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Expert Analysis

Judge Gets Common Interest Privilege Spot-On!

By
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While judges often make rulings on the attorney-client privilege and work product doctrine that are wide of the mark,[1] every so often they get one spot-on.[2] Happily, New York's Appellate Division, First Department (per Judge Karla Moskowitz), recently did just that.

Back to the Future

In *Ambac Assurance Corp. v. Countrywide Home Loans*,[3] Moskowitz reversed an order of New York County's Supreme Court which held that documents relating to a merger between entities of the Bank of America and Countrywide Financial Corp. were not protected from disclosure by the "common interest" privilege.

The "common interest" privilege is not a privilege that stands apart from the attorney-client privilege. Rather, it is an exception to the basic principle that privileged communications with counsel are waived when disclosed to a third party.[4] As recognized by the U.S. Court of Appeals for the Second Circuit, the "common interest" privilege "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel."[5]

New York licensed lawyers attempting to invoke this privilege have traditionally faced an unclear state of affairs. When does the privilege attach? Although the Second Circuit has made clear it is not required that an "actual litigation [be] in progress for the common interest rule of the attorney-client privilege to apply,"[6] various New York courts have also ruled that the privilege was "limited to where the parties reasonably anticipate, or are currently engaged in litigation."[7]

In *Ambac*, that company charged Countrywide with having fraudulently induced it to insure certain RMBS (residential mortgage backed securities) transactions; Ambac also alleged that the Bank of America should be secondarily liable because of a merger between Bank of America and Countrywide entities. Before the two entities entered into the merger, they executed (inter alia) a common interest agreement. One of the benefits of that agreement was it allowed both entities to share legal advice in order to comply fully with the complex legal and regulatory requirements attendant to the merger.

In the ensuing litigation, Ambac sought discovery of hundreds of documents containing this legal advice, contending they were not only directly relevant to Ambac's successor liability claims, but they also bore on the issue of the Bank of America being on notice of "the prevalence of unreported fraud at Countrywide well after the [merger]." Both the discovery referee and the Supreme Court ruled that Bank of America had to pony up these materials, notwithstanding the common interest agreement, on the ground that there was no pending or reasonably anticipated litigation. An unhappy Bank of America then went up to the First Department.

Is Litigation Required?

At the very outset, Moskowitz (on behalf of a unanimous five-judge panel) acknowledged that the First Department had "never squarely decided whether…the communication must affect pending or reasonably anticipated litigation."

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But drawing on seminal decisions upholding the attorney-client privilege,[8] the court first (and correctly) noted that the privilege "is not tied to the contemplation of litigation." And not only was that insight fundamental to the resolution of the issue before the court, it also highlights a basic and critical difference between the attorney-client privilege and the attorney work product doctrine—a basic and critical difference which courts often misunderstand and which then leads to bad (or worse) results.[9]

Thus, while the work product doctrine has always been keyed to litigation (or the anticipation thereof),[10] the attorney-client privilege…has never been premised on that notion—except by some courts when addressing the common interest "exception."[11] But "just because" some courts have done so does not mean they were correctly understanding or ruling on the privilege.

Moskowitz did concede that a number of lower courts in New York have required "pending or reasonably anticipated litigation"[12]; but in her review of the law elsewhere, she found plenty of encouragement for not embracing that precedent. The Restatement of the Law Governing Lawyers, for example, expressly states that the common interest privilege applies "in a litigated or *non*-litigated matter."[13] And a number of federal courts have also so ruled, including the Southern District of New York.[14] The First Department also took great stock in the fact that the state of Delaware has codified the non-litigation standard for purposes of the common interest privilege: "We believe that Delaware presents the better approach."[15]

Case law aside, Moskowitz also looked at this issue from a policy standpoint and, again, reached the correct result:

> [I]mposing a litigation requirement in this scenario discourages parties with a shared legal interest, such as the signed merger agreement here, from seeking and sharing that advice, and would inevitably result instead in the onset of regulatory or private litigation because of the parties' lack of sound guidance from counsel. This outcome *would make poor legal as well as poor business policy*.[16]

The common interest privilege is an exception to the basic principle that privileged communications with counsel are waived when disclosed to a third party.

Conversely, as Moskowitz also (correctly) observed, the case law supporting the litigation requirement "undermines the policy underlying [the] attorney-client privilege."[17]

Where to Now?

At least one academic commentator has suggested that *Ambac* may receive a not-so-welcome reception if and when the New York Court of Appeals addresses this issue.[18] While generally I am loath to make legal predictions,[19] I do not concur; in fact, I am fairly optimistic/sanguine that if the Court of Appeals really meant what it wrote in (among other cases) *Spectrum Sys. Intl. Corp. v. Chemical Bank*,[20] then the court will adopt in toto the fine and eminently correct work done by Judge Moskowitz. In the interim, hopefully other courts will jump on her bandwagon.

