Grochocinski v. Mayer Brown Rowe & Maw LLP et al Doc. 104 Att. 9

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID GROCHOCINSKI, Plaintiff, v MAYER BROWN ROWE & MAW, LLP, et al., Defendants	Docket No. 06 C 5486 Chicago, Illinois May 14, 2008 10:30 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MORTON DENLOW

PRESENT:

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THE CLERK: 06 C 5486, Grochocinski v Mayer, Brown, Rowe & Maw.

THE COURT: If the attorneys that are going to argue will step forward and identify yourselves and state your names and spell your last names for the record.

MR. NOVACK: Good morning, Judge, Steve Novack on behalf of defendants.

MR. CARROLL: Good morning, Judge, Rob Carroll, C-a-r-r-o-l-l, on behalf of the plaintiff.

THE COURT: Mr. Novack, could you spell your last name.

MR. NOVACK: I'm sorry, N-o-v-a-c-k.

THE COURT: First of all, let me just say I want to compliment the attorneys for the way the material has been organized and put together. It really has helped frame the issues more in terms of discrete legal issues than having to actually dig through each document. There are some overarching legal issues, and it was very helpful. I thought the briefs were very good and I look forward to the arguments.

We have got several discrete issues, and I think from my standpoint it would probably make the most sense to break them up and take them one at a time and give you each an opportunity to wrestle with me on those issues.

So Mr. Carroll, you can go first, and why don't we just identify, you know, the various issues in the order that we're going to argue them.

MR. CARROLL: Okay.

THE COURT: Did you have a plan?

MR. CARROLL: Well, the way that I have the issues laid out is to first address the at issue waiver doctrine, and then the second issue that I was going to address is the defendant's argument that because in their view the plaintiff's and his attorney's opinion is the relevant fact, that it is considered fact work product instead of opinion work product, and then the third issue I was going to address is defendant's substantial need and undue hardship argument. Then finally, I was going to brief address the common interest doctrine.

THE COURT: Okay. I would say the common interest doctrine is a very intriguing one and I think it is a fairly close question. So don't feel you need to cut yourself off into briefly.

Mr. Novack, does that order work for you?

MR. NOVACK: That's fine, Judge.

THE COURT: So why don't we just attack them one at a time. Mr. Carroll, let's start with the at issue waiver.

MR. CARROLL: Okay. Well to begin, just as a general matter, in plaintiff's opening brief, plaintiff identified the applicable protection for each document, whether it be attorney-client privilege or work product or both, and there has been no contention here from defendants, no challenge here from defendants that plaintiff's assertion that those protections

apply as a general matter is wrong. Instead, what defendants have done is say that because plaintiff has put those documents that were withheld "at issue," he has waived any applicable privilege.

Although defendant's at issue waiver argument is based on its unclean hands defense, and that defense has had many different names, but just for purposes of this argument I'm either going to refer to it as the "unclean hands defense" or just simply "the defense."

In order to resolve the at issue waiver dispute, there is no need for this court to address the merits of that defense, and I think both sides are in agreement on that particular point. Instead, what this court must do is simply look at whether plaintiff has actually relied on evidence to advance a position and the evidence that plaintiff relied upon puts documents withheld by plaintiff at issue.

THE COURT: So I mean, you know, in the typical at issue context, where somebody comes in and says "Well, I relied on the advice of counsel."

MR. CARROLL: Right.

THE COURT: That's the easiest cleanest case where they have put advice of counsel at issue and therefore, basically waived it.

MR. CARROLL: Correct. I think the at issue waiver doctrine comes up in cases such as like a patent infringement

case where there is a willfulness allegation and the defense of the willfulness allegation is "I consulted a patent attorney and I was told that there was no violation."

THE COURT: Right.

MR. CARROLL: And in that kind of a context where you're affirmatively asserting that you relied on your counsel to defeat the willfulness allegation --

THE COURT: And oftentimes you're asked to then present the opinion of counsel and that becomes your basis for avoiding willfulness.

MR. CARROLL: Correct.

THE COURT: So what you're really saying, as I understand your argument, is "They have made some charges against us and our conduct, but unless and until we rely on a specific document or a specific advice of counsel, we don't feel that there is an obligation for us to produce anything. We haven't waived anything."

MR. CARROLL: Correct.

THE COURT: However, if going forward you do -- I mean, here is where it gets a little tricky, here is where it gets a little tricky in a litigation context, and it gets a little tricky even in the patent context, which is at some point in time you don't know when you're going to make that call. In other words, there may be a point in time where you feel you need to rely upon advice of counsel or the investigation that you did and

the documents that were created there to rebut what's going on, but at the same time, the defendants don't want to be surprised. They don't want to find out for the first time at trial or after the close of discovery that all of a sudden you're now changing your tune.

So how can you -- how do we protect defendant from surprise and at the same time protect you from not disclosing what you don't think you want to voluntarily disclose?

MR. CARROLL: Well, we have already taken steps in that direction as far as we issued interrogatories to the defendants where we said "Please define what your affirmative defense is and what evidence you have at this point that supports that defense so that we can have a better idea of how we are going to respond to that defense."

THE COURT: Because with respect to these defendants the burden is on them?

MR. CARROLL: Correct.

THE COURT: And until they come forward with what evidence and what they're relying upon, you don't feel you need to have to make that decision?

MR. CARROLL: Well, until we know exactly what their defense is and what evidence they're submitting in support of it, I don't know how we can make that determination. I mean, at this point based on what they have argued and how they have answered their interrogatory, the defenses that they have presented in the

motion to dismiss, in the motion to reconsider the denial of that motion to dismiss, we don't think that we are going to have to rely on any documents that would put privileged material at issue and we addressed that in the briefs that we submitted, the various ways we can simply put -- say it's their burden, not submit any affirmative argument about the plaintiff's good faith, for example, and simply argue that they can't meet their burden, they have not presented enough evidence to show that he acted in bad faith.

I don't want to speculate too much about what's going to happen, but for example, they could depose the plaintiff and say, "Did you file this case in good faith?" And let's say he says yes. Their next question would be "Well, on what do you base that statement -- on what do you base your belief that this case is a meritorious case?" And he will say, could say the 17 exhibits attached to the complaint, this nonprivileged document over here, you know, refer to things other than advice of counsel to support his belief.

THE COURT: Right.

MR. CARROLL: Now, it's our opinion at this point in the litigation that we're -- that the plaintiff is not going to have to rely on any documents that put at issue privileged communications, but you know, part of the defendant's response to our interrogatory said that they're not yet sure -- they cannot yet fully define what their defenses are. So while I understand

your concern about the defendants being surprised, there is also our concern of an ever changing defense where we're surprised.

THE COURT: And as I understand what you're saying, you don't want to see their defenses become a mechanism for uncovering your legal theories, your legal strategies on how all this came about.

MR. CARROLL: Correct.

THE COURT: Because in any case, somebody -- you know, there was a time when Rule 11 was very popular and people were attacking each other, with every motion the response would be "Well, I move to strike and here is a Rule 11 challenge," you know, bad faith, and then that would open up, by analogy, Pandora's Box, "Well, what did you have in your file, what were you doing, what were you researching?"

