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NY Court Gets It Right On Common Interest Privilege

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The New York Appellate Division, First Department, came to the right conclusion recently regarding the application of the common interest privilege in the nonlitigation context. Ambac Assurance Corp. v. Countrywide Home Loans Inc. (N.Y.A.D. 1 Dept., Dec. 4, 2014). The trial court held that the common interest privilege applied only where the parties shared a common interest in pending or reasonably anticipated litigation. The appellate division rejected that logic and correctly held that the common interest privilege applies equally to litigated and nonlitigated matters. This was the first New York appellate opinion expressly adopting the majority rule on this issue and should lead to greater certainty and consistency for parties seeking legal advice to advance their common interests.

Ambac brought the lawsuit against Countrywide Home Loans and affiliated entities alleging that Countrywide fraudulently induced it to insure residential mortgage-backed securities transactions between 2004 and 2006. Ambac also asserted claims against Bank of America Corp. as Countrywide's successor-in-interest pursuant to a merger between a BAC subsidiary and a Countrywide affiliate. The merger agreement bound the parties to work together on a number of preclosing activities, including preparing and filing joint proxy and registration statements. The parties required shared legal advice to ensure that these filings complied with the law and to advance their common interest in resolving legal issues necessary to the merger's success. Ambac sought discovery of communications between the parties and their legal counsel in order to further its merger-related claims against BAC and Countrywide.

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A referee supervising discovery concluded that the communications were not protected because the common interest privilege is limited to parties sharing a common legal interest that impacts actual or potential litigation, not a merger or other common business interest. The trial court agreed with the referee, concluding that BAC was seeking to extend New York's common interest privilege beyond its existing boundaries.

The trial court's limitation makes no sense in light of the history and purpose of the common interest privilege. The common interest privilege is an extension of the attorney-client privilege, which protects communications between lawyers and their clients made in confidence for the purpose of rendering and obtaining legal advice. It is not an independent basis for privilege, but rather an exception to the general rule that the attorney-client privilege is waived if communications are made in the presence of third parties. The common interest privilege serves the public interest in advancing compliance with the law by encouraging parties with common legal interests to seek legal assistance without fear that their communications will be made public. There is no basis in law, public policy or common sense to limit its protections to parties with a common interest in litigation.

The appellate division observed that the vast majority of federal courts that have addressed the issue, as well as authorities from other states, have found that the common interest privilege is not limited to parties sharing a common interest in actual or anticipated litigation. Although not discussed in the Ambac opinion, it appears that only one federal circuit – the Fifth Circuit – requires that the common interest be in pending or reasonably anticipated litigation.[1]

The appellate division seemed at a loss as to why the trial court – and a handful of prior opinions from New York trial and appellate courts – came to the conclusion that the common interest privilege should be limited to circumstances in which litigation is actual or imminent. The court noted that the litigation requirement seems to have leaked into the civil common interest privilege case law from opinions addressing the common defense privilege in the criminal context. Although the court did not explore the issue in depth, common interest in the world of criminal law is more logically limited to the litigation context, since there are few nonlitigation contexts in which criminals might legitimately seek legal counsel to further a common interest. In the civil context, parties routinely need to seek legal advice to advance their common interests in order to comply with the law and avoid litigation in the future. The appellate division correctly noted that this is precisely the type of activity that the attorney-client privilege and the common interest privilege were designed to encourage.

Moreover, none of the prior New York cases cited in the Ambac opinion actually seems to hold that the common interest privilege is limited to actual or anticipated litigation. The opinions all recite that rule, and some offer varying degrees of justification for it, but then each of their determinations actually turns on a distinction between communications involving legal advice (protected by the attorney-client privilege) and communications involving business or other advice (not protected by the attorney-client privilege). Since communications for business purposes rather than legal advice are not privileged to begin with, these courts arguably never reach the question whether the common interest privilege would apply. Some of the opinions simply make less clear that their legal pronouncements are dicta, and thereby contribute to confusion in the law.

The Ambac opinion was correctly decided and should be followed. Whether litigation is ongoing or imminent is a factor in the application of the work-product doctrine, not of the attorney-client privilege. But the information at issue in Ambac involved privileged communications between the parties and their counsel made for the purpose of obtaining legal advice. As the appellate division noted, it would make no sense to hold that where two parties seek legal counsel on a matter of common interest, that communication is not protected unless the parties anticipate imminent litigation, but if one of the parties visits the lawyer's office alone, the same communication is privileged regardless of whether litigation is contemplated. The court stated that it "cannot reconcile this contradiction, as it undermines the policy underlying the attorney-client privilege."

It is not clear where the Ambac opinion leaves the state of New York law on this topic, at least in courts where it is not binding precedent. There are numerous opinions from other state courts, including the Appellate Division, Second Department, reciting that the common interest privilege in New York applies only in the litigation context. But as noted above, most of those opinions merely recite the rule without actually applying it in reaching their decisions.

In a recent opinion in which the Second Department was asked to revisit the rule, it found that it did not need to reach the issue but did not suggest that it would be unwilling to do so under the right circumstances.[2] The Ambac opinion appears to be the first New York opinion clearly to reject this limitation. And it does so in a thoughtful, well-reasoned discussion that is consistent with the purpose of the common interest privilege and the majority of authorities from other jurisdictions. Other New York courts should follow its lead.

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[1] See United States v. BDO Seidman LLP, 492 F.3d 806 (7th Cir. 2007) (collecting cases and identifying United States v. Newell, 315 F.3d 510, 525 (5th Cir.2002) (requiring a "palpable threat of litigation at the time of the communication") as an outlier in this regard).

[2] Hyatt v. State of Cal. Franchise Tax Board, 105 A.D.3d 186, 962 N.Y.S.2d 282 (N.Y.A.D. 2 Dept. 2013) (collecting Second Department cases).