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COURT OF APPEALS

STATE OF NEW YORK

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AMBAC ASSURANCE CORP.,

Appellant,

-against-

No. 80

COUNTRYWIDE HOME LOANS, INC.,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
April 28, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Meir Sabbah  
Official Court Transcriber

1 JUDGE PIGOTT: Case number 80, Ambac  
2 Assurance corporation v. Countrywide Home loans Inc.  
3 Chief Judge DiFiore has recused herself  
4 from this case.

5 Mr. Younger, good afternoon, sir.

6 MR. YOUNGER: May it please the court. I  
7 would like to reserve two minutes of my time for  
8 rebuttal, please.

9 JUDGE PIGOTT: Two minutes, yes, sir.

10 MR. YOUNGER: In this case, in considering  
11 whether you make a dramatic expansion of our common  
12 interest doctrine, you need to weigh two things.  
13 One, what does the claim benefit of this expansion,  
14 against what is the cost to the litigation system, to  
15 litigants, and even government. We submit that the  
16 costs outweigh any claim benefit, if there is - - -  
17 even is one.

18 It's long been the law in this state, whether  
19 you read Segal or prints on evidence, or whatever you look  
20 at whatever a judge - - - court would look at, that the  
21 attorney-client privilege protects confidential  
22 communication. It's in the statute, it's in CPLR 4503.  
23 We make narrow exceptions for that, like the Joint Defense  
24 Doctrine.

25 JUDGE ABDUS-SALAAM: Where does the - - -

1 the exception that you're talking about originate,  
2 counsel, the one that you have to have either actual  
3 or anticipated litigation in order to have confi - -  
4 - the - - - in order to evoke the attorney-client  
5 privilege?

6 MR. YOUNGER: It originates first with this  
7 court, in People v. Osorio, and then it was applied  
8 in lower courts, and there became - - -

9 JUDGE ABDUS-SALAAM: Well, People v. Osorio  
10 was a criminal action, so there was already a case,  
11 right?

12 MR. YOUNGER: Correct.

13 JUDGE ABDUS-SALAAM: So there was no need  
14 to decide whether there was an actual or an  
15 anticipated litigation, because there was an actual  
16 litigation.

17 MR. YOUNGER: That's correct. But then  
18 from there, if you just had a Joint Defense Doctrine,  
19 which was then applied to the civil contexts, first  
20 in Aetna and Parisi, and then a number of Appellate  
21 Division decisions, it would be too narrow. It has  
22 to be applied to the plaintiffs, so it would be a  
23 joint plaintiffs' privilege or - - - so they made it  
24 a common interest doctrine; they broadened it. But  
25 the roots are in the Joint Defense Doctrine.

1                   And when that broadening happened, the  
2                   question is, what is the appropriate limit. And the  
3                   courts have, regularly for twenty years in this  
4                   state, drawn that limit at litigation. Why? Because  
5                   that's when you anticipate, not just litigation, but  
6                   discovery request. That's when you - - -

7                   JUDGE ABDUS-SALAAM: But what if you want  
8                   to avoid litigation, and so you consult a lawyer,  
9                   jointly as these folks did, to try to avoid  
10                  litigation.

11                 MR. YOUNGER: Yeah, that happens every day  
12                 of the week. Not just for the business community,  
13                 but for the guy in the street or the woman in the  
14                 street, who goes and maybe does a house closing,  
15                 consults an insurance broker, consults a financial  
16                 advisor.

17                 JUDGE RIVERA: Is there something unique to  
18                 the merger context that perhaps gives - - - supplies  
19                 a justification for carving the rule, or applying the  
20                 rule, specifically to mergers in a particular way?

21                 MR. YOUNGER: Yeah, I don't think you can  
22                 have a common interest doctrine for mergers. The  
23                 common interest doctrine is meant to encourage - - -  
24                 if you look at it, and it goes to the back to the  
25                 roots of it, to encourage sharing of - - - of

1 confidential information in the context of litigation  
2 or litigation as afoot. Not to encourage a free flow  
3 of information as being, if they would have it,  
4 anywhere. That's - - - that's opposite of the  
5 attorney-client privilege. The attorney-client  
6 privilege is all about keeping things private,  
7 keeping things confidential.

8 JUDGE GARCIA: But if we're looking at an  
9 analogy to anticipation of litigation, so on that  
10 front, just anticipation, you have a merger between  
11 two heavily regulated companies and industries,  
12 right?

13 One is, can you anticipate litigation in  
14 that context, that's one issue. And second, because  
15 of the nature of the highly regulated industries that  
16 they are in, in that period between the signing and  
17 the closing, aren't you working towards a common  
18 legal goal, one, you may be anticipating government  
19 inquiries, but two, you are working towards common  
20 legal goal of complying with the regulations  
21 particular to those industries, and wouldn't we want  
22 to encourage that?

