IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re: BOY SCOUTS OF AMERICA and DELAWARE BSA, LLC, Debtors.	Civil Action No. 20-cv-00798 (RGA)
CENTURY INDEMNITY COMPANY, WESTCHESTER FIRE INSURANCE COMPANY and WESTCHESTER SURPLUS LINES INSURANCE COMPANY, Appellants, v. BOY SCOUTS OF AMERICA and DELAWARE BSA, LLC, Appellees.	On appeal from the U.S. Bankruptcy Court for the District of Delaware Bankruptcy Case No. 20-10343 (LSS) Bankruptcy BAP No. 20-13

APPELLANTS' OPENING BRIEF ON APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 8012 of the Federal Rules of Bankruptcy Procedure, Appellant Century Indemnity Company ("Century") states that it is a wholly owned subsidiary of Brandywine Holdings Corporation, which is a wholly owned subsidiary of INA Financial Corporation. INA Financial Corporation is a wholly owned subsidiary of INA Corporation, which is a wholly owned subsidiary of Chubb INA Holdings, Inc. Chubb INA Holdings, Inc. is 80% owned by Chubb Group Holdings Inc. and 20% owned by Chubb Limited. Chubb Group Holdings, Inc. is a wholly owned subsidiary of Chubb Limited. Chubb Limited, the ultimate parent corporation, is publicly traded (NYSE: CB).

Appellant Westchester Surplus Lines Insurance Company is a wholly owned subsidiary of Chubb US Holdings Inc. (a Delaware corporation). Chubb US Holdings Inc. is a wholly owned subsidiary of Chubb Group Holdings Inc. (a Delaware corporation). Chubb Group Holdings Inc. is a wholly owned subsidiary of Chubb Limited (a Swiss company). Chubb Limited is the ultimate parent and an NYSE-listed publicly traded company. Appellant Westchester Fire Insurance Company is a wholly owned subsidiary of Chubb US Holdings, Inc., a Delaware corporation. Chubb Limited, a Swiss corporation, is the ultimate, indirect parent and the only publicly traded entity. Chubb Limited does not directly own any stock of Westchester Fire Insurance Company.

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JURISDICTIONAL STATEMENT

The bankruptcy court has jurisdiction over the chapter 11 bankruptcy cases filed by Boy Scouts of America and Delaware BSA, Inc. (collectively, "BSA") under 28 U.S.C. § 1334.

The bankruptcy court's June 2, 2020 order authorizing BSA to retain Sidley Austin LLP ("Sidley") as their attorneys, *nunc pro tunc* to the petition date, and its May 29, 2020 Bench Ruling, were final orders. *See In re Pillowtex, Inc.*, 304 F.3d 246, 250 (3d Cir. 2002) (court's determination of a retention application in a bankruptcy case is a final order for purposes of appellate jurisdiction).

Appellants[1] timely filed a notice of appeal under 28 U.S.C. §158(c)(2) and Fed. R. Bankr. P. 8002(a)(1) on June 11, 2020.[2] This Court has jurisdiction to hear

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[1] Appellants in this matter are the Chubb companies set forth in the signature block below: Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America and Indemnity Insurance Company of North America, Westchester Fire Insurance Company and Westchester Surplus Lines Insurance Company (collectively, "Century").

[2] Century's original Notice of Appeal named only the Debtors as Appellees. On June 13, 2020, Century filed an Amended Notice of Appeal adding Sidley as a separate Appellee at Sidley's request. All parties to this appeal stipulated that the amendment would relate back to the filing date of the original Notice of Appeal, and the Court so-ordered that stipulation on July 22, 2020. Dist. Ct. Dkt. 18.

this appeal under 28 U.S.C. §158(a)(1), which grants district courts jurisdiction to hear appeals from final judgments, orders, and decrees of bankruptcy judges.[3]

STATEMENT OF THE ISSUES

1. Did the bankruptcy court err in applying 11 USC § 327 without applying the ethical standards prescribed by Rules 1.7 and 1.9 of the Rules of Professional Conduct?

2. Did the bankruptcy court err in allowing BSA to retain Sidley in this matter, even though Sidley was actively representing Chubb—an entity adverse to the estate—as of the retention date?

3. Did the bankruptcy court err in allowing Sidley to represent BSA after Sidley unilaterally sought to drop Chubb as a client, after a period of undisclosed concurrent representation, in order to take on a more lucrative representation of BSA in this proceeding?

4. Did the bankruptcy court err in finding that Sidley's past and continuing conflicts would be excused by the availability of co-counsel for BSA and an internal screen at Sidley, even though the screen was not established until long after Sidley's conflicts manifested?

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[3] Unless otherwise noted, all Docket references ("Dkt. __") are to *In re Boy Scouts of America*, Case No. 20-10343, before Judge Laurie Selber Silverstein in Delaware Bankruptcy Court.

STANDARD OF REVIEW

The bankruptcy court's legal conclusions about the application of the Bankruptcy Code and the Rules of Professional Conduct to Sidley's retention are subject to plenary review. *See In re Marvel Entertainment Group*, 140 F.3d 463, 470 (3d Cir. 1998).[4] The question whether Sidley's conduct establishes conflicts precluding retention under Section 327 or the Model Rules constitutes a mixed question of law and fact, which the Court must "break down" and "apply[] the appropriate standard to each component." *Meridian Bank v. Alten*, 958 F.2d 1226, 1229 (3d Cir. 1992).

STATEMENT OF THE CASE

Sidley has represented Chubb for at least fifteen years.

Chubb and its affiliate entities, including Century, are longtime clients of Sidley's Insurance and Financial Services Group.[5] Over just the last decade, Sidley has represented Chubb and its predecessors and their subsidiaries in more

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[4] *See also In re Duro Dyne Nat'l Corp.*, No. BR 18-27963 (MBK), 2019 WL 4745879, at *4 (D.N.J. Sept. 30, 2019) ("The Court reviews the Bankruptcy Court's decision to apply the 'disinterested person' standard *de novo*."); *In re Tenenbaum*, 918 A.2d 1109 (Del. 2007) (standard of review of conclusions of law of Board on Professional Responsibility is *de novo*); *see generally In re Sharon Steel Corp.*, 871 F.2d 1217, 1222–23 (3d Cir. 1989) ("this court applies a clearly erroneous standard to findings of fact, but conducts plenary review of legal conclusions.").

[5] APP1027, May 4, 2020 Hr'g Tr. at 137:1–12 (Russell testimony), Dkt. 572.

than a dozen matters.[6] The vast majority of these matters involved reinsurance, an area of insurance law in which Sidley specializes.[7] Chubb retained Sidley in many of its most significant reinsurance disputes.[8]

These disputes gave Sidley access to highly sensitive Chubb propriety information, as well as its legal theories and strategies.[9] Indeed, many cases were by agreement (or order) privately arbitrated to protect information that was the subject of the disputes.[10] Thus, during its years of work for Chubb, Sidley developed extensive knowledge of highly confidential information about Chubb's insurance and reinsurance programs that apply beyond any single policyholder or matter.[11]

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6 APP0799, Declaration of Joshua Schwartz ("Schwartz Decl.") ¶ 2, Dkt. 539; APP1026–27, May 4, 2020 Hr'g Tr. at 136:22–137:12 (Russell testimony), Dkt. 572.

7 APP0799, Schwartz Decl. ¶ 2; APP0539, APP0542–45, April 14, 2020 Declaration of Janine Panchok-Berry ("April 14 Panchok-Berry Decl.") ¶ 2, Ex. A, Dkt. 437.

8 APP1027–28, May 4, 2020 Hr'g Tr. at 137:20–138:11 (Russell testimony), Dkt. 572.

9 *Id.*

10 APP0799, Schwartz Decl. ¶ 2, Dkt. 539.

11 *Id.*; APP1027–28, May 4, 2020 Hr'g Tr. at 137:20–138:11 (Russell testimony), Dkt. 572.

Sidley's legal representation of Chubb/Century with respect to BSA insurance policies.

Chubb's affiliate Century issued multiple insurance policies to BSA.[12] On October 5, 2018, Chubb retained Sidley to pursue reinsurance for Century coverage of molestation claims against BSA.[13] Reinsurance is insurance for insurers—an insurer transfers to one or more reinsurers some or all of the risk of the policies it has issued to its own insureds, reducing the likelihood the insurer will be forced to bear a large insurance liability on its own.[14] Given the nature of this arrangement, analyzing or seeking to collect on reinsurance inherently implicates an interrelationship between the reinsurance and the reinsured insurance policy.[15]

Sidley's first BSA-related representation for Chubb involved disputes with Lloyd's of London over reinsurance for Century's BSA policies.[16] As of August 2019, Sidley was also advising Century in an arbitration with a second reinsurer involving Century's BSA policies.[17] As Century's counsel, Sidley was privy to highly confidential information about Chubb's insurance coverage for BSA and

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12 APP0585, April 14 Panchok-Berry Decl. Ex. D ¶ 50, Dkt. 437.

13 APP0800, Schwartz Decl. ¶ 4, Dkt. 539.

14 APP1020, May 4, 2020 Hr'g Tr. at 130:19–25 (Russell testimony), Dkt. 572.

15 APP1022–24, May 4, 2020 Hr'g Tr. at 132:10–134:13 (Russell testimony), Dkt. 572.

16 APP0800, Schwartz Decl. ¶ 4, Dkt. 539.

17 *Id.*

agreements concerning that coverage.[18] Sidley's knowledge includes privileged information concerning the disputes between Century and BSA over its insurance coverage, Century's legal analysis of BSA's claims, and Century's legal strategies and defenses in these matters.[19]

While Sidley was representing BSA, Sidley was also advising on multiple other matters for Chubb, including an arbitration against a third reinsurer involving non-BSA policies.[20]

Rule 1.7(b)(4) and Sidley's retention agreement with Chubb require it to obtain written conflict waivers.

