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Benefits and Issues Surrounding Appointment of Independent Directors

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Overview

- When a company becomes financially distressed, management may appoint particular individuals or groups of individuals, previously unaffiliated with the company, to act as independent directors.
  - The duties of these independent directors range from evaluating restructuring proposals or running sale processes to investigating claims against prepetition shareholders or lenders.
- Over the last twenty years or so, the use of independent directors on boards has nearly doubled.
  - According to a recent presentation from the Financial Lawyers Conference, 48.4% of boards claimed director independence in 2019 compared to 3.7% of boards in 2004.
- While there are clearly benefits to having an independent director on the company's board, professionals have raised issues regarding such appointments.

Appointment of Independent Directors: The Benefits

- According to some bankruptcy courts and professionals, the utilization of an independent director is a matter of good corporate governance.
  - The appointment of an independent director ensures the company's decisions are – from an objective standpoint – sound choices calculated to benefit the company.
  - An independent director can validate an action, whether it be a course of action or submission of a general restructuring plan.
- For some, appointment of an independent director displays the company's decision-making process as a thorough and honest process that does not favor insiders.
  - Further, the presence of a newly added independent director may help restore creditor confidence in the company.
- Additional benefits of appointing an independent director include:
  - **Avoidance of Conflicts of Interest**
  - **Resolution of Intercompany Conflicts**
  - **Access to Restructuring Expertise**

Appointment of Independent Directors: Avoidance of Conflicts of Interest

An independent director acts as an impartial and unbiased director, helping to avoid any conflicts of interest with respect to strategic decisions to be made in the bankruptcy. As a result, courts are typically willing to give substantial deference to the judgment and decision of independent directors.

***In re Edison Mission Energy*, No. 12-49219 (Bankr. N.D. Ill.)**

- In the years leading up to Edison Mission Energy's ("***Edison***") bankruptcy, its parent company – Edison International – received a number of significant distributions from Edison.
- Edison's creditors asserted that Edison International's conduct was the exercise of "abusive domination and control," calculated to drain Edison's value for the benefit of its parent.
- Upon suggestion from its restructuring counsel, Edison engaged two independent directors to serve as the sole members of its newly formed investigation and compensation committee. The committee was charged with investigating such allegations and deciding whether claims should be brought.
  - The company determined that the independent directors would make decisions on topics for which certain directors might have a conflict.
- As part of Edison's proposed plan sponsor agreement, Edison and its economic stakeholders agreed to distribute a total of up to $7.5 million in bonuses to Edison employees.
  - The two independent directors were responsible for determining whether the proposed executive compensation was reasonable and in the best interest of the company. After thorough review and based upon their experience working in chapter 11 cases, the independent directors supported the bonuses as critical components to a successful restructuring.
  - The U.S. Trustee objected, arguing that the Bankruptcy Code disfavored such bonuses and the benchmarks for entitlement for bonuses were vague and objective. The court, however, agreed with the independent directors, deferring to the committee's findings that the bonuses were not retentive in nature since insider employees would receive "no guaranteed payouts" and payouts for such insiders would be tied to "actual future operational and other transactional results."

Appointment of Independent Directors: Resolution of Intercompany Conflicts

An independent director may aid the company in adversarial intercompany relationships or transactions, thereby producing consensual outcomes that can benefit all stakeholders. This is triggered especially where a corporation enters into an "insider" transaction – meaning a transaction to which any director is affiliated with the counter-party to the transaction or in which a director or controlling shareholder stands on both sides of the deal.

***In re Maxus Energy Corporation*, No. 15-11501 (Bankr. D. Del.)**

- Prior to filing for bankruptcy, the board of directors for Maxus Energy Corporation ("***Maxus***") appointed two independent directors to examine the historical transactions, interrelationships, and course of dealings between Maxus and its corporate parent, YPF S.A. ("***YPF***") in order to identify potential claims arising from that relationship.
- The independent directors, following diligence, agreed to settle the claims of Maxus and YPF. In June 2016, Maxus filed for bankruptcy protection, seeking court approval of the settlement (the "***Maxus Settlement Agreement***"):
  - YPF would provide Maxus with (i) $130 million upon the satisfaction of certain conditions and (ii) $63.1 million in DIP financing (part of which was subordinate in payment to all general unsecured claims against YPF).
  - In exchange, Maxus agreed to release billions-of-dollars of claims against YPF and comply with certain case milestones set forth in the settlement agreement.
- As a result of YPF's control of the Maxus board and its roles as the settlement counterparty and postpetition lender, Maxus, at the encouragement of its creditors, expanded the scope of the independent directors' authority to include restructuring efforts.
  - The independent directors would therefore have exclusive authority over any claims, transactions, litigations, disputes, arrangements or other matters among Maxus and YPF, including the YPF settlement agreement.
  - In addition, the independent directors would be the sole arbiters of any matter deemed a "conflict matter" (broadly defined as anything involving the debtors and their parent entity and nondebtor affiliates).
- By delegating authority over significant case matters to independent directors, Maxus managed to overcome a challenging and contentious historical relationship between its parent company and its creditors as well as timely exit from bankruptcy with the overwhelming support of its creditors.

Appointment of Independent Directors: Access to Restructuring Expertise

While the company's counsel and advisors can certainly explain restructuring issues to the board, the presence of an independent director who has been through the restructuring war zone many times before will likely make the process run more smoothly.

***In re Cengage Learning, Inc.*, No. 13-44106 (Bankr. E.D.N.Y.)**

- In 2007, Apax Partners LLP ("***Apax***"), the equity sponsor of Cengage Learning, Inc. ("***Cengage***), acquired Cengage for $7.75 billion. Shortly thereafter, Cengage was faced with a 22% decline in revenues and insufficient liquidity to pay off its obligations. Cengage filed for bankruptcy to restructure its balance sheet and reduce its $5.8 billion debt level.
  - Prior to Cengage's bankruptcy filing, however, Apax purchased $1 billion of Cengage debt.
- In July 2013, Richard D. Feintuch—a former Wachtell, Lipton, Rosen & Katz partner and director of PGT, Inc. with over twenty years of restructuring experience – was appointed as an independent director of Cengage. When advised of the $1 billion debt purchases by Apax, Mr. Feintuch decided to investigate whether Apax or any of Cengage's directors violated their fiduciary duties.
  - To aid in his investigation and to prepare a detailed report of findings, Mr. Feintuch hired Willkie, Farr & Gallagher ("***Willkie***") to serve as his independent counsel.
  - The report prepared by Willkie concluded it was "unlikely" (i) that either Apax or any of the company's directors breached any fiduciary duty owed to the company in connection with the debt purchases, (ii) that the purchases were made on the basis of material non-public information, or (iii) that attempts to equitably subordinate, disallow or recharacterize Apax's claims would prevail.
- Upon reviewing the report and based on his many years of restructuring experience, Mr. Feintuch concluded it was not in the Cengage's best interests to pursue claims against Apax and the Cengage's officers and directors.

Appointment of Independent Directors: The Issues

- Several issues surrounding the appointment of independent directors remain at the forefront of bankruptcy cases.
- **Passive Independent Directors**
    - Independent directors may be portrayed as mere props and individuals willing to "rubber stamp" any proposal by the board.
- **Taking on the role of Examiner or UCC**
    - Independent directors often take on the role of investigator in restructuring cases. Undoubtedly, this may lead to tension between independent directors and the examiner or creditors' committees.
    - However, even though a creditors' committee may view the use of an independent investigation as usurping its role, creditors' committees retain traditional remedies (standing motions, etc.) and will employ them irrespective of the appointment of independent directors.
    - In certain situations, a court will still require the appointment of an examiner to assist in the investigation process if the independent director is deemed untrustworthy or ill-equipped to take on the role.
    - Consequently, the investigation process in bankruptcy has become an expensive balancing act – where independent board members are not trusted, examiners are being appointed, and each ad hoc committee, in addition to the official committees, wants to be involved in the investigation.
- **Actual Independence of Independent Director**
    - Because a board of directors appoints the independent directors, true objectivity is difficult to prove and often comes into question.

Appointment of Independent Directors: Rubber Stamp Approvals

Independent directors may not be as engaged in the investigation or review process as was expected. In fact, their appointment may be a way to rubber stamp the restructuring transaction without proper consideration.

***In re Specialty Retail Shops Holding Corp.*, No. 19-80064 (Bankr. D. Neb.)**

- In December 2017, prior to its bankruptcy filing, Specialty Retail Shops Holdings Corporation's ("***Shopko***") board of directors appointed two independent directors to review and investigate certain transactions, including Shopko's more than $100 million dividend payments to Sun Capital between 2013 and 2015, and the fact that Shopko borrowed money to make such dividend payments.
- After its investigation, the special committee found that the dividend payments made pre-2015 were likely barred by statute of limitations and that Shopko was most likely solvent at the time the disputed dividend payments were made.
    - However, after the court approved the disclosure statement, disputes arose between Shopko and the creditors' committee regarding the independent directors' findings.
    - Although the creditors' committee agreed that the 2013 claims were barred, it concluded that the company was insolvent in 2015 when the dividend payments were made.
- On March 13, 2019, the creditors' committee filed a motion for standing to prosecute claims that were the subject of the special committee investigation, arguing that Shopko and the independent directors unjustifiably refused to bring such claims.
    - The creditors' committee questioned whether the independent directors' investigation was merely a rubber stamp for releases benefitting Sun Capital, pointing specifically to the lack of transparency with the independent director's report.
    - Judge Thomas L. Saladino echoed this concern, stating that if the claims were being investigated and the estate was paying for the investigation, then the committee should be brought up to speed on what's going on in the investigation instead of being left on the outside.
- As a result of lengthy negotiations, on May 1, 2019, the independent directors reached a settlement with Sun Capital, whereby Sun Capital would pay $15 million to satisfy the insider claims. The creditors' committee filed a motion to compel discovery regarding the settlement's reasonableness. On May 21, 2019, Shopko, Sun Capital, and the creditors' committee reached a global settlement and increased the settlement amount to $15.5 million.
    - The plan was ultimately confirmed, but only after a long, litigious, and expensive process.

Appointment of Independent Directors: Taking on the Role of Examiner or the UCC

***In re Neiman Marcus Group Ltd., LLC*, No. 20-32519 (Bankr. S.D. Tex.)**

- Two independent directors – Marc Beilinson and Scott Vogel – were tasked with investigating allegations of fraudulent asset transfers related to MyTheresa.com.
- Marble Ridge, a hedge fund that challenged the MyTheresa asset transfer, requested a court-appointed examiner lead the investigation of the transfer.
  - Specifically, Marble Ridge argued that the two directors appointed by the company's board were not independent since (i) they could be removed at any time; (ii) had numerous business and professional ties to Ares Management and CPPIB, and their professionals; and (iii) Mr. Beilinson served on Neiman's non-bankruptcy parent company before being appointed to Neiman's board.
- When Judge Jones challenged Mr. Beilinson on the legal issues of the case and the role of the independent directors, according to Judge Jones, Mr. Beilinson was unable to articulate exactly what he was investigating.
  - This deeply concerned Judge Jones, leading him to question the quality of the investigation. He went on to state that he was disappointed to see an "unprepared, uneducated and borderline incompetent" witness put on the stand.
- While Judge Jones said he would grant the motion, he indicated that the investigation would be limited to a three-week examination of the independent directors' management of the case with another week to do a report. Marble Ridge declined this proposal and withdrew the motion.

Appointment of Independent Directors: Is an Independent Director Truly Independent?

***In re Sanchez Energy*, No. 19-34508 (Bankr. S.D. Tex.)**

- In preparation for its chapter 11 filing, Sanchez Energy ("***Sanchez***") established a special committee of two disinterested directors in November 2018 to investigate potential claims against related parties. Sanchez filed for chapter 11 protection on August 11, 2019. On September 6, 2019, the special committee sought to retain Ropes & Gray as counsel.
- The unsecured creditor committee ("***UCC***"), along with several other creditor groups, objected to the application to appoint counsel, arguing that the special committee was not truly independent because (1) it was a group handpicked by the same insiders that were the subject of the investigation; (2) the special committee allowed payments to directors months before the petition date; and (3) the special committee's proposed counsel received more than $5 million in fees prepetition from those parties.
  - The objecting parties believed that the only efficient manner to move forward was to conclude the investigation and hand it over to the UCC. The special committee and the debtors replied, stating it is the special committee, not the UCC or ad hoc group of unsecured noteholders, that is vested with the responsibility to investigate related-party transactions and the objecting parties' efforts to deprive the debtors of investigative ability unrelated to the retention application.
  - The dispute was ultimately resolved through a stipulation between the unsecured creditor committee and the debtors. In exchange for the UCC's withdrawal of its objection, the special committee would provide the UCC with an unredacted copy of their investigation report, and would produce certain documents to the UCC, with such production being substantially completed no later than November 22, 2019.
- Eventually, however, the ad hoc group of unsecured noteholders, still unhappy with the alleged "rampant conflict of interests plaguing these cases," filed a motion to appoint an examiner.
  - The motion asserted that the appointment of the independent directors has "done nothing to stop the bleeding or to recover anything that had already been drained," and that these independent directors have taken "no apparent action" to protect the interests of creditors in relation to those of the Sanchez family and affiliates, which "remain firmly in control."
- The ad hoc group of unsecured noteholders initially prevailed, with Judge Isgur finding that appointment of an examiner was "mandatory" given the facts of the case.
  - Ultimately, Judge Isgur abated the examiner appointment after the U.S. Trustee and the ad hoc group of unsecured noteholders determined that the extent of any examiner's duties would be deemed moot at this point in the case.

Conclusion

- The use of independent directors in bankruptcy cases is likely to remain prevalent in the restructuring landscape.
- While it is difficult to determine the exact "science" of appointing independent directors, there are certainly some practical advantages to the use of independent directors, especially where speed to exit is paramount.
- Like any other restructuring tool, restructuring professionals must acknowledge the trend and consider the utility of independent director appointments on a case by case basis.

<u>History and Evolution of Boards and the Independent Director</u>[1]

- The nature and composition of the American board has evolved over time.
  - With this evolution has come the independent director's rise to prominence.

A. <u>Function of Early American Boards</u>

- Extending from English tradition (1791 Charter of "Bank of the United States.")[2], corporate boards have always been a part of the American landscape.
  - First American incorporation statute was the <u>New York 1811 Act</u>:
    - "[T]he stock, property and concerns of such company shall be <u>managed and conducted by trustees</u>, who, except those for the first year, shall be elected at such time and place as shall be directed by the bylaws of the said company[.]"[3]
      - Directors were often called "trustees" in early America.[4]

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[1] Sources:

Kelli A. Alces, Beyond the Board of Directors, 46 Wake Forest L. Rev. 783 (2011)

Lisa M. Fairfax, The Uneasy Case for the Inside Director, 96 Iowa L. Rev. 127 (2010)

Tamar Frankel, Corp. Boards of Directors: Advisors or Supervisors?, 77 U. Cin. L. Rev. 501 (2008)

Franklin A. Gevurtz, The Function of "Dysfunctional" Boards, 77 U. Cin. L. Rev. 391 (2008)

Franklin A. Gevurtz, The Historical and Political Origins of the Corporate Board of Directors, 33 Hofstra L. Rev. 89, 108 (2004)

Franklin A. Gevurtz, The European Origins and Spread of the Co1porate Board of Directors, 33 STETSONL . REV. 925 (2004)

Jeffrey N. Gordon, The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices, 59 Stan. L. Rev. 1465 (2007)

Yaron Nili, Out of Sight, out of Mind: The Case For Improving Director Independence Disclosure, 43 J. Corp. L. 35 (2017)

[2] Gevurtz, European Origins, at 935.

