New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 255—NO. 118
TUESDAY, JUNE 21, 2016

Southern District Civil Practice Roundup

Expert Analysis

Requirements for Invoking The Common Interest Doctrine

By **Edward M. Spiro**

And **Judith L. Mogul**

Attorneys and their clients often rely on the "common interest" doctrine to shield from disclosure communications among allied parties and their counsel. Although invocation of the common interest doctrine is seldom challenged through litigation in the Southern District of New York, with only a handful of written decisions on the subject each year, its contours are not as well-defined as many lawyers assume, and such challenges tend to result in disclosure of some communications parties and their counsel thought would remain confidential when they took place.

Two recent decisions narrowly construing the common interest doctrine—one from the Southern District of New York and one from the New York Court of Appeals—underscore the importance of understanding the common interest doctrine's requirements before engaging in communications with third parties and their counsel with the expectation that those communications will be privileged. Recent decisions also highlight those aspects of the doctrine that remain to be defined.

> The common interest doctrine is an exception to the general rule that disclosure of privileged information to a third party waives the privilege.

Common Interest Doctrine

The common interest doctrine, sometimes referred to as the common interest privilege, is not actually a privilege, but an exception to the general rule that disclosure of privileged information to a third party waives the attorney-client privilege.[1] As articulated by the U.S. Court of Appeals for the Second Circuit in *United States v. Schwimmer*,[2] the common interest doctrine "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… in the course of an ongoing common enterprise…[where] multiple clients share a common interest about a legal matter."[3]

Thus the requirements for invocation of the common interest doctrine are that (1) the communications in question must otherwise qualify as privileged; and (2) that (a) the party asserting the doctrine must share a common legal interest with the party with whom the information was shared; and (b) that the statements for which protection is sought must have been in furtherance of that shared legal interest.[4]

Southern District Judge Robert W. Sweet's recent decision in *Guiffre v. Maxwell*,[5] explores the limitations on the doctrine

EDWARD M. SPIRO *and* JUDITH L. MOGUL *are principals of Morvillo Abramowitz Grand Iason & Anello P.C. and co-authors of "Civil Practice in the Southern District of New York," 2d Ed. (Thomson West 2015).*

imposed by the first requirement—that the communications in question must otherwise qualify as privileged. The New York Court of Appeals' recent decision in *Ambac Assurance Corp. v. Bank of America Corp.*[6] explores the second requirement, that the communicating parties share a common legal interest in order to avoid waiver of the privilege. We discuss each of these decisions below.

Otherwise Privileged

In *Guiffre v. Maxwell*, the plaintiff moved to compel production of a number of documents withheld by the defendant on privilege grounds, some of which involved third parties or a third party's counsel. The defendant claimed that those communications were protected by the common interest privilege. Sweet analyzed the communications in batches, based on who specifically was included in each communication.

Sweet first eliminated from the universe of potentially privileged communications all documents which included a public relations consultant retained by the defendant. He concluded that the consultant's presence waived the privilege, rejecting the argument that the public relations consultant was acting as the defendant's agent or that the consultant's input was necessary for the defendant's lawyer to communicate with the defendant or implement the lawyer's legal advice. Sweet held that these communications, which lost their privilege because of the presence of the consultant, could not be rehabilitated by the common interest privilege.

The second batch of communications he examined consisted of messages including the defendant, a third party and the third party's counsel. He noted that "[t]he law distinguishes between a common legal defense interest, which cloaks related communications in privilege, and a common problem, to which the privilege does not apply."[7] Without discussing the nature of the relationship between the defendant and the third party (who was not a party to the litigation before him), Judge Sweet concluded that that individual and the defendant have more than a common problem and that sharing their legal advice was necessary to put forth a common defense.

Judge Sweet went on to analyze another batch of documents, consisting of a series of emails between the defendant and the same third party but in which no attorney was involved. He concluded that notwithstanding their shared common legal interest, the common interest privilege did not apply to this set of communications because they did not involve a privileged attorney-client communication.