MR. CARROLL: And you know, regardless of what they say as to why they want this material, once they have it, you can't unring the bell. I mean, once they see our legal analysis or strategies about prosecuting this case, our mental impressions about the case, they can't be undone. Then they have it, they have seen it.

THE COURT: But the point I want to make clear is to the extent that you are -- to the extent, first of all, that the materials are truly attorney-client or truly work product, and while I haven't studied them in great detail in my skimming through the two boxes of documents, they clearly look like work

product and attorney-client and mental impressions and those kind of things jump out at me as I look at them, I want to be sure that you understand that you can't have it both ways, that you can't preserve the attorney-client and preserve the work product and then be taking the positions that it was advice of counsel or it was a memorandum from my attorney or whatever that caused me to do that.

MR. CARROLL: I agree, but let me just make one point, though. You know, the defendants are going to have the chance to depose the plaintiff.

THE COURT: Right.

MR. CARROLL: And in that deposition they can ask any question that's relevant and not privileged. And so they may ask -- in asking our client a question, they may ask him a question that elicits a response of "I relied on my attorneys," and maybe that's part of a larger answer, and then in a summary judgment brief we never use that part of his answer, they could potentially argue well, because that answer is out there, there has been an at issue waiver.

And I just want to make clear today that it's our position that just because he answers truthfully a question that they ask, there is no waiver unless we cite to that portion of his deposition, for example, in response to a summary judgment motion.

THE COURT: Well, what your position is that there is a

distinction between the issue that's created and the evidentiary basis for the issue.

MR. CARROLL: Absolutely.

THE COURT: And that once you cross the line and begin using the evidentiary pieces, whether it's oral advice or documents or whatever, then you may have waived, but unless and until you do that, you haven't waived, is that --

MR. CARROLL: Correct. I think the discussion of the case law that we included in the briefs makes that point pretty clear, that in every situation it's an instance of the party actually relying on some evidence or testimony from a deposition that puts at issue privileged communications.

THE COURT: The other thing I want to make clear, the other thing I want to make clear is I mean, to the extent that there is information that's gathered, you know, attorney work product, I mean, the fact that it's gathered doesn't mean it doesn't get disclosed in response to the discovery. In other words, you may have discovered things, but the facts are the facts and therefore, in response to discovery, you know, you have to disclose facts. You have to disclose what took place.

MR. CARROLL: Right. I think I understand.

THE COURT: I mean, in other words, just because an attorney discovers something doesn't mean it stays a secret.

MR. CARROLL: Absolutely. I understand that, right.

THE COURT: That's different from the memo in which you

may have recorded something that may be different from a letter telling your client about what you have discovered or how you have discovered it, but, for example, if you find a witness out there --

MR. CARROLL: Sure.

THE COURT: -- you know, the fact that you have a witness has to be disclosed.

MR. CARROLL: I understand. I think the point the court is making, which I agree with, is that if there is a document in our file that's work product that contains facts as opposed to like opinions or mental impressions or something like that, we may not have to produce that document, but we do have to disclose those facts, we can't keep those facts a secret.

THE COURT: Correct.

MR. CARROLL: And I absolutely agree with that.

THE COURT: Anything else you want to tell me with respect to the at issue waiver?

MR. CARROLL: Nothing at this time, although I do have a question. Am I going to have a chance to reply as the moving party to --

THE COURT: Yes, I'll give you the first 30 seconds of your next argument to reply to Mr. Novack's argument.

MR. CARROLL: Very good. Thank you.

THE COURT: Okay. Mr. Novack.

MR. NOVACK: May it please the court. Judge, I thought

it was a good idea to do this, and I think it's going to focus. There are some things that I'm going to say that might have spillover to the other issues and I'll try to keep that to a very, very minimum, but sometimes you can't separate the interrelationship of the issues.

Judge, the first thing I would say is I want to remind the court and make it real clear, we're here not on the merits of this case. This case has been bifurcated. Judge Kendall has bifurcated it and set a schedule for dealing with one discrete issue that really while it has got some relationship to the merits, isn't the ultimate merits of the case. So when we think about what is at issue, what is the issue, the issue is a little bit different than would be the case if this were just coming up in regular discovery on the merits, because the issue here, among other things, there is a lot of issues in this bifurcated part so I don't want to preclude myself by not remembering each and every one, but among these issues are the trustee's good or bad faith in filing this case, the trustee's good or bad faith, adequacy, inadequacy of not seeking to vacate the default judgment, and the adequacy or inadequacy of the trustee's investigation of the allegations that he made instead of seeking to vacate the default.

And on those issues, while we firmly believe and have set forth in the brief that the plaintiff, the trustee here has injected voluntarily these issues because the trustee in his

response to our motion for reconsideration in a brief that ended up winning that issue because reconsideration was denied said: "If plaintiff decided to file this case because he believes that the claims against defendants are meritorious" -- and here is the key parenthetical -- "(which he did), then this case cannot be a fraud."

So he argued to Judge Kendall that he brought this case because he believed it was meritorious to try to defeat our motion that this is a fraud. Then in his motion for protective order, on which he also prevailed, he said at the conclusion of his (and his attorney's) pre-lawsuit investigation, plaintiff concluded that meritorious claims exist against at least defendants and Charles Trotter. Thus, plaintiff filed this case. So --

THE COURT: But the point I would ask you is factually, factually, the question of what was the investigation such as who did you contact, who did you did you meet with, those facts are different from what they communicated to each other, what they did with that, how they analyzed that internally. In other words, if they said "We went out and met with 14 witnesses and spoke to them, and that was the basis of it," you know, I'm not sure that they -- "and that these witnesses told us certain information," I mean, it's sort of a question of how they respond, it's a question of how they respond and what they rely on.

So I think, I think they have a choice to make about what they're going to say. I mean, I don't know that I can forecast precisely what their response is going to be. I think, I think, you know, they have to make a choice, and depending upon what their choice is -- in other words, I don't necessarily agree that just because you have tried to put something at issue and it's at issue in the case, that everything the lawyers have done becomes fair game. That's where I'm troubled.

MR. NOVACK: I understand that, but just to follow up on your example, if that was their position, they defended the filing of this case on the basis of 14 witness interviews and that they were told that there was a great case against us, we're certainly entitled, aren't we, to challenge that, investigate that ourselves to see if that's true. One of the ways is what if their note says "This witness has a lousy case." We should be able to cross-examine the veracity of the statement that they would make in that regard.

And I would also say I took very seriously what you said about Rule 11 because I sort of don't have a good answer for saying that if in every case at the beginning of the case the defendant files a Rule 11 motion, that opens the door. This is a different case. We passed a threshold. Judge Kendall listened to our argument, took it seriously, we made a prima facie case at the very least. As a matter of fact, three separate times she said that our motion is very persuasive. So the gatekeeper role

that this court and Judge Kendall obviously need to play to prevent something getting out of hand just because the defendant elects to make a particular challenge I think has been passed here because we have made, we have passed the threshold, and I think that's the difference.

THE COURT: What's the point in time? In other words, what's the relevant period of time? I have got documents here I think that run, run through after the filing of the case as well as before the filing of the case. So you know, what would you say is the threshold period of time, up to when?

