June 22, 2016

New York Court of Appeals Holds that Common Interest Doctrine Only Applies Where Pending or Reasonably Anticipated Litigation Involved

On June 9, 2016, the New York Court of Appeals, declining to follow the law of many other jurisdictions, held that the common interest doctrine – which allows for privileged communications to be exchanged between parties represented by separate counsel without losing the privilege, so long as the parties share a "common interest" – applies only where pending or reasonably anticipated litigation is involved.

The ruling came in *Ambac Assurance Corp.* v. *Countrywide Home Loans, Inc.*[1] The monoline insurer Ambac Assurance Corporation alleged that defendant Countrywide Home Loans, Inc. and its affiliated entities fraudulently induced Ambac to enter into contracts to insure residential mortgage backed securities. Ambac also asserted claims against Bank of America Corporation ("BofA"), alleging that as Countrywide's successor-in-interest, BofA would be liable for any judgment obtained in the action.

In the *Ambac* suit, BofA and Countrywide withheld, as privileged, documents involving pre-closing matters of mutual interest to the parties, such as "filing disclosures, securing regulatory approvals, reviewing contractual obligations to third parties, maintaining employee benefit plans, and obtaining legal advice on state and federal tax consequences."[2] The documents in question were exchanged during 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 purporting to protect communications between BofA and Countrywide from outside disclosure.

Ambac argued that the sharing of the documents between BofA and Countrywide waived the attorney-client privilege and made them subject to production. The trial court agreed with Ambac and said that, where there existed no pending or anticipated litigation, the common interest doctrine did not apply.[3] The Appellate Division, First Department reversed, rejecting the litigation requirement and taking a broader view of the common interest doctrine.[4]

The First Department, breaking from earlier New York precedent, held that, under the common interest doctrine, the attorney-client privilege would apply to communications between two separately represented parties as long as the purpose for the communications is for those parties to obtain legal advice or to further a common legal interest. The First Department, citing several federal courts that have taken a similar view, noted that the policies animating the attorney-client privilege – to encourage full and frank communication between attorneys and their clients – support an expansive application of the

common interest doctrine. The First Department 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."[5]

The Court of Appeals reversed. It held that the common interest exception applies only where there is pending or reasonably anticipated litigation. The Court stated "we do not perceive a need to extend the common interest doctrine to communications made in the absence of pending or anticipated litigation, and any benefits that may attend such an expansion of the doctrine are outweighed by the substantial loss of relevant evidence, as well as the potential for abuse."[6] The Court of Appeals pointed to the fact that the volume and success of corporate transactions in New York has not suffered despite twenty years of precedent limiting the common interest doctrine to pending or anticipated litigation.

In reversing the Appellate Division's broader application of the common interest doctrine, the Court of Appeals declined to follow both the Restatement of the Law Governing Lawyers, as well as statutes and, according to some sources, the "vast majority" of case law in other jurisdictions.[7]

In Delaware, for example, whose law governs many corporate transactions, the legislature explicitly amended the applicable rules of evidence in 2001 to provide that a party may refuse to disclose communications "made for the purpose of facilitating the rendition of professional legal services to the client . . . by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest," with no requirement that there be anticipated or pending litigation.[8] Similarly, federal courts, including the Second, Third, Seventh, Ninth and Federal Circuits, have also concluded that there should be no pending or anticipated litigation requirement for the common interest doctrine to apply.[9]

The result is that companies doing business in New York or entering into merger agreements containing New York choice of law provisions cannot assume that all—or any—communications with transactional counterparties will retain their privileged nature and be exempt from discovery should litigation arise, particularly if the litigation in which the privilege assertion will be tested is likely to be brought in New York State Court. This is true regardless of the common interests they and their counterparties share and even where the merger agreement contains a "common interest provision" purporting to protect the confidentiality of such communications.

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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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[1] --- N.E.3d ---, 2016 N.Y. Slip Op. 04439 (June 9, 2016).
[2] Op. at 3.
[3] *Ambac Assur. Corp.* v. *Countrywide Home Loans, Inc.*, 41 Misc3d 1213(A) (N.Y. Sup. Ct. 2013).
[4] *Ambac Assur. Corp.* v. *Countrywide Home Loans, Inc.*, 998 N.Y.S.2d 329 (App. Div. 2014).
[5] *Id.* at 335.
[6] Op. at 16-17.
[7] *See* Restatement (Third) of the Law Governing Lawyers § 76(1) (2000); Gregory Mauldin, *Invoking the Common Interest Privilege in Collaborative Business Ventures*, 56 Fed. Law. 54, 56 (2009).
[8] Del. R. Evid. 502(b)(3); *see, e.g.*, *In re Quest Software Inc. Shareholder Litig.*, No. 7357-VCG, 2013 WL 3356034, at *5 (Del. Ch. Ct. July 3, 2013) (finding minutes of meeting concerning contemplated corporate transaction protected by common interest doctrine because "all parties shared a *legal* interest in the potential legal risk" (emphasis in original)).
[9] *See, e.g.*, *Schaeffer* v. *United States*, 806 F.3d 34, 40 (2d Cir. 2015); *United States* v. *BDO Seidman, LLP*, 492 F. 3d 806, 816 (7th Cir. 2007); *In re Teleglobe Comm'cns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007); *In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1390-91 (Fed. Cir. 1996); *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987), *vacated in part on other grounds*, 491 U.S. 554 (1989).