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Professional Liability Insurance

# Court of Appeals Refuses to Expand the Common Interest Doctrine

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The Court of Appeals, in a lengthy 4-2 decision, recently reversed the Appellate Division, First Department's unanimous decision that expanded the common interest doctrine to business transactions or mergers in which litigation was neither pending nor reasonably anticipated. The court reaffirmed the long-held precedent that the common interest doctrine applies to communications with a third party having a shared interest only if there is pending or reasonably anticipated litigation.

Business lawyers should be aware that a number of federal circuits, including the U.S. Court of Appeals for the Second Circuit, give the common interest doctrine, an exception to waiver of the attorney-client privilege, a more expansive treatment than the New York state courts. All other issues being equal, attorneys may choose to litigate either in federal or state court depending on whether there is a desire for a more or less restrictive view of the common interest doctrine.

## Reaffirmed Narrower Scope

The Court of Appeals' decision in *Ambac Assurance Corp. v. Countrywide Home Loans and Bank of America Corp.*<sup>1</sup> (the Ambac litigation) refused to extend the "Common Interest" doctrine. Attorney client communications remain privileged when disclosed to a third party only when the third party shares a common interest with the client who made the communication; it is confidential; in furtherance of the common legal interest; and is related to pending or reasonably anticipated litigation. The court stated that if it extended the doctrine to communications not involved in pending or reasonably anticipated litigation there could be a loss of evidence between parties who have only non-legal or exclusively business interests to protect.

## Basis for the Holding

Ambac Assurance Corporation sued Countrywide Home Loans, Inc. and Bank of America Corp. (collectively, Bank of America) after the 2008 recession, alleging Bank of America fraudulently induced Ambac to insure certain mortgage-backed securities issued by Countrywide. Bank of America and Countrywide merged in 2008 after protracted negotiations. Ambac alleged Bank of America breached its contractual representations, fraudulently misrepresented the quality of the

loans and fraudulently induced Ambac to guaranty the loans. The current discovery dispute stemmed from communications between Bank of America and Countrywide with their separate counsel during the merger negotiations but before the closing.

Bank of America, whose burden it was to establish the common interest doctrine applied, maintained all of its communications with Countrywide and Countrywide's attorneys during the entire merger process were protected by the common interest privilege, claiming the communications were related to common legal issues requiring resolution before the merger could be completed and were essential for the successful completion of the merger. It argued that the absence of pending or imminent litigation was irrelevant since the two entities had a common legal interest at the time the communications were shared; the merger agreement bound the parties to work on several pre-closing issues including employee benefit plans, tax issues and approvals by third parties and regulators.<sup>2</sup> Ambac maintained that sharing the communications with third parties resulted in waiver of the attorney-client privilege.

The Special Referee appointed to handle discovery issues agreed with Ambac and held that in the absence of pending or reasonably anticipated litigation, the common interest doctrine was not applicable to the allegedly privileged documents. Bank of America moved to set aside the ruling, and the Supreme Court upheld the Special Referee's order.

## First Department Decision

The First Department unanimously reversed the Supreme Court's ruling, stating it disagreed with prior case law holding that the common interest privilege was limited to situations where there was pending or reasonably anticipated litigation. The First Department held that it was sufficient that the two parties had a common legal interest and together sought advice from counsel.

The [Appellate Division](#) approvingly cited several federal court decisions that had "overwhelmingly rejected" a litigation requirement for the common interest doctrine to apply. It also stated the attorney-client privilege is not tied to litigation; rather, advice may be needed to avoid litigation; and to facilitate compliance with the law or to guide the client's conduct, the doctrine should apply.<sup>3</sup>

## Majority Decision

The Court of Appeals refused to expand the scope of the common interest doctrine holding that since litigation was neither reasonably anticipated nor pending at the time of the merger negotiations the doctrine did not apply. The court discussed the history of the common interest doctrine and acknowledged that several federal appeals courts, including the Second, Third, Seventh and Federal Circuits as well as the Restatement (Third) of the Law Governing Lawyers §76(1) (1997), disagreed with courts in New York State that require pending or reasonably anticipated litigation. It stated: "The rationale for these rules is to ensure that the privilege is 'strictly confined within the narrowest possible limits consistent with the logic of its principle.'"<sup>4</sup> It noted that the expanded doctrine has not been uniformly adopted.

The court held that extending the common legal interest doctrine outside the context of litigation could result in the loss of evidence of a wide range of communications between parties who assert common legal interest but who really have only non-legal or exclusively business interests to protect. The court cited one commentator who observed the greatest rush to expand the privilege comes from corporate attorneys representing multiple clients, often concerning antitrust matters

and that it is in that context that there was the greatest potential for abuse.<sup>5</sup>

It also wrote that "until the First Department's decision in this case, New York courts uniformly rejected efforts to expand the common interest doctrine to communications that do not concern pending or reasonably anticipated litigation."<sup>6</sup> It concluded that policy reasons for keeping the construction of the doctrine narrow outweighed the justification for expanding the doctrine.

## The Dissent

The dissent focused on, what it called, the more forward-thinking approach adopted by the majority of federal circuit courts, other state courts and several legal commentators recognizing the important interests served by the free flow of information between parties with a common interest, even without the threat of litigation.

Echoing the First Department's decision, the dissent noted that since communications between attorney and client are privileged even when litigation is not pending, and that clients frequently need to communicate with third parties to comply with legal and regulatory mandates to avoid litigation, to facilitate compliance within the law dealing with highly regulated matters or to guide a client's course of conduct, the common interest doctrine should apply without the requirement of pending or anticipated litigation.

The dissent also stated the doctrine should apply during mergers in which the parties commit to collaboration or exchange of confidential information and advance a joint strategy to ensure regulatory or other legal compliance even if no litigation is pending or contemplated.

## Conclusion

The *Ambac* decision should impact the litigation strategy involving business transactions. Attorneys may consider whether to litigate in state or federal court depending on whether they want the broader common interest doctrine to apply in discovery. Litigators in New York state court litigation must continue to recognize that the attorney-client privilege will be waived if otherwise privileged communications are shared with third parties or their attorneys during transactional negotiations if litigation is neither pending nor reasonably anticipated.

Litigators in New York who want more expansive discovery of communications during mergers and business transactions should choose state court and those who want less expansive discovery under the common interest doctrine if requirements are met should choose federal court.

### Endnotes:

1. *Ambac Assurance Corp. v. Countrywide Home Loans*, 2016 WL 3188989 (June 9, 2016)(uncorrected).
2. *Id.*
3. *Ambac Assurance Corp. v. Countrywide Home Loans*, 124 A.D.3d 129 (1st Dept. 2014).
4. *Ambac Assurance Corp.*, 2016 WC 3188989
5. *Id.*

6. Id.

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