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Introduction

Courts disagree about whether a trustee may waive an individual debtor's attorney-client privilege. Although the Supreme Court has addressed the issue in the case of corporate debtors, it has not done so in the case of individual debtors. Thus, lower courts have adopted three approaches to cases involving individual debtors: allowing the trustee to always waive privilege, never allowing the trustee to waive privilege, and a balancing approach.

This memo explores the importance of the attorney-client privilege, its relevant statutory bases, Supreme Court precedent, and the three approaches mentioned above. This memo also considers the advantages and disadvantages of the three different approaches.

The Attorney-Client Privilege

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege encourages "full and frank communication between attorneys and their clients and thereby promotes broader public interests in the observance of law and administration of justice." *Id.* Thus, the law recognizes that some communications may be kept privileged during trial despite the fact that withholding the information disrupts the job of the factfinder. *See United States v. Ballard*, 779 F.2d 287, 292 (5th Cir. 1986). These communications are kept

privileged because "lawmakers and courts consider protecting confidential relationships more important to society than ferreting out what was said within the relationship." *Id.* at 292.

Attorney-Client Privilege in the Bankruptcy Realm

Outside of bankruptcy, the attorney-client privilege belongs to the client alone. *In re Bazemore*, 216 B.R. 1020, 1023 (Bankr. S.D. Ga. 1998) (citing *In re* Impounded Case, 879 F.2d 1211, 1213 (3d Cir. 1989). However, inside the bankruptcy realm, courts disagree about whether the individual debtor, or the trustee in bankruptcy, holds the privilege. *Id.* at 1023–24. Lower courts continue to construct their own theories about how the privilege should apply to individual debtors. *See* Julianna M. Thomas, Note, *Fifteen Years After Weintraub: Who Controls the Individual's Attorney-Client Privilege in Bankruptcy?*, 80 B.U. L. REV. 635, 657 (2000). This lack of uniformity among courts has created much confusion on the matter. Even within districts, bankruptcy judges write conflicting opinions on the matter. *Id.*

Lower courts appear to use three different approaches in deciding if a trustee has the power to waive attorney-client privilege when the debtor is an individual: (1) trustees, as a matter of law, can waive attorney-client privilege; (2) trustees can never waive attorney-client privilege on the debtor's behalf; and (3) the trustee's power to waive attorney-client privilege turns on balancing the harm to the debtor against the benefit to the estate.

The issue of who controls privilege in the case of a bankruptcy debtor is an important one. Full and frank communication will likely be inhibited if clients know confidential statements will be divulged if they ever find themselves filing for bankruptcy. *See* Niel E. Herman, *Who Controls the Attorney-Client Privilege in Bankruptcy*?, 13 HOFSTRA L. REV. 549, 584 (1985). To be sure, divulging confidences after bankruptcy is filed can adversely affect a

debtor. For example, in *In re Courtney*, 372 B.R. 519 (Bankr. M.D. Fla. 2007), the defendant-debtor was involved in a wrongful death action. *Id*. at 520. There, the court considered whether the debtor would be exposed to additional criminal liabilities upon revealing the privileged information. *Id*. at 521. Courts have stated that given the potential for criminal prosecutions against a debtor, the degree of harm to a debtor "becomes particularly acute" in bankruptcy cases. *See* Ralph McCullough, Chris Whelchel & Sharyn Epley, *Trustees: The Ability to Waive the Debtor's Attorney-Client Privilege*, 106 COMM. L.J. 1, 20 (2001) (citing *In re Miller*, 247 B.R. 704 (Bankr. N.D. Ohio 2000)). On the other hand, it is also clear that creditors and others seeking to benefit from the debtor's estate might be negatively affected if privilege is allowed to inhibit the trustee's duties in properly administering the estate.

Despite the clear importance of the issue, the proper method for determining whether the trustee has this privilege in the case of the individual debtor remains undecided. The next two sections discuss the relevant section of the Bankruptcy Code and Supreme Court precedent.

The Governing Bankruptcy Code is Unclear on Waiver of Debtor Privilege

The relevant Bankruptcy Code section addressing the issue of whether a trustee can waive a debtor's privilege is 11 U.S.C. § 542. This section governs turnover of a debtor's property to the estate. Specifically, section 542(e) enables a court to require an attorney holding information relating to the debtor's property to turn over information to the trustee. *See* 11 U.S.C. 542(e) (2006). This turnover of information is subject to any applicable privilege. *See id*. The extent to which attorney-client privilege can be asserted against a bankruptcy trustee, however, is unclear. *See* Herman, *supra*, at 556. Under current law, the extent of this attorney-client privilege is left to the courts to decide on a case-by-case basis. *Id*. at 556.

