American Bankruptcy Institute
New York City Bankruptcy Conference

D&O Litigation and Coverage Issues in Bankruptcy: Voidable Clauses, Who Owns Policy Proceeds, and Who Can Assert Claims

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CONCURRENT SESSION
2024

D&O Litigation & Coverage: Who Owns It, Voidable Clauses, & Who Can Assert Claims?

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Topics Covered

- Business Judgment Rule
- Is a Director & Officer insurance policy property of the Estate under 11 U.S.C. § 541(c)(1)
  - Who owns the proceeds? Why can't Courts agree on this issue, and does asserting an indemnity claim impact the outcome?
  - Can a plan administrator or trustee sell a D&O policy back to the insurer and enjoin claims by non-settling parties ?
  - Are attempts to void an insurance policy a stay violation?
  - Are clauses that void insurance contracts in case of bankruptcy enforceable?
- Gatekeeper provisions : Should the Bankruptcy Court decide if a party can sue a non-debtor third party that was not released under the plan?
- Can a Committee assert derivative claims under the Delaware Limited Liability Company Act: the *Pack Liquidating* decision?

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The Business Judgement Rule

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WHAT IS THE BUSINESS JUDGEMENT RULE?

- a "presumption that directors act in good faith, on an informed basis, honestly believing that their action is in the best interest of the company"

WHEN DOES IT APPLY?

- Motion to dismiss?
- Motion for summary judgment?

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- "[I]t is an affirmative defense that should not be considered at the motion to dismiss stage unless the plaintiff raises the business judgment rule on the face of the complaint." *In re Furniture Factory Ultimate Holding, L.P.*, No. 20-12816 (JKS), 2023 WL 5662747, at *14 (Bankr. D. Del. Aug. 31, 2023)(citing *In re Tower Air, Inc.,* 416 F.3d 229, 238 (3d Cir. 2005))
  - Additionally, where a loss results from inaction, "the protections of the business judgment rule do not apply." *In re Bridgeport Holdings, Inc*., 388 B.R. 548, 569 (Bankr. D. Del. 2008)

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How to plead around the Business Judgement Rule:

- By alleging that a decision is so far beyond the bounds of reasonable business judgment that its only explanation is bad faith.
- By establishing that a decision was the product of an irrational process or that directors failed to establish an information and reporting system reasonably designed to provide the senior management and the board with information regarding the corporation's legal compliance and business performance, resulting in liability.
- By alleging that there is evidence of fraud, self-dealing, or bad faith

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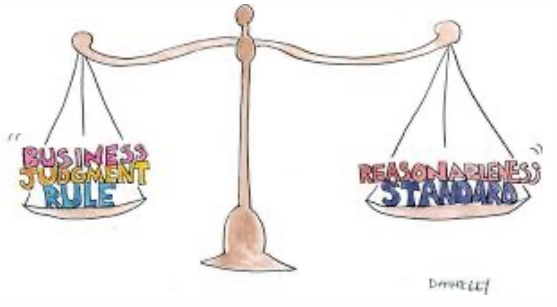

- Courts are now applying in almost every situation, unless there is evidence of fraud, bad faith, or self-dealing
- But breach of duty of care = gross negligence
- Impact of fraud determination on coverage

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Is a Director & Officer insurance policy property of the Estate under 11 U.S.C. § 541(c)(1): Who owns the proceeds? Why can't Courts agree on this issue, and does asserting an indemnity claim impact the

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If Directors and Officers policies are the debtor's property interests in accordance with 11 U.S.C. § 541(c)(1), why can't the Courts agree on who owns the proceeds?

General Questions in Analyzing Access to Proceeds

- Is the policy subject to a priority of payments provision that allows insured individuals to access proceeds ahead of the debtor? Is it enforceable?
- Does the insurer have recourse to the estate or the insurer pay the individual at its own risk?
- Are future claims the same indemnity claims for which the insurer would be paying defense?

