

# New York Court of Appeals Restores Litigation Requirement for Common-Interest Privilege

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Mergers and Acquisitions and Litigation

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The attorney-client privilege generally is waived if a privileged communication is disclosed to a third party. The common-interest rule provides an exception to the ordinary rule of waiver, by protecting attorney-client communications that are shared with certain parties who have a common legal interest. Although a recent decision of New York's Appellate Division, First Department broadly construed the common interest rule to extend to any communication involving a legal interest common to the parties, New York's Court of Appeals reversed that ruling on June 9, 2016 in *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*,<sup>1</sup> restoring the traditional limitation that the common-interest rule protects only communications related to pending or anticipated litigation.

## The *Ambac* Decision

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**Background.** Ambac Assurance Corp., the guarantor of certain securities issued by Countrywide Home Loans, Inc. ("Countrywide"), brought suit against Countrywide and its acquirer, Bank of America Corp., as Countrywide's successor-in-interest. The defendants claimed that communications they exchanged between the signing of the merger agreement and the closing were privileged under the common-interest rule. The Appellate Division agreed, holding that such communications were protected, even if unrelated to litigation, so long as their primary purpose was "for the parties to obtain legal advice or to further a legal interest common to the parties."<sup>2</sup>

**Opinion.** The Court of Appeals reversed, declining to expand the common-interest rule beyond communications related to litigation. The court made clear that an attorney-client communication disclosed to another party remains privileged under the common-interest rule only if: (1) the parties share a common legal interest; (2) the communication was made in furtherance of that interest; and (3) the communication relates to pending or anticipated litigation.

In reaching its decision, the Court of Appeals rejected the more expansive version of the privilege adopted in certain jurisdictions, reasoning that "the policy reasons for keeping a litigation limitation on the common interest doctrine outweigh any purported justification for doing away with it . . . ." Specifically, the court found that the "difficulty of defining 'common legal

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<sup>1</sup> *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, No. 80, \_\_\_ N.E.3d \_\_\_, 2016 WL 3188989 (N.Y. June 9, 2016).

<sup>2</sup> *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 998 N.Y.S.2d 329, 334 (N.Y. App. Div. 2014), rev'd, No. 80, \_\_\_ N.E.3d \_\_\_, 2016 WL 3188989 (N.Y. June 9, 2016).

interests' outside the context of litigation could result in the loss of evidence of a wide range of communications between parties who assert common legal interests but who really have only non-legal or exclusively business interests to protect." This "loss of relevant evidence" outweighed any benefits from expanding the doctrine to communications unrelated to litigation.

## Implications for Practitioners

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- **Communications must relate to litigation to be protected.** Because a communication must relate to pending or anticipated litigation to be protected, many communications about common merger issues, such as tax planning and regulatory approval, may fall outside the protection of the common interest rule in cases governed by New York law.
- **New York's approach differs from Delaware and many federal courts.** Delaware and many federal courts have eliminated the requirement that shared communications relate to litigation. The breadth of the common interest privilege will thus vary significantly depending on governing law.
- **Many communications will still be privileged.** Even in New York, many communications between merger counterparties should remain protected under the common interest rule, including communications relating to pending or anticipated merger litigation common in transactions involving acquisitions of public companies.

## Conclusion

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Transactional advisors and litigators should be aware that, under New York law, the common-interest rule will **not** protect attorney-client communications shared with third parties, including counterparties to a merger agreement, if the communications do not relate to pending or reasonably anticipated litigation.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Mergers and Acquisitions or Litigation Practice Groups:

Kemper Diehl	+1 212 841 1203	<a href="mailto:kdiehl@cov.com">kdiehl@cov.com</a>
Mark Gimbel	+1 212 841 1161	<a href="mailto:mgimbel@cov.com">mgimbel@cov.com</a>
James Garland	+1 202 662 5337	<a href="mailto:jgarland@cov.com">jgarland@cov.com</a>
C. William Phillips	+1 212 841 1081	<a href="mailto:cphillips@cov.com">cphillips@cov.com</a>
J. D. Weinberg	+1 212 841 1037	<a href="mailto:jweinberg@cov.com">jweinberg@cov.com</a>

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