

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED

99 APR 15 PM 4: 26

U.S. BANKRUPTCY COURT
DIST. OF SOUTH CAROLINA

C/A No. 98-05909-W

IN RE:

Trenton B. Ingram,

Debtor.

JUDGMENT

Chapter 7

ENTERED

APR 16 1999

V. L. D.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Motion of Ralph C. McCullough, the Chapter 7 Trustee, to compel Timothy D. St. Clair, Esquire and Charles B. Ridley, Esquire to turn over property of the estate pursuant to 11 U.S.C. § 542(e) in the form of documents and client files regarding a lawsuit brought by Daniel Vickery against the Debtor is granted. Within ten (10) days of the entry of this Order, Mr. Ridley and Mr. St. Clair shall turn over the documents in their possession related to this lawsuit to the Chapter 7 Trustee.

Columbia, South Carolina,

April 15, 1999.



UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

APR 16 1999

✓ accants for
St Clair

✓ Jgmt index

✓ Ridley

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

VANNA L. DANIEL

Deputy Clerk

Rm
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Dove
UST
Ridley

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FOR THE DISTRICT OF SOUTH CAROLINA

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U.S. BANKRUPTCY COURT
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IN RE:

C/A No. 98-05909-W

Trenton B. Ingram,

ORDER

Debtor.

Chapter 7

THIS MATTER comes before the Court upon the Motion of Ralph C. McCullough, the Chapter 7 Trustee ("Trustee"), to compel the turn over of property of the estate pursuant to 11 U.S.C. § 542(e).¹ In his motion, the Trustee seeks the turn over of all documents and client files ("Client File") of the Debtor Trenton B. Ingram ("Debtor" or "Mr. Ingram") regarding a lawsuit brought by Daniel Vickery ("Mr. Vickery") against Mr. Ingram, which documents are in the possession of Timothy D. St. Clair, Esquire ("Mr. St. Clair") and Charles B. Ridley, Esquire ("Mr. Ridley"). While Mr. Ingram, who has been adjudicated an involuntary debtor pursuant to § 303 and has not been represented by counsel in the bankruptcy case, has not filed an objection to the Trustee's motion or otherwise asserted any type of privilege concerning the Client File, Mr. St. Clair and Mr. Ridley object to the turn over of the Client File asserting the attorney-client and attorney work product privileges. Based upon the arguments of counsel and a review of the file, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

On or about July 3, 1993, Mr. Ingram was involved in a vehicular collision wherein the car he was driving struck Mr. Vickery. The car that Mr. Ingram was driving was insured by Allstate

¹ Further references to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, shall be by section number only.

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Insurance Company ("Allstate").

On or about April 8, 1994, Mr. Vickery initiated a lawsuit against Mr. Ingram to recover for personal injuries. Allstate secured an attorney for the Debtor, Mr. Ridley, to provide the defense of the personal injury lawsuit.

On August 20, 1998, this Court entered its Order for Relief under Chapter 7 of the United States Bankruptcy Code, placing Mr. Ingram into an involuntary bankruptcy. The Debtor has been acting in this bankruptcy case without counsel.

On October 28, 1998, the Trustee filed an adversary proceeding against Allstate, Adv. Proc. No. 98-80251-W, alleging several causes of action against Allstate related to its alleged bad faith in its defense of Mr. Vickery's claim against Mr. Ingram. The Complaint alleges that Mr. Vickery offered to settle the state court litigation for the payment of \$15,000.00; however, Allstate rejected the offer. Following the rejection of the settlement offer, on October 18, 1995, a jury found Mr. Ingram at fault in the wreck and awarded Mr. Vickery a judgment of \$150,000.00. Prior to the trial, during the proceeding before the Circuit Court, and in matters relating to that judgment, Mr. Ingram was represented by Mr. Ridley and/or Mr. St. Clair. The attorney representing the Trustee in the adversary proceeding is L. Dale Dove, Esquire ("Mr. Dove"), who represented Mr. Vickery in the personal injury lawsuit in the Court of Common Pleas and currently still represents him in the resulting appeal. Mr. Dove's representation of the Trustee is as special counsel and was approved by this Court.

The Trustee asserts that the adversary proceeding against Allstate has merit and that the Trustee will be successful at trial, leading to a substantial recovery for the creditors of the estate. However, the Trustee asserts that Mr. Ingram's Client File, which is in the possession of Mr. St.



