Who's in Control?: An Overview of Control of the Attorney-Client Privilege in Corporate and Consumer Bankruptcy Proceedings
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In the hustle and bustle of a bankruptcy proceeding, the issue of who possesses the right to assert or waive the attorney-client privilege can often fall by the wayside, only to re-surface at inopportune times. This article is intended to provide a brief overview of the attorney-client privilege and who controls and directs the privilege in bankruptcy.

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Legislative Update
Lisa P. Sumner, Poyner Spruill, Raleigh, North Carolina, and Judith Greenstone Miller, Jaffe Raitt Heuer & Weiss, Southfield, Michigan

Congress and the Supreme Court recently instituted amendments to the Code and the Federal Rules that alter how days are counted for filing pleadings, papers, appeals, and a whole host of other actions in bankruptcy proceedings. These amendments take effect on December 1 of this year. This legislative update provides a summary of those changes and of recently enacted and pending bills that affect bankruptcy practitioners.

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Assignment for the Benefit of Creditors: An Alternative to Bankruptcy ©

By Mark Leipold

Some businesses cannot continue to operate and must therefore be sold or liquidated and the proceeds distributed to creditors. An Assignment for the Benefit of Creditors (hereinafter an “Assignment” or “ABC”) is a well-established tool that is an alternative to bankruptcy and can provide a benefit to troubled companies and present an opportunity for potential buyers. Assignments are structured to save time and expense in concluding the affairs of an insolvent company. Through an Assignment, the insolvent company’s assets can be sold quickly and efficiently, and the liquidation proceeds can be distributed to creditors shortly thereafter. In general, after the secured creditors are paid first, then tax and wage claims are paid. Secured creditors may find an Assignment useful, because it is relieved of the legal costs and risks associated with the foreclosure and sale of its collateral. Secured creditors may be willing to allow some portion of the proceeds from the sale of its collateral to pay the fees and costs of the Assignee, as well as tax and wage claims.

Similar to a Chapter 7 Case

An Assignment is analogous to a Chapter 7 liquidation proceeding under the Bankruptcy Code. It can either be pursuant to a statute, like California, or common law, like Illinois. In most instances, ABCs are statutory. An Assignment, however, is not recognized or used in all states.

In Illinois, an Assignment is simply a contract whereby the troubled entity (Assignor) transfers legal and equitable title, as well as custody and control of its property, to a third party (Assignee) in trust, to apply the proceeds of the liquidation of the assets to the Assignor’s creditors in accord with priorities established by law. Unlike a Chapter 7 however, an Assignee can more easily elect to keep the business operating while he tries to sell the company as a going concern.

Neither Illinois’ nor California’s ABCs require a court filing. A court filing, however, is required in many states and it is not uncommon for the Assignee to have to post a fiduciary bond.

An Assignee is generally an individual selected by a troubled company. The decision to undertake an Assignment must be approved by the equity owners. The Assignee is charged with the responsibility of gathering all of the Assignor’s assets and selling the Assignor’s right, title and interest in those assets. The Assignee has a fiduciary duty to all creditors. The Assignor must turn over and assign all right, title and interest in its assets to the Assignee together with a complete listing of all creditors, their addresses and the amount of indebtedness shown on the debtor’s books and records. The Assignee is required to give notice of the Assignment to the creditors and invite each creditor to file a claim in the Assignment estate. The notice or state

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statute (e.g. New Jersey) may provide a bar date, by which all claims must be filed. After the bar
date, the Assignee will reconcile the claims and object to those deemed to be improper.

Unlike a bankruptcy filing, there is no automatic stay in Assignments. Creditors will be
able to continue to pursue the Assignor. A judgment against the Assignor, though, will most
likely have little value because the Assignor no longer has title to or interest in the assigned
assets. Consequently, an informal (and often incomplete) automatic stay will result from an
ABC.

Liquidation of Assets

As a general rule, the Assignee will assemble the Assignor’s assets and advertise an
auction sale. The assets will be liquidated either piecemeal or in bulk, whichever method will
yield the highest price. An Assignee generally will obtain at least one liquidation appraisal, and
if the Assignee can find a buyer for the entire asset pool which exceeds the appraised liquidation
value by a reasonable amount, the Assignee may immediately sell to such buyer without
advertising or an auction.