Sidley's representation of Chubb was subject to Rule 1.7(b)(4), which required Sidley to obtain the informed consent of its client, ***confirmed in writing***, to any conflict.[21] Further, as a condition to accepting engagements from Chubb for Century, Sidley agreed to abide by the companies' Service Level Agreement ("SLA") for law firms.[22] Pursuant to this agreement, Sidley agreed "to identify and bring to the attention of the Client, ***in writing***, any circumstances that may

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[18] APP0800, APP0806, Schwartz Decl. ¶¶ 5, 26–27, Dkt. 539.

[19] *Id*.

[20] APP0800, Schwartz Decl. ¶ 4, Dkt. 539.

[21] APP0532–34, Declaration of Charles Slanina ("Slanina Decl.") ¶ 5, 10, 13, Dkt. 429 ("No exception exists to permit the concurrent representation despite the conflict" where, *inter alia*, each affected client does not give "informed consent, confirmed in writing.").

[22] APP1234 – APP1257, Schwartz Decl. Ex. 1, Dkt. 593-1.

create or involve a conflict of interest" as it was required to do under Rule 1.7(b)(4).[23] For any newly retained matter, Sidley agreed to "confirm the absence of any conflicts of interest."[24] Sidley also agreed that if it "identifie[d] a potential conflict after it has begun work for [Chubb], it shall make all reasonable efforts to resolve that conflict in a manner that will allow [Sidley]'s continued representation of [Chubb]."[25]

Sidley fails to disclose its concurrent and conflicting representation of the BSA and obtain a written conflict waiver.

On October 3, 2018, BSA signed a letter engaging Sidley to represent it in connection with its anticipated bankruptcy.[26] Sidley also was concurrently engaged by BSA's lender.[27] Sidley was Chubb's counsel in another matter when

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[23] APP1241, Schwartz Decl. Ex. 1 at 6 (emphasis added), Dkt. 593-1; APP0949–50, May 4, 2020 Hr'g Tr. at 59:17–60:8 (Sneed testimony, confirming Chubb and Sidley's relationship was governed by the SLA during the time that Sidley was simultaneously representing both Chubb in Boy Scouts-related reinsurance work and BSA), Dkt. 572.

[24] APP1241, Schwartz Decl. Ex. 1 at 6, Dkt. 593-1.

[25] *Id*. The SLA further provides: "The Law Firm is required, without charge to the Client, to conduct or have conducted appropriate searches and inquiries with regard to any actual or potential conflict of interest, and to consult with the Client accordingly." APP1250, Schwartz Decl. Ex. 1 at 15, Dkt. 593-1.

[26] APP0646–53, April 28, 2020 Declaration of Jessica C. K. Boelter ("April 28 Boelter Decl.") Ex. 1, Dkts. 500, 500-2; APP0909–10, May 4, 2020 Hr'g Tr. at 19:23–20:11 (Sneed testimony), Dkt. 572.

[27] APP0452, APP0515–25, March 17, 2020 Declaration of Jessica C. K. Boelter ¶ 21, Schedule 2, Dkt. 204-3.

Sidley started representing BSA, and had been since "around May 2017."[28] Sidley continued as Chubb's counsel on this matter until Sidley withdrew in 2020.[29] When Sidley took on BSA as a client, BSA was litigating against Chubb in actions concerning insurance coverage for abuse claims filed in Illinois in November 2017 and in Texas in August 2018.[30] Even though obtaining coverage from Century's BSA policies would inevitably be central to any BSA bankruptcy, Sidley never disclosed its adverse BSA representation to Chubb, much less obtain Chubb's informed written consent to commence and continue the concurrent representation.[31]

In December 2018, the *Wall Street Journal* published a report citing an unnamed source that Sidley was allegedly advising BSA.[32] When asked by Chubb whether the article was true, Chubb's reinsurance counsel at Sidley, William Sneed, refused to disclose whether the representation existed but assured his client

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[28] APP0778, Declaration of William Sneed ("Sneed Decl.") ¶ 9, Dkt. 532; APP0801, Schwartz Decl. ¶ 8, Dkt. 539.

[29] APP0853–56, Schwartz Decl. Ex. 8, Dkt. 539; APP0786–787, APP1231–33, Sneed Decl. ¶ 37, Ex. 13, Dkt. 532.

[30] APP0540, APP0546–62, APP0577–613, April 14 Panchok-Berry Decl. ¶¶ 3, 5 Ex. B, D, Dkt. 437.

[31] APP1214, Bench Ruling Delivered May 29, 2020 on Debtors' Application to Retain Sidley Austin LLP as Attorneys for the Debtors and Debtors in Possession ("Bench Ruling") at 2, Dkt. 572; APP0801–04, APP0844–46, Schwartz Decl. ¶¶ 8, 11, 18, Ex. 5, Dkt. 539.

[32] APP0794–98, Sneed Decl. Ex. 5, Dkt. 532-5.

Chubb that Sidley was "conflict-free."[33] Relying on this representation, Chubb took no further action at that time.[34]

Around the same time Chubb inquired about the BSA representation (December 2018), Sidley requested that Chubb provide a general prospective waiver of conflicts, but Chubb declined.[35] Sidley tried again in January 2019, but after some back-and-forth, Sidley abandoned the issue by March 21, 2019, when Chubb confirmed in an email "that the advance waiver is no longer being requested."[36] Sidley said nothing in any proposed waiver about representing BSA in its bankruptcy, even though Sidley had already undertaken that representation.[37]

In August 2019, Mr. Sneed told Century that he had cleared conflicts for Sidley to represent Century in an arbitration with another reinsurer involving Century's coverage for molestation claims against BSA.[38] Sidley yet again did not disclose to Chubb that it was representing BSA in connection with a bankruptcy

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[33] APP0711–74, May 1, 2020 Declaration of Janine Panchok-Berry ("May 1 Panchok-Berry Decl.") Ex. 1, Dkt. 530-1.

[34] APP1081, May 4, 2020 Hr'g Tr. at 191:14-22 (Schwartz testimony), Dkt. 572.

[35] APP0919–20, May 4, 2020 Hr'g Tr. at 29:19-30:5 (Sneed testimony), Dkt. 572; APP0789–91, Sneed Decl. Ex. 1, Dkt. 532-1.

[36] APP0920–22, Hr'g Tr. at 30:9–32:5 (Sneed testimony), Dkt. 572; APP0802, APP0832–834, Schwartz Decl. ¶ 11, Ex. 2, Dkt. 539; APP0740–41, May 1 Panchok-Berry Decl. Ex. 1, Dkt. 530-1; APP0792–93, Sneed Decl. Ex. 2, Dkt. 532-2.

[37] APP0802, Schwartz Decl. ¶ 11, Dkt. 539.

[38] *Id*.

that would inevitably put Sidley in opposition to Century's rights and interests under its BSA policies. And Century never granted any waiver to Sidley, prospective or otherwise.[39]

Chubb discovers Sidley's concurrent and conflicting representation of BSA.

In late September 2019, BSA invited the Century people handling BSA's insurance coverage to a meeting on October 14, 2019, at which Sidley appeared for BSA.[40] But it was not until the end of October that anyone on Chubb's reinsurance side learned about the October 14 meeting and that Sidley was concurrently representing Century and BSA.[41]

On October 29, 2019, Chubb told Mr. Sneed that it was concerned about the conflict, asked for an explanation, and advised that Chubb did not consent to the dual representation.[42] Mr. Sneed summarily denied a conflict, but he refused to

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[39] APP1214, Bench Ruling at 2, Dkt. 755; APP0802, APP0804, APP0844–46, Schwartz Decl. ¶¶ 11, 18, Ex. 5, Dkt. 539.

[40] APP0802, Schwartz Decl. ¶ 12, Dkt. 539.

[41] APP0883, Declaration of Christopher Celentano ¶¶ 5–6 Dkt. 542; APP0986, Hr'g Tr. at 96:5-22 (Boelter testimony), Dkt. 572 ("there was not a disclosure [by Sidley] at [the October 14] meetings of the reinsurance engagement"). On November 3, 2019, the Chubb representatives handling BSA coverage separately advised Sidley and BSA that they had just learned about the concurrent representation, advised that Chubb had not consented to a dual representation, and proposed adjourning a planned mediation. APP0803, Schwartz Decl. ¶ 14, Dkt. 539.

[42] APP0835–37, Schwartz Decl. Ex. 3, Dkt. 539.

provide any written opinion or other analysis explaining why there was not a conflict, even when Chubb asked for it, nor did he offer any other explanation.[43]

While denying any conflict, Sidley nevertheless requested that Chubb consent to Sidley's representation of BSA while concurrently working on behalf of Century in the reinsurance arbitration matters.[44] Sidley also asserted on December 3, 2019 that it had recently instituted a "screen" to avoid information sharing between its BSA lawyers and its reinsurance lawyers.[45] That assertion only raised more concerns, because Sidley confirmed that no screen—or any other precautions—had been in place before November 4, 2019.[46]

Sidley threatens and bullies its client, telling Chubb to "live with" the situation or risk being dropped in active cases.

Chubb asked Sidley several times to provide its opinion or other analysis to support its denial of a conflict.[47] Sidley refused. Instead, on December 16, 2019, Sidley called Chubb's concerns about a conflict a "distraction."[48] Two days later, Mr. Sneed threatened Chubb that if it could not "live with" the situation, then

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43 APP0838–43, Schwartz Decl. Ex. 4, Dkt. 539.

44 APP0803, Schwartz Decl. ¶ 15, Dkt. 539.

45 *Id*.

46 *Id*.

47 APP0802–03, APP0806–07, APP0835–37, APP0853–56, Schwartz Decl. ¶¶ 13, 16, 28, Ex. 3, 8, Dkt. 539.

48 APP0803, Schwartz Decl. ¶ 16, Dkt. 539.

Sidley would unilaterally terminate their attorney-client relationship.[49] When pressed for further explanation of why Sidley believed there was no conflict, Mr. Sneed refused to provide any additional explanation.[50]

Sidley concurrently represents Chubb and Boy Scouts when it files Boy Scouts bankruptcy.