MR. NOVACK: Well, certainly up to the filing, things that occurred before then. I think if I'm remembering right, the trustee was in for about two years before filing the case. I'm looking back to make sure I'm not misstating that.

MR. CISZEWSKI: Two years or a little bit less.

MR. NOVACK: A little bit less than the two years. Certainly, that period of time would be relevant. I don't know what documents -- let me finish this thought, but I've got to make a caveat before I forget it. I don't know what's in those boxes afterwards, but if afterwards information came to the trustee that negated those 14 witness statements, for example, I think that would be very, very relevant to the continued prosecution of the case, particularly in the face of the challenge that we made.

Judge, let me take an injury time out here for just one

second. Counsel started off by saying, and he was right, it was true what he said, that we didn't in our response brief challenge whether these are the kinds of documents that but for waiver and the other issues that we are raising, you know, would be attorney-client privilege or work product, but there is a good reason for that. We have never seen any one of those documents and we're not in a position to make that argument. As a matter of fact --

THE COURT: That's true at every one of these kinds of situations where, you know, we create privilege logs and try to provide as much information while still -- I mean, it's a difficult situation.

MR. NOVACK: Understood, but, Judge, these are unusual situations because these documents, at least two or three of the six categories, went to somebody that's not the client.

THE COURT: That's a different issue.

MR. NOVACK: Understood, but their response to that or their prima facie case was well, that was in response to the lawyer asking and this and that. We don't know that's true or false. In part, We are relying on this court in its gatekeeper function if there is something that doesn't look like it's privileged or whatever, but we are reserving our right, and as we go through this discovery process, if we learn that contrary to the representation that some of these, some or all of these submissions that were made by the non-client were volunteered and

they weren't in response to something that would allegedly give away counsel's theories, then we're going to come back and say "Wait a minute, we argued waiver, we don't need to argue waiver. This isn't" -- I just want to preserve that.

THE COURT: Let me say I have been on the bench now 12 years, and I have done a number of these. I have never seen files as well organized and presented as they have done and the systematic way it has been presented in the categories. I mean, they have credibility with me in the professional way that it's all been put together, and clearly, I'm going to dig into it, but if I can resolve these things on the overarching legal issues, some of that may or may not come into play.

MR. NOVACK: Of course. So if I can return now, so we think they did inject this issue of the good faith. When we first filed our motion, we said that this was a fraud performed by Spehar Capital and we addressed Spehar Capital's conduct. Their response said no, it should be tested by the trustee's conduct, and the trustee made a good faith investigation, the trustee really believed in good faith, et cetera.

But, Judge, in a strange way it may not even matter because regardless of how we got here, Judge Kendall has opened the door to testing what the trustee did with investigation prior to filing this complaint.

THE COURT: Under that rationale why would she even bother to send it to me? Under that rationale if she had opened

the door and said it's all at issue, then, you know, why engage in an attorney-client or work product analysis? Under your rationale, it's there, it should just all be turned over.

MR. NOVACK: Well, I think she wanted obviously to give the parties their day in court, and she for whatever reason decided to have your Honor do that, but she wasn't ruling on the attorney-client privilege at that time when she referred it.

THE COURT: No, but your point is that you know, if it's at issue, it's at issue.

MR. NOVACK: But that wasn't presented to her. She didn't hear either side say this. Neither side argued the privilege in front of her. She learned that there is going to be a privilege -- and a privilege objection hadn't really even been made. That was made according to your Honor's briefing schedule. The logs hadn't even been created. So she had a blank slate. For all I know, had we said, had I been smart enough to say, "Judge, there can't be a privilege here because of that," she might have said "You're right." I guess I wasn't quick enough to do that.

So I don't think that we should take anything from her referral of that issue. I do think we should take a lot from the fact that she, even if they didn't do it, she has now made this a part of the case, and it's not only that these documents relate to the investigation, it's not only this information relates to the investigation, it is the investigation, and I'm sliding a

little bit into the need and I won't go further than that, but for this purpose there is nothing that could be more relevant to the question of whether an adequate investigation was made other than these documents. It is the investigation. The trustee isn't going to be able to say what his attorney's investigation was. Those documents and the information gleaned in that investigation will constitute the attorney's investigation.

So based on the case law that says that when the privileged materials are put into issue that both the attorney-client and work product privilege are waived, on that authority we would ask the court to find such a waiver.

THE COURT: Thank you.

Mr. Carroll, you can briefly have a reply and then move on to fact versus opinion.

MR. CARROLL: I just have one brief comment in response to something that came up at the end of counsel's argument. I would just like to point out that the way this matter ended up before your Honor is that we filed a motion for a protective order seeking a process to address these privilege issues, and in response to our motion, defendants filed a written pleading or a written brief arguing the at issue waiver. We filed a reply and we appeared before Judge Kendall on our motion for protective order and their response to it.

And so this issue was -- the at issue waiver argument was teed up before Judge Kendall, and her response to it was to

refer the matter to this court for a resolution of that issue and any other privilege issues that come up. So that's really the only point I want to make in rebuttal.

THE COURT: Let me just go back for a second. In terms of the timing of the documents that you have given me, they go far beyond the investigation, including issues involving motions to dismiss and other things.

MR. CARROLL: Correct.

THE COURT: So in terms of at issue, assuming I agreed with Mr. Novack's position that at issue applies, what would your position be on the timing of what's the cutoff in terms of timing with respect to documents?

MR. CARROLL: Well, we certainly have a timing objection in that their whole defense is premised on this case was filed in bad faith, and so necessarily all the evidence relevant to that is material that led up to the filing of the case. Anything after the case, I mean, Mr. Novack made the comment that, you know, if facts were disclosed after we filed the complaint that are contradictory to the allegations in our complaint, that that is then relevant, well, as your Honor pointed out when I was up here initially, the facts themselves are not privileged. I mean, if we learned -- if any of the, and I don't think this is the case, but if any of the material in there that postdates the filing of the complaint contains facts that were learned after we filed the complaint that relate to the

allegations and those facts contradict our allegations, I mean we have to -- we have a duty to disclose those facts regardless of this privilege issue.

And so I mean, I don't think that those documents are at all -- I don't think that the documents that postdate the filing of the complaint are at all relevant to the issues here.

THE COURT: What was the date of the filing of the complaint, if you recall? If not, I can look it up.

MR. CARROLL: You're testing my memory. I think it was sometime in August of 2005, I believe. I would have to look.

THE COURT: Very good. Let's go on to the next one.

MR. CARROLL: Okay. So the next issue that I'm going to address is defendant's argument that even if there has not been an at issue waiver here, plaintiff should be required to produce his work product because of substantial need and undue hardship, but before getting to that, we have to first address the notion of is this material opinion work product or fact work product, and on our privilege logs we asserted that all of the material that was withheld on the basis of work product is opinion work product because it reflects or reveals plaintiff's and plaintiff's attorneys' mental process, legal strategies, you know, the sorts of things that make a document opinion instead of fact work product.

