One Year After Ambac: Sharing Information Among Deal Parties

Law360, New York (June 9, 2017, 1:54 PM ET) –

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On June 9, 2016, the New York Court of Appeals issued its decision in Ambac Assurance Corp. v. Countrywide Home Loans Inc.[1] and held that the common interest doctrine protects only communications among deal parties that are related to a shared legal interest in pending or reasonably anticipated litigation. The court justified its decision as adhering to long-standing New York precedent, which had traditionally limited the doctrine's application to litigation-related communications.[2]

Ironically, this decision to stick with precedent only created more confusion by deepening the divide between what the Court of Appeals characterized as "the New York approach" to the common interest doctrine and the interpretation applied by other courts, which required pending or reasonably anticipated litigation, and the interpretation applied by other courts, which have accepted a more liberal interpretation of the common interest doctrine. Indeed, many had expected the court to follow the lower court's decision in Ambac, which had held elimination of the litigation requirement was "the better policy."[3]

Despite all the attention Ambac has received in the legal press, so far it has not sparked a trend outside of New York toward a narrower application of the common interest doctrine. But one year after the court's decision in Ambac, one thing remains clear: parties should proceed with caution before sharing privileged information with an opposing party in a transaction. As Ambac illustrated, the contours of the common interest privilege are far from settled.

Protected Communications

Ordinarily, confidential communications between attorney and client are protected from disclosure to third parties under the attorney-client privilege. This protection can be lost, however, if a communication is disclosed to someone outside the attorney-client relationship.

The common legal interest doctrine provides an exception to this rule. It permits parties represented by separate counsel, but nonetheless sharing a common legal interest, to communicate regarding that legal issue without waiving the attorney-client privilege.

The doctrine presents a tantalizing option — parties can communicate shared legal concerns without fear of being exposed in subsequent litigation. Nonetheless, parties should proceed cautiously, as the strength of the doctrine's protection will depend on: (1) the subject of the communication, (2) the persons making the communication, (3) the parties' relationship at the time of the communication and (4) the jurisdiction in which the privilege will be assessed.

Subject of the Communication

When determining if a communication is entitled to the doctrine's protection, courts will examine the subject matter of the communication. Courts generally agree that communications regarding a shared threat of litigation are protected. But, as Ambac illustrated, courts are divided as to whether the privilege protects communications absent such a threat. Thus, while New York will not protect communications between parties who share only a common legal interest in a commercial transaction, the federal courts may protect those very same communications. Compare Ambac[4] with Schaeffler v. United States[5] (applying common interest doctrine even where parties did not anticipate litigation).

As a result, communications between deal parties relating to a common defense against specific threatened shareholder lawsuits or government investigations will likely have stronger claims to the privilege than communications regarding regulatory disclosures or the interpretation of labor and employment contracts, even though such issues raise a general concern about litigation.

Given that communications regarding expected litigation are more assured of protection, parties may be tempted to brand nearly all of a deal's joint legal concerns as "anticipated litigation." But that strategy may have unintended negative consequences, including:

- unnerving the other party by unduly emphasizing the threat of litigation;
- triggering disclosure obligations to shareholders, who may use that disclosure as grounds to oppose the deal; or
- exposing both parties to disruptive and expensive document retention obligations.

Persons Making the Communication

Communications between nonlawyers are more likely to be viewed as nonlegal, business communications and, therefore, less likely to be protected by the doctrine than communications between attorneys. Once again, however, courts disagree on whether the doctrine only protects communications between parties' lawyers or extends to nonlawyers communicating on behalf of counsel. Compare Gucci America Inc. v. Gucci[6] (if privileged information is shared between parties that have a common legal interest, "the privilege is not forfeited even though no attorney either creates or received that communication") with Federal Trade Commission v. Abbvie[7] ("The doctrine applies only where attorneys, not the clients, share the information."). The safer course is to communicate through counsel to the extent practical or (if nonlawyers must make the communication) make clear that the communication is at the request of the company's lawyers and limit the distribution of the communication to a small group on a need-to-know basis.

Parties' Relationship at Time of Communication

The timing of the communication is also crucial. Before parties sign a merger agreement, communications regarding due diligence are likely not protected because the parties' interests are still adverse. See In re JP Morgan Chase & Co. Securities Litigation.[8] In contrast, communications after an agreement has been signed, when the parties' interests have aligned, are more likely to be protected, particularly in those jurisdictions that do not require pending or anticipated litigation.[9] Thus, parties should not share sensitive information until their legal interests have sufficiently aligned.

Jurisdiction in Which Privilege Will Be Assessed

As noted above, courts have adopted varying interpretations of the common interest doctrine. So perhaps the biggest factor in determining whether the communication will be protected is the court in which it will be examined. Several states have limited the doctrine's application to litigation-related communications either through statute (e.g., Maine, New Hampshire, Oklahoma and Texas) or through the courts (e.g., Connecticut, Florida, New Jersey, New York and Virginia). In contrast, Delaware protects communications from disclosure regardless of whether litigation is pending or anticipated.[10] Parties are advised to investigate which law will govern the common interest analysis and tailor their communications to meet that jurisdiction's requirements.

Conclusion

The common interest doctrine can protect privileged information shared in a transaction, but it is a tool that should be used thoughtfully — especially considering that a uniform interpretation of the doctrine is unlikely to emerge anytime soon. Parties may best protect themselves by being mindful of the factors noted above.

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[1] Ambac Assurance Corp. v. Countrywide Home Loans Inc., 27 N.Y.3d 616, 628 (N.Y. 2016)

[2] Id.

[3] Ambac Assurance Corp. v. Countrywide Home Loans Inc., 124 A.D.3d 129, 135 (N.Y. App. Div. 2014)

[4] Ambac, 27 N.Y.3d at 628

[5] Schaeffler v. United States, 806 F.3d 34, 40 (2d Cir. 2015)

[6] Gucci America Inc. v. Gucci, 2008 WL 5251989 (S.D.N.Y. Dec. 15, 2008)

[7] Fed. Trade Comm'n v. Abbvie Inc., No. CV 14-5151, 2015 WL 8623076, at *3 (E.D. Pa. Dec. 14, 2015)

[8] In re JP Morgan Chase & Co. Securities Litigation, No. 06 C 4674, 2007 WL 2363311, at *5 (N.D. Ill. Aug. 13, 2007)

[9] Id.

[10] DEL. R. EVID. 502.