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MEMORANDUM

To: Our Clients and Friends

From: Stuart M. Riback
Stephen D. Hoffman

Re: Attorney-Client Privilege

Date: January 23, 2015

The Appellate Division, First Department (the New York state appellate court covering Manhattan and the Bronx) issued a very sensible and welcome ruling about attorney-client privilege last month. As a result of this ruling, it is now clear, at least in the First Department, that the "common interest" privilege applies even outside the context of litigation-related discussions. The case is *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, decided December 4, 2014.

Ordinarily, communications between an attorney and client concerning legal advice are protected by the attorney-client privilege. But if someone else besides the client is privy to the conversation, the privilege doesn't apply. The thinking is that if someone other than the attorney and client is present, that means the communication isn't really confidential. There is an exception: if the non-client in the room shares a common legal interest in the matter being discussed, the discussion is still privileged. (This is a vast oversimplification, but for purposes of understanding this new case it isn't necessary to spell out the many qualifications).

In New York, this "common interest" privilege was generally understood to apply in litigation. For example, two co-defendants with similar postures could both speak in the presence of the other's attorney without jeopardizing the attorney-client privilege. But for curious, quirky, historical reasons, the common interest exception in New York has been thought in many quarters to apply ***only*** in litigation. Of course, a huge volume of client consultations with attorneys – probably most – does not involve litigation. Clients seek attorney advice on a wide range of matters that never come close to reaching a courtroom. So the position that the common interest rule applies only if litigation is pending or apparently imminent appears to be out of step with reality.

The facts of the *Ambac* case illustrate just how odd the old rule was. In early 2008, Countrywide entered into a merger agreement with Bank of America under which Countrywide would merge into a Bank of America subsidiary. To prepare for closing, the two companies and their lawyers exchanged numerous communications to prepare for the closing. These pertained, among

other things, to the extensive regulatory compliance matters they needed to address to effectuate the merger, as well as drafting a joint proxy and registration statement.

Ambac later sued Countrywide and Bank of America. It had insured payments on certain RMBS Countrywide issued, which Ambac claimed it had been induced to do fraudulently. In its discovery requests, Ambac demanded that Bank of America produce documents reflecting its communications with Countrywide before the merger closed. It argued that the documents would show that Bank of America was on notice of the fraud even before the closing.

So here we have an instance where Countrywide and Bank of America clearly were aligned in interest. They had an agreement to merge. They were taking steps together to make sure what they were doing in the merger was legal – in fact, they ***had*** to do it together, just to make sure they were staying on the right side of the law. Remember, the purpose of the attorney-client privilege is to encourage clients to seek legal advice and speak freely in doing so. Yet under the prior rule – which the trial court adopted in *Ambac* – Bank of America and Countrywide would not have had the protection of the privilege. But they would have had that protection if the reason they were speaking to each other was a lawsuit rather than a merger.

Businesses doing transactions with other businesses need legal advice every bit as much as businesses that are aligned in lawsuits with other businesses. So the First Department's ruling makes eminent sense. It also brings the First Department into alignment with the local federal courts and with the rule in Delaware.

Bear in mind, though, that the First Department covers only Manhattan and the Bronx. Yes, that is the premier business location in the state. But almost half the state's population lives in the Second Department, which covers the rest of New York City, Long Island and several other suburban and exurban counties. The Second Department still limits the common interest rule to the context of litigation. In other words, location matters, at least for now. Presumably, at some point the New York Court of Appeals will decide the question.

If you have any questions or comments, or would like a copy of the *Ambac* case, please feel free to contact me either by telephone (212) 981-2326 or by email sriback@wilkauslander.com.

SMR