In January 2020, Chubb advised Sidley that it would not waive the conflict[51] and instructed Sidley not to discuss the conflict with arbitrators or opposing parties without its written permission.[52]

Just three weeks later, on February 18, 2020, Sidley filed BSA for bankruptcy. Two days after that, and without Chubb's consent, Sidley sent emails to the arbitration panels in two reinsurance matters requesting to unilaterally withdraw from its Century representation.[53] Sidley ignored its client's instructions and—without allowing Century to better position itself for its counsel's withdrawal—Sidley plowed ahead with its unauthorized attempt to withdraw from the active matters involving Century.[54] On February 24, 2020, also without

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49 APP0804, Schwartz Decl. ¶ 18, Dkt. 539.

50 APP1036–37, May 4, 2020 Hr'g Tr. at 146:22–147:2 (Russell testimony), Dkt. 572.

51 APP0844–46, Schwartz Decl. Ex. 5, Dkt. 539.

52 APP0853–56, Schwartz Decl. Ex. 8, Dkt. 539.

53 APP0805, Schwartz Decl. ¶ 22, Dkt. 539.

54 APP0805, APP0869–78, Schwartz Decl. ¶ 22, Ex. 11, 12, Dkt. 539; *see* APP0535, Slanina Decl. ¶ 17, Dkt. 429 (explaining that "wrongful termination of an attorney-client relationship is prohibited" and that an attorney is required

Chubb's consent, Sidley called the arbitrators in the Lloyd's matter to withdraw from its Century representation.[55] Sidley's abrupt and unilateral withdrawal from its six pending Century/Chubb matters materially prejudiced its client's interests in each matter.[56]

On February 18, after Sidley had filed BSA's bankruptcy petition and while indisputably still representing Chubb,[57] BSA sought affirmative relief from the court on multiple issues implicating Chubb's interests, including filing a plan of reorganization and moving for a mandatory mediation order and a bar date order.[58] Chubb and other insurers ultimately objected to the relief sought by BSA in both motions; Chubb's objection to the bar date motion is pending in this Court.[59]

The conflicts posed by Sidley's representation of BSA.

In the bankruptcy, Chubb found itself negotiating opposite Sidley on matters such as procedures for allowing tort claims, which directly implicated Century's

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to take reasonable steps to protect its clients' interest under Rule 1.16(d) of the Model Rules of Professional Conduct).

55 APP0805, Schwartz Decl. ¶ 22, Dkt. 539.

56 APP0805, APP0849–56, Schwartz Decl. ¶ 22, Ex. 7, 8, Dkt. 539.

57 APP1214, Bench Ruling at 2, Dkt. 755; APP0965, May 4, 2020 Hr'g Tr. at 75:14–18 (Sneed testimony), Dkt. 572; APP0805, APP0869–78, Schwartz Decl. ¶¶ 22, Ex. 11, 12, Dkt. 539.

58 APP0163, Debtors' Mediation Motion Dkt. 17; APP0177, Debtors' Bar Date Motion, Dkt. 18.

59 *See* APPP001163–APP1175, Century's Supplemental Objection to Debtors' Mediation Motion, Dkt. 646; APP1184–93, Century's Objection to Debtor's Bar Date Motion, Dkt. 656.

rights as a BSA insurer, and also involved privileged subject matter that Sidley is privy to as Century's reinsurance lawyer.

The Proposed Plan of Reorganization that Sidley filed and is charged with confirming impairs Century's (and other insurers') right to defend and settle claims, and adversely affects the corresponding obligation of BSA to cooperate and assist in Century's defense of claims, by transferring BSA's rights to the policies to a claimant-controlled trust.[60] The Proposed Plan then confers on the trust the right to settle its own constituents' claims on whatever terms the trust chooses,[61] with the settlement amount passed on to insurers, who must either pay or face suit by the trust.[62] Article IV.G of the Plan also purports to eliminate Century's right to assert certain policy defenses, by directing that all BSA insurance policies be deemed unimpaired and unaffected post-confirmation.[63]

After enshrining in the terms of the Plan a substantial revision of the fundamental bargain between insurer and policyholder, Article XII.I of the Proposed Plan purports to establish that all rights and obligations arising under the

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[60] APP0240, Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC ("Plan") at Art. IV.F.I, Dkt. 20.

[61] APP0239, Plan at Art. IV.C, Dkt. 20.

[62] APP0245, Plan at Art. IV.S, Dkt. 20.

[63] APP0241, Plan at Art. IV.G, Dkt. 20.

Plan shall be governed by the laws of Delaware, rather than the laws of Texas or Illinois, where the rights of insurers are being adjudicated.[64]

In a stark illustration of its adversity with Chubb, Sidley moved for an order compelling a mandatory mediation between BSA and its insurers (including Century) concerning the Sidley drafted plan of reorganization.[65] And the filed Plan, Disclosure Statement, and mandatory mediation order all make clear that BSA's coverage with Century and other insurers is directly relevant to Sidley's work in BSA's bankruptcy.[66] Further, Chubb faces the prospect of dealing with Sidley on motions and orders implicating the status of privileged Chubb documents concerning defense of tort claims and insurance.[67]

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64 While admitting that "the availability of certain insurance policies remains contingent upon the resolution of active pending litigation between the BSA and some of its insurers," the plan fundamentally changes the parties' rights by purporting to insulate BSA from the outcome of its actions in the bankruptcy and the changes it implements through the Plan. APP0330, Disclosure Statement for the Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC ("Disclosure Statement") at 26, Dkt. 21.

65 APP0171, Debtor's Motion for Entry of an Order (I) Appointing a Judicial Mediator, (II) Referring Certain Matters to Mandatory Mediation, and (III) Granting Related Relief ("Mediator Motion") at 9, Dkt. 17.

66 APP0172, Mediator Motion at 10, Dkt. 17.

67 APP0526–27, Century Indemnity Company's Limited Objection to the Official Tort Claimants' Committee's Motion for an Order Clarifying the Requirements to Provide Access to Confidential or Privileged Information at 1–2, Dkt. 368.

Chubb's objection to BSA's motion to retain Sidley and the subsequent evidentiary hearing in the bankruptcy court.

Although Sidley filed BSA's bankruptcy petition on February 18, 2020, it delayed filing its retention application and mandatory disclosures under Bankruptcy Rules 2014 and 2016 until March 17, 2020.[68] In the intervening period, Sidley filed BSA's plan of reorganization and obtained orders on multiple issues inconsistent with its role as Chubb's counsel, including an order dealing with insurance and another one granting protections to BSA's lender, which Sidley also concurrently represented.[69]

Chubb objected to Sidley's retention application, and the bankruptcy court heard testimony from six fact witnesses and two experts on the objection on May 4, 2020 and conducted oral argument on May 6, 2020.[70]

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[68] APP0428–42, Debtors' Application for Entry of an Order Authorizing the Retention and Employment of Sidley Austin LLP as Attorneys for the Debtors and Debtors in Possession, *Nunc Pro Tunc* to the Petition Date, Dkt. 204.

[69] APP0401–27, Interim Order (I) Authorizing the Debtors to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363; (II) Granting Adequate Protection to the Prepetition Secured Party Pursuant to 11 U.S.C. §§ 105(a), 361, 362, 363, 503 and 507; (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(b); and (IV) Granting Related Relief ("Interim Cash Collateral Order"), Dkt. 90; APP0385–400, Interim Order (I) Authorizing Debtors to (A) Continue Using Existing Cash Management System, Including Existing Bank Accounts, (B) Honor Certain Prepetition Obligations Related Thereto, and (C) Maintain Existing Business Forms; and (II) Waiving the Requirements of 11 U.S.C. § 345(B); and (III) Granting Related Relief ("Interim Cash Management Order"), Dkt. 83.

[70] At the May 4, 2020 hearing on Century's objection, BSA/Sidley introduced evidence from William Sneed (Chubb's former reinsurance counsel at Sidley),

Mr. Sneed, Chubb's reinsurance counsel at Sidley, was one of the fact witnesses. In his testimony, he acknowledged that the SLA governed the attorney-client relationship between Sidley and Chubb.[71] He admitted that Sidley never sought or received a conflict waiver from Chubb,[72] and that Sidley never disclosed its representation of BSA to Chubb, much less the scope of that representation.[73] He explained that the reinsurance work he did for Chubb included seeking reinsurance for Century's coverage of payments for alleged abuse claims against BSA.[74] Mr. Sneed also admitted that Sidley still represented various Chubb entities when it filed BSA's bankruptcy petition on February 18, 2020.[75]

Jessica Boelter (one of the Sidley lawyers now representing BSA in the bankruptcy), and Professor Nancy Rapoport (expert witness). Chubb introduced testimony from Christine Russell (Senior Vice President and head of reinsurance for Chubb subsidiary Brandywine Group), Joshua Schwartz (managing counsel and director of reinsurance litigation for the Chubb group), Christopher Celentano (Senior Vice President for Coverage and Complex Claims at Chubb), Ann Rappleye (Operations Counsel in the Global Legal and Compliance group at Chubb), and Charles Slanina (expert witness).

71 APP0949–50, May 4, 2020 Hr'g Tr. at 59:17–60:8 (Sneed testimony), Dkt. 572.

72 APP0948, May 4, 2020 Hr'g Tr. at 58:11–19 (Sneed testimony), Dkt. 572.

73 APP0939, APP0943, APP0946, APP0961–62, May 4, 2020 Hr'g Tr. at 49:3–12, 53:5–19, 56:18–23, 71:22–25, 72:1–6 (Sneed testimony), Dkt. 572; *see also* APP1077, Hr'g Tr. at 187:11–15 (Schwartz testimony), Dkt. 572.

