

Lawyer Insights

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NY's Highest Court Rejects Expansion of Common Interest Doctrine and Upholds Narrow Privilege Rule

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As the number of parties and professionals involved in business transactions and disputes has increased, so, too, has the number of potential privilege issues. But a recent ruling from New York narrowed the privilege protection afforded to the common interest doctrine.

Generally, the common interest doctrine applies when two or more clients separately retain counsel to advise each on matters of common legal interest. It protects from disclosure certain attorney-client communications shared for the purpose of furthering this common legal interest. But the legal landscape surrounding the common interest doctrine is not uniform, and the recent New York decision further muddies the waters.

While a substantial number of federal and state courts have broadened the doctrine to remove a litigation requirement, New York's highest court upheld a more restrictive reading of the common interest doctrine. In *Ambac Assurance v. Countrywide Home Loans*, the New York Court of Appeals held that an attorney-client communication disclosed to a third party during the period between the signing and closing of a merger will remain privileged only if the communication relates to a common legal interest in a pending or anticipated litigation.

In light of conflicting authority and uncertainty as to which privilege law applies at the time of sharing communications, parties should carefully consider whether to disclose privileged information to a third party in the course of a transaction, even where the parties share a common legal interest.

Ambac Background

Ambac Assurance Corp. guaranteed certain residential mortgage-backed securities issued by Countrywide Home Loans and its affiliates. After the securities failed, Ambac sued Countrywide alleging fraudulent inducement. Ambac also claimed that Bank of America (which acquired Countrywide) was liable for Countrywide's conduct as its successor in interest.

Ambac sought communications exchanged between Countrywide and Bank of America from the period between the signing of the parties' merger agreement and the closing. Bank of America argued that the attorney-client privilege protected these communications, many of which dealt with legal issues in connection with the closing. The merger agreement specifically directed the companies to share privileged information, and purported to shield the information from disclosure under the common interest doctrine.

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In opposition, Ambac argued that the common interest doctrine could not apply, because there was no expectation of litigation when the communications were made, and the parties waived the privilege because they were not affiliated entities at the time of disclosure.

The Lower Courts' Rulings

On Oct. 16, 2013, the trial court ordered production of the documents, holding that New York law requires a reasonable anticipation of litigation for the common interest doctrine to apply. Bank of America appealed.

The New York Appellate Division First Department unanimously reversed the lower court's decision on Dec. 4, 2014, holding that litigation was not a necessary element of the common interest doctrine. The First Department acknowledged contrary authority, but relied upon various sources, including federal courts, the Restatement of the Law Governing Lawyers, and Delaware Evidentiary Rule 502(b). The court found that a litigation requirement to the common interest doctrine would "inevitably result" in more litigation, because parties to a merger would be discouraged from seeking and sharing legal advice concerning the merger.

As expected, Ambac appealed. Amicus briefs were filed by the U.S. Chamber of Commerce and the Association of Corporate Counsel supporting a broad interpretation of the doctrine and arguing that the court's decision would influence how companies structure deals both within and outside New York. On the opposing side, two state trial attorney organizations argued that any expansion of the doctrine would lead to a significant loss of discoverable evidence and unjustly disadvantage plaintiffs.

The *Ambac* Decision

On June 9, 2016, New York's highest court reversed the decision, ruling that the privileged communications were not protected under the common interest doctrine, because they did not concern pending or reasonably anticipated litigation—a holding in line with two decades of authority in New York. The court reasoned that retaining the litigation requirement would limit the common interest doctrine to situations where the benefit and necessity of shared communications are highest, and the potential for misuse is minimal.

The court also pointed to policy concerns with expanding the privilege, particularly the potential for abuse. The majority expressed concern that the difficulty of defining "common legal interests" outside litigation could result in the loss of evidence between parties who assert common legal interests but who really have only nonlegal or exclusively business interests. In sum, the risk of shielding potentially pertinent business evidence was too great to justify removing the litigation requirement. It was an especially relevant point in *Ambac*, as the company alleged that the two firms had structured their deal in order to shield Countrywide's wrongdoing from disclosure.

While acknowledging that some federal courts eliminated the litigation requirement, the court reiterated that this understanding has not been uniformly received. Ultimately, the court concluded that the policy reasons for retaining the litigation requirement outweigh any purported justification for doing away with it, and therefore maintained the traditionally narrow construction.

The court noted in a footnote, however, that the legislature could consider the alternative arguments articulated by the dissent and expand the common interest doctrine as other state legislatures have done.

Additionally, the court expressly declined to decide what it means to "share legal interests in pending or anticipated litigation," or what constitutes "reasonably anticipated litigation," holding only that "such litigation must be ongoing or reasonably anticipated, and the exchanged communication must relate to it in order for the common interest exception to apply." Thus, the holding espousing a narrow view of the common interest doctrine was also a narrow holding.

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The Dissent

In a relatively rare move, Judge Jenny Rivera, in an opinion joined by Judge Michael Garcia, dissented from the four-judge majority's holding. She based her reasoning in part on the fact that the attorney-client privilege has no litigation requirement and the reality that clients often seek legal advice specifically to comply with legal and regulatory mandates and avoid litigation. Judge Rivera also concluded that any attempts to misuse the common interest doctrine could be addressed through existing methods for preventing and sanctioning obstruction of proper discovery.

Ambac's Impact

Ambac's rejection of an expanded common interest doctrine leaves parties with less certainty about privilege and the protection of their communications. The breadth of the common interest doctrine will vary significantly depending on governing law, particularly given the differences between federal and state law. Unfortunately, at the time they must determine whether to share information, parties may be unable to predict with certainty which jurisdiction's privilege rules will apply in any future discovery dispute.

A few practices emerge as helpful to parties and counsel in this murky legal landscape. A party should vigilantly screen all information prior to sharing it as part of a due diligence process. A party should redact privileged information as needed. A party can share helpful underlying factual information, but avoid inadvertent disclosure of any privileged material. Additionally, to the extent that parties to a merger or other transaction anticipate important regulatory or compliance issues in connection with the closing of a transaction, they should consider jointly engaging one law firm to serve as special counsel to guide the sharing of privileged information to address such issues. *Ambac* recognized that a joint client or co-client arrangement for such purposes may preserve privilege.

Conclusion

By maintaining a litigation requirement to the common interest doctrine, New York explicitly rejected the trend to expand the privilege, resulting in less certainty concerning its application. Parties and counsel should be mindful of this when engaging in transactions. Many communications about common merger issues, such as antitrust considerations, tax issues and regulatory approval, may fall outside the protection of the common interest doctrine under New York law.

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