23 MR. YOUNGER: Let me address the first  
24 point, first, Judge Garcia. Of course there was  
25 anticipated litigation. And if they had come in and



1 information between them?

2 MR. YOUNGER: Sharing - - -

3 JUDGE STEIN: Does that need to be  
4 encouraged?

5 MR. YOUNGER: That is not - - - that kind  
6 of turns the attorney-client privilege on its head.  
7 The point of the attorney-client privilege, it's  
8 right in the statute, is to preserve information from  
9 being confidential. When you share it, it's waived.  
10 That's a fundamental - - -

11 JUDGE RIVERA: Don't they already have a  
12 business incentive to share? Don't they want this  
13 deal to happen?

14 MR. YOUNGER: Not only do they want this  
15 deal to happen, it happened. They had 160 million  
16 dollars in reasons to make it happen; there was going  
17 to be a termination fee if it didn't happen.

18 So it's not like, you know, this issue is  
19 one where mergers are going to stop in New York.  
20 This merger went on, in fact, when this merger  
21 closed, it was under existing New York Law, which had  
22 been the law for - - - for two decades.

23 JUDGE STEIN: So had they come in and made  
24 the argument that, you know, we - - - this - - - we  
25 have this deal coming together and for whatever

1 reasons, we fully anticipate that there is going to  
2 be litigation coming out of this, government  
3 regulation, whatever it is, you're saying, no  
4 objection. Or - - -

5 MR. YOUNGER: I'm not saying no objection;  
6 it might have been a different case. But that's not  
7 the record. The record is, we're not asserting  
8 anticipation of litigation all the way through. And  
9 - - - and, you know, frankly - - -

10 JUDGE RIVERA: Yeah, but - - - so for  
11 purposes of the rule, though, you mean a company can  
12 simply say, well, we're highly regulated, so if - - -  
13 if we make an error, we anticipate litigation; does  
14 that get the coverage?

15 MR. YOUNGER: I mean, the problem with that  
16 kind of a rule, Your Honor, is that it would make  
17 everything to - - - I mean, when I get up in the  
18 morning, I anticipate litigation. The courts for  
19 years have been - - -

20 JUDGE RIVERA: You're a good lawyer, so you  
21 really should.

22 MR. YOUNGER: Maybe I should. The courts  
23 for years in this state have known how to draw that  
24 line in the Work-Product Doctrine, and other lines.

25 But I think you raise a good point, because this



1 is all - - -

2 JUDGE ABDUS-SALAAM: But don't they - - -  
3 don't they also - - - okay, I'm sorry.

4 MR. YOUNGER: This is all about what the  
5 benefit is. Even if you buy that there is some  
6 benefit, our case law says you have to weigh that  
7 against the cost, a point that's never raised in the  
8 B of A brief.

9 So what are the costs? One, the cost to  
10 people on the other side. So for example, consumers  
11 who may be hurt by a product, or if there is joint  
12 ventures - - - they point to joint ventures among  
13 utility companies. There may be ground water issues.  
14 Second cost is to the individual.

15 I mean, you say this is a complex merger  
16 deal, it's no different than a house closing; it's  
17 just more complex.

18 JUDGE RIVERA: Can you address the Second  
19 Circuit's recent decision? Oh, I'm sorry, Judge  
20 Abdus-Salaam, you had a question.

21 MR. YOUNGER: Yeah.

22 JUDGE ABDUS-SALAAM: I, you know, my  
23 question goes to the issue that you raised before  
24 about the attorney-client privilege and wanting to  
25 keep documents confidential. And if each of these

1 companies individually had consulted attorneys, would  
2 there be any real difference in the - - - the  
3 assertion of the attorney-client privilege here?

4 MR. YOUNGER: Well, these - - - these  
5 clients actually did consult, I mean - - -

6 JUDGE ABDUS-SALAAM: Individually.

7 MR. YOUNGER: - - - if they consulted a  
8 joint attorney.

9 JUDGE ABDUS-SALAAM: Yeah, or if they had  
10 consulted a joint attorney.

11 MR. YOUNGER: Well, I don't think you have  
12 to reach that. I mean, there is a joint client rule  
13 in New York, but they have been asked and said they  
14 couldn't. Why, because the conflicts were too great.  
15 If the conflicts are so great, how can there be a  
16 common interest? I mean, that's our alternative  
17 point.

18 But if I could go back to the cost point,  
19 because it's rather important. It's not just the cost of  
20 the business communities, you can't say there is - - - we  
21 have a corporate America rule, we have a corporate merger  
22 rule; the common interest rule is made as an evidence rule  
23 in our evidence books.