Fees and Costs of an Assignment

In general, the fees and costs associated with an Assignment are about the same as a
Chapter 7 bankruptcy case. In an Assignment, the Assignor pays the fees and costs of its
professionals, including the fees and costs of an attorney experienced in insolvency matters.
Before an Assignment occurs, the company retains an attorney to evaluate the financial situation
of the business and consider the various options available to the entity. If the attorney and
company determine that an Assignment is the best option, the attorney will assist the company in
selecting an independent Assignee and in the preparation of the Assignment documents. The
Assignee’s fees and costs are paid from the proceeds of the sale of the assets. In general, the
Assignee will prepare the Assignment documents.

Right, Title and Interest

The buyer of the assets will receive an Assignee’s bill of sale establishing that the buyer
has received the Assignee’s right, title and interest in the purchased assets on an AS IS, WHERE
IS basis without any warranties, representations or covenants. The buyer at an Assignee’s sale is
advised to obtain a thorough lien search before consummating such a purchase. The sale is free
and clear of only known liens, claims and encumbrances. The purchase price must be sufficient
to satisfy these secured claims, or the buyer and the unpaid lienholder will need to enter into a
settlement. This differs from bankruptcy in that the assets can be purchased through a
bankruptcy sale free and clear of all liens, claims and encumbrances notwithstanding the
purchase price or the agreement of a lienholder. Even if the Assignee is willing to give the buyer
a warranty, a representation or covenant, the Assignee’s liability is generally limited to the
proceeds of the sale. If the breach of any of the foregoing is not discovered until after the assets
are liquidated and disbursed, the Assignee will not have any funds to pay any damages. In some
instances, if the Assignee’s conduct amounts to gross negligence or willful misconduct, a court
may require the Assignee to pay claims from its own resources.
Assignment for the Benefit of Creditors: Preservation of Value

Goodwill may be a significant asset whose value can be realized only through the sale of the business as a going concern. In fact, many potential buyers are identified prior to the Assignment. An assignee may also operate a business for a short period of time in hopes of locating a buyer of the company as a going concern, and/or conduct an orderly liquidation of the debtor’s assets that would maximize the value over a straight public auction. A Chapter 7 Trustee has no incentive to undertake this type of extra work or spend the time and money required seeking court approval to pursue this type of turnkey sale.

Avoidance Actions

Obviously, most states have some version of the Uniform Fraudulent Transfer Act, or its predecessor, the Uniform Fraudulent Conveyance Act. Most courts will recognize the Assignee’s standing to bring such claims for the benefit of the creditors. However, preferences are not as simple. First, not all states recognize preferences. For example, Illinois – which employs a common law ABC – does not have “mini-preference” provisions. California and Delaware – which have statutory ABCs – do have mini-preference provisions. There is an issue however as to whether Section 547 of Title 11 of the United States Code has preempted these mini-preference provisions. Sherwood Partners, Inc. v. Lycos, Inc., 394 F.3d 1198, 1202 (9th Cir. 2005) (Bankruptcy Code §547 preempts California’s mini-preference statute); contra Credit Managers Ass’n of California v. Countrywide Home Loans, Inc., 144 Cal.App.4th 590, 593, 50 Cal.Rptr.3d 259, 260 (Cal.App. 4th Dist. 2006) and Spector v. Melee Entertainment LLC, 2008 WL 362125, 1 (Del.Super. 2008) (interpreting California’s assignment for the benefit of creditors mini-preference provision is not preempted by §547) Ready Fixtures Co. v. Stevens Cabinets, 488 F.Supp.2d 787 (W.D. Wis. 2007) (holding Wisconsin’s mini-preference provision is not preempted).

Risk Factors

One of the risks inherent in an Assignment is that three unsecured creditors of the Assignor might file an involuntary bankruptcy proceeding against the entity. If this happens, the Assignor will often have to return the assets to the entity. Bankruptcy courts may abstain from exercising jurisdiction over the case and dismiss it if the Assignee can establish that the Assignee’s administration of the estate is competent and continued administration by the Assignee will best serve the interests of the creditors.

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WHO'S IN CONTROL?:
AN OVERVIEW OF CONTROL OF THE ATTORNEY-CLIENT PRIVILEGE IN CORPORATE AND CONSUMER BANKRUPTCY PROCEEDINGS

By Nathan A. Wheatley

I. INTRODUCTION

The bankruptcy process in general, and a bankruptcy proceeding specifically, can be a fast-paced environment that is not always conducive to careful planning and forethought. In the hustle and bustle of this process, the issue of who possesses the right to assert or waive the attorney-client privilege can often fall by the way side, only to re-surface at inopportune times. This article is intended to provide a brief overview of the attorney-client privilege and who controls and directs the privilege in bankruptcy.