Clair and Mr. Ridley, is necessary to pursue the adversary proceeding as well as other pre-petition causes of action against third parties.

The Trustee has made written demand on both Mr. Ridley and Mr. St. Clair for the turn over of the Debtor's Client File which requests have been refused on the grounds of either the attorney-client privilege or the attorney work product privilege. Additionally, Mr. St. Clair and Mr. Ridley maintain that the Client File should not be turned over since the Debtor is in an involuntary bankruptcy and may choose to convert his case to a Chapter 13.

CONCLUSIONS OF LAW

The Trustee has requested that Mr. St. Clair and Mr. Ridley turn over to the Trustee the Debtor's Client File pursuant to §542(e). Section 542(e) states that:

(e) subject to any applicable privilege, after notice and a hearing, the Court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

11 U.S.C. §542(e). Mr. St. Clair and Mr. Ridley have primarily refused to surrender the Client File on the grounds of the attorney-client privilege.

The attorney-client privilege is "an exception from the otherwise liberal construction of discovery rules" and thus "is not favored by federal courts." Cameron v. General Motors Corp., 158 F.R.D. 581, 586 (D.S.C. 1994); In re Allen, 106 F.3d 582, 600 (4th Cir. 1997); States v. Owens, 424 S.E. 2d 473 (1992) (privilege is strictly construed to protect only confidences within the attorney-client relationship), cert denied, 507 U.S. 1036 (1993). "Whether a communication is privileged is for the trial judge to decide in the light of a preliminary inquiry into all of the facts and circumstances; and this determination by the trial judge is conclusive in the absence of an abuse of discretion." Doster, 284 S.E.2d at 220 (citing State v. Love, 271 S.E.2d 110 (S.C. 1980)). The essential elements of the privilege are:



(1) [w]here legal advice of any kind is sought (2) from a professional legal advisory in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Doster, 284 S.E.2d at 219-220.

Aetna Casualty and Surety Co. v. CMA Construction Management Inc., et. al., 3:96-3172-19

(D.S.C. 6/25/97) slip op. at p. 3.

The sole issue before this Court as it relates to the attorney-client privilege is the final element of the privilege related to waiver and in particular, whether a Chapter 7 Trustee can waive the privilege of an individual Chapter 7 debtor.

The decision by the United States Supreme Court in Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed. 2d 372 (1985) is recognized as a seminal case in the area of attorney-client privilege. In Weintraub, the Supreme Court held that the attorney-client privilege was available to a corporation, that the privilege passed from the corporation's management to a Chapter 7 trustee, and that the privilege could be waived by the Chapter 7 trustee for pre-petition attorney-client communication. The Supreme Court left the issue of an individual debtor's assertion of the privilege to the courts to decide on a case-by-case basis.

Our holding today has no bearing on the problem of individual bankruptcy, which we have no reason to address in this case. . . . An individual . . . can act for himself; there is no 'management' that controls a solvent individual's attorney-client privilege. If control over that privilege passes to a trustee, it must be under some theory different from the one we embrace in this case.

Weintraub, 471-U.S. at 356-357, 105 S.Ct. at 1995. "It is presently unsettled whether a trustee



may waive an individual debtor's attorney-client privilege and the Supreme Court, in Commodity Futures Trading Commission v. Weintraub [citation omitted], shed little light on the subject."

Russell, Bankruptcy Evidence Manual, 1999 Ed., § 501.7.

Several courts since Weintraub have considered the issue at hand. The Bankruptcy Court for the District of Colorado in In re Foster, 217 B.R. 631 (Bkrcty. Colo. 1997) provides a very thoroughly reasoned decision on the issue of access to attorney-client information in an individual chapter 7 case.

The right to assert an attorney-client privilege is acquired by the trustee in bankruptcy in a situation where . . . the trustee has become entitled to and the estate is owner of assets in the nature of a debtor's pre-petition causes of action against third parties.

