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# The Application of Common-Interest Privilege to Merger Pre-Closing Communications

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**Editor's Note:** Theodore N. Mirvis is a partner in the Litigation Department at Wachtell, Lipton, Rosen & Katz. The following post is based on a Wachtell Lipton memorandum by Mr. Mirvis, William Savitt, Elaine P. Golin, and Justin V. Rodriguez.

A New York appellate court today [December 04, 2014] ruled that the "common-interest privilege" can protect from discovery pre-closing communications among merger parties and their counsel made for the predominant purpose of furthering a common legal interest, even if there is no pending or anticipated litigation. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, No. 651612/10 (N.Y. App. Div. 1st Dep't Dec. 4, 2014). The ruling recognizes that after a merger agreement is signed, the merging parties must often share legal advice to complete the transaction.

The decision arose in an RMBS suit brought against Countrywide and Bank of America Corporation (BAC), alleging that BAC would be liable for any judgment as Countrywide's successor following the 2008 merger of a BAC subsidiary and Countrywide Financial Corporation (CFC). The plaintiff sought discovery of communications between BAC and CFC and their counsel made during the post-signing, pre-closing period.

The First Department noted that while the presence of a third party usually destroys the attorney-client privilege, the common-interest privilege applies "if the communication is for the purpose of furthering a nearly identical legal interest shared by the client and the third party." Departing from the narrow view previously taken by other New York state courts, and following an approach previously accepted in Delaware, the First Department held that "in today's business environment, pending or reasonably anticipated litigation is not a necessary element of the common-interest privilege" because "business entities often have important legal interests to protect even without the looming specter of litigation."

The Court recognized that "two business entities, having signed a merger agreement without contemplating litigation, and having signed a confidentiality agreement, required the shared advice of counsel in order to accurately navigate the complex legal and regulatory process involved in completing the transaction." Under the merger agreement, the parties undertook to cooperate on a variety of pre-closing legal issues, such as obtaining regulatory approvals and filing joint proxy and registration statements. The Court reasoned that "imposing a litigation requirement in this scenario discourages parties with a shared legal interest, such as the signed merger agreement here, from seeking and sharing that advice, and would inevitably result instead in the onset of regulatory or private litigation because of the parties' lack of sound guidance from counsel."

As the First Department points out, a litigation requirement in this context "would make poor legal as well as poor business policy."