[3] Gevurtz, Historical and Political Origins, at 108.

[4] *Id.*

- The American board of the 1800s was very different from today's board.
  - Boards were responsible for the day-to-day management of the corporation.[5]
    - This was because:
      - In the 1800s, corporations were typically small, family-run businesses.[6]
      - Boards at the time usually consisted of the majority shareholders – often friends and relatives – and senior managers selected by those shareholders.[7] As such, they were friendly to management and generally "rubber stamps" for whatever management wanted to do. The board members were aligned with management.

B. <u>The Mid-Twentieth Century American Board</u>

By the middle of the 20th century:

- corporations grew exponentially. Because they were publicly held, they were able to raise enormous amounts of money from ever-increasing numbers of small shareholders.
- Majority shareholders with controlling positions became rare.[8]

- As a result, there was a dilution of shareholder interests that continued the practice of CEOs handpicking directors that catered to the CEO and accepted management's decisions.

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[5] Gevurtz, The Function of "Dysfunctional" Boards, at 395; 1811 N.Y. Sess. Laws ch. LXVII (McKinney).
[6] Alces, Beyond the Board, at 788.
[7] *Id.*
[8] Frankel, Corporate Boards of Directors, at 505.

- This allowed CEOs to control boards by choosing its members.[9]
  - Boards thus consisted of people with whom management was comfortable and who were expected not to challenge the CEO:
    1. senior officers;
    2. bankers who did business with the company;
    3. inhouse counsel;
    4. lawyers from the firm serving as the company's outside counsel;
    5. others handpicked by the CEO.[10]
- As a result, CEOs, <u>not directors</u>, were viewed as the watchdogs to protect corporate/shareholder interests.[11]
- Boards had effectively abdicated their managerial and supervisorial roles, and effectively became nothing more than advisors to the CEO.[12]

[9] *Id.*
[10] *Id.* at 505-06.
[11] *Id.* at 506; Gordon, The Rise of Independent Directors, at 1511-14.
[12] Gordon, The Rise of Independent Directors, at 1511.

C. Investment Company Act of 1940:

- Purpose: used the concept of "independent director" to reign in management's dominance of the board, especially concerning conflict-of-interest transactions.

- Reality: The Act was limited to relatively few investment companies (and so not most corporations.)

  - Independent directors were rarely used (other than for investment companies) and boards remained advisory in practice.[13] In other words, for most of corporate America, nothing changed.

    - CEOs took advantage of the lack of oversight. It's human nature to exploit whatever can be exploited,

      - and this led to the corporate excesses that caused disasters like Penn Central, Enron, and WorldCom.

  - These corporate bankruptcies forced an evaluation of what went wrong.

    - The conclusion reached was that the (a) boards failed in their oversight duties and that (b) board composition had to be to changed.

      - Since 1950, the composition of the American board has gone from 80% non-independent directors to over 80% independents today.[14]

[13] Frankel, Corporate Boards of Directors, at 506-07.
[14] Gordon, The Rise of Independent Directors, at 1465; Nili, Out of Sight, out of Mind, at 45.

D. 1970s: Shift to the Monitoring Board

- Penn Central Railroad Collapse Scandal – the "bluest of blue chips":
    - Huge scandal – board approved $100 million in dividends while unaware that the company had serious financial troubles.
- Watergate Scandal:
    - More than 400 companies admitted making illegal campaign contributions/bribes in U.S. and abroad.
        - Investigations revealed that corporate officers typically knew about this, but the "advisory" directors had no idea.[15]
- In the wake of these two corporate disasters:
    - there was immense market and regulatory pressure to shift from the prevailing "advisory" board model to a "monitoring" board model.[16]
- Role of the Monitoring Board:
    - A "Monitoring" board is designed to have a supervisory role, separate and independent from senior management.[17]
        - Delaware law: board is responsible for monitoring officers and ultimately responsible for corporate decisions officers make.[18]
        - Monitoring board is also tasked with:
            - appointing the CEO and advising the CEO re selection of senior officers;
            - evaluating the performance of senior management team.[19]
                - "Audit committee" is also essential to board monitoring capacity.[20]

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[15] Gordon, The Rise of Independent Directors, at 1515.
[16] *Id.* at 1515-16.
[17] Alces, Beyond the Board, at 790.
[18] *Id.*
[19] Alces, Beyond the Board, at 790.
[20] Gordon, The Rise of Independent Directors, at 1518.

- Movement Toward Independent Boards
  - The rise of the monitoring board marked the beginnings of a shift in favor of independent directors over insiders.

E. Independent Director Defined

- Definition has evolved and become more stringent over time:
  - While the term "independent director" has no uniform definition, current definitions focus on the lack of a material relationship (personal or financial) with the corporation.
    - E.g., an independent director cannot:
      - be an employee or officer of the corporation or its parent/subsidiaries;
      - or otherwise have any other relationship with the corporation that would compromise his/her independence.[21]
        - For example, Boards often included the corporation's banker but post-Enron/WorldCom, such persons were not considered to be independent.
- Under Delaware law, independent, "disinterested" directors are expected to make decisions:
  - "based on the corporate merits of the subject before the board rather than extraneous considerations or influences"; and
  - "only with the best interests of the corporation in mind."
    - A director incapable of doing this is not independent.[22]
- It is thus expected that independent directors will:
  - prioritize maximizing shareholder value;
  - not be beholding to management;
  - not hesitate to challenge managers or remove them.[23]

[21] *See* 1 Publicly Traded Corporations Handbook § 2:22 (2020).
[22] *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 938 (Del. Ch. 2003).
[23] Alces, Beyond the Board, at 791.

F. Function of the Independent Director

- Independent directors are primarily designed to monitor the corporation and independently evaluate conflict-of-interest transactions.
    - For example, in a hostile takeover where management is to be replaced.
- Independent directors are believed to be better monitors than insider directors.
    - They are more likely to scrutinize management and work to ensure that:
        - managers do not commit fraud, engage in self-dealing, or ignore their responsibilities.[24]
    - Independent directors are supposed to:
        - guard against self-dealing by evaluating whether conflict-of-interest transactions benefit the corporation;
        - protect against internal fraud through their oversight of management;
        - make sure that managers are fulfilling their responsibilities and making good decisions.[25]
    - Classic examples of the intended use of independent directors:
        - Audit Committee: independent directors are supposed to make sure that managers disclose unbiased accounting information to shareholders.
        - Compensation Committee: independent directors to make sure that compensation packages incentivize managers to focus on the interests of shareholders.[26] Insiders should not fix their own comp.

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[24] *Id.* at 138.
[25] *Id.*
[26] *Id.* at 138-39.

G. 1980s: Rise of the Independent Director

- Emerging belief in the 1980s:
  - stock prices are best measure of corporate success.
- Increasing acceptance of:
  - the monitoring board with independent directors.
- The "hostile takeover" movement of the 1980s catalyzed both of these developments.[27]
  - 1980s – Dubbed the "Deal Decade" was characterized by the "hostile bid."
    - Popular view at the time:
      - The rise in hostile bids was the result of a need to correct "managerial inefficiency" across various industries.[28]
  - Growing Influence of the Institutional Investor:
    - By 1980, institutional investors held more than 40% of U.S. equities.
      - They were a major class of shareholders focused on shareholder value.
        - And they were eager to accept the market premiums offered in hostile bids.[29]

[27] *Gordon, The Rise of Independent Directors,* at 1520.
[28] *Id.* at 1521.
[29] *Id.* at 1521-22.

- Management's Need For Independent Directors:
  - Managers challenged the hostile takeover movement by:
    - sacrificing their autonomy and increasingly accepting the "monitoring" board with independent directors.
  - Under the fiduciary standards of Delaware law, independent directors gave credibility to resisting hostile bids by "independently" evaluating whether the bids were adequate.[30]
    - Delaware courts promoted the importance of director independence to rejecting the hostile bids in several key takeover cases, including:
      - Unocal v. Mesa Petroleum Co. (1985)
      - Moran v. Household International, Inc. (1985)[31]

[30] *Id.* at 1522-23.
[31] *Id.* at 1524-25.

- <u>Advantages of Having Independent Directors</u>
  - Because independent directors are supposed to act solely for the benefit of the corporation and its shareholders, they bring greater legitimacy to:
    - The board and its oversight of management;
      - and by extension, corporate decision-making in general.
  - Independent directors that help insulate the board from personal liability actions are expressly favored to avoid lawsuits.
    - Most corporate conduct is subject to the "business judgment" rule, which presumes that:
      - directors make business decisions in the best interests of the corporation.
    - Conflict-of-interest, or "self-dealing" transactions typically are subject to a more rigorous standard – the "entire fairness" test.
      - But if the transaction is approved by the board's independent directors, the more deferential "business judgment" rule is applied.[32]
        - Independent directors thus enable court deference to even self-dealing transactions.
    - Court's also give similar deference to independent directors with respect to shareholder derivative actions against the board.[33]

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[32] *See, e.g.*, *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 644 (Del. 2014) (business judgment is the standard of review that should govern mergers between a controlling stockholder and its corporate subsidiary, where the merger is conditioned ab initio upon both the approval of an independent, adequately-empowered Special Committee that fulfills its duty of care; and the uncoerced, informed vote of a majority of the minority stockholders.); *see* Del. Code Ann. tit. 8, § 144.
[33] Fairfax, The Uneasy Case for the Inside Director, at 143-45.

H. 1990s: Rise of the Independent Board

- 1990s – maximizing shareholder wealth, i.e., stock prices:
  - became the ultimate corporate objective and viewed as the most important measure of managerial performance.[34]
    - This was an extension of the dominance of institutional investors, who cared most about shareholder value.[35]
- The primacy of the shareholder value criterion galvanized a trend toward an "independent board" (a board with a majority of independent directors).
  - The independent board:
    - Brought greater legitimacy to managerial decisions by benchmarking managerial performance in terms of stock prices.
      - Executive contracts increasingly used stock option-based compensation.
      - Independent boards relied more on stock market returns in CEO termination decisions.[36]

[34] *Gordon, The Rise of Independent Directors,* at 1526.
[35] *Id.* at 1528.
[36] *Id.* at 1526, 1530-33.

I. 2000s to Today: Dominance of the Independent Board

- The early 2000s collapse of companies like Enron and WorldCom, as well as the 2008 financial crisis:
  - have led to the dominance of the independent board.
    - Numerous regulations now require independent boards and provide enhanced standards for what constitutes an independent director.[37]
- For example, with respect to non-controlled companies, the majority of the board must be independent.
  - Nasdaq Rule 5605(b)(1)
  - The New York Stock Exchange requires listed companies to have a majority of independent directors on their boards. NYSE Listed Company Manual Section 303A.01 [38]
  - The National Association of Securities Dealers requires that transactions that create a conflict within the corporate enterprise consist only of Independents.[39]

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[37] *Id.* at 1535-36.
[38] So long as the Corporation does not have a 50% shareholder but even then, the audit and compensation committees must be populated with Independents.
[39] See Sarbanes-Oxley Act of 2002 §301.

- <u>The definition of an "independent" director</u> has become stricter.
  - For example, Nasdaq, which has a similar definition as the NYSE, states:
    - "Independent Director means a person other than an Executive Officer or employee of the Company or any other individual having a relationship which, in the opinion of the Company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director."
      - The rule expressly states, among other things, that "a director who is, or at any time during the past three years was, employed by the Company," including any parent or subsidiary of the Company, is <u>not</u> independent.
        - Nasdaq Rule 5605(a)(2) and IM-5605
- <u>Today mandatory audit/compensation committees</u> must be entirely independent.
  - NYSE Listed Company Manual Sections 303A.05-.07
  - Nasdaq Rule 5605(c)-(d)
    - <u>Note</u>: Under both the NYSE and NASDAQ rules, audit committee members must meet even more stringent requirements for establishing independence, including the standards in:
      - Sarbanes-Oxley Act of 2002 §301
      - Exchange Act Rule 10A-3(b)(1)[40]
- The NYSE also requires an <u>independent nominating/corporate governance committee</u>.
  - NYSE Listed Company Manual Sections 303A.04

[40] Before Enron, the Securities and Exchange Commission recommended that companies establish audit committees composed of outside directors. *See* ASR No. 123 (Mar. 23, 1972). In 1974 and 1978, the Commission adopted rules requiring disclosures about audit committees. *See* Release No. 34-11147 (Dec. 20, 1974) and Release No. 34-15384 (Dec. 6, 1978).

- Conflict of interest transactions must be reviewed by independent directors.
    - Nasdaq Rule 5630(a):
        - "Each Company that is not a limited partnership shall conduct an appropriate review and oversight of all related party transactions for potential conflict of interest situations on an ongoing basis by the Company's audit committee or another independent body of the board of directors."
        - This is very different than an attorney's conflicts of interest.
            - Under the ethics rules, it is the attorney's job to do its own conflict review.
- In a nutshell, the independent director is now the protector and dominant fixture of America's corporate landscape.

J. Misuse of Independent Directors in Bankruptcy

- Once a corporation becomes insolvent, the interests of shareholders are worthless. As board members, independent directors have no duty to creditors or outside counsel for the corporation.
- Over the last 10 years, the use of independent directors has been taken to a whole new level –
    - Now they're being used to sanitize attorney conflicts in the bankruptcy cases.
- The modern corporate Chapter 11 case involves multiple companies – sometimes dozens or more than a hundred of them – in the org chart, all represented by the same law firm.
- During the case, there may be intercompany transactions that create conflicts –
        - there may be a sale of the subsidiary whose interests are at odds with the parent and other corporate entities;
        - there may be a need to settle intercompany claims that should not have the same parties on both sides of the negotiation;
        - counsel may have to choose between the interests of its main client (the parent or main operating company) and one of the subs.
- The traditional fix is to bring in separate counsel to avoid the conflict.
    - Main counsel is reluctant to do this.
        - Main counsel wants to maintain control of the case.
        - Main counsel may believe it can manage the conflict professionally.

To alleviate the problem, one or more independent directors is hired.

- Usually, the independent director is recommended by main counsel.
- Counsel wants someone they can work with, who will not disrupt the case.

- You see the same people selected as independent directors, especially in the bankruptcy context.

- As Warren Buffet famously said at Berkshire Hathaway's 2019 shareholder's meeting:

    - "The independent directors in many instances are the least independent."

- The reason is that, unlike the usual independent director who has a lack of a material relationship (personal or financial) with the corporation, the "independent" directors in a bankruptcy case have both a personal and financial relationship with the bankruptcy lawyers.

    - The want to be hired in case after case.

    - They want to keep the bankruptcy counsel happy.

▪ Independent directors were never designed to do that.

- They were intended to prevent the types of self-interested corporate mismanagement that led to the collapse of companies like Penn Central and Enron.

- They are not for determining if a law firm has a conflict that goes to disinterestedness.