Proceeds are Debtor's Property

- Is there entity coverage (Side B or C) within the policy?
- Does the policy enhance the estate's value?
- Does the policy protect the estate from diminution?
- Impact of filing indemnity claim

Proceeds are not Debtor's Property

- Is the policy coverage Side A?
- Do the proceeds reside outside of the bankruptcy estate?
- Is there sufficient coverage such that the payments to individuals will not impair the debtor's indemnification interests?

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Insurance Policy Exclusions and the *Ipso Facto* Prohibitions under the Bankruptcy Code

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Do policy exclusions conditioned on the insolvency or financial condition, or the commencement of a bankruptcy case, violate the *ipso facto* prohibitions of the Bankruptcy Code?

Section 541(c) – Estate Property?

- Is the exclusion an *ipso facto* clause? Is there a change in coverage based on the bankruptcy?
- Does it matter if the policy or the proceeds are property of the estate?
- Can the benefit of the interest be triggered by a claim under the policy?

General Questions in Analyzing Enforceability

- Is the policy property of the estate? Does the estate's interest benefit if the coverage remains intact?
- Does the estate have a property interest in the proceeds of the policy?
- Are there unperformed obligations under the policy (i.e., an executory contract)?
- Does the exclusion terminate or modify a right or obligation, or the contract itself?

Section 365(e) – Executory Contract?

- Are the premiums paid?
- Do the contract terms such as risk retention, cooperation, and the retained tail option constitute continuing obligations?
- Does the breach of continuing obligations give effect for a termination of the debtor's interest?

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Director & Officer Insurance Policies For Sale

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D&O Policy For Sale

In re CTE 1, LLC (Bankr. U.S.D.N.J. Chapter 11 Case no. 19-30256)

Plan is confirmed and Plan Administrator takes over

"Debtor" Notifies Insurer of potential claims against the insiders/insureds

Plan Administrator files a complaint against various insiders of the Debtor & tenders D&O Claims to the Insurer with a Demand for payment of policy limit in exchange for a release

Insurer agreed to provide coverage for defense costs but issued a complete reservation of rights, including right to recoup costs paid in the event no coverage:

- Potential false statements triggering an exclusion

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Next stop, mediation

Mediation Fails

Then, Plan Administrator agrees to Settle with the Insurer

- Sale of Policy under 363 is part of the settlement
- Sale Order includes an injunction barring the defendants/insureds from asserting claims against the Insurer relating to the policy
- $2,000,000 payment (and mutual releases between ***Debtor*** and ***Insurer***)

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D&O Policy For Sale

Plan Administrator claims the Policy is undeniably property of the bankruptcy estate

Sale under 363(b) and 363(f)

363(f)(4) – bona fide dispute

Competing Interests:

"*The Defendant-Insureds seek to access the Policy for their own benefit, while the Plan Administrator is duty-bound to pursue the policy limits for the benefit of the Debtor's creditors*."

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D&O Policy For Sale

363(f)(5) – Accept Money Satisfaction of Such Interest

"In the event that there were to be coverage litigation with [Insurer], the Defendant-Insureds would only be entitled to seek monetary compensation for their claimed interest in the proceeds of the Policy. The same is true for monetary claims that the Defendant-Insureds have asserted against the estate. Accordingly, because the Defendant-Insureds would be compelled to accept monetary relief in any cause of action, the Plan Administrator may sell the Policy free and clear of the Defendant-Insureds' interest in the Policy."

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D&O Policy For Sale

Other Justification – ***There is a Material Risk that [Insurer] Could Deny All Coverage***

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D&O Policy For Sale

Opposition:

- Policy Not Property of the Estate
- No Channeling Injunction
- No clarity as to how settlement payment impacts any judgment against insured persons

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The Gatekeeper - Highland

The Gatekeeper - Highland

Exculpation

… to the maximum extent permitted by applicable law, no Exculpated Party will have or incur, and each Exculpated Party is hereby exculpated from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for conduct occurring on or after the Petition Date in connection with or arising out of (i) the filing and administration of the Chapter 11 Case; (ii) the negotiation and pursuit of the Disclosure Statement, the Plan, or the solicitation of votes for, or confirmation of, the Plan; (iii) the funding or consummation of the Plan (including the Plan Supplement) or any related agreements, instruments, or other documents, the solicitation of votes on the Plan, the offer, issuance, and Plan Distribution of any securities issued or to be issued pursuant to the Plan, including the Claimant Trust Interests, whether or not such Plan Distributions occur following the Effective Date; (iv) the implementation of the Plan; and (v) any negotiations, transactions, and documentation in connection with the foregoing clauses (i)-(iv); provided, however, the foregoing will not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that ***constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct…***

