

Stuart M. Riback
Partner
(212) 981-2326
sriback@wilkauslander.com

M E M O R A N D U M

To: Our Clients and Friends

From: Stuart M. Riback

Re: New York Court of Appeals Ruling on Attorney-Client Privilege

Date: June 16, 2016

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 current purposes it isn't necessary to spell out the many qualifications). Thus, under the common interest doctrine, the attorney-client privilege can cover communications between different, separately represented persons whose legal interests are aligned – that is, if they have a common legal interest.

This month New York's highest court, the Court of Appeals, restricted the scope of the common interest doctrine. The Court of Appeals held, by a 4-2 vote, that the common interest doctrine applies only if litigation is anticipated or pending. This decision overturned a December 2014 decision by the Appellate Division, First Department (the New York appellate court that covers Manhattan and the Bronx), which held that the common interest doctrine could apply whether or not the communications related to pending or anticipated litigation. This ruling by the Court of Appeals means that New York privilege law is now definitively different from that of a number of federal circuits and a number of other states.

The case is *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, decided June 9, 2016. Countrywide had experienced severe difficulties in late 2007 and early 2008, and ultimately sold itself to Bank of America. The merger was announced in January 2008 and closed on July 1 of that year. Unsurprisingly, after the two companies signed their merger plan, they communicated extensively about a number of issues relating to implementing the merger, including regulatory filings, public disclosures, employment issues and tax matters. The merger agreement specifically directed the two companies to share privileged information, and purported to shield the information from disclosure under the "common interest" doctrine.

Ambac had insured payments on certain mortgage-backed securities Countrywide issued. Ambac later sued Countrywide and Bank of America, claiming that Countrywide had procured the insurance fraudulently and in breach of its contractual representations. 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.

The trial court refused to protect the documents from disclosure because the communications did not relate to litigation that was then either underway or in prospect. On appeal, though, the First Department held that, under the common interest doctrine, the communications were protected by the attorney client privilege even though they were between different entities – Countrywide and Bank of America – because the two companies had a common legal interest in implementing the merger. This decision put the First Department at odds with at least one other New York appellate court – the Second Department. So it was no surprise that the Court of Appeals decided to hear the case.

The Court of Appeals held that the communications were not covered by privilege because the common interest doctrine did not apply. As a result, the communications between Bank of America and Countrywide were between different parties and cannot have been confidential.

The opinion appears to have been driven by several considerations. First, the attorney-client privilege exists to foster open communication between attorneys and clients for purposes of legal advice. Companies that together are actual or potential litigants may need the assurance of confidentiality if they are to be comfortable planning legal strategy together. But in the Court's view, sharing an interest in completing a transaction does not raise such concerns, even in such a heavily regulated industry as finance. The Court did not believe transactions would fail if communications between the parties were not privileged. As the Court put it, the transacting parties' "shared interest in the transaction's completion is already an adequate incentive for exchanging information necessary to achieve that end."

The Court also was concerned that extending common interest privilege out of the litigation context would lead to abuses. It would be difficult to separate out communications on common legal interests from those primarily on business matters. Given that privilege prevents potentially relevant evidence from coming to light, the Court thought the risk of shielding potentially pertinent business evidence was too great -- and it noted that in the *Ambac* case, the allegation was that the two companies had structured their deal in order to shield Countrywide's wrongdoing from disclosure.

It is true that the attorney client privilege exists when a client seeks legal advice, even if no litigation is pending or anticipated. But that does not mean the common interest doctrine must extend just as far. As the Court explained, the common interest doctrine means that the privilege is not waived by communicating privileged information to another person who has a common legal interest. It is not itself a form of privilege.

Ambac places New York into the group of jurisdictions that take the narrow view of the common interest doctrine. Some other states and several federal circuits take the broader view (as did the dissent in *Ambac*). So whether certain kinds of communications are protected as privileged may turn on where a later lawsuit is filed, or a nuanced choice of law decisions made by judges after the fact.

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

SMR