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Consulting Experts—When Privilege May Not Apply

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A recent decision by the Bankruptcy Court for the Northern District of Texas, Northwest Senior Housing v. Intercity Investment Properties (In re Northwest Senior Housing), addressed these important issues involving the retention of a public relations firm and highlights some important pitfalls to avoid.

The retention of an expert is obviously common and essential in many litigation scenarios. However, simply because the expert is retained by counsel in anticipation of litigation, does not automatically render all communications privileged. This is generally true whether the litigation is pending in a bankruptcy or nonbankruptcy proceeding. Therefore, the terms of an expert's retention, as well any decision as to what information is disclosed must be carefully considered in advance. A recent decision by the Bankruptcy Court for the Northern District of Texas, *Northwest Senior Housing v. Intercity Investment Properties (In re Northwest Senior Housing)*, 2023 Bankr. LEXIS 1001 (Bankr. N.D. Tex. 2023), addressed these important issues involving the retention of a public relations firm and highlights some important pitfalls to avoid.

Northwest Senior Housing Corp., a Chapter 11 debtor, brought an adversary proceeding that asserted that certain disclosures made by the defendants violated a nondisclosure agreement between the parties. Pre-petition, the defendants' counsel entered into a consulting agreement with a public relations firm (the PR firm), which contemplated the provision of public relations advice in connection with anticipated litigation with the debtor.

Within the adversary, the debtor sought discovery from the defendants and the PR firm related to communications and documents exchanged between them. The defendants and PR firm asserted privilege and refused to produce, resulting in the debtor filing a motion to compel. The bankruptcy court determined that there were two key issues: whether the attorney-client privilege applied between the PR firm and the defendants based on the PR firm's retention by the defendants' counsel; and whether the consulting-expert privilege applied to protect the communications from production. Finding that neither privilege applied, the bankruptcy court ordered production.

In support of its ruling, the bankruptcy court first defined the three elements of attorney-client privilege to include whether: "the communication was confidential; made to a lawyer or a lawyer's subordinate; and for the primary purpose of securing either legal opinions or legal services, or assistance in a legal proceeding." Not surprisingly, the bankruptcy court noted that a determination of whether attorney-client privilege applies is highly fact-specific and to be narrowly construed given that the privilege results in relevant information being withheld from the fact finder. The bankruptcy court further noted that, while disclosure to third parties typically constitutes a waiver of privilege, there is a recognized exception for disclosure to professionals retained by a lawyer to assist with the

provision of legal advice. The debtor and defendants took opposing positions with respect to whether the PR firm was necessary to the defendants' receipt of legal advice. Importantly, the bankruptcy court noted, however, that the defendants failed to put forward a witness to testify in support of their privilege assertion despite the privilege analysis being fact-specific.

In the defendants' favor, the bankruptcy court found prior case law recognized that the attorney-client privilege extended to public relations firms. Unfortunately for the defendants, however, the bankruptcy court went on to note that those cases were distinguishable. Here, the PR firm did not possess information required for counsel to provide legal advice to the defendants. Furthermore, the bankruptcy court's analysis of the PR firm's production in camera supported its conclusion that the PR firm did not provide services beyond that of a typical public relations firm. Nor was the bankruptcy court persuaded that the communications with the PR firm furthered counsel's legal advice to the defendants. Therefore, the bankruptcy court held that the attorney-client privilege did not extend to the PR firm's "ordinary public relations purpose."

Next, the bankruptcy court analyzed whether the consulting expert privilege shielded the PR firm's communications with the defendants because the PR firm was retained "in anticipation of litigation." The debtor argued that the PR firm was not a consulting expert retained in anticipation of litigation and that, even if the PR firm was a consulting expert, the PR firm was also a fact witness to which the privilege does not extend.

The bankruptcy court noted that a party cannot usually take discovery of an expert retained in anticipation of litigation who is not expected to testify at trial. The U.S. Court of Appeals for the Fifth Circuit has held that retention in "anticipation of litigation" means that the "the primary motivating purpose behind the creation of the document was to aid in possible future litigation." Furthermore, the privilege must be narrowly construed to allow attorneys to appropriately provide legal advice their clients

The bankruptcy court emphasized that its own fact-finding was "severely" hampered by the defendants' decision to not put forth a witness to support the asserted privilege. In reviewing the PR firm's in camera production, the bankruptcy court determined that the PR firm was not "solely and specifically" engaged in anticipation of litigation nor was litigation strategy the "primary motiving purpose" behind the PR firm's communications with the defendants. Instead, the lack of evidentiary support for the consulting expert privilege and the in camera document production led the bankruptcy court to conclude that the PR firm was primarily retained to simply manage the defendants' public relations related to the debtors and, thus, the consulting expert privilege did not extend to the PR firm.

Alternatively, the bankruptcy court held that, even if the PR firm was found to be an expert retained in anticipation of litigation, the privilege does not extend to a party that was involved in the underlying litigation as an actor or observer. Here, the PR firm's communications that were the subject of the discovery requests and the motion to compel were directly related to the debtor's causes of action against the defendants, i.e., whether the defendants violated their non-disclosure agreement with the debtor by disclosing confidential information to non-parties to the NDA.

This case serves as a simple reminder that the retention of an expert in anticipation of litigation does not automatically shield all communications with the expert from discovery. It also provides two important lessons. First, at the time of retention, a decision must be made to carefully determine what communications are made to

an expert and delineate which are not likely subject to privilege. Second, the case demonstrates the importance of understanding the applicable standard so that appropriate supporting pleadings and relevant evidence can and are submitted to best assist the court (or other fact-finder) undertaking a privilege analysis should a discovery dispute arise.

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