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Case Study: In Re Almatris

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The recent unpublished decision in *In re Almatris BV, et al.*, Case No. 10-12308 (MG) provides important guidance for bankruptcy counsel on the application of the common-interest privilege.

In particular, the ruling by the Honorable Martin Glenn of the United States Bankruptcy Court for the Southern District of New York concerns the use of the common-interest privilege in the context of a dispute over the production of documents that were created and shared during the negotiation of a plan support agreement.

The Almatris decision addresses the discoverability of documents in this context, and in doing so highlights important considerations for counsel involved with advising entities that are negotiating a plan support agreement.

The Dispute

The dispute at the center of Almatris arose when a group of junior lenders realized they would receive nothing if a proposed Chapter 11 plan was confirmed. They proceeded to vigorously contest confirmation of the plan, and began with a demand that a more senior lender, Oaktree Capital Management LP, produce “all documents, communications or correspondence concerning the Plan Support Agreement, the Plan and the Disclosure Statement.”

In responding, counsel for Oaktree did not produce its markups and redlines of the debtors’ draft plan documents, claiming a common-interest privilege existed among Oaktree, the debtors, their advisers and members of a committee of senior lenders. The common-interest privilege is an “exception to the general rule that voluntary disclosure of confidential, privileged material to a third-party waives any applicable privilege.” *HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 71 (S.D.N.Y. 2009) (Lynch, J.).

In contrast to the co-client privilege, which arises when common counsel represents multiple clients, the common-interest privilege is limited to situations where (i) multiple parties are represented by separate counsel that share a common legal interest about the information shared, and (ii) the communications for which protection is sought must have been designed to further that interest. See *In re Quigley, Co. Inc.*, Case No. 04-15739 (SMB), 2009 Bankr. LEXIS 1352, ** 8-9 (Bankr. S.D.N.Y. April 24, 2009) (Bernstein, B.J.).

In *In re Quigley Co. Inc.*, the bankruptcy court held that the common-interest privilege protected most of the communications at issue that were between a debtor and its nondebtor parent company because, inter alia, they shared a common interest of confirming a plan of reorganization for the debtor subsidiary that existed since the commencement of the subsidiary’s bankruptcy case. See *id.* at **12-15.

The Quigley court also found that the debtor and its unsecured creditors' committee and future creditors' committee shared no common interest based on the facts that the members and constituents of the two committees had been litigating against the debtor in asbestos cases prior to filing for bankruptcy protection and the two committees "have a natural antagonism; the [Unsecured Creditors'] Committee wants to maximize the payments to current creditors, while the [Future Creditors' Committee] wants to ensure that enough is available to future creditors." Id. at **15-16.

It was on the applicability of the common-interest privilege to the Almatris case that Judge Glenn was asked to rule.

The Decision

Judge Glenn first noted that the facts of the Almatris case were "a far cry" from the circumstances of the Quigley precedent discussed above. He noted that, rather than having common interests, Oaktree had been an aggressive senior creditor in a largely adversarial relationship with the debtors until they reached a plan support agreement and the proposed plan.

Judge Glenn also made the following additional factual findings: The parties to the negotiations pursued their own respective interests, that at various times Oaktree threatened litigation against the debtors, and that no term sheet for the plan support agreement was ever signed.

Based on this, the court decided that a common interest did not exist between the parties prior to entering into the plan support agreement. Accordingly, the bankruptcy court held that a common-interest privilege did not apply to any of the disputed documents shared prior to the execution of the plan support agreement.

Turning to the question of whether the common-interest privilege could be applied to documents shared by the parties after they entered into the plan support agreement, the court found that the requisite number of senior lenders, including Oaktree, signed the plan support agreement on March 7, 2010. However, the debtors did not execute the agreement, which remained unchanged after March 7, 2010, until April 14, 2010, because of litigation pending against them in the Netherlands.

Even though the court stated that "ordinarily the Court would require that the agreement be fully signed before a common-interest privilege attached," it concluded that the common-interest privilege may have attached on March 7, 2010, because the debtors' delay was not the result of incomplete or open terms in the plan support agreement.

The bankruptcy court, without elaborate discussion, then brushed aside the relevancy and work product objections asserted by Oaktree. Finally, it offered an in camera review of any remaining disputed documents if the parties were still unable to resolve the matter.

Lessons Learned

Almatris provides helpful guidance on common-interest privilege issues in the plan support confirmation process. As Almatris instructs, the common-interest privilege may apply to the parties' documents and communications that are shared in furtherance of the plan confirmation process during the period of time after the parties have finalized the terms of the plan support agreement.

Narrowly limiting the terms of the plan support agreement to solely those terms that are essential to embodying the economic deal struck between the parties might lessen the time needed to negotiate the agreement and therefore reduce the number of documents and communications that may be discovered by third parties. Parties should also be mindful that Judge Glenn in *Almatis* considered whether the parties had signed a term sheet setting forth the principal terms of the plan support agreement.

There may now be an opening for attorneys to argue that the signing of a term sheet in advance of negotiating a plan support agreement may render the documents and other communications between the parties during the time period after the signing of the term sheet and prior to execution of the plan support agreement subject to the common-interest privilege. Whether the common-interest privilege will apply, however, may depend on whether the parties are viewed by a court as still negotiating following the execution of the term sheet or pursuing a common interest.

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