Now, opinion work product is afforded nearly absolute immunity, and unfortunately, there is not a clear bright line

test for opinion work product as there is for fact work product. All I can say is in all the briefing that we did on this issue and all the cases that we read, I don't recall seeing any cases where opinion work product was compelled to disclosure because of a substantial need.

THE COURT: And this is where it may tie in with the at issue concept. In other words, if before filing of the complaint you analyzed the ups -- the pluses and minuses of going forward with the lawsuit, that in theory could demonstrate your good faith or your bad faith in filing the lawsuit. So Mr. Novack will probably argue that there is probably nothing more important than seeing those mental impressions, and that he can't obtain that anywhere else other than from your own memos and analysis.

MR. CARROLL: It could, but I just want to make sure that it's clear that their defense is essentially that plaintiff conducted an inadequate investigation before deciding to file this case. In fact, in their brief they say they failed to conduct an easy and dispositive prefiling investigation. So the premise of their argument is that had that been done, plaintiff would have never decided to file this case. And so all they have to do is do that investigation that they're saying plaintiff should have done, come up with the facts that purportedly contradict our allegations or would have led the plaintiffs to the conclusion that I shouldn't file this case, go take plaintiff's dep and say "Look at what we've got. Why didn't this

prevent you from filing the case?"

It's not necessary to get into the plaintiff's, you know, work product to determine whether the case was filed in good faith.

THE COURT: The other thing that concerns me in a situation like this, and I'll address this with Mr. Novack, is oftentimes you see in the patent cases these issues are raised and it becomes a tactic device to then move to exclude counsel because then counsel potentially becomes a witness.

MR. CARROLL: Right, and I don't want to segue too much back into at issue, I just want to make one very brief point, which I just lost.

THE COURT: I can't help.

MR. CARROLL: I wish you could. If it comes to me, I'll come back to it.

THE COURT: Okay, go ahead and stay with the fact versus opinion.

MR. CARROLL: I'll stay with this. And so what defendants are arguing, they're not contesting, they have not gone through our privilege log and we really were as descriptive as we possibly could be, and they have not said "Well, based on this description, we either challenge or have some questions about whether this is actually opinion work product as opinion work product is traditionally defined." Instead, what they have said is just generally all of the documents should be considered

fact work product because it's our opinion and our client's opinion that's the relevant fact at issue here. And they have not cited, and I have never seen a case that says that a court can just disregard -- can just disregard the fact that something is opinion work product because the defendants believe that the plaintiff's attorney's opinion is relevant. That's just not the test. That's like doing an end run around the at issue waiver doctrine.

I mean, we are in control of the privilege. You know, they will probably file a summary judgment motion on their defense, and in responding to that, we have the choice of saying well, we could insert some documents that will put at issue privileged material and maybe that would greatly strengthen our defense, but because we want to protect our privilege we are not going to do that. We are going to rest on the fact that they can't establish their burden or we are going to rely solely on nonprivileged documents. It's our choice. They can't force us --

THE COURT: You're saying you can make a tactical choice and they're saying that they need that underlying information as an essential element of their offense.

MR. CARROLL: Correct, but by saying that, they're turning the law on its head. It's our choice.

THE COURT: Right.

MR. CARROLL: We are the ones who are in control of our

privileged documents. We either choose to use them as a sword, in which case we can't use the privilege as a shield, or we can say we're just not going to use it at all. It's exactly the situation in U.S. v Bilzerian, which is the case they filed in their response where the defendant there had the choice. He could either testify about his intent or his good faith to negate the scienter element in a securities fraud case, and if he did so, he would waive the privilege as to protected communications on that issue, or he could choose not to testify. And in that case he made the choice not to testify and so his privileged communications did not have to be produced.

And it's the same situation here. Until we have actually relied on something that puts privileged communications at issue, we have not waived the privilege and they can't force a waiver by making an argument.

And so really I think that's all I have to say about this notion that our opinion work product is no longer opinion work product because the facts in those documents may be relevant. I mean, there is just no support for that and it's contrary to established law on under what circumstances opinion work product can be produced and under what circumstances there has been an at issue waiver. That's all.

THE COURT: Mr. Novack.

MR. NOVACK: Judge, counsel was right. He reminded me we did take a stab at the at-issue issue, but you will see in

Exhibit B to our response, page 7, Judge Kendall said I don't know why you filed that response. The only issue today is the process they're asking for or the two-step production where Spehar would first produce the documents to the trustee rather than producing them directly to us, and she said that is all I'm going to consider and then she referred the issue on privilege to your Honor.

I don't know that we made a separate fact versus opinion argument, frankly, Judge, because once again, we don't have the materials to be able to say with precision this document is fact, this document is opinion. I think what we said was that to the extent, if any, that there is opinion in there, that that opinion really does form the factual basis for whether there was a good faith basis and a good faith investigation and an adequate investigation for filing this suit. That just happens to be the, turns into the fact that got to the trustee's wealth of information, if you will. So we didn't make a specific --

THE COURT: So then what happens, you get that and then you seek to depose the attorney and then you move to disqualify the attorney and, you know, is that how this plays out?

MR. NOVACK: Well, no, I don't think so at all. I haven't thought about the deposition of the attorney, I'm hoping that wouldn't be necessary, but as far as disqualification, again, this round is going to the bifurcated part of the case. I can't imagine, though I haven't thought about it, that that would

even be grounds for disqualification. I have no desire to disqualify counsel, and if I had my client at the side I would whisper and then say to you we will represent that we won't. I can't do that without the client, but I don't think that it follows because they're not going to be witnesses in the underlying merits, if we ever get to the underlying merits, if they survive this procedure that's going to lead to some kind of a dispositive motion.

THE COURT: So do you anticipate that the defenses will be actually, these affirmative defenses are going to be litigated before the underlying claim?

MR. NOVACK: Yes, that's what Judge Kendall ordered. She said take discovery on that issue, and she actually had set up a briefing schedule for an anticipated summary judgment. That's been kind of dropped because of the length of time that the discovery has taken, but it's leading to a motion -- I mean, assuming the facts bear out, we are not going to file a frivolous motion, but if the facts bear out our suspicion, I don't see how they won't based on what we know so far, there is going to be a motion that asks the judge to stop the case in its tracks. That's what she said she is so far persuaded by, but wants to see the facts. She said "I can't do it in the motion to dismiss context because there are going to be disputed facts," but yes, that's where exactly --

THE COURT: I have never been a fan of summary

judgment.

MR. NOVACK: I know that.

THE COURT: And it would be hard for me to visualize --

MR. NOVACK: Well, Judge, if I could do two things --

THE COURT: -- how it could be disposed of on that basis, but maybe it can.

MR. NOVACK: One of the things I was going to start with if we had done a fulsome argument without the procedure that's been I think very nicely arranged, I was going to say why is this stuff relevant, what is it that brings us here. Could I spend a couple of minutes doing that?

THE COURT: I would love to hear it.

MR. NOVACK: And as you hear this, the Seventh Circuit has come down with a case the end of March -- March 21st was when the slip opinion was issued. It was after Judge Kendall set this bifurcated process. The case is called Maxwell v KPMG LLP, No. 07 2189. I don't know, because I didn't check today, if it has made publication.

THE COURT: I know the case well. I had those attorneys in front of me for a long time.

