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# **ANYTHING BUT COMMON: NEW YORK’S “PENDING OR ANTICIPATED LITIGATION” LIMITATION TO THE COMMON INTEREST DOCTRINE CREATES MORE PROBLEMS THAN IT SOLVES**

Eric A. Franz\*

*Abstract:* New York’s highest court recently handed down *Ambac v. Countrywide*, a decision that has major ramifications in the mergers and acquisitions (M&A) world. Once parties sign a merger or acquisition agreement, they share a common interest in ensuring that both parties comply with applicable laws, a process that requires legal communications with each other’s attorneys. Under the common interest doctrine, Delaware and the majority of federal circuits apply the attorney-client privilege to shield many of these communications from discovery. However, *Ambac* upset M&A attorneys’ reliance on the common interest doctrine by holding that parties to a merger waive their attorney-client privilege when they share legal advice with the other entity’s attorneys, unless the communications relate to pending or anticipated litigation. In addition to the M&A world, *Ambac* will have negative consequences for many business entities attempting to comply with the law on advice from counsel during major transactions. While a number of commentators have addressed the litigation requirement tangentially, there is currently no thorough evaluation of the state of this requirement, which has special relevance in the post-*Ambac* world. This Comment evaluates the history and purpose of the common interest doctrine and surveys the current state of the law across multiple jurisdictions. This Comment then argues that *Ambac*’s litigation requirement is contrary to the purpose of the attorney-client privilege—to encourage persons and entities to freely seek legal advice in order to comply with the law. Finally, this Comment urges the many jurisdictions with underdeveloped law on the common interest doctrine to reject *Ambac*’s restrictive litigation requirement.

## **INTRODUCTION**

The attorney-client privilege plays an important role in our legal system to encourage “full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”<sup>1</sup> The Supreme Court of the United States has placed great emphasis on clarity when defining the scope of the privilege. As the Court noted, an uncertain privilege is “no

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\* J.D. Candidate, 2017, University of Washington School of Law. Many thanks to Andrew Escobar for providing the idea for this Comment, and for his helpful feedback. Thank you also to Professor Maureen Howard for her critical direction and feedback. Finally, thank you to the *Washington Law Review* editing team, without which this piece would not be possible.

1. *United States v. Zolin*, 491 U.S. 554, 562 (1989).

privilege at all”<sup>2</sup> because if there is doubt as to whether a legal communication is discoverable, clients are much less likely to make that communication to their attorney<sup>3</sup>—thereby contravening the privilege’s purpose.

Clients may waive the attorney-client privilege if they disclose their communications to third parties.<sup>4</sup> The common interest doctrine is perhaps the most confusing aspect of third-party waiver. The common interest doctrine allows a client to avoid waiving the attorney-client privilege by disclosing an otherwise privileged communication to a third party, when the client and the third party share a common legal interest.<sup>5</sup> The common interest doctrine began as a “joint defense” doctrine in criminal cases,<sup>6</sup> and later expanded to civil cases as well.<sup>7</sup> While many jurisdictions have adopted the common interest doctrine, the details of the doctrine differ based on jurisdiction, and many jurisdictions have not adopted a common interest doctrine in the civil arena at all.<sup>8</sup>

One particularly muddled aspect of the common interest doctrine recently thrust itself front and center in the mergers and acquisitions world: the litigation requirement, which allows the common interest doctrine to protect communications only when those communications relate to litigation.<sup>9</sup> States and the federal circuits differ widely on whether they have adopted or even addressed the litigation requirement.<sup>10</sup>

New York’s highest court recently gave a lengthy defense of the litigation requirement in *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*<sup>11</sup> The *Ambac* majority and dissenting opinions disagreed

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2. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

3. *Id.* at 392–93.

4. *See, e.g., Maday v. Pub. Libraries of Saginaw*, 480 F.3d 815 (6th Cir. 2007) (holding that a party waived attorney-client privilege by voluntarily disclosing communications to a social worker).

5. *See Morgan v. City of Federal Way*, 166 Wash. 2d 747, 757, 213 P.3d 596, 601 (2009) (“The presence of a third person during the communication waives the privilege, unless the third person . . . has retained the attorney on a matter of ‘common interest.’”) (citations omitted).

6. *Chahoon v. Commonwealth*, 62 Va. 822, 841–42 (1871) (reasoning that the exception was justified because the parties “had the same defen[s]e to make”); *see also Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 36 (N.Y. 2016) (describing the “joint defense” doctrine’s origins in *Chahoon*).

7. *See, e.g., Schmitt v. Emery*, 2 N.W.2d 413 (Minn. 1942) (expanding the common interest doctrine to civil cases) (overruled on other grounds); UNIF. R. EVID. 502(b) (UNIF. LAW COMM’N 1999).

8. *See infra* Part III.

9. *See Ambac*, 57 N.E.3d 30 (adopting the litigation requirement).

10. *See infra* Part III.

11. 57 N.E.3d at 38.

sharply about whether a litigation requirement is doctrinally sound, supported by historical precedent, and supported by policy considerations.<sup>12</sup> This Comment argues that jurisdictions should reject *Ambac*'s formulation of the litigation requirement for three reasons. First, *Ambac*'s assertion that courts need not ensure that the common interest doctrine advances the full disclosure purpose of the attorney-client privilege is doctrinally unsound.<sup>13</sup> Second, the litigation requirement is not necessary to ensure broad discovery because the common interest doctrine is limited by the other requirements of the attorney-client privilege: it only covers legal communications, not business communications or underlying facts.<sup>14</sup> Third, the litigation requirement is contrary to the full disclosure purpose of the attorney-client privilege, and it will result in poorer legal advice, produce less compliance with the law, and encourage gamesmanship.<sup>15</sup>

This Comment proceeds in five Parts. Part I discusses the attorney-client privilege and waiver generally as context for a discussion of the common interest doctrine. Part II traces the history and current state of the common interest doctrine. Part III focuses narrowly on the litigation requirement and surveys the current state of the requirement (or lack thereof) in state and federal jurisdictions. Part IV discusses the *Ambac* case, which adopts a litigation requirement and frames the common interest doctrine as an "exception" to third-party waiver of the attorney-client privilege. Finally, Part V argues that jurisdictions should reject *Ambac*'s litigation requirement as an arbitrary and doctrinally unsound limitation on the common interest doctrine—and therefore on the attorney-client privilege itself. Part V therefore urges jurisdictions to reject *Ambac*'s rationale for a litigation requirement.

## I. THIRD-PARTY WAIVER LIMITS THE SCOPE OF COMMUNICATIONS THAT THE ATTORNEY-CLIENT PRIVILEGE PROTECTS

The common interest doctrine prevents third-party waiver of the attorney-client privilege.<sup>16</sup> Thus, it is important to first understand the

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12. See generally *id.*

13. See *infra* section V.A.

14. See *Upjohn Co. v. United States*, 449 U.S. 383, 395–96 (1981); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 cmt. d (AM. LAW INST. 2000).

15. See *infra* section V.C.

16. See, e.g., *Ambac*, 57 N.E.3d at 35 (“[W]here two or more clients *separately* retain counsel to advise them on matters of common legal interest, the common interest exception allows them to

attorney-client privilege and waiver generally. Scores of scholars have addressed the attorney-client privilege and waiver.<sup>17</sup> This Part attempts to provide information sufficient to allow the reader to evaluate the common interest doctrine in its proper context. In particular, this Part provides background on the full disclosure purpose of the attorney-client privilege and the third-party waiver doctrine.

A. *All Jurisdictions Protect Legal Communications Between Attorneys and Their Clients*

The attorney-client privilege is “the oldest of the privileges for confidential communications known to the common law.”<sup>18</sup> The privilege applies to corporations as well as individuals<sup>19</sup> and applies equally to communications that relate to litigation and those that do not.<sup>20</sup> There is no one-size-fits-all approach to the attorney-client privilege; instead, a web of statutes and common law governs.<sup>21</sup>

On the federal level, Federal Rule of Evidence (“FRE”) 501 covers privileges:<sup>22</sup>

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:  
the United States Constitution;  
a federal statute; or  
rules prescribed by the Supreme Court.

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shield from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest.”) (emphasis in original) (citations omitted).

17. See, e.g., 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (John T. McNaughton rev. 1961); PAUL R. RICE ET AL., 2 ATTORNEY-CLIENT PRIVILEGE IN THE U.S. (2d ed. 1999); KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE (7th ed. student ed. 2006).

18. *Upjohn*, 449 U.S. at 389.

19. *Id.*

20. See, e.g., *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 805 (Fed. Cir. 2000) (holding that attorney-client privilege covered submission of invention record to corporate legal counsel for the purpose of obtaining legal advice); *Adler v. Greenfield*, 990 N.E.2d 1219, 1237 (Ill. Ct. App. 2016) (holding that attorney-client privilege covered legal, estate-planning oriented communications between attorney and client’s representative).

21. On the federal level, Federal Rule of Evidence 501 governs privileges and gives federal courts leeway to interpret privileges in light of the common law. Some states extensively codify their attorney-client privilege and its exceptions—examples are Delaware (DEL. R. EVID. 502), Idaho (IDAHO R. EVID. 502), and North Dakota (N.D. R. EVID. 502). Other states rely almost exclusively on the common law to define privileges—examples are West Virginia (W. VA. R. EVID. 501) and Wyoming (WYO. R. EVID. 501).

22. FED. R. EVID. 501.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.<sup>23</sup>

The Judiciary Committee rejected a proposed FRE 501 that enumerated nine specific privileges and instead determined that it was best to leave specific privileges to the common law.<sup>24</sup> Judiciary Committee Notes to FRE 501 indicates that Congress left full discretion to judges to define and apply privileges “in the light of reason and experience.”<sup>25</sup> The attorney-client privilege on the federal level—as well as the other privileges—is now a matter of federal common law. Therefore, federal judges have wide latitude to interpret the privilege in light of its purposes.

Courts widely apply the standard formulation of the privilege that was created by Professor John Henry Wigmore:

1) Where legal advice of any kind is sought 2) from a professional legal adviser in his capacity as such, 3) the communications relating to that purpose, 4) made in confidence 5) by the client, 6) are at his insistence permanently protected 7) from the disclosure by himself or by the legal adviser, 8) except the protection be waived.<sup>26</sup>

The burden is on the party asserting the privilege to prove each of these elements by a preponderance of the evidence.<sup>27</sup>

State privilege rules apply in state cases and in federal civil cases where state law provides the rule of decision.<sup>28</sup> Most states address the attorney-client privilege through state statutes and state rules of evidence, while other states apply attorney-client privilege solely as a matter of common law.<sup>29</sup>

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23. *Id.*

24. H.R. REP. NO. 93-650 at 8–9 (1973), [http://federalevidence.com/pdf/FRE\\_Amendments/1975\\_Orig\\_Enact/House%20Report%2093-650%20\(1974\).pdf](http://federalevidence.com/pdf/FRE_Amendments/1975_Orig_Enact/House%20Report%2093-650%20(1974).pdf) [<https://perma.cc/87V2-DBPX>].

25. *Id.*

26. WIGMORE, *supra* note 17, § 2292, at 554. *See also* United States v. Bisanti, 414 F.3d 168, 171 (1st Cir. 2005) (quoting Prof. Wigmore’s language); United States v. Landof, 591 F.2d 36, 38 (9th Cir. 1978) (same).

27. *See, e.g.*, Ralls v. United States, 52 F.3d 223, 225 (9th Cir. 1995) (“A party asserting the attorney-client privilege has the burden of establishing the relationship and the privileged nature of the communication.”).

28. FED. R. EVID. 501.

29. *Compare* W. VA. R. EVID. 501 (closely mirroring Federal Rule of Evidence 501 and providing that privileges are governed by the common law), *with* ARK. R. EVID. 502 (statutorily defining attorney-client privilege).

