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COMMENTARY

New York Reins In "Common Interest" Doctrine– Special Caution Warranted in Negotiating Mergers

In June 2016, New York's highest court reversed an important 2014 decision by an intermediate appellate court that had expanded the application of the common interest doctrine to commercial transactions, such as mergers, where litigation was neither pending nor anticipated. In *Ambac Assurance Corporation v. Countrywide Home Loans*,[1] the New York Court of Appeals reversed that effort and clarified the scope of the common interest doctrine—an exception to waiver of attorney-client communications—holding that it applies to communications between separately represented parties only if there is pending or anticipated litigation.[2]

Thus, *Ambac* has articulated the circumstances in which the common interest doctrine may apply in New York: attorney-client communications disclosed to a third party remain privileged when (a) the third party shares a common interest, and (b) the communications are confidential, (i) in furtherance of the common legal interest, and (ii) related to pending or reasonably anticipated litigation.

Notwithstanding New York's "litigation" limitation, a number of other state and federal courts apply the common interest doctrine more expansively in commercial settings where parties to a transaction enjoy a joint legal interest (e.g., effectuating a merger). New York's litigation requirement not only limits the application of the doctrine in such settings but also now injects considerable uncertainty regarding the discoverability of communications between parties in transactions implicating the laws and interest of numerous jurisdictions—it's not exactly clear which forum's version of the doctrine a court will ultimately apply in ruling whether such communications are immune from discovery.

Thus, transactional attorneys and litigators alike should anticipate that communications made in these settings may be discoverable in the event litigation arises in the aftermath of a commercial transaction, especially in the context of merger agreements, which often require parties to share "privileged" communications.

Background

While the attorney-client privilege is generally limited to communications between a client and his attorney that were not made in the presence of a third party or later disclosed to a third party, the common interest

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doctrine grants protection to confidential communications exchanged between separately represented parties, as long as they were made for the purpose of pursuing a joint legal strategy.[3] Accordingly, some jurisdictions have deemed the common interest doctrine to protect communications made in the transactional context, even where multiple parties are involved.[4]

New York courts, however, have traditionally imposed a "litigation requirement" to the common interest doctrine. In other words, New York law has long held that in order for the doctrine to apply to communications made in furtherance of a joint legal interest, the parties must face pending litigation or reasonably anticipate litigation.[5]

The First Department Breaks from Tradition: No Litigation Requirement

But in 2014, a unanimous decision by the First Department of New York's Appellate Division sought to do away with this litigation requirement, stating that it disagreed with prior cases holding that pending or anticipated litigation was necessary for the common interest doctrine to apply.[6]

The decision stemmed from a legal battle where Ambac Assurance Corporation ("Ambac") sued Countrywide Home Loans ("Countrywide") and Bank of America ("BoA"), alleging that it was fraudulently induced to insure certain mortgage-backed securities issued by Countrywide. The discovery dispute that led to the First Department's ruling stemmed from communications between Countrywide and BoA with their separate counsel during their merger negotiations, but before their merger was consummated in 2008.

BoA argued that the common interest doctrine protected its communications with Countrywide and its attorneys during the merger process, because the communications were related to important common legal issues between the parties and necessary for the successful completion of the merger. Indeed, BoA argued, the merger agreement itself required the parties to work on numerous pre-closing legal issues and share privileged information relating to such issues, including those requiring regulatory and third-party approvals. The communications were subject to the merger agreement's confidentiality provisions, and the parties had signed a common interest agreement before signing the merger agreement. Ambac, on the other hand, maintained that any claimed attorney-client privilege over the pre-closing communications were waived when they were shared between Countrywide and BoA.

The trial court sided with Ambac, holding that there was no showing of pending or reasonably anticipated litigation for the common interest doctrine to apply under New York law. In reversing the trial court, the First Department cited with approval to several federal court decisions that had "overwhelmingly rejected" the litigation requirement for the doctrine to apply, noting that the attorney-client privilege itself is not tied to litigation, and routinely applies in non-litigation settings to facilitate compliance with the law. As a result, the First Department determined that the policy objective of furthering legal compliance via candid communication between counsel in a transaction warranted a departure from New York's litigation requirement for the common interest doctrine to apply—litigation was no longer a necessary element of the doctrine.

