Courts Confirm Bankruptcy Trustees' Power

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In his May 14, 2014 “Privilege Points” release, Tom Spahn discusses a bankruptcy Trustee’s access to the debtor’s privileged communications.

In *In re Amerlink, Ltd.*, Ch. 7 Case No. 09-01055-8-RDD, 2014 Bankr. LEXIS 813 (Bankr. E.D.N.C. Mar. 3, 2014), a Chapter 11 Trustee filed and then settled numerous adversary proceedings, including an action against several of the debtor's senior executives. Some of those executives later filed a state court action against other executives. The Trustee (still possessing the power to waive the debtor's privilege after conversion to Chapter 7) agreed to waive the privilege. The state court plaintiff resisted the waiver, but the court confirmed that the "Trustee has full authority and discretion to determine if a waiver is appropriate." *Id.* at *9. Two weeks later, another court dealt with a more complicated situation. In *McKinstry v. Genser (In re Black Diamond Mining Co.)*, Civ. No. 13-125-ART, 2014 U.S. Dist. LEXIS 36992 (E.D. Ky. Mar. 19, 2014), Jones Day represented a debtor during a Chapter 11 restructuring. The Trustee charged with liquidating some of the debtor’s assets later sued several defendants for mismanagement during the reorganization. The Trustee sought Jones Day's file, but the law firm resisted. Although acknowledging that the Trustee was not the legal "successor" to the debtor, the court concluded that "[w]hatever one calls the Trustee's relationship to [the debtor], Jones Day's argument against turnover is equivalent to invoking work-product product protection against its own client." *Id.* at *13. The court compelled Jones Day to produce its files to the Trustee.

Lawyers advising corporate clients teetering on the edge of bankruptcy should remember that their files may fall under the control of a trustee whose job is to search for deep pockets, and who may want to examine the law firm's files for helpful documents created during the frantic time leading up to the bankruptcy.