74 APP0909–10, May 4, 2020 Hr'g Tr. at 19:23–20:1 (Sneed testimony), Dkt. 572.

75 APP0965, May 4, 2020 Hr'g Tr. at 75:14–18 (Sneed testimony), Dkt. 572.

Ms. Russell, who has overseen reinsurance for Chubb since 2012,[76] confirmed the longstanding attorney-client relationship between Chubb and Sidley, which commenced before she joined Chubb.[77] Ms. Russell testified to the interrelationship between underlying coverage and reinsurance and explained the extent to which terms of underlying coverage become relevant in disputes with reinsurers—like the disputes in which Mr. Sneed represented Chubb.[78] She also explained the privileged nature of the discussions, strategies, and materials that Sidley was privy to, as did Mr. Schwartz, who was Chubb's day-to-day point of contact with Sidley.[79]

Charles Slanina, former Chief Disciplinary Counsel for the Delaware Supreme Court, opined that Sidley's conduct constituted a conflict of interest under Rule 1.7, which governs conflicts between a law firm's concurrent representations.[80] "Without timely disclosure, screening or a written waiver," Mr. Slanina explained, Sidley "violated its duty of loyalty to Century by undertaking a bankruptcy on behalf of one of Century's insureds while simultaneously working

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[76] APP1020, May 4, 2020 Hr'g Tr. at 130:3–13 (Russell testimony), Dkt. 572.

[77] APP1027, May 4, 2020 Hr'g Tr. at 137:1–12 (Russell testimony), Dkt. 572.

[78] APP1022–25, May 4, 2020 Hr'g Tr. at 132:10–22, 133:3–135:20 (Russell testimony), Dkt. 572.

[79] APP1022–23, May 4, 2020 Hr'g Tr. at 132:10–22, 133:3–135:20, (Russell testimony), Dkt. 572; APP1096, May 4, 2020 Hr'g Tr. at 206:23–25 (Schwartz testimony), Dkt. 572.

[80] APP0532, Slanina Decl. ¶ 6, Dkt. 429.

on reinsurance matters involving the same insurance policies at issue in the bankruptcy."[81] According to Mr. Slanina, Sidley's "bankruptcy representation will be adverse to Century and will implicate information obtained by Sidley Austin in the reinsurance arbitration matters handled by Sidley Austin on behalf of Century."[82]

Mr. Slanina stated that Rule 1.7 applies "whenever an attorney represents two clients with adverse interests at the same time, even if the representation of one of the clients ceases prior to the time the challenge is raised."[83] Mr. Slanina also stated that Sidley could not escape its Rule 1.7 conflict by simply terminating Chubb as a client, and that "[n]othing in the Bankruptcy Code supersedes or replaces this notion under the applicable state ethics rules."[84] He explained that "the Hot-Potato gambit of terminating a client to cure a concurrent conflict and to permit the representation of a more lucrative client has been roundly condemned."[85] And even if unilaterally dropping Chubb implicated only Rule 1.9—which governs conflicts arising from ***former*** representations—Sidley still breached its ethical duties, because BSA is adverse to Chubb in the bankruptcy,

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81 APP0537, Slanina Decl. ¶ 23, Dkt. 429.

82 *Id.*

83 *Id*.

84 *Id*.

85 APP0536, Slanina Decl. ¶ 19, Dkt. 429.

Sidley failed to obtain Chubb's informed consent to the conflict, and there is a material risk that BSA's Sidley lawyers could have been exposed to confidential Chubb information Mr. Sneed obtained in his reinsurance work for Chubb.[86]

Sidley's expert, Nancy Rapoport, conceded that Sidley did not obtain a waiver.[87] She also conceded that an ethical screen is effective only if it is established ***before*** a conflict manifests,[88] which Sidley admitted it did not do here.[89] Tellingly, Ms. Rapoport testified that Sidley had directed her to "assume" that Chubb was only a ***former*** client and that all of Mr. Sneed's work for Chubb involved only paid historical claims, not work on continuing BSA-related matters and other matters even while Sidley was representing BSA in opposition to Chubb's interests.[90]

Ms. Rapoport thus provided no evidence concerning Sidley's obligations to Chubb as an ***existing*** client under Rule 1.7. Mr. Slanina's expert testimony concerning Sidley's Rule 1.7 violations accordingly is unrebutted.

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86 APP0537–38, Slanina Decl. ¶¶ 23–25, Dkt. 429.

87 APP1008–09, May 4 Hr'g Tr. at 118:23–119:1 (Rapoport testimony), Dkt. 572; *see also* APP1006–07, May 4 Hr'g Tr. at 116:15–117:5 (Rapoport testimony, admitting that informed consent is necessary), Dkt. 572.

88 APP1004, May 4 Hr'g Tr. at 114:14–18 (Rapoport testimony), Dkt. 572.

89 APP0838, Schwartz Decl. Ex. 4, Dkt. 539 (email from Sidley attorney Michael Andolina explaining that Sidley put an ethical screen between the BSA and Chubb/Century matters in placed on November 4, 2019).

90 APP1001–02, May 4 Hr'g Tr. at 111:24–112:4 (Rapoport testimony), Dkt. 572.

The bankruptcy court's June 2, 2020 ruling.

The bankruptcy court delivered its bench ruling on May 29, 2020, and docketed the signed order on June 2, 2020. The court found the following facts:

- Chubb and Sidley had a "longtime" attorney-client relationship that involved "both specific arbitration proceedings and general counseling matters."
- The 2015 SLA is the "operative agreement" that governed the attorney-client relationship between Sidley and Chubb
- Sidley worked on matters for Century/Chubb involving "claims Century paid or in the future would pay to BSA under insurance policies Century issued to BSA."
- Sidley was still Chubb's lawyer when it filed BSA's bankruptcy petition on February 18, 2020. Sidley did not fully withdraw from its representations of Chubb until after it filed the bankruptcy case.
- Century/Chubb never consented to waive any conflict "with respect to [Sidley's] concurrent representation of Century in reinsurance matters and BSA in restructuring matters."
- The insurance policies at issue in the two BSA-related reinsurance matters Sidley was handling for Chubb are "assets of the BSA bankruptcy estate."[91]

The bankruptcy court found no merit to Sidley's arguments that Chubb had waived its right to bring this objection through any purported post-petition delay and noted that Sidley had "abandoned any argument that Chubb's pre-bankruptcy conduct constituted a waiver."[92]

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[91] APP1213–14, Bench Ruling at 1–2, Dkt. 755.

[92] APP1227, Bench Ruling at 15, Dkt. 755.

The bankruptcy court granted BSA's application to retain Sidley despite Bankruptcy Code Section 327, which authorizes a bankruptcy trustee to retain lawyers and other professionals only insofar as they "do not hold or represent an interest adverse to the estate" and "are disinterested persons." In Judge Silverstein's view, Section 327 does not apply because its present-tense construction addresses only ***current*** conflicts, and Sidley had terminated Chubb before seeking retention (though only after filing the bankruptcy petition and a long period of concurrent representation).[93]

Judge Silverstein acknowledged that ethical rules are "not irrelevant" to retention applications in bankruptcy,[94] but she declined to apply them here. She correctly identified the standard for Rule 1.7, but then simply failed to apply the Rule to determine whether Sidley had a conflict of interest when it assumed the bankruptcy engagement in the first place. Nor did she address Chubb's argument that Sidley could not eliminate its Rule 1.7 concurrent conflict by abruptly dropping its Chubb clients post-petition in favor of the more lucrative BSA representation.[95]

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[93] APP1217–18, Bench Ruling at 5–6, Dkt. 755.

[94] APP1218, Bench Ruling at 6, Dkt. 755.

[95] APP1219, Bench Ruling at 7, Dkt. 755.

Judge Silverstein addressed only Rule 1.9(a), which prohibits a law firm that "formerly represented a client in a matter" from representing a person "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Judge Silverstein found as a matter of fact that "the reinsurance litigation could be 'substantially related' to at least some aspects of Boy Scout's bankruptcy case for purposes of Rule 1.9," and that "Sidley received from Century information relevant to the BSA bankruptcy."[96]

Judge Silverstein nevertheless did not reject Sidley's retention under Rule 1.9. She instead merely noted that other lawyers representing the estate could handle insurance coverage issues, which in her view sufficed to ensure that Sidley could not use information it learned in representing Chubb to Chubb's detriment in the bankruptcy.[97] Judge Silverstein conceded that "a retroactive ethical screen may not work for purposes of violations of the Rules of Professional Conduct."[98] But, ignoring the presumptions upon which Rule 1.9 is premised and the directive of Rule 1.10, which imputes information among lawyers in the same firm, she concluded that because Sidley claimed that no information had actually passed

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[96] APP1222–23, Bench Ruling at 10–11, Dkt. 755.
[97] APP1223, Bench Ruling at 11, Dkt. 755.
[98] APP1224, Bench Ruling at 12, Dkt. 755.

between the groups, no harm had been or could be done.[99] In response to Chubb's observation that allowing Sidley's retention in these circumstances would give other firms an adverse incentive to drop clients to eliminate conflicts artificially, Judge Silverstein asserted that business incentives would suffice to prevent such client-prejudicial conduct.[100]

Judge Silverstein granted Sidley's retention application to represent BSA *nunc pro tunc* to the petition date of February 18, 2020.[101]

SUMMARY OF ARGUMENT

Sidley took on BSA as a client while it represented and had represented Chubb for more than a decade. And it represented BSA and Chubb simultaneously even after filing a bankruptcy petition directly adverse to Chubb's interests. Section 327 categorically prohibits retaining a firm with an actual conflict like Sidley's, and the ethical rules prohibit Sidley from escaping its actual conflicts by unilaterally dropping Chubb as a client like a "hot potato."

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[99] APP1223–24, Bench Ruling at 11–12, Dkt. 755.

[100] APP1226, Bench Ruling at 14, Dkt. 755.

[101] APP1229–30, Order Authorizing the Retention and Employment of Sidley Austin LLP as Attorneys for the Debtors and Debtors in Possession, *Nunc Pro Tunc* to the Petition Date, Dkt. 758 ("Debtor are authorized to retain and employ Sidley as their attorneys under section 327(a) of the Bankruptcy Code, *nunc pro tunc* to the petition date . . . .").