MR. NOVACK: Okay. And one of the things I just wanted to say because it sort of informs this process and Judge Kendall's process, the opinion says "Judges must therefore be vigilant in policing the litigation judgment exercised by trustees in bankruptcy and in an appropriate case must be give

consideration to imposing sanctions for the filing of a frivolous suit." And I'm not saying that for sanctions purposes, but consistent with this policing gate keeping process that we're now going through.

Judge, the way this process started is we moved to dismiss the case as our response to the complaint based on what we call fraud on the court or that it would lead to an absurd result if the plaintiff somehow won. The court kind of took all the various components of that and said "I'm just going to call it unclean hands as a shorthand," and that's what the parties have started to use. But I think unclean hands is a little bit too limited in what's at play.

And it starts with this, Judge. It starts with a backwards lawsuit, a completely backwards lawsuit that was filed in California. That's what started this whole ball rolling. What happens is that CMGT, the debtor in bankruptcy, was a startup business. It needed financing, it hired Spehar Capital to go out and look for financing. Spehar looks for two years, doesn't find any financing. The debtor ends up doing a financing on its own with one of its own minority shareholders. Spehar, however, says "I want a piece of that action. I want a commission out of that."

The parties negotiate toward settlement, try to find a way to resolve it. They fail and Spehar files this lawsuit. But it doesn't do --

THE COURT: The lawsuit --

MR. NOVACK: The California lawsuit. It doesn't do what you would expect a broker who wants to get a commission out of a closing to do, which would be let the closing occur, sue for a commission. Win or lose, at least there is the deal. Instead, what we call killing the golden goose --

THE COURT: They tried to enjoin the transaction.

MR. NOVACK: Not only tried, but succeeded in enjoining the deal from closing. It's like I'll punch out one of my eyes if you will punch out two of their eyes.

THE COURT: I see lawyers do that all the time.

MR. NOVACK: Pardon?

THE COURT: I see lawyers do that all the time.

MR. NOVACK: I hope not today.

THE COURT: I hope not today too. Lawyers are constantly shooting themselves in the foot thinking they're helping their cause, and then the other lawyer turns around and shoots himself in the foot.

MR. NOVACK: Spehar certainly did and ended up killing everybody. So what happens then? There is a default, Spehar goes to prove up a default judgment and proves up $17 million on a $500,000 deal.

THE COURT: But this is all really on the merits, this is really on the merits which Judge Kendall is going to have to deal with on the merits.

MR. NOVACK: I understand, but I think it's -- I'll stop.

THE COURT: What's the significance of that background to what I have to decide?

MR. NOVACK: The background gets us to what is it that we are supposed to be investigating, what is it we are supposed to be discovering, and when the California judge enters the default judgment, he makes two pretty telling comments. One is he says this seems speculative, he says none of this stuff has happened, but then he says --

THE COURT: They will either vacate it or file for bankruptcy.

MR. CARROLL: Well, he does more than that, and I wish I had quote quoted this. It's in the exhibit that we attached. He says -- he doesn't say this, but I'm now saying this, but I'm going to say what he says. I guess it doesn't matter how much I award because -- and this is what he does say -- he says "Once you have the judgment, they're going to come in and set aside the judgment and the dance starts all over again. I'm just saying this is what usually happens. It's like the first dance, one person forgot to get up and the second dance everybody gets up." He didn't say they're going to come in and move to set aside the judgment, he said they're going to come in and set aside the judgment. He couldn't have invited a motion to set aside the default any more than that.

The trustee, though, gets appointed. The federal law gives him a 60-day special time even if the time to vacate had expired, to go -- he had 54 days when he became trustee. All he had to do was read that transcript, he would have known -- he should have known to vacate, but that was his invitation and he doesn't. Instead, he makes this deal with the party that destroyed the company through this backwards stuff and then gives 90 percent of the action away. That's what we call the fraud on the court, and that's what we think led Judge Kendall to bifurcating and saying "We're going to find out about that failure to vacate the default, we are going to find out about that deal, we are going to find out about that investigation." So that's what makes all these documents so very relevant.

THE COURT: And then they then convert it into a lawsuit for malpractice against the deep pocket.

MR. NOVACK: That was all part of that deal with the wrongdoer. They get into bed with the party that destroys the company, causes the bankruptcy. It was an involuntary filed by that one creditor who caused the whole problem in the first place. And no money was ever paid on that judgment. It could have been vacated, there could have been zero claimed by this Spehar, but instead, the trustee gets seduced into or knowingly goes into "Well, let's sue a deep pocket law firm even though no damages were ever paid on the judgment that I could vacate in a heartbeat." That's what makes this so relevant and that

investigation is all in there.

THE COURT: But there is apparently a conscious decision to let the default be entered or there was some decision to let the default --

MR. NOVACK: By the client?

THE COURT: By the client and their counsel.

MR. NOVACK: Because they had no money.

THE COURT: Okay. I mean, so --

MR. NOVACK: So the trustee had the wherewithal to vacate that judgment.

THE COURT: But, you know, that really deals, that goes to the merits. That goes to the merits of whether or not there is something of substance here or whether it's a sham or some unclean hands.

MR. NOVACK: I agree with you. I'm just setting the table for why these documents are so critical.

I don't know if counsel got into the substantial need argument or stopped at fact versus opinion.

THE COURT: Why don't you start with the substantial need argument then because you're the one really arguing the substantial need.

MR. NOVACK: That is the "even if" argument, so our first argument is the at issue waiver should end the case, but if the court finds that it doesn't as to all or some or all of the documents, then we have an argument that applies to all six

categories except Category No. 3. This would not apply to Category No. 3.

But the argument, Judge, is that even if the waiver doesn't apply, both the attorney-client privilege and the work product privileges fail in the context of this case, and here is why.

On attorney-client privilege first, and I'll deal with them separately, the privilege was lost by disclosure to Spehar Capital of the privileged materials, and those are categories 1 and 2, and I think I have got the numbers right, the memos that the law firm prepared that it sent to Spehar and the correspondence that the lawyer and client had that were sent to Spehar.

THE COURT: Those are 1 and 2.

MR. NOVACK: Okay. The only defense to that that has been advanced is what's called the common interest principle and only one case is cited for that. That's the Dexia case. That was Magistrate Judge Schenkier's case, 2004.

Here are the rules or principles we see that apply. First of all, the burden is on the trustee to establish the common interest. It is not our burden to negate that common interest principle.

The common interest must be legal. It cannot just be business or financial, and it must be an actual cooperation towards a common legal goal, not a common financial goal, but a

common legal goal.

THE COURT: There is some interesting language in the Dexia opinion that -- at page 294, 231 F.R.D. 294 where Judge Schenkier.

MR. NOVACK: 294 or 274?

THE COURT: 294 -- 231 F.R.D. 294, towards the end, he says: "Thus" --

MR. NOVACK: Could you wait one second for me. My case starts at 231 F.R.D. 268.

THE COURT: 231 F.R.D. 287 is where mine starts.

MR. NOVACK:

THE COURT: Dexia v Rogan?

MR. NOVACK: Yes. Okay. Could you point me to a headnote number.