▪ Yet bankruptcy lawyers now frequently recommend independent directors as the cure for their own conflicts.

▪ A large part of the attraction of independent directors in a regular corporate context is to raise the bar on the ability to sue the other directors.

▪ But they do not – and cannot – save attorneys from being sued for conflicts.

- If a lawyer is conflicted, an independent director cannot fix the conflict.

- Independent directors are for decisions that inside directors should not make with respect to the corporation, such as for an asset sale, officers' compensation, etc.
  - They act solely on behalf of the corporation and its shareholders.
    - They have nothing to do with the decisions that a conflicted law firm may make in representing a debtor.
    - And they cannot help a law firm satisfy the disinterestedness test.
  - The purpose of independent directors simply has nothing to do with curing a law firm conflict.
- Accordingly:
  - While there is a need to appoint independent directors to deal with potential conflicts of the corporate enterprise,
    - it does not – and cannot – fix main counsel's conflicts.

INDEPENDENT DIRECTORS & ATTORNEY CLIENT PRIVILEGE

- As a general matter, the attorney client privilege protects communications between attorney and client. In the corporate context, however, it is not always clear who the "client" is. The issue often more acute when it comes to independent directors and committees, which have a distinct relationship with the corporation – whether by design or otherwise.

Individual Directors with Dual Corporate Roles: *Argos Holdings Inc. v. Wilmington Trust National Association*, 18cv5773(DLC), 2019 WL 1397150 (S.D.N.Y. Mar. 28, 2019):

- It is fairly common that a private equity firm will install directors on the board of a portfolio company that it controls. Often, those directors are also employees of the equity firm. Under those circumstances, these individuals wear two hats – one as members of the controlling firm, and another as directors of the portfolio company.

- When the portfolio company then hires counsel that communicates with its board, its members' dual roles may raise privilege issues, particularly for those communications specifically with the equity firm's employees. Did those individuals receive attorney communications as directors of the client—i.e., the portfolio company—such that the communications are privileged? Or did they receive the communications as employees of the non-client equity firm, such that they are not?

- In *Argos Holding*, Judge Cote in the S.D.N.Y. made clear that this question may turn on whether and to what extent it is clear that the communications were kept confidential, and not shared with the non-client entity.

    - Background: A private equity firm, BC Partners, Inc. invested in Argos Holding Inc. and appointed three of its own employees to the Argos board. Argos retained outside counsel in connection with its acquisition of PetSmart. Litigation arose when the administrative agent in the acquisition refused to release liens on the target company's assets. During discovery, Argos moved for a protective order with respect to certain communications involving the three BC Partners employees on the Argos Board.

    - Holding: The Court held that a majority of the communications between outside counsel and the three individuals were *not* privileged, citing the following concerns:

        - Communications were sent by outside counsel to the three individuals *only*, but not the rest of the board. Argos did not show why, if these communications related to Argos and not BC Partners, they were not shared with the entirety of the Argos board.

        - These communications were sent to the three individuals using their BC Partners email addresses, despite the fact that the individuals had Argos addresses. The e-mails were therefore stored on BC Partners' servers, making the emails available to the equity firm.

        - Finally, Argos did not articulate what steps, if any, were taken to ensure that the communications were kept confidential, nor did it state expressly that the documents *were* kept confidential.

    - By contrast, the court held that e-mail communications sent by outside counsel to the entirety of the Argos board were privileged, despite the fact that that these communications were sent to the board members non-Argos e-mail addresses.

    - <u>Take-Away:</u> Those with multiple roles and outside counsel should be apprised of the risk to the portfolio company's privilege. Guidelines for communication should be established to prevent sharing communications with non-client entities. This is particularly important where a director may have an obligation as an employee of the equity fund to share certain information with that employer about a transaction.

- <u>Additional Reading</u>:

    - For an older example of this issue that informed the *Argos'* court's reasoning, *see Allied Irish Banks, P.L.C. v. Bank of America, N.A.*, 252 F.R.D. 163 (S.D.N.Y. 2008). There, PricewaterhouseCoopers International Limited had a "global board" comprised of partners and employees of its member firms. Because it was often not clear that these board members received communications from the company's general counsel specifically as members of the global board, such communications were deemed not privileged. The Court's determined that privilege could be asserted only if the role of the recipient was sufficiently described.

    - Ari M. Berman & Colin Davis, *How PE firms can minimize attorney-client privilege risks after* Argos Holdings Inc. and PetSmart Inc. v. Wilmington Trust N.A., https://www.pillsburylaw.com/en/news-and-insights/petsmart-tells-pe-firms-to-getsmart-on-privilege.html (last visited Apr. 4, 2021). This provides a useful list of steps that can be taken to minimize the risk of waiving privilege in the *Argos* context.

ALERT

pillsbury

PetSmart Tells PE Firms to GetSmart on Privilege

How PE firms can minimize attorney-client privilege risks after Argos Holdings Inc. and PetSmart Inc. v. Wilmington Trust N.A.

By Ari M. Berman, Colin Davis

TAKEAWAYS

- PE firms face a variety of litigation and deal-related attorney-client privilege challenges which can be minimized with a thoughtful approach to training and structure
- *Argos* makes clear that PE firms should pay close attention to attorney-client privilege issues involving their board designees
- PE firms should ensure that portfolio companies have guidelines in place to preserve attorney-client privilege and ensure outside counsel is aware of these dynamics

05.07.19

Much like our beloved pets provide us with ill-timed wake-up calls, a federal court in the Southern District of New York recently provided private equity firms with a reminder not to hit the snooze button when it comes to protecting attorney-client privilege in the context of designated directors serving on the boards of directors of portfolio companies. On March 28, 2019, the District Court, in *Argos Holdings Inc. and PetSmart Inc. v. Wilmington Trust N.A.*, ruled largely in favor of defendants in compelling the plaintiffs to produce allegedly privileged documents that had been sent by law firms representing PetSmart and its owner directly to three individuals who were partners at a private equity firm which was one of the company's major investors. We discuss below why this case is of interest to private equity firms that appoint their employees as directors to portfolio company boards, along with other attorney-client privilege concerns and practical tips.

Attorney-Client Privilege—A Quick Primer

The attorney-client privilege is the oldest among the common-law evidentiary privileges and protects confidential communications between a client and its attorney made for the purpose of obtaining or providing legal advice. The purpose of the privilege is to encourage full and frank dialogue between lawyers and clients, and communications protected by the privilege need not be disclosed in litigation. *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981). It is important to keep in mind that courts' analyses of the attorney-client privilege vary according to state and there can be significant, and outcome-determinative, differences among states. We provide a general overview of key principles associated with the privilege as well as those principles' application within the private equity context.

To be privileged, a communication essentially must be primarily or predominantly of a legal—rather than a business—character. The critical inquiry is whether the communication was made in order to render legal advice or services to the client. *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377, 581 N.E.2d 1055, 1059 (1991). Courts generally tend to scrutinize more closely communications with in-house counsel than outside counsel—guided by the principle that the privilege is not meant to be used as a shield to protect otherwise discoverable information. This is due primarily to the fact that in-house lawyers often have mixed legal and business responsibilities and can wear multiple hats, including serving as company officers. During their day-to-day interactions, in-house lawyers often walk the line between legal and nonlegal involvement in company affairs—and that line can easily, and inadvertently, get blurred. Courts have warned that the mere participation of an in-house lawyer does not automatically protect communications from disclosure. *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 594, 540 N.E.2d 703, 705-706 (1989).

Privilege Challenges Facing In-House Counsel

In the private equity context, issues relating to the attorney-client privilege may arise in various scenarios, including when: (1) a private equity firm's employee plays multiple roles, (2) one lawyer or law firm represents two clients, (3) clients share a common legal interest, and (4) there is a sale of a portfolio company.

Multiple Roles of Private Equity Professionals

Private equity firms commonly designate employees to serve as members of the boards of directors of portfolio companies. These designees wear two hats—one as employees of the private equity firm and the other as members of portfolio companies' board of directors. If a portfolio company shares privileged information (e.g., advice provided by the portfolio company's outside or in-house counsel) with an individual in his capacity as a director, the attorney-client privilege should be preserved. However, if the privileged information is shared with an individual other than in his capacity as a director, or if that individual subsequently shares the privileged communication with his private equity colleagues in his capacity as an employee of the private equity firm, there is a risk that the attorney-client privilege could be considered to have been waived. (Generally, when a client shares privileged information with a third party, the attorney-client privilege will be waived.) As *Argos Holdings* teaches, in addition to being trained with respect to fiduciary duties owed to portfolio companies, private equity director designees should be sensitized to the issue of preserving portfolio companies' privilege.

In *Argos Holdings*, a private equity firm invested in Argos Holdings Inc. and appointed three of its own employees to the Argos board of directors (which had seven directors in total). *Argos Holdings Inc. v. Wilmington Trust Nat'l Ass'n*, No. 18cv5773 (DLC), 2019 WL 197150, at *1 (S.D.N.Y. Mar. 28, 2019). Argos, through its subsidiary, had retained outside counsel to help it acquire PetSmart, an online pet supply retailer, and issues arose with an administrative agent during the acquisition. After the administrative agent refused to release the liens it held on the target company's assets, litigation ensued. During the discovery phase, Argos moved for a protective order with respect to thirteen sets of documents, ten of which the Court found were not privileged. *See id.* at *2.

The Court relied on a few key facts in making its determination. First, the Court found that the ten sets of documents were sent by outside counsel to the three private equity-designated board members, but not the rest of the Argos board. *See id.* at *4. Second, Argos failed to describe any measures taken to prevent disclosure to the private equity firm of privileged communications with Argos personnel, officers or directors. *See id.* at *5. Third, despite the three private equity board members having email addresses at the portfolio company, the documents at issue were sent to their private equity firm email addresses and thus were stored on the private equity firm's email servers. *See id.* Because Argos was unable to demonstrate that the three private equity board members received these communications pursuant to their status as directors at Argos, the Court held that the attorney-client privilege was waived. *See id.*

Joint-Client Theory

The joint-client or co-client theory applies when one attorney represents the interests of two or more entities on the same matter, including where a parent corporation and one of its subsidiaries consult the same counsel with respect to a common legal cause. *See, e.g.*, *Bass Pub. Ltd. Co. v. Promus Cos. Inc.*, 868 F. Supp. 615 (S.D.N.Y. 1994). Each respective joint client's communications with common counsel are protected by the attorney-client privilege, and if such communications are shared with another joint client, the privilege should be preserved.[1] Whether two clients qualify as joint clients depends primarily on the understanding of the parties and the lawyer in light of the circumstances, including the details of the representations and the clients' interaction with the attorney and each other. *In re Teleglobe Communications Corp*., 493 F.3d 345, 363 (3d Cir. 2007), as amended (Oct. 12, 2007)) (citing *Sky Valley Ltd. P'ship v. ATX Sky Valley Ltd*., 150 F.R.D. 648, 652-53 (N.D. Cal. 1993)).

There is not well-developed case law applying joint-client principles to the private equity context (i.e., to communications between a private equity firm and a portfolio company that shares the same lawyer). Accordingly, it is important to proceed with caution when relying on the joint-client theory and make clear in engagement letters with outside counsel that such representation will be on a joint-client basis.

Common Interest Exception

Common interest is an exception to the general rule that the presence of a third party will destroy a claim of privilege. Where two or more clients separately engage their own counsel to advise them on matters of common legal interest, the common interest exception allows them to shield from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest. This exception historically has been applied in the merger context. For instance, where parties were represented by separate counsel and a merger agreement directed them to share privileged information relating to preclosing legal issues, courts generally had found that such disclosure did not waive the privilege—reasoning that the parties shared a common legal interest and the communication was designed to further that interest. However, in *Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, the New York Court of Appeals held that such a fact pattern would waive the attorney-client privilege, unless the sharing of information was made in connection with pending or reasonably anticipated litigation. 27 N.Y.3d 616 57 N.E.3d 30 (2016). Making matters even more complicated is that those jurisdictions requiring a litigation element differ on whether litigation must be pending or only reasonably anticipated. Accordingly, in-house counsel should use caution and anticipate that the common interest exception may not apply to these types of communications (especially considering the recent uptick in merger-related lawsuits).

The common interest exception also may apply in the context of a communication between the private equity firm and its investors concerning a threatened or ongoing litigation or investigation. Much like communications including portfolio companies, these interactions require careful analysis due to the risk of waiver (i.e., the potential that the private equity firm loses the privilege by sharing privileged information with one or more limited partners). The District Court addressed this issue in *Argos Holdings*—specifically, the Court found that the common interest doctrine was inapplicable because Argos did not assert that its outside counsel was acting as the private equity firm's counsel in connection with the acquisition of the target company. *See* 2019 WL 197150, at *7.

Sale of a Portfolio Company

When control of a company passes to new management, whether through a sale, merger, takeover or normal succession, the authority to assert and waive the company's attorney-client privilege also passes to new management. *Bass Pub. Ltd., 868 F. Supp. at 619 (citing Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 349, 105 S. Ct. 1986, 1991, 85 L.Ed.2d 372 (1985)). If a company that acquires a portfolio company from a private equity firm later sues the private equity firm, the acquirer may be able to access and use in the litigation legal advice that the private equity firm and its former portfolio company received jointly. Thus, it is important to limit the joint representation of a private equity firm and its portfolio companies to instances in which it is necessary. And, consideration should be given to whether it makes sense to retain separate counsel for purposes of any contemplated sales/purchases in an effort to limit the amount of privileged communication that can be passed to new management.

Practice Tips and Lessons Learned

Argos Holdings provides private equity firms with somewhat of a roadmap (at least in New York) to preserve the attorney-client privilege. While privileged communications are not likely to be challenged until litigation, it is important to follow best practices to ensure that the firm and its portfolio companies are in a strong position to defend the privileged status of their communications. Think about the extent to which the privilege may or may not apply to a particular communication with a portfolio company or a fund investor.

- ***No Bright-Line Test.*** As the District Court noted in *Argos Holdings*, there is no established test to assess the capacity in which communications were received where the recipient has multiple roles in a transaction. However, the court offered guidelines to help prevent these communications from being disclosed during litigation—e.g., establishing procedures governing private equity directors' ability to share with the sponsor communications between the directors and attorneys representing the portfolio company's board.
- ***Make Any Joint-Client Relationship Clear in an Engagement Letter***. When the joint-client theory is a portfolio company's basis for asserting that sharing privileged information with a private equity firm does not waive privilege, such expectation should be laid out in an engagement letter with the law firm that clearly sets out the scope of the joint representation. Further, agreements between the private equity firm and its portfolio company should provide that privileged information will be shared among the parties as co-clients and must be kept confidential and not shared with any third parties.
- ***Keep Those with Multiple Roles Aware of the Risk***. Educate employees who serve as designees on boards of portfolio companies of the risks associated with sharing privileged information belonging to the portfolio company with others at the private equity firm. If applicable, remind the employees serving in two roles to communicate with outside portfolio company counsel through their email addresses at the portfolio company, as opposed to their private equity firm email addresses.
- ***Establish Guidelines to Maintain Confidentiality***. The portfolio company should have guidelines set in place that prevent the directors from sharing communications between themselves and outside counsel with the private equity firm. Note that private equity board designees may also have a duty to share information with their fund for purposes of understanding the investment, which raises issues regarding steps to maintain confidentiality.
- ***Ensure Outside Counsel is Aware of this Risk***. When retaining outside counsel, make sure that they are aware of the directors' status within the portfolio company and the private equity firm. Outside counsel should be aware of these issues so that they do not inadvertently waive privilege by disclosing information to private equity firm employees.
- ***Take Steps to Maintain Privilege***. When possible, disseminate privileged information only to those who "need to know," (i.e., those who need to know the content of the communication to perform their job effectively or to make informed decisions concerning the subject matter of the legal communication). Instruct those with access to privileged information to avoid disclosing such information to others.

