Ambac Assurance Corp. v. Countrywide Home Loans, Inc.—New York Court of Appeals Declines to Extend Common-Interest Doctrine to Merger Parties’ Pre-Closing Communications

New York’s Highest Court Reverses First Department and Holds That Common-Interest Doctrine Only Applies to Communications That Relate to Pending or Anticipated Litigation

SUMMARY
Under the common-interest doctrine, an attorney-client communication disclosed to a third party remains privileged if the third party shares a common legal interest with the client who made the communication and the communication is made in furtherance of that common legal interest. On June 9, 2016, the Court of Appeals of New York—New York’s highest court—issued Ambac Assurance Corp. v. Countrywide Home Loans, Inc., overturning a December 2014 decision of the Supreme Court of New York, First Judicial Department (“First Department”) and holding that the doctrine is limited to a common interest in pending or anticipated litigation, and other common legal interests do not qualify. In so doing, the court refused to apply the doctrine to communications by parties to a merger after the merger agreement was signed but before closing. The court acknowledged that the Restatement and “some federal courts of appeals have eliminated the common law requirement that shared communications relate to pending or anticipated litigation,” but it declined to follow those views. Recognizing that New York courts had articulated a litigation requirement for over two decades, the court saw no need to expand the doctrine, concluding that transactional parties already have ample incentive to share information.
Ambac clarifies that New York’s common-interest doctrine applies only to communications related to pending or anticipated litigation, and that the doctrine likely will not apply in the case of other legal common interests, including, as was the case in Ambac, a host of common pre-closing communications between merger parties (e.g., communications related to disclosures and regulatory compliance). Nevertheless, Ambac leaves unanswered a number of important questions, including when New York’s common-interest doctrine will apply (as opposed to less restrictive versions of the doctrine adopted in some other jurisdictions) and when a communication qualifies as being related to pending or anticipated litigation. Because privilege determinations are often highly context-specific, we encourage transacting parties to consult with their counsel as to the applicability of privilege to their circumstances.

BACKGROUND
Ambac arises from a lawsuit in the Commercial Division of the Supreme Court of New York, New York County, by Ambac Assurance Corporation, a financial-guaranty insurer, against Countrywide Home Loans, Inc. and certain affiliates and Bank of America Corp. In that suit, Ambac alleged that Countrywide fraudulently induced it to insure payments on residential mortgage-backed securities from 2004 through 2006. Ambac claimed that Bank of America, which merged with Countrywide in 2008, was liable for Countrywide’s conduct as its successor-in-interest.

In connection with its successor liability claims, Ambac sought disclosure of several hundred documents reflecting communications between Bank of America and Countrywide and their counsel following their entry into a merger agreement in January 2008 until the close of the merger in July 2008. Bank of America resisted disclosure, arguing that the documents were protected under the common-interest doctrine and were shared by the parties “to ensure their accurate compliance with the law and to advance their common legal interests in resolving the many legal issues necessary for successful completion of the merger.” A special master subsequently ordered production of the documents and the Commercial Division Justice denied Bank of America’s motion to vacate the order, reasoning that there must be “a reasonable anticipation of litigation for the common-interest doctrine to apply” and none was present here. Bank of America appealed.

On December 4, 2014, the First Department reversed, holding that “pending or reasonably anticipated litigation is not a necessary element of the common-interest privilege.” Although recognizing that other New York courts had applied a pending-or-prospective-litigation requirement (but the Court of Appeals had not addressed the issue), the First Department found the requirement inconsistent with the purposes of the attorney-client privilege and with the weight of authority. The court observed that the purpose of the attorney-client privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice,” a purpose that applies equally in both litigation and non-litigation contexts. 

"[A]dvice is often
sought, and rendered, precisely to avoid litigation, or facilitate compliance with the law, or simply to guide a client’s course of conduct.8

The court held that the doctrine could apply to pre-closing communications between Bank of America and Countrywide and their counsel because the communications between the parties included advice of counsel to one or both parties exchanged in furtherance of a common legal interest “to accurately navigate the complex legal and regulatory process involved in completing the transaction.”9 The First Department subsequently granted Ambac leave to appeal to the Court of Appeals.10

THE COURT OF APPEALS’ DECISION

On June 9, 2016, the Court of Appeals reversed, holding that, “as the courts in New York have held for over two decades,” a communication must “relate to litigation, either pending or anticipated,” for the common-interest doctrine to apply.11 Writing for a majority of the court, Judge Eugene F. Pigott, Jr. explained that the common-interest doctrine is not coextensive with the attorney-client privilege but rather a “distinct, exception to the general rule that the presence of a third party destroys any claim of privilege.”12 The doctrine originated in the criminal law, allowing criminal co-defendants to share confidential information about defense strategy.13 Over time, New York courts applied the doctrine to both criminal and civil matters, including to communications of co-plaintiffs and co-defendants.14 Prior to the First Department’s decision in Ambac, however, New York courts had “uniformly rejected efforts to expand the common-interest doctrine to communications that do not concern pending or reasonably anticipated litigation.”15