In all jurisdictions, the attorney-client privilege protects only *legal* communications.<sup>30</sup> To successfully invoke the privilege for a specific communication, the purpose of the communication must have been to obtain legal advice from the client's attorney.<sup>31</sup> The underlying facts of a communication are not privileged,<sup>32</sup> nor are communications for the purpose of obtaining business advice.<sup>33</sup> A communication is not privileged where it "neither invited nor expressed any legal opinion whatsoever, but involved the mere soliciting or giving of business advice."<sup>34</sup>

In defining the scope of the attorney-client privilege, all jurisdictions agree that it must be shaped by its purposes. The next section discusses the primary, overarching purpose of the privilege: to improve legal representation by encouraging clients to make full disclosure to their attorneys.<sup>35</sup>

### *B. The Purpose of the Attorney-Client Privilege Is Full Client Disclosure*

The primary purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."<sup>36</sup> The United States Supreme Court<sup>37</sup> has long recognized the importance to the legal system of "encourag[ing] clients to make full disclosure to their attorneys."<sup>38</sup> Full disclosure enables attorneys to represent their clients adequately.<sup>39</sup> However, clients who

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30. See, e.g., N.H. R. EVID. 502 Reporter's Notes ("Generally the [attorney-client] privilege does not exist when consultation is held with a lawyer as a friend or in some business capacity not involving the rendering of legal advice or services.").

31. *Id.*

32. *Upjohn Co. v. United States*, 449 U.S. 383, 395–96 (1981); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 cmt. d (AM. LAW INST. 2000).

33. See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950).

34. *Id.*

35. *Upjohn*, 449 U.S. at 395–96.

36. *United States v. Zolin*, 491 U.S. 554, 562 (1989).

37. Some states have codified their attorney-client privilege rules. In those states, the analysis may be less governed by common law and more by the code. That said, common law principles still play a role and the purposes of attorney-client privilege still apply. For that reason, this Part focuses on the federal common law of attorney-client privilege.

38. *Upjohn*, 449 U.S. at 390 (citing *United States v. Nashville R. Co.*, 236 U.S. 318, 336 (1915)).

39. *Id.*

fear their communications will be disclosed may withhold important facts from their attorneys.<sup>40</sup>

Encouraging full and frank communication between clients and lawyers helps ensure that the clients comply with the law. This benefits clients, the legal system, and society as a whole.<sup>41</sup> Without full information from clients, attorneys are more likely to give inaccurate advice that leads their clients down a path of noncompliance or poor litigation strategy.<sup>42</sup> The Supreme Court recognizes that the privilege's application must be predictable to serve its purposes.<sup>43</sup> Both attorneys and clients need to know which communications they can expect to shield from discovery.<sup>44</sup> If there is doubt as to whether legal communications are discoverable, clients are much less likely to make those communications to their attorneys.<sup>45</sup>

An example of how the full disclosure purpose shapes the privilege is the seminal case of *Upjohn Co. v. United States*, which relied on the purpose of full disclosure in rejecting a lower court's "control group" test for the communications of corporate employees.<sup>46</sup> The control group test would have limited the corporate attorney-client privilege to the communications of senior management, on the grounds that only senior management personify the client corporation when it communicates with its counsel.<sup>47</sup> The Court rejected the control group test on three related grounds. First, that middle and lower-level employees often possess the information needed by corporate counsel to ensure that the corporate

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40. *Id.*

41. *Id.* at 389 (attorney-client privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure") (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)).

42. As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.

Katherine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 57 (2005) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1972)).

43. *Upjohn*, 449 U.S. at 393 ("[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.").

44. *Id.*

45. *Id.* at 392–93.

46. *Id.* at 396.

47. *Id.* at 390.



client complies with the law.<sup>48</sup> Second, that not extending the attorney-client privilege to communications by middle and lower-level employees would discourage “the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation.”<sup>49</sup> Third, the control group test prevented legal communications from counsel to middle and lower-level employees “who will put into effect the client corporation’s policy.”<sup>50</sup> The chilling effect on communication would inhibit the kind of sound legal advice that promotes the “broader public interests in the observance of law and administration of justice.”<sup>51</sup>

*Upjohn* is an example of the Supreme Court using a practical approach to define the bounds of the attorney-client privilege to ensure that full disclosure and sound legal advice were possible between corporate clients and their counsel. The Court recognized that it had the power to shape the privilege with “the principles of the common law as . . . interpreted . . . in the light of reason and experience.”<sup>52</sup> It noted that corporations face “a vast and complicated array of regulatory legislation”<sup>53</sup> that is “hardly an instinctive matter,”<sup>54</sup> and rejected a test that would limit the corporation’s ability to comply with such legislation.<sup>55</sup> In doing so, *Upjohn* suggested an approach to attorney-client privilege that emphasizes function over form.

### C. *Third-Party Disclosure Waives the Attorney-Client Privilege*

The attorney-client privilege applies to communications made in confidence.<sup>56</sup> Disclosure of such a communication to a third-party often waives the privilege because it signals an indifference to

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48. *Id.* at 391.

49. *Id.* at 392.

50. *Id.*

51. *Id.* at 389.

52. *Id.* at 397 (quoting FED. R. EVID. 501).

53. *Id.* at 392.

54. *Id.* (citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 440–41 (1978)).

55. For a detailed analysis of the attorney-client privilege and the common interest exception as applied to major business transactions, see Anne King, Note, *The Common Interest Doctrine and Disclosures During Negotiations for Substantial Transactions*, 74 U. CHI. L. REV. 1411 (2007). Note, however, that King assumes a “pending or anticipated litigation” requirement applies to the common interest exception. *Id.* at 1424 (“The common interest doctrine may also apply before litigation occurs, as long as the parties anticipate being possible targets of litigation in the area of their common interest.”) (citations omitted). This is a requirement not present in several jurisdictions and one that this Comment argues against. See *infra* Parts III, V.

56. See *Maday v. Pub. Libraries of Saginaw*, 480 F.3d 815 (6th Cir. 2007).

confidentiality.<sup>57</sup> It is not a client's subjective intention that triggers waiver, but rather whether the client objectively demonstrates the proper respect for confidentiality.<sup>58</sup> For that reason, careless third-party disclosures constitute waiver,<sup>59</sup> but disclosures under duress or deception do not.<sup>60</sup>

With the exception of enumerated waiver provisions in Federal Rule of Evidence 502 and in some state statutes, common law dictates which persons or entities constitute third parties for purposes of waiver.<sup>61</sup> Courts have held that disclosure to an auditor,<sup>62</sup> to a social worker,<sup>63</sup> and to a wider audience via blog or e-mail<sup>64</sup> constitute third-party waiver. However, two clients represented by the same attorney may disclose privileged communications relating to the represented matter to each other without waiving the privilege.<sup>65</sup> Courts recognize that the purposes of the attorney-client privilege are best served by those clients being able to communicate with each other in this setting, where both clients expect that the communications will be privileged as to the outside world, but not between each other.<sup>66</sup> For the same reasons, communications to some agents of the client,<sup>67</sup> to the lawyer's staff,<sup>68</sup> or to an interpreter<sup>69</sup>

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57. *Id.*

58. WIGMORE, *supra* note 17, § 2327.

59. *See, e.g., O'Leary v. Purcell Co.*, 108 F.R.D. 641, 644 (M.D.N.C. 1985) (holding that the attorney-client privilege may be waived by a careless, unintentional, or inadvertent disclosure).

60. *SEC v. Forma*, 117 F.R.D. 516, 523 (S.D.N.Y. 1987).

61. *See* FED. R. EVID. 502 (enumerating some forms of waiver).

62. *See Couch v. United States*, 409 U.S. 322 (1973).

63. *See Maday v. Pub. Libraries of Saginaw*, 480 F.3d 815 (6th Cir. 2007).

64. *Lenz v. Universal Music Corp.*, No. C 07-03783 JF (PVT), 2010 WL 4286329, at \*3-5 (N.D. Cal. Oct. 22, 2010).

65. James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631, 634 (1997) ("The 'joint client' privilege attaches when the clients are represented by a common lawyer. Communications among the clients and their common lawyer remain privileged as against third parties, and the joint client privilege applies to both litigated and nonlitigated matters.").

66. *Id.* at 648 ("[C]onfidentiality is preserved because the values associated with the disclosure to the third person outweigh the interests in treating the privilege as having been waived.").

67. *See United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

68. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 cmt. g (AM. LAW INST. 2000) ("A lawyer may disclose privileged communications to other office lawyers and with appropriate nonlawyer staff—secretaries, file clerks, computer operators, investigators, office managers, paralegal assistants, telecommunications personnel, and similar law-office assistants.").

69. *See People v. Osario*, 549 N.E.2d 1183, 1186 (N.Y. 1989) ("[C]ommunications made to counsel through a hired interpreter, or one serving as an agent of either attorney or client to facilitate communication, generally will be privileged.").

generally do not constitute waiver because these parties are necessary to further legal representation.

The waiver analysis is inseparable from the attorney-client privilege analysis because the extent of waiver defines the scope of the privilege.<sup>70</sup> This connected nature between the privilege itself and waiver of the privilege is shown by the fact that generally the party claiming attorney-client privilege must establish lack of waiver as an element of the privilege.<sup>71</sup> In this sense, waiver simply describes a circumstance in which the attorney-client privilege does not apply. In either case, the privilege does not cover the communications, and a judge will likely deny a claim of privilege and order the communications to be disclosed. For these reasons, the waiver rules must further the purposes of the attorney-client privilege because they are fundamentally aimed at the same goal: balancing liberal discovery rules against the societal benefit from clients' full disclosure that facilitates sound legal advice and compliance with the law.

One area of waiver that has caused considerable confusion is the common interest doctrine, often referred to as the common interest exception.<sup>72</sup> The common interest doctrine allows a client to avoid waiving the attorney-client privilege by disclosing an otherwise privileged communication to a third party when the communication relates to a common legal interest shared by the parties.<sup>73</sup>

The common interest doctrine is often invoked to protect communications between parties on the same side of litigation and their separate attorneys.<sup>74</sup> Some jurisdictions strictly limit application of the

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70. See, e.g., *In re Keeper of Records* (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16, 22 (1st Cir. 2003) (“[T]he party who invokes the privilege bears the burden of establishing that it applies to the communications at issue and that it has not been waived.”).

71. See *id.*; *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30 (N.Y. 2016) (“Generally, communications made in the presence of third parties, whose presence is known to the [client], are not privileged from disclosure” because they are not deemed confidential.”) (quoting *People v Harris*, 442 N.E. 2d 1205, 1208 (N.Y. 1982)). But see *Sampson v. Sch. Dist. of Lancaster*, 262 F.R.D. 469, 478 (E.D. Pa. 2008) (“As the party challenging the privileged communication, Plaintiff bears the burden of showing that Defendants waived the privilege.”).

72. Courts and scholars refer to the common interest doctrine by many names, including the common interest exception. See *infra* Parts IV–V. While “exception” indicates correctly that the common interest doctrine is not a standalone privilege, the term “exception” causes its own problems by suggesting that the common interest analysis is separate and apart from the waiver analysis. See *infra* Part V. For that reason, this Comment uses “common interest doctrine.”

73. See *Morgan v. City of Federal Way*, 166 Wash. 2d 747, 757, 213 P.3d 596, 601 (2009) (“The presence of a third person during the communication waives the privilege, unless the third person . . . has retained the attorney on a matter of ‘common interest.’”) (citations omitted).

74. See, e.g., *State v. Emmanuel*, 42 Wash. 2d 799, 815, 259 P.2d 845, 854 (1953); *Schmitt v. Emery*, 2 N.W.2d 413 (Minn. 1942).

common interest doctrine to co-parties in litigation that retain separate attorneys.<sup>75</sup> In contrast, many jurisdictions extend the common interest doctrine to protect communications that relate to non-litigation common interests, such as prospectively seeking legal advice to comply with laws or regulations.<sup>76</sup> To understand how this jurisdictional split evolved and what it means for the law of privilege, the next Part discusses the origins and development of the common interest doctrine itself.

## II. THE COMMON INTEREST DOCTRINE EVOLVED FROM CRIMINAL LAW INTO A WIDESPREAD—YET MUDDLED—CIVIL LAW DOCTRINE

The common interest doctrine began as a “joint defense” doctrine in criminal cases.<sup>77</sup> Over time it has expanded to cover a broader range of legal communications in both civil and criminal contexts.<sup>78</sup> While many jurisdictions have adopted some form of the common interest doctrine, the details of the doctrine differ based on jurisdiction, and many jurisdictions have not adopted a common interest doctrine in the civil arena at all.<sup>79</sup> This Part addresses the doctrine’s scope and history in the federal circuits and the states.

### A. *The Common Interest Doctrine’s Broad Contours*

The common interest doctrine is still evolving, and many jurisdictions have yet to address or apply it at all.<sup>80</sup> Yet the doctrine shares some traits among most of the jurisdictions that have adopted it.<sup>81</sup> First, most common interest doctrine jurisdictions describe the common interest doctrine either as part of the general attorney-client privilege rule, or as an exception to waiver of the attorney-client privilege, not as a separate,

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75. See, e.g., *Ambac*, 57 N.E.3d at 30 (adopting the litigation requirement).