II. THE ATTORNEY-CLIENT PRIVILEGE

A party to litigation may discover evidence which is 1) relevant and 2) non-privileged. Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Under this definition, there is a wide range of evidence that is discoverable. However, a key limitation on discovery is the existence of a privilege. If a document or communication is privileged, it may be withheld from opposing counsel and may only be discovered under very limited circumstances.

One of the most well-established forms of privilege is the attorney-client privilege. If information is subject to the attorney-client privilege, the rules of procedure and evidence will not require a party to disclose such privileged information, and will not permit such information to be entered into evidence.

What is the Attorney-Client Privilege?

According to the United States Supreme Court in Upjohn Company v. United States, the attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to “encourage full and frank communication between attorneys

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2 Fed. R. Evid. 401.
3 Hickman v. Taylor, 329 U.S. 495, 507-508, 67 S.Ct. 385 (1947) (stating that discovery has ultimate and necessary boundaries that come into existence when the inquiry touches on the irrelevant or encroaches upon the recognized domains of privilege.)
4 Ross v. City of Memphis, 423 F.3d 596, 600 (6th Cir. 2005) (attorney-client privilege is the oldest of the privileges for confidential communication known to the common law).
5 United States v. Lentz, 524 F.3d 501, 524 (4th Cir. 2008) (stating that it is a well settled principal of law that confidential conversations between a defendant and his counsel generally are protected by the attorney-client privilege, which afford the communication complete protection from disclosure.)
and their clients and thereby promote broader public interests in the observance of law and administration of justice.”

The attorney-client privilege protects the confidentiality of communications between an attorney and the client made for the purpose of securing legal advice. To invoke the privilege, a party must demonstrate: 1) a communication between client and counsel that 2) was intended to be and was in fact kept confidential, and 3) was made for the purpose of obtaining or providing legal advice.

**Scope of the Attorney-client Privilege**

Any individual, entity, or government body that seeks the advice of an attorney and establishes an attorney-client relationship will be considered a client that has the right to assert privilege over its communications with his/its attorney(s). Moreover, the attorney-client privilege is not limited to oral communications between attorney and client. It also attaches to documents prepared for the purpose of seeking legal advice, legal opinions, legal services, or assistance in a legal proceeding.

However, while the attorney-client privilege extends to communications and documents, it does not protect the discovery of underlying facts. Therefore, while a client cannot be asked what he communicated to his attorney, he may not refuse to disclose factual information simply because it was incorporated into a communication with his attorney.

Finally, the attorney-client privilege extends to communications with both in-house and outside counsel, and can even attach to communications between the corporation’s attorney and employees of all levels within a company.

**Controlling law**

The laws governing attorney-client privilege depend on the type of claim being asserted. In federal courts, the attorney-client privilege is governed by “the principles of the common law as it may be interpreted by the court of the United States in light of reason and experience.” However, Federal Rule of Evidence 501 provides that, in civil actions with respect to an element of a claim or defense over which State law controls, privilege shall be determined in accordance with State law. Therefore, if federal law determines the substantive rights of the parties, then

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7 Id.
9 *Pritchard, et al. v. The County of Erie, et al. (in re the County of Erie)*, 473 F.3d 413, 419 (2nd Cir. 2007).
10 *Ross*, 423 F.3d at 602-603.
13 Id at 396.
14 Id at 394-397 (finding privilege of low-level employee questionnaires was necessary for attorneys to render adequate legal advice to their corporate client).
15 *United States v. BDO Seidman, LLP*, 492 F.3d 806, 814 (7th Cir. 2007).
the federal common law of privilege governs; but if the underlying claim or defense is governed
by State law, then the State privilege law will control.17

**Control of Attorney-Client Privilege and Waiver**

It is well established that the attorney-client privilege is held and controlled by the client
and not the attorney.18 Therefore, while the attorney-client privilege is most often asserted by
the attorney on behalf of the client, ultimately it is the client, and not legal counsel, who may
choose to assert the privilege or waive its protections.19

The attorney-client privilege may also be waived through a variety of means,20 including
affirmative disclosure,21 conduct inconsistent with confidentiality,22 and if the client places in
issue a communication that that goes to the heart of a claim in controversy.23 To determine if the
privilege has been waived, courts will examine whether there has been a disclosure of a
“significant part” of a privileged communication.24

**Who is the client?**

Given the importance of the control of the attorney-client privilege and the ability to
either assert or waive said privilege, identifying the client is a critical task. Until such a
determination is made, there may be a dispute as to who has the right to assert the attorney-client
privilege.

