M&A Update

New York State Court Extends Common Interest Privilege to Merger Talks

December 10, 2014

In a December 4, 2014 decision, the New York Appellate Court, First Department, held that documents and discussions related to negotiation of a merger could be protected by the common interest privilege. The ruling represents a change in New York law which, unlike Delaware, previously limited the common interest privilege to situations where litigation was pending or reasonably anticipated. While the opinion is from an intermediate New York appellate court and has not been confirmed by New York's highest court, it represents an important clarification for boards and financial advisors alike, who can now be more assured that privileged communications in the course of negotiating mergers and acquisitions may not have to be produced to plaintiffs in subsequent litigations.

Background

During discovery in a lawsuit by Ambac Assurance Corporation ("Ambac") against Countrywide Home Loans ("Countrywide") and Bank of America for fraud relating to mortgage-backed securities, Ambac requested that Bank of America produce documents involving pre-merger communications between Bank of America, Countrywide and their counsel. Bank of America refused to produce the documents, claiming they were protected by the common interest privilege. The common interest privilege is an extension of the attorney-client privilege to communications that involve third parties as well as counsel. The lower court ordered Bank of America to produce the documents, finding that without the threat of litigation at the time the legal advice was given the common interest doctrine would not protect the communications. On appeal, the Appellate Court overturned the decision, taking a new approach to the common interest privilege.

Takeaways

1. The Common Interest Privilege Now Can Be Asserted Under New York Law in Situations Involving M&A Negotiations. Typically, the presence of a third party in an otherwise privileged communication between attorney and client would destroy the privilege. The common interest privilege is an exception to this rule where a third party

is present, if "the communication is for the purpose of furthering a nearly identical legal interest shared by the client and the third party." Merger talks, such as the ones that took place in this case, often meet this standard because they involve extensive common legal concerns. The parties to the transaction, along with their advisors, are all working together toward the shared goal of reaching an acceptable, and legally feasible, deal. Tax consequences, regulatory filings, transfer of liabilities, and satisfaction of closing conditions are all among the common legal interests that permeate the deal negotiation process and to which the common interest privilege can apply.

2. The Decision Reflects the Approach of Both the Second Circuit and Delaware. As the Court discussed in its reasoning, its new position more closely follows that of the Second Circuit Court of Appeals. In *United States v Schwimmer*, for example, the Second Circuit explicitly held that litigation did not have to be in progress in order for the common interest privilege to be invoked. The Court understood the *Schwimmer* decision to mean that no litigation even needed to be reasonably anticipated for the exception to apply. Delaware also takes a similar approach and has codified the common interest doctrine in its rules of evidence as applying to any "matter" of common interest, and not specifically limiting it to litigation.

3. Legal Protection in Negotiating a Merger is Now Expanded. As the Court emphasized, during merger negotiations, businesses often have important legal interests to protect, even if the legal interests do not involve the threat of litigation. Thus, the decision provides more clarity for parties negotiating mergers, who can negotiate with less concern that communications with their attorney in the presence of third parties may be subject to production in discovery should a lawsuit ensue. Financial advisors, who often are the "third party" that is present when the attorney-client communications occur, can feel a little freer to sit in on their client's deal discussions with their lawyers and add insight to the conversation.

For a copy of the full opinion, click here.

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