OUTSIDE COUNSEL

New York Court of Appeals Clarifies Common Interest Doctrine

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The common interest doctrine holds that otherwise privileged attorney-client communications, exchanged between two separately represented parties or their counsel for the purpose of pursuing a joint legal strategy, are privileged from discovery by third parties. The doctrine is an exception to the general rule that conducting an attorney-client communication in the known presence of a third party, or disclosing it to a third party after the fact, destroys or waives any attorney-client privilege that might otherwise attach.

Recently, in *Ambac Assurance Corporation v. Countrywide Home Loans*,[1] the Court of Appeals held that the existence of a joint legal strategy is a necessary, but not sufficient condition, for applying the common interest doctrine. Reversing the Appellate Division, First Department, the Court of Appeals held that the existence of actual or anticipated litigation is additionally required in order for the doctrine to apply. In so holding, the Court of Appeals declined to follow several other federal and state courts that had eliminated such a requirement.

The General Rule

The attorney-client privilege attaches to communications (1) between an attorney and client (2) made in confidence (3) for the purpose of obtaining legal advice.[2] It encompasses confidential legal advice rendered by the lawyer to the client,[3] and it also applies to confidential communications with in-house counsel that are of a legal rather than business nature.[4]

Ordinarily, if such communications occur in the known presence of a third party, they are not confidential, and therefore not privileged.[5] Similarly, voluntary disclosure after the fact to a third party ordinarily destroys any confidentiality, and therefore any privilege.[6]

Exceptions to the Rule

As the Court of Appeals noted in *Ambac*, the rule that disclosure to a third party waives privilege has some well-recognized exceptions. For example, communications with, or in the presence of, someone serving as an agent of either attorney or client (such as an interpreter, a secretary, or a forensic accountant), made in order to facilitate the representation, generally will be privileged.[7]Another exception is that one attorney may represent multiple clients concerning a matter of common interest, in which case disclosure of one client's confidences in the presence of the other client remains privileged as to the rest of the world.[8]

The common interest doctrine represents a third such exception. The doctrine's origins lie in criminal law. As the Court of Appeals recognized in *People v. Osorio*, the common interest doctrine permits criminal co-defendants and their counsel to exchange confidential communications for the purpose of mounting a common defense or joint strategy, without fear of disclosure to the government or any other third party.[9] After *Osorio*, New York courts applied the common interest doctrine in civil matters as well as criminal matters.[10] Thus, both separately represented parties who have a common interest in defending against a pending or anticipated civil proceeding, and separately represented parties who have a common interest in pursuing an actual or pending civil proceeding, may assert the common interest privilege as to attorney-client-privileged communications exchanged between themselves and/or their lawyers.

Issue and Ruling in 'Ambac'

In *Ambac*, a monoline insurer, Ambac Assurance Corporation, which had guaranteed payments on certain residential mortgage backed securities issued between 2004 and 2006, alleged that the issuer of those securities, Countrywide Home Loans, had fraudulently induced Ambac to insure those payments. Ambac also sued Bank of America (BoA), alleging that BoA, which acquired Countrywide via a merger agreement in 2008, was liable for any resultant judgment.

The merger agreement required BoA and Countrywide to work together on several pre-closing issues, including employee benefit plans, state and federal taxes, and approval of the transaction by third parties and regulators. To that end, they shared legal advice from counsel in order to ensure regulatory compliance and advance their common interest in resolving legal issues necessary to complete the merger.

In response to Ambac's discovery requests, BoA withheld numerous communications between itself and Countrywide containing legal advice or communications, contending that a common interest privilege shielded such documents from discovery. The referee supervising discovery disagreed, holding that the common interest doctrine did not apply unless the parties shared a common legal interest in a potential litigation, and the Supreme Court upheld the referee's order. The First Department, however, reversed.

The First Department noted that the attorney-client privilege is not tied to the contemplation of litigation. To the contrary, the attorney-client privilege is a blanket privilege that cloaks a wide variety of attorney-client communications undertaken to further transactions where no litigation is pending or anticipated. It suffices that the client requests, or receives, advice relating to compliance with legal obligations.

