June 14, 2016

New York Decision on Common Interest Doctrine Suggests Caution in Sharing Attorney-Client Communications

On June 9, the New York Court of Appeals issued a decision on the attorney-client privilege and "common interest doctrine," which is an exception to the general rule that parties waive the attorney-client privilege by sharing protected communications with third parties. The court construed the common interest doctrine narrowly and held that it applies only when the attorney-client communication "relate[s] to litigation, either pending or anticipated." This ruling has implications for reinsurance because cedents sometimes rely on the common interest doctrine in providing certain information to reinsurers.

In *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 2016 N.Y. LEXIS 1649, 2016 N.Y. Slip Op. 04439 (June 9, 2016), Countrywide and Bank of America declined to produce certain of their attorney-client communications concerning their 2008 merger in subsequent litigation with Countrywide's insurer. Countrywide and Bank of America acknowledged that they were separate entities at the time of the communications, but nevertheless argued that they could withhold the communications because they had a "shared legal interest in the merger's successful completion," thus bringing the documents within the protection of the common interest doctrine. The Court of Appeals disagreed.

The court began its examination of the companies' claim by noting that the attorney-client privilege shields from disclosure any confidential communication between an attorney and a client made for the purpose of requesting and receiving legal advice. This privilege is often waived when an attorney-client communication is disclosed to a third party – and once waived, the privilege is typically waived not only as to the client's adversary, but as to others as well. The common interest doctrine is an exception to these principles. It applies when two or more entities separately retain counsel to advise them on matters of common legal interest and then engage in or share some of those privileged communications with one another.

The question presented by the *Ambac* case was whether, under New York law, a communication must relate to pending or reasonably anticipated litigation in order to be protected from disclosure under the doctrine. The court held that it must. "[A]ny such communication must . . . relate to litigation, either pending or anticipated, in order for the exception to apply." Slip Op. at 2. The court added that "the policy reasons for keeping a litigation limitation on the common interest doctrine outweigh any purported justification for doing away with it." *Id.* at 22.

Insurers and reinsurers may wish to take note of the Court of Appeals' decision in *Ambac.* Cedents and reinsurers sometimes share attorney-client privileged information about a policyholder's underlying claim for coverage, under an expectation that the common interest doctrine will prevent the communications from becoming discoverable by the policyholder. *See, e.g., Fireman's Fund Ins. Co. v. Great Am. Ins. Co.*, 284 F.R.D. 132 (S.D.N.Y. 2012). The *Ambac* decision suggests that more caution is in order, at least in situations where the applicability of the attorney-client privilege is governed by New York law. Cedents and reinsurers should be confident that the status of the policyholder's coverage claim satisfies the requirement of a pending or reasonably anticipated litigation. Under the principles set forth in *Ambac*, the generalized common interest of cedent and reinsurer would seem to be insufficient to protect shared attorney-client communications; rather, that common interest must relate to a specific dispute that is in actual litigation or for which the cedent and reinsurer can demonstrate it was reasonable to conclude would result in litigation.