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(1888).
20 First, privilege is waived if documents are produced without objection to their privileged nature. See Steen
v. First Nat. Bank, 298 F. 36 (C.C.D. Mo. 8th Cir. 1924). Second, privilege is waived when the client makes a
disclosure that is inconsistent with the confidentiality of the attorney-client privilege. See Hartford Fire Ins.
Co. v. Garvey, 109 F.R.D. 323 (N.D. Cal. 1985). While some courts have found that the disclosure must be
voluntary and intentional, other courts have found inadvertent disclosures also waive privilege. Compare
People v. Gardner, 198 Ca. Rptr. 452 (Cal Ct. App. 1984) with In re Pioneer Hi-Bred Intern., Inc., 238 F.3d
1370 (Fed. Cir. 2001). In some cases, the mere presence of third persons during an otherwise privileged
communication will waive privilege. See State v. Barnhart, 442 P.2d 959 (Wash. 1968). Third, privilege can
also be waived when a client has, “placed in issue a communication which goes to the heart of the claim in
21 Attorney-client privilege is waived if documents are produced without objection to third-parties, or the substance
of privileged communications is revealed to third-parties. In re Grand Jury Proceedings, 78 F.3d 251, 254 (6th Cir.
1996). (Affirmative disclosures may not waive the attorney work-product protections. United States v. AT&T, 642
F.2d 1285, 1299 (D.C. Cir. 1980).)
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452 with In re Pioneer Hi-Bred Intern., Inc., 238 F.3d 1370.
23 Chicago Title Ins. Co., 220 Cal. Rptr. at 512.
24 In re OM Securities Group Litigation, 226 F.R.D. 579, 590 (N.D. Ohio 2005); see In re Perrigo Co., 128 F.3d
430, 438 (6th Cir. 1997); In re Dayco Corp. Derivative Securities Litigation, 99 F.R.D. 616 (S.D. Ohio 1983) (no
waiver of the attorney-client privilege because a “significant part” of an internal investigative report was not
released where only a 2-page press release stating that an internal investigation had been conducted and providing
only the findings and conclusions was produced).
Where the client is an individual, this question is easily answered. But what of those circumstances, far too common in the business world, where the client is a legal entity? And who within such legal entities possesses the ability to determine how and when the privilege will be asserted?

In the context of corporations, attorney-client privilege becomes more complex. As a legal fiction, a corporation must rely on agents to protect its interests. For solvent corporations, courts have held the attorney-client privilege is controlled by a corporation’s management. Members of management must act in a manner consistent with their fiduciary duty to act in the “best interests of the corporation and not of themselves as individuals.”

In regard to transitioning management, the Supreme Court has stated “new managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and management.” Former managers have no control over the attorney-client privilege, even for communications made during their tenure.

III. ATTORNEY-CLIENT PRIVILEGE IN THE BANKRUPTCY CONTEXT

The protections afforded by the attorney-client privilege are not eliminated by the commencement of a bankruptcy proceeding. The same protections and burdens control within the bankruptcy forum as they apply outside of bankruptcy.

This is not to say that the commencement of a bankruptcy proceeding has no affect upon the attorney-client privilege. Indeed, the ability of an individual or entity to assert the attorney-client privilege may be significantly affected by an insolvency proceeding, because the filing of a bankruptcy proceeding may transfer the authority to exercise or waive the protections of the attorney-client privilege from the debtor to another party. The remainder of this article will address how the federal courts resolve the issue of who controls the attorney-client privilege in the bankruptcy context.

IV. CORPORATE BANKRUPTCY PROCEEDINGS

In Commodity Futures Trading Commission v. Weintraub, the United States Supreme Court held that, because the attorney-client privilege is controlled outside of bankruptcy by a corporation’s management, the actor whose duties most closely resemble those of management should control the privilege within bankruptcy. Therefore, in the typical corporate Chapter 11

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25 See Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 349 (1985) (commenting the attorney-client privilege may be exercised by a solvent corporation’s officers and directors).
26 Id. (citing Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919)).
27 Id.
28 Id.
30 Id.
31 Weintraub, 471 U.S. at 251-52 (unless this results in interference with the policies underlying the bankruptcy laws.)
bankruptcy proceeding, and in the absence of a bankruptcy trustee, the debtor in possession controls the corporation’s attorney-client privilege.\textsuperscript{32}

While interested parties, such as creditors’ committees, have attempted to exercise the attorney-client privilege on behalf of a debtor or force a waiver of the attorney-client privilege on behalf of the debtor in possession, courts have held the \textit{Weintraub} analysis does not extend the trustee’s power to a creditor’s committee.\textsuperscript{33} However, under the “common interest privilege,” attorney-client privileged communications between a debtor and the unsecured creditors’ committee may be protected from disclosure where the communication at issue was in furtherance of the debtor’s and the committee’s common legal interest.\textsuperscript{34} The common interest privilege exists where a communication is made by separate parties in the course of a matter of common interest, the communication was designed to further that effort, and the privilege has not been waived.\textsuperscript{35}

