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NY High Court's Ambac Decision Causes Litigation Confusion

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On June 9, 2016, the New York Court of Appeals issued its split decision in Ambac Assurance Corp. v. Countrywide Home Loans Inc., limiting the common interest privilege to protect only communications that relate to a common legal interest in a pending or reasonably anticipated litigation.[1]


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As explained in the dissenting opinion authored by Judge Jenny Rivera, the majority's decision conflicts with the law of many jurisdictions, including many federal courts, that have declined to impose a litigation requirement for the common interest privilege.[2] This inconsistency creates significant uncertainties for commercial actors that may find themselves in subsequent litigation. Given the choice of law rules applied by the courts, parties will be unable to confidently predict, at the time they must determine whether to share information, which jurisdiction's privilege rules will apply in any future challenge to the privileged nature of a communication. While commercial parties can take steps to increase the likelihood that their common interest communications will remain privileged, the uncertainty as to the applicable law means that parties need to carefully weigh the benefits and risks of sharing privileged information absent a common legal interest in a pending or anticipated litigation.

The Application of Ambac in Federal Courts Will Depend on the Particular Claims Asserted

In federal courts, the privilege law that applies depends on the manner in which the plaintiff has cast its claims. Federal privilege rules govern where federal claims are at issue.[3] However, in diversity cases asserting state law claims, state privilege law governs.[4] When both federal and state claims are asserted, courts have generally held that federal privilege rules govern, though some courts have applied state privilege law in federal question cases where the materials at issue could be relevant only to the pendent state law claims.[5]

Of course, at the time they engage in common interest communications, parties to a merger or other commercial transaction will not know whether a potential plaintiff might in the future bring federal claims, state claims or both. Thus, the parties will have no way of knowing whether a federal court will apply the restrictive Ambac rule or the more expansive federal interpretation of the common interest privilege. As a result, these commercial actors will be unable to accurately assess whether a particular communication will be protected and, therefore, will have a difficult time intelligently deciding whether to share information.

Additional Choice of Law Uncertainties

Even where state law will govern the privilege inquiry, the question of which state's law will apply is itself a fact-specific inquiry that is often difficult to predict in advance of litigation. New York courts, and federal courts applying New York law, generally apply the law of the state with the most significant interest in the dispute.[6] With respect to privilege issues, this generally leads to the application of the law of the jurisdiction in which the communications at issue were made.[7] While such a rule is easily applied where all the activity occurred in one jurisdiction, that is often not the case in complex commercial transactions, creating additional uncertainty as to whether the Ambac rule might apply in a future litigation.

One possibility for clients seeking to avoid New York's restrictive view of the common interest privilege is to enter into a common interest agreement with a choice of law clause that provides for the more favorable law of a different jurisdiction, such as Delaware, to govern. While such a common interest agreement should be helpful in establishing the parties' expectation at the time they made the communications at issue, it remains to be seen whether a New York court would enforce the agreement where New York law would otherwise apply and where the future adversary was not itself a party to the agreement.[8] At this point, courts have not yet addressed whether Ambac will apply in such circumstances. Until they do, commercial parties will continue to face uncertainty as to whether and how they may obtain protection for privileged materials that they desire to share.

Dealing with the Uncertainty

While many commercial actors would like the broadest possible protection for privileged communications, most value certainty even more. The Court of Appeals' Ambac decision advances neither interest. In some cases, clients may be able to attain privilege protection and certainty by engaging joint counsel to advise both of the common interest parties on matters that fall within the scope of their common interest.[9] But joint representation may not be feasible where the parties desire to receive advice from their own, independent counsel. In these cases, clients must use caution when sharing information to further a common legal interest unrelated to a pending or anticipated litigation, because, despite their best efforts, it is uncertain whether their otherwise privileged communications could end up being disclosed to a future adversary. Finally, because Ambac restricts the common interest privilege only where litigation is neither pending nor reasonably anticipated, parties should endeavor to articulate, ideally in a written common interest agreement, any litigation or investigation, pending or anticipated, to which their common legal interest relates. Doing so should increase the chances that, even under the Ambac rule, a court will later find the common interest privilege applicable.

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[1] __ N.E.3d __, 2016 WL 3188989 (2016).

[2] Ambac, dissenting slip op. at 5-6; see Schaeffler v. United States, 806 F.3d 34, 40 (2d Cir. 2015); In re Teleglobe Commc'ns Corp., 493 F.3d 345, 364 (3d Cir. 2007); United States v. BDO Seidman, LLP, 492 F.3d 806, 816 (7th Cir. 2007); United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987), aff'd in part, vacated in part on other grounds, 491 U.S. 554 (1989); In re Regents of Univ. of California, 101 F.3d 1386, 1390-91 (Fed. Cir. 1996); Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 449 Mass. 609, 616-17 (2007); S.F. Pac. Gold Corp. v. United Nuclear Corp., 143 N.M. 215, 222 (N.M. Ct. App. 2007); D.R.E. 502(b).

[3] Fed. R. Evid. 501.

[4] Id.

[5] See Agster v. Maricopa County, 422 F.3d 836, 839 (9th Cir. 2005); Hancock v. Hobbs, 967 F.2d 462, 466-67 (11th Cir. 1992); von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 141 (2d Cir. 1987); Wm. T. Thompson Co. v. General Nutrition Corp., 671 F.2d 100, 104 (3d Cir. 1982); Lego v. Stratos Lightwave Inc., 224 F.R.D. 576, 578-81 (S.D.N.Y. 2004).

[6] See Lego, 224 F.R.D. at 578-79.

[7] See id. at 579; Delta Fin. Corp. v. Morrison, 13 Misc. 3d 1229(A) (Sup. Ct., Nassau Cty. 2006).

[8] See Cap Gemini Ernst & Young U.S. LLC v. Nackel, 346 F.3d 360, 365 (2d Cir. 2003) (although New York courts generally "defer to the choice of law made by the parties to a contract ... New York law allows a court to disregard the parties' choice when the most significant contacts with the matter in dispute are in another state" (internal quotation omitted)); Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's London, 176 Misc. 2d 605, 613 (Sup. Ct., N.Y. Cty. 1998) (a common interest agreement "cannot create a privilege that otherwise does not exist," because "[a] private agreement by the parties to protect communications cannot create a privilege"), aff'd, 263 A.D.2d 367 (1st Dep't 1999).

[9] See Ambac, slip op. at19 (noting that communications involving jointly represented clients will remain privileged).