Sweet made clear that communications not involving counsel could, in some instances, qualify for protection under the common interest doctrine, such as, for example, where two parties who share a common legal interest communicate, outside the presence of their respective counsel, about legal advice previously received in furtherance of their common legal interest. The communications in this case did not fall into that category. Sweet described them as "mundane exchanges [that] contain[ed] no indication that there [was] any underlying communication from any attorney." He held that despite the common legal interest of defendant and the third party, the communications solely between those two individuals were not privileged and had to be produced.[8]

The Litigation Requirement

While the court in *Guiffre* assumed, without substantive discussion, that the defendant in that case and the third party included in some of her privileged communications shared a common legal interest sufficient to satisfy the common interest privilege, the question of what constitutes a sufficient shared legal interest is at the heart of the New York Court of Appeals' decision earlier this month in *Ambac*. Specifically, in that case, New York's highest court held that application of the common interest doctrine is limited to communications made in the context of pending or anticipated litigation, and cannot apply to communications made in the absence of litigation or the threat of litigation.[9]

The communications at issue in *Ambac* occurred between Bank of America and Countrywide Home Loans during the period between when Bank of America and Countrywide signed a merger plan in

January 2008 and consummated that merger in July 2008. Bank of America asserted that those communications were protected under the common interest doctrine because they pertained to legal issues the two companies needed to resolve jointly prior to the merger. Some of the documents related to required disclosures, to obtaining regulatory approval, to contractual obligations to third parties and employee benefit plans, and to state and federal tax consequences of the merger. The merger documents directed the two banks to share this information and provided that the information would be protected from outside disclosure.

In finding that by sharing this information with each other, Bank of America and Countrywide had waived the attorney-client privilege, the Court of Appeals reversed the decision of the Appellate Division, First Department, that the common interest doctrine applied. The Court of Appeals noted at the outset that the attorney-client privilege is in tension with the policy of broad discovery and for that reason must be narrowly construed. The court traced the development of the common interest doctrine, as a limited exception to the rule that the presence of a third party will waive the privilege, first in the context of criminal cases, and then to civil matters as well, "but always in the context of pending or reasonably anticipated litigation."[10]

It declined to extend the doctrine beyond the litigation context, to any common legal interest, reasoning that the litigation limitation limits the doctrine to "situations where the benefit and the necessity of sharing communications are at their highest, and the potential for misuse is minimal."[11] The court concluded that when parties are facing litigation in which they share a common 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."[12]

In 'Ambac,' New York's highest court held that application of the common interest doctrine is limited to communications made in the context of pending or anticipated litigation, and cannot apply to communications made in the absence of litigation or the threat of litigation.

The court rejected Bank of America's argument that extension of the common interest doctrine to communications between those who share a common interest in a commercial transaction would promote better legal representation and compliance, finding no evidence that the absence of such protection has chilled corporate mergers or licensing agreements or led corporate clients into noncompliance with the law. It concluded that the shared interest in consummating a contemplated business transaction is sufficient incentive for exchanging necessary information.[13]

Finally, the Court of Appeals recognized that some federal courts as well as the Restatement have moved away from the common law requirement that shared communications be related to pending or anticipated litigation for the common interest doctrine to apply.[14] It nevertheless held that the "policy reasons for keeping a litigation limitation on the common interest doctrine outweigh any purported justification for doing away with it," and favored maintaining the narrow construction New York courts have traditionally applied.

The Law in the Second Circuit

The Second Circuit has not specifically addressed whether the common interest doctrine has a litigation requirement, although its most recent decision on the common interest privilege suggests that it would, at the very least, take an expansive view of when litigation is "reasonably anticipated,"—a question the Ambac decision did not address. Its decision late last year in *United States v. Schaeffler*[15] concerned a claim of common interest protection over communications between an entity under IRS audit, and a consortium of 11 banks that had loaned it money in connection with a tender offer.