"Exculpated Parties" means, collectively, (i) the Debtor and its successors and assigns, (ii) the Employees, (iii) Strand, (iv) the Independent Directors, (v) the Committee, (vi) the members of the Committee (in their official capacities), (vii) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case, (viii) the CEO/CRO; and (ix) the Related Persons of each of the parties listed in (iv) through (viii)…

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The Gatekeeper

… no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or arises from or is related to the Chapter 11 Case, the negotiation of the Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing without the Bankruptcy Court (i) ***first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind, including, but not limited to, negligence, bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence against a Protected Party*** and (ii) specifically authorizing such Enjoined Party to bring such claim or cause of action against any such Protected Party… The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, only to the extent legally permissible and as provided for in ARTICLE XI, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action.

"Enjoined Parties" means (i) all Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor (whether or not proof of such Claims or Equity Interests has been filed and whether or not such Entities vote in favor of, against or abstain from voting on the Plan or are presumed to have accepted or deemed to have rejected the Plan), (ii) James Dondero ("Dondero"), (iii) any Entity that has appeared and/or filed any motion, objection, or other pleading in this Chapter 11 Case regardless of the capacity in which such Entity appeared and any other party in interest, (iv) any Related Entity, and (v) the Related Persons of each of the foregoing

The Gatekeeper - Highland

Fifth Circuit, relying on *Pacific Lumber*, scaled back the exculpated parties.

Acknowledged a Circuit Split

No Third-Party Exculpation
5th & 10th

More Permissive Exculpation
2nd, 3rd, 4th, 7th, 9th, 11th

524(e) doesn't allow absolving a non-debtor from negligent conduct during the course of a bankruptcy absent another source of authority.
- Asbestos
- Creditor Committee members for actions within the scope of their statutory duties (1103(c))
- Also, bankruptcy trustees unless they act with gross negligence

The Fifth Circuit says strike all exculpated parties from the Plan except Highland Capital, the Committee and its members, and the Independent Directors.

The Gatekeeper - Highland

The Fifth Circuit says strike all exculpated parties from the Plan ***except*** Highland Capital, the Committee and its members, and the Independent Directors.

The Gatekeeper - Highland

Gate Keeper

Four primary arguments:

- Breath
- Length (permanency)
- Vagueness
- Bk may lack Subject Matter Jurisdiction over claims subject to the Gate Keeper

Rejected arguments stating:

In sum, the Plan violates § 524(e) but only insofar as it exculpates and enjoins certain non-debtors. The exculpatory order is therefore vacated as to all parties *except* Highland Capital, the Committee and its members, and the Independent Directors for conduct within the scope of their duties. ***We otherwise affirm the inclusion of the injunction and the gatekeeper provisions in the Plan***.

The Gatekeeper - Highland

But wait, there's more

Appellants believe the 5th Circuit mandated that the Gatekeper only apply to the exculpated parties

Bankruptcy Court disagrees

Back to 5th Circuit

In re Pack Liquidating, LLC

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Committee's Authority to Bring Derivative Claims – *In re Pack Liquidating, LLC*, No. 22-10797, 2024 WL 409830 (Bankr. D. Del. Feb. 2, 2024)

Facts:

- Debtors filed bankruptcy following multiple unsuccessful rounds of financing and a collapsed merger with a special purpose acquisition company. After failed merger, debtors attempted a going-concern sale, which was unsuccessful, leading to an orderly liquidation.
- Official Committee of Unsecured Creditors (the "Committee") attributed the Company's failure to mismanagement and self-dealing by the Company's insiders, and filed a motion seeking derivative standing to pursue such claims, among others.
- The defendants in the adversary proceeding argued that the Committee could not be given derivative standing to pursue estate causes of action in bankruptcy, citing Delaware Limited Liability Company Act §§ 18-1001, 1002 and Delaware case law which reserves such standing for members or their assignees.