- ***Separate Business from Legal***. To the extent possible, in-house counsel should keep their legal files and business files separate from one another and utilize confidentiality designations to make clear what is considered legal advice versus pure business advice. Be wary, however, of overuse of such confidentiality designations—a document that is labeled "privileged and confidential" may not be considered as such if there is no actual legal advice being sought or communicated and may prejudice other more worthy designations.
- ***Tailor Inspection Rights***. Consider tailoring inspection rights to permit a portfolio company to withhold privileged information from the private equity firm where no joint-client or other shared privilege applies.
- ***Use Separate Counsel When Concerned About Potential Post-Sale Litigation by Purchasers***. If concerned about the possibility of post-sale litigation, be wary of relying upon the joint-client theory to protect privileged communications from disclosure to the acquirer. Consult separate legal counsel for issues the firm does not want a potential acquirer to learn about or communicate with the portfolio company's outside counsel separately, as a separate client, to ensure it receives its own legal advice. For added security, consider including in sale/merger agreements a provision that expressly addresses the transfer of ownership of privileged communications.
- ***Enter into a Common Interest Agreement***. One way to avoid many of these issues is to have the private equity firm and the portfolio company enter into a common interest agreement. As demonstrated in *Argos*, if the portfolio company and the private equity firm had entered into an appropriately tailored common interest agreement, the District Court may not have been concerned with which communications were disclosed to the private equity firm.

As *Argos* teaches us, by taking care to properly identify privileged communications and implement thoughtful policies and procedures, private equity firms should be able to successfully balance minimizing the risk of waiver with the commercial goal of effectively managing its investments.

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1. Waiving the joint-client privilege typically requires the consent of all joint clients. A joint client may unilaterally waive the privilege as to its own attorney-client communications, so long as those communications concern only the waiving client. Such client may not unilaterally waive the privilege as to any of the other joint clients' communications or as to any of its communications that relate to other joint clients. *In re Teleglobe Communications Corp*., 493 F.3d 345, 363 (3d Cir. 2007), as amended (Oct. 12, 2007).

252 F.R.D. 163
United States District Court,
S.D. New York.

ALLIED IRISH BANKS, P.L.C., Plaintiff,
v.
BANK OF AMERICA, N.A. and Citibank, N.A., Defendants.

No. 03 Civ. 3748(DAB)(GWG).
|
March 26, 2008.

Synopsis

Background: Irish bank brought action against two American banks asserting claims arising out of a rogue trading scheme perpetrated by one of its traders. Defendant filed motion to compel production of documents from non-party which was related to one of plaintiff's auditors, and auditor moved to intervene to obtain protective order.

Holdings: The District Court, Gabriel W. Gorenstein, United States Magistrate Judge, held that:

non-party could not assert attorney-client privilege with respect to documents whose recipients were not identified as acting on behalf of non-party;

non-party could assert attorney-client privilege with respect to document authored by in-house counsel;

under New York law, common interest rule was not applicable to extend attorney-client privilege to protect documents shared between British limited liability company and its members who were network of independent professional services entities using the same trade name; and

accounting firm which was non-party in suit against its client was entitled to common-law work product protection for materials prepared by its attorneys in anticipation of litigation against its client.

Motion to compel granted in part and denied in part; motion to intervene granted.

Attorneys and Law Firms

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OPINION AND ORDER

GABRIEL W. GORENSTEIN, United States Magistrate Judge.

Allied Irish Banks, p.l.c. ("AIB") brought this action against Citibank, N.A. and Bank of America, N.A. ("BofA") for claims arising out of a rogue trading scheme perpetrated by one of AIB's traders, John Rusnack. PricewaterhouseCoopers LLP ("PwC-US") was one of AIB's auditors. During discovery, BofA served a document subpoena on an entity called PricewaterhouseCoopers International Limited ("PwCIL"). PwCIL withheld certain responsive documents under the work product doctrine and attorney-client privilege. BofA then filed this motion to ***166** compel the production of these documents. Shortly thereafter, PwC-US filed a motion to intervene to stop the disclosure of some of the documents withheld by PwCIL on the ground that they are protected by the work product doctrine. For the reasons below, BofA's motion to compel (Docket # 65) is granted in part and denied in part. PwC-US's motion to intervene (Docket # 77) is granted. Its motion for a protective order will be the subject of further proceedings as set forth below.

I. *BACKGROUND*

A. *Facts*

PwCIL is a "UK-registered limited liability company, the members of which are the independently-organized professional services entities that use the

PricewaterhouseCoopers name." *See* Declaration of Lawrence W. Keeshan, filed Aug. 30, 2007 (Docket # 69) ("Keeshan Decl."), ¶ 5. PwCIL does not provide client-related services, and thus did not provide any services to AIB or its affiliates. *Id.* ¶¶ 5, 17. Instead, PwCIL "facilitates and coordinates its member firms' activities, including protection of the PricewaterhouseCoopers brand." *See* Non-Party PricewaterhouseCoopers International Limited Response to Bank of America, N.A.'s Motion to Compel the Production of Documents, filed Aug. 30, 2007 (Docket # 71) ("PwCIL Resp."), at 2; Keeshan Decl. ¶ 5. PwCIL is overseen by its Chief Executive Officer, its Global Board and a group called the Global Leadership Team. Keeshan Decl. ¶ 5.

During the period of time at issue in this case, the Global Board was composed of partners, principals, or employees of PwCIL's member firms, who served for fixed terms and acted as directors under British law. Keeshan Decl. ¶ 7. Members of the Global Board worked principally for their member firms, not the Global Board itself. *Id.*

The Global Leadership Team consisted of PwCIL's CEO, individuals the CEO appointed to manage PwCIL's affairs, and the Territory Senior Partners of the major PwCIL member firms or regional groupings. *Id.* ¶ 10. The CEO and "his management team" (but not the Territory Senior Partners) spent substantially all of their time working on PwCIL's affairs, although they remained partners or employees of their member firms and were paid by those firms. *Id.* The Global Leadership Team acted "both directly and through a number of subordinates." *Id.* ¶ 12. These "subordinates" were partners or employees of the member firms, some of whom worked full time on PwCIL matters and others of whom divided their time between PwCIL and the member firms. *Id.*

PwCIL's "Managing Partner-Operations," Amyas Morse, was responsible for PwCIL's risk management with respect to legal issues, and chaired the "Global Operations Committee." *Id.* ¶ 14. This Committee consisted of operations leaders from larger PwCIL member firms who advised Morse on the needs and priorities of member firms in addition to consulting with each other about common responses to shared risk issues such as litigation and insurance matters. *Id.* ¶ 15. PwCIL also coordinated assistance between member firms through the Global Board and the Global Leadership Team. *Id.* ¶ 16.

Lawrence W. Keeshan was both the Global General Counsel for PwCIL and a principal of PwC-US from July 1, 1998 until September 20, 2006. *Id.* ¶¶ 2-3. PwC-US-along with PricewaterhouseCoopers Ireland Ltd. ("PwC-Ireland")-provided auditing services for AIB and its affiliates. *Id.* ¶ 17. As Global General Counsel for PwCIL, Keeshan provided legal counsel to the Global Board, the Global Leadership Team and the Global Operations Committee. *Id.* ¶ 15. Keeshan learned of Rusnack's fraudulent trading scheme in February 2002, *id.* ¶ 17, and thereafter "PricewaterhouseCoopers-affiliated professionals were contacted by and cooperated with U.S. government agencies conducting civil and criminal investigations into the Allfirst fraud," *id.* ¶ 18.

B. *Procedural History*

BofA filed this motion to compel in August 2007.[1] BofA ultimately withdrew its motion ***167** as to certain documents and now seeks production of the following documents, numbered according to PwCIL's August 2007 privilege log (*see* Revised Privilege Log, dated Aug. 24, 2007 (attached as Ex. A to White Decl.) ("Revised Privilege Log")) Document 1-7, 9, 11-41, 43-47, 49-56, 58-59, 62, 69-71. *See* BofA Reply at 21-22.

Shortly after BofA filed its motion to compel, PwC-US filed a motion to intervene in the case in order to obtain a protective order to preclude the disclosure of a subset of these documents specifically, Document 7, 11-17, 19, 22-30, 32-41, 43-47, 49, 52-56, 58, 62. *See* Non-Party PricewaterhouseCoopers LLP's Memorandum of Law in Support of Motion to Intervene and for a Protective Order, filed Oct. 3, 2007 (Docket # 80) ("PwC-US Mem."), at 1 n. 1.[2] On December 21, 2007, at the request of the Court, PwCIL submitted copies of the documents to the Court for *in camera* review.

The documents at issue can be divided into three categories. The first consists of communications between Keeshan and the Global Board and Global Leadership team regarding AIB. The second category consists of communications between Keeshan, other persons at PwCIL, and employees of PwC-US, PwC-Ireland and/or PricewaterhouseCoopers LLP (UK) ("PwC-UK"). This category includes documents responding to a request by Keeshan that attorneys from member firms prepare legal summaries of claims against their respective firms. Third are documents sent to or shared with the PricewaterhouseCoopers network's insurance provider, L & F Indemnity Limited. Keeshan Decl. ¶ 28.

II. *DISCUSSION*

A. *Adequacy of Privilege Log*

Before discussing each of the three categories of documents, we begin by addressing BofA's argument that the insufficiency of some of PwCIL's descriptions in the privilege log should result in a denial of protection. BofA Mem at 14-16.

PwCIL's privilege log contains, as applicable to each document listed, information on the type of document, its date, its author, its recipients, persons copied on the document, persons to whom the document was forwarded, the author of the responsive portion of any attachment, and a description of the subject matter of the document. While the log does not provide every piece of factual information necessary to demonstrate all aspects of the claims of privilege, the log does provide enough detail "to permit a judgment as to whether the document is at least potentially protected from disclosure." *United States v. Constr. Prod. Research, Inc.,* 73 F.3d 464, 473 (2d Cir.1996). Cases rejecting claims of privilege based on the inadequacy of the privilege log alone typically involve an absence of basic information such as names of recipients, dates, or subject matters of documents-or a failure to produce a log at all. *See, e.g., Aurora Loan Services, Inc. v. Posner, Posner & Associates, P.C.,* 499 F.Supp.2d 475, 479 (S.D.N.Y.2007); ***168** *OneBeacon Ins. Co. v. Forman Int'l Ltd.,* 2006 WL 3771010, at *3, *7, *8 (S.D.N.Y. Dec. 15, 2006). While a claim of privilege may be rejected based on lesser inadequacies, the Court exercises its discretion not to do so here in light of the fact that both sides have now made full submissions on the claims of privilege. *See, e.g., NXIVM Corp. v. O'Hara,* 241 F.R.D. 109, 131 (N.D.N.Y.2007).

B. *Communications Within PwCIL and the Attorney-Client Privilege*

The first category of documents consists of communications between PwCIL's in-house counsel, Keeshan, and the Global Board and Global Leadership Team of PwCIL (Document 18, 29, 30, 37, 49 and 70-71). PwCIL asserts attorney-client privilege with respect to these documents. We begin by discussing the law governing attorney-client privilege.

1. *Law Governing the Assertion of the Attorney-Client Privilege*

Because this Court's subject matter jurisdiction is based upon diversity, *see* Complaint, filed May 23, 2003 (Docket # 1), ¶ 10, state law provides the rule of decision concerning the claim of attorney-client privilege. *See* Fed.R.Evid. 501; *Dixon v. 80 Pine St. Corp.,* 516 F.2d 1278, 1280 (2d Cir.1975). While neither party has addressed the choice of law issue in its motion papers, this Court previously applied New York privilege law to a motion to compel in this case, *see Allied Irish Banks v. Bank of Am., N.A.,* 240 F.R.D. 96, 102-03 (S.D.N.Y.2007), and both parties cite to cases applying New York law in their memoranda of law. Thus, the Court will apply New York privilege law. *See id.*

In New York, the statutory codification of the privilege is as follows

> [A]n attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication ....

N.Y.C.P.L.R. § 4503(a)(1). For the privilege to apply, the communication from attorney to client must be made "for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship." *Rossi v. Blue Cross & Blue Shield of Greater N.Y.,* 73 N.Y.2d 588, 593, 542 N.Y.S.2d 508, 540 N.E.2d 703 (1989). The communication itself must be "primarily or predominantly of a legal character." *Id.* at 594, 542 N.Y.S.2d 508, 540 N.E.2d 703. "The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client." *Spectrum Sys. Int'l Corp. v. Chem. Bank,* 78 N.Y.2d 371, 379, 575 N.Y.S.2d 809, 581 N.E.2d 1055 (1991).

"The proponent of the privilege has the burden of establishing that the information was a communication between client and counsel, that it was intended to be and was kept confidential, and [that] it was made in order to assist in obtaining or providing legal advice or services to the client." *Charter One Bank, F.S.B. v. Midtown Rochester, L.L.C.,* 191 Misc.2d 154, 166, 738 N.Y.S.2d 179 (N.Y.Sup.Ct.2002); *accord People v. Mitchell,* 58 N.Y.2d 368, 373, 461 N.Y.S.2d 267, 448 N.E.2d 121 (1983) (citing cases). A communication between an attorney and the agent or employee of a corporation may be privileged where the agent "possessed the information needed by the corporation's attorneys in order to render informed legal advice." *In re Copper Mkt. Antitrust Litig.,* 200 F.R.D. 213, 218-19 (S.D.N.Y.2001) (citing *Upjohn Co. v. United States,* 449 U.S. 383, 391, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)).

"Generally, communications made between a defendant and counsel in the known presence of a third party are not privileged." *People v. Osorio,* 75 N.Y.2d 80, 84, 550 N.Y.S.2d 612, 549 N.E.2d 1183 (1989) (citing cases). Rather, "disclosure of attorney-client communication to a third party or communications with an attorney in the presence of a third party, not an agent or employee of counsel, vitiates the confidentiality required for asserting the privilege." *Delta Fin. Corp. v. Morrison,* 13 Misc.3d 441, 444-45, 820 N.Y.S.2d 745 (N.Y.Sup.Ct.2006).

Under New York law, "the burden of establishing any right to protection is on the ***169** party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity." *Spectrum Sys.,* 78 N.Y.2d at 377, 575 N.Y.S.2d 809, 581 N.E.2d 1055 (citing cases). It is also the burden of the party asserting a privilege to establish that it has not been waived. *See John Blair Commc'ns, Inc. v. Reliance Capital Group,* 182 A.D.2d 578, 579, 582 N.Y.S.2d 720 (1st Dep't 1992). Such showings must be based on competent evidence, usually through affidavits, deposition testimony or other admissible evidence. *See von Bulow by Auersperg v. von Bulow,* 811 F.2d 136, 147 (2d Cir.), *cert. denied,* 481 U.S. 1015, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987); *Bowne of N.Y. City, Inc. v. AmBase Corp.,* 150 F.R.D. 465, 472 (S.D.N.Y.1993). The burden cannot be met by " 'mere conclusory or ipse dixit assertions' " in unsworn motion papers authored by attorneys. *von Bulow,* 811 F.2d at 146 (quoting *In re Bonanno,* 344 F.2d 830, 833 (2d Cir.1965)).