The bankruptcy court erred in holding that Bankruptcy Code Section 327 does not preclude Sidley's retention on the ground that it is written in the present tense and thus only addresses current conflicts. First, Sidley sought—and was granted—retention as of the February 18, 2020 petition date, and all agree that Sidley did not withdraw from its Chubb representations until ***after*** that date. Sidley thus ***did*** have a current, actual conflict under Section 327 as of the date it was retained. That actual conflict categorically precludes its retention under Section 327.

Second, even after Sidley dropped Chubb, its obligations under Rule 1.7 continued and thus represented an actual conflict precluding its retention under Section 327. As other courts have recognized, the concurrent conflict principle of Rule 1.7 applies even after a firm has terminated a client. That principle includes the "hot potato" doctrine, which bars a firm from eliminating a concurrent conflict by unilaterally dropping a client, as Sidley did here. Sidley's actions here violated, and continue to violate, its continuing duty to Chubb by virtue of its years-long representation of Chubb and its related entities.

The bankruptcy court also misapplied Rule 1.9, despite finding that Sidley's conduct met the conflict-of-interest standard. The court concluded that Sidley's conflict would be mitigated by appointment of separate coverage counsel and an ethical screen between Sidley's BSA restructuring lawyers and Sidley's Chubb

reinsurance lawyers. But as Sidley's own expert admitted, a screen does nothing to mitigate the conflict that existed for many months before the screen was established, including the risk that during that time confidential Chubb information was shared—even if inadvertently—with the BSA restructuring lawyers. Rule 1.9 ***presumes*** that such information-sharing occurs, which is why screens are even contemplated. Chubb's policies, and by extension the coverage work that Sidley did for Chubb, are intrinsic to the structure and purpose of this bankruptcy case—they simply cannot be uncoupled from the general role of formulating a plan of reorganization in which the primary asset is insurance.

Under the bankruptcy court's rule, a debtor's counsel could maintain a conflicting representation all the way up to the eve of its retention application, and avoid any problem simply by eliminating the conflict before the moment of filing the application. That result is consistent with neither the Bankruptcy Code nor the ethical rules, both of which apply in full force here. The Court should reverse the order appointing Sidley as attorneys for BSA.

ARGUMENT

I. SECTION 327 DOES NOT PRECLUDE, BUT REQUIRES, APPLICATION OF THE RULES OF PROFESSIONAL CONDUCT.

Section 327(a) authorizes BSA to retain only attorneys who "do not hold or represent an interest adverse" to BSA and "are disinterested." The bankruptcy court's decision starts from the erroneous premise that Section 327(a) has no

application here because it is written in the present tense and thus applies only to current conflicts.[102] Because Sidley claimed that it no longer represented Chubb when the bankruptcy court ruled on its retention, the court held that Sidley did not ***currently*** "hold or represent" an adverse interest under Section 327.

That analysis is incorrect. Most importantly, Sidley's retention application sought authorization to represent BSA *nunc pro tunc* to the February 18, 2020, and the order granted retention to that date.[103] And the bankruptcy court also found that Sidley continued to represent Chubb until ***after the petition date.***[104] Accordingly, as of the date of its retention, Sidley ***did*** "hold or represent"—present

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[102] APP1217, Bench Ruling at 5–6, Dkt. 755.

[103] APP1229–30, Order Authorizing the Retention and Employment of Sidley Austin LLP as Attorneys for the Debtors and Debtors in Possession, *Nunc Pro Tunc* to the Petition Date, Dkt. 758 ("Debtor are authorized to retain and employ Sidley as their attorneys under section 327(a) of the Bankruptcy Code, *nunc pro tunc* to the petition date . . . ."). When the bankruptcy court granted its retention *nunc pro tunc* to the petition date, Sidley sought and obtained compensation for the period from the filing date to shortly after the retention application was filed on March 31, 2020. *See* Certificate of No Objection to Sidley's First Application for Compensation and Fees, Dkt. 921 (reflecting Sidley's nearly $3 million in requested fees for its work from the petition date Feb. 18 through March 31, 2020).

[104] APP1214, Bench Ruling at 2, Dkt. 755 ("The last action taken [by Sidley] to withdraw from any Chubb matter was either on February 20 or 24, 2020."); APP0805, APP0869–78, Schwartz Decl. ¶ 22, Ex. 11, 12, Dkt. 539 (Sidley emails arbitrators to withdraw from two matters on February 20, 2020 and calls the arbitrators in a third matter to withdraw on February 24, 2020); APP0965, May 4, 2020 Hr'g Tr. at 75:14–18 (Sneed testimony), Dkt. 572 (confirming notified arbitrators of his withdrawal "during the week of February 17th of this year").

tense—an interest adverse to the estate. On the retention/petition date, Sidley was representing Chubb in various matters—including but not limited to BSA-reinsurance matters—even while acting contrary to Chubb's interests under its BSA policies in multiple respects, as shown above.[105] And because Sidley's concurrent representation of BSA and Chubb on the retention date constituted an ***actual*** conflict—not merely a "potential" conflict or an "appearance" of conflict—Third Circuit precedents mandate "per se disqualification" under Section 327.[106] Under those precedents, the bankruptcy court lacked discretion to grant retention for administrative convenience or other reasons—Sidley's actual conflict made its retention categorically impermissible.

Sidley's efforts to drop Chubb as a client do not eliminate the conflict, either for purposes of Section 327 or the Model Rules of Professional Conduct ("Model

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[105] *See supra* notes 60–67 and accompanying text. Sidley also delayed filing its formal retention application and making its mandatory 2014 and 2016 disclosures ***for almost month*** after the petition date, while it sought to shed Chubb as a client. During this period, Sidley sought and obtained orders from the bankruptcy court on matters implicating Chubb's rights. *E.g.*, APP0401–27, Interim Cash Collateral Order, Dkt. 90; APP0385–400, Interim Cash Management Order, Dkt. 83.

[106] *In re Marvel Entm't Grp., Inc.*, 140 F.3d 463, 476 (3d Cir. 1998); *In re Pillowtex*, 304 F.3d 246, 251 (3d Cir. 2002); *In re Fleming Cos.*, 305 B.R. 389, 393 (Bankr. D. Del. 2004); *cf. Parallel Iron, LLC v. Adobe Sys. Inc.*, No. CA 12-874-RGA, 2013 WL 789207, at *4 (D. Del. Mar. 4, 2013).

Rules").[107] As just discussed, Sidley was representing both Chubb and BSA on the retention/petition date, which is the relevant date under the bankruptcy court's own analysis. What is more, as discussed below, even after termination, *both* Rules 1.7 and 1.9 impose continuing obligations to the client that may survive termination.[108] And to the extent the lawyer would violate obligations to a former client by representing a bankruptcy estate, those obligations necessarily constitute a *current* interest adverse to the estate under Section 327. In other words, Section 327 does not itself determine what constitutes a current adverse interest; that determination must be made by reference to the lawyer's current ethical obligations.[109] If the lawyer has an ethical obligation to a party adverse to the estate, then he or she *does* currently "hold or represent" an adverse interest, and Section 327 applies.[110]

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[107] The Model Rules govern the practice of law before this Court. Del. Bankr. L.R. 1001-1(b) (adopting the Local Rules of Civil Practice and Procedure of the United States District Court for the District of Delaware); D. Del. L.R. 83.6(d) (incorporating the Model Rules).

[108] APP0532, Slanina Decl. ¶ 6, Dkt. 429

[109] *See In re Congoleum Corp.*, 426 F.3d 675, 692 (3d Cir. 2005) ("Our discussion of the Rules of Professional Conduct demonstrates that Gilbert also cannot meet the Bankruptcy Code's requirement of disinterestedness contained in section 327(a).").

[110] Nothing in the Bankruptcy Code supersedes or replaces this notion under the applicable state ethics rules. *See* 1 Collier on Bankruptcy, § 8.02[2] (15th ed. 2002) ("These state [ethics] rules are not preempted by federal bankruptcy law under the Supremacy Clause of the Constitution.").

The Third Circuit has recognized that "attorneys retained in bankruptcy proceedings" must satisfy both "the restrictions imposed by Section 327" and "the standards established by professional ethics."[111] As the *Collier* treatise explains, even "apart from the particular requirements of the Bankruptcy Code or rules," attorneys practicing in bankruptcy court "are bound by the ethical codes or rules in force in the jurisdiction in which they practice law."[112] Indeed, given the many interests uniquely involved in bankruptcy proceedings, bankruptcy courts "often set higher standards for the application" of ethical concepts "such as loyalty, independent judgment and even who is considered a client."[113] And bankruptcy courts enforce these rules "through, among other mechanisms, disqualifications of counsel or disapproval of the appointment of counsel."[114] In so doing, "doubts as

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[111] *In re Congoleum Corp.*, 426 F.3d 675, 688 (3d Cir. 2005); *see also In re Star Broadcasting, Inc.*, 81 B.R. 835, 839 (Bankr. D.N.J. 1988) ("In addition to the standards in Section 327(a) . . . many courts have relied on the Rules of Professional Conduct for guidance in determining whether a conflict-of-interest exists in a law firm's representation of parties to a bankruptcy.").

[112] 1 *Collier on Bankruptcy*, § 8.03[2] (16th ed. 2020) (emphasis added).

[113] *Id.*; *see id.* at ¶ 8.01[1] ("Ethical rules are often considered more necessary and applicable in bankruptcy cases."); *id* at ¶ 8.03[1] ("Conflict of interest rules are more strictly applied in the bankruptcy context than in other areas of the law, at least insofar as they relate to professionals retained by the estate.").