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Committee's Authority to Bring Derivative Claims – *In re Pack Liquidating, LLC*, No. 22-10797, 2024 WL 409830 (Bankr. D. Del. Feb. 2, 2024)

Holding:

- Citing the Third Circuit's decision in *Unsecured Creditors of Cybergenics Corp. v. Chinery*, the Bankruptcy Court for the District of Delaware held that bankruptcy courts have authority to grant creditors' committees derivative standing to pursue claims that belong to the estate in cases where the debtor is a limited liability company. *See Pack Liquidating*, 2024 WL 4098330, at *2. Such authority "stems from the Bankruptcy Code rather than state law," and restrictions on derivative actions imposed by Delaware state law "have no bearing on a bankruptcy court's ability to authorize a committee to bring an estate cause of action." *Id.* at *2, *11; *see also* 11 U.S.C. 1109(b), 1103(c)(5), and 503(b)(3)(B).

- "[F]ederal courts must be ever vigilant to insure that application of state law poses no significant threat to any identifiable federal policy or interest." *See Pack Liquidating*, 2024 WL 4098330, at *15.

- Disagreeing with: *In re HH Liquidation, LLC*, 590 B.R. 211 (Bankr. D. Del. 2018), *In re PennySaver USA Publishing, LLC*, 587 B.R. 445 (Bankr. D. Del. 2018), and *In re Citadel Watford City Disposal Partners, L.P.*, 603 B.R. 897 (Bankr. D. Del. 2019) in favor of following the reasoning of the *en banc* Third Circuit decision in *Cybergenics. See Pack Liquidating*, 2024 WL 4098330, at *16-18.

- Standard for granting Committee right to bring claims: "demonstrate that (i) the debtor-in-possession has unjustifiably refused to pursue the claim or refused to consent to the moving party's pursuit of the claim on behalf of the debtor-in-possession; [and] (ii) the moving party has alleged colorable claims." *Id.* at *18.

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	**CASE NO: 23-90611**
WESCO AIRCRAFT HOLDINGS, INC., *et al.*,	§	
	§	**CHAPTER 11**
	§	
Debtors.	§	
	§	
WESCO AIRCRAFT HOLDINGS, INC., *et al.*,	§	
	§	
	§	
VS.	§	**ADVERSARY NO. 23-3091**
	§	
SSD INVESTMENTS LTD., *et al.*,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

This is a dispute concerning whether there has been a partial waiver of attorney-client privilege. Kevin Smith, a fact witness for Platinum Equity Advisors, testified about his understanding of certain sections of Wesco's Indentures. He testified that he formed his own "commercial understanding" of those sections. He also testified that he received legal advice from counsel that confirmed his commercial understanding. The 2024/2026 Noteholders and Langur Maize argue Kevin Smith's testimony was based on advice received by counsel, thereby waiving the attorney-client privilege with respect to the subject of the testimony. Platinum argues that no waiver has occurred because Smith formed his own understanding of the Indentures and only confirmed that understanding through advice of counsel. The Court finds that privilege is waived only with respect to the narrow line of

questioning regarding the legal advice received by Smith on those limited sections of Wesco's Indentures.

BACKGROUND

On February 9, 2024, Kevin Smith, a Platinum Equity Advisors fact witness, testified in this adversary proceeding. Smith testified he was asked to review Wesco's Indentures and form a commercial understanding of its terms. ECF No. 827 at 88:9–13. Smith shared these conclusions with Michael Fabiano, a Platinum employee and director of Wolverine Intermediate Holding Co., and Bank of America. ECF No. 827 at 94:22–25.