2. *Discussion*

BofA argues that PwCIL has not met its burden of establishing the privilege because, *inter alia,* PwCIL has not identified in what capacity the recipients of the communications were acting-that is, whether they were acting as members of the Global Board or Global Leadership Team or in their respective capacities at their member firms. *See* BofA Mem. at 15. As noted, where attorney-client communications are shared with third parties, the privilege is normally extinguished. *See, e.g., Osorio,* 75 N.Y.2d at 84, 550 N.Y.S.2d 612, 549 N.E.2d 1183 (citing cases). Thus, to the extent any of these individuals were acting in their capacities as employees of the member firms, any privilege-assuming it were demonstrated-would be vitiated. In addition, even where materials are shared within a corporate organization, a corporation asserting the attorney-client privilege has the burden of showing "that it preserved the confidentiality of the communication by limiting dissemination only to employees with a need to know." *Bank of N.Y. v. Meridien Biao Bank Tanz. Ltd.,* 1996 WL 474177, at *2 (S.D.N.Y. Aug. 21, 1996) (citing 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence,* ¶ 503(b) [04] at 503-49 to 503-50 (1988)).

Here, all of the communications have multiple recipients. PwCIL, however, has provided only the most rudimentary descriptions of the roles and functions of the individuals who received copies of these documents. *See* Ex. B to White Decl. A description of the function of each individual is indispensable here inasmuch as PwCIL admits to having "acted ... through" at least some individuals who "divided their time" between PwCIL and their member firms. Keeshan Decl. ¶ 12.

With respect to five of the seven documents (18, 29, 30, 37, and 49), the documents were authored by or shared with two individuals-Ann L. MacDougall and Steven M. Witzel-who are each identified only as "[a]n attorney involved with preparing for potential litigation relating to the AIB matter." *See* Ex. B. to White Decl. A sixth document, Document # 71, was shared with a Michael D. Kelley, who is identified only with the single phrase, "Global Marketing"-a phrase that is nowhere linked to PwCIL. *See id.* Nor does this phrase explain Kelley's function with respect to these communications, including why it was necessary that he participate in them. Each of these three individuals is also identified as working for PwC-US. *See id.* PwCIL and PwC-US, however, are separate corporate entities. If a privileged PwCIL attorney-client communication is shared with an individual not acting on behalf of PwCIL, the privilege has been lost (barring the applicability of the common interest rule).[3] Thus, the capacity in which these individuals acted when they viewed these documents is critical to the assertion of the privilege. Here, PwCIL has provided no evidence that MacDougall, Kelley or Witzel were acting on behalf of PwCIL, as opposed to acting on behalf of their member firms, when they received these documents. Accordingly, ***170** PwCIL cannot assert the attorney-client privilege with respect to these documents. In addition, with respect to Kelley, there is no evidence of his need to know the contents of the communication at issue.

A clearer factual showing has been made with Document # 70, however. With respect to this document, each of the recipients is identified as being a member of or working for either the Global Board or the Global Leadership Team, and the description of their functions suggests that there was a reason for each to participate in the communication. Accordingly, the motion is denied with respect to Document # 70.

The elements of the privilege have otherwise been established with respect to this document. The Court recognizes that BofA is arguing that "it is not at all clear that the communications in question were predominantly legal, rather than business, in nature given that it was in the nature of PwCIL's business to monitor the quality of the services provided by its member firms." BofA Mem. at 10. However, PwCIL has filed a declaration from its General Counsel at the time, Keeshan, stating that this communication (among others) was made "so that [the Global Board and Global Leadership Team] could assess and address potential legal claims and reputational/monetary risks arising from the Allfirst fraud." Keeshan Decl. ¶ 19. Keeshan directed that this document be prepared, and it was "used in the course of providing legal analysis to the Global Board and Global Leadership Team, as well as in discussions with PricewaterhouseCoopers in-house attorneys." *Id.* ¶ 20. In light of the absence of evidence contradicting Keeshan's assertions, the Court accepts that PwCIL has met its burden of showing that Document # 70 was made "in order to render legal advice or services to the client." *Spectrum Sys. Int'l. Corp.,* 78 N.Y.2d at 379, 575 N.Y.S.2d 809, 581 N.E.2d 1055, and was not for purely business purposes.

C. *Communications Between PwCIL and Personnel of Its Member Firms and the Common Interest Rule*

The second category of documents consists of communications between attorneys for PwCIL (including Keeshan) and various personnel from member firms, principally PwC-US, PwC-Ireland and/or PwC-UK. With respect to these documents, PwCIL asserts protection under the common interest rule.

The common interest rule is not a separate privilege but " 'an extension of the attorney client privilege.' " *United States v. Schwimmer,* 892 F.2d 237, 243 (2d Cir.1989) (quoting *Waller v. Fin. Corp. of Am.,* 828 F.2d 579, 583 n. 7 (9th Cir.1987)). The rule

> serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.... Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected.... The need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter, ... and it is therefore unnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privilege to apply .... Neither is it necessary for the attorney representing the communicating party to be present when the communication is made to the other party's attorney.

Id. at 243-44 (citations and internal quotation marks omitted).

New York courts applying the common interest rule to civil proceedings have often looked to federal case law for guidance. *See, e.g., U.S. Bank Nat'l Ass'n v. APP Int'l Fin. Co.,* 33 A.D.3d 430, 431, 823 N.Y.S.2d 361 (1st Dep't 2006) ("the federal courts have been instructive in [the doctrine's] applicability"); *Stenovich v. Wachtell, Lipton, Rosen & Katz,* 195 Misc.2d 99, 106-08, 756 N.Y.S.2d 367 (N.Y.Sup.Ct.2003). Therefore, we look not only to New York but also to federal case law to determine the applicability of the rule.

The common interest rule is intended to allow clients to share information with an attorney for another party who shares the same legal interest. *See* ***171** *SR Int'l Bus. Ins. Co. Ltd. v. World Trade Center Prop., LLC,* 2002 WL 1334821, at *3 (S.D.N.Y. June 19, 2002). As is true for any privilege, the common interest rule is narrowly construed. *See, e.g., United States v. Weissman,* 195 F.3d 96, 100 (2d Cir.1999) (*per curiam*) ("Privileges should be narrowly construed and expansions cautiously extended.") (citing *Univ. of Pa. v. EEOC,* 493 U.S. 182, 189, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990)); *see also Aetna Cas. and Sur. Co. v. Certain Underwriters at Lloyd's London,* 176 Misc.2d 605, 612, 676 N.Y.S.2d 727 (N.Y.Sup.Ct.1998) (the common interest rule "is subject to severe limitations and a 'narrow construction' "), *aff'd,* 263 A.D.2d 367, 692 N.Y.S.2d 384 (1st Dep't 1999). There are two elements of the common interest rule (1) the party who asserts the rule must share a common legal interest with the party with whom the information was shared and (2) the statements for which protection is sought were designed to further that interest. *See Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.,* 215 F.R.D. 466, 471 (S.D.N.Y.2003); *Johnson Matthey, Inc. v. Research Corp.,* 2002 WL 1728566, at *6 (S.D.N.Y. July 24, 2002). The interest must be "primarily or predominantly ... legal rather than ... commercial." *U.S. Bank Nat'l Ass'n,* 33 A.D.3d at 431, 823 N.Y.S.2d 361 (emphasis omitted) (citing *Gulf Islands Leasing,* 215 F.R.D.

at 471); *accord Yemini v. Goldberg,* 12 Misc.3d 1141, 1144, 821 N.Y.S.2d 384 (N.Y.Sup.Ct.2006) ("business-oriented or personal communications are not covered by the 'common interest' exception").

Before a communication can be protected under the common interest rule, the communication must meet the elements of the attorney-client privilege. *Gulf Islands Leasing,* 215 F.R.D. at 470. Thus, with regard to the "interest" that must be shown, case law has repeatedly held that communications regarding business matters-even where litigation is pending or imminent-do not qualify for protection from discovery under the common interest rule. *See, e.g., id.* at 472. As one New York case has held, "[t]here must be a substantial showing by parties attempting to invoke the protections of the privilege of the need for a common defense [as opposed to the mere existence of a] common problem." *Finkelman v. Klaus,* 2007 WL 4303538, at *4 (N.Y.Sup.Ct. Nov. 28, 2007) (internal quotation marks and citations omitted; bracketing in original).

New York law appears to restrict the doctrine to communications with respect to legal advice "in pending or reasonably anticipated litigation." *Aetna,* 176 Misc.2d at 612, 676 N.Y.S.2d 727; *see also Parisi v. Leppard,* 172 Misc.2d 951, 956, 660 N.Y.S.2d 307 (Sup.Ct.N.Y.Co.1997) ("[a] proper assertion of the privilege in a given instance therefore will rest on whether the exchange was for the purpose of giving and receiving shared legal counsel in or in anticipation of litigation, as opposed to transmitting information that was business-oriented ... in nature") (citing *Rossi,* 73 N.Y.2d at 593, 542 N.Y.S.2d 508, 540 N.E.2d 703); *accord Bank of Am., N.A. v. Terra Nova Ins. Co. Ltd.,* 211 F.Supp.2d 493, 498 (S.D.N.Y.2002); *Yemini,* 12 Misc.3d at 1142, 821 N.Y.S.2d 384.

There are two subcategories of documents for which PwCIL seeks protection under the common interest rule. The first subcategory-consisting of Document 1-7, 9, 11-13, 16-17-are communications with lawyers and others in member firms that Keeshan says were for the purpose of "coordinat[ing] a consistent legal strategy in response to the Allfirst fraud and ... potential claims arising from that fraud." Keeshan Decl. ¶ 22. Keeshan says that this effort "was undertaken to avoid, and prepare for, the possibility of litigation." *Id.* According to Keeshan, these communications "were made as part of a cooperative effort, and were not directed to any disciplinary or remedial actions that PwCIL might take against any member firm." *Id.*

The second subcategory-consisting of Document 14-15, 19-28, 31-36, 38-41, 43-47, 52-56, 58-59, 62-are documents arising from a request by Keeshan that attorneys from member firms prepare legal summaries of claims against their respective firms. Keeshan Decl. ¶ 24. Keeshan made this request "to facilitate [Keeshan's] advice to the Global Board and Global Leadership Team with respect to major pending and potential claims facing the ... network." *Id.* The summaries "also helped to facilitate a ***172** discussion among counsel to the various network firms regarding legal risks-including potential claims-then facing the network and their response to addressing those matters." *Id.* Keeshan contends in his affidavit that PwCIL and its member firms had "a common interest in avoiding and defending against potential legal claims that could arise from the Allfirst fraud." *Id.* ¶ 26; *accord id.* ¶ 23. PwC-US lawyers drafted summaries of the AIB matter that were updated multiple times, *id.* ¶ 24, and that included, according to Keeshan, only information regarding actual or potential litigation in which "the ... network faced potential claims that were material to [it]," *id.* ¶ 25.

PwCIL's assertion of the common interest rule suffers from a critical defect, however. As previously noted, New York state law applies the common interest doctrine only with respect to legal advice "in pending or reasonably anticipated litigation." *Bank of Am.,* 211 F.Supp.2d at 498 (emphasis, internal quotation marks and citation omitted). Thus, for the purportedly privileged attorney-client communications to remain privileged, PwCIL must show that it "reasonably anticipated" litigation in common with the other firms in its network. Federal law would require the same showing in this instance because the only interest that is alleged to be common among PwCIL and the member firms is their defense of potential claims against them relating to the Allfirst fraud. If, in fact, PwCIL did not reasonably anticipate any claims against it, there would be no common interest.

Here, PwCIL offers only one piece of evidence on this question the affidavit from Keeshan, its General Counsel during the relevant time period. While this affidavit states unequivocally that Keeshan anticipated that legal claims might be brought against *member firms* after the Allfirst fraud, he does not say that he actually anticipated litigation against PwCIL. Rather he states only that "in cases where large potential claims existed against member firms, [he] would *generally be concerned about the possibility"* of a claim against PwCIL. Keeshan Decl. ¶ 18 (emphasis added).

In the context of the work product doctrine, it has been held that "[w]hether material was prepared 'in anticipation of litigation' requires a determination of the subjective question of whether the party actually thought it was threatened with litigation and the objective question of whether that belief was reasonable." *Gulf Islands Leasing,* 215 F.R.D. at 475. There is no reason why the same test should not be applied in the context of the common interest doctrine.

We do not need to consider the "objective" question of whether PwCIL could have reasonably believed that it was threatened with litigation (the topic of the bulk of the briefing by the parties on this issue). Here, there is a complete lack of evidence that Keeshan or anyone else at PwCIL *actually* thought PwCIL was threatened with litigation at the time of these communications-let alone evidence that these communications were prepared in anticipation of that litigation. Thus, PwCIL has not met the subjective component of the test.

Notably, the documents themselves are devoid of any reference to this topic. No affidavit or deposition testimony has been offered from anyone at PwCIL stating that at the time these documents were prepared, PwCIL viewed itself as being threatened with litigation. Keeshan's views as to what claims he "generally" would have been "concerned" about are simply insufficient to show that PwCIL actually thought it was threatened with litigation and engaged in the various communications at issue to further its own interest in not being sued.

Because the common interest extension of the attorney-client privilege is not met, there is no need to address BofA's other arguments attacking the assertion of this privilege.

D. *Applicability of the Work Product Doctrine*

What remains to be discussed is the applicability of the work product doctrine to (1) the first two categories of documents for which there has not been a showing of attorney-client privilege, and (2) the third category of documents, consisting of documents characterized as "communications with ***173** [PwCIL's] insurer," PwCIL Resp. at 13 n. 18; *see* Keeshan Decl. ¶ 2 8 (referring to Documents 50-51, 69).[4]

While state law governs the question of attorney-client privilege in a diversity action, federal law governs the applicability of the work product doctrine. *See, e.g., Weber v. Paduano,* 2003 WL 161340, at *3 (S.D.N.Y. Jan. 22, 2003) (citing cases). The work product doctrine is codified in Fed.R.Civ.P. 26(b)(3), which provides that a party is not entitled to obtain discovery of "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative" unless the party makes a showing of substantial need and lack of undue hardship.

PwCIL, however, cannot claim work product protection under Fed.R.Civ.P. 26(b)(3) because that rule refers to protection given to a "party" or its representative, and PwCIL does not fit into either category. *See Ramsey v. NYP Holdings, Inc.,* 2002 WL 1402055, at *6 (S.D.N.Y. June 27, 2002) (quoting 8 C. Wright, A. Miller & R. Marcus, Federal Practice & Procedure Civil § 2024 at 354-56 (2d ed.1994)).[5] Nonetheless, courts have recognized that "the inapplicability of Rule 26(b)(3) does not preclude granting similar immunity under the common-law work-product doctrine or the 'good cause' balancing test that is incorporated in Federal Rule of Civil Procedure 26(c)." *Haus v. City of New York,* 2006 WL 3375395, at *3 (S.D.N.Y. Nov. 17, 2006) (internal citations omitted). Notably, Rule 45 specifically permits non-parties to seek protection from a subpoena that "requires disclosure of privileged or other protected matter." Fed.R.Civ.P. 45(c)(3)(A)(iii).