Some debtors claim that section 542(e) allows them to assert the privilege against trustees. *Id*. at 555. The legislative history of section 542(e), however, indicates that the section was not designed to protect the debtor; but rather, was designed to prevent accountants and attorneys from using leverage granted to them under state law liens to receive payment ahead of other creditors when information they hold is necessary to the estate. *Id*. at 555–56.

The Bankruptcy Code's application in this realm appears to turn on ownership of property. *See* 11 U.S.C. §542(e); *see also In re Miller*, 247 B.R. 704 (Bankr. N.D. Ohio 2000). Ownership of property is important because the trustee's powers are limited to that of a representative of all the property that comes into a debtor's bankruptcy estate. *Id.* To be sure, the Code does not give the trustee power to make decisions concerning the debtor's everyday affairs. *Id.* The trustee's control over the bankruptcy estate does not translate into control over the debtor's right to assert privilege because privilege is not an "alienable commodity" as are other pieces of property. *Id*. Thus, the trustee cannot be said to control the debtor's attorney-client privilege simply because he controls the debtor's property. *Id*.; *see also* William R. Mitchelson, Jr., *Waiver of the Attorney-Client Privilege by the Bankruptcy Trustee,* 51 U. CHI. L. REV. 1230, 1259 (1984).

The Supreme Court Allows Waiver in Context of Corporate Debtors

While no rule exists as to whether a trustee can waive an individual debtor's privilege, the Supreme Court has held that in the corporate context, the trustee has the power to waive the corporation's attorney-client privilege with respect to pre-bankruptcy communications. *Commodity Futures Trading Comm. v. Weintraub*, 471 U.S. 343, 353, 358 (1986). However, the Supreme Court was careful to note that it was not announcing a rule for cases involving

individual debtors. *Id.* at 356. The *Weintraub* Court clearly noted, "[O]ur holding today has no bearing on the problem of individual bankruptcy, which we have no reason to address in this case." *Id*.

Because the Supreme Court limited its opinion to corporate debtors, lower courts have held that the *Weintraub* reasoning does not apply to individual debtors. *See e.g., McClarty v. Gudenau*, 166 B.R. 101, 102 (E.D. Mich. 1994). For example, the *McClarty* court reasoned that an individual debtor seeking legal advice on his own behalf is fundamentally different from the corporate debtor's manager, and thus, *Weintraub* should not apply in the case of the individual debtor. *Id.* at 102 (citing *In re Hunt*, 153 B.R. 445, 452 (Bankr. N.D. Tex. 1992)). It has also been argued that the debtor is a natural person, and therefore, the privacy concerns underlying the privilege are "far more significant than when the debtor is a corporation or other business entity." Stephen F. Black, *The Debtor's Attorney-Client Privilege in Bankruptcy*, 40 BUS. LAW. 879, 887 (1985).

Thus, unlike in the context of the corporate debtor, no one approach has prevailed in the context of the individual debtor. Instead, lower courts have adopted the three different approaches, mentioned *supra*, in deciding if the trustee has the power to waive an individual debtor's attorney-client privilege. The next sections discuss the three approaches, and the advantages and disadvantages of each.

Approach 1: A Trustee Can Always Waive Privilege

The first approach in the case of the individual debtor is to categorically allow a trustee to waive a debtor's attorney-client privilege. This approach is akin to the approach adopted by the Supreme Court in *Weintraub* for corporate debtors. This approach is exemplified in *In re Smith*,

24 B.R. 3 (Bankr. S.D. Fla. 1982). There, the court held that the debtor's privilege passes by operation of law to the bankruptcy trustee. *Id.* at 5. In *Smith*, the creditor asked the defendant-debtor questions about communications between the debtor and the insurance company attorney, who had represented him in a wrongful death action. *Id.* at 4. The creditor asked the debtor those questions in an effort to ascertain whether the plaintiff-trustee had a chose in action against the insurance company for bad faith refusal to settle, or against the insurance company attorneys for malpractice. *Id.* The debtor refused to answer, claiming attorney-client privilege. *Id.* As a result, the creditor filed a motion to compel the debtor to answer. *Id.*

In *Smith*, the court held that any attorney-client privilege the debtor had passed by operation of law to the bankruptcy trustee. *Id.* at 5. Thus, the court did not allow the debtor to assert attorney-client privilege against the creditor attempting to obtain information in order to bring suit against the insurance company and its attorneys. *Id.* The court relied on two rationales in reaching its decision: first, that privilege is property of the estate that passes to the trustee along with debtor's other assets, and second, that the trustee must have the power to waive the privilege in order to fulfill his duties as a representative of the estate. *See* Mitchelson, *supra*, at 1236–37.