Smith testified that he consulted with counsel for Platinum and counsel for Wesco regarding the Indentures. Smith also testified about his own "commercial understanding" of the Indentures. For instance, Smith testified it was his "commercial understanding" that the 2022 Transaction was not a redemption. ECF No. 827 at 105:24. Platinum argued Smith is permitted to interpret the documents from a solely commercial perspective by separating his commercial knowledge from his legal knowledge. According to Platinum, even if Smith received legal advice regarding the same testimony, since the testimony is based on his commercial understanding, no waiver of privilege has occurred.

Smith testified that the law firm Latham & Watkins provided him with advice about the transaction and about the redemption section of the Indentures. Smith testified he "vaguely" recalled having communications with Latham regarding the 2022 Transaction. ECF No. 827 at 216:22. And to the best Smith could recall, he confirmed that Latham would have given Smith its view of the 2022 Transaction. ECF No. 827 at 217:24–25. Latham was available to Smith to answer questions about the documents as Smith was forming his commercial understanding, and Smith would have received that counsel. ECF No. 827 at 219:3–13. When asked specifically about Section 3.02—the section in the Indentures dealing with redemptions—Smith recalled discussing the section with counsel. ECF No. 827 at 225:22. Smith

testified the legal advice confirmed his commercial understanding of the documents. ECF No. 827 at 227:4–6.

Langur Maize and the 2024/2026 Noteholders assert Platinum waived attorney-client privilege. ECF No. 807. Langur Maize and the 2024/2026 Noteholders allege Platinum elicited "(a) testimony that Mr. Smith subjectively believed identified aspects of the March 2022 Transaction were permissible under the governing debt documents; and (b) testimony regarding his subjective 'commercial understanding' of the legal meaning of the selected provisions of those debt documents." ECF No. 807 at 2. Platinum asserts it only elicited from Mr. Smith his "commercial understanding . . . informed by decades of experiences negotiating these sorts of documents across hundreds of transactions." ECF No. 809 at 3. Platinum argues Smith's understanding is intended to show that Platinum did not act maliciously in the 2022 Transaction. ECF No. 809 at 4. And Platinum asserts that because Smith's understanding was not premised on the advice of counsel, the fact that Smith also got legal advice confirming his understanding does not waive privilege. ECF No. 809 at 10.

DISCUSSION

The parties do not dispute that New York law governs privilege issues. New York courts look to common law to determine the scope of the attorney-client privilege. *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 581 N.E.2d 1055,1059-60 (N.Y. 1991). The party asserting the privilege bears the burden of proving the privilege. *Id.* at 1059. Privilege may not be used as a sword and a shield. *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991).

Privilege is waived when the party asserting privilege relies on the "privileged communication as a claim or defense or as an element of a claim or defense." *Pritchard v. County of Erie (In re County of Erie)*, 546 F.3d 222, 228 (2d Cir. 2008). Courts may also consider on a case-by-case basis fairness in determining whether the privileged information ought to be disclosed. *Id.* at 229. That consideration should

happen in the context in which the party is asserting the privilege. *Point 4 Data Corp. v. Tri-State Surgical Supply & Equip. Ltd.*, No. 11-CV-726, 2013 WL 12503118, at *14 (E.D.N.Y. July 18, 2013). "[P]rivilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications." *Bilzerian*, 926 F.2d at 1292.

When a party "asserts a good faith belief in the lawfulness of its actions, even without expressly invoking counsel's advice," the privilege may be forfeited. *Sec. & Exch. Comm'n v. Honig*, No. 18 Civ. 8175, 2021 WL 5630804, at *11 (S.D.N.Y. Nov. 30, 2021) (internal citation omitted). "[T]he privilege holder need not attempt to make use of a privileged communication to implicate waiver—the proponent may waive the privilege if he makes factual assertions the truth of which can only be assessed by examination of the privileged communication." *Id.* (internal citations and quotations omitted).

In *Omnicon*, the party asserting privilege claimed it was not relying on legal advice, but rather the advice of accountants. *In re Omnicom Grp., Inc. Sec. Litig.*, 233 F.R.D. 400, 414 (S.D.N.Y. 2006). The court noted if the accountants had relied on legal advice at all, the privilege may still have been waived. *Id.* (finding no waiver of privilege because it was unclear the degree to which the accountants relied on legal advice).