[114] *In re Berger McGill, Inc.*, 242 B.R. 413, 418 (Bankr. S.D. Ohio 1999); *see In re Universal Bldg. Prods.*, 486 B.R. 650, 661 (Bankr. D. Del. 2010) (violation of Model Rules was grounds to disqualify counsel from employment under section 327 of the Bankruptcy Code); *Baron & Budd, P.C. v. Unsecured Asbestos Claimants Comm.*, 321 B.R. 147, 164 (D.N.J. 2005) ("Not only are state ethical laws imposed upon professionals in the bankruptcy context, but the Bankruptcy

to the existence of an asserted conflict of interest should be resolved in favor of disqualification."[115]

The bankruptcy court here accordingly erred in declining to follow the ethical rules—especially Rule 1.7—in analyzing whether Sidley holds or represents an interest adverse to BSA precluding its retention under Section 327. As shown in the next section, despite its attempt to eliminate its conflicts by terminating its representation of Chubb, Sidley has continuing obligations to Chubb, an adversary of BSA, under Rules 1.7 and 1.9. Given those obligations, Sidley cannot satisfy the disinterestedness requirements of Section 327.

II. SIDLEY HAS VIOLATED AND CONTINUES TO VIOLATE ITS ETHICAL OBLIGATIONS TO CHUBB

A. Sidley breached and continues to breach its duty of loyalty to Chubb under Rule 1.7.

The bankruptcy court did not even analyze whether Sidley breached its duties to Chubb under Rule 1.7. It plainly did.

To establish a violation under Rule 1.7(a)(1), "one does not have to prove prejudicial impact, negative result, or an exchange of confidential information. . . . It is the interests of the client with which the rule is concerned, not the result

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Code and Federal Rules of Bankruptcy Procedure contain specific references and directives imposing additional ethical obligations upon attorneys and other professionals.").

[115] *In re Meridian Auto. Sys.-Composite Operations, Inc.*, 340 B.R. 740, 750 (Bankr. D. Del. 2006).

obtained."[116] Rather, a conflict under Rule 1.7 exists if "the representation of one client will be directly adverse to another client" or if there is a risk that representation of one client would materially limit that of another, and both clients have not given informed consent to the representation. The bankruptcy court found that Chubb did not give its consent—let alone informed written consent—to Sidley's representation of BSA.[117]

Sidley concurrently represented Chubb and BSA from October 2018 until after the petition date in February 2020.[118] Sidley's representation of BSA was and is adverse to Chubb's interests.[119] Sidley designed a plan of reorganization with multiple provisions undermining insurers' rights, including provisions that transfer insurance rights, enjoin insurers' rights of contribution, and set trust distribution procedures that settle, value, and pay claims without insurer consent.[120] The plan is fundamentally insurance-driven. Indeed, Sidley touts in the disclosure statement

[116] *In re Cendant Corp. Sec. Lit.*, 124 F. Supp. 2d 235, 243 (D.N.J. 2000) (internal quotations omitted).

[117] APP1213–14, Bench Ruling at 1–2, Dkt. 755.

[118] *Id.*

[119] *Supra* notes 60–67 and accompanying text.

[120] *Supra* notes 60–64 and accompanying text.

that the "proceeds" of BSA insurance policies will constitute "a substantial portion of the assets contributed to any victims compensation trust."[121]

There is inherent adversity between insurers and debtors in a mass tort bankruptcy proceeding such as this where there is even a question as to whether a plan of reorganization impairs an insurer's rights.[122] Any plan that "may have a substantial economic impact on insurers," as the BSA plan does, will thus find insurers and debtors on opposite sides of the ledger, with the debtors advocating a plan that the insurers oppose.[123]

Already, in the months since Century first objected to Sidley's retention here, BSA and Century have been on opposite sides of disputes regarding the terms of, and personnel involved with, mediation, BSA's bar date motion, and the terms

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[121] APP0082, Declaration of Brian Whittman in Support of the Debtors' Chapter 11 Petitions and First Day Pleadings at 24, Dkt. 16; *see also* APP0332, Disclosure Statement at 28, Dkt. 21.

[122] *In re Thorpe Insulation Co.*, 677 F.3d 869, 885 (9th Cir. 2012) (reversing confirmation and remanding to allow insurers to offer proof in contested hearing that plan impairs their rights).

[123] *Id.* BSA has pursued a plan that Chubb opposes since pre-bankruptcy negotiations. *See, e.g.*, APP0654–57, April 28 Boelter Decl., Ex. 2, Dkt. 500-2 (letter from Chubb's coverage counsel to Sidley's co-counsel for BSA, objecting to BSA's provision of a claims matrix prior to a mediation in October 2019); APP1123–24, May 4, 2020 Hr'g Tr. at 233:23–234:1 (Celentano testimony, confirming that Sidley lawyers told him at the October 2019 mediation "that this matrix was part of the bankruptcy that [BSA was] trying to negotiate").

of the protective order entered in this case.[124] The Court need look no further than the list of issues on which Sidley moved for the mandatory appointment of a mediator to negotiate, among others, with its insurers:

- the relative treatment of abuse claimants under the Plan and trust distribution procedures;
- the funding of a victims' compensation trust;
- the treatment of abuse claims related to Scouting that are asserted against entities that are not debtors in these cases;
- the enforceability or restrictions on the Debtors' and local councils' assets limiting their contribution to uninsured period;
- issues pertaining to shared insurance between the Debtors and local councils; and
- coverage disputes between the Debtors and its insurers.[125]

Sidley has litigated these issues and advocated positions over Chubb's objection that impair Chubb's legal rights and are contrary to its economic interests.[126] These disputes are the definition of adversity.

Sidley's withdrawal from representing Chubb in its reinsurance actions involving BSA policies—after BSA filed for bankruptcy—does not eliminate the ethical conflict arising from that adversity. As already discussed, Sidley was

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[124] *See* APPP001163–75, Century's Supplemental Objection to Debtors' Mediation Motion, Dkt. 646; APP1184–93, Century's Objection to Debtor's Bar Date Motion, Dkt. 656; APP1194–212, Century's Objection to Proposed Protective Order, Dkt. 697.

[125] APP0177–206, Debtors' Mediation Motion, Dkt. 18.

[126] *Id*.

representing both BSA and Chubb as of and even after the retention date of February 18, 2020—the only relevant date under the court's own analysis, making Sidley's subsequent termination of Chubb irrelevant. In any event, Sidley's effort to drop Chubb did not eliminate its ethical obligations. The prohibitions imposed by the current client provisions of Rule 1.7(a)(1) apply whenever an attorney represents two clients with adverse interests at the same time, even if the representation of one of the clients ends before the conflict challenge is raised.[127]

Sidley thus cannot recast Century as a "former client" to benefit from its wrongful termination of Century as a client. The determination of whether a client

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[127] *See, e.g.*, *Unified Sewerage Agency of Wash. v. JELCO, Inc.*, 646 F.2d 1339, 1345 n.4 (9th Cir. 1981) ("[T]he present-client standard applies if the attorney simultaneously represents clients with differing interests. *This standard continues even though the representation ceases prior to the filing of the motion to disqualify*." (emphasis added)); *Atl. Specialty Ins. Co. v. Premera Blue Cross*, No. C15-1927-TSZ, 2016 WL 1615430, at *13 (W.D. Wash. Apr. 22, 2016) ("As a threshold matter, the question under Rule 1.7 is whether there was concurrent representation of adverse clients, *i.e.*, whether 'the attorney undertook representation adverse to a present client, and not whether there is dual representation at the time disqualification is sought."); *Merck Eprova AG v. ProThera, Inc.*, No. 08CIV0035RMBJCF, 2009 WL 10696470, at *6 (S.D.N.Y. Oct. 6, 2009) ("[W]here counsel have simultaneously represented clients with differing interests, the standard for concurrent representation applies even if the representation ceases prior to the filing of a disqualification motion."); *Florida Ins. Guar. Ass'n v. Carey Canada, Inc.*, 749 F. Supp. 255, 261 (S.D. Fla. 1990) ("The cases addressing the issue are in agreement: in the absence of an immediate withdrawal upon discovery, clients who were concurrently represented *at any point during the conflict* are treated as concurrent clients for purposes of the disqualification motion." (emphasis added) (collecting cases)).

is "current" or "former" under the ethical rules is properly assessed at the time the conflict arises.[128] Here, the conflict arose when Chubb was still a client, and thus Rule 1.7 applies. And as other courts have recognized, the concurrent conflict principle of Rule 1.7 applies even after a firm has terminated a client.

For example, in *Santacroce*, the district court applied Rule 1.7(a) to a conflict between a law firm and a client it had withdrawn from representing.[129] The firm previously represented both the client and her deceased boyfriend's estate; when the firm learned that the client intended to file suit against the estate, it withdrew from representing the client so it could continue its representation of the estate.[130] Several weeks later, when the now-former client moved to have the

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[128] *See Merck Eprova AG v. ProThera, Inc.*, 670 F. Supp. 2d 201, 209 (S.D.N.Y. 2009); *In re Agway, Inc.*, No. 02-65872, 2005 WL 3806043, at *2 (Bankr. N.D.N.Y. Dec. 9, 2005) ("In determining whether a law firm is simultaneously representing two adverse parties, courts must assess the status of the law firm's relationship with the adverse parties at the time the conflict arises, not at the time the motion to disqualify is presented to the Court. Otherwise, the law firm could eliminate the conflict by abandoning the disfavored client."); *Pulsecard, Inc. v. Discovery Card Servs., Inc.*, 1994 U.S. Dist. LEXIS 19635, at *11 (D. Kan. Dec. 29, 1994) ("The critical inquiry in determining whether Pulsecard is an existing or former client, for purposes of conflict of interest analysis, is when the conflict arose."); *see also Ehrich v. Binghamton City School District*, 210 F.R.D. 17, 25 (N.D.N.Y. 2002) ("[T]he critical event is when the conflict arose, not when the motion was brought."); *Chemical Bank v. Affiliated FM Ins. Co.*, No. 87 Civ. 0150, 1994 WL 141951, at *10 (S.D.N.Y. Apr. 20, 1994) ("[T]he status of the relationship is assessed at the time the conflict arises"); *see also* APP0538, Slanina Decl. ¶ 24, Dkt. 429.

