims including common defenses."); *Acceleration Bay LLC v. Activision Blizzard, Inc.*, No. 16-cv-00453, at *2 (D. Del. Feb. 9, 2018) (noting that party asserting privilege had burden of establishing the elements of attorney-client privilege and elements of common-interest privilege).

[31] *Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 472 (S.D.N.Y. 2003).

[32] *Id.* (citing *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 146 (2d Cir. 1987)).