Approach 2: A Trustee Can Never Waive Privilege

The second approach, which produces an absolute bar to waiver of a debtor's privilege, is exemplified by *In re Hunt*, 153 B.R. 445 (Bankr. N.D. Tex. 1992). There, the plaintiff-trustees, who were liquidating the defendant-debtor's estate, sued the debtor's relatives to recover information about fraudulent transfers. *Id.* at 447. The trustees wanted to request documents and depose the debtor's lawyers and accountants regarding the transactions. *Id.* The debtor asserted

attorney-client and accountant-client privileges and refused to comply. *Id*. The *Hunt* court held that the debtor alone, and not the trustee, has the power to waive these privileges. *Id.* at 454.

The court in *Hunt* rested its reasoning on the *Weintraub* distinction between individual and corporate debtors, concluding that the trustee's ability to waive the privilege did not apply to an individual debtor. *Id.* at 453–54. The Court distinguished between individual and corporate debtors in *Weintraub* because it reasoned that the corporate debtor is an inanimate entity that acts through its agents. *Weintraub*, 471 U.S. at 356. The Court stated that outside of bankruptcy, the corporation's management controls the privilege; and thus, in bankruptcy, the management's power passes to the trustee to control the privilege. The power passes to the trustee because the trustee's functions are "most closely analogous to those of management outside of bankruptcy . . . " *Id*. An individual, by contrast, acts for himself. *Id*. As further explained in *In re Silvio de Lindegg*, an individual can be sent to prison for statements made to his or her attorney, whereas a corporation cannot suffer any penalty greater than the loss of monetary assets. 27 B.R. 28, 28 (Bankr. S.D. Fla. 1982). There, the court stated "There is no reason why the trustee cannot waive a corporate debtor's attorney-client privilege. There is every reason . . . the trustee cannot waive an individual debtor's . . . privilege." *Id.*

A second case where the court held a trustee can never waive the debtor's privilege is *McClarty v. Gudenau*, 166 B.R. 101 (E.D. Mich. 1994). There, the defendant-debtor refused to produce information from a prior case, asserting attorney-client privilege. The court recognized that limitations on a client's control over the privilege would inhibit free and open communication. *Id.* at 2. The court stated that the "fundamental purpose of the privilege could be eroded" if a trustee was allowed to waive a debtor's privilege. *Id*. Thus, the court held that

these important policy considerations justified a rule preserving control of the privilege to the debtor. *Id.*

Approach 3: The Balancing Approach

The third and final approach strikes a balance between the other two approaches. The balancing approach is employed in *In re Courtney*, 372 B.R. 519 (Bankr. M.D. Fla. 2007). There, the court held that a trustee could waive an individual debtor's attorney-client privilege based on balancing of benefits and harms. *Id.* at 521. The court criticized *Smith*, discussed *supra*, where the court adopted a categorical rule that the debtor's privilege passes by operation of law to the bankruptcy trustee. *Id.* at 521.

In *Courtney*, the plaintiff-trustee wanted the power to waive the defendant-debtor's privilege and direct the law firm representing the debtor to turn over all files it kept in connection with its representation of the debtor in a wrongful death action. *Id.* at 520. In allowing the records to be turned over to the trustee, the court weighed the harm to the debtor against the benefits to the bankruptcy estate, rather than applying a blanket rule that all attorney-client-privileged materials pass from debtor to trustee. *Id.* at 521. After balancing the harms and benefits, the court allowed the trustee to waive the privilege, holding that the benefits to the debtor's estate outweighed any harm to the debtor. *Id.* at 521. The court reasoned that any incriminating evidence against the debtor that was uncovered as a result of waiving privilege could be redacted and reviewed *in camera* by the court. *Id.*

The *Courtney* court adopted the balancing test of *In re Bazemore*, 216 B.R. 1020 (Bankr. S.D. Ga. 1998). In *Bazemore,* the court also balanced the harm to the defendant-debtor as a result of waiving privilege, against the benefit to the bankruptcy estate. There, the debtor's

passenger was injured while riding in his truck. *Id.* at 1022. The passenger sued the debtor in state court for injuries sustained during the accident. *Id.* After losing the state court action, the debtor refused to be examined by the plaintiff-trustee or to produce non-public records regarding his representation in state court. *Id.* The examination would have aided the trustee in determining whether the bankruptcy estate of the debtor had a cause of action against the attorney and insurance company for bad faith or malpractice. *Id.* After applying the balancing approach, the *Bazemore* court held that the trustee in this case had the power to waive the debtor's privilege. *Id.* at 1024. The court reasoned that the policy concerns against a finding that trustees have waiver power did not exist in this case. *Id.* at 1024. Here, the court stated that harm would not come to the debtor because the inquiry was only aimed at augmenting the estate through possible lawsuits the debtor, and in turn, the bankruptcy estate, might have against the attorney and the insurance company. *Id.*