24 So if you think about a house closing, I'm  
25 trying to sell my house to you, you're buying it for me,

1 we figure there is a, you know, we have to comply with  
2 electric codes, or we want to get an oil tank out, and - -  
3 -

4 JUDGE FAHEY: Yeah, but the way - - - the  
5 way I understand Countrywide's argument is it - - -  
6 they want to protect all legal matters, and - - - and  
7 not just litigation; intellectual property, taxes,  
8 mergers, you know, any kind of joint venture public  
9 regulatory context. And so, the par - - - what I  
10 struggle with is how to articulate a rule that does  
11 that, and at the same time, doesn't eliminate the  
12 ability to have public regulation. I think, that's  
13 really what you're saying to us.

14 MR. YOUNGER: Yeah, and - - -

15 JUDGE FAHEY: That the rule itself is so  
16 broad that it's - - - it could potentially destroy  
17 it. The policy goal seems perfectly reasonable to  
18 me, the question is whether or not a rule can be  
19 articulated that doesn't subsume attorney-client  
20 confidentiality, and make it so large that every  
21 transaction is protected from any form of regulatory  
22 behavior at all.

23 MR. YOUNGER: And you're not the only one  
24 who has struggled with this. I mean, there are  
25 commentators who have said, this is an amorphous rule

1 if you go to the common interest without a tether to  
2 litigation.

3 JUDGE FAHEY: Well, look at - - - look at  
4 the other states, and I'm sure you have two. And the  
5 states seem to be split across the board.  
6 Massachusetts is the only one that done it. Delaware  
7 has - - - has moved in that direction a little bit,  
8 and the argument that's always made to New York is  
9 Delaware and the Feds are doing it, except for I  
10 think the Fifth Circuit, why aren't you doing it.

11 I suppose in response to that is, New York seems  
12 to be doing all right financially, they seem to be able to  
13 make a merger in New York financially, one way or without  
14 it. But they have some legitimate points in emerging  
15 areas of law that are inherent with litigation, while  
16 litigation may not be on the horizon. And that's what I  
17 think you need to address.

18 MR. YOUNGER: Well, if you mention  
19 Delaware, they adopted it by statute.

20 JUDGE FAHEY: Um-hum.

21 MR. YOUNGER: They adopted a Federal rule  
22 that Congress had rejected, by the way. And, you  
23 know, the uniform rule of evidence, which many states  
24 have adopted, is the New York Rule. And there are  
25 people who advocate for policy interest every day

1 across the hall in the legislature - - - across the  
2 street in the legislature, but you need to balance,  
3 are those perceived benefits outweighed by the costs.

4 And I just want to point out, it's not just the  
5 costs to litigants, the cost is weal in government  
6 investigations. Do we want to hinder government  
7 investigations? The Schwimmer case, someone mentioned the  
8 Second Circuit, that was a case where two financial  
9 advisers hired a joint accountant. Now, it was, one,  
10 which we think is dicta because litigation was actually  
11 afoot, but if you think about it, you could - - - we have  
12 all kinds of situations. There is no accountant privilege  
13 in New York, there is no architect privilege in New York,  
14 but you could create a privilege. It's only as, you know,  
15 as broad as the good lawyer's imagination that will  
16 subvert our privileged logs.

17 Thank you.

18 JUDGE RIVERA: Can you address the Second  
19 Circuit's Schaeffler decision?

20 MR. YOUNGER: Yeah, the Schaeffler decision  
21 really is no different than Schwimmer. There, the  
22 case says litigation was anticipated. So, I think it  
23 kind of proves our point. You don't need to make  
24 this major extension in the law.

25 JUDGE FAHEY: Schaeffler was actual

1 litigation; it was actual litigation.

2 MR. YOUNGER: Well, it was a tax audit, and  
3 they said in the - - - in the second holding, that  
4 there was anticipation of litigation for work  
5 product.

6 So my point is, you don't need to extend  
7 the law. This is - - - the privileges are supposed  
8 to be narrowly construed, as, you know, Judge Abdus-  
9 Salaam said in her first - - -

10 JUDGE RIVERA: Well, no, I'm talking - - -  
11 let me go back to Schaeffler. It is recognizing that  
12 the fact that you may have a - - - a heavy financial  
13 interest doesn't discount that you may also have a  
14 common legal interest. And so again, why doesn't  
15 that apply in the merger context? They want the  
16 deal, they want the money, maybe that's even a  
17 priority for them; I would think it would be.

18 But if they have this common legal interest  
19 to deal with the regulatory concerns, and to close  
20 the deal; why isn't that enough given the Schaeffler?

21 MR. YOUNGER: It would be if you could  
22 balance the harm to society, to transparency, you  
23 know, we - - - we learned in U.S. v. Nixon that you  
24 have a right to every person's evidence. That's what  
25 our justice system is all about. And when you take

1 away evidence, you don't just do it by, you know,  
2 willy-nilly. It's something we do very cautiously  
3 because it takes away from the justice system.

