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New York Court Extends Common-Interest Rule to Pre-Closing Communications Among Parties to a Purchase Agreement

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Mergers & Acquisitions and Litigation

The attorney-client privilege is normally waived when the privileged communication is disclosed to a third party. The common-interest rule provides an exception to such a waiver of the attorney-client privilege by protecting communications among multiple parties and their attorneys who have a shared legal interest. In the context of communications among parties to a definitive agreement (including, for example, an asset purchase, a stock purchase and a merger), New York courts have taken a narrow view of the common-interest rule. Unlike Delaware and most federal courts, New York courts have limited the common-interest rule to communications concerning anticipated or pending litigation. In *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*,[1] however, an appellate court recently signaled a new approach that, if adopted by other New York courts, could protect information shared by parties to a purchase agreement before the closing of a transaction.

The *Ambac* Decision

Background. Plaintiff Ambac Assurance Corp., the guarantor of payments on certain securities issued by defendant Countrywide Home Loans, Inc. ("Countrywide"), brought suit against Countrywide for breach of contract and fraud. It also asserted claims against Bank of America Corp. ("BofA"), alleging that BofA was Countrywide's successor-in-interest under a purchase agreement by which Countrywide was acquired by BofA. The defendants objected to producing communications between BofA and Countrywide made following the signing of the purchase agreement and before its closing, arguing that such communications were protected by the common-interest rule. The discovery referee ordered production, and the motion court agreed.

Opinion. The appellate court vacated the motion court's decision. The court noted that the common-interest rule applies if (1) the communication qualifies for protection under the attorney-client privilege and (2) the communication was made for the purpose of furthering a legal interest or strategy common to the parties. Drawing on Delaware and federal court precedents,[2] the court declined to impose the additional requirement that a communication be made in contemplation of pending or reasonably anticipated litigation. Rather, "so long as the primary or predominant purpose for the communication with counsel is for the parties 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."[3] The court acknowledged that this approach differed

[1] *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, No. 651612, 2014 WL 6803006 (1st Dep't Dec. 4, 2014).
[2] Federal courts generally follow forum state laws on privilege. *See* C.T. Drechsler, *Federal Courts as Following Law of Forum State with Respect to Privileged Communications*, 95 A.L.R.2d 320, § 3 (1964 & Supp. 2001).
[3] *Ambac*, 2014 WL 6803006, at *4 (internal quotation marks omitted).

from that taken by other New York courts,[4] but held that the litigation requirement conflicts with the policy goal of encouraging "full and frank communication between attorneys and their clients".[5]

Implications for Practitioners

There are several important takeaways from the *Ambac* decision for practitioners:

- ***The parties must have a common legal interest.*** *Ambac* made clear that a shared "business" interest is insufficient; rather, the common-interest rule applied because BofA and Countrywide needed "the shared advice of counsel in order to accurately navigate the *complex legal and regulatory process* involved in completing the transaction."[6] Parties could sign a common-interest agreement to help document such an interest. Pre-closing communications not relating to legal issues are unlikely to be protected, and a court will likely examine each communication in context to assess whether the common-interest rule applies.[7]
- ***Be cautious until the New York Court of Appeals decides this issue.*** *Ambac* conflicts with precedent in other lower New York courts. Parties to a purchase agreement should therefore take steps to preserve the common-interest rule but bear in mind that it may ultimately not apply if the New York Court of Appeals steps in and disagrees with *Ambac*.
- ***The status of pre-signing communications remains unaddressed in New York.*** *Ambac* did not address whether communications made before signing may be protected. It is worth noting, though, that a Delaware court has found it possible for two parties negotiating a purchase agreement to have a common legal interest based on the unique facts of their negotiation.[8]

Conclusion

While it remains to be seen whether other New York courts will adopt the *Ambac* rule, transactional advisors and litigators should pay close attention to the decision, which may signal a trend toward expanded protections for communications between parties to an agreement on matters of common legal interest.

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[4] *See id.* (citing *Hyatt v. State Franchise Tax Bd.*, 962 N.Y.S.2d 282, 296 (2d Dep't 2013)).
[5] *Id.* at *2 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).
[6] *Id.* at *5 (emphasis added).
[7] *See id.* at *6 (citing *3Com Corp. v. Diamond II Holdings, Inc.*, No. 3933-VCN, 2010 WL 2280734, at *7-8 (Del. Ch. May 31, 2010)).
[8] *See In re Leslie Controls, Inc.*, 437 B.R. 493, 502 (Bankr. D. Del. 2010).