Although recognizing that the Restatement, Delaware, and some federal courts of appeal have concluded that the common-interest doctrine applies outside a litigation context, the Court of Appeals declined to follow suit.16 The court’s rationale for a litigation requirement was rooted in policy. The court reasoned that “[w]hen two or more parties are engaged in or reasonably anticipate litigation in which they share a common legal interest, the threat of mandatory disclosure may chill the parties’ exchange of privileged information and therefore thwart any desire to coordinate legal strategy.”17 In those situations, the court reasoned, the common-interest doctrine “promotes candor that may otherwise have been inhibited.”18

The court concluded that the same considerations are not present when parties share a common legal interest in a commercial transaction but do not reasonably anticipate litigation.19 As support, the court noted that corporate transactions had flourished in New York even though New York courts had recognized a litigation requirement in the common-interest doctrine for decades.20 The court concluded that the costs of an expanded doctrine—“the substantial loss of relevant evidence, as well as the potential for abuse”21—outweighed the benefits and supported its decision to “maintain the narrow construction that New York courts have traditionally applied.”22
Judge Jenny Rivera filed a dissenting opinion. Judge Rivera would have expanded the common-interest doctrine to situations like *Ambac* consistent with decisions in other jurisdictions that hold that the disclosure of privileged advice in furtherance of a common legal interest does not waive the privilege. Judge Rivera argued that "important interests [are] served by the free flow of information between parties with a common legal interest, even without the threat of litigation."^23

**IMPLICATIONS**

The Court of Appeals’ decision clarifies the elements of New York’s common-interest doctrine. Now, under New York law, an attorney-client communication made in the presence of or disclosed to a third party represented by separate counsel will remain privileged only if (1) the third party shares a common legal interest with the client who made the communication, (2) the communication is made in furtherance of that common legal interest, and (3) the communication relates to pending or anticipated litigation.^24

Under *Ambac*, the doctrine likely will not apply in other settings where parties share non-litigation-related common legal interests, including what had been routine pre-closing communications between merger parties, such as those at issue in *Ambac*: filing disclosures, securing regulatory approvals, reviewing contractual obligations to third parties, maintaining employee benefit plans, and obtaining legal advice on tax consequences.^25

While the court in *Ambac* narrowed the scope of the common-interest privilege (as compared to the First Department’s ruling), it did note that New York recognizes at least two separate, distinct exceptions to the general rule of third-party waiver:

- **When a third party’s presence “is deemed necessary to enable the attorney-client communication and the client has a reasonable expectation of confidentiality.”**^26 The federal courts have likewise long generally accepted that translators and, in some cases, accountants and other experts necessary to facilitate the rendition of legal advice (but not hired to render, for example, accounting services to the clients) do not destroy the privilege.

- **“[W]hen one attorney represents multiple clients concerning a matter of common interest.”**^27 *Ambac* makes clear that, in this situation, there is no requirement that a communication relate to pending or anticipated litigation for a communication to remain privileged. “In the joint client or co-client setting... the clients indisputably share a complete alignment of interests in order for the attorney, ethically, to represent both parties. Accordingly, there is no question that the clients share a common identity and all joint communications will be in furtherance of that joint representation.”^28

While *Ambac* establishes the elements of New York’s common-interest doctrine, it also leaves a number of open issues:

- ***Ambac* is a decision by New York’s highest court, and thus is a definitive statement of the common-interest doctrine under New York law. *Ambac* recognizes, however, that a number of federal courts (including the Third Circuit, Seventh Circuit, and Federal Circuit) and some states (including Delaware) have declined to impose any litigation requirement in connection with the common-interest doctrine.**^29 State law applies in federal diversity cases (except where the proof is directed to an issue that is governed by federal law).^30 To determine which state’s law of privilege applies, a court must apply the choice-of-law rules prevailing in the state in which the court sits,^31 which often involves an
analysis of the contacts of the communication with the state in question. New York’s common-interest doctrine will thus apply in diversity cases only if the forum state’s choice-of-law principles so dictate. Given this complexity, transaction parties considering sharing communications that implicate common-interest doctrine issues might wish to be conservative and assume that New York’s restrictive approach potentially might apply in any situation in which that is a plausible possibility.

- **Ambac** expressly declines to decide “what it means to share common legal interests in pending or anticipated litigation.” The court held “only that such litigation must be ongoing or reasonably anticipated, and the exchanged communication must relate to it, in order for the common interest exception to apply.” This language is very similar to the articulation of the attorney work-product doctrine (a separate doctrine that protects from disclosure certain materials “prepared in anticipation of litigation or for trial”), which in New York requires that the material has been “prepared primarily if not solely for litigation,” not “in the ordinary course of business” or “to aid defendant in the operation of its business.” In a transactional setting, some federal courts have found the common-interest doctrine applicable when the parties are likely to be involved in “joint anticipated litigation” after the closing of the transaction. For example, one court applied the doctrine to the sharing of a patent opinion letter where “the odds were quite strong” that both buyer and seller would be defending the same patent in post-closing litigation, but refused to apply it to the pre-closing exchange of abstracts summarizing one party’s pending litigation because “there appears little to indicate that [the parties] might ever engage in joint litigation.”