76. See *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815–16 & n.6 (7th Cir. 2007) (clients need only “undertake a joint effort with respect to a common legal interest”).

77. See *Chahoon v. Commonwealth*, 62 Va. 822, 841–42 (1871) (reasoning that the exception was justified because the parties “had the same defen[s]e to make”).

78. See, e.g., UNIF. R. EVID. 502(b) (UNIF. LAW COMM’N 1999); *Schmitt*, 2 N.W.2d 413 (expanding the exception to civil cases).

79. See *infra* Part III.

80. See, e.g., GA. CODE ANN. § 24-5-501 (2016) (leaving attorney-client privilege to the common law). The Supreme Court of Georgia has not yet addressed the common interest doctrine. This pattern is followed in several other states, including Illinois (ILL. R. EVID. 502), Indiana (IND. R. EVID. 502), Iowa (IOWA R. EVID. 5.502), and others.

81. See *infra* section II.C.1.

standalone privilege.<sup>82</sup> Thus, the common interest doctrine only protects communications to third parties that would have already been covered by the attorney-client privilege if they were made in confidence between a client and the client's attorney.<sup>83</sup> For that reason, communications with a non-legal purpose are not covered.

Second, the common interest doctrine protects communications between clients with *separate* attorneys.<sup>84</sup> While some jurisdictions use the term "common interest" to describe application of the attorney-client privilege to separate clients with the same attorneys, that situation is generally already covered under separate principles of the common law attorney-client privilege.<sup>85</sup> Throughout its history, from its inception as the joint-defense doctrine to the modern common interest doctrine, the common interest doctrine has operated to protect disclosures to separate attorneys that would otherwise waive the attorney-client privilege.<sup>86</sup> The Restatement also takes this approach by expressly stating that the common interest doctrine applies to communications between clients that are "represented by separate attorneys."<sup>87</sup>

Third, disclosure to third parties other than those sharing a common legal interest waives the privilege.<sup>88</sup> A common example is where a meeting of clients and their separate counsel happens to include a third party who is not a client with a common interest or an attorney of such a client. Imagine that officers of a corporate client hold an in-person

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82. The Uniform Rules of Evidence, adopted by at least eleven states, includes the common interest language in its "General Rule of Privilege." UNIF. R. EVID. 502(b)(3) (UNIF. LAW COMM'N 1999). *But see In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 362 (3d Cir. 2007) (describing the "Community-of-Interest (Or Common Interest) *Privilege*" (emphasis added)).

83. For example, business communications without a legal component are generally not covered by the attorney-client privilege. *See, e.g., Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp.*, No. 93 Civ. 5125, 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. Jan. 25, 1996) (communications with lawyer serving purely as negotiator not privileged).

84. *See, e.g.,* UNIF. R. EVID. 502(b) (UNIF. LAW COMM'N 1999) (protecting legal communications "by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein").

85. *See* Fischer, *supra* note 65, at 634.

86. *See* Schaffzin, *supra* note 42, at 59.

87. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(1) (AM. LAW INST. 2000) ("If two or more clients with a common interest in a . . . matter *are represented by separate lawyers* . . . a communication of any such client . . . that relates to the matter is privileged as against third persons.") (emphasis added).

88. *See, e.g., Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 35 (N.Y. 2016) ("Generally, communications made in the presence of third parties, whose presence is known to the [client], are not privileged from disclosure' because they are not deemed confidential.") (quoting *People v. Harris*, 442 N.E. 2d 1205, 1208 (N.Y. 1982)).

meeting with the corporation's attorney and an outside advertising consultant. In this scenario, legal communications in the presence of the outside consultant waive the attorney-client privilege because they are disclosed to a third party that does not share a common *legal* interest with the corporation—although they may share a common *business* interest.<sup>89</sup> Because the communication to that third party by definition cannot be for the purpose of securing legal counsel on the matter of common interest, the common interest doctrine does not apply to shield those communications.<sup>90</sup>

Fourth, while jurisdictions differ as to how common the common interest must be, jurisdictions generally require the parties to be on the same side of some kind of legal issue. Co-parties in litigation therefore may generally invoke the common interest doctrine to prevent disclosure of their communications regarding litigation strategy with their separate counsel.<sup>91</sup> But parties negotiating at arms-length generally cannot invoke the common interest doctrine because the interest in a successful negotiation is not a sufficiently common interest.<sup>92</sup> For that reason, legal communications to a legal adversary's attorney in settlement negotiations are generally not covered by the common interest doctrine—there is no common legal interest in a particular legal outcome because the parties' legal objectives are different.<sup>93</sup> The same goes for corporations negotiating a merger: until they sign a merger agreement, it is much less likely that they share a common legal interest because there is no shared legal interest in the resulting entity complying with the law before the parties have agreed to create the entity.<sup>94</sup>

### B. *The Joint Defense Doctrine Emerged in a Criminal Case*

The modern common interest doctrine has its roots in criminal law with the joint defense doctrine.<sup>95</sup> In 1871, the Supreme Court of Appeals of Virginia in *Chahoon v. Commonwealth* held that three defendants in a criminal conspiracy case were entitled to the attorney-client privilege in regards to communications made in a private meeting with two of the

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89. See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950).

90. *Id.*

91. See *Ambac*, 57 N.E.3d at 626–27.

92. King, *supra* note 55, at 1412–13 (“Most courts conclude that disclosures made during transaction negotiations work a waiver of the attorney-client privilege.”).

93. *Id.*

94. *Id.*

95. See *Chahoon v. Commonwealth*, 62 Va. 822 (1871).

three defendants' attorneys present.<sup>96</sup> Importantly, no persons other than the defendants and their lawyers were present, as the presence of an unrelated third party would certainly have waived the privilege.<sup>97</sup>

Although *Chahoon* did not fully define the criminal joint defense doctrine, the case forecasted some parameters of what would eventually evolve into the civil common interest doctrine. First, it applies to communications between a client and a *separate* attorney of another client.<sup>98</sup> Second, the communications must be for a legal purpose shared in common between the clients.<sup>99</sup> This means that communications between clients represented by separate attorneys without attorneys present are not covered because client-to-client conversations are de facto not for the purpose of obtaining legal counsel and thus are not protected by the attorney-client privilege in the first place.

The *Chahoon* court justified the extension of the criminal attorney-client privilege as follows:

Under such circumstances, it was natural and reasonable, if not necessary, that these parties, thus charged with the same crimes, should meet together in consultation with their counsel, communicate to the latter all that might be deemed proper for them to know, and to make all necessary arrangements for the defen[s]e.<sup>100</sup>

While *Chahoon* was decided a century before *Upjohn*, the purpose of encouraging full disclosure is evident in the opinion.<sup>101</sup> Communication between co-defendants and their counsel is important to ensure competent legal advice, and *Chahoon* allowed that kind of communication in the criminal arena.

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96. *Id.* at 839–40.

97. *Id.* at 839 (“There were present at that meeting all three of the accused, Chahoon, Sands and Sanxay; and John M. Gregory, counsel representing Sands, and John Lyon, counsel representing Sanxay. The counsel of Chahoon was absent. It does not appear that any other person was present on the occasion than those above named, and it may well be inferred that there was not.”).

98. *See id.*; *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 35 (N.Y. 2016).

99. *Id.*

100. *Chahoon*, 62 Va. at 839.

101. *Id.*

C. *The Joint Defense Doctrine Expanded into a Civil Common Interest Doctrine That Has Gained Acceptance in Many Jurisdictions*

The criminal joint defense doctrine eventually evolved into a civil common interest doctrine. In 1942, the Supreme Court of Minnesota was the first court to adopt a civil common interest doctrine.<sup>102</sup> In *Schmitt v. Emery*, the Court held that the statement of a civil defendant, made for the purpose of litigation, remained privileged when the statement was provided to a co-defendant's counsel for a legal purpose.<sup>103</sup> The parties had a joint legal interest in shielding the statement from disclosure, and the statement was provided to the co-defendant's counsel "solely to accommodate [the attorney] and thereby to enable them to make their effort and aid more effective in the common cause of excluding the statement."<sup>104</sup>

The Minnesota Supreme Court did not provide an extensive rationale for its holding.<sup>105</sup> That said, the civil common interest doctrine furthers the full disclosure purpose of the attorney-client privilege that the *Chahoon* court relied on to create the criminal doctrine. Indeed, in a recent dissent in New York State's highest court, justices supporting a broad common interest doctrine argued that full disclosure "furthers the goal of compliance with the law, thus benefitting not only clients but society in general."<sup>106</sup> This dissent also pointed out that "clients often seek legal advice specifically to comply with legal and regulatory mandates,"<sup>107</sup> echoing *Upjohn*'s acknowledgement that full disclosure and effective representation are intertwined.<sup>108</sup>

The civil common interest doctrine has gained broad acceptance. Every jurisdiction to address the doctrine applies it. The Restatement has also adopted civil common interest doctrine, as follows:

If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as

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102. See *Schmitt v. Emery*, 2 N.W.2d 413, 416–17 (Minn. 1942).

103. *Id.*

104. *Id.* at 417.

105. See *id.*

106. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 41 (N.Y. 2016) (Rivera, J., dissenting).

107. *Id.*

108. *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981).



privileged under §§ 68–72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.<sup>109</sup>

Additionally, most commentators accept that at least some form of the common interest doctrine is good law.<sup>110</sup>

The broad acceptance of the common interest doctrine is likely because it is necessary to avoid unequal application of the rules of evidence to clients who are represented by separate—as opposed to the same—counsel, even though the legal matter of representation is identical. For example, imagine two plaintiffs file a joint complaint against an employer for wrongful termination. Next, the plaintiffs meet in person with their joint attorney to discuss their litigation strategy. The attorney-client privilege protects these communications. Now imagine the same set of facts, but instead of a single attorney, each plaintiff retains separate counsel, who work together on the case. Assume that each plaintiff shares a common legal interest: a judgment against the defendant. Because Plaintiff One and the attorney for Plaintiff Two do not have a lawyer-client relationship, that attorney is a third party with respect to Plaintiff One. In this scenario, absent the common interest doctrine, a litigation strategy meeting with both plaintiffs and both attorneys in the room would result in third-party waiver of the attorney-client privilege.

Some commentators argue against the common interest doctrine on the basis that the doctrine is contrary to the “traditional approach of applying the [attorney-client] privilege narrowly.”<sup>111</sup> The common interest doctrine technically does extend the attorney-client privilege to communications between two parties that do not have an attorney-client relationship themselves.<sup>112</sup> However, this is not the only context in which courts have extended the privilege to third parties when necessary to ensure sound legal advice. For example, courts extend the privilege to

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109. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (AM. LAW INST. 2000).

110. Even in more restrictive jurisdictions, the debate over the common interest doctrine tends to focus less on whether it should exist at all, and more on what the proper scope of the exception should be. *Compare Ambac*, 57 N.E.3d at 38 (majority opinion) (“[A]ny benefits that may attend such an expansion of the doctrine are outweighed by the substantial loss of relevant evidence, as well as the potential for abuse.”), *with id.* at 43 (Rivera, J., dissenting) (noting that “[s]everal legal commentators also support a broad application of the privilege”).

111. Grace M. Giesel, Comment, *End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting*, 95 MARQUETTE L. REV. 475, 559 (2011).

112. *Id.* at 479 (“When the privilege is applied in the allied lawyer setting, however, the privilege protects communications that are not between an attorney and that attorney’s clients.”).

legal communications in the presence of a translator.<sup>113</sup> Additionally, the broad acceptance of the doctrine indicates that jurisdictions understand the fundamental unfairness that would result from the above-described scenario.<sup>114</sup> The jurisdictions adopting the common interest doctrine recognize that as long as the parties can prove that a common legal interest exists, the doctrine should apply.<sup>115</sup>

Despite the areas of overlap, the common interest doctrine remains shrouded in confusion and ambiguity. Jurisdictions differ on numerous aspects of the doctrine, including the circumstances in which it applies, the terminology used to refer to the doctrine, and even whether the doctrine is part of waiver itself, an exception to waiver, or a standalone, separate privilege.<sup>116</sup>

#### *D. Anything but Common: The Muddled State of the Common Interest Doctrine*

Since *Schmitt*, the common interest doctrine has become muddled in both nomenclature and application. Major differences include how common the common interest must be, whether the common interest doctrine requires a written agreement, and who may waive the privilege under the common interest doctrine.<sup>117</sup> This subsection addresses the confused terminology and status of the doctrine. The following subsection addresses a particularly impactful jurisdictional split: some

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113. See *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961).