1. See, e.g., *In re Kellogg Brown & Root*, 756 F.3d 754 (D.C. Cir. 2014); *Eastman Kodak Co. v. Kyocera Corp.*, 2011 WL 1432038 (W.D.N.Y. April 14, 2011); *U.S. v. Textron*, 557 F.3d 21(1st Cir. 2009); *Georgia Pacific v. GAF Roofing*, 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. 1996); *In re von Bulow*, 828 F.2d 94 (2d Cir. 1987); *Diversified Industries v. Meredith*, 572 F.2d 596 (8th Cir. 1977); *Melworm v. Encompass Indemnity*, 37 Misc.3d 389, 951 N.Y.S.2d 829 (Nassau City Sup. Ct. July 16, 2012).

2. *Upjohn v. U.S.*, 499 U.S. 383 (1981); *In re Murphy*, 560 F.2d 326 (8th Cir. 1977); *U.S. v. Adlman*, 134 F.3d 1194 (2d Cir. 1998); *U.S. v. Ackert*, 169 F.3d 136 (2d Cir. 1999); *In re IPO Securities Litigation*, 2008 U.S. Dist. LEXIS 11508 (S.D.N.Y. Feb. 14, 2008).

3. 124 A.D.3d 129, 998 N.Y.S.2d 329 (1st Dept. Dec. 4, 2014).

4. See C.E. Stewart, "The Attorney-Client Privilege: The Best of Times, the Worst of Times," Professional Lawyer 63 (2000).

5. *U.S. v. Schwimmer*, 899 F.2d 237, 243 (2d Cir. 1989). See also *People v. Osorio*, 75 N.Y.2d 80 (1989); *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822 (1871).

6. *U.S. v. Schwimmer*, 899 F.2d at 244.

7. See, e.g., *Nat'l Union Fire Ins. Co. of Pittsburgh v. TransCanada Energy*, 2013 N.Y. Misc. LEXIS 3735, *10 (Sup. Ct. N.Y. Co. 2013); *Polycast Tech. Corp. v. Uniroyal*, 125 F.R.D. 47, 50 (S.D.N.Y. 1989); *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 192 Misc.2d 99, 108 (N.Y. Sup. Ct. 2003).

8. *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 N.Y.2d 371 (1991); *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

9. See C.E. Stewart, "The Attorney-Client Privilege: Misunderestimated or Misunderstood," New York Law Journal (Oct. 24, 2014). See also supra note 1.

10. Albeit, not always with consistent results. Compare *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459 (S.D.N.Y. 1996) with *In re Subpoena Duces Tecum (Willkie Farr and Gallagher)*, 1997 U.S. Dist. LEXIS 2927 (S.D.N.Y. 1997).

11. Unfortunately, some judges have on occasion (improperly) super-imposed litigation as a condition for the privilege to apply. See, e.g., *Georgia Pacific*, supra note 1.

12. See supra note 7.

13. See Restatement (Third) of the Law Governing Lawyers §76 (2006) (emphasis added).

14. See, e.g., *Fox News Network v. U.S. Dept. of the Treasury*, 739 F.Supp.2d 516, 563 (S.D.N.Y. 2010); *Dura Global Tech v. Magna Donnelly*, 2008 U.S. Dist. LEXIS 41432, *10 (E.D. Mich. May 27, 2008); *United States v. BDO Seidman*, 492 F.3d 806, 815-16 (7th Cir. 2007); *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 514 (D. Conn. 1976). See also *OXY Res. California v. Superior Court*, 9 Cal. Rptr. 3d 621, 626-27 (2004); *For Your Ease Only v. Calgon Carbon Corp.*, 2003 WL 21920244 (N.D. Ill. Aug. 12, 2003).

15. 998 N.Y.S.2d at 336. See Del. Uniform R. of Evid. §502 (b). See also *3Com Corp. v. Diamond II Holding*, 2010 WL 3426, *2 (Del. Ch. March 20, 1986).

16. 998 N.Y.S.2d at 335 (emphasis added). Earlier, the court had said the whole purpose of the privilege is to "serve [ ] the public interest by advancing compliance with the law, facilitating the administration of justice and averting litigation." (citing *United States v. BDO Seidman*, 492 F.3d 806, 816 (7th Cir. 2007), cert denied sub nom *Cuillo v. U.S.*, 552 U.S. 1242 (2008)) See also *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

17. 998 N.Y.S.2d at 334-35.

18. See M.J. Hutter, "Attorney-Client Privilege: Ambac's New Exception to Waiver of Confidentiality," New York Law Journal (Feb. 3, 2015) ("it is far from certain the [c]ourt will affirm *Ambac*.").

19. Except when I am not. See, e.g. C.E. Stewart, "'Here's Johnny!': Carnacing the Future of the SEC's Preemption Overreach," BNA Securities Regulation and Law Report (April 28, 2014).

20. See supra note 8. See also *Rossi v. Blue Cross and Blue Shield of Greater N.Y.*, 73 N.Y.2d 588 (1989).

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