THE COURT: Mine is a Westlaw, sub B.

MR. NOVACK: Okay.

THE COURT: Sub B. Do you find the B there?

MR. NOVACK: Yes, I do.

THE COURT: Headnote 7, headnote 7, starting with "Dexia recognizes this point," beginning of the paragraph.

MR. NOVACK: I wonder if it's possible we have two opinions.

THE COURT: I'm looking at the 2005 case.

MR. NOVACK: Oh. I thought the case that was cited was the 2004 case. Anyway, go ahead. I'm sorry that I don't --

THE COURT: 231 F.R.D. 287, it's the 2005 case.

MR. NOVACK: I'll carefully listen along.

THE COURT: Judge Schenkier says: "Thus, EMC and the management company had the identical interests that the legal advice Tatooles gave was sound so that each could rely upon it. The fact that EMC and the management companies had different business reasons for relying on the advice does not undermine that they had the identical interest in the legal advice itself, and it is the common legal interest, not business interest, that is central to application of the common interest doctrine."

So the easy case is if they both got the same legal issue that they're looking to lawyer on. Here it appears that they may have a common business interest, but a common interest in the legal point that's being adopted. That's one interpretation of the case.

MR. NOVACK: Well, I think it's actually consistent with the 2004 opinion because what the judge was pointing out, and I think it is the rule, is that there has to be a legal claim that each of the parties is pursuing against that same third party. In that case, at least the 2004 opinion made this clear, each of EMC and the management company had filed cases against the same third party arising out of I think it was the Medicaid fraud and so they both had legal claims that were being asserted. That gave them their common legal goal. But that doesn't mean that if somebody has an interest, a financial interest in the

outcome because it's going to share in the recovery, that that creates that common legal goal. And if it did, it would prove much too much, wouldn't it, because that would mean that shareholders of corporations would come under the penumbra of the attorney-client privilege. We know that's not the case because only the control group does, and if a lawyer were to tell something to a shareholder or even an employee that was not in the control group, there is no privilege for that. But every shareholder of every public company has an interest financially in how that case goes.

And what the argument here is that Spehar is a creditor, and to be sure the creditor would get 90 percent of the recovery, but every creditor I guess could then have that same financial interest, but surely the lawyer for the trustee can't go and talk to every creditor without breaching the privilege.

So I think the neutral principle here is do the two parties have a legal claim, i.e. the legal interest that they're trying to protect, which would make a common interest that's cognizable.

THE COURT: So is it your position that absent a legal claim on file by Spehar, that they cannot have a common legal interest?

MR. NOVACK: Yes, and in fact, in this case they couldn't even have one on file. Spehar had no standing to sue Mayer Brown.

THE COURT: Right.

MR. NOVACK: So that's the, I think, the nub of the issue and why it doesn't apply here. And Dexia did have the two claims, and that's the distinction between legal and business.

So that's the reason we say that even if the at issue waiver doesn't defeat the attorney-client privilege, the common interest doesn't save it as to those two categories. The privilege would stand obviously for the part of the privileged materials that were not given. That's category No. 3.

Then turning to work product, your Honor, the test there, as we all know, it's not disputed what the test is, is that --

THE COURT: Let me just step back.

MR. NOVACK: Sure.

THE COURT: Does the fact that Spehar wants the trustee to win the lawsuit, is that enough of a common legal interest?

MR. NOVACK: I don't think so, Judge, because again, just to use the analogy, every shareholder wants their corporation to win, every employee wants their corporation to win. There could be a party that, you know, hopes that the plaintiff wins an antitrust suit because that will be better for competition and that party will do better. There is all kinds of reasons why a nonparty would want a party to win, but absent having a legal claim, then it's just a financial or business interest, which is not enough.

Turning to work product, if I may, work product -- finding that something is work product and finding that something has not been put in issue and thus waived as work product does not answer the ultimate issue because even if it is work product, there are circumstances under which the court will order its production. Rule 26(b)(3)(a) provides expressly that that can happen where two tests are met, both have to be met: there is a substantial need for the information and the party seeking it cannot without undue hardship obtain the substantial equivalent by other means.

It is true that opinion work product has a higher threshold, and I know some courts have said, including your Honor, that that opinion is almost, I think your language was nearly absolute that it cannot be produced. However, the court recognized in those circuits that do recognize the production of opinion, the standard is a compelling showing. The Seventh Circuit has not, at least as of my last check, hadn't weighed in yet.

Here, Judge, both prongs are really answered in favor of our client, defendants, for the same reason. It's both substantially necessary to get this material and we can't get it elsewhere because, and I'm a little bit repeating what I said before, this is the investigation. There is no substitute for this. Depositions are likely not to be as accurate. We could depose the people that were interviewed, don't want to depose the

lawyers. This should tell us what the investigation was. And we have a substantial need because one of the things we have to prove to Judge Kendall, among others, is an inadequate investigation, or at least that's one of the ways we would prove our case. And the only way to do that is to know what the investigation was and to test it.

Well, that's the investigation. I'm pointing toward those boxes. So it's not like there is a set of facts and there happens to be a document that relates to it and do we really need that document or not.

THE COURT: Are you saying the investigation should include both the legal investigation and their legal -- the factual investigation as well as the legal analysis they made of the law, of what the state of the law was and what the likelihood is that they could proceed on these various theories?

MR. NOVACK: Well, I would like to answer in two -- first of all, the answer is yes, so that I bluntly answer your question. I recognize that the factual investigation is a lower threshold for us under that two-pronged test, but yes, we would seek that. And one of the things we said in our motion to Judge Kendall was Illinois follows malpractice, and Illinois law is going to govern the malpractice claim, follows what's called the "case within a case" test so that in order to prove malpractice you have to prove that what the lawyer did or didn't do was outcome determinative, and we would have won if only the lawyer

had done X.

So then you have to find out would you really have won, and in our case we think that the either or, we win under either of them because if Spehar would have won that California case had we shown up and defended it, then there can be no malpractice.

THE COURT: But what if they go through a legal analysis, and let's say -- and I'm not suggesting that this is in the documents, but let's say they go through the legal analysis and they say "You know, there may be a one in three chance of prevailing and here is the case law that supports going this way and here is the case law that supports going the other way." I mean, if you have access to that, haven't you been given a roadmap to perhaps defeat whatever claim they have on the merits?

MR. NOVACK: On the merits?

THE COURT: Even if it's a -- you know, lawyers sometimes take hard cases, and the fact that, you know, it may not be a slam dunk doesn't mean that they haven't done an investigation.

So how on the one hand do you receive the discovery and at the same time not cripple their ability to prosecute the case, assuming that Judge Kendall is satisfied that they did an investigation, gives you an unfair advantage over them?

MR. NOVACK: Well, I certainly think your Honor's point is a good one and a well taken point. I think what answers the question, and first of all, this relates only to, as you call it,

the legal opinion. I don't want this argument to control this whole case because there is plenty of stuff in there that doesn't raise to that level.

THE COURT: And they're trying to separate the legal from the factual as well. They have acknowledged that.