Here, however, it is not necessary to explore the contours of what work product protection would be available to PwCIL under "common law" work product immunity since it could not prevail even under the Rule 26(b)(3) standard. Under Rule 26(b)(3), the party asserting work product protection "bears the burden of establishing its applicability to the case at hand." *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002,* 318 F.3d 379, 384 (2d Cir.2003) (citing cases). This includes demonstrating that the doctrine applies and that it has not been waived. *See, e.g., Allied Irish Banks,* 240 F.R.D. at 105. The burden is a "heavy one." *In re Grand Jury Subpoenas,* 318 F.3d at 384. "Three conditions must be met to earn work product protection. The material must (1) be a document or a tangible thing, (2) that was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by his representative." *Allied Irish Banks,* 240 F.R.D. at 105 (internal quotation marks, citations and bracketing omitted).

As discussed previously in the context of the common interest doctrine, PwCIL has failed to show that it actually anticipated litigation at the time of the creation of the documents. For this reason alone, its claim to work product privilege must fail.

While it is not necessary to reach the issue, the Court notes that even if PwCIL had shown that it harbored some concern about litigation against itself, PwCIL has not shown that any of the documents were prepared *"because of* the prospect" of that litigation. *United States v. Adlman,* 134 F.3d 1194, 1202 (2d Cir.1998) (emphasis in original) (internal quotation marks and citation omitted). Work product protection is not available for documents "that would have been created in essentially similar form irrespective of litigation." *Id.* at 1202. Thus, even if PwCIL had shown it anticipated litigation on the AIB matter, it failed to provide evidence that the documents would not have been prepared in essentially the same form irrespective of that litigation, as required by *Adlman,* 134 F.3d at 1202. No testimony or affidavit has been presented to the Court on ***174** this point-a failing specifically noted in an earlier decision in this case, *Allied v. Irish Bank,* 240 F.R.D. at 107. Significantly, the withheld documents themselves appear to relate to litigation against the member firms-not against PwCIL-and thus it is perfectly plausible that even if PwCIL had not expected to be sued itself, it would have undertaken the same exercise to investigate the claims against its member firms.

E. *PwC-US's Motion to Intervene*

PwC-US has moved to intervene to assert work product protection with respect to Document 7, 11-17, 19, 22-30, 32-41, 43-47, 49, 52-56, 58, 62. *See* PwC-US Mem. at 1 n. 1. BofA objects to intervention and also to the assertion of work product protection.

1. *Law on Intervention*

Intervention is available under Fed.R.Civ.P. 24(a)(2) to a party that "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Under this rule, intervention is granted where "(1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties." *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.,* 471 F.3d 377, 389 (2d Cir.2006). The only elements disputed here are whether the motion is "timely" and whether PwCIL adequately protects PwC-US's interests.

Here, PwC-US sought to file its motion one week after the briefing was completed on BofA's motion to compel production from PwCIL. While the delay in making this motion was unnecessary inasmuch as PwC-US was apparently aware of the need for the motion by the time BofA made its own motion, the relatively short delay caused no prejudice to BofA or anyone else. After considering the factors that govern the judgment of timeliness, *see MasterCard Int'l Inc.,* 471 F.3d at 390, the Court will not deem the motion untimely.

As for the question of adequate representation, it is obvious that PwCIL does not represent PwC-US's interests. As BofA has vociferously (and correctly) argued in the context of the common interest rule, the two entities are independent, and thus they cannot assert privileges on behalf of the other. Indeed, the inadequacy of PwCIL's representation is demonstrated by the fact that, as will be discussed shortly, PwCIL's and PwC-US's showings as to whether each anticipated litigation differ substantially.

Accordingly, the motion to intervene is granted. *See, e.g., United States v. Am. Tel. & Tel. Co.,* 642 F.2d 1285, 1293 (D.C.Cir.1980) (motion to intervene granted to permit party to assert work product privilege); *In re Katz (Jamil v. United States),* 623 F.2d 122, 125 (2d Cir.1980) (attorney-client privilege). *Sackman v. Liggett Group, Inc.,* 167 F.R.D. 6, 22 (E.D.N.Y.1996) (joint defense privilege).

2. *Merits of the Claim*

The documents at issue (or their attachments) were either authored or received by Steven M. Witzel, an attorney for PwC-US. Witzel Decl. ¶ 1. Witzel states that he anticipated that PwC-US would become "involved in litigation" as a "potential defendant[ ]" in a lawsuit arising out of the Allfirst fraud, *id.* ¶¶ 6, 7, 12, and that he would not have engaged in the communications at issue had there been no threat of litigation, *id.* ¶¶ 6, 7, 12, 15. He also states that he expected these materials to be kept confidential within the PwC network, and that they would not be shared with outside firms. *Id.* ¶ 13.

If PwC-US came within Rule 26(b)(2), its submission would show all the elements required to obtain work product protection. BofA argues, however, that the common law protection afforded to such documents is narrower than the rule-based protection and that, because BofA is not its adversary, ***175** PwC-US should not be entitled to assert the doctrine. *See* BofA Resp. at 13-16.

There is some force to the argument that there should be lesser protection afforded to work product where an adversary is not seeking to obtain the material at issue. Nonetheless, to vindicate the underlying purposes of the doctrine, case law makes clear that some protection should be afforded. These purposes are "preventing discovery from chilling attorneys' ability to formulate their legal theories and prepare their cases, preventing opponents from free-loading off their adversaries' preparation, and preventing disruption of ongoing litigation." *In re Student Fin. Corp.,* 2006 WL 3484387, at *12 (E.D.Pa. Nov. 29, 2006). Thus, courts should afford work product protection to non-parties if disclosure would "(1) alter attorney behavior, (2) reward sloth, or (3) interfere with ongoing litigation." *Haus,* 2006 WL 3375395, at *3 (citing *Abdell v. City of New York,* 2006 WL 2664313, at *4 (S.D.N.Y. Sept. 14, 2006)).

Here, the first two factors favor work product protection. If an attorney representing an accounting firm knew that the adversary of his firm's client might obtain his work product, he would understandably be more circumspect in creating such work product in the future. Even though the accounting client's adversary is not the accountant's adversary, there is a close relationship between an accounting firm and its client, and an attorney for an accounting firm would naturally not wish to create material that could be used to the detriment of the firm's client. Of course, the "freeloader" problem exists here as well, even though BofA is not now an adversary. If BofA can show no substantial need for the materials and no undue hardship in obtaining them, there does not seem to be a reason to give BofA the advantage of PwC-US's diligence as expressed in its work product. Accordingly, the Court will accord work product protection to these materials.

As to the question of whether BofA has shown a "substantial need" for any of these materials and "undue hardship" in trying to obtain them by other means, BofA is obviously at a disadvantage in making this argument since it cannot examine the materials. The Court too finds itself unable to make an intelligent assessment of these questions based on its *in camera* review because of its lack of knowledge regarding many of the matters recounted in the documents. Accordingly, the Court will defer a ruling on the questions of "substantial need" and "undue hardship" to allow for fuller disclosure from PwC-US to BofA regarding the contents of the documents at issue. The mechanism for this disclosure will be discussed at a conference that will be held on April 7, 2008 at 11:00 a.m. in Courtroom 17-A, 500 Pearl Street, New York New York. Following the disclosure, BofA will be given a new opportunity to seek to overcome the work product protection afforded the documents.

Conclusion

Bank of America's motion to compel (Docket # 65) is granted in part and denied in part. PwC-US's motion to intervene (Docket # 77) is granted. Its motion for a protective order is disposed of as set forth above.

SO ORDERED.

All Citations

252 F.R.D. 163

Footnotes

1 *See* Notice of Motion by Defendant Bank of America, N.A., filed Aug. 2, 2007 (Docket # 65); Memorandum of Law in Support of Defendant Bank of America, N.A.'s Motion to Compel the Production of Doicuments [sic] By Non-Party Pricewaterhouse Coopers International, filed Aug. 2, 2007 (Docket # 66) ("BofA Mem."). PwCIL filed opposition papers. *See* Declaration of Sarah L. Cave, filed Aug. 30, 2007 (Docket # 68); Keeshan Decl.; Declaration of William E. White, filed Aug. 30, 2007 (Docket # 70) ("White Decl."); PwCIL Resp. BofA filed reply papers. *See* Supplemental Declaration of Donald Rosenthal Pursuant to 28 U.S.C. § 1746, filed Sept. 14, 2007 (Docket # 73); Reply Memorandum of Law in Support of Defendant Bank of America, N.A.'s Motion to Compel the Production of Documents by Non-Party Pricewaterhouse Coopers International, filed Sept. 14, 2007 (Docket # 74) ("BofA Reply").

2 *See* Non-Party PricewaterhouseCoopers LLP's Notice of Motion to Intervene and for a Protective Order, filed Oct. 3, 2007 (Docket # 77); Declaration of Sarah L. Cave, filed Oct. 3, 2007 (Docket # 78); Declaration of Steven M. Witzel, filed Oct. 3, 2007 (Docket # 79) ("Witzel Decl."); PwC-US Mem. BofA opposed the motion, *see* Memorandum of Law in Opposition to Non-Party Pricewaterhouse Coopers LLP's Motion to Intervene and for a Protective Order, filed Nov. 2, 2007 (Docket # 83) ("BofA Resp."); Declaration of Donald Rosenthal Pursuant to 28 U.S.C. § 1746, filed Nov. 2, 2007

(Docket # 84), and PwC-US filed a reply, *see* Non-Party PricewaterhouseCoopers LLP's Reply Memorandum of Law in Further Support of Its Motion to Intervene and for a Protective Order, filed Nov. 16, 2007 (Docket # 86).

3 PwCIL does not assert the common interest rule with respect to any of the documents in this category, however. *See* PwCIL Resp. at 16. Even if it had, the rule would not apply for the reasons discussed in the next section.

4 While the Revised Privilege Log asserts the attorney-client and common interest privileges with respect to Document # 51, we discuss only the applicability of the work product doctrine because this is the only argument that PwCIL raises with respect to this document. *See* PwCIL Resp. at 13 n. 18; Keeshan Decl. ¶ 28.

5 As was noted in *Ramsey,* 2002 WL 1402055, at *6 n. 5, cases that have applied Rule 26(b)(3) to non-parties typically have done so where no litigant raised the issue of the rule's applicability.

End of Document

2019 WL 1397150
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

ARGOS HOLDINGS INC.
and Petsmart Inc., Plaintiffs,
v.
WILMINGTON TRUST NATIONAL
ASSOCIATION, as Administrative Agent,
Defendant, Counterclaim-Plaintiff,
v.
Argos Intermediate Holdco III Inc., Buddy
Chester Corp., Buddy Chester Sub Corp.,
Buddy Holdings Corp. Alan M. Schnaid,
Paulette R. Dodson, Paul Keglevic, Peter
S. Kravitz, Scott D. Vogel, and Cezar
M. Froelich, Counterclaim-Defendants.

18cv5773(DLC)
|
Signed 03/28/2019

Attorneys and Law Firms

For the plaintiffs: Michael S. Shuster, Dwight A. Healy, Benjamin F. Heidlage, Matthew Gurgel, Holwell Shuster & Goldberg LLP, 425 Lexington Avenue, New York, New York 10017.

For the defendant: Mark T. Stancil, Kathryn S. Zecca, Rachel S. Li Wai Suen, Joshua S. Bolian, Lauren M. Cassady Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, 2000 K Street, NW, 4th Floor, Washington, DC 20006.

OPINION AND ORDER

DENISE COTE, United States District Judge

***1** Plaintiffs PetSmart, Inc. ("PetSmart") and Argos Holdings, Inc. ("Holdings") have moved pursuant to Fed. R. Civ. P. 26(c) for a protective order with respect to thirteen sets of documents on the grounds of attorney-client and work product privileges. For the reasons that follow, that motion is granted for three of the thirteen sets.

Background

The communications at issue were made by or on behalf of attorneys to three individuals, or were forwarded to those individuals by PetSmart personnel. Those three individuals hold two positions of relevance to this dispute. They are each partners in the principal investor in the plaintiffs -- the private equity firm BC Partners, Inc. ("BC Partners") -- and they also serve as members of the board of the plaintiffs' ultimate owner, which is Argos Holdings GP LLC ("Argos GP").[1] The three individuals are Raymond Svider ("Svider"), Michael Chang ("Chang"), and Fahim Ahmed ("Ahmed", together "Three Individuals"). They are three of the seven members of the Argos GP board, and exercise a majority of the votes on the board by virtue of Argos GP's LLC Agreement. In addition to being Argos GP directors, Ahmed was Vice President and Secretary of Argos GP, Chang was Vice President and Treasurer of Argos GP, and Svider was Executive Chairman of PetSmart until June 2018.

The attorneys at issue are the law firms Kirkland & Ellis LLP ("Kirkland") and Simpson Thacher & Bartlett LLP ("Simpson Thacher"). Both law firms were retained by Argos GP and related entities to advise them in connection with transactions at issue here. They were not retained by BC Partners in connection with these matters, and BC Partners was not their client. In brief, the transactions are the following.

BC Partners' acquisition of PetSmart was financed through a Credit Agreement dated March 11, 2015 ("the Credit Agreement"). Defendant and counterclaim-plaintiff Wilmington Trust, National Association ("Wilmington Trust") is the Administrative Agent under the Credit Agreement and represents the interests of the lenders under the Credit Agreement.

In 2017, PetSmart acquired Chewy, Inc. ("Chewy"), an online pet supply retailer. Simpson Thacher advised PetSmart, Holdings, Argos LP, and Argos GP concerning that transaction. In June 2018, PetSmart transferred some Chewy stock to Holdings, which then transferred the same stock to other entities wholly owned by Argos LP, but not by PetSmart. PetSmart also transferred some Chewy stock to a newly formed indirect subsidiary of PetSmart. Kirkland advised the same four entities -- PetSmart, Holdings, Argos LP, and Argos

GP -- concerning these two transactions ("the Transactions"), which are the primary subject of this litigation.

***2** PetSmart and Holdings filed this action on June 26, 2018, seeking a judgment compelling Wilmington Trust, as Administrative Agent under the Credit Agreement, to release liens on Chewy's assets and the transferred Chewy stock and to release Chewy's guarantees of PetSmart's debt. Wilmington Trust contends that the Transactions did not comply with the Credit Agreement and applicable law and has counterclaimed.

On December 26, 2018, Wilmington Trust filed a letter requesting a conference to address a dispute regarding ninety-four documents over which plaintiffs asserted the attorney-client privilege. That dispute as well as other discovery issues were addressed at a pretrial conference on January 18, 2019. An Order of January 23 directed the parties to file any motion for a protective order with respect to the ninety-four documents by January 28. On January 24, plaintiffs agreed to produce the majority of the withheld documents subject to a non-waiver stipulation.[2] In many instances, those produced documents were addressed to BC Partners personnel in addition to the Three Individuals.