[129] *Santacroce v. Neff*, 134 F. Supp. 2d 366, 370 (D.N.J. 2001).

[130] *Id*. at 367–68.

firm disqualified, the firm argued that only the former-client standard of Rule 1.9 applied to assess the conflict.[131] The district court disagreed and explained that whether someone is a former or present client for purposes of the Rules does not depend on the date a lawsuit or motion to disqualify is filed.[132] Rather, application of the conflict-of-interest rules is determined by the date of the action that "precipitated the events" pertinent to disqualification—in that case, the date on which the adversity between the two law firm clients emerged.[133] Because on that day Santacroce—like Century here—was still a current client of the firm, the court found that Rule 1.7(a) applied and disqualified the firm for having concurrently represented two clients whose interests were directly adverse to one another.[134]

A similar result obtains under the "hot potato" rule, a related doctrine that precludes attorneys from creating a conflict and then seeking to resolve it by withdrawing from the original representation and using the withdrawal to resist application of Rule 1.7. "To hold otherwise," one court explained, "would allow such unethical behavior to continue unrestricted because a law firm could always convert a present client to a former client merely by seeking to withdraw after

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[131] *Id*. at 369–70.
[132] *Id*. at 370–71.
[133] *Id*. at 370.
[134] *Id*.

suing a present client."[135] As the *Santacroce* court observed, under the hot potato doctrine, "a firm may not circumvent Model Rule 1.7 by dropping a present client or characterizing him as a former client in order to take on a conflicting and, quite possibly, more lucrative client. Were it otherwise, both the duty of undivided loyalty to the client and public confidence in attorneys and the legal system would be undermined."[136] This rule has been applied in many jurisdictions, including within the Third Circuit.[137] These cases recognize that taking on a conflicted representation, then seeking to "cure" the conflict by withdrawing from the original representation, is fundamentally wrong because no attorney or law firm

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[135] *Ransburg Corp. v. Champion Spark Plug Co.*, 648 F. Supp. 1040, 1044 (N.D. Ill. 1986) (emphasis added).

[136] *Santacroce*, 134 F. Supp. 2d at 371 (quoting *Schiffli Embroidery Workers Pension Fund v. Ryan, Beck & Co.*, No. 91-5433, 1994 WL 62124 at *3 n.2 (D.N.J.1994)).

[137] *See Santacroce*, 134 F. Supp. 2d at 370-71; *Int'l Longshoremen's Ass'n, Local Union 1332 v. Int'l Longshoremen's Ass'n*, 909 F. Supp. 287, 293 (E.D. Pa. 1995); *Davis v. Kraft Foods N. Am*, No. 03-6060, 2006 WL 237512, at *12 (E.D. Pa. Jan. 31, 2006) (lawyer's "unseemly" suggestion that he would drop four-years long representation of individual in order to avoid conflict would violate "hot potato rule"); *see also Markham Concepts, Inc. v. Hasbro, Inc.*, 196 F. Supp. 3d 345, 349 (D.R.I. 2016) (collecting cases); *Snapping Shoals Elec. Membership Corp. v. RLI Ins. Corp.*, No. 1:05 CV 1714-GET, 2006 WL 1877078 (N.D. Ga. July 5, 2006) ("A lawyer may not evade ethical responsibilities by choosing to jettison a client whose continuing representation becomes awkward." (quoting *Harrison v. Fisons Corp.*, 819 F. Supp. 1039, 1041 (N.D. Fla. 1993))); Model R. Prof'l Conduct 1.16(d) (withdrawing attorneys must take reasonable steps to protect the clients' interests, including giving reasonable notice and allowing time for employment of replacement counsel).

should elevate such incentives—financial or otherwise—over its clients' interests.[138]

Notably, attempting to avoid a conflict in this way violates the *concurrent* representation principle of Rule 1.7, which is enforced through disqualification from the second representation even *after* the firm withdraws from the original representation.[139] The "hot potato" doctrine thus shows how a firm's obligations to the original client under Rule 1.7 constitute a continuing interest adverse to the second client, despite the firm's attempt to eliminate the conflict. While the Third Circuit has not explicitly adopted the hot potato doctrine,[140] its application here is warranted.

In *Sonos, Inc. v. D & M Holdings*, this Court declined to apply the "hot potato" doctrine because the allegedly conflicted lawyers had left the law firm representing the defendants (who brought the motion to disqualify) *years* before the second case was filed and their former firm decided to drop the defendants as

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[138] *See* Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering* § 20.10 at 20–24 (3d ed. 2001); Richard W. Painter, *Advance Waiver of Conflicts*, 13 Geo. J. Legal Ethics 289, 322 (2000); Charles W. Wolfram, *Symposium: Restatement of the Law Governing Lawyers, Former-Client Conflicts*, 10 Geo. J. Legal Ethics 677, 708 (1997).

[139] *Santacroce*, 134 F. Supp. 2d at 370-71.

[140] *See Sonos, Inc. v. D & M Holdings Inc.*, No. 14-1330-RGA, 2015 WL 5277194 (D. Del. 2015).

clients.[141] Because the allegedly conflicted lawyers had long ago exited the scene, they had not been part of "the decision to terminate the attorney-client relationship" with their former client.[142]

Those circumstances are not present here. Sidley and Mr. Sneed himself have for years represented Chubb, and it was Sidley and Mr. Sneed who undertook the dual representation and then sought to terminate the relationship with Chubb to maintain the BSA engagement. To the extent Chubb is a "former" client of Sidley's, that is only so because Sidley, through Mr. Sneed, Chubb's longtime lawyer, dropped Chubb as a client post-petition in the midst of its representation to pursue a more lucrative engagement with BSA.[143] This situation thus falls squarely within the compass of the "hot potato" doctrine.

Avoiding the conflict of interest, and Chubb's reaction to it, was the only reason Sidley offered to explain its withdrawal in the midst of multiple representations of a longtime client.[144] Indeed, Mr. Sneed indicated during his

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[141] *Id*.

[142] *Id*.

[143] *See, e.g.*, Certificate of No Objection to Sidley's First Application for Compensation and Fees.

[144] APP0932–34, May 4, 2020 Hr'g Tr. at 42:23–44:5 (Sneed testimony, explaining that the decision to withdraw was tied to Chubb's position regarding the conflict), Dkt. 572; APP1112, May 4, 2020 Hr'g Tr. at 222:5–6 (Schwartz testimony: "The only breakdown in the relationship was that we wouldn't waive the conflict."), Dkt. 572; *see also* APP0535, Slanina Decl. ¶ 17, Dkt. 429.

testimony that Sidley never even considered addressing this conflict by dropping BSA.[145] Sidley's contention that its withdrawal was permissible because of "irreconcilable differences" with Chubb is irrelevant for this reason but it is also wrong as a matter of law. While in theory irreconcilable differences between lawyer and client may be a valid ground for withdrawal, the only "irreconcilable difference" Sidley cites here was disagreement over Chubb waiving the conflict.[146] If that kind of disagreement could justify withdrawal under Rule 1.16, it would swallow the rule prohibiting unilateral withdrawals to eliminate a conflict.

While law firms may withdraw from ongoing representations without client consent under limited circumstances, they cannot do so where there is a "material adverse effect on the interests of the client."[147] Sidley's unilateral withdrawal from its ongoing representations here was materially prejudicial to Chubb. As Mr. Schwartz detailed in his declaration and the correspondence exhibited thereto, as well as his testimony, several of the matters that Sidley withdrew from were at

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[145] APP0930, May 4, 2020 Hr'g Tr. at 40:19–21 (Sneed testimony: "We weren't going to withdraw from representing [Boy Scouts]."), Dkt. 572.

[146] APP0934, May 4, 2020 Hr'g Tr. at 44:1–5 (Sneed testimony).

[147] *Parallel Iron, LLC v. Adobe Sys. Inc.*, No. CA 12-874-RGA, 2013 WL 789207, at *1 (D. Del. Mar. 4, 2013) (quoting Model R. Prof'l Conduct 1.16(b)).

crucial stages, replacement counsel had not yet been secured, and the withdrawal undermined Chubb's interests.[148]

Finally, because Sidley's post-termination duty of loyalty to a party adverse to BSA constitutes an *actual* conflict, Sidley's retention is categorically impermissible, as shown above.[149]

B. Sidley is in breach of its duty of loyalty under Rule 1.9.

While it is Rule 1.7 that applies in this instance, even if Rule 1.9 applies, Sidley breached that rule as well. Rule 1.9 governs a lawyer's duties to a ***former*** client. It is breached when (1) the lawyer had an attorney-client relationship with the former client; (2) the present client's matter is the same or a "substantially related" matter; (3) the interests of the second client are materially adverse to the interests of the former client; and (4) the former client did not consent to the representation after consultation.[150]

There is no dispute concerning the first and fourth prongs. Sidley had an attorney-client relationship with Chubb and represented various Chubb-related entities in many matters. Those matters included representing Century in

[148] APP0804–05, APP0857–68, APP0879–81, Schwartz Decl. ¶¶ 21–22, Ex. 9, 10, 13, Dkt. 539.

[149] *See supra* note 105 and accompanying text.

[150] *Intellectual Ventures I LLC v. Checkpoint Software Techs. Ltd.*, No. CIV. 10-1067-LPS, 2011 WL 2692968, at *5 (D. Del. June 22, 2011).

connection with the BSA's insurance claims and obtaining reinsurance for those claims. And Chubb never consented to Sidley's representation of BSA in the bankruptcy proceeding.

There is also no meaningful dispute concerning the third prong concerning material adversity between the former and new client. As shown in the prior section, BSA and Chubb are directly and concretely adverse in the bankruptcy proceeding, which involves a Proposed Plan that impairs Century's rights and seeks to fund recoveries almost entirely on the basis of BSA's insurance policies, over objections from Century and other insurers.

