

New York and North Carolina Take a Narrow Approach to Common Interest Doctrine

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[*Ambac Assurance Corp. v. Countrywide Home Loans, Inc.* No. 80, 2016 NY Slip Op 04439 \(N.Y. 2016\)](#) and [*Friday Investments, LLC v. Bally Total Fitness of the Mid-Atlantic, Inc.*, No. COA15-680 \(N.C. 2016\)](#)

Brief Summary

The “common interest doctrine” generally protects attorney-client communications, even if such communications are disclosed to a third party, as long as the third party shares a common legal interest with the client making the communication, and the communication is made in furtherance of the common legal interest. Last week, courts in two cases adhered to a narrow application of the “common interest doctrine” and held there must be pending or anticipated litigation, and a common legal versus business interest between the parties, to shield attorney-client communications from disclosure.

Complete Summaries

New York — *Ambac Assurance Corp.*: Plaintiff, Ambac Assurance Corp. (Ambac), was an insurer that guaranteed payments on certain residential mortgage-backed securities issued by Countrywide Home Loans, Inc. (Countrywide). When the mortgage-backed securities that Ambac insured failed, Ambac commenced an action against Countrywide for breach of contract, fraudulent misrepresentation and fraud in the inducement. Ambac also named Bank of America Corporation (BOA) as a defendant based upon its merger with Countrywide, alleging that BOA became Countrywide’s successor-in-interest and alter ego and was responsible for Countrywide’s liabilities to Ambac.

During discovery, Ambac challenged BOA's withholding of communications between itself and Countrywide that took place after signing the merger plan, but before the merger closed. BOA claimed the communications were protected from disclosure by the attorney-client privilege because they pertained to legal issues the two companies needed to resolve jointly in anticipation of the merger — such as filing disclosures and obtaining legal advice on tax consequences. In a motion to compel, Ambac countered that the privilege was waived because the disclosures were made prior to the merger when BOA and Countrywide were not affiliated entities and when they did not share a common legal interest in litigation or anticipated litigation.

The trial court agreed with Ambac, recognizing that New York requires that there be at least a reasonable anticipation of litigation for the common interest doctrine to apply. The appellate court reversed, choosing to follow several federal courts that have rejected the litigation requirement. The question was then certified to the New York Court of Appeals.

North Carolina — *Friday Investments, LLC*: Plaintiff, Friday Investments, LLC (Friday), entered into a lease agreement with the predecessor in interest of Bally Total Fitness of the Mid-Atlantic, Inc. (Mid-Atlantic) for space to operate a health club. The lease was guaranteed by Bally Total Fitness Holdings Corporation (Holdings), the parent of Mid-Atlantic and its predecessor. Mid-Atlantic later sold this, along with some of its other health clubs, to Blast Fitness Group (Blast). The Asset Purchase Agreement between Mid-Atlantic and Blast provided that the sale transferred Mid-Atlantic's obligations under the lease with Friday. Blast also agreed to defend and indemnify Mid-Atlantic and Holdings against claims made against them, including those arising under the lease.

Friday sued Mid-Atlantic and Holdings for back rent and other charges under the lease, but Blast was not a party to the action. Blast agreed to defend both defendants pursuant to the indemnification provision in the Asset Purchase Agreement. During discovery, Friday sought certain post-suit correspondence and documents exchanged between defendants and Blast. Defendants refused to provide the documents and sought a protective order, claiming the communications were protected by the attorney-client privilege. The trial court disagreed, but stayed disclosure pending appeal.

The issue before the courts was: does the common interest doctrine protect attorney-client communications from disclosure where: (1) there is no pending or anticipated litigation; or (2) the third party and the client share a common business interest rather than a common legal interest. Answer: No. In both cases, the defendants were required to disclose the communications.

In *Ambac*, by a 4-2 decision (with the chief justice abstaining), the New York Court of Appeals adhered to the litigation requirement that has historically existed in New York. The court reasoned that it did not see the need to extend the common interest doctrine to communications made in the absence of pending or anticipated litigation, and that any benefits from such an expansion were “outweighed by the substantial loss of relevant evidence, as well as the potential for abuse.” Because it is difficult to define a “common legal interest” outside the context of litigation, there was the danger that parties would assert a common legal interest to protect communications when they really only had a nonlegal or exclusively business interest to protect. The

communications sought in *Ambac* were not shared in the context of pending or anticipated litigation. Accordingly, they were not protected from disclosure.

The dissent, pointing out that there is no litigation requirement in the attorney-client privilege itself, and concluding that the potential for abuse cited by the majority was speculative, argued that privilege should apply in this and similar transactional situations “where disclosure of client communications facilitates the provision of legal services to advance a joint strategy developed to ensure compliance with regulatory or other legal mandates . . . and framing of legal positions necessitated by regulatory and legal obligations.”

In *Friday Investments, LLC*, the appellate court acknowledged that North Carolina courts had not yet formulated a bright-line rule or articulated criteria for determining whether a common legal interest exists to extend the attorney-client privilege to multiple parties. Defendants urged that the indemnification by Blast be viewed as a “tripartite” attorney-client relationship such as the relationship between an insurer, the insured and counsel appointed by the insurer. The court concluded, however, that unlike an insurance contract, the relationship between Blast and defendants was not formed primarily for the purpose of indemnification or coordination in anticipated litigation. Rather, Blast’s indemnification obligations were ancillary to the Asset Purchase Agreement, and Blast had no contractual authority to settle or otherwise affect the outcome of the action against defendants. Consequently, while defendants and Blast may have shared a common business interest, they did not share a common legal interest, and the communications were not protected.

Both the *Ambac* and *Friday* courts addressed the federal court decisions that have relaxed the litigation requirement, but declined to adopt this position.

Significance of Opinions

The decisions demonstrate that although there has been some expansion of the common interest doctrine to include communications that are not made in the context of litigation, there are courts that have adopted or adhered to a more narrow application of the doctrine. Counsel should thus be cautious when considering the sharing of client communications.

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