New York's High Court Maintains that Common Interest Is Tied to Litigation

In a lengthy 4–2 decision, the New York Court of Appeals reversed the First Department, rejecting the intermediate appellate court's attempt to expand the scope of the common interest doctrine to communications that do not involve pending or reasonably anticipated litigation.[7] Thus, as applied to the BoA-Countrywide communications, the Court of Appeals in *Ambac* held that where the litigation requirement is not satisfied, the common interest doctrine does not apply to communications made in the context of a merger,

even though those communications are made in pursuit of a common goal (completion of the transaction).[8]

The decision did acknowledge that many federal courts (including the Second, Third, Seventh, and Federal Circuits) and the Restatement (Third) parted with the law in New York but noted that the expanded doctrine (with no litigation requirement) was not uniformly adopted.[9] Moreover, the Court of Appeals' decision was grounded in policy considerations. Among them, the court's chief concern was that expanding the doctrine beyond the litigation setting would invite potential for abuse, resulting in the loss of evidence of a wide range of purely business communications between parties who nevertheless assert the doctrine to protect the disclosure of such non-legal communications.[10]

It is policy considerations such as these that drove the court's decision to hold that construing the doctrine narrowly outweighed the justification for its expansion. The court noted that the needs of disclosure of information must be balanced against the importance of encouraging free communication between clients and counsel.[11] To achieve the ideal balance between these competing interests, the court determined that the common interest doctrine should apply only when it best serves the need for such free communication with little chance of being misused.[12] Finally, the court noted that the number of mergers and other commercial transactions has not decreased, despite the lack of extension of the common interest doctrine.[13]

Conclusion (What Now?)

New York's courts are keenly aware that other jurisdictions take a broader view of the common interest doctrine. In Delaware, for example, there is no litigation requirement; instead, the statute states that there is a general common interest exception between separately represented clients and their respective counsel.[14] Likewise, as the Court of Appeals acknowledged, federal appellate courts routinely apply the doctrine outside the litigation context.[15]

This difference in application of the doctrine among jurisdictions raises a significant question: whose privilege law will apply in the case of a conflict of law? If a litigant brings an action in New York and requests discovery of communications from a merger between Delaware entities that was principally consummated in New York, would the court deny production of the communications pursuant to Delaware's broad view of the privilege, or compel production pursuant to New York's narrow application? To confuse matters further, New York's courts may apply different standards in resolving such thorny questions.

What is clear is that the *Ambac* decision should affect litigation strategy in business transactions. Transactional attorneys and litigators alike should anticipate the disclosure of communications in these settings—especially in the context of merger agreements, which often require parties to share privileged communications—and recommend alternative strategies to clients. For example, parties may wish to consider entering into common-interest agreements at the outset of negotiations that specifically reference either pending or reasonably anticipated litigation (e.g., by shareholders or regulators).

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Endnotes

1 *Ambac Assur. Corp. v. Countrywide Home Loans*, Op. No. 80, 2016 WL 3188989 (N.Y. June 9, 2016).
2 *Id.*
3 *U.S. Bank Nat. Ass'n v. APP Int'l Fin.* Co., 33 A.D.3d 430, 431 (1st Dept. 2006).
4 *United States v. BDO Seidman*, 492 F.3d 806, 816 (7th Cir. 2007), cert. denied sub. nom *Cuillo v. U.S.*, 522 U.S. 1242 (2008); I*n re Teleglobe Comms. Corp.*, 493 F.3d 345, 364 (3d Cir. 2007); *DuraGlobal Tech v. Magna Donnelly Corp.*, 2008 WL 2217682, at *3 (E.D. Mich. May 27, 2008).
5 *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 108, 756 N.Y.S.2d 367, 378 (Sup. Ct. 2003).
6 *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 124 A.D.3d 129, 131, 998 N.Y.S.2d 329, 331 (2014), rev'd, No. 80, 2016 WL 3188989 (N.Y. June 9, 2016).
7 *Ambac Assur. Corp. v. Countrywide Home Loans*, Op. No. 80, 2016 WL 3188989 (N.Y. June 9, 2016).
8 *Id.*
9 *Id.* at *20-21 & n.5.
10 *Id.* at *14-15.
11 *Id.*at *17-18.
12 *Id.*
13 *Id.* at *15.
14 Del. R. Evid. 502(b)(3).
15 *United States v. BDO Seidman*, 492 F.3d 806, 816 (7th Cir. 2007), cert. denied sub. nom *Cuillo v. U.S.*, 522 U.S. 1242 (2008); *In re Teleglobe Comms. Corp.*, 493 F.3d 345, 364 (3d Cir. 2007); *DuraGlobal Tech v. Magna Donnelly Corp.*, 2008 WL 2217682, at *3 (E.D. Mich. May 27, 2008).
16 For example, the Second Department of New York's Appellate Division has held that a court should apply the law of the jurisdiction with the greatest interest in the litigation when adjudicating privilege disputes. *Hyatt v. State Franchise Tax Board*, 105 A.D.3d 186, N.Y.S.2d 282 (2d Dept. 2013). By contrast, the First Department has ruled that courts should apply the privilege law of the state in which the discovery proceeding is being held or where the requested material would be introduced at trial. *JP Morgan Chase & Co. v. Indian Harbor Insurance Co.*, 98 A.D.3d 18, 25 (1st Dept. 2012).

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