New York Court of Appeals Limits Availability of Common Interest Privilege

June 13, 2016

On June 9, 2016, New York's highest court issued an important decision on the "common interest doctrine," limiting the circumstances in which parties with common legal interests may share information protected by the attorney-client privilege without waiving the privilege. In a 4-2 decision in *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*,[1] the New York Court of Appeals reversed a 2014 ruling by the Appellate Division, First Department, and held that the common interest doctrine applies to communications between parties that share a common legal interest *only if* those communications relate to pending or reasonably anticipated litigation. The Court of Appeals' opinion, which departs from the approach taken in Delaware, Massachusetts, and many federal courts, will have implications for parties' exchange of documents and other information in a range of transactional, regulatory and other non-litigation contexts.

The *Ambac v. Countrywide* Decision

In *Ambac v. Countrywide*, Ambac filed suit in New York State Supreme Court against Countrywide and Bank of America alleging among other things that Countrywide misrepresented the quality of certain loans that Ambac guaranteed, and that Bank of America was liable as Countrywide's successor-in-interest because it had acquired substantially all of Countrywide's assets in a 2008 merger. Ambac moved to compel the production of certain communications between Bank of America and Countrywide that took place after a merger plan was signed in January 2008 but prior to the July closing. Bank of America asserted that these communications were protected by attorney-client privilege and the common interest doctrine. Although Bank of America and Countrywide were represented by separate counsel at the time of the communications at issue, Bank of America contended that the parties to the merger shared common legal interests on the matters addressed in the communications. The documents at issue did not involve pending or anticipated litigation; rather, they related to other non-litigation legal issues, including "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]

A special referee and later the trial court issued orders that required the production of all such documents. They held that the common interest doctrine applies only in situations where litigation is pending or reasonably anticipated and therefore that any attorney-client privilege was waived here, in spite of the parties' shared common legal interests on the non-litigation matters described above. The First Department reversed and held that pending or reasonably anticipated litigation was not a necessary element to establish protection under the common interest doctrine.[3] Citing to federal decisions, the

[1] *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, No. 80, slip op. 04439 (N.Y. June 9, 2016).

[2] *Id.* at 3.

[3] *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 124 A.D.3d 129, 130 (1st Dep't 2014).

Delaware common interest rule, and the Restatement of the Law Governing Lawyers, the First Department stated that "imposing a litigation requirement in this scenario discourages parties with a shared legal interest . . . from seeking and sharing that advice," noting "[t]his outcome would make poor legal as well as poor business policy."[4]

Last week, however, the Court of Appeals rejected the First Department's articulation of the common interest privilege requirements. The four-judge majority held that in order to remain privileged under the common interest exception, shared communications must be made in furtherance of a common legal interest in the context of a pending or reasonably anticipated litigation. The Court applied a narrow view, limiting the common interest doctrine to the traditional rationale that co-litigants should be able to mount a common claim or defense without concern that "mandatory disclosure may chill the parties' exchange of privileged information."[5] The Court stated that the same rationale did not hold true for "clients who share a common legal interest in a commercial transaction or other common problem," stating that "no evidence [had] been presented . . . that privileged communication-sharing outside the context of litigation is necessary to achieve" objectives such as facilitating better legal representation, ensuring compliance with the law, and avoiding litigation.[6]

Judges Rivera and Garcia dissented, noting that attorney-client privilege is not tied to the existence of litigation. The dissent contended that the privilege should apply where, as in *Ambac*, parties to a merger agreement have a common legal interest in the successful completion of the merger, and exchanged communications in order to achieve that objective while complying with legal and regulatory requirements.