MR. NOVACK: I think, Judge, it's one of those things about hard cases shouldn't make bad law. And I think the difference in this case, and you have to balance it, you truly have to balance it, is that we have satisfied this first threshold of the merits of -- the meritorious nature of our motion. Judge Kendall didn't say, and I'm not going to overstate it, she didn't say we win, but she did say she is very persuaded. She did see enough to do a very unusual step in this case of the bifurcation. And so you have to balance. How do we prove that, because if we're right, then this case should never go ahead. It never should have been filed and it should never go ahead against this legitimate law firm and have this kind of a reputational thing going against it.

If the price of it is that we get to see that analysis, which, by the way, the law is not secret. I mean, if they found some law, we are going to find that law. There is no hide and seek in it. I think it would be very relevant that if in a case where all of the, the lion's share of the recovery goes to a wrongdoer in a case where under either scenario we win the case within a case and there can be no malpractice, where there has

been an inadequate investigation, and then you add on to that the hypothetical that the lawyer says "By the way, you only have a one in three chance of winning, but you could go and vacate the default judgment and take this debt off the books of the claims of this estate," I think all of that is most relevant and indeed significant. And I do recognize that counter point.

THE COURT: I think responsible lawyers in advising clients try to explain the upside and the down side so that a reasonable decision can be made, and you certainly wouldn't want the other side to see what you advised your client.

MR. NOVACK: Could I throw a hypothetical back at the court?

THE COURT: Sure.

MR. NOVACK: Dare to do that, and you can just say "I'm not addressing it," but what if instead of it saying a one in three chance, what if that memo says "We have no chance of succeeding on the merits. However, Mayer Brown is a deep pocket, they got, you know, zillions of dollars of insurance, they always settle their cases" -- I'm not saying any of this is true, just saying what if that's in there -- "they always settle and we know from our experience that if you shake down a law firm, you're going to get some money and so it's worth it."

I would argue that that is extremely relevant, if not significant or dispositive, of this.

Now, am I saying that's there? I'm not saying that

because I certainly don't know. But there is -- so I don't know how we take out the legitimate from the illegitimate.

THE COURT: I mean, I think one of the things that we have cherished professionally is the ability for attorneys to share candidly advice with their clients and to do their homework with the knowledge that it's going to be with them.

Now, yesterday I had a case in a settlement conference where there was an allegation that somebody was sending, somebody was sending legal research and advice that one attorney was giving to his client to the other side. It was shocking, sort of shocks the conscience, the idea that lawyer advice is being given to the other side. And that's why I think there is generally a very, extremely high threshold that you have to make to justify that or that the law has suggested.

MR. NOVACK: I agree that it's a high threshold. I think we have made it here. We have made it in two ways, by getting past the Judge Kendall test, and secondly, because there is no other way to get at this. This is it.

THE COURT: Can I invite Mr. Carroll back up.

MR. NOVACK: Thank you, your Honor.

THE COURT: Thank you, Mr. Novack.

Mr. Carroll. Hope it was okay with you I let Mr. Novack talk about his substantial need. I think it made more sense for him to tell me why he needed it.

MR. CARROLL: Absolutely. I would like to go back to

just -- before I go into what have I prepared, I'll just address a couple of things that Mr. Novack said starting with substantial need.

The notion that they need to find out what's in those boxes to discover our legal evaluation of this case before we filed the case, and you know, Mr. Novack made the comment that the law isn't secret. I mean, as we go forward in this case, as we did in response to the motion to dismiss, we are going to make legal arguments and they're going to see the end result of the work that led up to our client making the decision to file this case and what legal, what the end result of that legal analysis is when we set forth in response to a motion to dismiss or a motion for summary judgment what our theories are in addressing issues like damages and breach and that sort of thing.

As far as getting into our documents, I mean, that defeats the entire purpose of opinion work product, which is supposed to protect how we got to that point. And part of getting to that point, as your Honor pointed out, is that you always have to put yourself in your opponent's shoes, what are they going to argue, and go through that analysis, and if that's produced, they then, as you correctly pointed out, have a roadmap from our own work of how to address, you know, our theories. That doesn't make our theories wrong. I mean, there is always a loser in litigation. That doesn't mean that there was bad faith.

And so the notion that they need to get our legal

opinion to establish that there was a fraud here or that the plaintiff acted in bad faith is, I mean, I just don't think that -- that's not nearly sufficient to meet the heavy burden of showing substantial need.

And then this continuous argument that they have gotten to this point, that they have gotten this extraordinary relief of bifurcation, there has been no evidence in this case so far. All have had is a motion to dismiss. An argument was made regarding a purported fraud that was initially rejected. On a motion to reconsider the judge said "Yes, your argument is persuasive and so I want there to be some discovery." And the basis of their argument, I mean, there has been very little discussion of what exactly that defense is.

The defense that was made in their motions, in their motion to dismiss and their motion to reconsider, is looking at as a matter of law the plaintiff has to establish the case within the case, and if he establishes the case within the case, according to their view of the law, it's an either or situation. Either Spehar would have gotten nothing in the underlying case, in which case the malpractice case's result will be absurd or he would have been the complete prevailing party, the only prevailing party, complete a hundred percent relief and in that case the plaintiff's malpractice case fails because Mayer Brown could not have done anything to prevent Spehar from winning his claim since it was meritorious.

It doesn't take into account the fact that there could have been a situation where Spehar got some relief but not $20 million where, you know, it's this either or situation. But my point is their argument that got them to this point was essentially a legal argument based on this notion of proving the case within the case and the fact that Spehar, who is paying some litigation costs, was the judgment creditor for the underlying case. That's all there was. And the notion that the trustee maybe should have tried to vacate the default judgment. That's what was presented to Judge Kendall, that's what got them here. They're now leaping from that and saying that we get every single document that relates to our evaluation of this case because in essentially a fishing expedition they want to try to establish some other type of bad faith. I don't even know what they're trying to establish. It's analogous to a situation where somebody files a securities fraud case and then conducts discovery to try to find the fraud.

I mean, they made an argument. Judge Kendall was persuaded by it. They got to this point.

THE COURT: This is a very unusual case. Nobody is going to deny that.

MR. CARROLL: Right, I don't deny that, but it's their legal issues that will be addressed, and when you break it down and take the different parts of their defense, the prefiling investigation, they can find out what was done and not done as

part of that investigation without getting into our legal analysis and our legal evaluation of the claims. They can depose CMGT's management and shareholders and say "Were you contacted by the trustee?" If yes, "What did he say to you, what did he ask you? Did you contact him? What did you tell him?" I mean, they can do all that. They can depose the trustee and say "What did you do?" I don't think -- that's not privileged, simply asking him "What did you do?" But to get into our analysis of case law applying, you know, as far as how are we going to prosecute this case, what are the potential pitfalls in this case, I mean that doesn't -- they have not come even close in my opinion to meeting the burden that they need to meet to get that type of material.

And as far as this notion of the trustee not moving to vacate the default judgment, they can ask him that question, "Why didn't you move to vacate the default judgment?" He can answer that question, as far as I know, and I have not thought about it a great deal, but I can't imagine why he wouldn't be able to answer that question. I don't think that leads into anything privileged.