Only a few cases have addressed a question similar to the one presented here: if a third party offers legal advice that confirms a witness' initial understanding, whether that initial understanding can be separated from the confirmed understanding, allowing the legal advice to remain privileged. Here, the question is whether Smith's initial understanding can be separated from the confirmation of that understanding through legal advice from Latham.

Courts evaluate "'[w]hether fairness requires disclosure' in the 'specific context in which the privilege is asserted.'" *Wang v. Hearst Corp.*, No. 12 CV 793, 2012 WL 6621717, at *2 (S.D.N.Y. Dec. 19, 2012)

(quoting *Pritchard*, 546 F.3d at 228) (alterations in original). But "as a matter of fairness, waiver may apply even if the defendant claims to have ignored the advice of counsel because '[e]ven if . . . [Defendant's] beliefs about the lawfulness of his conduct were actually separate from legal advice . . . Plaintiffs would still be entitled to know if [Defendant] ignored counsel's advice.'" *Scott v. Chipotle Mexican Grill, Inc.*, 67 F. Supp. 3d 607, 611 (S.D.N.Y. 2014) (quoting *Arista Records LLC v. Lime Grp. LLC*, No. 06 Civ. 5963, 2011 WL 1642434, at *3 (S.D.N.Y. Apr. 20, 2011)) (alterations in original). "Where the defendant has clearly benefited from the advice of counsel on the very issue on which it asserts good faith, it puts its relevant attorney-client communications at issue and thereby waives its privilege." *Id.* at 618.

The Southern District of Texas considered an issue similar to the one here. *See Edwards v. KB Home*, No. 3:11-CV-00240, 2015 WL 4430998, at *1 (S.D. Tex. July 18, 2015)[1]. Plaintiff sued defendant KB Home based on an employment classification. *Id.* Prior to consulting with counsel, KB Home made an initial classification decision. *Id.* But KB Home could not recall what that classification was. *Id.* KB Home later received advice from counsel related to the classification. *Id.* The defendant asserted privilege as to communications it has with its counsel. *Id.* KB Home wanted to allow its witnesses to testify as to their opinions regarding employment classification based on their own "independent judgment." *Id.* at *2. But, the court noted, "as a psychological matter, it seems very difficult, if not impossible, for a witness to compartmentalize his reliance on what he may have independently understood regarding the law and what he was told by attorneys." *Id.* The Court found privilege was waived as to the narrow classification decision in question. *Id.* at *3. The Court found significant that the defenses KB Home was relying on required a good faith belief about the lawfulness of their classification decision. *Id.* at *2. The Court found that the communications with counsel would inevitably affect that

[1] This decision was issued by then Circuit Judge Greg Costa, who had previously been a District Court Judge in the Southern District of Texas.

belief in lawfulness. *Id.* The court thus held that the communications were "most probative on whether [KB Home] had a good faith belief in the lawfulness of the classification decision . . .." *Id.* The Court did note that KB Home had, and may have simply ignored, the advice of counsel. *Id*. at *3. Regardless the privileged was waived. *Id.*

The reasoning in *Edwards* is persuasive and supported by New York privilege law. Platinum is asking the Court to allow Smith to testify only as to his commercial understanding. But the only way to separate Smith's commercial understanding of Wesco's Indentures and the legal advice Smith received is to understand what the legal advice was. Even if the legal advice merely "confirmed" Smith's initial understanding, the opposing parties are entitled to probe that confirmation. That legal advice would inevitably affect Smith's understanding of the Indentures and the actions permitted by their terms. And that legal advice would inevitably, at minimum, help Smith in justifying his conclusion that the Indentures permitted the 2022 Transaction. Smith's understanding of the Indentures is directly at issue in this case because Platinum is asserting a good faith defense. His communications with counsel would be highly probative in determining that understanding. Because Platinum, like the party asserting privilege in *Scott*, benefitted from the legal advice on the very issue on which it asserts good faith, Smith's communications with Latham are at issue. *See Scott*, 67 F. Supp. 3d at 618.