4 And you can see it right in this case. In  
5 this case, there are two pieces of evidence you need  
6 to think about. One is a sealed document that would  
7 show - - - remember, this is the largest financial  
8 fraud to - - - probably in U.S. history, right, and  
9 there is a sealed document, which you should look at  
10 R806, 807, which shows, you know, how much - - - how  
11 pervasive this mortgage crisis was in the company  
12 they were acquiring.

13 And we only got that because they actually  
14 took it off the privilege log. But if you then look  
15 at their log at page R205, the other one is at R807,  
16 the log lists things like, review of lending and  
17 mortgage practices. Is that what we try to cover in  
18 the attorney-client privilege? I mean, we have a  
19 public interest to make sure that there is free  
20 disclosure of information in the litigation process,  
21 and you only cut back from that in a privilege.

22 JUDGE ABDUS-SALAAM: I guess you do if  
23 there is some smoking gun in there that says we don't  
24 have any. I guess, if you do want to - - -

25 MR. YOUNGER: Well, we believe we have one,

1 we believe there will be more, and that's the whole  
2 point of discovery. I see my red light is on, but I  
3 appreciate the - - -

4 JUDGE PIGOTT: Thank you, Mr. Younger.

5 Mr. Rosenberg. Good afternoon, sir.

6 MR. ROSENBERG: Good afternoon, may it  
7 please the court, Jonathan Rosenberg for Bank of  
8 America Corporation.

9 This court should not put New York, the  
10 financial capital of the world, at a step with - - - with  
11 other court - - -

12 JUDGE PIGOTT: Suppose this deal was such  
13 that, you know, Bank of America is buying  
14 Countrywide, and through happenstance, or whatever,  
15 you say, oops, you know, we didn't know that they had  
16 this bigger problem than the one that we confronted.

17 Now, if Ambac finds that out, we're in deep  
18 doo-doo, so why don't we - - - why don't we protect  
19 ourselves and yourselves by saying, we have a common  
20 interest in not disclosing this big bad thing that's  
21 out there.

22 Right now, you can't, because you're - - -  
23 Bank of America has its lawyer, Countrywide has its  
24 lawyer, presumably you both protected each, you know,  
25 your clients. And now, we're going to say, well,



1 we're going to - - - we're going to broaden the - - -  
2 or limit the attorney-client privilege to the point  
3 where now - - - or excuse me, increase it so that we  
4 can protect our - - - our - - - the evil doing that  
5 went on.

6 MR. ROSENBERG: Your Honor, the same  
7 argument would apply for the attorney-client  
8 privilege. And that's the problem with many of their  
9 arguments, many of their slippery slope arguments,  
10 you would have the same argument in the attorney-  
11 client privilege context.

12 JUDGE PIGOTT: We don't have to change it.

13 MR. ROSENBERG: And - - - and you would  
14 have the crime fraud exception. You also have  
15 business - - -

16 JUDGE FAHEY: Well, that's why it's drafted  
17 so narrowly. The attorney-client privilege is  
18 drafted so narrowly to only include someone that you  
19 have this direct relationship with, this special  
20 relationship with. This moves beyond that special  
21 relationship. It's - - - it's really, it seems to me  
22 to be almost a radical expansion of the privilege  
23 itself.

24 MR. ROSENBERG: Because the attorney-client  
25 privilege is interpreted so narrowly, Your Honor,

1           this extension through the common interest doctrine  
2           is necessarily going to be narrow, because the first  
3           element of the common interest doctrine is, do you  
4           have an attorney-client privilege upon - - -

5                    JUDGE FAHEY:  So - - - so let me ask this.  
6           If we take away the litigation or pending litigation  
7           restraint that's on our communications with third  
8           party, what would the rule be?

9                    MR. ROSENBERG:  The rule is, as the First  
10          Department articulated, Your Honor, there has to be a  
11          privileged attorney-client communication that you're  
12          talking about in the first place.  And the parties -  
13          - -

14                   JUDGE FAHEY:  So I'm at a meeting with my -  
15          - - I'm at a meeting with my attorney, and I'm also  
16          meeting - - - so I've got attorney-client privilege  
17          in place, all right.

18                   MR. ROSENBERG:  The parties then need to  
19          share a common legal interest, not a business  
20          interest, but a legal interest.

21                   JUDGE FAHEY:  So let me ask this then.  
22          Here is what I struggle with, because I - - - we've  
23          all read the First Department, you don't have to go  
24          back to it.  But I struggle with how to distinguish a  
25          common business interest from a common legal

1 interest. And how this court could ever do that,  
2 because in the environment that we live in, more so  
3 in New York than anywhere else, a common business  
4 interest and a common legal interest are the same  
5 thing.

6 And that's why it seemed that the  
7 litigation rule is at least a manageable rule; it's  
8 something you can identify as measurable.

9 MR. ROSENBERG: It - - -

10 JUDGE FAHEY: This doesn't seem to be  
11 measurable, it seems to - - - to almost subsume every  
12 communication in any particular business transaction.

