THE TRUSTEE'S CHOICE? THE ABILITY OF THE TRUSTEE TO WAIVE A CORPORATION'S ATTORNEY-CLIENT PRIVILEGE IN A CORPORATE BANKRUPTCY

I. INTRODUCTION

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."[1] Its basic premise rests on the idea of encouraging full and frank communications between the attorney and the client,[2] while also recognizing that in order to render the most effective legal representation to the client, the attorney must be aware of all the pertinent information. This can only be done through full disclosure.[3]

Courts had previously recognized that the "privilege is that of a 'client' without regard to the non-corporate or corporate character . . . ."[4] It was for that reason that the Seventh Circuit in *Radiant Burners, Inc. v. American Gas Association* fully recognized the availability of the attorney-client privilege to the corporate entity.[5] This finding was later affirmed by the Supreme Court in *Upjohn v. United States*.[6] The two pertinent issues then became whether the attorney-client privilege survives in a corporate bankruptcy, and if so, who has the right to exercise it?

The Federal Rules of Evidence govern all bankruptcy proceedings[7] and mandate that any issue of privilege is to be "governed by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience."[8] Early decisions were not always clear as to whether the privilege was to survive the filing of protection under the bankruptcy laws.[9] Early denials were soon changed, however, to affirmative

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1. Upjohn v. United States, 449 U.S. 383, 389 (1981) (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961)).

2. Upjohn v. United States, 449 U.S. 383, 389 (1981).

3. Trammel v. United States, 445 U.S. 40, 51-53 (1980).

4. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963), *cert. denied*, 375 U.S. 929 (1963).

5. *Id.* at 322.

6. Upjohn v. United States, 449 U.S. at 389-90. "Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation." *Id.* (citing United States v. Louisville & N.R. Co., 236 U.S. 318, 336 (1915)).

7. FED. R. EVID. 1101.

8. FED. R. EVID. 501.

9. *In re* Bellis, 3 F. Cas. 132 (Bankr. S.D.N.Y. 1869) (No. 1274). Statements made by the bankrupt to the attorney regarding certain conveyances prior to bankruptcy were not within

findings that the privilege did exist after the filing of bankruptcy.[10]

The Bankruptcy Reform Act of 1978 only vaguely refers to the question of how the attorney-client privilege is affected by the filing of a bankruptcy petition.[11] Indeed, the intent of Congress was not to determine the survival of the attorney-client privilege, but rather to leave the question to the courts.[12] In light of such vague congressional guidance, the federal courts of appeal have varied, not over whether the privilege existed, but rather in whom the control was vested after the filing of a petition of bankruptcy by a corporation.[13]

II. Confusion in the Circuits

The issue as to who has the right to exercise the attorney-client privilege in a corporate bankruptcy has been recently addressed by four federal courts of appeal. The first decision came out of the Eighth Circuit in *Citibank, N.A. v. Andros.*[14]

In *Citibank*, the issue arose when Citibank, as a principal secured creditor of three bankrupt corporations, sought production of certain documents in the possession of legal counsel. Production of all the requested documents was made with the exception of some with respect to which the officers of one of the corporations asserted the attorney-client privilege.[15] The liquidation trustee waived the privilege on behalf of the debtors at a later hearing.[16] The bankruptcy judge held that the trustee in bankruptcy could not waive the bankrupt's attorney-client privilege and refused to compel

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the privilege. *Id.*

10. *In re* Krueger, 14 F. Cas. 870 (D. Mass. 1872) (No. 7942). "It has been ruled that the solicitor of a bankrupt is an exception [to the privilege] because the privilege being that of the client, and the bankrupt being bound to disclose everything, the solicitor must do likewise . . . . This ruling appears to me to be founded on a misapprehension." *Id.* at 871. *See also In re* Turner, 51 F. Supp. 740 (W.D. Ky. 1943); *In re* Aspinwall, 2 F. Cas. 64 (S.D.N.Y. 1874) (No. 591).

11. 11 U.S.C. § 542(e) (1987). "Subject to any applicable privilege, after notice and a hearing, the court may order an attorney [holding information] relating to the debtor's prosperity or financial affairs, to disclose such recorded information to the trustee." *Id.*

Legislative history indicates that this was intended to remove the leverage of lawyers or accountants to withhold documents necessary for the administration of the estate until they received payment. S. Rep. No. 989, 95th Cong., 2d Sess. 84 *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5870; H.R. Rep. No. 595, 95th Cong., 1st Sess. 369-70, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6325-26. *See also In re* Sea Catch, Inc., 36 B.R. 226 (Bankr. Alaska 1983).