Plaintiffs filed a motion for a protective order as to the thirteen sets of documents on January 28, and provided those documents to the Court, with proposed redactions, for in camera review. In that motion, the plaintiffs principally argued that Argos GP was a client of the two law firms and that the legal advice communicated to the Three Individuals, who were members of the Argos GP board, is privileged. The plaintiffs described PetSmart, its intermediate parents, and Argos GP as the common clients of the law firms. The defendant opposed the motion, principally by pointing out that the Three Individuals were also partners in BC Partners, which was not a client of the law firms. The defendant asserted that the plaintiffs had not carried their burden to show that the Three Individuals received the communications in their capacity as Argos GP board members.

In reply, the plaintiffs advanced a new theory to protect the communications. They assert that there is no need to determine in what capacity the Three Individuals received the privileged communications since, where there is no conflict of interest, a stockholder is entitled to assert the privilege as to communications with its representatives on the board of directors of one of its portfolio companies. In light of this new argument, the defendant was invited to submit a sur-reply. The defendant contends that a capacity analysis remains necessary since the mere fact of corporate parentage or ownership does not expand the privilege. According to the defendant, unless the entities are jointly represented or the common interest doctrine applies, neither of which has been asserted here, an investor may not invoke the privilege possessed by the portfolio company. The motion became fully submitted on March 4.

Discussion

New York law governs the plaintiffs' assertion of the attorney-client privilege because this is a diversity action regarding a claim for which New York law supplies the rule of decision. See Fed. R. Evid. 501. Moreover, each of the parties has relied on New York law in addressing this motion. See Arch Ins. Co. v. Precision Stone, Inc., 584 F.3d 33, 39 (2d Cir. 2009). It is noteworthy, however, that the "New York law of attorney-client privilege is, with certain exceptions, substantially similar to the federal doctrine." HSH Nordbank AG New York Branch v. Swerdlow, 259 F.R.D. 64, 70 n.6 (S.D.N.Y. 2009) (Lynch, J.).

***3** In New York, "[t]he attorney-client privilege shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship." Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616, 623 (2016) (citing N.Y. C.P.L.R. § 4503(a)(1)). The attorney-client privilege is "narrowly construed." Id. at 624. The mere fact that attorneys are involved in a communication does not cloak it with privilege. To qualify for the privilege, a communication must be "generated for the purpose of obtaining or providing legal advice as opposed to business advice." In re County of Erie, 473 F.3d 413, 419 (2d Cir. 2007). In determining the purpose of a communication, courts consider "whether the predominant purpose ... is to render or solicit legal advice." Id. at 420. "[L]egal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct." Id. at 419. "The party asserting the privilege bears the burden of establishing its entitlement to protection...." Ambac, 27 N.Y.3d at 624.

"Generally, communications made in the presence of third parties, whose presence is known to the client, are not privileged from disclosure because they are not deemed confidential." Ambac, 27 N.Y.3d at 624.

> While as a general matter the attorney-client privilege applies only to communications between lawyers and their clients ... under certain circumstances, the privilege for communication with attorneys can extend to shield communications to others when the purpose of the communication is to assist the attorney in rendering advice to the client.

United States v. Mejia, 655 F.3d 126, 132 (2d Cir. 2011) (citation omitted). Where communications from a client to a consultant are made in confidence and "for the purpose of obtaining legal advice from the lawyer," the communication is privileged. United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961). "[I]f the advice sought is the [consultant]'s rather than the lawyer's, no privilege exists." Id. This extension, however, "has always been a cabined one" that protects "communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client." Mejia, 655 F.3d at 132.

In New York, "where two or more clients separately retain counsel to advise them on matters of common legal interest, the common interest exception allows them to shield from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest." Ambac, 27 N.Y.3d at 625 (2016). This exception applies "where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel in the course of an ongoing common enterprise and multiple clients share a common interest about a legal matter." Schaeffler v. United States, 806 F.3d 34, 40 (2d Cir. 2015). "Demonstrating the applicability of the common interest doctrine requires a two-part showing: (1) the party who asserts the rule must share a common legal interest with the party with whom the information was shared and (2) the statements for which protection is sought must have been designed to further that interest." Swerdlow, 259 F.R.D. at 71 (citation omitted).[3] The doctrine "does not ... encompass a joint business strategy which happens to include as one of its elements a concern about litigation...." Id. (citation omitted). The common interest must be of "sufficient legal character to prevent a waiver by the sharing of ... communications." Schaeffler, 806 F.3d at 41. New York law further requires that the common legal interest involve "pending or reasonably anticipated litigation." Ambac, 27 N.Y.3d at 628.

***4** Attorney work product is also protected from discovery.[4] Schaeffler, 806 F.3d at 43. "Documents prepared in anticipation of litigation are work product, even when they are also intended to assist in business dealings." Id. To determine whether documents were prepared "in anticipation of litigation," courts in this Circuit look to the test established in United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998). Under that governing precedent,

> [a] document will be protected if, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. Conversely, protection will be withheld from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.

Schaeffler, 806 F.3d at 43 (emphasis in original) (citation omitted).

Each of the communications submitted for in camera review appears to have been created "for the purpose of obtaining or facilitating legal advice in the course of a professional relationship." Ambac, 27 N.Y.3d at 623. Ordinarily, such communications, if made between an attorney and a client and not disclosed to a third party, would be privileged.

The plaintiffs do not argue that Kirkland & Ellis or Simpson Thacher were counsel to BC Partners in connection with the communications, or that BC Partners shared a common legal interest with plaintiffs or Argos GP that was furthered by those communications. The question to be resolved, therefore, is whether the communications were with BC Partners, and if so, whether that would constitute a waiver of the privilege. Cf. Allied Irish Banks, P.L.C. v. Bank of America, N.A., 252 F.R.D. 163, 169 (S.D.N.Y. 2008) (to the extent that individuals receiving privileged communications were not acting on behalf of the client and received the communications in another capacity, the privilege is lost); Am. S.S. Owners Mut. Protection and Indem. Ass'n, Inc. v. Alcoa S.S. Co., Inc., 232 F.R.D. 191, 198 (S.D.N. Y 2005) ("When a Director of the [corporation] is acting on behalf of the member entity of which he is an officer, he can neither disseminate confidential information he has received as a Board member nor pierce the privilege to obtain additional information.").

Plaintiffs' Evidentiary Support for This Motion

The plaintiffs contend principally that the communications were made to a client because the Three Individuals received the communications pursuant to their status as directors at Argos GP. The plaintiffs have not, however, made a document by document presentation to explain why that is so. Instead, they rely on little more than the simple fact that the Three Individuals were directors of Argos GP at the time they received or sent the communications. They argue, without explanation, that the Three Individuals' concurrent employment by BC Partners should be ignored.

In support of this application, the plaintiffs submitted two brief declarations. Ahmed has declared that as "directors of Argos GP" at the time they sought and received legal advice from Simpson Thacher and Kirkland," Svider, Chang and he "understood that our communications with Simpson Thacher and Kirkland would be protected by the attorney-client privilege." A Kirkland partner has submitted a declaration that represents that he and other Kirkland attorneys involved in the engagement "have understood that at all times we are communicating with GP Board Members in their capacity as Argos GP board members and through them with our client, Argos GP. It is likewise my understanding that in communication with Kirkland & Ellis, the GP Board Members understood that the communications were confidential and were protected by the attorney-client privilege."

***5** These declarations are insufficient to establish that the communications were privileged. There is no submission from a Simpson attorney. Neither Svider nor Chang submitted an affidavit. The two declarations that were submitted from Ahmed and a Kirkland attorney are conclusory. See In re Grand Jury Subpoena Dated July 6, 2005, 510 F.3d 180, 184 (2d Cir. 2007). They do not explain why, if the communications were with the Three Individuals in their capacity as directors of Argos GP, the communications were not sent to every board member. They do not explain the basis for the purported understanding that the communications were confidential. They do not assert that this purported understanding meant that neither the communications nor their contents could be shared with individuals outside of Argos GP and its related entities, and specifically, that they could not be shared with BC Partners. Nor do they assert that the communications were in fact kept confidential and not, for instance, shared with other personnel at BC Partners. Given the intense engagement of BC Partners with the transactions discussed in the documents, it would have been incumbent upon Argos GP, if it wished the communications to be treated as privileged, to take steps to ensure that they were kept appropriately confidential. After all, when the Three Individuals received the communications they were partners at BC Partners and had an obligation to act to protect the interests of BC Partners.

There is no established litmus test to assess the capacity in which communications were received where a recipient plays multiple roles in a transaction, with only one of those roles allowing for the receipt of privileged communications. Nonetheless, the following factual gaps are noteworthy. Plaintiffs, who bear the burden of establishing that the privileges apply, have not described any measures taken to prevent disclosure to BC Partners of privileged communications with Argos GP personnel, officers or directors. They have not identified any document, protocol, or training designed to protect the privilege. Despite their having PetSmart email accounts, many of the documents were sent to the Three Individuals at their BC Partners email addresses, and thus were stored on BC Partners' email servers. The plaintiffs have not explained whether that gave other BC Partners personnel, in addition to the Three Individuals, access to the communications. Storage on the BC Partners servers certainly made it more difficult to protect the communications as communications belonging to Argos GP and protected by its attorney client privilege. Accordingly, unless an examination of the documents provides additional evidence that they were sent to the Three Individuals in their capacity as directors of Argos GP, the plaintiffs have not carried their burden to show that their application for a protective order should be granted.

Documents Protected by the Privilege

The plaintiffs have carried their burden of showing that the proposed redactions to three sets of documents are protected by the attorney-client privilege.[5] First, the plaintiffs seek to redact portions of an email chain of April 15, 2017 containing a question regarding the Chewy acquisition, and counsel's response to the question, as conveyed by Ahmed (Exhibit A). Each of the documents in the chain is addressed to the entire Argos GP Board. While the email addresses for the Three Individuals are their BC Partners email addresses, it appears that the email addresses of the other Board members are also email addresses associated with other employment and not their membership on the Argos GP board. Because the correspondence is with the entire Argos board, the plaintiffs' application is granted with respect to this document.

Two other sets of documents relate to litigation hold notices sent at the direction of counsel on June 22 and June 27, 2018 to individuals listed on a schedule of recipients (Exhibits

K and L). The listed individuals were identified on the schedules as PetSmart executives, the directors of Argos GP and PetSmart, and the Three Individuals. The schedules identify each of the Three Individuals by their relationship to PetSmart or Argos GP.[6] The schedules do not identify any recipient as associated with BC Partners. This identification of capacity is sufficient to find that the documents relate to the Three Individuals' membership on the Argos GP Board.[7] Additionally, the email history attached to the email forwarded in Exhibit L indicates that the Three Individuals received this communication at their PetSmart.com email addresses. The plaintiffs' application is therefore granted with respect to these documents.

Documents Not Protected by the Privilege

***6** The motion for a protective order is otherwise denied. In none of the following communications are there indications that the correspondence with the Three Individuals was in connection with their service as directors of Argos GP as opposed to their partnership in BC Partners. In several of the documents, Svider's email address is identified as a "BCP Contact," and Chang and Ahmed's email addresses are identified as "external." None of these communications were sent to the entire Argos GP Board.

The plaintiffs seek to withhold the entirety of an email sent on April 27, 2017 (Exhibit B). The email, which concerns an excess cash flow calculation, was sent by a PetSmart executive to counsel and was copied to others at PetSmart and to Chang. The attachment, the PetSmart excess cash flow calculation, was produced in discovery.

The plaintiffs seek to withhold a May 1, 2017 draft offering document prepared by counsel for the Chewy acquisition (Exhibit C). The cover email, sent by counsel to PetSmart officers, Chang, and Ahmed has been produced.

The plaintiffs seek to withhold a May 2, 2017 draft of the description of the unsecured notes (Exhibit D). The plaintiffs have produced the cover email from counsel, which was sent to PetSmart personnel. Chang, Ahmed and additional counsel were copied on the email.

The plaintiffs have produced a PetSmart certification pursuant to PetSmart's engagement letter with its accountants. The plaintiffs, however, seek to redact passages from a related email chain of May 31, 2018. Most of the emails were between counsel and a PetSmart officer, and relate to issues to be addressed at a PetSmart board meeting. A PetSmart officer forwarded the email chain and certification to Chang at his BC Partners email address, indicating it was "Fyi" (Exhibits E and F).[8]

The plaintiffs seek to withhold a draft PetSmart earnings call script containing revisions by counsel, attached to a May 31, 2018 email chain, which has been produced (Exhibit G). The emails are between counsel and the Three Individuals. PetSmart's CFO is copied on the last email in this chain. The emails are sent to and from the BC Partners email addresses of the Three Individuals.

The plaintiffs have produced an August 1, 2018 email from counsel to the Three Individuals, PetSmart officers, and persons who appear to be employees of the financial advisory firm Houlihan Lokey. They have withheld a draft power point presentation regarding a corporate transaction referred to as Operation Buddy (Exhibit H). Svider is listed as the first person to whom the materials were sent, and he is identified as "Raymond Svider BCP Contact". Chang and Ahmed's email addresses are identified as "Michael Chang External Email" and "Fahim Ahmed External Email."

The plaintiffs seek to withhold an August 6, 2018 draft of a power point presentation also related to Operation Buddy, but have produced the cover email from counsel (Exhibit I). In this email, Svider is again identified as the "BCP Contact," but is listed second. Chang and Ahmed's email addresses are listed as "external." The other recipients are PetSmart officers and employees of Houlihan Lokey.

On September 17, 2018, counsel sent an email to Svider, identified again as the "BCP Contact", Chang, Ahmed, PetSmart officers, and employees of Houlihan Lokey attaching a document describing an aspect of Operation Buddy (Exhibit J). Chang and Ahmed's email addresses are identified as "external." The email has been produced, but the plaintiffs seek to withhold disclosure of the attachment.

***7** Finally, the plaintiffs seek to withhold a draft PetSmart earnings call script, attached to a September 5, 2018 email which has been produced (Exhibit M). Counsel sent the email to Svider, again identified as "BCP Contact." Copied on the email were Chang, Ahmed, (again, at "external" email addresses) and certain PetSmart officers.

Remaining Arguments

The plaintiffs make two additional arguments in support of their motion. To support their claim that the communications were intended for the Three Individuals in their capacity as Argos GP board members, rather than as investors in Argos GP and its subsidiaries through their company BC Partners, plaintiffs note that no other BC Partners personnel were copied on these emails. This absence stands in contrast to other emails which the plaintiffs have now agreed to produce pursuant to a non-waiver agreement. The practice of copying BC Partners personnel on communications regarding the Transactions and related events is less than helpful to the plaintiffs. The fortuity that those additional personnel were not included on this handful of communications does not establish that their absence was intentional. The plaintiffs have not pointed to the substance of these emails as having any particular relevance to Argos GP, rather than BC Partners, especially when compared to the other now-produced emails. Again, if the communications did relate to the business of Argos GP and to the Three Individuals as members of the Argos GP board, it is puzzling that the emails were not addressed to the full Argos GP board.