114. In many cases, separate counsel may suggest less commonality of interest than in the joint client setting. However, the common interest exception still requires parties to show a “common legal interest.” See *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 366 (3d Cir. 2007) (noting that multiple clients represented by the same attorney must have nearly identical legal interests for the attorney to represent them, whereas in the separate-attorney context, “courts can afford to relax the degree to which clients’ interests must converge without worrying that their attorneys’ ability to represent them zealously and single-mindedly will suffer”).

115. Notably, the presence of even a single unrepresented party may preclude application of the common interest exception, because at that point the communication regarding that third party cannot be for the purpose of obtaining legal advice. See, e.g., *Cavallaro v. United States*, 153 F. Supp. 2d 52, 61 (D. Mass. 2001) (“Under the strict confines of the common-interest doctrine, the lack of representation for the remaining parties vitiates any claim to a privilege.” (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(1) (AM. LAW INST. 2000) (“If two or more clients with a common interest in a . . . matter are represented by separate lawyers . . . a communication of any such client . . . that relates to the matter is privileged as against third persons.”))).

116. See *infra* section II.D.

117. Schaffzin, *supra* note 42, at 68–90 (discussing these differences and advocating for a uniform approach).

jurisdictions apply the common interest doctrine to legal communications only in the context of litigation.

Courts have conflated several similar terms and used the term “common interest” to refer to related but distinct privilege doctrines.<sup>118</sup> The fact that several jurisdictions have not yet addressed the common interest doctrine—or only addressed it indirectly—has furthered the confusion.<sup>119</sup> Commentators have begun to cry out for a consistent statement of the circumstances to which the common interest doctrine applies.<sup>120</sup> Indeed, it is difficult to define the scope of the doctrine when it is alternately referred to by several different terms—terms that may refer to a completely different doctrine in another jurisdiction.<sup>121</sup>

One of many examples of this confusion features prominently in the 1994 D.C. Circuit case, *In re Sealed Case*.<sup>122</sup> First, the Court of Appeals uses the term “common interest privilege,”<sup>123</sup> which implies—incorrectly—that the common interest doctrine is a standalone privilege as opposed to part of the attorney-client privilege. Second, the party refers to the “joint defense privilege” as only applying to the “new phenomenon”<sup>124</sup> of “joint defense arrangements”<sup>125</sup>—even though the “joint defense doctrine” applied to co-defendants in civil cases as far back as 1942.<sup>126</sup> Third, neither the Court nor the party in the case claiming the common interest exception adequately distinguishes it from the “joint defense privilege,” from which the common interest exception evolved.<sup>127</sup> Fourth, another court following the citations in the case will find very different formulations of the exception, making it difficult to define and apply.

*In re Sealed Case* is useful not only as an example of the confused state of the doctrine generally, but also as an example of the difficulty this confusion creates for practitioners who seek to invoke the exception on behalf of their clients. The appellant in *In re Sealed Case* claimed the

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118. See Fischer, *supra* note 65, at 632–34.

119. See *infra* Part IV.

120. See, e.g., Fischer, *supra* note 65; Schaffzin, *supra* note 42; Jared S. Sunshine, *Seeking Common Sense for the Common Law of Common Interest in the D.C. Circuit*, 65 CATH. U. L. REV. 833 (2016).

121. See Fischer, *supra* note 65, at 632–34.

122. *In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994).

123. *Id.* at 719.

124. *Id.*

125. *Id.*

126. See *Schmitt v. Emery*, 2 N.W.2d 413, 416–17 (Minn. 1942).

127. See generally *In re Sealed Case*, 29 F.3d 715.

“joint-defense privilege” at the court below.<sup>128</sup> The United States as respondent on appeal attempted to distinguish the “joint-defense privilege” from the “common interest privilege,” and argued that the appellant waived the latter because he did not raise it below.<sup>129</sup> The Court rejected this argument on the basis that “[a]lthough the Government is correct in noting that the appellant concentrated his argument on the joint defense privilege in district court, he also asserted the common interest privilege.”<sup>130</sup> To support its conclusion, the Court of Appeals quoted a portion of the district court record in which the appellant referred to a “common law privilege about common interests:”

In terms of the joint defense issue, your honor—and I know the court knows this—there’s a common law privilege, not pertaining to joint defense agreements per se—joint defense agreements are a new phenomenon—but *there’s a common law privilege about common interests. If clients have common interests, the privilege applies. And that’s what we’re talking about here.*<sup>131</sup>

The Court of Appeals then stated its formulation of the common interest doctrine, but in doing so it cited sources that provide very different formulations of the doctrine.<sup>132</sup> Finally, the Court of Appeals remanded the case to the District Court with instructions to determine whether the communications at issue were really between two separate entities.<sup>133</sup>

The confused state of the common interest doctrine has real consequences. The less sure clients are that the common interest doctrine applies to a particular legal communication, the more likely clients are to refrain from fully disclosing facts to their attorneys. As the United States Supreme Court noted in *Upjohn*, “if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.”<sup>134</sup>

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128. *Id.* at 719.

129. *Id.*

130. *Id.*

131. *Id.* (emphasis in original) (citations omitted).

132. *Id.* (citing both the Fifth Circuit, which applies a narrow formulation of the common interest exception, and Prof. Wigmore, who provides a broader formulation of the common interest exception).

133. *Id.*

134. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

Commentators have begun to take note of this confusion and have made valiant efforts to clarify the doctrine and to define its scope.<sup>135</sup> Consistent terminology across jurisdictions—at the very least—would be immensely helpful. These commentators generally agree that the common interest doctrine should be defined so that 1) it can be easily distinguished from related but distinct doctrines, and 2) to make clear that the common interest doctrine is part of the attorney-client privilege and waiver analyses, not a separate, standalone privilege.<sup>136</sup>

While a uniform terminology is not out of the question, a uniform *scope* of the common interest doctrine is far less likely to become reality. In addition to the confused nomenclature, jurisdictions differ on a particularly important doctrinal aspect of the exception: some jurisdictions only apply the common interest doctrine to privileged communications made during or in anticipation of litigation, while others allow the doctrine to cover legal communications made without the looming threat of litigation.<sup>137</sup> Practitioners who seek to invoke the common interest doctrine are well-served by understanding their jurisdiction's position on the litigation requirement.

### III. JURISDICTIONS DIFFER ON WHETHER PARTIES CAN INVOKE THE COMMON INTEREST DOCTRINE TO PROTECT LEGAL COMMUNICATIONS THAT DO NOT RELATE TO LITIGATION

One of the most impactful differences between jurisdictions is whether the common interest doctrine only applies in the context of some form of litigation, or whether it also applies to non-litigation legal contexts such as estate or business planning. The approach adopted by Delaware,<sup>138</sup> most federal circuits that have addressed the common interest doctrine,<sup>139</sup> and the Restatement<sup>140</sup> allows the common interest doctrine to apply to both litigated and non-litigated matters.

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135. See Fischer, *supra* note 65; Schaffzin, *supra* note 42, at 69; Sunshine, *supra* note 120.

136. See Fischer, *supra* note 65; Schaffzin, *supra* note 42, at 69; Sunshine, *supra* note 120.

137. See *infra* Part III.

138. See D.R.E. 502(b) (attorney-client privilege covers legal communications that relate to a “matter of common interest”) (omitting a litigation requirement).

139. See *In re* Regents of Univ. of Calif., 101 F.3d 1386, 1390–91 (Fed. Cir. 1996); Schaeffler v. United States, 806 F.3d 34, 40 (2d Cir. 2015); *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 364 (3d Cir. 2007); United States v. BDO Seidman, LLP, 492 F.3d 806, 816 (7th Cir. 2007); United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987).

140. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (AM. LAW INST. 2000).

In contrast, the Uniform Rules of Evidence (“URE”), adopted by a number of states, requires a “pending action” in order for a party to invoke the common interest doctrine.<sup>141</sup> Under the URE approach, co-parties or potential co-parties in litigation can invoke the common interest doctrine, but clients obtaining legal advice in the absence of litigation cannot—even though common legal interests occur in many non-litigation contexts.<sup>142</sup> For example, entities that have signed a merger agreement may not face immediate litigation, but they share a common legal interest in ensuring that the ensuing merger transaction complies with the relevant statutes and regulations. Even in jurisdictions that impose a litigation requirement, the scope of that requirement differs: jurisdictions disagree on whether litigation must be actual, pending, or anticipated.<sup>143</sup>

A. *The Majority Federal Approach Does Not Impose a Litigation Requirement*

A majority of federal circuits that have addressed the common interest doctrine do not require actual, pending, or anticipated litigation. These circuits include the Federal,<sup>144</sup> Second,<sup>145</sup> Third,<sup>146</sup> Seventh,<sup>147</sup> and Ninth<sup>148</sup> Circuits. The First Circuit has a less-developed common interest doctrine jurisprudence but has stated in dicta that “the privilege sometimes may apply outside the context of actual litigation,”<sup>149</sup> placing it somewhat close to the majority of federal circuits. The Eighth Circuit, while not as clear as the others, has noted that “[t]he rule applies ‘not only if litigation is current or imminent but, consistently with the rest of the Standard, whenever the communication was made in order to facilitate the rendition of legal services to each of the clients involved in

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141. UNIF. R. EVID. 502(b) (UNIF. LAW COMM’N 1999); *see also* The Litigation Requirement in States, *infra* notes 267–317 tbl.2.

142. UNIF. R. EVID. 502(b).

143. *See id.* (“pending action”); *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 38 (N.Y. 2016) (“pending or anticipated”); *O’Boyle v. Borough of Longport*, 94 A.3d 299 (N.J. 2014) (“actual or anticipated”); *Hewes v. Langston*, 853 So. 2d 1237, 1244 (Mississippi 2003) (“pending action”).

144. *See In re Regents of Univ. of Calif.*, 101 F.3d at 1390–91.

145. *See Schaeffler v. United States*, 806 F.3d 34, 40 (2d Cir. 2015).

146. *See In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007).

147. *See United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007).

148. *See United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987).

149. *In re Grand Jury Subpoena*, 274 F.3d 563, 572 (1st Cir. 2001).

the conference.”<sup>150</sup> However, the Ninth Circuit, which does not require actual litigation, has not addressed whether some threat of litigation is nevertheless required.<sup>151</sup>

The Fifth Circuit is the only circuit that imposes a concrete litigation requirement. Under this approach, a plaintiff must show:

[A] palpable threat of litigation at the time of the communication, rather than a mere awareness that one’s questionable conduct might some day result in litigation, before communications between one possible future co-defendant and another . . . could qualify for protection.<sup>152</sup>

Absent actual litigation or a “palpable threat” of litigation in the Fifth Circuit, a party cannot invoke the common interest doctrine.<sup>153</sup>

The remaining circuits either have not addressed a litigation requirement or are unclear on whether they adopt one. For example, the Fourth Circuit appeared to reject the litigation requirement when it stated that “it is unnecessary that there be actual litigation in progress for this privilege to apply.”<sup>154</sup> Unfortunately, in that case the Fourth Circuit applied what it called the common interest doctrine to facts in which multiple clients were represented by a single attorney<sup>155</sup>—a formulation that describes in reality the co-client doctrine, not the common interest doctrine. For that reason, it remains unclear whether the Fourth Circuit would apply the litigation requirement to the commonly understood formulation of the common interest doctrine in which separate attorneys represent clients with common legal interests.

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150. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 939 (8th Cir. 1997) (quoting JACK B. WEINSTEIN ET. AL., WEINSTEIN’S FEDERAL EVIDENCE § 503[06] (1987) [hereinafter WEINSTEIN’S FEDERAL EVIDENCE]).

151. *See* *United States v. Gonzalez*, 669 F.3d 974 (9th Cir. 2012); *Zolin*, 809 F.2d at 1417.

152. *In re Santa Fe Int’l Corp.*, 272 F.3d 705, 711 (5th Cir. 2011).

153. *Id.*

154. *Hanson v. U.S. Agency for Int’l Dev.*, 372 F.3d 286, 292 (4th Cir. 2004).