13 MR. ROSENBERG: It doesn't, Your Honor.  
14 This is the bread and butter of what courts in this  
15 and other states do every day on a regular basis.

16 JUDGE FAHEY: So you're saying that each  
17 court would decide in an individual basis then,  
18 whether or not this is a common business transaction  
19 or a legal transaction.

20 MR. ROSENBERG: Exactly. Just as courts  
21 decide in all circumstances.

22 The National Union case, deciding whether  
23 attorneys providing coverage advice, was just what - - -  
24 what the business of an insurance company is - - -

25 JUDGE FAHEY: Do you - - -

1 MR. ROSENBERG: - - - or it was legal  
2 advice. In the - - - in the - - -

3 JUDGE STEIN: What's happened in the last  
4 twenty years, what's changed, you know, why all of a  
5 sudden? If we don't have this expansion of the rule,  
6 is business going to flee New York State and go to  
7 Delaware?

8 MR. ROSENBERG: Your Honor, there's a  
9 misnomer that the rule in New York has been that  
10 there is a litigation requirement. This court has  
11 never said there is a litigation requirement, the  
12 First Department has never said so, the Second  
13 Department only said so in dicta, and indeed in 2013  
14 said, we need not reach the issue. You only have - -  
15 -

16 JUDGE ABDUS-SALAAM: Where does it come  
17 from - - -

18 MR. ROSENBERG: - - - lower courts'  
19 decisions - - -

20 JUDGE ABDUS-SALAAM: Okay, you were just  
21 about to tell us.

22 MR. ROSENBERG: You only have lower courts'  
23 decisions saying it without analysis, in dicta, where  
24 they didn't need to decide it for their case.

25 JUDGE STEIN: Well, that may be true, but

1 obviously nobody was challenging that. If - - - if  
2 there weren't decisions of the Appellate Divisions,  
3 and there wasn't, you know, a flood of cases coming  
4 up to the Court of Appeals.

5 MR. ROSENBERG: Your Honor, when people  
6 manage their affairs, when corporations manage their  
7 affairs, and by the way, in Upjohn, in 20 - - - in  
8 1981, thirty six years ago, the Supreme Court talked  
9 about the vast array of regulatory legislation,  
10 that's threefold at least, on this one.

11 JUDGE STEIN: So what's the problem with,  
12 you know, both sides have tons of lawyers, and why  
13 can't they consult their own lawyers? Why, you know,  
14 why do they have to be sharing this information?

15 MR. ROSENBERG: First of all, just to my -  
16 - - to finish my point in your first question, Your  
17 Honor.

18 JUDGE STEIN: It's all right.

19 MR. ROSENBERG: Parties don't know what law  
20 is going to apply, because privilege necessarily  
21 depends on what form you're going to be in. They  
22 don't know whether they're going to be sued in  
23 Delaware, New York, or California, or North Carolina,  
24 or in another jurisdiction.

25 JUDGE STEIN: That's true with lots of

1 laws, corporate laws.

2 MR. ROSENBERG: Yeah, but I'm just  
3 addressing the fallacy that because lower courts in  
4 New York said in dicta that there is a litigation  
5 requirement, that that somehow changed the way  
6 parties acted.

7 But secondly, Your Honor, if you look at  
8 the circumstances of this case, not only highly  
9 regulated companies, but bound by a merger agreement  
10 to consummate a merger by which they are going to  
11 become parent and subsidiary, communicating under  
12 confidentiality agreements about clearly defined  
13 legal issues that they need to address together, then  
14 you can see in this situation, there is every reason  
15 not to have a litigation requirement.

16 JUDGE PIGOTT: I don't see that.

17 JUDGE RIVERA: Well, it's possible you  
18 would - - - that something would have happened,  
19 right, and the merger would have fallen through? It  
20 was not really a done deal.

21 MR. ROSENBERG: Well, not that the merger  
22 would - - - would have fallen through, Your Honor,  
23 but there would have been less effective legal  
24 advice. For example, they had to file a joint proxy  
25 statement. So would it have been better for them to

1 say, okay, we're not going to talk to each other, and  
2 let's just hope that our parallel legal advice  
3 somehow gets to the right conclusion in having - - -

4 JUDGE PIGOTT: I would think in this  
5 situation, somebody has got to fill it out, right,  
6 one of you. And it gets filled out, and gets sent to  
7 the other one, and they say, looks good to us, and it  
8 gets filed. But you don't have to sit in the same  
9 room and say, in order to protect, you know, the two  
10 of us, we've got to do it together.

11 MR. ROSENBERG: Not to protect the two of  
12 us, Your Honor, but to comply with the complex  
13 Federal Securities disclosure laws.

14 JUDGE PIGOTT: Of course, but what I'm  
15 saying is, to pick on Mr. Younger's - - - if - - - if  
16 you've got a house closing, and somebody is going to  
17 prepare the deed, I mean, it's not going to be both  
18 of us. I'm not - - - I'm not going to sit down with  
19 the - - - the seller and say let's take a look at the  
20 deed. He or she is going to prepare it, I'm going to  
21 look at it, and if there is - - - if there's a  
22 problem with it, I'm going to tell him.