12. Citibank, N.A. v. Andros, 666 F.2d 1192, 1195 (8th Cir. 1981); *In re* O.P.M. Leasing Serv., Inc., 13 B.R. 64, 69-70 (Bankr. S.D.N.Y. 1981).

13. *See infra* notes 14-58 and accompanying text.

14. Citibank, N.A. v. Andros, 666 F.2d 1192 (8th Cir. 1981).

15. *Id.* at 1193.

16. *Id.*

production.[17]

The decision was reversed by the Eighth Circuit Court of Appeals.[18] The court found that the privilege belongs to the management of the corporation, and not to any one individual.[19] As such, the right to decide whether to waive the privilege passes with the other property of the corporate debtor to the trustee.[20]

The court ignored the debtor's assertion that a liquidation should be treated differently from a reorganization.[21] The debtor's argument stems from the fact that in a liquidation case, the trustee primarily represents the interests of the creditors, which may be in conflict with those of the debtor.[22] This could, theoretically, leave the bankrupt's privilege open to abuse by the creditors who may control the trustee.

The principal authority on which the Eighth Circuit relied was a district court decision, *In re O.P.M. Leasing Services, Inc.*[23] This case was later affirmed by the Second Circuit Court of Appeals.[24] The facts of *O.P.M. Leasing* show that O.P.M. filed a petition for bankruptcy under chapter 11[25] (reorganization). Subsequently, a trustee was appointed to administer the estate.[26] In the same month the trustee was appointed, the officers of the corporation resigned.[27] The trustee later required documents which were in possession of the bankrupt corporation's attorney, and as to which the attorney asserted the privilege.[28] The trustee then waived the privilege and the district court issued an order for production, stating that the attorney-client privilege passes by operation of law to the trustee.[29]

The facts in *O.P.M.* differ significantly from those in *Citibank*, and therefore reliance on *O.P.M.* was improper. The court in *O.P.M.* noted that the crucial fact of the decision was that "there has been no board of directors of O.P.M. in existence during the tenure of the trustee . . ."[30] and that "assertion or waiver of the important attorney-client privilege adheres to the trustee by virtue of the nonexistence of any other entity authorized to so

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17. *Id.* This was affirmed by the district court. *Id.* at 1194.
18. *Id.* at 1196.
19. *Id.* at 1195.
20. *Id.*
21. *Id.* at 1194.
22. Black, *The Debtor's Attorney-Client Privilege in Bankruptcy*, 40 BUS. LAW. 879, 890 (May 1985). *See also* Ross v. Popper, 9 B.R. 485, 487 (Bankr. S.D.N.Y. 1980) (trustee is in conflict with the bankrupt).
23. *In re* O.P.M. Leasing Serv., Inc., 13 B.R. 64 (Bankr. S.D.N.Y. 1981).
24. *In re* O.P.M. Leasing Serv., Inc., 670 F.2d 383, 387 (2d Cir. 1982).
25. *Id.* at 384.
26. *Id.*
27. *Id.* at 385.
28. *Id.*
29. *Id.*
30. *Id.* at 386.

act."[31] This language tends to suggest that had there been some management in existence, the court might have decided differently.

The court also refused to adopt any broad holding that the privilege of the corporate debtor passes by operation of law to its trustee in bankruptcy.[32] It was also found unnecessary to accept the finding that waiver of the attorney-client privilege was based upon the concept of property.[33]

The Seventh Circuit Court of Appeals, in *Commodity Futures Trading Commission v. Weintraub*, was the third court to grapple with the question of the right to exercise the debtor's attorney-client privilege.[34] In *Weintraub*, the trustee of a commodity brokerage corporation in a chapter 7 liquidation purported to waive the debtor's attorney-client privilege in order to permit pre-petition counsel to answer questions posed during an investigation of the debtor by the Commodity Futures Trading Commission.[35] Two of the officers, one of whom had never resigned and one who was a shareholder, were allowed to intervene to object.[36] The district court overruled the objections and ordered the pre-petition counsel to answer the questions.[37]

The Seventh Circuit reversed,[38] distinguishing *O.P.M.* on its facts, and disagreeing with the decision in *Citibank*.[39] The court's decision was based upon four arguments.