155. *Id.*

**Table 1:**  
**The Litigation Requirement in the Federal Circuits**

<b>Rejected the Litigation Requirement</b> <sup>156</sup>	<b>Adopted the Litigation Requirement</b> <sup>157</sup>	<b>Position on the Litigation Requirement Unclear</b> <sup>158</sup>
Federal Circuit Second Circuit Third Circuit Seventh Circuit Eighth Circuit Ninth Circuit	Fifth Circuit	First Circuit Fourth Circuit Sixth Circuit Tenth Circuit Eleventh Circuit D.C. Circuit

The majority approach of the federal circuits that reject a litigation requirement is echoed by the Restatement of the Law Governing Lawyers<sup>159</sup> and by Professor Weinstein.<sup>160</sup> The Restatement is the most explicit of all in rejecting a litigation requirement:

If two or more clients with a common interest in a litigated *or nonlitigated* matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client . . . that relates to the matter [of common interest] is privileged as against third persons.<sup>161</sup>

The uncertainty regarding the scope of the common interest doctrine on the federal level might have been avoided by a proposed Federal Rule

156. *Schaeffler v. United States*, 806 F.3d 34, 40 (2d Cir. 2015); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007); *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 939 (8th Cir. 1997); *In re Regents of Univ. of Calif.*, 101 F.3d 1386, 1390–91 (Fed. Cir. 1996); *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987).

157. *In re Santa Fe Int'l Corp.*, 272 F.3d at 711 (“[T]here must be a palpable threat of litigation at the time of the communication, rather than a mere awareness that one’s questionable conduct might some day result in litigation, before communications between one possible future co-defendant and another . . . could qualify for protection.”).

158. *In re IPCom GmbH & Co., KG*, 428 F. App’x 984, 986 (D.C. Cir. 2011); *Hunton & Williams v. U.S. DOJ*, 590 F.3d 272, 283 (4th Cir. 2010) (declining to address whether the presence of adverse party is a prerequisite for invoking the common interest doctrine); *In re Qwest Commc’ns Int’l Inc.*, 450 F.3d 1179, 1195 (10th Cir. 2006); *United States v. Almeida*, 341 F.3d 1318, 1324 (11th Cir. 2003); *In re Grand Jury Subpoena*, 274 F.3d 563, 572 (1st Cir. 2001) (“[T]he privilege sometimes may apply outside the context of actual litigation.”).

159. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (AM. LAW INST. 2000).

160. WEINSTEIN’S FEDERAL EVIDENCE, *supra* note 150, § 503.21[2].

161. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(1) (AM. LAW INST. 2000) (emphasis added).



of Evidence 503 in 1972. The Supreme Court Advisory Committee proposed thirteen specific rules on privileges, including Rule 503, which “would have codified the attorney-client privilege and would have recognized the common interest doctrine.”<sup>162</sup> The proposed Rule explicitly rejected the pending litigation requirement in the URE in favor of the approach adopted by Delaware, requiring only a “matter” of common interest:

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer’s representative, or (2) between his lawyer and the lawyer’s representative, or (3) by him or his lawyer to a lawyer representing another in a *matter of common interest*, or (4) between representatives of the client or between the client and a representative of the client.<sup>163</sup>

However, “Congress rejected Article V of the Court’s Proposed Rules in its entirety, including Proposed Rule 503(b).”<sup>164</sup> Instead, the House Judiciary Committee “through a single rule, 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States.”<sup>165</sup> The Advisory Committee Notes indicate Congress’s concern that “[m]any of these rules contained controversial modifications or restrictions upon common law privileges.”<sup>166</sup> By not enacting a specific Rule for each privilege, “the House provided that privileges shall be governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience.”<sup>167</sup> This standard provides wide discretion for judges to fashion and interpret privileges. It also has the effect of allowing judges to consider the practical consequences of the privileges. The result is disparate application of the common interest doctrine across federal circuits,<sup>168</sup> with some federal circuits rejecting the litigation requirement, some adopting it, and still more unclear.

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162. Schaffzin, *supra* note 42, at 87.

163. *Id.* (emphasis added); see also PAUL R. RICE, 1 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2:1 (2d ed. 1999).

164. *Id.*

165. FED. R. EVID. 501 advisory committee’s notes to 1974 enactment.

166. *Id.*

167. *Id.*

168. See The Litigation Requirement in the Federal Circuits, *supra* notes 156–58 tbl.1.

### B. States Differ Widely on the Litigation Requirement

As in the federal circuits, there is no clear majority for or against a litigation requirement in the states.<sup>169</sup> The litigation requirement received a major boost when it was included in the Uniform Rules of Evidence (URE) in 1999<sup>170</sup>:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client . . . (3) by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer *or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein* . . . .<sup>171</sup>

It is unclear why the Uniform Law Commission (ULC)—the drafter of the URE— included the litigation requirement. The Comment to Rule 502 is silent on the “pending action” language.<sup>172</sup> The ULC states on its website that the URE “reflects closely the federal rules of evidence.”<sup>173</sup> However, Rule 501 provides that the federal common law governs privileges, and the majority federal circuit approach rejects this litigation requirement.<sup>174</sup> One scholar suggests that “[m]any state legislatures enacted evidentiary rules modeled after Proposed [Federal] Rule 503(b), which was never enacted by Congress.”<sup>175</sup> However, if that were the case, one would expect these states to use the “common interest” language in that proposed rule, rather than the “pending action” language in the URE.

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169. See The Litigation Requirement in the States, *infra* notes 267–317 tbl.2.

170. See UNIF. R. EVID. 502(b) (UNIF. LAW COMM'N 1999) (“General Rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or a representative of the client and the client's lawyer or a representative of the lawyer; (2) between the lawyer and a representative of the lawyer; (3) *by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein*; (4) between representatives of the client or between the client and a representative of the client; or (5) among lawyers and their representatives representing the same client.”) (emphasis added).

171. *Id.* (emphasis added).

172. See UNIF. R. EVID. 502 (UNIF. LAW COMM'N 1999).

173. *Rules of Evidence*, UNIF. LAW COMM'N: THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, <http://www.uniformlaws.org/Act.aspx?title=Rules%20of%20Evidence> [<https://perma.cc/26JY-H2S9>].

174. See *supra* section III.A.

175. See Schaffzin, *supra* note 42, at 86 n.135.

Further, the rationale for adopting the URE's "pending action" language does not appear in state cases interpreting URE 502(b). At least one state court refers to their URE-based attorney-client privilege statute as "essentially codif[ying] the common law attorney-client privilege,"<sup>176</sup> with no discussion of how the litigation requirement is nowhere to be found in all but one federal circuit's formulation of the common interest doctrine.

At least eleven states have adopted the URE's common interest language without change.<sup>177</sup> Many more states have not adopted the URE's attorney-client privilege language, and many states' rules differ from the URE's in significant ways.<sup>178</sup> Significant differences exist even among some states that have adopted a common interest doctrine similar to that in the URE.<sup>179</sup> For example, while the URE requires a pending action, New Jersey applies the common interest doctrine to "communications for different parties if the disclosure is made due to *actual or anticipated litigation* for the purpose of furthering a common interest."<sup>180</sup>

The differences are even greater among states that have not adopted the URE. For example, Delaware, a major jurisdiction for corporate transactions, applies a relatively broad version of the common interest doctrine and rejects a litigation requirement.<sup>181</sup> Delaware's relevant statutory provision, D.R.E. 502(b)(3), states that the attorney-client privilege covers disclosures to an attorney or client "representing another in a matter of common interest."<sup>182</sup>

In contrast to Delaware's statutory clarity, many other states have not addressed the common interest doctrine at all.<sup>183</sup> Among the non-URE

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176. Hampton Police Ass'n, Inc. v. Town of Hampton, 20 A.3d 994, 1001 (N.H. 2011).

177. See *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 36 n.2 (N.Y. 2016) (citing ARK. R. EVID. 502(b)(3); HAW. R. EVID. 503(b)(3); KY. R. EVID. 503(b)(3); ME. R. EVID. 502(b)(3); MISS. R. EVID. 502(b)(3); N.H. R. EVID. 502(b)(3); N.D. R. EVID. 502(b)(3); 12 OKLA. STAT. tit. 12, § 2502(B)(3) (2017); S.D. CODIFIED LAWS § 19-19-502(b)(3) (2017); TEX. R. EVID. 503(b)(1)(C); VT. R. EVID. 502(b)(3). *But see* DEL. R. EVID. 502(b)(3) (permitting disclosure to an attorney or client "representing another in a matter of common interest").

178. See *The Litigation Requirement in the States*, *infra* notes 267–317 tbl.2.

179. See *Hewes v. Langston*, 853 So. 2d 1237, 1259 (Miss. 2003) (describing the common interest exception as its own privilege: "The defendants to this suit now assert the attorney client privilege, the work product privilege, and the common interest privilege").

180. *O'Boyle v. Borough of Longport*, 94 A.3d 299, 317 (N.J. 2014) (emphasis added). "Pending action" is a strict requirement that does not allow the doctrine to cover *anticipated* litigation.

181. DEL. R. EVID. 502(b)(3).

182. *Id.*

183. These states include Tennessee (TENN. CODE ANN. § 23-3-105 (2017)) and Montana (MONT. CODE ANN. § 26-1-803 (2017)).

states that have adopted the common interest doctrine, many have yet to address whether it requires litigation,<sup>184</sup> leaving clients and attorneys simply to guess whether their common interest communications are privileged in the absence of some threat of litigation.<sup>185</sup> Washington State's common interest doctrine jurisprudence is an example of this uncertainty. The State of Washington does not define the common interest doctrine by statute,<sup>186</sup> and Washington State courts have not yet addressed whether the doctrine requires the threat of pending or anticipated litigation. The only examples of the common interest doctrine thus far in Washington involved actual or potential co-parties in litigation.

For example, in *State v. Emmanuel*, the Washington State Supreme Court held that the doctrine applied when two parties and their counsel communicated for the purposes of pursuing a common defense.<sup>187</sup> However, no Washington State opinion expressly requires pending or anticipated litigation, and some opinions describe the privilege in a way that suggests pending or anticipated litigation might not be required.<sup>188</sup> For example, in *Sanders v. State*, the Washington State Supreme Court upheld the trial court's application of the common interest doctrine to communications related to litigation, but described the common interest doctrine to apply if "the third person is necessary for the communication, or has retained the attorney on a matter of 'common interest.'"<sup>189</sup> This broader language suggests that Washington may not adopt a litigation requirement.

Many courts have made valiant efforts to clear up the confusion in their jurisdictions regarding the common interest doctrine, though attempts to clarify have often only muddied the waters further.<sup>190</sup> Others have attained some level of clarity, though not always without consequences for the doctrine.<sup>191</sup> A primary example of the latter is the

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184. See *State v. Emmanuel*, 42 Wash. 2d 799, 815, 259 P.2d 845, 855 (1953) (applying the common interest doctrine in the litigation context, but not addressing the common interest doctrine outside of the litigation context).

185. *Id.*

186. See generally WASH. R. EVID. 501–02.

187. *Emmanuel*, 42 Wash. 2d at 815, 259 P.2d at 855.

188. See, e.g., *Sanders v. State*, 169 Wash. 2d 827, 854, 240 P.3d 120, 134 (2010).

189. *Id.* ("The presence of a third person during the communication waives the privilege, unless the third person is necessary for the communication, or has retained the attorney on a matter of 'common interest.'") (quoting *Morgan v. City of Federal Way*, 166 Wash. 2d 747, 757, 213 P.3d 596, 601 (2009) (en banc)).

190. See Fischer, *supra* note 65, at 632–34.

191. See *infra* Part V.

recent case of *Ambac v. Countrywide*,<sup>192</sup> in which New York's highest court adopted a pending or anticipated litigation requirement.

#### IV. NEW YORK ADOPTED A LITIGATION REQUIREMENT IN *AMBAC V. COUNTRYWIDE*

In the midst of the confused state of the common interest doctrine, New York's highest court issued an opinion on the litigation requirement that is significant for two reasons. First, the *Ambac v. Countrywide* majority presented an alluringly clear analysis of the scope and purpose of the common interest doctrine that is sorely lacking in other jurisdictions.<sup>193</sup> Second, the dissent presented an equally clear rebuttal that outlined several prominent reasons against the litigation requirement.<sup>194</sup>

The *Ambac* court held that in addition to the common legal interest requirement, the common interest doctrine is also subject to a litigation requirement: the doctrine does not apply to legal communications between a corporation and another corporation's lawyers unless those communications relate to "pending or anticipated litigation."<sup>195</sup> While a model of clarity compared to most other cases discussing the litigation requirement, *Ambac*'s framing of the common interest doctrine as an exception to waiver<sup>196</sup> creates significant problems for the doctrine and justifies a strict litigation requirement.