23 But I'm - - - but I'm certainly not, you  
24 know, going to waive my confid - - - my  
25 confidentiality with my - - - with my client by

1 saying, well, we were working together on it.

2 MR. ROSENBERG: But these are con - - - are  
3 parties bound by a contract to work together and to  
4 close the merger.

5 JUDGE ABDUS-SALAAM: Are you - - - are you  
6 suggesting, counsel, that any rule we adopt should be  
7 limited to mergers?

8 MR. ROSENBERG: I'm saying, Your Honor,  
9 based on the facts of this case, there is no need to  
10 have a litigation requirement, and that it would be  
11 counter to the doctrine of waiver that 4503  
12 incorporates, and sound public policy that this court  
13 applies under the common law.

14 In this context, where the parties are  
15 bound to work together to close a merger, there is no  
16 reason to say, you can't - - -

17 JUDGE RIVERA: It's your choice because  
18 you're trying to consummate a business deal. Because  
19 you're trying to make a lot of money off of that  
20 particular arrangement, and that's fine. That's the  
21 way the system goes; you're entitled to do so. His -  
22 - - his point is only, then fine, get your own  
23 lawyers, do that separately, but when you choose to  
24 share what's otherwise privileged, you've given up  
25 the privilege.



1                   MR. ROSENBERG: Because that's - - - that's  
2 why the common interest doctrine is there, Your  
3 Honor. Because you shouldn't force - - -

4                   JUDGE RIVERA: You're going circular; you  
5 haven't really explained why your situation is so  
6 unique that it shouldn't apply in your context.

7                   MR. ROSENBERG: Because you shouldn't force  
8 - - - let's - - - let's look at one example.

9                   JUDGE RIVERA: There are many examples  
10 where it would be great if people could openly  
11 communicate, and we don't necessarily apply the  
12 attorney-client privilege. Exceptions that you are  
13 looking for.

14                   MR. ROSENBERG: Well, let's look at the JP  
15 Morgan case, which is in the Morgan - - - which is in  
16 the merger context.

17                   JUDGE RIVERA: Um-hum.

18                   MR. ROSENBERG: That's 2007 case, a year  
19 before these communications were occurring, and the  
20 court differentiated between pre-merger agreement  
21 communications, which had said were not privileged  
22 because those were predominantly for a business  
23 reason, and post-merger agreement communications,  
24 where you do have a joint interest in complying with  
25 the law, in getting regulatory approval from the - -

1 - for the transactions, in - - - in filing a joint  
2 proxy statement, in dealing with tax issues that  
3 you're going to have to deal with, both leading up to  
4 the merger, and after the merger agreement is  
5 consummated.

6 JUDGE RIVERA: Well, I guess I'm not making  
7 myself clear; I'm not understanding your argument. I  
8 understand that point. What I'm concerned about, or  
9 what I'm trying to get to is, yes, you may both have  
10 this interest of making the deal happen, and of  
11 course you would want to do that in a way that  
12 complies with the law, but you each independently  
13 have that interest. To do that, there is - - - why  
14 do you need this exception to encourage you to do  
15 things that are within the parameters of the law?

16 MR. ROSENBERG: Because there is - - -  
17 there is no reason not to, Your Honor.

18 JUDGE FAHEY: Well, well - - -

19 MR. ROSENBERG: Let's say they hired one  
20 lawyer, let's say they hired one lawyer, okay - - -

21 JUDGE RIVERA: Other than he says the cost  
22 is on the other side. Why don't the costs outweigh  
23 whatever might be some semblance of a benefit to you;  
24 it sounds more like a convenience.

25 MR. ROSENBERG: Because there are no costs,

1 Your Honor, because courts are perfectly able to  
2 distinguish between business and - - - and legal.

3 JUDGE PIGOTT: You were going to say it's -  
4 - -

5 MR. ROSENBERG: Just as the court did in  
6 the Aetna Casualty coverage case.

7 JUDGE PIGOTT: You were going to say,  
8 suppose they hired one lawyer.

9 MR. ROSENBERG: If they hired one lawyer,  
10 then all would agree that it would be privileged to -  
11 - -

12 JUDGE STEIN: But you say they can't hire  
13 one lawyer, because they have - - - there are  
14 possible conflicts there, which doesn't that  
15 undermine that it's a common interest?

16 MR. ROSENBERG: No, because - - -

17 JUDGE STEIN: I mean, there may be some  
18 common interest, but not completely.

19 MR. ROSENBERG: Well, just as in the joint  
20 defense context, you don't - - - you're not forcing  
21 defendants, either in criminal or civil cases, to  
22 hire one lawyer just because they might have  
23 divergent interests in particular situations.