The First Department noted that several other authorities that had considered the issue saw no reason to depart from this rule, and impose a litigation requirement, in order for confidential legal communications exchanged between two separately represented parties, acting in furtherance of a common legal objective, to remain privileged. For example, Restatement (Third) of Law Governing Lawyers §76 states that the common-interest privilege applies either to a "litigated or a nonlitigated matter." Several other federal courts also have so held.[11]

The rationale, as explained by the U.S. Court of Appeals for the Seventh Circuit, is that the common-interest privilege serves the same basic purpose as the attorney-client privilege: it "encourages parties with a shared legal interest to seek legal assistance in order to meet legal requirements and to plan their conduct accordingly," and therefore "serves the public interest by advancing compliance with the law, facilitating the administration of justice and averting litigation."[12]

Conceding that New York case law previously had required pending or reasonably anticipated litigation for the common-interest privilege to apply, the First Department concluded that the better policy required diverging from this approach. The scenario presented in *Ambac*, it reasoned, particularly warranted such a departure: "Two business entities, having signed a merger agreement without contemplating litigation, and having signed a confidentiality agreement, required the shared advice of counsel in order to accurately navigate the complex legal and regulatory process involved in completing the transaction."[13] The First Department concluded that recognizing a common-interest privilege in such circumstances would foster the sharing of communications that facilitated legal compliance; conversely, denying such a privilege would discourage such frank communication at the risk of encouraging unnecessary subsequent regulatory challenge or litigation because of the parties' lack of legal coordination.

Court of Appeals' Rationale

The Court of Appeals reversed the First Department. The Court of Appeals began its analysis by observing that because the attorney-client privilege prevents the discovery, and use, of evidence relevant to the truth-finding process, it must be narrowly construed. In the case before it, for example, Ambac contended that the documents withheld by BoA were relevant both to the liability issue, and to Countrywide's alleged fraud, which Ambac contended may be revealed in such documents. Given this tension between fostering certain kinds of communications freely and thwarting relevant discovery, the court reasoned that the common interest doctrine should be limited "to situations where the benefit and the necessity of shared communications are at their highest, and the potential for misuse is minimal."[14]

The Court of Appeals held that cases of pending or anticipated litigation satisfy this test because the parties need to communicate freely in order to mount a common claim or defense at a time when they fully expect to receive discovery requests from their common adversary. Thus, absent the protection of the common interest doctrine, the threat of disclosure would "chill the parties' exchange of privileged communication and therefore thwart any desire to coordinate legal strategy."[15] By contrast, a voluntary business transaction, conducted outside the shadow of litigation, does not satisfy this test because the participants' "shared interest in the transaction's completion is already an adequate incentive for exchanging information necessary to achieve that end."[16]

As support, the Court of Appeals cited the absence of evidence that mergers, licensing agreements and other complex commercial transactions occurred at any reduced rate in New York in the past 20 years due to the lack of a common interest privilege. The Countrywide-BoA transaction itself proved this point: At the time of the transaction, no New York court held that the common interest privilege protected the parties' exchanged attorney-client communications from third-party discovery in subsequent litigation, yet that did not prevent the parties from exchanging such communications to facilitate the merger.

Conflicts Analysis

As *Ambac* makes clear, the Court of Appeals' decision puts it at odds with jurisdictions that do not require existence of pending or anticipated litigation for the common interest privilege to apply to attorney-client communications between separately represented clients pursuing joint legal strategy. Thus, an issue that *Ambac* did not face, but that may well arise in the future, is whose privilege law to apply in the case of such a conflict, e.g., if a litigant in a New York action seeks attorney-client communications exchanged between parties to a merger conducted in Delaware—which unlike New York, does not impose a litigation requirement on assertion of a common interest privilege.[17]

The Second Department, however, addressed this very question in *Hyatt v. State Franchise Tax Board*.[18] *Hyatt* involved a subpoena issued to a New York entity, the U.S. Philips Corporation, in aid of a tax proceeding in California. One of the parties to the California proceeding, Gilbert Hyatt, who claimed to have resided in Nevada at the time of the relevant transactions, objected that the subpoena sought disclosure of documents he exchanged with Phillips in connection with patents he had previously licensed to Philips. The documents, he claimed, were subject to a common interest privilege.