The attorney-client privilege is waived with respect to the line of questions asked to Smith regarding his commercial understanding of specific provisions of Wesco's Indentures and the advice given by Latham to Smith regarding that understanding. Specifically, that line of questioning can be found at ECF No. 827 at 94:1–25, 102:1–106:10, 221:21–222:24, 223:23–227:6.

CONCLUSION

Kevin Smith is recalled as a witness. He may be cross-examined about the specific line of questioning cited in the preceding paragraph.

Before Kevin Smith retakes the stand, he is required to produce copies of all written communications from counsel to Smith (individually or with other recipients) regarding the meaning of any section of the Indentures if that section contains one or more of the words "redeem", "redemption" or "redemptions."

SIGNED 04/22/2024

Marvin Isgur
United States Bankruptcy Judge

Faculty

Tim Daileader, CFA is a member of Drivetrain, LLC in New York. He is a senior investment professional and manager with more than 25 years of experience in leveraged finance, bankruptcy and corporate reorganization, and investment research and management, including the formation of post-restructuring operating companies and liquidation of post-bankruptcy estates. Mr. Daileader received his A.B. in economics from Georgetown University, where he was a George F. Baker Scholar.

Daniel F. X. Geoghan is a member of the Bankruptcy and Corporate Restructuring department f Cole Schotz P.C. in New York. He is experienced in all facets of financial restructuring, complex insolvency law and bankruptcy proceedings, as well as commercial litigation. Mr. Geoghan has represented official committees of unsecured creditors, chapter 11 debtors, chapter 7 trustees and secured creditors in all aspects of chapter 11 proceedings and out-of-court restructurings in regards to post-confirmation trusts and the energy/oil and gas, automotive/industrial/manufacturing, retail, biotechnology/pharmaceuticals and services industries. He has represented parties in breach-of-contract claims, copyright and trademark infringement claims, director and officer liability claims and avoidance actions. In addition, he has represented clients in more than 500 mediations. Mr. Geoghan is a member of the board of directors of the Fordham Law School Alumni Association, and he chairs the Fordham Law Alumni Association Restructuring Affinity Group and sits on its Strategic Planning Committee. He also is a member of the New York State Bar Association, the New Jersey State Bar Association, ABI, the Turnaround Management Association and the Fordham Law Alumni Association, and he is an adjunct professor teaching trial advocacy at Fordham University School of Law. Mr. Geoghan was named to the list of *New York Super Lawyers* from 2012-20 and was given the 2013 Rising Star Award by Fordham University School of Law in recognition of his extraordinary achievements in private practice. He received both his B.A. and J.D. from Fordham University.

Hayley G. Harrison is Of Counsel with Bast Amron LLP in Miami, where she handles a broad range of cases focusing on matters involving litigation in bankruptcy cases, assignments for the benefit of creditor and out-of-court workouts. She represents a broad spectrum of clients, including bankruptcy trustees, in their administration of chapter 7 debtor cases, including all aspects of analyzing avenues of recovery, the sale of bankruptcy estate assets, and the pursuit of avoidance actions and other litigation claims. Ms. Harrison advises debtors, secured and unsecured creditors and creditors' committees in relation to their rights in chapter 7, 11 and 13 bankruptcy proceedings and out-of-court proceedings. She also represents fiduciaries in various capacities, most frequently assignees in state court assignments for the benefit of creditors. Ms. Harrison served as the 2021-22 president of the Bankruptcy Bar Association for the Southern District of Florida and has spearheaded the firm's Business Advantage Forum since its inception, bringing together thought leaders to share best practices. She was named by *Chambers and Partners* as Up and Coming for Bankruptcy Litigation - Florida and as a Rising Star by *Florida Super Lawyers* Magazine, both in 2023, and she was named among Florida Trend's Legal Elite for 2021. Ms. Harrison received her B.S. in public relations and business from the University of Texas at Austin and her J.D. *cum laude* from the University of Florida Levin College of Law.