24 You're - - - in fact, you're encouraging  
25 them to have separate lawyers, and you want to

1 encourage them to talk about joint defense strategy,  
2 and joint legal interests. The same is true here,  
3 Your Honor.

4 JUDGE STEIN: But then - - - but - - - but  
5 if what you're saying is true, then why don't we just  
6 do away with the whole third party - - - once you  
7 disclose to a third party, it's no longer privileged.  
8 Because then, we'll just encourage everybody in every  
9 transaction to share information so that things are  
10 done properly, and legally, and hopefully we can  
11 avoid litigation. Why - - - why wouldn't it extend  
12 to that?

13 MR. ROSENBERG: Because you should have a  
14 confidentiality requirement, Your Honor. There  
15 should be an expectation that the parties in the  
16 common interest doctrine setting are going to keep  
17 the information - - - the privileged information  
18 confidential.

19 And you have every comfort that that's  
20 going to happen here. Written confidentiality  
21 agreements with parties contractually bound, having  
22 every economic incentive to keep it confidential.

23 JUDGE STEIN: That's the problem, is that  
24 there are other interests in having some of this  
25 information disclosed.

1 MR. ROSENBERG: The - - - the - - - well,  
2 that applies in any privilege context, Your Honor.

3 JUDGE STEIN: That - - - isn't that what  
4 we're weighing, as your adversary says?

5 MR. ROSENBERG: And I un - - -

6 JUDGE ABDUS-SALAAM: Isn't - - - isn't that  
7 our bedrock policy, as Mr. Younger pointed out, that  
8 the public is entitled to all of that information,  
9 unless it's confidential, as we've, you know, carved  
10 out that exception.

11 MR. ROSENBERG: Yes, Your Honor. And the  
12 legislature said, unless the client waives the  
13 privilege, that here are the contours of the  
14 attorney-client privilege.

15 In this context, Your Honor, where you have  
16 parties bound by a - - - by a merger agreement to  
17 work together to close the deal, where you have,  
18 clearly defined and well-articulated through  
19 testimony, legal interests that they have to address  
20 together, and they have written confidentiality  
21 agreements, there is - - - there is no reason to  
22 believe that there should be a litigation requirement  
23 imposed in these circumstances.

24 The court - - - the Supreme Judicial Court, in  
25 2007 in Massachusetts, said that the common interest

1 doctrine is in its early developmental stages.

2 This court need not go beyond - - - need not  
3 define all the contours of the common interest doctrine in  
4 this case. All it needs to decide is that legal means  
5 legal and not litigation, because litigation is a  
6 subcategory of legal. And that in this particular  
7 context, the common interest doctrine applies, and we  
8 shouldn't have a litigation requirement eviscerate the  
9 common interest doctrine, and make it no different than  
10 the work product (indiscernible).

11 JUDGE PIGOTT: If - - - if we agree with  
12 you, are we inviting a lot of litigation over what  
13 common interest means in your opinion?

14 MR. ROSENBERG: There has - - - there  
15 hasn't been that explosion of litigation, Your Honor,  
16 in the other jurisdictions. In the Federal courts,  
17 the majority of the Federal courts say there is no  
18 litigation requirement. In Massachusetts, in New  
19 Mexico, in Delaware, there hasn't been an explosion  
20 of litigation that they decry.

21 And in fact, in the Aetna Casualty case,  
22 the 1998 Supreme Court - - - lower Supreme Court case  
23 that they rely on heavily, the court had no  
24 difficulty distinguishing between business and legal.  
25 And it said that when the London reinsurers were

1 meeting to talk about their environmental coverage  
2 liability in the U.S., that they had - - - they were  
3 looking for an economic solution. And even though  
4 they were talking about legal provisions in the  
5 reinsurance treaties, the court said, that's a  
6 business purpose.

7 Courts do it on a regular basis, there is  
8 no reason why they can't do it in the common interest  
9 doctrine purpose, and this case is the heartland of  
10 why there should be no litigation requirement.

11 JUDGE PIGOTT: Thank you, sir.

12 MR. ROSENBERG: Thank you, Your Honor.

13 JUDGE PIGOTT: Mr. Younger.

14 MR. YOUNGER: Yeah, a few quick points. I  
15 just want to - - -

16 JUDGE RIVERA: Is New York an outlier in  
17 the majority of jurisdictions?

18 MR. YOUNGER: Absolutely not. I mean, it's  
19 very easy to distinguish every case by saying there's  
20 no analysis. I mean, you heard the notion that - - -  
21 that New York has never adopted this in the Appellate  
22 Division? Read the Hyatt case, I mean, I'll read the  
23 quote to you.

24 It's at - - - at page 296, "This Court has  
25 held that application of the common-interest

1 privilege requires anticipation of litigation." That  
2 a holding of the Appellate Division.