Those banks had participated actively in refinancing that debt and restructuring the entity after the financial crisis threatened to

drive the entity into insolvency and jeopardize repayment of the loans. The entity anticipated that it would be audited by the IRS as a result of the "complex and novel refinancing and restructuring," and engaged lawyers and accountants to advise it on the tax implications of these transactions and possible future litigation with the IRS.

The anticipated audit materialized, and the IRS issued a summons specifically seeking documents—including legal opinions and analysis—relating to the restructuring. The entity moved to quash the demand for legal opinions. The district court denied that motion, finding that the entity had waived the attorney-client privilege by sharing the otherwise privileged documents with the banks. It held that the common interest doctrine did not apply because the banks did not share a common legal stake in the outcome of the entity's "putative litigation" with the IRS, inasmuch as the banks would not be named in any tax proceeding. The court held that the bank consortium had only a commercial, rather than a legal, interest at stake.[16]

In reversing the district court and finding that the common interest doctrine did shield the documents in question notwithstanding their disclosure to third parties, the court took an expansive view of the common legal interest necessary to satisfy the requirements of the common interest doctrine. It observed first, that parties may share a common legal interest even if they are not parties to ongoing litigation, so long as the communications are made in the course of an ongoing common enterprise and intended to further that enterprise. It framed the "dispositive issue… [as] whether the Consortium's common interest with the [entity] was of a sufficient legal character to prevent a waiver by the sharing of those communications."[17]

The court answered this question in the affirmative. It held that the original relationship between the banks and the entity was commercial, but that the nature of that relationship was altered by the financial crisis and potential default by the entity on the loans. Finding that the banks and the entity could avoid mutual financial disaster by securing favorable tax treatment of the refinancing and the restructuring, and that securing that treatment "would likely involve a legal encounter with the IRS," the court held that the entity and the banks had a strong common interest in the outcome of that legal encounter. It concluded that the banks and the entity had undertaken a "common legal strategy" to achieve their mutual goal, and that communications between them toward that end were protected under the common interest doctrine.[18]

Conclusion

The Ambac decision makes clear that under New York law, the common interest doctrine applies only where there is pending or anticipated litigation. For litigants in the Southern District of New York seeking to avail themselves of the common interest privilege, however, so long as the communication is otherwise privileged, considerable play in the joints remains in determining when litigation is reasonably anticipated, and what qualifies as a common legal interest.

1. *Guiffre v. Maxwell*, 2016 WL 1756918, at *6 (S.D.N.Y. May 2, 2016) (Sweet, J.).

2. 892 F.2d 237 (2d Cir. 1989).

3. Id. at 243 (internal quotation mark omitted).

4. *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 434 (S.D.N.Y. 2013) (Gorenstein, M.J.) (citing *Allied Irish Banks v. Bank of Am.*, 252 F.R.D. 163, 171 (S.D.N.Y. 2007) (Gorenstein, M.J.)).

5. 2016 WL 1756918.

6. No. 80, 2016 WL 3188989 (N.Y. June 9, 2016).

7. 2016 WL 1756918 at *11 (citing *Egiazaryan*, 290 F.R.D.at 434).

8. Id.

9. Although a state court decision on state law, *Ambac* is of considerable relevance to federal practitioners because federal courts sitting in diversity apply state law when assessing claims of privilege.

10. No. 80, 2016 WL 3188989 at *5.

11. Id. at *6.

12. Id. at *6.

13. Id. at *6–7.

14. Id. at *9 (citing Restatement (Third) of the Law Governing Lawyers, §76(1) (1997); *Teleglobe v. Communications Corp. v. BCE*, 493 F.3d 345 (3d Cir. 2007); *United States v. BDO Seidman*, 492 F.3d 806 (7th Cir. 2007); *In re Regents of the Univ. of Calif.*, 101 F.3d 1386 (Fed. Cir. 1996)).

15. 806 F.3d 34 (2d Cir. 2015).

16. Id. at *38 (citing *Schaeffler v. U.S.*, 22 F.Supp.3d 319 (S.D.N.Y. 2014) (Gorenstein, M.J.)).

17. Id. at *40–41.

18. Id. at *41.