
Protecting Privileged Communications Shared Between Transaction Parties

By William E. Sigler

Parties to a merger or similar transaction frequently need to provide information to another party in order to navigate a legal or regulatory process required to close the transaction. However, it is generally not the party's intent to waive privilege and potentially have to disclose that information to other parties.

The "common interest privilege" has a simple function. It extends the attorney-client privilege and, in some jurisdictions, attorney work-product protection beyond an attorney and his or her client to a third party. The privilege generally allows persons who have common interests to coordinate their positions without destroying the privileged status of their communications with their lawyers.

Recent Case

The common-interest privilege was recently the subject of litigation in *Ambac Assurance Corp. v Countrywide Home Loans, Inc.*, Index No. 651612/10 (1st Dep't Dec. 4, 2014). *Ambac* was a financial-guaranty insurer who alleged in the lawsuit that Countrywide fraudulently induced it to insure payments on residential mortgage-backed securities. Countrywide had merged into Bank of America, and *Ambac* sought disclosure of communications between Bank of America and Countrywide. Bank of America resisted disclosure, arguing that the documents were protected by the common-interest privilege, 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."

Court's Decision

A special master had ordered production of the documents on the basis that there must be a "reasonable anticipation of litigation for the common-interest doctrine to apply." The court reversed holding that "pending or reasonably anticipated litigation is not a necessary element of the common-interest privilege." 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.

Applying these principles to the communications sought by *Ambac*, the court held that the common-interest privilege could apply to pre-closing communications between Bank of America, Countrywide and their counsel because of the existence of signed merger and confidentiality agreements and the need for shared advice of counsel “in order to accurately navigate the complex legal and regulatory process involved in completing the transaction.”

Lessons to be Learned

Ambac does not address whether the common-interest privilege can apply to communications shared prior to the execution of a merger or a similar agreement or to communications shared with persons other than the transaction parties and their counsel, such as investment bankers. Thus, caution should be exercised in determining with whom privileged communications should be shared. There should be appropriate merger and confidentiality agreements in place, and the confidentiality agreements should limit the individuals receiving the communications to those strictly necessary, place time limits on their ability to access the communications, and constraints on with whom the communications may be shared.

The court also noted that the common-interest privilege does not apply to “advice of a predominantly business nature.” Thus, the parties should document the legal interest to be furthered by the communications being exchanged and segregate privileged communications from more general business communications.