Implications of the Decision

The Court of Appeals' decision in *Ambac* will contribute to uncertainty about the application of the common interest doctrine and create further practical difficulties for parties working together on common legal issues in a non-litigation context. Jurisdictions around the country remain split on whether pending or anticipated litigation is necessary for the common interest doctrine to apply. As the Court of Appeals majority opinion noted, a number of states include such a requirement, either by rule or as interpreted by the states' courts, consistent with the approach articulated in *Ambac*.[7] But the modern trend has acknowledged that parties can and do work together on common legal issues outside of the litigation context and that they should be able to do so without fear of waiving privilege. For example, many recent federal appellate decisions, the Restatement, and the Delaware rule all permit the application of the common interest doctrine where parties share common legal interests—whether in the context of litigation or in a non-litigation context such as complying with the legal and regulatory requirements associated with a corporate transaction.[8]

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[4] *Id.* at 134, 137.

[5] *Ambac Assur. Corp.*, N.Y. slip op. 04439 at 15.

[6] *Id.* at 15-16.

[7] *Id. at* 11-12, 14 nn.2&3 (citing Ark. R. Evid. 502(b)(3); Haw. R. Evid. 503(b)(3); Ky. R. Evid. 503(b)(3); Me. R. Evid. 502(b)(3); Miss. R. Evid. 502(b)(3); N.H. Evid. R. 502(b)(3); N.D. R. Evid. 502(b)(3); 12 Okla. Stat. § 2502(B)(3); S.D. R. Evid. § 19-19-502(a)(3); Tex. R. Evid. 503(b)(1)(C); Vt. R. Evid. 502(b)(3); *O'Boyle v. Borough of Longport,* 218 N.J. 168, 193, 198-199 (2014); *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 214-215 (Tenn. App. 2002); *Gallagher v. Off. of the Attorney Gen.*, 141 Md. App. 664, 676-677 (Ct. Special App. 2001); *Hicks v. Commonwealth of Va.*, 17 Va. App. 535, 538 (1994); *Visual Scene, Inc. v. Pilkington Bros., Plc.*, 508 So.2d 437, 440 (Fla. Dist. Ct. App. 1987)).

[8] *See, e.g.*, D.R.E. 502(b)(3); *3Com Corp. v. Diamond II Holdings, Inc.*, No. CIV.A. 3933-VCN, 2010 WL 2280734 (Del. Ch. May 31, 2010); *see also In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007); *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815-16 (7th Cir. 2007); *United States v Schwimmer*, 892 F.2d 237, 244 (2d Cir 1989); *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987), *affd in part, vacated in part on other grounds*, 491 U.S. 554 (1989); Restatement 3d of the Law Governing Lawyers § 76 (2000); *but see In re Santa Fe Int'l Corp.*, 272 F.3d 705, 711 (5th Cir. 2001).

The differing law on the application of the common interest doctrine will create complications for parties in non-litigation contexts. Parties exchanging otherwise privileged materials in transactions will need to be sensitive to the possibility that New York law might apply in a future litigation and, if so, that otherwise privileged documents or communications may lose their protection. The lack of uniformity across jurisdictions may also prompt parties to consider shaping transactions to try to implicate attorney-client privilege laws of more protective jurisdictions or adding choice of law provisions when negotiating common interest agreements or other contracts.[9] Parties to common interest agreements may also more often include reference to the possibility of anticipated litigation (understanding, however, that doing so may have document preservation implications). Finally, parties may consider hiring separate counsel to represent them jointly on specific non-litigation matters on which they share a common legal interest: The Court of Appeals appeared to accept that one anomalous result of its decision would be that an otherwise identical communication involving identical parties in identical circumstances would be protected if the parties were represented by the same counsel, but not protected if represented by separate counsel.

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[9] For instance, in a dispute between parties to a merger, the Delaware Court of Chancery applied Delaware's attorney-client privilege law to decide whether communications between one party, its attorneys, and its investment banker were privileged notwithstanding the fact that most communications at issue took place in another state, explaining that the parties had selected Delaware law to govern the merger agreement and consented to Delaware as the exclusive jurisdiction for disputes arising out of the agreement. *3Com Corp.*, 2010 WL 2280734 at *5-6.