##### A. *The Ambac Majority Framed the Common Interest Doctrine as an "Exception" to Waiver of Attorney-Client Privilege and Defended the Litigation Requirement*

The *Ambac* majority's definition of the common interest doctrine as an exception to third-party waiver<sup>197</sup> allowed the majority to assign different purposes to the common interest doctrine than to the attorney-client privilege as a whole.<sup>198</sup>

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192. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30 (N.Y. 2016).

193. *Id.*

194. *Id.* (Rivera, J., dissenting).

195. *Id.* at 38. "Anticipated" is broader than the U.R.E.'s "pending action," but *Ambac* does not clearly define the scope of "anticipated litigation." The dissent criticizes the majority opinion for this reason. *See id.* at 48 (Rivera, J., dissenting).

196. *Id.* at 40.

197. *Id.* at 39.

198. *Id.*

In *Ambac*, Bank of America and Countrywide Insurance publicly announced a merger plan on January 11, 2008, and closed the deal on July 1, 2008.<sup>199</sup> The issue was whether the companies shared a common legal interest between those dates such that the common interest doctrine applied and shielded from discovery their communications with each other's lawyers.<sup>200</sup> The court held that the common interest doctrine required the presence of pending or anticipated litigation, and because Bank of America and Countrywide did not provide evidence of such, the doctrine did not apply and the attorney-client privilege was waived.<sup>201</sup> The court rejected Bank of America's argument that the constant threat of litigation in mergers met the anticipated litigation requirement, and the court required the threat of litigation to be specific, not general.<sup>202</sup>

In adopting the litigation requirement, *Ambac* presented a clear version of the common interest doctrine as a whole. In an attempt to resolve the confusion surrounding the terminology and operation of the doctrine, the majority first determined that the general rule is that the presence of a third-party waives the attorney-client privilege.<sup>203</sup> It then presented the common interest doctrine as an exception to that waiver.<sup>204</sup> This allowed the majority to distinguish between the purposes of the exception and the purposes of the attorney-client privilege as a whole. The majority acknowledged that the attorney-client privilege is not tied to the anticipation of litigation.<sup>205</sup> However, it concluded that "the common interest doctrine does not need to be coextensive with the privilege because the doctrine itself is not an evidentiary privilege or an independent basis for the attorney-client privilege."<sup>206</sup>

Once it defined the common interest doctrine as an exception to waiver, the majority justified the litigation requirement on several grounds. In a nod to *Upjohn*, the majority acknowledged that in some cases "the threat of mandatory disclosure may chill the parties' exchange of privileged information and therefore thwart any desire to coordinate legal strategy."<sup>207</sup> But it determined that the threat of chilled communication is lowest in non-litigation settings:

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199. *Id.* at 32.

200. *Id.* at 33.

201. *Id.* at 40.

202. *Id.* at 38.

203. *Id.* at 35.

204. *Id.*

205. *Id.* at 39.

206. *Id.*

207. *Id.* at 38.

[N]o evidence has been presented here that privileged communication-sharing outside the context of litigation is necessary to achieve those objectives . . . [W]hen parties share attorney-client communications for planning purposes outside of the specter of anticipated litigation, such as when parties cooperate to strengthen or obtain patent protection . . . , it is more likely that [they] would have shared information even absent the privilege.<sup>208</sup>

The majority went on to conclude that “when businesses share a common interest in closing a complex transaction, their shared interest in the transaction’s completion is already an adequate incentive for exchanging information necessary to achieve that end.”<sup>209</sup>

After concluding that there is a low disclosure benefit to the litigation requirement, the majority expressed great concern with its costs.<sup>210</sup> The majority asserted that applying the common interest doctrine to non-litigation-related legal communications “could result in the loss of evidence of a wide range of communications between parties who assert common legal interests but who really have only nonlegal or exclusively business interests to protect.”<sup>211</sup> The majority stated that absent the litigation requirement “the potential for abuse [of the common interest doctrine] is sufficiently great, and the accompanying benefits so few,” that “expansion” is not warranted.<sup>212</sup> The majority also asserted that their approach “seems to have been the common law rule”<sup>213</sup> and that “at least eleven states have statutorily restricted the common interest doctrine to communications made in furtherance of ongoing litigation.”<sup>214</sup>

### *B. The Ambac Dissent Rejected the Litigation Requirement*

The *Ambac* dissent rejected the notion that the purpose of the common interest doctrine is distinct from the purpose of the attorney-client privilege as a whole.<sup>215</sup> By doing so, the dissent rejected the

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208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* This statement is somewhat confounding given that the attorney-client privilege does not apply to nonlegal communications in the first place.

212. *Id.* at 39.

213. *Id.* at 36 n.2.

214. The *Ambac* majority did not address the fact that the majority of federal circuits that have adopted the common interest doctrine take the opposite approach.

215. *Id.* at 44–45 (Rivera, J., dissenting).

litigation requirement as not fulfilling the attorney-client privilege's purpose.<sup>216</sup>

The dissent began with *Upjohn*'s purpose of full disclosure.<sup>217</sup> It then noted that the attorney-client privilege itself is not tied to the contemplation of litigation because:

[L]itigation may not be the motivating factor leading to a client's communication of private information. Rather, "[l]egal advice is often sought, and rendered, precisely to avoid litigation, or facilitate compliance with the law, or simply to guide a client's course of conduct" . . . . All the more so in the corporate context . . . .<sup>218</sup>

The dissent then rejected the litigation requirement and argued that the requirement "ignores the unique common legal interests of parties to a merger."<sup>219</sup> It also noted that "the majority of federal courts . . . and a significant number of state jurisdictions . . . have held that the privilege applies even if litigation is not pending or reasonably anticipated."<sup>220</sup>

In contrast to the majority, the dissent relied on the attorney-client privilege's purpose in analyzing the common interest doctrine. The dissent relied on *Upjohn* to note that corporate clients "often seek legal advice specifically to comply with legal and regulatory mandates,"<sup>221</sup> and that "the majority fails to identify any distinction between coparties or person who reasonably anticipate litigation, and parties committed to the completion of a merger"<sup>222</sup> regarding how likely each party is to seek full and frank legal advice.

Further, the dissent rejected the majority's concern with abuse of the common interest doctrine as "purely speculative," and argued that "there is certainly as much or more potential [for abuse] in assertions of the [common interest doctrine] by those 'anticipating' litigation and seeking to shield communications from a potential adversary."<sup>223</sup> The dissent also argued that any attempted abuse of the common interest doctrine absent a litigation requirement can "be addressed through our legal

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216. *Id.*

217. *Id.* at 41 ("Effective representation furthers the goal of compliance with the law, thus benefitting not only clients but society in general.")

218. *Id.* at 41–42.

219. *Id.* at 43.

220. *Id.* at 42–43.

221. *Id.* at 41.

222. *Id.* at 45.

223. *Id.*



system's existing methods for preventing and sanctioning obstruction of proper discovery."<sup>224</sup>

The dissent further asserted that the *Ambac* majority's formulation of the litigation requirement actually creates *more* confusion about the scope of the common interest doctrine.<sup>225</sup> Under the majority's formulation, a party seeking to invoke the common interest doctrine must show that litigation is either "ongoing or reasonably anticipated."<sup>226</sup> The dissent seized on this standard, and argued that the majority "ignores the inherent vagueness in the term. Indeed, whether the parties reasonably anticipated litigation inevitably requires judicial consideration of case-specific facts."<sup>227</sup>

### C. *Ambac's Alluring Clarity is Misleading*

*Ambac* appears to clarify and simplify a muddled doctrine, but it creates more problems than it solves.<sup>228</sup> The *Ambac* majority and dissent define the common interest doctrine using clear and consistent terms.<sup>229</sup> Early in its opinion, the majority acknowledged that the common interest doctrine "has come to be known by many names"<sup>230</sup> and stated that the doctrine is not an independent privilege but an "exception to the general rule that communications shared with third parties are not privileged."<sup>231</sup> Both the majority and dissent also made clear that the common interest doctrine applies "where two or more clients *separately* retain counsel to advise them on matters of common legal interest,"<sup>232</sup> thereby distinguishing the common interest doctrine from the co-client doctrines

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224. *Id.*

225. *See id.*

226. *Id.* at 39 n.4.

227. *Id.* at 45.

228. Despite the recency of *Ambac*, one court has already cited the decision as persuasive authority in interpreting South Carolina privilege law. *See Wellin v. Wellin*, 2016 WL 5539523, at \*12 (D.S.C. Sept. 30, 2016) ("The [common interest] doctrine is unquestionably available under federal and New York privilege law, which is at least suggestive of South Carolina courts' position on the issue, given South Carolina courts' tendency to cite to New York or federal privilege law.") (citing *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 43 (N.Y. 2016)).

229. *See generally Ambac*, 57 N.E.3d 30. In contrast to cases like *In re Sealed Case*, 29 F.3d 715 (D.C. Cir. 1994) (*see supra* section IV.D), *Ambac* consistently uses the term "common interest doctrine" and does not mix it up with distinct terms like "joint defense doctrine," "joint client exception," and so forth. *Ambac* also consistently refers to the common interest doctrine as applying to representation on a matter of common interest by separate attorneys.

230. *Ambac*, 57 N.E.3d at 35 n.1.

231. *Id.*

232. *Id.* at 35.

with which it is so often confused. Moreover, the majority and dissent's disagreements about the scope of the common interest doctrine are clearly delineated.

However, buried beneath the surface of the opinions are major doctrinal differences between the majority and dissent that have real consequences for clients, lawyers, and society as a whole. While the dissent argued forcefully against the litigation requirement, it did not make a direct attack on the majority's framing of the common interest doctrine as an exception to waiver of attorney-client privilege. Arguably, the dissent implicitly rejected this framing by referring to it as the common interest "doctrine."<sup>233</sup> Further, by asserting that the litigation requirement should be rejected because it "does not derive from the common-law roots of the attorney-client privilege,"<sup>234</sup> the dissent may have implicitly rejected the majority's framing of the doctrine as a separate, standalone exception to waiver of attorney-client privilege. However, by not making a frontal attack on the idea of the common interest doctrine as an "exception," the dissent may have inadvertently muddied the waters of the common interest doctrine further. Indeed, the litigation requirement should be rejected precisely because the common interest doctrine is *not* an exception to waiver, but rather part of the waiver analysis itself and therefore subject to the purposes of the attorney-client privilege.

#### V. *AMBAC'S* LITIGATION REQUIREMENT IS DOCTRINALLY UNSOUND AND AT ODDS WITH THE PURPOSE OF THE ATTORNEY-CLIENT PRIVILEGE

Federal and state jurisdictions should reject *Ambac's* litigation requirement for both doctrinal and practical reasons. First, the common interest doctrine should serve the full disclosure purpose of the attorney-client privilege in *Upjohn*: to encourage the kind of full disclosure from clients to attorneys in order to enable attorneys to provide competent legal advice.<sup>235</sup> This is particularly important in the world of major corporate transactions, in which two separate entities with separate counsel must work together to ensure compliance with an enormous

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233. *Id.* at 43 (Rivera, J., dissenting).

234. *Id.*

235. *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981).

number of complex laws and regulations.<sup>236</sup> The litigation requirement is contrary to that purpose.<sup>237</sup> Given that the attorney-client privilege itself is not limited to the litigation context, a protected “common legal interest” communication should not be so limited. Second, the cost of rejecting the litigation requirement is low because as a part of attorney-client privilege, the common interest doctrine only protects legal communications—not business communications or underlying facts.<sup>238</sup> Finally, the litigation requirement has practical consequences: it disincentivizes full disclosure, and encourages potential plaintiffs to engage in gamesmanship by withholding the threat of litigation until the last possible moment. These practical consequences will likely lead to a lower quality of legal advice, less compliance with the law, and more litigation.

A. *Ambac Mischaracterizes the Common Interest Doctrine as an Exception to Third-Party Waiver and Thereby Restricts its Application in a Manner Contrary to the Attorney-Client Privilege’s Purpose*

Every state and federal circuit accepts that the attorney-client privilege itself applies in non-litigation contexts. The privilege applies to corporations as well as individuals,<sup>239</sup> and it applies in both litigation and non-litigation settings.<sup>240</sup> The common interest doctrine should as well.