In re Foster, 217 B.R. at 635. In Foster, which also involved an involuntary Chapter 7 debtor, the trustee was requesting the turn over of recorded information relating to the debtor's property and financial affairs in order to pursue causes of actions for breach of promissory note, breach of consulting agreement, breach of personal guarantee, fraud in the inducement and general fraud. The Court found that neither the attorney-client privilege, the work-product doctrine nor the constitutional rights asserted by the debtor, bar the production of documents requested by the trustee from debtors' counsel. The Court concluded that "the right to assert, or to waive, the attorney-client privilege, passes from the debtor to a bankruptcy trustee where . . . it involves recovery of assets of the estate in the nature of pre-petition civil action." In re Foster, 217 B.R. at 638. In this case, there is no dispute that the cause of action arose pre-petition and therefore is property of the estate and that any recovery for the benefit of creditors depends upon the outcome of the adversary proceeding.



The present case is also very similar to the facts of a recent decision from the Bankruptcy Court for the Southern District of Georgia, In re Bazemore, 216 B.R. 1020 (Bkrtcy. S.D.Ga. 1998). In Bazemore, the Court confronted the issue of whether or not the trustee in a Chapter 7 individual bankruptcy had the authority to waive the attorney-client privilege of the debtor and require the debtor's insurance company selected attorney to be deposed regarding his representation of the debtor in the state court action. The Court concluded that the examination would aid the trustee in determining whether the bankruptcy estate of the debtor had a cause of action against the attorney and the insurance company for malpractice or bad faith. The Court concluding that the trustee could waive the privilege and held:

when the trustee seeks to determine whether the bankruptcy estate holds a cause of action against an insurance company and the attorney it appointed for potential bad faith in settlement and malpractice during a state court case, which judgment precipitated the debtors' bankruptcy, the trustee holds the right to waive the attorney-client privilege.

In re Bazemore, 216 B.R. at 1025.

In re Smith, 24 B.R. 3 (Bkrtcy. S.D. Fla. 1982) is also a case with facts similar to this case. In Smith, a wrongful death state judgment caused the debtor to file for bankruptcy. The trustee was attempting to depose the debtor to determine if the estate might have a cause of action for bad faith refusal to settle and malpractice against the liability insurance carrier and appointed attorney of the debtor. The Court held that "any attorney-client privilege which the debtor had passes by operation of the law to the bankruptcy trustee." In re Smith, 24 B.R. at 5 (citing O.P.M. Leasing Services, Inc., 13 B.R. 64 (S.D.N.Y. 1981); Citibank, N.A. v. Andros, 666 F.2d 1192 (8th Cir. 1981); and In re Blier Cedar Co., Inc., 10 B.R. 993 (Bkrtcy. Me. 1981).



In Smith, the debtor refused to answer a number of questions at his 2004 examination invoking his privilege through his attorney. The Court noted in Smith that the debtor's position was argued primarily by the insurance company lawyers who defended the debtor in the wrongful death action. Similar to the facts in Smith, the privilege in this case is being asserted by Mr. St. Clair and Mr. Ridley who were the insurance company lawyers that defended the Debtor pre-petition.

Similarly, Judge Yacos from the Bankruptcy Court for the District of New Hampshire, when confronted with the issue in an involuntary case in which the debtor had fled the jurisdiction, found that the waiver of the attorney-client privilege rested with the judgment of the trustee.

I believe, in these extraordinary circumstances, the trustee should have the privilege. The trustee is the person empowered to administer the estate for the benefit of creditors. The trustee is the financial "alter ego" of the debtor and the records in question are necessary for the trustee to administer a bankruptcy estate which the debtor has abandoned. There can be no real question raised as to the clear need that the trustee has for the business records of the debtor in the administration of the estate nor as to his authorization under the Bankruptcy Code to take custody and control of such records. A chapter 7 trustee is the representative of the bankruptcy estate pursuant to § 323(a) of the Bankruptcy Code. As such the trustee is entitled to the property of the estate wherever located and by whomever held under § 541(a) of the Code. Property of the estate under § 541 is broadly defined and includes all types of property including tangible or intangible property.

In re Fairbanks, 135 B.R. 717 (Bkrcty. D.N.H. 1991).

While there are also a number of cases which find that a trustee does not have the power to waive the attorney-client privilege of the individual debtor, these cases focus on personal harm to the debtor. See In re Silivio, 27 B.R. 28 (Bkrcty. S.D. Fla. 1982) (where an individual owner of the stock of a bankruptcy corporation also filed for bankruptcy, the trustee could not waive the



privilege for the individual because the disclosure could involve criminal conduct and thus, loss of personal freedom). Also see In re Rice, 224 B.R. 464 (Bkrcty.D.Or. 1998) (finding the debtor's attorney-client privilege related to a personal injury lawsuit, which may be exempt property, did not pass to the trustee but recognizing that the decision must be made on the equities of the particular facts and circumstances of each case). The policies against a finding that trustees have waiver power in individual bankruptcies do not exist in this case. If the waiver by the Trustee is allowed, harm will not come to Mr. Ingram, instead, the Trustee and the Debtor actually have a common interest as the information sought in the Client File will only assist the Trustee and the Debtor in bringing causes of action that the Debtor may have against Allstate or other third parties.