Peter Hurwitz is a principal of Dundon Advisers, LLC in New York and a senior engagement manager. He is a veteran business leader, restructuring expert and attorney. Mr. Hurwitz heads Dundon Adviser's telecom, media and entertainment and restructuring advisory practice. He has substantial experience in the role of litigation trustee, plan administrator and independent director. Mr. Hurwitz's prior roles include CEO of Core Media/19 Entertainment, CAO merchant banking Bank of Montreal and General Counsel/EVP Business Affairs Martha Stewart Living Omnimedia. He received his B.A. from Middlebury College and his J.D. from Georgetown University Law Center.

Elizabeth A. LaPuma is a managing director with UBS in New York, where she focuses on financial institutions financing, structuring and M&A. She has been involved in landmark financial institution assignments around the globe for nearly 20 years. Previously Ms. LaPuma ran Alvarez & Marsal's Asset Management practice. Before joining A&M, she worked with BlackRock Financial Markets Advisory Group, where she was part of initiating the group's client coverage model with primary responsibility for more than 30 of the largest financial institutions, including banks, insurance companies, government regulators, private equity, hedge funds and specialty finance companies. Before that, she worked at Lazard Freres & Co. within its financial institutions and restructuring group, leading teams in three of the 10 largest bankruptcies during the financial crisis, as well as other significant restructuring assignments. Ms. LaPuma has completed the sales of public and private companies, buy-side advisories and fairness opinions, and public and private debt and equity offerings, leading all phases of transactions and negotiating numerous merger and private placement agreements. She received her B.S. in finance from the University of Pennsylvania School of Arts and Sciences, and her M.B.A. from the Wharton School, graduating as a Palmer Scholar.

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Hon. Vincent F. Papalia is a U.S. Bankruptcy Judge for the District of New Jersey in Newark, sworn in on Dec. 29, 2014, following a 30-year career in private practice. For 20 years, he had been a partner with the law firm of Saiber LLC and the head of its Bankruptcy and Creditors' Rights Department. Prior to joining Saiber LLC, he was an associate and then a partner with Clapp & Eisenberg, P.C. For virtually his entire career, Judge Papalia focused his practice on representing various parties-in-interest in bankruptcy and foreclosure-related litigation and proceedings before federal, state and bankruptcy courts. He also served for many years as a court-appointed mediator for the U.S. Bank-

ruptcy Court for the District of New Jersey and was vice-chair of the District V-A Ethics Committee from 2013-14. He also chaired the Debtor-Creditor Committee of the Essex County Bar Association. Judge Papalia has authored or co-authored numerous articles on bankruptcy and creditors' rights issues and has often spoken on those topics. While in private practice, he was listed in *Chambers USA* and *New Jersey's Best Lawyers*. Judge Papalia received his B.B.A. in 1980 *summa cum laude* from Pace University and his J.D. *cum laude* from Fordham University School of Law in 1984, where he was a member of its law review.

Edward H. Tillinghast, III is a partner and Practice Group Leader of Sheppard Mullin's Finance and Bankruptcy Practice Group in New York. He specializes in U.S. and cross-border insolvencies, particularly involving Asia and Latin America, and related creditors' rights and bankruptcy-related litigation. Mr. Tillinghast's broad bankruptcy and creditors' rights litigation and appellate experience, and his understanding of business realities, is helpful in creating and implementing business solutions to complex financially driven problems and resulting opportunities, regardless of whether they involve structuring a business deal or litigating related issues. He has been involved in many real estate-related bankruptcies representing commercial real estate developers, lenders, lessors and lessees. Mr. Tillinghast has represented ad hoc and official committees, debtors, distressed asset-purchasers, equityholders, funds, indenture trustees and institutional lenders. He also has litigated creditors' rights-related cases in many courts, including the U.S. Supreme Court, various U.S. Circuit Courts of Appeals, and various district and bankruptcy courts, and he has led cases in courts in Australia, Bermuda, the British Virgin Islands, the Cayman Islands, China, England, Germany, Hong Kong, Indonesia and Japan. Mr. Tillinghast received his undergraduate degree with honors from Lake Forest College and his J.D. from Chicago-Kent College of Law, where he served on the editorial board of the *Chicago-Kent Law Review*.