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Trials & TRIBULATIONS

Court of appeals assigns narrow approach to common interest privilege

On June 9, 2016, the New York State Court of Appeals determined that the common interest privilege in New York should not be expanded to situations where there is no pending litigation, or the anticipation of litigation. *Ambac Assurance Corporation, et al. v. Countrywide Home Loans, Inc., et al.*, 2016 WL 3188989 (June 9, 2016).

The First Department, adopting the position of many federal courts, had held that the existence of ongoing or anticipated litigation was not necessary to assert the common interest privilege between two unaffiliated parties engaged in a commercial merger, as long as they have a common legal interest. The Court of Appeals rejected this approach.

The lawsuit involved claims brought by Ambac Assurance Corporation against its insured, Countrywide Home Loans, and Bank of America, Countrywide's successor in interest, for fraudulent misrepresentation and breach of contract, among other claims. The privilege dispute arose when Ambac sought to compel the production of documents that it believed would support its fraudulent misrepresentation claims against Countrywide and Bank of America.

Specifically, Ambac sought communications that Countrywide, Bank of America, and their counsel had exchanged after the two companies signed a merger plan, but before the merger actually closed. Ambac's position was that even though documents may have been protected by the attorney-client privilege at one time, that privilege was waived once the companies exchanged those documents with each other.

Countrywide and Bank of America



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argued that once they signed the merger plan and were working to jointly resolve legal issues, including filing disclosures, securing regulatory approvals, reviewing contractual obligations to third parties, maintaining employee benefits, and obtaining legal advice on state and federal tax consequences, the two companies shared a common legal interest that should be protected by the common interest privilege.

The discovery dispute was initially presented to a referee assigned to the case. The referee concluded that under New York law, there must be pending or anticipated litigation for the common interest privilege to arise, and ordered the production of the documents. *Ambac Assurance Corporation v. Countrywide Home Loans, Inc.*, 41 Misc.3d 1213(a), *1 (N.Y. Co. Sup. Ct. 2013). Bank of America sought to overturn the referee's decision, based on its interpretation of the Second Circuit's decision in *U.S. v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989), arguing that the Second Circuit actually rejected the "litigation requirement" for asserting the common interest privilege.

New York County Supreme Court Justice Eileen Bransten upheld the referee's initial determination, noting that while the Schwimmer Court rejected the requirement that there be actual pending litigation, it still required "a reasonable anticipation of litigation." *Ambac Assurance*

Corp., 41 Misc.3d at *1; *Schwimmer*, 892 F.2d at 244.

Bank of America appealed to the First Department, which reversed the Supreme Court's decision, finding that neither pending nor anticipated litigation were necessary for a party to assert the common interest privilege. *Ambac Assurance Corporation v. Countrywide Home Loans, Inc.*, 124 A.D.3d 129 (1st Dept. 2014). The First Department asserted that the extension of the common interest privilege to common legal interests unrelated to pending or anticipated litigation had not yet been directly reviewed by the First Department or the Court of Appeals and, therefore, was open to the Court's interpretation. The Court held that taking into account "today's business environment," the common interest privilege should extend to companies that have completed a signed merger agreement because "business entities often have important legal interests to protect even without the looming specter of litigation." *Id.* at 130-131.

In reaching this decision, the First Department noted that attorney-client privilege is not limited to situations where litigation is contemplated, because "advice is often sought, and rendered, precisely to avoid litigation." *Id.* at 133. As such, the common interest privilege should be similarly extended outside of the litigation context.

While acknowledging a line of New York cases that required pending or reasonably anticipated litigation, the First Department adopted the approach of federal courts, concluding "so long as the primary or predominant purpose for the communication with counsel is for the parties

Continued on next page

Continued from previous page

to obtain legal advice or to further a legal interest common to the parties, and not to obtain advice of a predominantly business nature, the communication will remain privileged.” *Id.* at 135.

The Court of Appeals, however, reversed the First Department’s decision, noting that the purpose of the common interest doctrine in situations where litigation is pending or anticipated is to promote candor between parties who otherwise may not share information. This candor benefits their legal strategy. The same level of concern does not exist where two parties simply have a commercial or business interest in exchanging information, such as a commercial merger. According to the Court, the parties’ ability to

protect those communications offers the potential for misuse.

Bank of America argued that financial institutions, which are highly regulated, constantly face a threat of litigation, and protection of their shared communications is necessary to facilitate the goals of providing better legal representation, ensuring compliance with laws, and avoiding potential litigation. Unpersuaded, the Court found that Bank of America had provided no evidence that “privileged communication-sharing outside the context of litigation is necessary to achieve those objectives.” Further, the Court asserted that the parties had presented no evidence that mergers and other complex commercial transactions were hindered in New York due to the state’s historical limitation of the common interest privilege.

Specifically, the Court noted that the

state law limitation of the common interest privilege to anticipated or pending litigation was in place at the time Countrywide, Bank of America and their counsel exchanged the communications at issue, and they did so based upon the mutual benefit each received, despite their expectation that the communications were not protected by privilege.

There is no question that going forward, parties engaged in a merger or other commercial transaction in New York should proceed with the certainty that, absent pending or anticipated litigation, any communications exchanged will not be protected by a common interest privilege.

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