The United States Supreme Court has stated that the issue of whether a Chapter 7 trustee may waive the attorney-client privilege on behalf of an individual debtor must be made on a case by case basis. It is important to this Court that in this case, the attorney-client privilege is not being asserted by the Debtor, the original party that the privilege was intended to protect. In fact, the Debtor did not even make an appearance at the hearing. The privilege is being asserted by the attorneys selected by the insurance company to defend Mr. Ingram in the state court litigation. It appears to the Court that if there is a divergence of interests, it is between the estate and the insurance company and the lawyers that are routinely selected by the insurance company. The attorney-client privilege and the work product doctrine were not recognized for the purpose of protecting insurance companies or their attorneys from liability claims. Furthermore, this case involves an involuntary Chapter 7 debtor who does not appear to be cooperating with the Trustee pursuant to §§303(3) and (4) which requires him to "cooperate with the trustee as necessary" and

A handwritten signature in cursive script, appearing to be the initials 'JMS' followed by a flourish.

to “surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate.” It is therefore the finding of the Court that the Trustee is entitled to the Debtor’s Client File since the information sought would aid the Trustee and the Debtor in the recovery of assets of the estate.²

Additionally, while the parties have primarily argued the issue of waiver of the attorney-client privilege, Mr. Ridley and Mr. St. Clair also assert a privilege pursuant to the attorney work product privilege. However, the burden is upon Mr. Ridley and Mr. St. Claire to show which documents are subject to the attorney work product privilege and they have not done so.³

The burden of establishing that a document is attorney work-product is on the party seeking the protection of the doctrine, and the burden of establishing that materials determined to be attorney-work product should nonetheless be disclosed is on the party seeking production.

In re Foster, 217 B.R. at 641. Also see Gerstle v. Mitsubishi Heavy Industries, Ltd., et al., 3:97-3662-19 (D.S.C.) (“[t]he burden rests on the party asserting the privilege to establish that the documents were prepared in anticipation of litigation” citing Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332, 356 (4th Cir. 1992)). Therefore, for all of these reasons, it is

² Mr. St. Clair further objects to the turn over of the Client File for the reason that Mr. Ingram may convert his case to a Chapter 13. However, at this time, Mr. Ingram has not filed a Motion to Convert and therefore, the issue of conversion is not before the Court for consideration.

³ As this Court has previously held, waiver of the attorney-client privilege is different than a waiver of the attorney work product privilege with the latter requiring an in camera review of the documents as issue. See Wamco VIII, Inc. v. RTC Land Assets Trust 1995-NP2B (In re Long Point Road Limited Partnership), 93-72769-W, Adversary No. 96-8296-W (Bkrcty. D. S.C. 9/8/97) and In re Rice, 224 B.R. at 472. If Mr. Ridley and Mr. St. Claire wanted to maintain that certain documents were subject to the attorney work product doctrine, the proper procedure is to present those documents to the Court for an in camera review along with a corresponding privilege log. This procedure was not followed in this case.



ORDERED, that the Motion of Ralph C. McCullough, the Chapter 7 Trustee, to compel Timothy D. St. Clair, Esquire and Charles B. Ridley, Esquire to turn over property of the estate pursuant to 11 U.S.C. § 542(e) in the form of documents and client files regarding a lawsuit brought by Daniel Vickery against the Debtor is granted. Within ten (10) days of the entry of this Order, Mr. Ridley and Mr. St. Clair shall turn over the documents in their possession related to this lawsuit to the Chapter 7 Trustee.

AND IT IS SO ORDERED.

Columbia, South Carolina,
April 15, 1999.


UNITED STATES BANKRUPTCY JUDGE



CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

Mccants APR 16 1999

✓ ^{for} St. Clair ✓gmt index ✓ridley
DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

VANNA L. DANIEL

Deputy Clerk