3 The same thing is done by just a swipe of  
4 their hand of seventeen different states that follow  
5 this rule. You have New Jersey, our next door  
6 neighbor in O'Boyle, you've got four other states  
7 that have done it by case law, you've got another ten  
8 that have done it under the uniform rules of  
9 evidence; that's not, you know, something that we  
10 should follow; the uniform rules of evidence?

11 But this isn't a counting game. We're not  
12 sitting there, you know, on election night and saying this  
13 state came in this way, this way, and this way. There is  
14 a split in the authority, and we believe the better view  
15 is the New York view. I - - - there is - - - a lot has  
16 been said about Delaware, as I mentioned, the Delaware  
17 legislature decided that.

18 But the point that I think is important you  
19 asked, there is going to be an explosion of litigation.  
20 We all remember what happened in tobacco. In the 1950s,  
21 the tobacco companies set up these nonprofits that were  
22 going to do research. For forty years they held things  
23 back based on the privilege, including the common  
24 interest. And you know how much litigation there was?  
25 And eventually, that what came out is millions of pages of



1 documents.

2 And it's submitted that we don't have to think  
3 about all the contours; that's exactly what you have to  
4 think about before you adopt a new rule. It's not just a  
5 merger rule, what else is it going to be?

6 I would like to come back to the house closing.  
7 It's not just the deed, Judge Pigott, but think about the  
8 oil tank. I'm selling my house to you, and we discover an  
9 oil tank, and we do have a common interest in making sure  
10 that the oil tank is handled properly. But I don't want  
11 to pay for it, and you don't want to pay for it. The idea  
12 that that's any different than that - - -

13 JUDGE GARCIA: But I don't think you are  
14 living together after the closing.

15 MR. YOUNGER: You are right, well, nor are  
16 you with - - - I mean, the people that - - - the  
17 shareholders of Countrywide are basically cashed out  
18 of this. So there is - - - they don't exist anymore  
19 after the merger.

20 JUDGE GARCIA: But your business entities  
21 are living together, right, I mean it's a merger, so  
22 you're working towards combining these assets, and  
23 maybe that's part of your litigation is how are they  
24 combine, but that's what your goal is. It's not, I'm  
25 selling you something.

1                   MR. YOUNGER: Well, until it closes, I  
2 would submit that you are. Because prior to the  
3 closing - - - and this is an important point, they -  
4 - - he said that everybody had every comfort. Look  
5 at page R85, section 6.2 of the merger agreement. It  
6 said, we don't have to share privileged information;  
7 it said it expressly. Why? Because Bank of America  
8 doesn't want to share everything with Countrywide,  
9 and Countrywide doesn't want to share everything with  
10 Bank of America. And in - - -

11                   JUDGE GARCIA: Isn't that always in the  
12 common interest privilege? I think the point was  
13 made in a criminal common interest. You always have  
14 - - - and I know, forget the litigations, which is  
15 important, but you always have your own interest that  
16 may conflict, but the key is, do you have a common  
17 legal interest, right?

18                   So there will be conflicts here in two  
19 separate entities, but the question is, are we going  
20 to find there is common legal interest that would  
21 justify privilege?

22                   MR. YOUNGER: Yeah, and it has to be enough  
23 of one that will justify the cost to what we say in -  
24 - -

25                   JUDGE GARCIA: Right.

1                   MR. YOUNGER: - - - U.S. v. Nixon is, every  
2 person is evidence.

3                   JUDGE GARCIA: Um-hum.

4                   MR. YOUNGER: Because that cost is many  
5 fold. It's - - - it's the costs, not just in the  
6 business context, which is great, I mean, you can  
7 imagine, you know, any number of situations that we  
8 covered here, you know, two companies that are  
9 considering whether, you know, they're going to  
10 merge, and they were manufacturing facilities that  
11 have safety issues. They may have a common interest  
12 in making sure they're handled, you know, the right  
13 way, but, you know, they - - - is that the kind of  
14 thing we want to keep out of the court record?

15                   And then you look at the - - - outside the  
16 business context, you could think of retirement  
17 advisers, you could think about subcontractors, you  
18 could think about architects. But I think that at  
19 the end of the day, there has to be a balancing.

20                   You have to see, does this policy interest,  
21 is it enough of a justification? And we know that  
22 the first interest isn't. You know, the need to  
23 consult counsel, everybody was consulting counsel  
24 when the deal was done. But then, is it outweighed  
25 by all these costs? And we submit that - - - that

1           there is no way that - - - that you can really  
2           grapple with us and say, in today's world, we should  
3           depart from twenty years of precedent legal work.

4                         JUDGE PIGOTT: Thank you, Mr. Younger.

5                         MR. YOUNGER: Thank you all.

6                         JUDGE PIGOTT: Thank you.

7                                 (Court is adjourned)

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I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Ambac Assurance Corp. v. Countrywide Home Loans, Inc., No. 80 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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