By characterizing the common interest doctrine as an exception to waiver of attorney-client privilege, the *Ambac* majority arbitrarily limits its application to legal communications made in anticipation of litigation. The majority describes the common interest doctrine as “an exception to the general rule that communications made in the presence of or to a third party are not protected by the attorney-client privilege.”<sup>241</sup> This formulation allows the majority to limit the

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236. King, *supra* note 55, at 1433 n.132 (“Heavy government regulation of corporations increases the likelihood of government litigation against corporations, but also renders corporations more vulnerable to suit by private parties.”); *see also Upjohn*, 449 U.S. at 392.

237. *Upjohn*, 449 U.S. at 390.

238. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 cmt. d (AM. LAW INST. 2000); *Upjohn*, 449 U.S. at 395–96.

239. *Upjohn*, 449 U.S. at 389.

240. *See, e.g., In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 805 (Fed. Cir. 2000) (attorney-client privilege applied to submission of invention record to corporate legal counsel for the purpose of obtaining legal advice); *Adler v. Greenfield*, 990 N.E.2d 1219, 1237 (Ill. Ct. App. 2016) (attorney-client privilege applied to legal, estate-planning oriented communications between attorney and client’s representative).

241. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 37 (N.Y. 2016).

application of the doctrine in a way it could not limit attorney-client privilege as a whole, to communications made while litigation is pending or anticipated: “[w]hile it is true that the attorney-client privilege is not tied to the contemplation of litigation, the common interest doctrine does not need to be coextensive with the privilege because the doctrine itself is not an evidentiary privilege or an independent basis for the attorney-client privilege.”<sup>242</sup> In the common interest context, the majority first determines that waiver has presumptively occurred—and thus the privilege is vitiated—and then fashions a narrow subset of attorney-client privilege and applies it to legal communications in only one context: that of pending or anticipated litigation. This creates a hurdle to protection in other circumstances, even those in which parties meet the other “common interest” elements.

Doctrinally, however, the analytical process should be the reverse. First, courts should look to the nature of the communication to determine whether the client meets the elements of the attorney-client privilege. In doing so, if a legal communication was disclosed to a third party who shares a common legal interest, then courts should determine that there *simply has been no waiver*. In that sense, the common interest doctrine is a point of analysis to determine whether waiver has occurred at all—*not* an exception to disclosure when waiver *has* occurred.

This distinction matters because if the common interest doctrine is framed as a part of the waiver analysis, it is subject to the full disclosure purpose of attorney-client privilege, as opposed to a separate exception for which courts can create a separate analysis that is not subject to the purposes of *Upjohn*. Part of the waiver analysis is the parties’ expectations of what will remain private.<sup>243</sup> If clients make legal communications in the presence of other parties that share a common legal interest, the analysis should be that there *has been no waiver in the first place*. For this reason, the type of communication covered by the common interest doctrine should be the same as that covered by the attorney-client privilege as a whole.

Anticipating litigation may be one concrete external motive that signifies a client’s intent to seek legal advice that remains confidential, but it is hardly the only one. Clients—particularly corporate clients—also seek legal advice to ensure that their future actions are lawful.<sup>244</sup> By

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242. *Id.* at 39.

243. *See, e.g.,* Stengart v. Loving Care Agency, 990 A.2d 650, 663 (N.J. 2009) (privilege not waived when plaintiff had a reasonable expectation of privacy in e-mails sent over a cloud-based e-mail account on a company computer).

244. *See* King, *supra* note 55, at 1425 n.84.

recognizing the common interest doctrine, jurisdictions have accepted that parties expect their legal communications with other parties that share a common legal interest to remain privileged. The waiver analysis should not differ depending on whether the parties with a common interest are seeking legal advice for a lawsuit or to ensure advance compliance with the law.

By determining that the common interest doctrine need not coincide with the full disclosure purpose of the attorney-client privilege, the majority is also at odds with the spirit of *Upjohn*. *Upjohn* indicates that the scope of third-party waiver has to do with the client's state of mind.<sup>245</sup> The state of mind required is that of seeking legal advice, which occurs in a variety of contexts. Nowhere in formulations of attorney-client privilege or third-party waiver does the common law require anticipation of litigation. The common interest doctrine acknowledges that clients' states of mind while engaging in legal communications with parties that share a common interest are that these communications will remain private—and this is true whether or not the legal communications involve litigation, or something completely different.

The purpose of the attorney-client privilege is the same in both litigation and non-litigation contexts,<sup>246</sup> and the common interest doctrine should not turn on that distinction. Either the common interest doctrine serves the purposes of the attorney-client privilege in both contexts, or in neither. In short, the litigation requirement does not serve the purpose of the attorney-client privilege “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”<sup>247</sup>

*B. The Risk That the Common Interest Doctrine Will Over-Protect Communications Is Low Because It—Like the Attorney-Client Privilege Itself—Does Not Shield Non-Legal Communications or Underlying Facts*

The common interest doctrine does not sweep too broadly absent the litigation requirement. The *Ambac* majority asserted that applying the common interest doctrine to non-litigation-related legal communications “could result in the loss of evidence of a wide range of communications between parties who assert common legal interests but who really have

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245. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

246. *See id.* at 389.

247. *Id.*

only nonlegal or exclusively business interests to protect.”<sup>248</sup> However, the common interest doctrine cannot and does not protect communications that would not have been privileged in the first place. “Where a communication neither invited nor expressed any legal opinion whatsoever, but involved the mere soliciting or giving of business advice, it is not privileged” by the attorney-client privilege.<sup>249</sup> The common interest doctrine is the same—the “common interest” must be *legal* in nature,<sup>250</sup> attorneys must be present, and any disclosure to a *client* with a common interest absent still waives the privilege.

Additionally, the communications must be for the purpose of securing legal advice, so business communications with only a tangential legal element are not protected.<sup>251</sup> The common interest doctrine does not operate to shield the underlying facts of communications after those communications have been disclosed to a third party because the attorney-client privilege itself does not shield underlying facts.<sup>252</sup>

Given these restraints on the common interest doctrine, *Ambac*’s concern that it might shield business communications is somewhat confounding. The majority asserted that applying the common interest doctrine to non-litigation-related legal communications “could result in the loss of evidence of a wide range of communications between parties who assert common legal interests *but who really have only nonlegal or exclusively business interests* to protect.”<sup>253</sup> The *Ambac* majority did not—and indeed, could not—give examples or point to actual cases where the common interest doctrine was applied to “non-legal or exclusively business” communications<sup>254</sup> because the common interest doctrine—and the attorney-client privilege itself—simply does not apply in those circumstances.<sup>255</sup>

Absent the possibility of the common interest doctrine applying to non-legal communications, the *Ambac* majority’s concern with

248. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 38 (N.Y. 2016). This statement is somewhat confounding given that the attorney-client privilege does not apply to nonlegal communications in the first place.

249. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359–60 (D. Mass. 1950).

250. *King*, *supra* note 55, at 1412–13.

251. *Id.*

252. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 cmt. d (AM. LAW INST. 2000); *Upjohn Co. v. United States*, 449 U.S. 383, 395–96 (1981).

253. *Ambac*, 57 N.E.3d at 38 (emphasis added).

254. *See generally Ambac*, 57 N.E.3d.

255. The attorney-client privilege only covers communications for the purpose of securing *legal* advice, not *business* advice. *See United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950).

overbroad application of the common interest doctrine is misguided. While there may be a higher likelihood that communications absent the threat of litigation are for a business (nonlegal) purpose,<sup>256</sup> claims of privilege for those communications will not necessarily succeed. Courts can adequately assess each claim of privilege as they do in any other circumstance and reject those without merit.

C. *Ambac's Litigation Requirement Creates Arbitrary Outcomes, Harms the Public Interest, and Encourages Gamesmanship*

A simple hypothetical exposes the practical consequences of *Ambac's* formulation of the litigation requirement. Imagine that Entity One and Entity Two are corporations that have signed a merger agreement. Assume the entities share a common legal interest in ensuring that the merger complies with all applicable laws and regulations. The CEO of Entity One (CEO One) goes to a meeting with the CEO of Entity Two (CEO Two) and attorneys for both corporations. At the meeting, CEO One and CEO Two seek legal advice from their attorneys on how to ensure that the merger complies with applicable securities laws. The meeting goes well, and CEO One is optimistic about the merger. As he leaves the meeting, he checks his phone and discovers an e-mail from a lawyer containing a threat to sue on behalf of Entity One shareholders and alleging that the merger agreement violates securities laws. Under *Ambac*, in discovery, the communications in the meeting are not covered by the common interest doctrine—even though they were legal communications with counsel—because they do not relate to pending or anticipated litigation. The court orders Entity One to disclose the conversations during discovery.

Now imagine the same set of facts, except this time, CEO One happens to check his phone right before walking into the meeting. He discovers the litigation threat that alleges securities violations. He then walks into the meeting and promptly tells CEO Two and Entity Two's attorneys, "I just got word we are being sued already for securities violations. We really need to make sure we remain in compliance with securities laws as we go forward." The rest of the meeting proceeds as it did in the first hypothetical. Under *Ambac*, the communications in this scenario are likely covered by the common interest doctrine because

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256. *Ambac*, 57 N.E.3d at 38 (citing James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV LITIG 631, 642 (1997)) ("[I]n a non-litigation setting the danger is greater that the underlying communication will be for a commercial purpose rather than for securing legal advice.").

they relate to “pending or anticipated litigation.” The court upholds Entity One’s claim of attorney-client privilege for the conversations. This hypothetical underscores the consequences of *Ambac*’s formulation of the litigation requirement. Whether the attorney-client privilege protects Entity One and Two’s legal communications at the meeting depended solely on when CEO One happened to check his e-mail.

The arbitrary nature of the litigation requirement is harmful to clients, but it is also harmful to the public. The public interest in observance of law can be substantial in many nonlitigation contexts. For example, corporations that have agreed to undergo a substantial merger share a common legal interest in the surviving entity complying with all laws and regulations—a legal purpose that serves the ends of the merging entities, shareholders, and society.<sup>257</sup> To accomplish their shared legal interest in compliance with the law, it is necessary that merging entities and their separate counsel share and cooperate on legal strategy—the sheer number and complexity of shared legal obligations requires it.<sup>258</sup> Companies in this situation have a critical interest in retaining their attorney-client privilege during the pre-closing process. But *Ambac*’s holding ensures that the threat that all such communications may be subject to protracted discovery in a future lawsuit discourages these entities from disclosing the facts necessary for their attorneys to give sound legal advice and ensure compliance with the law. This result harms not just the parties but also the public as a whole, which has an interest in corporate entities following the law.

Even in areas riddled with litigation, the doctrine does not apply under *Ambac*’s formulation unless there is a threat of *specific* litigation.<sup>259</sup> In recent years, a significant percentage of mergers and acquisitions were the target of merger objection suits.<sup>260</sup> Between 2011 and 2014, over ninety percent of mergers valued over \$100 million were subject to shareholder suits (although that number declined to sixty-four percent in the first half of 2016).<sup>261</sup> Many of these cases settle, but some

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257. See King, *supra* note 55, at 1433 n.132 (“Heavy government regulation of corporations increases the likelihood of government litigation against corporations, but also renders corporations more vulnerable to suit by private parties.”); *Upjohn*, 449 U.S. at 392.

258. King, *supra* note 55, at 1433 n.132. See also *Upjohn*, 449 U.S. at 392.

259. *Ambac*, 57 N.E.3d at 38.

260. Ravi Sinha, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2015 and 1H 2016 M&A Litigation*, CORNERSTONE RESEARCH 1, <http://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-2016.pdf> [<https://perma.cc/5T9A-DL5F>].

261. *Id.*



cases result in extremely large judgments.<sup>262</sup> But *Ambac* rejected Bank of America's argument that the constant threat of litigation in mergers met the anticipated litigation requirement.<sup>263</sup> The result is an incentive for entities that share a common legal interest in complying with the law to not fully communicate with each other's attorneys, leading to less effective legal advice and unintentional noncompliance with the law.