Finally, the plaintiffs seek to extend the entity's privilege to its shareholders and investors. They assert that it is "well-established that where a stockholder of a corporation appoints directors to a company's board, the stockholder is entitled to the same privileged information as its representative." Not so. The weight of authority holds that shareholders are not entitled to corporate documents protected by attorney-client privilege absent litigation between the shareholders and the company and a showing of good cause. See Garner v. Wolfinbarger, 430 F.2d 1093, 1104 (5th Cir. 1970). See also In re Dow Corning Corp., 261 F.3d 280, 286 (2d Cir. 2001) (endorsing exception articulated by the Fifth Circuit in Garner); Fitzpatrick v. Am. Intern. Grp., Inc., 272 F.R.D. 100, 110-11 (S.D.N.Y. 2010); Urban Box Office Network, Inc. v. Interfase Managers, L.P., 01cv8854 (LTS), 2005 WL 1639392, at *1 (S.D.N.Y. July 12, 2005). The Delaware cases cited by the plaintiffs are inapposite. They address the circumstances in which directors may have access to the entity's privileged communications in the context of litigation. See Moore Bus. Forms, Inc. v. Cordant Holdings Corp., Civ. A. Nos. 13911, 14595, 1996 WL 307444, at *4 (Del. Ch. June 4, 1996) (memorandum opinion); KLM v. Checchi, No. C.A. 14764-NC, 1997 WL 525861, at *1 (Del. Ch. July 23, 1997) (letter opinion); In re CBS Corp. Litig., C.A. No. 2018-0342-AGB, 2018 WL 3414163, at *7 (Del. Ch. Jul, 13, 2018) (letter opinion).

In In re Teleglobe Commc'ns Corp., 493 F.3d 345 (3d Cir. 2007), cited by the plaintiffs, the Third Circuit noted that a parent company and its subsidiary will often share in a privilege because they are joint clients of a single firm, or because the common interest doctrine applies. Id. at 369-70. As noted at the outset, the plaintiffs admit that neither Kirkland nor Simpson Thacher were acting as counsel for BC Partners in these matters. They have not asserted that the communications are protected by the common interest doctrine. The Third Circuit noted as well that "treating members of a corporate family as one client fails to respect the corporate form." Id. at 371. The plaintiff's resort to the argument that an entity's privilege extends to its shareholders and investors suggests that Argos GP and its counsel did not guard the privilege with the diligence required to protect it.

Conclusion

***8** The plaintiffs' January 28 motion for a protective order is granted with respect to the documents submitted for in camera review as Exhibit A, K, and L to the Gurgel Declaration. The motion for a protective order is denied with respect to the remaining documents.

All Citations

Not Reported in Fed. Supp., 2019 WL 1397150

Footnotes

1 PetSmart is a wholly owned subsidiary of Holdings. Holdings is wholly owned, through a series of intermediaries, by Argos Holdings, L.P. ("Argos LP"). Argos Holdings GP LLC ("Argos GP") is the general partner of Argos LP, and manages Argos LP's business. BC Partners and each of its co-investors own a stake in both Argos GP and Argos LP.

2 Since that time, the plaintiffs have also produced other documents pursuant to a non-waiver stipulation.

3 Although New York law provides the rule of decision in this diversity action, see Fed. R. Evid. 501, "New York Courts applying the common interest rule to civil proceedings have often looked to federal case law for guidance." Swerdlow, 259 F.R.D. at 71 n.8.

4 The work product doctrine is a creature of federal law. See Fed. R. Civ. P. 26(b)(3). The parties rely on federal law in addressing the claimed work product. See Arch Ins. Co., 584 F.3d at 39.

5 The plaintiffs have divided the thirteen emails that they seek to withhold into six categories. Each of the emails and attachments has been submitted to the Court for in camera review as an exhibit to the declaration of Matthew Gurgel ("the Gurgel Declaration").

6 "Raymond Svider, former Executive Chairman, PetSmart, Inc. and current consultant, PetSmart, Inc.," "The Board of Directors of Argos Holdings GP LLC in their capacity as directors," "Michael Chang, Vice President and Treasurer, Argos Holdings GP LLC," and "Fahim Ahmed, Vice President and Secretary, Argos Holdings GP LLC."

7 In addition to being protected by attorney-client privilege, these documents are protected work product because they were prepared at the direction of Kirkland because of this litigation.

8 Exhibits E and F are substantially the same. The emails to Chang in the two exhibits were sent just moments apart.

End of Document

Faculty

Hon. Melanie L. Cyganowski is a partner with Otterbourg P.C. in New York and chairs its Bankruptcy practice. She joined the firm in 2008 after serving a full 14-year term as a U.S. Bankruptcy Judge for the Eastern District of New York and as its Chief Judge from 2005-08. She is currently co-counsel to the Ad Hoc Committee in *Purdue Pharma*, and was appointed as a member of a blue-ribbon committee by the Rockville Center Diocese with former Chief Bankruptcy Judge Arthur Gonzalez and former Comptroller of the City of New York Harrison J. Goldin. Judge Cyganowski's fiduciary appointments include receiver in *SEC v. Platinum Partners*; CRO and temporary operator of Brooklyn's Interfaith Medical Center; patient care ombudsman in *Randolph Hospital Inc.*, *Promise Healthcare*, *Orianna Health Systems*, *21st Century Oncology* and *California Proton*; auditor of Capital One; and various trusteeships. She also served as special master in *Vivendi* and *Neogenix Oncology*, a court-appointed expert in Orion HealthCorp, and an arbitrator/mediator in cases including *Madoff* and *Lehman*. Judge Cyganowski has testified as an expert in international cases involving U.S. bankruptcy laws. She is a Fellow in the American College of Bankruptcy, sits on the editorial advisory board of the *Norton Journal of Bankruptcy Practice & Law*, and is an adjunct professor at St. John's University School of Law in the Bankruptcy LL.M. Program. She also is active in philanthropic organizations, including Tina's Wish. Judge Cyganowski received her J.D. *magna cum laude* from the State University of New York at Buffalo School of Law in 1981.

Hon. Robert D. Drain is a U.S. Bankruptcy Judge for the Southern District of New York in White Plains. Since his appointment, he has presided over such chapter 11 cases as *Loral*, *RCN*, *Cornerstone*, *Refco*, *Allegiance Telecom*, *Delphi*, *Coudert Brothers*, *Frontier Airlines*, *Star Tribune*, *Reader's Digest*, *A&P*, *Hostess Brands*, *Christian Brothers* and *Momentive*. He also has presided over the ancillary or plenary cases of *Corporacion Durango*, *Satellites Mexicanas*, *Parmalat S.p.A.* and its affiliated U.S. debtors, *Varig S.A.*, *Yukos* (II), *SphinX*, *Galvex Steel*, *TBS Shipping*, *Excel Maritime*, *Nautilus*, *Landsbanki Islands*, *Roust* and *Ultrapetrol*. He also has served as the court-appointed mediator in a number of chapter 11 cases, including *New Page*, *Cengage*, *Quicksilver*, *LightSquared*, *Molycorp* and *Breitburn Energy*. Prior to his appointment to the bench in May 2002, Judge Drain was a partner in the bankruptcy department of Paul, Weiss, Rifkind, Wharton & Garrison, where he represented debtors, trustees, secured and unsecured creditors, official and unofficial creditors' committees, and buyers of distressed businesses and distressed debt in chapter 11 cases, out-of-court restructurings and bankruptcy-related litigation. He was also actively involved in several transnational insolvency matters. Judge Drain is a Fellow of the American College of Bankruptcy and a member and board member of ABI, a member of the International Insolvency Institute, a member and Secretary of the National Conference of Bankruptcy Judges and a founding member and chair of the Judicial Insolvency Network. He also is the current chair of the Bankruptcy Judges Advisory Group established through the Administrative Office of the U.S. Courts, and was appointed to the FDIC's Systemic Resolution Advisory Committee through May 1, 2021. Judge Drain was an adjunct professor for several years at St. John's University School of Law's LL.M. in Bankruptcy Program and currently is an adjunct professor at Pace University School of Law. He has lectured and written on numerous bankruptcy-related topics and is the author of the novel *The Great Work in the United States of America*. He received his B.A. *cum laude* from Yale University and his J.D. from Columbia University School of Law, where he was a Harlan Fiske Stone Scholar for three years.

Scott J. Greenberg is a partner in Gibson, Dunn & Crutcher's New York office and co-chairs the firm's Business Restructuring and Reorganization Practice Group. He focuses his practice on representing debtors and creditors in in-court and out-of-court restructurings. Mr. Greenberg was named a 2021 "Dealmaker of the Year" by *The American Lawyer* and has been consistently recognized as leading restructuring lawyer by *Chambers USA: America's Leading Lawyers for Business*, *The Best Lawyers in America* and *New York Metro Super Lawyers*. He has also been named a "Leading Lawyer" and "Next Generation Lawyer" by *The Legal 500 US*, a "Leading Global Bankruptcy & Restructuring Lawyer" by *Lawdragon*, an "Outstanding Young Restructuring Lawyer" and twice named an "Outstanding Restructuring Lawyer" by *Turnarounds & Workouts*, a "Rising Star" by *IFLR1000*, and a Bankruptcy "MVP" and "Rising Star" by *Law360*. Mr. Greenberg's recent representations include serving as lead counsel on Outcome Health, Rex Energy, M&G Chemicals and American Apparel's chapter 11 cases and as lead counsel for Transtar (DACCO Transmission Parts [NY] Inc.) and Nextel (NII Holdings Inc). in their chapter 11 cases in the SDNY. On the creditor side, he has a market-leading practice and recently represented the term lenders in 4L/Clover, Akorn, AMC, Catalina Marketing, Constellis, Crossmark, David's Bridal, Garrett Motion, Global Eagle Entertainment, Iqor, Mallinckrodt, Monitronics, NPC, Savers, Serta, Skillsoft, Sunguard, Tailored Brands, TNT Crane, Town Sports and WorldStrides. Prior to joining Gibson Dunn, Mr. Greenberg was a partner at Jones Day from 2013-19, where he also served as co-head of Jones Day's Business Restructuring & Reorganization practice. He began his career as an associate at Weil, Gotshal & Manges LLP in its restructuring practice. Mr. Greenberg received his B.S. *cum laude* in 1999 from Boston University and his J.D. with honors from Emory University in 2002, where he was a member of the Order of the Coif.

Marc D. Puntus is a partner with Centerview Partners LLC in New York and established and co-heads its Restructuring and Debt Advisory practice. During his 25+-year career, he has led restructuring, financing, debt-advisory, capital markets and M&A assignments for companies, creditors, acquirers, shareholders and other stakeholders across a wide array of industries. Mr. Puntus's recent company-side experience includes representing Neovia Logistics, CTI Foods, Westmoreland, Catalina Marketing, Sears, Blackhawk Mining, Catalina Marketing, Caesars Entertainment Corp., Clearwire, Cloud Peak Energy, CTI Foods, JCPenney, Mashantucket Pequot Tribal Nation/Foxwoods, Neovia Logistics, Patriot Coal, Performance Sports Group, Residential Capital, Sears Holdings Corp. and Westmoreland Coal. Prior to joining Centerview, Mr. Puntus was a managing director and founder of Miller Buckfire & Co. Prior to that, he was a partner in the Business, Financing & Restructuring department of Weil, Gotshal & Manges LLP. Mr. Puntus is a member of several industry trade organizations, including ABI and the Turnaround Management Association, and he is a frequent lecturer on restructuring, financing and M&A topics. He also serves on the board of advisors of the McDonough School of Business at Georgetown University. Mr. Puntus received his B.S.B.A./finance *magna cum laude* from Georgetown University and his J.D. *cum laude* from Boston University School of Law.

Albert J. Togut is the senior member of Togut, Segal & Segal, LLP in New York, where he pioneered the use of conflicts counsel in mega-cases, and co-chaired ABI's Commission to Study the Reform of Chapter 11. For the past 46 years, he has specialized in bankruptcy law to the exclusion of all other areas of practice. He formed the firm in 1980 as a bankruptcy boutique. Mr. Togut has been counsel to the debtor or official committee, or principal owner, in some of the largest and highest profile chapter 11 cases, including Latam Airlines, McClatchy Newspapers, Pacific Drilling, Westinghouse, American Airlines, Kodak, Lehman Brothers Aurora, General Motors, Chrysler Automotive, Enron, Toisa Shipping, Dewey & LeBeouf, Relativity Media, Avaya, Nautilus, Ambac Financial, Sun Edison, Aeropostale, A&P, Delphi Automotive, Collins & Aikman, St. Vincent's Hospitals, Charter Communications, Loehman's, Frontier Airlines, Tower Automotive, Winn-Dixie, Ames Department Stores, Loew's Cineplex, SK Global and Daewoo International (America) Corp. He also was lead counsel to the European Operations of Westinghouse, Lehman Brothers Aurora mortgage origination company, Rockefeller Center Properties, and Olympia & York Tower B Company, better known as the World Financial Center. Since 1981, Mr. Togut has been an active member of the trustee panel maintained by the Department of Justice in the Southern District of New York and has served as trustee in bankruptcy in several thousand bankruptcy cases under chapters 11 and 7. He is a Fellow of the American College of Bankruptcy, a Fellow of the International Insolvency institute, co-chair of ABI's Commission to Study the reform of Chapter 11, and a former ABI director and chair of its New York City Bankruptcy Conference. He also served on the ABI's fee-study commission, which provided the most comprehensive, independent look at professional fees in chapter 11 cases to date. Mr. Togut is a mediator in the Southern District of New York and was twice a member of the Committee on Bankruptcy and Reorganization of the Association of the Bar of the City of New York, a member of the International Bar Association, and a past president of the Bankruptcy Lawyers Bar Association of New York. In 2019, he was honored by the Lincoln Center Corporate Council for his leadership in corporate reorganizations. Mr. Togut received his B.S. from New York University in 1971 and his J.D. from St. John's University School of Law in 1974.

Michael H. Torkin is a partner with Simpson Thacher & Bartlett LLP in its Restructuring and Bankruptcy Practice in New York, and he founded the firm's Private Capital and Special Situations Investment Group. His multidisciplinary practice includes representing companies on liability management, recapitalization and restructuring transactions, both in and out of court, domestically and internationally. He also routinely represents sponsors, acquirers of distressed businesses, and hedge fund and private-equity fund clients in connection with a broad array of special-situation investments and recapitalization transactions. During his career, Mr. Torkin has been involved in restructuring matters across the globe, including Canada, Latin American, Mexico, the U.K., Israel, Africa, The Netherlands and Australia. His practice has included the representation of numerous private-equity and hedge fund clients, including Angelo Gordon, The Blackstone Group, The Carlyle Group, Chambers Energy Partners, Charterhouse, First Reserve, KKR Credit, Platinum Equity, Pointstate Capital, Primavera Capital Group, Riverstone and Silver Lake Partners, as well as corporates on an array of transactions. Mr. Torkin is ranked as a leading lawyer by *Chambers USA* and by *Chambers Global* and *The Legal 500 United States*, and he was recognized by The M&A Advisor as one of the top "40 under 40" M&A, financing and turnaround professionals in 2010 and by *Turnarounds & Workouts* as one of 12 "Outstanding Young Restructuring Lawyers" in 2009 and 2010. He is a member of ABI and the Turnaround Management Association. Mr. Torkin received his B.A. in 1993 from the University of Western Ontario and his J.D. in 1997 from Osgoode Hall Law School.