

NY Appellate Court Holds Common Interest Privilege Applies to Parties to a Merger

December 9, 2014

By: Jay Shapiro, Lori S. Smith and Brittney Edwards

The *common interest privilege* is a doctrine that operates to maintain the confidentiality of communications between parties and counsel that have aligned interests. It is designed to encourage the free flow of information between these parties, and has historically been utilized primarily in the context of litigation. However, in *Ambac Assurance Corp., et al. v. Countrywide Home Loans, Inc., et al.*, the New York Supreme Court, Appellate Division, First Department recently expanded the common interest privilege by holding that it is applicable in transactional contexts. 2014 WL 6803006, No. 651612/10 (1st Dep't 2014). The *Ambac* court defined the common interest doctrine as “a limited exception to waiver of the attorney-client privilege” when a third party is present during a communication between an attorney and his or her client. The doctrine shields such communications from disclosure when they are (1) protected by the attorney client privilege and (2) “made for the purpose of furthering a legal interest or strategy common to the parties.”

Until *Ambac*, New York courts touched on, but never squarely addressed, whether a third requirement must be satisfied before the common interest doctrine can be invoked: “that the communication must affect pending or reasonably anticipated litigation.” The *Ambac* court addressed and rejected this purported third requirement while reversing the decision of the trial court which found that defendant Bank of America failed “to cite any New York case that applied the common-interest doctrine outside of either joint-representation of two parties by one attorney, or where parties reasonably anticipated litigation.”

Ambac sued Countrywide Home Loans and Bank of America Corp. (BAC), its successor-in-interest, asserting claims related to mortgage fraud. The basis for the claims asserted against BAC arise from a merger between a BAC subsidiary and Countrywide Financial Corp. (CFC), a Countrywide entity. Not long before the parties signed a merger agreement, BAC and CFC entered into a common interest agreement. Further, the merger agreement provided that all information exchanged between BAC and CFC “was subject to confidentiality provisions.” *Ambac* moved to compel production of pre-merger communications between BAC and CFC which it claimed were relevant to BAC’s liability. BAC claimed that the communications were protected by the common interest doctrine because, among other things, BAC and CFC “shared legal advice from counsel together in order to ensure their accurate compliance with the law and to advance their common interests in resolving the many legal issues necessary for successful completion of the merger.” The Court held that the common interest doctrine applies even though the subject communications occurred in a purely transactional context and not in anticipation of litigation.

Before *Ambac*, New York courts narrowly construed the common interest doctrine. However, after considering the purpose of the attorney-client privilege (from which the exception derives), public policy interests, and federal precedent, the First Department concluded that “the better policy requires that [New York] diverge from [the former] approach.” Specifically, the Court noted that “[t]he ‘attorney client privilege is not tied to the contemplation of litigation,’ because

‘advice is often sought, and rendered, precisely to avoid litigation, or facilitate compliance with the law, or simply to guide a client’s course of conduct.’” Further, the Court held that encouraging parties with common legal interests to seek legal advice “to meet legal requirements and to plan their conduct accordingly...serves the public interest by advancing compliance with the law, facilitating the administration of justice[,] and averting litigation.”

The Court also relied on federal precedent to support its reasoning, and cited several federal court decisions, including New York federal courts, which address and “overwhelmingly reject[]” the requirement that communications sought to be shielded by the common interest doctrine be made in anticipation of litigation.

Federal courts in New Jersey and Pennsylvania and state and federal courts in Massachusetts have similarly rejected the anticipation of litigation requirement. See *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007) (“the community-of-interest privilege...applies in civil and criminal litigation, and even in purely transactional contexts”); *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 449 Mass. 609, 614-17 (2007) (“the common interest doctrine is not limited to litigation or impending litigation”).

As a result of this decision, parties engaged in a transaction may very well be able to avail themselves of greater protections from discovery by a third party as to matters where they have aligned interests. On the one hand, that should achieve the doctrine’s goal of facilitating communications. On the other, it may create more motion practice and challenges during the discovery process should a dispute progress to litigation.

For more information regarding this alert, please contact Jay Shapiro (212.714.3063 / shapiroj@whiteandwilliams.com) or Lori S. Smith (212.714.3075 / smithl@whiteandwilliams.com) of our New York office.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult a lawyer concerning your own situation and legal questions.