

New York Keeps Common Interest Doctrine Litigation Related

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The Common Interest Doctrine is used often in insurance and reinsurance-related disputes. As policyholder and claimant lawyers continue to aggressively pursue communications between insurers and reinsurers about their claims, those seeking to preclude disclosure often turn to the common interest doctrine to assert this as an exception to waiver of the attorney-client privilege. Many courts have extended the common interest doctrine to include any common legal advice and strategy and not just legal advice and strategy on current or anticipated litigation. New York has just chosen not to do so.

In [*Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*](#), No. 80, 2016 N.Y. LEXIS 1649 (NY Jun. 9, 2016), the New York Court of Appeals (New York's highest court) reversed a decision of the Appellate Division, First Department, and held that under the common interest doctrine, an attorney-client communication that is disclosed to a third party remains privileged if the third party shares a common legal interest with the client who made the communication, the communication is made in furtherance of that common legal interest, and any such communication relates to litigation, either pending or anticipated. It is the latter litigation requirement that the court, by majority decision, kept in place, even in the face of commentators and other courts expanding the common interest doctrine exception beyond litigation.

The decision is a necessary read for anyone interested in attorney-client privilege and anyone having to address the need to share attorney-client privileged communications with third parties in the context of a common legal interest. The majority ultimately concluded that the benefits of expanding the common interest doctrine beyond litigation were outweighed by the substantial loss of relevant evidence as well as the potential for abuse. The majority invited the New York Legislature to consider the alternative arguments made by the dissent if it wished to expand the doctrine beyond litigation.

The dissent concluded that the attorney-client privilege exception to discovery served individual and societal goals of furthering the proper administration of justice by encouraging the free flow of information essential to legal representation. Because it has never been limited to client communications involving pending or anticipated litigation, it made little sense to limit the common interest doctrine exception just to litigation. The dissent would extend the attorney-client privilege (through the common interest doctrine) to communications related to confidential communications

made for purposes of seeking legal and regulatory advice to complete a merger.

The ramifications under New York law to insurance and reinsurance disputes are many. The Court of Appeals has now made it crystal clear that the exception to waiver of the attorney-client privilege through the common interest doctrine will not apply unless the privileged communication shared is in furtherance of a shared common legal interest and relates to pending or anticipated litigation. Where discovery is sought concerning communications between cedents and reinsurers about underlying losses and there is no litigation pending or anticipated, those communications, under New York law, will not be shielded from discovery. On the flip side, in commercial litigation involving failed mergers or other corporate transactions, including insurance and reinsurance transactions, attorney-client privileged communications shared with third parties will not be shielded from disclosure unless those communications relate to pending or anticipated litigation. What this means is that under New York law, before any attorney-client communication is shared with a third party, consideration must be given to whether that communication will be discoverable in the future.

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