And so this notion that there is going to be some smoking gun document, I mean, there is no support for that, it's pure speculation.

THE COURT: How about the common interest?

MR. CARROLL: On the common interest, you know, we think that as the biggest creditor of the estate, as somebody who

has entered into a sharing agreement that's been approved by the bankruptcy court as far as paying costs of this litigation, which it's sort of ironic, defendants keep pointing that out, that there is this bankruptcy-proof agreement out there where Spehar agreed to pay some of the litigation costs, you know, that gives him an interest here. That gives him an interest in the outcome of this litigation, and as such, any communications with him should be subject to the attorney-client privilege under the common interest doctrine.

THE COURT: And you're saying that that is different from simply being a shareholder in a corporation or some of the other analogous situations that Mr. Novack was pointing out because there is a specific agreement approved by a bankruptcy court where this party is now an active direct payer of the litigation even though not a party and also a direct beneficiary.

MR. CARROLL: I think just, you know, analyzing the common interest doctrine on case by case basis, this isn't a situation where this is a public company and, you know, somebody that owns a hundred shares is communicating with the attorneys. I mean, this is a bankruptcy estate and Spehar is the largest creditor and he has been involved in the investigation and that sort of thing. He has got an obvious interest in the case.

THE COURT: What about the fact that Spehar is neither a party nor has a legal claim, and what's the role of the legal claim or the necessity for legal claim under the common interest

doctrine?

MR. CARROLL: Well, my recollection of the Dexia case is that it said, is that the --

THE COURT: The 2004 or the 2005?

MR. CARROLL: You know, in my file I had the 2004 and I don't know if I have looked at the 2005, but my recollection of the 2004 case is that there was no requirement that the party, that the person who is not a party but has a shared interest has to be an actual party in litigation. I don't think that there was a requirement for that doctrine to apply.

THE COURT: May 31, 2005. I may have the 2004 here as well, but it was the 2005 one that struck me. Okay.

MR. CARROLL: I should have cited that one then if I didn't.

THE COURT: I may cite it for you. I may not. I want Mr. Novack's jaw to drop back there.

MR. CARROLL: If I can just briefly review my notes. I don't want to rehash the briefs. I think our substantial need argument was pretty well laid out.

(Pause)

MR. CARROLL: My very nice boss reminded me to point out to the court that even if you find against plaintiff on this common interest doctrine issue, that doesn't mean that the documents for which we have made that argument need to be produced or should be produced. You know, there is still the

work product protection. There is no documents where we argue common interest where that was the sole argument that we made. Those documents are also subject to work product.

THE COURT: And there is broader protection in work product.

MR. CARROLL: Correct.

THE COURT: In terms of who you can share than there is under attorney-client.

MR. CARROLL: Correct. A waiver based on sharing a document with a third-party in the context of a work product doctrine is broader than the attorney-client privilege, and we cited that law in our briefs.

Unless the court has any specific concerns or questions, I don't want to rehash what we said in our briefs about all the different ways that they can get this information.

THE COURT: No, that's fine.

MR. CARROLL: Okay.

THE COURT: Is there any other points you want to --

MR. CARROLL: There is no other point that I want to make unless the court has a concern or question for me.

THE COURT: No.

Mr. Novack, any other point you want to make?

MR. NOVACK: Please, just a couple.

First of all --

THE COURT: And, Mr. Carroll, I will give you the last

word since it's your motion even though I have invited Mr. Novack up.

MR. NOVACK: Judge, on this Dexia 2004 versus 2005, we responded to their brief, which relied only on the 2004. Frankly, I have never read the 2005, but I do believe it's consistent based on what you read dividing between legal versus business.

Second point on common interest is that even though the cost and recovery sharing arrangement was entered into and approved by the bankruptcy court, that still does not make Spehar a party with a legal claim and it couldn't have a legal claim. It instigated this because it didn't have a legal claim against Mayer Brown.

On the work product argument that common interest is not the only argument, but there is also work product, again, we just have no way of knowing whether correspondence, a letter from lawyer to client or client to lawyer that then was given to Spehar has work product in it or is simply attorney-client privilege. We can only argue based on the privilege.

Two more things. One is counsel says that we're expanding this by going into the investigation. They made that argument in front of Judge Kendall. And it's in the excerpts that we have attached to our brief. They said "Judge, you only allowed them to take discovery on the vacating of the default." She said "No, I did not. The entire course of proceedings while

trustee is open."

Final thing, Judge. Judge Shadur says that a lawyer makes a mistake when he gives a fallback, kind of like "If you don't give us everything, just give us -- if you won't give us ten, give us three," because he says that once you say that, the judge is going to give you three.

Now, I'm going to take a risk here, though, anyway, and I know both of us hold Judge Shadur in very high esteem. And I kind of alluded to this before, but I know the court is bothered by us getting into the legal opinion and valuation, if you will. I think it's fair game, but if the court doesn't, the court can craft some ruling that allows us to get the stuff that doesn't implicate that but nevertheless protect that if that's the court's ruling.

And so I would ask that in the event that your Honor does feel that that should not be turned over, that instead of just saying nothing gets turned over that you craft a way to protect the reasonable entitlements of both parties.

Thank you very much.

THE COURT: Just so there is no later -- I'm not a believer in rehearings, so when I rule don't come back and bother me. Take it up to Judge Kendall. But because I was reading from the Dexia case and Judge Schenkier said this was his fourth opinion in this case, so it was very -- so I'll give the parties until Monday if they want -- if they want to just limit it to

Dexia at 231 F.R.D. 287, 231 F.R.D. 287, the 2005 case, limited to that case, by the close of business on Monday if either party wishes to say anything about that case and the common interest doctrine analysis, I'll give that to you because I don't want to write an opinion and then somebody comes back and say "Well, Judge, you relied on this case and we didn't know you were going to rely on it." So I would rather hear from you in advance than after the fact. So I'll leave it up to the two of you. Why don't you talk to each other, and either you both agree you're going to do something or whatever you want to do, but close of business on Monday if you want to supplement, limited to that case. I don't want to reopen argument.

MR. NOVACK: So if it's electronically filed, what would the cutoff be, 5:00?

THE COURT: I don't want any associate working after 5:00. I know you have a strict policy about --

MR. NOVACK: Only partners get to do that.

THE COURT: Right, only partners get to do that.

MR. NOVACK: Thank you for all the time you spent.

THE COURT: Thank you both. I appreciated your arguments.

MR. CARROLL: I just want to clarify that with respect to this possible brief to be filed on Monday, that's limited to just the common interest doctrine, I mean, within the context of the 2005 Dexia case.

THE COURT: Right, that's all. I'm not looking to open up other issues that we talked about here.

MR. CARROLL: Very good.

MR. NOVACK: Your Honor, just to make that perfectly clear, we are just going to address that case, we are not going to open up the whole common interest doctrine.

THE COURT: Just that case, just that case, period.

MR. NOVACK: Thank you, your Honor.

THE COURT: Thank you both. I enjoyed the argument. I'm going to take it under advisement and give you a ruling within 21 days.

MR. NOVACK: Thank you very much.

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I certify that the above is a true and correct transcript of proceedings had in the above matter.

Lois A. LaCorte

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