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New York Court Expands Application Of Common Interest Privilege In Case Involving M&A Transaction

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Expanding the law in New York governing the attorney client privilege, New York's intermediate appellate court held last week that anticipated or pending litigation is not a necessary prerequisite to invoking the common interest doctrine. The decision thus enlarges the "common interest" exception to the general rule that the presence of a third party destroys the privilege between an attorney and client. This ruling stands to benefit parties to mergers or other joint venture-type arrangements who share a common legal interest.

In *Ambac Assurance Corp. v. Countrywide Home Loans, Inc. et al.*, the plaintiff sought through discovery certain pre-merger communications between Countrywide and defendant Bank of America Corp., which merged in 2008. Defendants opposed the request on the ground that such communications were privileged because they shared a common legal interest with respect to the topics discussed therein, and had entered into a formal common interest agreement. In reversing the trial court's decision ordering the production of the documents, the Appellate Division for the First Department held that pending or reasonably anticipated litigation is not a necessary element of the common interest doctrine.

The court reasoned that the Countrywide and Bank of America merger "illustrate[s] precisely the reason that the common interest privilege should apply – namely, that business entities often have important legal interests to protect even without the looming specter of litigation." Quoting the U.S. Supreme Court's decision in *Upjohn Co. v. United States*, the court noted further that "advice is often sought, and rendered, precisely to avoid litigation, or facilitate compliance with the law, or simply guide a client's course of conduct" and that given "the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law..."

Although the New York Court of Appeals (New York's highest court) has not yet considered the propriety of a litigation requirement for the common interest privilege, the First Department's decision is consistent with federal case law, which has long rejected the litigation prerequisite. The court was also guided by Delaware statutory law on the common interest privilege, which does not include litigation or potential litigation as a necessary element.

In sum, *Ambac* stands as a potentially valuable tool to business entities who share a common legal interest and seek legal advice that they intend to protect from disclosure. Further, while *Ambac* was decided within the context of the Countrywide/Bank of America merger, nothing in the decision suggests that the court's holding is limited to the precise factual circumstances of that transaction. *Ambac*, however, does not change the law that in order for the attorney-client privilege to apply, the communication must be for the purpose of facilitating the rendition of legal advice. Further, companies wishing to protect their communications with counsel based on the common interest exception would be well-advised to memorialize their common interest agreement in writing, as the parties did in *Ambac*.