Finally, where a trustee, including a liquidation trustee, is appointed in a bankruptcy proceeding, the attorney-client privilege can be expected to pass to that individual, provided that he or she has been vested with control over the debtor’s bankruptcy estate or the particular claims to which the privilege applies.\textsuperscript{36} This general rule also applies to those situations were an examiner has been appointed by the bankruptcy court,\textsuperscript{37} or where a Chapter 7 Trustee is appointed after a Chapter 11 case has been converted to a Chapter 7 case.\textsuperscript{38}

In light of the foregoing, best practices require that legal counsel consider both the scope and preservation of the attorney-client privilege in the bankruptcy forum, as well as the effect of the appointment of a trustee or examiner on the issue of control of the privilege. Moreover, because there is relatively little case law that directly addresses the transfer of the attorney-client privilege pursuant to a plan of reorganization or liquidation, when drafting a bankruptcy plan and/or liquidation trust agreement, the wise practitioner will expressly identify who will control the attorney-client privilege post-confirmation, the scope of such privilege, and the authority to assert or waive such privilege.\textsuperscript{39}

\begin{itemize}
  \item \textsuperscript{34} \textit{In re Value Property Trust v. Zim Co. (In re Mortgage & Realty Trust)}, 212 B.R. 649, 652-54 (Bankr. C.D. Cal. 1997).
  \item \textsuperscript{35} Id. (citing \textit{In re Bevill, Bresler & Schulman Asset Management Corp.}, 805 F.2d 120, 126 (3\textsuperscript{rd} Cir. 1986); \textit{Griffin v. Davis}, 161 F.R.D. 687, 692 (C.D. Cal. 1995)).
  \item \textsuperscript{36} \textit{Weintraub}, 471 U.S. at 358 (the trustee of a corporation in bankruptcy has the power to waive the corporation’s attorney-client privilege); \textit{Official Committee of Unsecured Creditors v. Fleet Retail Finance Group (In re Hechinger Investment Co. of Delaware)}, 285 B.R. 601, 613 (D. Del. 2002) (finding that attorney-client privilege is controlled by liquidation trustee, to whom the debtor’s litigation claims passed, pursuant to the terms of the plan and liquidation trust agreement.)
  \item \textsuperscript{37} See \textit{In re Bioleau}, 736 F.2d 503, 506 (9th Cir. 1984) (finding examiner could waive privilege when granted powers normally held by a trustee).
  \item \textsuperscript{38} \textit{Weintraub}, 471 U.S. at 352-54.
  \item \textsuperscript{39} \textit{Hechinger}, 285 B.R. at 613 (holding that attorney-client privilege passed to liquidation trustee pursuant to liquidiating plan); \textit{See also, In re Hunt}, 153 B.R. 445, 454 (Bankr. N.D. Texas 1992) (refusing to permit the liquidation trustee to waive the debtors’ attorney-client privilege and noting that the confirmed plan was silent as to the transfer of the privilege).
\end{itemize}
V. CONSUMER BANKRUPTCY PROCEEDINGS

While the question of who controls the attorney-client privilege in a corporate bankruptcy can be relatively straightforward, the issue of who controls the privilege in the context of a consumer bankruptcy is far more convoluted. This is because, first, the interests and protected liberties of an individual differ significantly from that of a corporation. Moreover, the Fifth Amendment provides protections to an individual that are unavailable to a corporation. Finally, because of the foregoing, the case law governing the control of the attorney-client privilege in an individual bankruptcy can vary between the federal circuits, and even within the circuits.

Because the Chapter 7 trustee, rather than the individual debtor, controls the assets of the bankruptcy estate in Chapter 7 bankruptcy proceedings, the principal question that must be addressed in any Chapter 7 bankruptcy is whether the debtor or the Chapter 7 trustee controls the attorney-client privilege. Generally, judicial opinions fall within three distinct groups: those that permit the trustee to control the attorney-client privilege in individual bankruptcies; those that give the individual debtor exclusive control over the attorney-client privilege; and the final group, which utilize a balancing test based on the facts and circumstances of a specific bankruptcy to determine whether the individual debtor or the Chapter 7 trustee controls the privilege. Extreme care should be taken to determine which methodology your jurisdiction follows if the attorney-client privilege is likely to be an issue in a bankruptcy proceeding.

a. Trustee-control of privilege

The first category of decisions are those which hold the attorney-client privilege passes from the individual debtor to the Chapter 7 trustee upon the commencement of the bankruptcy proceeding. In these cases, courts hold that the trustee has absolutely control of the privilege, and may waive or assert the privilege despite objections from the debtor. Thus far, the only reported case where the court employed the “trustee-control” approach in its “pure” form to an individual debtor’s Chapter 7 bankruptcy proceeding is the Bankruptcy Court for the Southern District of Florida in the In re Smith case.

