Corporate Finance/M&A - USA

Court holds that common interest privilege governs pre-merger communications

Contributed by **Ropes & Gray LLP**

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In a recent opinion the Appellate Division, First Department of the New York Supreme Court held that the common interest privilege protected pre-merger communications between parties that ultimately consummated a change-in-control transaction.(1) Importantly, the court clarified that the common interest privilege can apply even when there is no "pending or reasonably anticipated litigation", which many New York courts had previously held was a necessary predicate to apply the common interest privilege.

Facts

This opinion arose in connection with the long-running litigation between Ambac Assurance, an insurer that guaranteed payments on certain residential mortgage-backed securities, and Countrywide Home Loans, which had originally issued many of those securities. Ambac also named Bank of America, which acquired Countrywide in 2008, as a defendant on a theory of successor liability and sought to compel production of documents exchanged between Countrywide and Bank of America after the transaction had signed, but before it closed. Bank of America resisted production of those documents, claiming that they were protected by the common interest privilege. The trial court disagreed, ordering production and concluding that the common interest does not apply where the communications were not made in connection with "pending or reasonably anticipated litigation".

Decision

The First Department – the New York State intermediate appellate court governing New York and Bronx Counties – reversed the trial court's ruling, holding that:

> "*litigation need not be actual or imminent for communications to be within the common interest doctrine... [so] long as the primary or predominant purpose for the communication with counsel is for parties to obtain legal advice or to further a legal interest common to the parties.*"

By so holding, the First Department rejected a line of New York cases (including recent cases from the Appellate Division, Second Department) that had imposed an 'actual or imminent litigation' requirement. The court held that such a requirement would not adequately protect parties such as Countrywide and Bank of America which had signed a merger agreement and were seeking to finalise a change-in-control transaction. In such situations, the parties "require the shared advice of counsel in order to accurately navigate the complex legal and regulatory process involved in completing the transaction".

The First Department astutely observed that refusing to apply the common interest privilege to parties in such a situation would discourage parties with a clearly shared legal interest from pursuing joint legal advice, which might precipitate needless miscommunication and litigation and would "make poor legal as well as poor business policy". The court also noted that its approach to this issue was guided by the prevailing Delaware test for the application of the common interest privilege, which focuses on the alignment of the parties' legal interests and takes a more pragmatic approach to that determination.

Comment

The *Ambac* opinion should provide some comfort to parties seeking to finalise a corporate transaction that otherwise privileged and confidential communications should be protected by the common interest privilege, regardless of whether they relate to actual or imminent litigation. Further, *Ambac* helpfully moves New York privilege law towards federal and Delaware law on this issue, which assists practitioners by further aligning those standards and providing greater predictability for situations in which it is unclear which jurisdiction's privilege law governs. Unfortunately, there is no uniformity among New York courts on whether pending or imminent litigation is required to invoke the

Authors

James Lidbury

Martin J Crisp

common interest privilege, as other intermediate New York appellate courts have taken a divergent approach. That divergence will hopefully precipitate guidance from the New York State Court of Appeals on this issue.

For further information on this topic please contact James Lidbury at Ropes & Gray LLP's Hong Kong office by telephone (+852 3664 6488) or email (james.lidbury@ropesgray.com). Alternatively, contact Martin J Crisp at Ropes & Gray LLP's New York office by telephone (+1 212 596 9000) or email (martin.crisp@ropesgray.com). The Ropes & Gray website can be accessed atwww.ropesgray.com.

Endnotes

(1) *Ambac Assurance Corp v Countrywide Home Loans, Inc*, 2014 NY Slip Op 08510 (1st Dep't 2014).