The Second Department held that traditional interest analysis governs this issue, i.e., the "law of the jurisdiction having the greatest interest in the litigation will be applied and...the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict."[19] The Second Department concluded that since the subpoenas sought documents created in New York concerning a licensing program conducted in New York by a New York entity (i.e., Philips), New York law would determine whether a common interest privilege applied to the communications between Philips and Hyatt sought by the subpoena.

Hyatt implies that, in a proper case, interest analysis may point in the opposite direction. For example, where two separately represented parties conduct a transaction in a jurisdiction that imposes no "litigation requirement" on the common interest privilege, and exchange confidential attorney-client communications in furtherance of their common interest in the transaction in reliance on that rule, an interest analysis would support finding a common interest privilege against discovery of such communications based on the law of the other jurisdiction even though New York law itself would not recognize any such privilege.

The First Department, by contrast, has held that "the law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding, is applied when deciding privilege issues."[20] Under this rule, even if the parties believed they had a common interest privilege in exchanging attorney-client communications based upon the law of their own

forum, a New York court might deem the communications discoverable and admissible under New York law. Any conflict between this choice of law rule and the Second Department's rule in *Hyatt* must be resolved on another occasion.

Endnotes:

1. *Ambac Assur. Corp. v. Countrywide Home Loans,* Op. No. 80, 2016 WL 3188989 (N.Y. June 9, 2016).

2. *Priest v. Hennessy*, 51 N.Y.2d 62, 69 (1980).

3. *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 379 (1991).

4. *Rossi v. Blue Cross and Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 592-93 (1989).

5. *People v. Harris*, 57 N.Y.2d 335, 343 (1982).

6. *Morgan v. New York State Dept. of Envtl. Conservation*, 9 A.D.3d 586, 588 (3d Dept. 2004).

7. *People v. Osorio*, 75 N.Y.2d 80, 84 (1989).

8. *Wallace v. Wallace*, 216 N.Y. 28, 35 (1915) (citing *Hurlburt v. Hurlburt*, 128 N. Y. 420 (1891)).

9. *People v. Osorio*, 75 N.Y.2d 80, 85 (1989).

10. See, e.g., *U.S. Bank Nat. Ass'n v. APP Int'l Fin. Co.*, 33 A.D.3d 430, 431 (1st Dept. 2006); 3*30 Acquisition Co. v. Regency Sav. Bank*, 12 A.D.3d 214 (1st Dept. 2004); *Parisi v. Leppard*, 172 Misc.2d 951, 955 (Sup. Ct., Nassau Co. 1997).

11. See, e.g. *United States v. BDO Seidman*, 492 F.3d 806, 816 (7th Cir. 2007), cert. denied sub. nom*Cuillo v. U.S.*, 522 U.S. 1242 (2008); *In re Teleglobe Comms. Corp.*, 493 F.3d 345, 364 (3d Cir. 2007);*Dura Global Tech v. Magna Donnelly Corp.*, 2008 WL 2217682, at *3 (E.D. Mich. May 27, 2008).

12. *United States v. BDO Seidman*, 492 F.3d 806 at 816 (7th Cir. 2007) (internal quotation marks omitted), cited in *Ambac Assur. Corp. v. Countrywide Home Loans*, 124 A.D.3d 129, 134 (1st Dept. 2014).

13. *Ambac*, 124 A.D.3d at 136-37.

14. *Ambac*, Op. No. 80 at 14.

15. *Ambac*, Op. No. 80 at 15.

16. *Ambac*, Op. No. 80 at 16.

17. Del. R. Evid. 502(b)(3). See also *3Com Corp. v. Diamond II Holdings*, 2010 WL 2280734, at *7 (Del. Ch. May 31, 2010).

18. 105 A.D.3d 186, 962 N.Y.S.2d 282 (2d Dept. 2013).

19. 105 A.D.3d at 204 (internal quotation marks and citation omitted).

20. *JP Morgan Chase & Co. v. Indian Harbor Ins. Co.*, 98 A.D.3d 18, 25 (1st Dept. 2012). Cf. Restatement (Second) of Conflict of Laws §139(2) ("Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.").

Daniel A. Cohen is senior counsel to Walden Macht & Haran. He is the author of "New York Motion Practice Handbook & Forms" (New York Law Journal Books).