Courts that have adopted a version of the “pure trustee-control” approach for both individual and corporate bankruptcies generally allow that a trustee must have access to relevant information to make a fair and accurate disposition of a debtor’s assets. Therefore, the trustee must be permitted to waive or assert the attorney-client privilege as necessary. The other appeal of this approach is that it provides a “bright line” rule that can be quickly and consistently implemented by the bankruptcy courts. However, critics of this approach argue that it has a chilling effect on communications, and discourage full and frank communications between a debtor and his counsel.

40 See In re Smith, 24 B.R. 3, 4 (Bankr. S.D. Fla. 1982); e.g., In re Williams, 152 B.R. 123, 124 (Bankr. N.D. Texas 1992) (stating that, under confirmed Chapter 11 plan, transfer of right to pursue avoidance actions also effects transfer of evidentiary privileges).
41 Id.
42 See, In re Williams, 152 B.R. at 129.
b. Debtor-control of privilege

The second, and slightly more accepted, category of cases adopts the opposite approach. In these cases, the debtor rather than the trustee maintains exclusive control over the exercise of the attorney-client privilege. Those courts that have adopted the “debtor-control” approach have generally done so based upon three guiding principals: first, unlike a corporate entity, an individual has an expectation to always remain in control of the attorney-client privilege; second, an individual has a greater interest in privacy than a corporate entity; and finally, the ability of a Chapter 7 trustee to waive the attorney-client privilege of an individual debtor would likely have a chilling effect on communications between an individual and his attorney.

Like the “trustee-control approach, this position has the advantage of providing a black-letter rule of law that permits consistent application. However, critics of this approach are quick to point out: 1) the “expectation of control of the privilege” argument is invalid because both corporate entities and individuals can possess expectation and beliefs concerning their control of the attorney-client privilege; 2) not all debtors can be expected to be forthcoming to the bankruptcy court, and may use the attorney-client privilege as a method for concealing assets or defrauding the bankruptcy court; and 3) not all debtors can be expected to know when it may be in their best interests to waive the attorney-client privilege.

c. Balancing test

The final category of cases utilizes a so-called “balanced approach” to determining who controls the attorney-client privilege by considering the unique facts of each case. Under the balancing test, the court weighs the interests of the debtor in preserving the privilege, and the potential harm that could result from its waiver, against the ability of the trustee to carry out his statutory duties and uphold the underlying policies of the bankruptcy code.

In rejecting the bright-line approaches of the preceding two doctrines, courts employing the balance test consider the interests of the debtor in preserving the attorney-client privilege, and weigh such interests against the obligations imposed upon the Chapter 7 trustee and the goals of a bankruptcy proceeding. In application, this test can have very different results depending upon the circumstances of each case. For example, in In re Bazemore, generally regarded as a seminal case for the balance test approach, the Bankruptcy Court for the Southern District of Georgia permitted the Chapter 7 trustee to waive the attorney-client privilege in order to permit the examination of the debtors’ legal counsel regarding his pre-petition representation of the debtors in a personal injury lawsuit. In reaching its decision, the Bazemore court considered Weintraub’s mandate that such inquiry requires balancing the interests of “a full and frank discussion in the attorney-client relationship and the harm to the debtor upon a disclosure with the trustee’s duty to maximize the value of the debtor’s estate,” and found that, because the trustee wished to waive the attorney-client privilege for the purposes of determining whether the

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44 E.g., McClarty v. Gudenau, 166 B.R. 101, 102 (E.D. Mich. 1994) (holding that debtor, and not trustee or bankruptcy court, can determine whether to waive attorney-client privilege); In re Silvio De Lindegg Ocean Dev. of America, Inc., 27 B.R. 28 (Bankr. S.D. Fla. 1982).
45 McClarty, 166 B.R. at 102 (citing In re Hunt, 153 B.R. at 450-53).
debtors have a claim against their attorney and insurer, no harm would come to the debtors.\textsuperscript{48} In contrast, permitting the trustee to waive the privilege would permit the trustee to comply with her statutory duty to investigate the potential assets of the debtors’ estates and maximize their value.\textsuperscript{49}