In re Courtney is only the most recent case to apply the balancing approach. Bankruptcy courts in other circuits, like *In re Miller*, 247 B.R. 704 (Bankr. N.D. Ohio 2000), have followed the balancing approach as well. In *Miller*, the court asserted, "Upon examining each of these approaches, this Court concludes that the latter approach, in which the individual circumstances of the case are considered, is the proper approach . . . " *Id.* at 709. Thus, the *Miller* court, like the courts in *Courtney* and *Bazemore*, believed a categorical ban or allowance on the waiver of an individual debtor's privilege was not the most sound approach.

Advantages and Disadvantages of the Three Approaches

The first approach, allowing categorical waiver by the trustee of the debtor's privilege, gathers support in the theory that privilege is property that passes under the Code to the trustee as

part of the debtor's estate. *See* Thomas, *supra*, at 658. However, this approach has been criticized because the Code does not contain a clear definition of property. *Id.* Furthermore, a categorical waiver of a debtor's privilege has been criticized because it does not comport with Supreme Court precedent. This discord results from the fact that in *Weintraub*, the Court refused to extend its holding to individual debtors. *Id*. Lastly, critics say waiving debtor privilege has a "chilling effect" on attorney-client privilege communications, where sound legal advice requires full disclosure between attorney and client. *Id*. at 661.

The second approach, creating an absolute bar to a trustee's ability to waive debtor privilege, has been criticized as well. For example, critics have stated that not allowing a trustee to waive the privilege can prevent a trustee from fully investigating the debtor's claim. *See* McCullough, *supra*, at 2. A trustee will often need to determine whether a debtor has a pre-petition civil action against a third party such as an insurance company and its attorneys for bad faith refusal to settle claims. *Id*. at 3. A trustee additionally might need to investigate whether the debtor attempted to fraudulently conceal estate assets. *Id*. This type of concealment can have catastrophic effects on bankruptcy proceedings by preventing creditors from collecting and leading to separate criminal charges against defendant-debtors by the Department of Justice. *Id.*

The third and final approach, exemplified in *Courtney*, provides some protection to the debtor's confidentiality rights, while allowing the trustee to exercise the duties provided by the Bankruptcy Code. *See* McCullough, *supra*, at 4. Proponents of the balancing approach argue that it considers the best interests of both the debtor and trustee. *Id.* at 23. However, the case-by-case approach has been criticized for providing no consistent method of analysis for determining who controls a debtor's attorney-client privilege. *See* Thomas, *supra*, at 667.

Additionally, the balancing approach has been attacked as contrary to the Supreme Court's holding in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). In *Swidler*, a non-bankruptcy case, the Court held that attorney-client privilege belonged solely to the client, even after the client's death. *Id*. at 401. There, petitioner was an attorney who made notes of an initial interview with a client shortly before the client's death. *Id*. The Court, in holding that the notes were protected by privilege, did not balance the importance of disclosure of the information against the importance of attorney-client privilege. *Id*. at 409. Instead, the Court explained that a balancing test introduces substantial uncertainty into the application of the attorney-client privilege. *Id*. Thus, one could argue that because the Supreme Court has rejected the balancing test outside the bankruptcy realm, it would logically follow that it should reject the balancing approach inside the bankruptcy realm as well.

Conclusion

The question of whether a trustee has the power to waive an individual debtor's attorney-client privilege has yet to be answered definitively. Lower courts take three different approaches to the matter and the Supreme Court has failed to address the issue in the context of the individual debtor.

The ramifications of the decision will be profound, as the attorney-client privilege serves the vital function of encouraging full and frank communications necessary for the proper functioning of the legal system. *See* Thomas, *supra*, at 639. If a debtor fears that a trustee might waive his or her privilege, a debtor might not fully disclose facts to the attorney and thwart the attorney's ability to zealously represent the client. *See* McCullough, *supra,* at 10. On the other hand, public policy supports the trustee's need to make a fair assessment of the bankruptcy estate.

Id. Because of these competing concerns, courts continue to explore the middle ground approach; which might strike a balance between a categorical ban and a categorical allowance of a trustee's right to waive a debtor's privilege. The future of attorney-client privilege in bankruptcy rests on which of the three approaches prevails.