Client Alert

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The Common Interest Doctrine Is Limited in New York

In New York, does the common interest doctrine require a pending or anticipated litigation?

This month, New York's Court of Appeals, in *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.,* answered this question in the affirmative. The court held that communications among those with a common legal interest will be protected as privileged *only* if the following requirements are met: (1) the communications must relate to *pending* or *anticipated* litigation; (2) the parties involved in the communication must share a common legal interest; (3) the communication must have been sent in furtherance of the common interest; and (4) the communication must be otherwise qualified as privileged (*e.g.*, is sent by counsel for the purpose of providing legal advice).

The requirement that the communication relate to pending or anticipated litigation had been put into doubt by the First Department in the *Ambac* case. In that litigation, a plaintiff sought the production of certain attorney communications sent between defendants Bank of America and Countrywide Financial Corp. while these entities were in the process of merging. The defendants objected based on the common interest doctrine. Plaintiff argued that the doctrine did not apply because defendants' common interest related to transactional issues, not pending or anticipated litigation. The First Department held the common interest doctrine applied even though the communications did not relate to litigation. In doing so, the First Department broke with earlier New York precedent and followed a more recent trend in state and federal courts that applied the common interest doctrine in transactional settings.

The First Department's decision, however, was appealed to New York's highest court and reversed. Rejecting the more liberal approach, the Court of Appeals reaffirmed that the application of the common interest doctrine must be limited to communications sent relating to pending or anticipated litigation. 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. In that situation, the common interest doctrine promotes candor that may otherwise have been inhibited. The same cannot be said of clients who share a common legal interest in a commercial transaction or other common problem but do not reasonably anticipate litigation." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.* 2016 NY Slip Op 04439 (2016).

In light of this holding, in-house counsel, as well as individuals negotiating deals, should be aware that, to the extent New York law applies, transactional communications among multiple parties relating to legal concerns could find their way into the hands of plaintiffs or regulators regardless of whether the communications involve attorneys.

If you have any questions about the common interest doctrine or about Leader & Berkon's commercial litigation practice, please feel free to contact us.