In contrast to the Bazemore case, the Bankruptcy Court for the Northern District of Ohio in \textit{In re Miller} applied the balance test set forth in Bazemore and held that, because the Chapter 7 trustee and the debtors were in an adversarial relationship, it would be improper to permit the trustee to waive the attorney-client privilege.\textsuperscript{50} In \textit{Miller} the Chapter 7 trustee was attempting to set aside the debtors’ Chapter 7 discharged based upon the debtors’ receipt and expenditure of estate assets post-discharge.\textsuperscript{51} Additionally, there was a very real possibility that the information obtained by the trustee as a result of his waiver of the privilege could be used against the debtors in a subsequent criminal prosecution for violations of the Bankruptcy Code.\textsuperscript{52} As a result, the bankruptcy court held that, because the potential harm to the debtors was particularly acute and because the trustee would not be significantly hampered in his representation of the estate if the privilege was not waived, the Chapter 7 trustee was not authorized to waive the attorney-client privilege.\textsuperscript{53}

While the Bazemore and the Miller cases reached different results, they both employ a balancing test based upon the language of the Weintraub decision and are indicative of the dominant trend in bankruptcy case law in Chapter 7 bankruptcy proceedings.\textsuperscript{54}

\textbf{VI CONCLUSION}

The importance of the attorney-client privilege to a debtor, and the variance between the treatment of corporate and individual debtors with regard to control of the privilege, necessitates a bankruptcy practitioner carefully weigh considerations of the attorney-client privilege prior to the commencement of a bankruptcy proceeding, or as soon thereafter as practicable.

Control of the corporate debtor’s attorney-client privilege will pass to that entity which most closely resembles management, whether that entity is the debtor-in-possession or a trustee. The loss of control of the attorney-client privilege can have unfortunate and unpredictable results on a corporate debtor. Therefore, as part of insolvency planning, management of the potential corporate debtor should be informed of, and carefully weigh the risks of, the potential loss of control of the attorney-client privilege and consider its impact on the corporate entity. Similarly, a bankruptcy practitioner must consider the potential effect of the threatened or actual appointment of a Chapter 7 or Chapter 11 trustee upon the privilege. Finally, when preparing a proposed bankruptcy plan, the debtor should expressly identify whether the attorney-client privilege

\textsuperscript{48} Id. at 1024.
\textsuperscript{49} Id. at 1024-25.
\textsuperscript{51} Id. at 706-7.
\textsuperscript{52} Id. at 710
\textsuperscript{53} Id. at 710-11.
\textsuperscript{54} In re Pearlman, 381 B.R. 903, 910 (Bankr. M. D. Fla. 2007) (stating that the majority of courts employ a balancing test whereby “the specific facts of a case are evaluated and balanced, including the risk of harm to the debtor versus the benefit to the estate.”)
privilege will be conveyed to a non-debtor party, as well as the scope and potential impact of such a transfer; in the absence of such provision, established case law will control.

With regard to the consumer debtor, the current majority approach clearly favors the balancing test for determining whether the debtor or a trustee may exercise control over the attorney-client privilege. Because this test requires consideration of the unique facts surrounding each case, prior to commencing a bankruptcy proceeding counsel for a consumer debtor should consider what effect, if any, transfer of control of the attorney-client privilege to a trustee may have upon his client and how the debtor will respond to such a request by a trustee. Conversely, prior to a trustee attempting to waive the attorney-client privilege on behalf of a consumer debtor, the trustee should be prepared to articulate the bases upon which a bankruptcy court may decide that the interests of the individuals in maintaining the privilege are overcome by the duties and obligations set forth within the Bankruptcy Code.

Finally, whether representing a corporate debtor, consumer debtor, or trustee, a bankruptcy attorney must carefully consider the issues surrounding the attorney-client privilege and its potential impact upon the client. As in most things, the keys to success with regard to the issues surrounding privilege are research, deliberation and preparedness.
Statutory Time-Periods Technical Amendments Act of 2009 (H.R. 1626) (“Bill”) and Amendments to Federal Rules by the United States Supreme Court
Enacted May 7, 2009

This Bill was introduced on March 18, 2009 by Senator Patrick Leahy (D-Vt.), and co-sponsored by Senator Arlen Specter (D-Pa.), Senator Sheldon Whitehouse (D-R.I.) and Senator Jeff Sessions (R-Ala.). The primary purpose of the legislation is to lengthen a number of federal court deadlines and bring them in sync with recent amendments to the federal rules of practice and procedure recommended by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (“Judicial Conference”) that were approved by the United States Supreme Court (“Supreme Court”) on March 26, 2009 (“Rules Amendments”).

