# First Department: Common Interest Privilege Does Not Require Pending Litigation or Reasonable Anticipation of Litigation

In *Ambac Assurance Corp.* v. *Countrywide Home Loans, Inc.*, the Appellate Division, First Department of New York's Supreme Court held that "pending or reasonably anticipated litigation is not a necessary element of the common-interest privilege." The common-interest privilege "is an exception to the rule that the presence of a third party at a communication between counsel and client will render the communication non-confidential" and not privileged.[1] The decision is precedential for litigation pending in New York's First Department, which covers New York and Bronx counties.

## I. Background

On July 1, 2008, Countrywide Financial Corporation, a subsidiary of Countrywide Home Loans, Inc., merged with a subsidiary of Bank of America Corporation. In connection with that merger, the parties exchanged information and material that "was subject to confidentiality provisions and a common interest agreement." In 2010, Ambac Assurance Corporation sued Countrywide and Bank of America in connection with Ambac's provision of insurance for certain structured finance securities prior to the merger. In discovery, Ambac sought certain of the information and material exchanged between Countrywide and Bank of America during their merger discussions that purportedly bore on Ambac's allegations. Countrywide and Bank of America declined production, asserting the common-interest privilege. Ambac disagreed, arguing that because the parties did not anticipate litigation in connection with the merger at the time they entered into the common interest agreement, the common-interest privilege did not attach and did not protect their communications.[2]

The Supreme Court agreed with Ambac, holding that "New York law requires pending or reasonably anticipated litigation in order for the common interest doctrine to apply." A panel of the First Department unanimously reversed.[3]

## II. First Department Rejects Need for "Pending or Reasonably Anticipated Litigation" for the Common Interest Privilege to Apply

The attorney-client privilege is the oldest among common-law evidentiary privileges. Its purpose "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."[4] For the attorney-client privilege to apply, a party does not need to be facing pending litigation or reasonably anticipate litigation. This is because "advice 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."[5]

The common-interest privilege "is an exception to the rule that the presence of a third party at a communication between counsel and [their] client will render the communication non-confidential." This "limited

---

1 2014 WL 6803006, at *1-*2 (1st Dep't Dec. 4, 2014), *also available at* http://www.nycourts.gov/reporter/3dseries/2014/2014_08510.htm.

2 *Id.*

3 *Id.* at *2, *6.

4 *Id.* at *2 (quoting *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981) (internal quotation marks omitted).

5 *Id.* at *3 (citation and internal quotation marks omitted).

exception" requires that "the communication qualify for protection under the attorney-client privilege" and that it "be made for the purpose of furthering a legal interest or strategy common to the parties." New York's highest court has not yet weighed in on whether litigation must be pending or reasonably anticipated, but other lower courts in New York (including the Appellate Division, Second Department) have held that litigation must be pending or reasonably anticipated.[6]

In departing from the Second Department, the First Department held that "the better policy requires that [it] diverge from this approach." Because the attorney-client privilege itself does not require pending or reasonably-anticipated litigation to apply, nor should the common-interest privilege. Recognizing that outside of New York state, the "weight" of jurisdictions does not require this additional element, the First Department held that "[s]o long as the primary or predominant purpose for the communication with counsel is for the parties to obtain legal advice or to further a legal interest common to the parties, and not to obtain advice of a predominantly business nature, the communication will remain privileged."[7] This broad rule "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."[8]

## III. Consistent with Federal Precedents and Delaware Law

The First Department noted that its decision is in line with that of most federal courts: those "federal courts that have addressed the issue have overwhelmingly rejected" the requirement of pending or reasonably-anticipated litigation, including the United States Court of Appeals for the Second Circuit, whose authority is binding over all the lower federal courts in New York, Connecticut, and Vermont.[9]

The approach is also consistent with Delaware law, which "has codified the common-interest privilege, extending the attorney-client privilege to certain communications by their clients, their representatives or their lawyers to a lawyer 'representing another in a matter of common interest.'" In other words, in Delaware "disclosure may be confidential even when made between lawyers representing different clients if those clients have a common interest – that is, an interest that is 'so parallel and non-adverse that, at least with respect to the transaction involved, they may be regarded as acting as joint venturers.'"[10]

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Guillaume Buell at 212.701.3012 or gbuell@cahill.com.

---

6 *Id.* at *3, *4 (citation omitted).

7 *Id.* at *4, *5.

8 *Id.* at *3 (citation and internal quotation marks omitted).

9 *Id.*

10 *Id.* at *6 (citations omitted).