- **Ambac** does not address who retains control over pre-merger communications protected by the common-interest privilege after the close of the merger. The general rule is that rights to privileged communications pass to the purchaser upon the close of a merger. The seller thus risks losing any control over communications subject to the common-interest privilege after the close of the merger. Delaware courts have held that parties to a merger agreement can agree to limit the purchaser’s post-merger rights to certain privileged communications, and selling parties might wish to carefully delineate those rights even in the absence of specific guidance from New York courts.

- Even under New York’s now-limited version of the common-interest doctrine, questions of whether the doctrine can apply, or if it applies to particular documents, are necessarily context-specific, and transaction parties should consult counsel for specific advice. Taking certain steps might be helpful in preserving the ability to invoke the common-interest doctrine, including:
  - **Contemporaneous documentation.** Contemporaneous documentation of the basis for the common-interest privilege and the parties’ intent to preserve it can often be more persuasive to courts than explanations provided after the privileged communications have been shared.
  - **Confidentiality.** Communications are generally not privileged unless kept confidential between the attorney and client. Transaction parties might bolster their ability to invoke the common-interest doctrine by such measures as executing confidentiality agreements, limiting the individuals receiving the communications to those strictly necessary in connection with the litigation or anticipated litigation, placing time limits on the ability to access the communications, and placing constraints on distribution (e.g., prohibiting copying or forwarding of the communications, or requiring that the privileged communications be reviewed in a facility with limited access).

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• Limitation to common legal interests. Courts addressing the common-interest doctrine frequently assess whether the interest being furthered was a “legal” or “business” interest, and have held that merely furthering common business interests does not invoke the protections of the doctrine. Under Ambac, the doctrine is limited to a common interest in pending or anticipated litigation, which will typically qualify as a legal interest. Even so, transaction parties might strengthen their common-interest privilege claims by contemporaneously documenting the legal interest that is to be furthered (including identifying the litigation or anticipated litigation), by advising transaction participants to segregate their privileged communications from more general business communications, and by limiting those privy to the privileged communications to counsel and others necessary to furthering the common legal interest.

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Ambac Assurance Corp. v. Countrywide Home Loans, Inc. (Ambac III), No. 80, slip op. at 2 (N.Y. June 9, 2016).


Ambac III, No. 80, slip op. at 20-21.

Ambac Assurance Corp. v. Countrywide Home Loans, Inc. (Ambac II), Index No. 651612/10, slip op. at 4 (1st Dep’t Dec. 4, 2014).


Ambac II, Index No. 651612/10, slip op. at 2.

Id. at 7 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

Id. at 7-8 (quoting Spectrum Sys. Int’l Corp. v. Chem. Bank, 78 N.Y.2d 371, 380 (1991)).

Id. at 14.

Ambac III, No. 80, slip op. at 7.

Id. at 2.

Id. at 8-9 (emphasis in original).

Id. at 10.

Id. at 13.

Id. (citing cases).

Id. at 20 (citing Restatement (Third) of the Law Governing Lawyers § 76(1) (1997); In re Teleglobe Commc’ns Corp., 493 F.3d 345, 364 (3d Cir. 2007); United States v. Seidman, LLP, 492 F.3d 806, 816 (7th Cir. 2007); In re Regents of the Univ. of Cal., 101 F.3d 1386, 1390-91 (Fed. Cir. 1996)); see also id. at 11-12 n.2 (citing Del. R. Evid. 502(b)(3)).

Id. at 15.

Id.

Id.

Id. at 15-16.

Id. at 16-17.

Id. at 22.

Id. at 6 (Rivera, J. dissenting).

Ambac III, No. 80, slip op. at 1-2.

Id. at 3-4.

Id. at 9.

Id.

Id. at 19.

Id. at 20-21 & 11-12 n.2.

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ENDNOTES (CONTINUED)


32 Ambac III, No. 80, slip. op. at 18-19 n.4.

33 Id.

34 NY CPLR 3101(d).


38 Nidec Corp. v. Victor Co. of Japan, 249 F.R.D. 575, 579 (N.D. Cal. 2007).


40 See Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155, 161 (Del. Ch. 2013) (advising parties “to use their contractual freedom . . . to exclude from the transferred assets the attorney-client communications they wish to retain as their own”).

41 See, e.g., Tenneco Packaging Specialty & Consumer Prods., Inc. v. S.C. Johnson & Son, Inc., 1999 WL 754748, at *2 (N.D. Ill. Sept. 14, 1999) (upholding assertion of common-interest privilege where disclosing party “took substantial steps to ensure that the opinion would remain confidential,” including disclosing the privileged communication only to a limited number of individuals, each of whom agreed to abide by the confidentiality agreement).
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