The Bill: The Bill extends several deadlines in provisions under the Bankruptcy Code (“Code”), as well as certain criminal and judiciary procedural codes, the Controlled Substances Act, the Classified Information Procedures Act and CIPA and CSA under titles 18 and 28.

The primary changes impact the manner in which days are counted. Under the Bill, days are counted as days, irrespective of whether the day is a business day, a weekend day or a holiday. This change, according to Sen. Leahy, is intended to provide “judges and practitioners with common-sense deadlines that are less confusing and less complex than current deadlines, and also ensures that existing time periods are not shortened. . . ”

Second, to the extent that the Code provided for a 5 day period, that time period is now extended to 7 days. These changes are reflected in Sections 109(h)(3)(A)(ii) [credit counseling], 322(a) [filing of bond after selection of trustee], 332(a) [consumer privacy ombudsman], 342(e)(2) [effect of providing notice of address by creditor], 531(e)(3)(B) [creditor request for copy of chapter 13 plan], 521(i)(2) [time governing order of dismissal if fail to provide information], 704(b)(1)(B) [providing statement of whether presumed abusive filing], 749(b) [avoidance of post-petition transfer of securities contracts], and 764(b) [avoidance of post-petition transfer of commodities contracts].

The changes in the Bill become effective on December 1, 2009.

The Rules Amendments: On March 26, 2009, the Supreme Court approved amendments to Appellate Rule of Procedure 26, Bankruptcy Rule of Procedure 9006, Federal Rule of Civil Procedure 6 and Criminal Rule of Procedure 45. These rules, as amended, count intermediate weekends and holidays for all time periods. Previously, such periods had been excluded when counting days for shortened time periods, thereby resulting in inconsistency and unnecessary complication, according to the Judicial Conference.

If a time period was previously established as 5 days, it has now been extended to 7 days. If a period was previously set at 10 days, the time period has now been extended to 14 days.

Questions regarding pending legislation may be directed to Judith Greenstone Miller, Chair of the Legislation Subcommittee, Business Bankruptcy Committee, ABA Section of Business Law and member of the Bankruptcy and Insolvency Group of Jaffe Raitt Heuer & Weiss, P.C. (jmiller@jaffelaw.com) located in Southfield, Michigan or to Lisa P. Sumner, Vice-Chair of the Legislation Subcommittee and a member of the Creditors’ Rights and Bankruptcy Section in Poyner Spruill’s Raleigh, North Carolina Office (lsumner@poynerspruill.com).

These changes become effective on December 1, 2009.

The time-computation rules amendments can be found at www.uscourts.gov/rules.

Separate "Powerpoint" presentations explaining the amended rules may be found at http://www.uscourts.gov/rules/presentations.html.

American Recovery and Reinvestment Act of 2009 (H.R. 1)
Enacted Feb 17, 2009

The Act combines supplemental appropriations, assistance to the unemployed and other fiscal measures.

The bankruptcy-related component is the extension of a tax credit for costs of health insurance coverage provided under an employee benefit plan funded by a voluntary employees’ beneficiary association if established pursuant to a bankruptcy court order. The credit is for eligible coverage months beginning before January 1, 2011, and applies to workers covered by the Trade Adjustment Assistance program under the Trade and Globalization Adjustment Assistance Act of 2009.

Credit Card Accountability Responsibility and Disclosure Act of 2009, or the Credit CARD Act of 2009 (H.R. 627)
Enacted May 22, 2009

This Act amends the Truth in Lending Act with respect to increases of the annual percentage rate of interest on consumer credit card accounts and adds numerous restrictions and requirements regarding rate increases, fees, the format of statements and other aspects of credit card agreements.

The bankruptcy-related component of this Act is tangential. Within 6 months of enactment, the Federal Reserve Board will issue rules requiring credit card issuers to establish a toll-free telephone number for consumers to access information about credit counseling and debt management services. The only agencies to which consumers can be referred will be the same nonprofit and credit counseling agencies approved by a United States bankruptcy trustee pursuant to section 111(a) of the Bankruptcy Code.

Helping Families Save Their Homes Act of 2009 (S. 896)
Enacted May 20, 2009

This Act bears the same name as a prior pending bill, Helping Families Save Their Homes Act of 2009 (H.R. 1106), which passed the House on March 5, 2009. However, whereas H.R. 1106 included provisions that would allow Chapter 13 debtors to modify the rights of creditors holding residential mortgages in order to avoid foreclosure, such provisions are not included in S. 896.