Only the second prong of Rule 1.9 was seriously disputed below, and the bankruptcy court correctly rejected Sidley's indefensible position that reinsurance litigation concerning Century's BSA policies was not "substantially related" to bankruptcy litigation concerning the very same policies. Having heard extensive testimony on the issue, the court found that, at a minimum, "the reinsurance litigation could be 'substantially related' to at least some aspects of Boy Scout's bankruptcy case for purposes of Rule 1.9."[151]

The record reflects ample evidence of a substantial relationship between the matters: the court found it undisputed that (1) Sidley's work for Chubb involved collecting reinsurance on paid and future claims under BSA's insurance policies;

[151] APP1222–23, Bench Ruling at 10–11, Dkt. 755.

and (2) those very same policies are assets of the bankruptcy estate.[152] As Ms. Russell explained in her testimony, counsel for Chubb in reinsurance matters by necessity must be familiar with privileged issues concerning the underlying coverage, how it is paid out, and Chubb's legal strategies with regard to the coverage in order to provide effective representation for the reinsurance matter.[153]

Given the evidentiary record and the bankruptcy court's findings, all four factors establishing a breach of the duty of loyalty under Rule 1.9 are easily satisfied here. Like Sidley's breach of Rule 1.7, the breach of Rule 1.9 constitutes a current, actual conflict between its duties to BSA and its duties to Chubb, requiring per se disqualification under Rule 1.9.

III. SIDLEY'S ETHICAL CONFLICTS CANNOT BE CURED BY A BELATED SCREEN OR THE USE OF CO-COUNSEL.

Conflicts of interests that involve a firm's duty of loyalty cannot be cured by simply erecting a barrier between groups of lawyers within the firm. While "ethical walls" have been utilized to address problems under Rules 1.10 and 1.11, and might possibly be employed where the affected client has consented to the

[152] APP1213–14, Bench Ruling at 1–2, Dkt. 755.

[153] APP1022–25, May 4, 2020 Hr'g Tr. at 132:10–22, 133:3–135:20 (Russell testimony), Dkt. 572.

adverse representation, a violation of Rule 1.7 cannot be cured solely by such means.[154]

Nor does the screen proposed by Sidley cure its violation of Rule 1.9. While courts have considered the effectiveness of screens established ***before*** an actual or potential conflict with a former client emerges,[155] there is no precedent for relying on a screen established more than one year ***after*** a law firm has been improperly representing one client adverse to another without the latter's consent. As Sidley's own expert testified, screens erected after a conflict has manifested are ineffective.[156] The Model Rules apply a presumption of shared confidences among members of the same firm.[157] Sidley's belated offer to implement a screen—after

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[154] *See In re Cendant,* 124 F.Supp.2d at 248 (ethical walls "do not treat situations involving simultaneous representation of two clients where a violation of any subsection of Rule 1.7 is present").

[155] *Intellectual Ventures I LLC v. Checkpoint Software Techs. Ltd.*, No. CIV. 10-1067-LPS, 2011 WL 2692968, at *13 (D. Del. June 22, 2011) (finding a timely established ethical wall insufficient to cure a conflict under Rule 1.9 where the moving party had engaged in no wrongdoing, the matters were substantially related, and the attorneys were in the same office); *EON Corp. IP Holdings LLC v. Flo TV Inc.*, No. CIV.A. 10-812-RGA, 2012 WL 4364244, at *5 (D. Del. Sept. 24, 2012).

[156] APP1004, May 4 Hr'g Tr. at 114:14–18 (Rapoport testimony), Dkt. 572.

[157] *See* Model Rule Prof'l Conduct 1.10; *Intellectual Ventures I LLC v. Checkpoint Software Techs. Ltd*., No. CIV. 10-1067-LPS, 2011 WL 2692968, at *12 (D. Del. June 22, 2011) ("Rule 1.10 imputes one attorney's conflicts to all other attorneys in the lawyer's firm," unless the conflict is based on a personal interest of a lawyer or the representation is based on the conflicted lawyer's association with a prior firm); *Essex Chem. Corp. v. Hartford Acc. & Indem. Co.*, 993 F. Supp. 241, 246 (D.N.J. 1998) ("Because knowledge of such

Chubb had called out the conflict months earlier—does nothing to cure the year-and-a-half period that Century's confidential information was unprotected from exposure to other firm lawyers.[158] Where, as here, there is any risk that confidential, privileged, or disadvantageous material could have already been disclosed, the failure to timely erect a screen requires disqualification.[159]

Nor can BSA cure the infirmities of Sidley's retention by delegating to co-counsel issues impacting Chubb in the bankruptcy.

First, that solution on its face does not cure any information-sharing that might have occurred—even inadvertently—before insurance counsel was

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confidences will also be imputed to all members of that attorney's firm, disqualification of the entire firm is equally compelled," citing RPC 1.10(a), employing per se rule of disqualification of all attorneys currently practicing in same firm without regard to actual sharing of confidences); Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 1.10:200, at 324–25 (1996).

[158] *See Madukwe v. Del. State Univ.*, 552 F. Supp. 2d 452, 458 (D. Del. 2008).

[159] *See United States ex rel. Bahsen v. Bos. Sci. Neuromodulation Corp.*, 147 F. Supp. 3d 239, 249 (D.N.J. 2015) (disqualifying firm for untimely erecting ethical wall where "no notice was given until after [client] discovered that its prior attorney was now employed by the firm suing it" and nothing prevented communication between attorneys at the firm when the conflict first arose); *Mitchell v. Metro. Life Ins. Co.*, No. 01 CIV. 2112 (WHP), 2002 WL 441194, at *10 (S.D.N.Y. Mar. 21, 2002) (disqualifying firm after holding that the firm did not formally implement an ethical screen until almost two months after it had actual notice of the conflict, which diminished the possibility that the screen remedied the conflict); *Atasi Corp. v. Seagate Technology*, 847 F.2d 826, 831 (Fed. Cir. 1988) (holding that presumption of shared confidences was not overcome where there was no evidence that screening measures were taken at the time of disqualified attorney's move to the firm).

appointed. Sidley long ago involved itself in issues directly implicating the rights of Chubb generally and Century specifically by negotiating and drafting a plan of reorganization, allowance procedures impairing its rights, and a host of other insurance issues. And the same insurance co-counsel, while working with Sidley for BSA pre-petition, served discovery in a coverage dispute between BSA and Chubb specifically targeting the reinsurance work that Sidley was doing for Chubb.[160] Second, the bankruptcy court's order is silent on the use of co-counsel, imposing no limitation on Sidley's conduct other than to refer to the bankruptcy court's bench ruling, which is itself vague to the point of being illusory.[161]

Finally, any notion that the availability of co-counsel excuses a conflict is inconsistent with the statutory scheme implemented by Section 327(a). By its terms, retention under Section 327(a) is for debtors' counsel charged with the overall interests of the estate and drafting, advocating, and confirming a plan of reorganization.[162] As demonstrated by the plan of reorganization drafted and filed

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[160] *See* APP0540–41, APP0624–25, APP0641–42, April 14, 2020 Panchock-Berry Decl. ¶¶ 7–8, Ex. F at 8–9, Ex. G at 8–9, Dkt. 437.

[161] *See* APP1226, Bench Ruling at 14 (providing that co-counsel "must handle all matters adverse to century that address the substantive treatment of BSA's insurance policies with Century, claims thereunder, proceeds therefrom, or that otherwise implicate insurance coverage").

[162] It is black letter bankruptcy law that lawyers retained for the purpose of advising on a plan of reorganization are, in fact, "general," not "special," counsel to the Debtors and should be scrutinized under § 327(a). *In re Congoleum Corp.*, 426 F.3d 675, 692 (3d Cir. 2005); *In re Hempstead Realty*

by Sidley, insurance is so intrinsic to the structure of this bankruptcy case that it simply cannot be uncoupled from the general role of formulating a plan of reorganization.[163] Nor can Sidley be decoupled from its conflict, as it drafted and filed the plan while it concurrently represented Chubb. Sidley's co-counsel, who was not retained as Section 327(a) counsel, would simply be carrying out instructions of Sidley's conflicted counsel, which taints them with the same conflict.

CONCLUSION

For the foregoing reasons, the order appointing Sidley as BSA counsel in the bankruptcy proceeding should be reversed.

Assocs., 34 B.R. 624, 625 (Bankr. S.D.N.Y. 1983) (refusing to employ as special counsel whose proposed services included assistance in "preparing a plan, . . . [r]egardless of what label the debtor ascribes to [counsel's] proposed legal services"); *see also In re Imperial Corp. of America,* 181 B.R. 501, 506-507 (Bankr. S.D. Cal. 1995) ("Plan strategizing [and] plan drafting . . . are . . . tasks for general bankruptcy counsel"); *In re Distribution Ctr. Assocs. (A), Ltd.,* 137 B.R. 826, 833 (Bankr. D. Colo. 1992) ("[A]ssisting in the construction of a chapter 11 Plan and Disclosure Statement are duties clearly beyond the scope and intent of Section 327(e)") (footnote, internal quotations, and citations omitted).

[163] *See also supra* notes 60–67 and accompanying text; *see also* APP0332, Disclosure Statement at 28, Dkt. 21 ("As a general matter, the amount of remaining coverage under [BSA's commercial general liability insurance policies] is substantial, and the BSA expects that the proceeds of these policies will comprise a significant portion of the assets contributed to any victims compensation trust.").

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Bankruptcy Procedure 8015(h), the undersigned certifies that the above memorandum complies with the applicable type-volume limitation of Federal Rule of Bankruptcy Procedure 8015(a)(7)(B)(i) because, excluding the parts of the memorandum exempted by Federal Rule of Bankruptcy Procedure 8015(g), this brief contains 11,975 words. The above brief also complies with the typeface requirements of Federal Rule of Bankruptcy Procedure 8015(a)(5) and type-style requirements of Federal Rule of Bankruptcy Procedure 8015(a)(6).

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