The first point was that even though the trustee holds broad powers for the corporate debtor, "[t]he corporation is capable of numerous functions even after the filing of a petition in bankruptcy."[40] The court stated that the corporation continues to exist until the shareholders dissolve it.[41] It was further stated that while the trustee may hold the power to manage the bankrupt corporation's property, he does not acquire absolute power over the corporation's legal rights.[42]

The second argument found that to allow the trustee to hold the privilege was to "condone an inequality of treatment between bankrupt corporations and bankrupt individuals . . . ."[43] The court found that had an individual been involved, he would clearly have the right to assert the privilege, and saw no reason to find differently towards corporations.[44]

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31. *Id.* at 387.
32. *Id.* at 386.
33. *Id.* at 386 n.2. The court specifically noted the decision by the Eighth Circuit in *Citibank*.
34. Commodity Futures Trading Comm'n v. Weintraub, 722 F.2d 338 (7th Cir. 1983).
35. *Id.* at 339.
36. *Id.*
37. *Id.* at 339-40.
38. *Id.* at 341.
39. *Id.* at 341-42.
40. *Id.* at 342 (citing 15A, W. FLETCHER, PRIVATE CORPORATIONS § 7657 (Rev. Ed. 1981)).
41. *Id.* at 342.
42. *Id.*
43. *Id.*
44. *Id.* at 342-43. "We perceive no reason to afford a corporate debtor less protection than

The third argument was that it was discriminatory to the corporate debtor to allow the trustee to waive the attorney-client privilege solely on the basis of economic status.[45] The court found that a simple change in economic circumstance does not justify the erosion of the privilege.[46]

Finally, the court stated that there was a need to avoid the "potential chilling effect on attorney-client communications"[47] that could result from allowing a trustee to control the privilege. The court reasoned that corporate clients would be wary of communicating fully with their attorneys for fear that sensitive information could subsequently be disclosed due to bankruptcy.[48]

The last federal court of appeals to deal with the attorney-client privilege issue was the Ninth Circuit Court of Appeals in *In re Boileau*.[49] In *Boileau*, the corporation was under a chapter 11 reorganization.[50] Although no trustee was appointed, the debtor in possession was excluded from management and an examiner[51] was appointed to act with most of the powers of a trustee.[52] The examiner filed a motion to compel production of pre-bankruptcy letters to counsel concerning fraudulent conveyances.[53] The debtor refused production on the claim of attorney-client privilege.[54] The bankruptcy court granted the motion to compel, and the district court affirmed.[55]

The Ninth Circuit summarily affirmed the district court[56] relying upon the finding in *Citibank* and ignoring any analysis of *Weintraub*.[57] The court even failed to decide whether an examiner has any authority to waive the privilege and resolved the case on the facts.[58]

III. The Effect of the Weintraub Decision

The Supreme Court granted certiorari to the *Weintraub* decision,[59] and

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afforded an individual debtor in bankruptcy." *Id.* at 343.

45. *Id.* at 343.

46. *Id.*

47. *Id.*

48. *Id.* "Free interchange between attorney and client is the cornerstone of effective legal representation." *Id. See also supra* notes 1-3 and accompanying text.

49. *In re* Boileau, 736 F.2d 503 (9th Cir. 1984).

50. *Id.* at 505.

51. *Id.* If a debtor is continued in possession during the reorganization case, the court may appoint a disinterested person as an examiner to perform any or all of the duties of a trustee. Collier § 241 (14th ed. 1940).

52. *In re* Boileau, 736 F.2d at 505.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 505-06.

59. Commodity Futures Trading Comm'n v. Weintraub, 105 S. Ct. 1986 (1985).

reversed,[60] in an opinion that this author thinks will result in a degeneration of the attorney-client privilege as it pertains to the corporate client.

Justice Marshall began the opinion by reaffirming the well established rule of *Upjohn* that the attorney-client privilege applies to corporations. The rule was qualified, however, by the statement that there were "special problems" in administering the privilege since the corporation, as an inanimate entity, can act only through agents, therefore complicating communications.[61] It was also noted that the power to waive the corporate attorney-client privilege rests with the corporation's management and that the authority to assert or waive the privilege passes in a management change.[62]

The Court then turned to the issue of section 542(e)[63] and gave a perfunctory analysis as to how that section was inapplicable.[64] The "subject to any applicable privilege" language in section 542(e) was mentioned but merely dismissed as an invitation for judicial determination of privilege questions.[65] The Court reiterated the legislative interest of section 542(e), but then ignored its mandate.[66] The very language the court quotes[67] shows that the legislative intent obviously was that the ability to demand information would be available to the trustee only when the attorney or accountant withholds information for payment. This right is still subject to the attorney-client privilege, hence the "subject to any applicable privilege" language was not intended as a general power of waiver.