By requiring the threat of *specific* litigation, the litigation requirement encourages plaintiffs to withhold notification of planned litigation until the last possible moment, and possibly even to delay filing a lawsuit. Recall the hypothetical above about the meeting between CEO One, CEO Two, and their lawyers. Now imagine that the plaintiffs are aware of *Ambac's* litigation requirement. Instead of emailing the Complaint to CEO One on the day of the meeting, the plaintiffs may decide to delay threatening litigation or filing their Complaint until the last possible moment. During that time, CEO One, CEO Two, and their attorneys hold several more meetings where they discuss compliance with securities laws. Under *Ambac*, all of those legal communications are waived.

Control over waiver of the attorney-client privilege should be in the hands of the party seeking legal advice.<sup>264</sup> By requiring an actual threat of litigation by a particular legal adversary to invoke the common interest doctrine, *Ambac's* formulation of the litigation requirement strips that control from the client and places it with the client's legal adversaries. Under *Ambac*, it is the adversary's threat of litigation that triggers the common interest doctrine for legal communications postdating that threat.<sup>265</sup> A legal adversary planning to sue in a jurisdiction where New York State rules of evidence apply need only wait as long as possible to bring the suit in order to gain full discovery of legal communications that would have been shielded under the common interest doctrine if the adversary threatened litigation earlier. In this way, the litigation requirement is contrary to the longstanding formulation of the privilege as the client's to control, and it leads to arbitrary application of the privilege.

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262. See, e.g., *Am.'s Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012) (affirming judgment for shareholders of over \$2 billion in damages and over \$304 million in attorney's fees); *In re S. Peru Copper Corp. S'holder Derivative Litig.*, 2011 WL 6866900 (Del. Ch. Dec. 29, 2011) (awarding \$1.347 billion, plus interest and attorneys' fees).

263. *Ambac*, 57 N.E.3d at 38.

264. Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967, 979 (1999) (citations omitted).

265. *Ambac*, 57 N.E.3d at 38.

## CONCLUSION

*Ambac* provides an alluring sense of clarity for an otherwise muddled doctrine. However, that clarity comes with a cost: *Ambac*'s litigation requirement is based on a misunderstanding of the nature of the common interest doctrine and results in arbitrary restrictions on the attorney-client privilege. This arbitrary application has real costs: it disincentivizes full disclosure that is the purpose of the privilege in the first place, and promotes gamesmanship by encouraging plaintiffs to notify defendants of litigation at the last possible moment.

For these reasons, New York and jurisdictions that have adopted a litigation requirement should reconsider it. Moreover, jurisdictions that have not yet addressed the litigation requirement or the common interest doctrine itself should reject the litigation requirement from the outset.<sup>266</sup> Finally, and as other scholars have urged, courts, legislators, and scholars should continue to strive for a common terminology that clearly defines the common interest doctrine as defining the scope of the attorney-client privilege, not as an exception to its waiver.

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266. See *supra* Part V.

## APPENDIX

**Table 2:**  
**The Litigation Requirement in the States**<sup>267</sup>

State	Position on the Litigation Requirement
Alabama <sup>268</sup>	Unclear
Alaska <sup>269</sup>	Rejected
Arizona <sup>270</sup>	Not adopted the civil common interest doctrine
Arkansas <sup>271</sup>	Adopted
California <sup>272</sup>	Not adopted the civil common interest doctrine
Colorado <sup>273</sup>	Not adopted the civil common interest doctrine
Connecticut <sup>274</sup>	Not adopted the civil common interest doctrine
Delaware <sup>275</sup>	Rejected
Florida <sup>276</sup>	Unclear
Georgia <sup>277</sup>	Not adopted the civil common interest doctrine

267. Given the variety of state positions on the common interest doctrine and the litigation requirement, a disclaimer is necessary. This table only counts states as having adopted the common interest doctrine or a litigation requirement if it is enshrined in a statute or recognized by the highest court in the state. Additionally, the common interest doctrine may evolve more quickly in some states after New York's decision in *Ambac v. Countrywide*. See *infra* Part V. Therefore, this table is meant only as a guide and a useful starting point; scholars and practitioners should carefully research lower court opinions in the relevant states before relying on this table for a definitive statement of the doctrine.

268. Alabama's privilege statute closely follows the URE language but omits "pending action," suggesting that the common interest doctrine might apply in a non-litigation context. ALA. R. EVID. 502(b)(3). However, the Advisory Committee's Notes cite a Seventh Circuit opinion that states that the section should be "broadly applied to cover any mutual interest that may promote the *trial strategies* of the parties," which suggests the opposite. Note to ALA. R. EVID. 502(b)(3) (quoting *United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979)). The Alabama Supreme Court has not interpreted the provision.

269. ALASKA R. EVID. 503(b)(3).

270. ARIZ. R. EVID. 502 (The Arizona Court of Appeals adopted the doctrine with no litigation requirement. See *Lund v. Donahoe*, 261 P.3d 456, 464 (Ariz. Ct. App. 2011)).

271. ARK. R. EVID. 502(b)(3).

272. CAL. EVID. CODE § 954 (West 2017) (A California Court of Appeals opinion refers to the common interest doctrine and the "joint client" exceptions as one and the same. See, e.g., *Walters Wholesale Elec. Co. v. Nat'l Union Fire Ins. Co.*, 247 F.R.D. 593, 597 (C.D. Cal. 2008)).

273. COLO. R. EVID. 502.

274. CONN. CODE EVID. § 5-1.

275. DEL. R. EVID. 502(b).

276. Florida has not taken a position on the litigation requirement. FLA. STAT. § 90.502 (2017).

277. GA. CODE ANN. § 24-5-501 (2017).

State	Position on the Litigation Requirement
Hawaii <sup>278</sup>	Adopted
Idaho <sup>279</sup>	Rejected
Illinois <sup>280</sup>	Not adopted the civil common interest doctrine
Indiana <sup>281</sup>	Not adopted the civil common interest doctrine
Iowa <sup>282</sup>	Not adopted the civil common interest doctrine
Kansas <sup>283</sup>	Not adopted the civil common interest doctrine
Kentucky <sup>284</sup>	Adopted
Louisiana <sup>285</sup>	Rejected
Maine <sup>286</sup>	Adopted
Maryland <sup>287</sup>	Not adopted the civil common interest doctrine
Massachusetts <sup>288</sup>	Rejected
Michigan <sup>289</sup>	Not adopted the civil common interest doctrine
Minnesota <sup>290</sup>	Not adopted the civil common interest doctrine
Mississippi <sup>291</sup>	Adopted
Missouri <sup>292</sup>	Not adopted the civil common interest doctrine

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278. HAW. R. EVID. 503(b)(3); *see also* Boston Auction Co., Ltd. v. Western Farm Credit Bank, 925 F. Supp. 1478, 1483–84 (D. Haw. 1996).

279. IDAHO R. EVID. 502(b)(3). Note 1 explains that the original provision was amended to expand the scope to cover “all communications,” not just those related to litigation.

280. ILL. R. EVID. 502.

281. IND. R. EVID. 502.

282. IOWA R. EVID. 5.502.

283. KAN. STAT. ANN. § 60-426 (2017).

284. KY. R. EVID. 503(b)(3).

285. LA. CODE EVID. ANN. art. 506(B) (2017).

286. ME. R. EVID. 502(b)(3).

287. MD. CODE ANN., CTS. & JUD. PROC. § 9-108 (West 2017).

288. The Massachusetts Supreme Judicial Court rejected the litigation requirement. *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 870 N.E.2d 1105, 1110–12, (Mass. 2007); *see also* MASS. R. EVID. 502(b) (adopting the Restatement approach that rejects the litigation requirement).

289. MICH. R. EVID. 501.

290. MINN. STAT. § 595.02(b) (2017).

291. MISS. R. EVID. 502(b)(3)(A)–(B) (requiring a “pending case” as opposed to a “pending action”); *see also* *Hewes v. Langston*, 853 So. 2d 1237, 1244 (Miss. 2003).

292. MO. REV. STAT. § 491.060 (2017).

State	Position on the Litigation Requirement
Montana <sup>293</sup>	Unclear
Nebraska <sup>294</sup>	Rejected
Nevada <sup>295</sup>	Rejected
New Hampshire <sup>296</sup>	Adopted
New Jersey <sup>297</sup>	Adopted
New Mexico <sup>298</sup>	Rejected
New York <sup>299</sup>	Adopted
North Carolina <sup>300</sup>	Not adopted the civil common interest doctrine
North Dakota <sup>301</sup>	Rejected
Ohio <sup>302</sup>	Not adopted the civil common interest doctrine
Oklahoma <sup>303</sup>	Rejected
Oregon <sup>304</sup>	Rejected
Pennsylvania <sup>305</sup>	Not adopted the civil common interest doctrine
Rhode Island <sup>306</sup>	Not adopted the civil common interest doctrine

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293. Montana has not taken a position on the litigation requirement. *See* MONT. CODE ANN. § 26-1-803 (2017); *Am. Zurich Ins. Co. v. Montana Thirteenth Judicial Dist. Court*, 280 P.3d 240, 244–47 (Mt. 2012) (citing various state courts on the common interest doctrine but not adopting a specific rule on the litigation requirement).

294. NEB. REV. STAT. § 27-503(2) (2017).

295. NEV. REV. STAT. § 49.095(3) (2017).

296. N.H. R. EVID. 502(b)(3).

297. New Jersey courts have imposed a litigation requirement. *See* *O’Boyle v. Borough of Longport*, 94 A.3d 299 (N.J. 2014) (noting that the common interest doctrine “applies to communications between attorneys for different parties if the disclosure is made due to actual or anticipated litigation for the purpose of furthering a common interest”).

298. N.M. R. EVID. 11-503(B).

299. New York courts have imposed a litigation requirement. *See* *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30 (N.Y. 2016); *see also supra* Part V.

300. North Carolina has not addressed the issue by statute or in the North Carolina Supreme Court.

301. N.D. R. EVID. 502(b)(3).

302. OHIO REV. CODE ANN. § 2317.02 (West 2017).

303. OKLA. STAT. tit. 12, § 2502(B)(3) (2017).

304. OR. R. EVID. 503(2).

305. PA. R. EVID. 501.

306. Rhode Island has not yet addressed the issue by statute or in the Rhode Island Supreme Court.

State	Position on the Litigation Requirement
South Carolina <sup>307</sup>	Rejected
South Dakota <sup>308</sup>	Adopted
Tennessee <sup>309</sup>	Not adopted the civil common interest doctrine
Texas <sup>310</sup>	Rejected
Utah <sup>311</sup>	Adopted
Vermont <sup>312</sup>	Adopted
Virginia <sup>313</sup>	Not adopted the civil common interest doctrine
Washington <sup>314</sup>	Unclear
West Virginia <sup>315</sup>	Not adopted the civil common interest doctrine
Wisconsin <sup>316</sup>	Rejected
Wyoming <sup>317</sup>	Not adopted the civil common interest doctrine

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307. The South Carolina Supreme Court rejected the litigation requirement. *Tobaccoville USA, Inc. v. McMaster*, 692 S.E.2d 526, 531 (S.C. 2010) (“When the common interest doctrine applies, it operates as an exception to any potential waiver of privilege, regardless of the subject matter of the present litigation.”).

308. S.D. CODIFIED LAWS § 19-19-502(b)(3) (2017).

309. TENN. CODE ANN. § 23-3-105 (2017).

310. TEX. R. EVID. 502(b)(1)(C); *see also In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 52 (Tex. 2012) (“[O]ur privilege is not a ‘common interest’ privilege that extends beyond litigation.”).

311. UTAH R. EVID. 504(b)(2).

312. VT. R. EVID. 502(b)(3).

313. VA. CODE ANN. § 8.01-420.7 (2017).

314. Washington courts have applied the common interest doctrine for litigation-related communications, but have not addressed whether the common interest doctrine covers other legal communications. *See State v. Emmanuel*, 42 Wash. 2d 799, 815, 259 P.2d 845, 855 (1953).

315. W. VA. R. EVID. 501. Additionally, a West Virginia opinion describes the “common interest doctrine” as applying to situations in which a lawyer represents multiple clients—contrary to the usual formulation involving separate attorneys. *See State ex rel. Brison v. Kaufman*, 584 S.E.2d 480, 492 (W.V. 2003) (“Under the common interest doctrine, when an attorney acts for two different parties who each have a common interest, communications by either party to the attorney are not necessarily privileged in a subsequent controversy between the two parties.”) (citations omitted).

316. WIS. STAT. § 905.03(2) (2017).

317. WYO. R. EVID. 501.