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## **New York Appellate Division, First Department, Upholds Assertion of “Common Interest” Privilege in the Absence of Pending or Anticipated Litigation**

On December 4, 2014, in a break with past rulings, the Appellate Division in the First Department held the “common interest” privilege is not limited to situations in which the joint privilege holders face the prospect of litigation, but may apply also to pre-closing communications made between merging entities and their lawyers in the absence of any pending or anticipated litigation.

The ruling came in *Ambac Assurance Corp. v. Countrywide Home Loans, Inc., et al.*, No. 651612/2010 (N.Y. App. Div. 1<sup>st</sup> Dep’t, Dec. 4, 2014), an action in which a monoline insurer, plaintiff Ambac Assurance Corporation, alleges that defendant Countrywide Home Loans, Inc. and its affiliated entities fraudulently induced Ambac to enter into contracts to insure RMBS. Ambac asserted secondary claims against Bank of America Corporation, alleging that as Countrywide’s successor-in-interest, BofA would be liable for any judgment obtained in the action.

The allegedly privileged documents concerned the period between January 11, 2008, when BofA signed a merger agreement with Countrywide, and July 1, 2008, when the merger closed. The merger agreement contained a confidentiality clause as well as a common interest agreement. In the Ambac suit, BofA and Countrywide withheld as privileged documents falling within the common interest agreement reflecting communications between the parties to the merger agreement and their counsel on pre-closing issues, including “maintaining employee benefit plans, consulting on state and federal tax consequences, and securing the appropriate merger approvals and consents of third parties and regulators.” Ambac argued that the sharing of the privileged documents made them subject to production. The trial court agreed with Ambac but the Appellate Division unanimously reversed.

So ruling, the First Department rejected prior precedent in New York requiring a “pending or reasonably anticipated litigation” for the common interest privilege to attach. In the appellate court’s view, the policies animating the attorney-client privilege – to encourage full and frank communication between attorneys and their clients – support a more expansive application of the common interest privilege. The Court explained that “imposing a litigation requirement in this scenario discourages parties with a shared legal interest, such as the signed merger agreement here, from seeking and sharing [legal] advice, and would inevitably result instead in the onset of regulatory or private litigation because of the parties’ lack of sound guidance from counsel.” The Court concluded that, “so long as the primary or predominant purpose for the communication with counsel is for the parties to obtain legal advice or to further a legal

interest common to the parties, and not to obtain advice of a predominantly business nature, the communication will remain privileged.”

This ruling is consistent with the case law in the Second Circuit, as well as Delaware statutory law, but the decision conflicts with at least two Second Department decisions, which continue to impose the “pending or reasonably anticipated litigation” requirement to the common interest privilege. This makes the decision a likely candidate for review by the New York Court of Appeals, which has yet to rule in this area.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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