The Court's reasoning with respect to section 542(e) also seems misguided when one considers that the section refers to accountants as well as lawyers. Had Congress intended section 542(e) to be means for the trustee to pierce the attorney-client privilege, inclusion of accountants within its purview would have been improper since it was well established at the time section 542(e) was passed that there was no confidential accountant-client privilege under federal law[68] which would be "subject to any applicable privilege." The Court's interpretation could, therefore, be read to imply the existence of a privilege between the accountant and client which may be pierced. This would clearly be contrary to the decision in *Couch*.

Ignoring the guidelines set by section 542(e), the Court turned to a com-

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60. *Id.* at 1996.
61. *Id.* at 1990-91.
62. *Id.* at 1991.
63. 11 U.S.C. § 542(e) (1982). *See also supra* note 11 and accompanying text.
64. Commodity Futures Trading Comm'n v. Weintraub, 105 S. Ct. at 1992.
65. *Id.*
66. *Id.* The decision quoted the legislative history as stating that "§ 542(e) 'is a new provision that deprives accountants and attorneys of the leverage they ha[d], . . . under State law provisions, to receive payment in full ahead of other creditors when the information they hold is necessary to the administration of the estate' (citations omitted) . . . It is therefore clear that § 542(e) was not intended to limit the trustee's ability to obtain corporate information." *Id.*
67. *See supra* note 66.
68. Couch v. United States, 409 U.S. 322, 335 (1973).

parison of the "roles played by various actors of a corporation in bankruptcy to determine which is most analogous to the role played by management in a solvent corporation."[69] The Court then enumerated the extensive powers which are granted in the Bankruptcy Code.[70] This portion of the Court's analysis simply begs the question. Since Congress was so specific and exhaustive as to the trustee's powers, why was the power to waive a client's legal privileges omitted? The clear answer would be that no such power was ever intended to be granted. The creation of the power appears to be simply judicial legislation on a subject that should be left to Congress.

It was found that "no federal interests . . . would be impaired by the trustee's control of the corporation's attorney-client privilege . . . ."[71] The Court ignores the broad availability of discovery under the Federal Rules of Civil Procedure,[72] in stating that it would be difficult for the trustee to carry out his investigatory duties without control of the privilege.[73]

Allowing the trustee to control the corporation's attorney-client privilege would also seem to impair a federal interest in that it might cause a corporation to hesitate to seek protection under the bankruptcy laws. A corporation that has confided in counsel regarding a sensitive matter might forgo what would otherwise be a successful liquidation or reorganization[74] in order to preserve its attorney-client privilege. This is a highly unfavorable choice and would seem to "create a disincentive for debtors to invoke the protections of bankruptcy"[75] and interfere with the "policies underlying the bankruptcy laws"[76] which are to give the debtor a fresh start.[77] A financially distraught corporation will hardly be given a fair chance to start fresh if it must choose whether to elect bankruptcy or sacrifice its attorney-client privilege.

The argument that "the trustee should not obtain control over the privilege because, unlike the management of a solvent corporation, the trustee's loyalty goes not to the shareholders but to creditors," was summarily dismissed.[78] The Court was unpersuaded and merely cited several cases that state a trustee's fiduciary duty runs to shareholders as well as creditors.[79]

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69. Commodity Futures Trading Comm'n v. Weintraub, 105 S. Ct. at 1992-93.

70. *Id.* at 1993.

71. *Id.*

72. *See generally* FED. R. CIV. P. 26.

73. Commodity Futures Trading Comm'n v. Weintraub, 105 S. Ct. at 1993-94.

74. *See* Citibank, N.A. v. Andros, 666 F.2d 1192 (8th Cir. 1982) (found the privilege passes in reorganizations as well as in liquidations).

75. Commodity Futures Trading Comm'n v. Weintraub, 105 S. Ct. at 1996.

76. *Id.* at 1993.

77. Williams v. United States Fidelity Co., 236 U.S. 549, 554-55 (1915). "It is the purpose of the Bankruptcy Act to . . . relieve the honest debtor from . . . [the debts] and permit him to start afresh . . . ." *Id.*

78. Commodity Futures Trading Comm'n v. Weintraub, 105 S. Ct. at 1994.

79. *Id.*

While this statement may be true, it ignores, as a practical matter, the differences between a chapter 7 liquidation and a chapter 11 reorganization.

In a chapter 11 reorganization, a trustee may be appointed at the request of a party in interest upon a showing of "cause," or if the appointment is in the interest of creditors.[80] The court then appoints a "disinterested party" to act as trustee.[81] Such is not the case in a chapter 7 liquidation, as the general unsecured creditors have the right to elect the trustee.[82]

Different treatment as to the person controlling the privilege could be an open invitation to use the Bankruptcy Code for purposes of discovering privileged matters which could not otherwise be obtained.[83] A creditor involved in litigation against a corporate debtor could, theoretically, file an involuntary petition against the debtor and—assuming the grounds for the petition are met—have a trustee appointed who is favorable to his interests and have the trustee waive the privilege.[84] While it may sound far-fetched, it is not beyond the realm of possibility and would be an obvious abuse of the attorney-client privilege.

Again relying on a theory of management powers vested in the trustee, the Court queries "why, out of all management powers, control over the attorney-client privilege should remain with those elected by the corporation's shareholders?"[85] The answer is due to the specific nature of the privilege itself. The attorney-client privilege is just that: a legal privilege. It is contrary to the mandate of the privilege, which depends upon secrecy,[86] to treat it as a chattel and pass it to those other than the client, without the client's consent. The privilege is intended to be enduring and is to last even past the termination of the attorney-client relationship, to ensure the client's protection.[87] It is adverse to the protection and the permanent nature of the privilege to allow the transient and temporary trustee to possess it.

The Court essentially ignored the argument that giving the trustee control over the attorney-client privilege would have a chilling effect on attorney-client communications.[88] The Court likened such a risk to that which present management faces with respect to the risk that successor management might waive the privilege regarding the prior management's privileged

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80. 11 U.S.C. § 1104(a) (1982).

81. 11 U.S.C. § 1104(c) (1982).

82. 11 U.S.C. § 702(a)-(c) (1982).

83. Shapiro & Balsley, *Attorney-Client Privilege: A Changing Concept in Corporate Reorganization*, 90 Com. L.J. 109 (Mar. 1985).

84. *Id.* at 119.

85. Commodity Futures Trading Comm'n v. Weintraub, 105 S. Ct. at 1994.

86. United States v. Goldfarb, 328 F.2d 280 (6th Cir. 1964), *cert. denied*, 377 U.S. 976 (1965).

87. United States v. Kahn, 366 F.2d 259 (2d Cir. 1966), *cert. denied*, Pacelli v. United States, 385 U.S. 948 (1966).

88. Commodity Futures Trading Comm'n v. Weintraub, 105 S. Ct. at 1995.

communications.[89] Such a rationalization ignores the potential abuses previously mentioned[90] that may have a chilling effect.

It is often in times of financial distress that a company needs, and seeks, the advice and counsel of its attorneys. Under such conditions it would be contrary to the basic premise of the attorney-client privilege, which depends for its usefulness upon the client's freedom to make full disclosure,[91] to compel the client to give false or incomplete information for fear that counsel may be required to reveal the communications in the future.

Finally, the Court refused to be "particularly concerned about [the] differential treatment" that would result from the decision.[92] It is apparent that the result discriminates against insolvent corporations, as had the bankruptcy laws not been invoked, there would be no question as to control of the privilege. The Seventh Circuit Court of Appeals held that allowing the trustee to control the privilege is discriminatory.[93] The mere economic plight of a client is no basis for extinguishing the attorney-client privilege. The result is also discriminatory against the corporate entity itself, as were the debtor an individual, rather than a corporation, the trustee would have no right to control the privilege.[94]

IV. Conclusion

In retrospect, the resolution of the issue by the Supreme Court in *Weintraub* appears to have raised more questions than it has answered. Whether these questions will be settled remains to be seen. It is the author's opinion that the Court has created a no more definitive or workable standard than that which existed before, in light of the problems of application and the possibility of abuse.

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89. *Id.*

90. *See supra* notes 63-87 and accompanying text.

91. *See supra* notes 1-3 and accompanying text.

92. Commodity Futures Trading Comm'n v. Weintraub, 105 S. Ct. at 1996.

93. Commodity Futures Trading Comm'n v. Weintraub, 722 F.2d 338 (7th Cir. 1983).

> [A]llowing the trustee in bankruptcy to waive the attorney-client privilege . . . discriminates against the corporate debtor solely on the basis of economic status. A solvent corporation, as long as it remains solvent, can freely assert or waive its attorney-client privilege. Once the corporation enters bankruptcy, however, it would pass to the trustee the power to control the privilege.

Id. at 343.

94. Commodity Futures Trading Comm'n v. Weintraub, 105 S. Ct. at 1995. "[O]ur holding today has no bearing on the . . . individual bankruptcy . . . ." *Id.*