Courts Examine Two Elements of the Joint Defense/Common Interest Doctrine: Part II

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In his August 22, 2012 “Privilege Points” release, Tom Spahn discusses the “litigation” requirement for a joint defense/common interest privilege to apply:

Last week's Privilege Point dealt with the degree of commonality of interest required to support a non-waiver doctrine known as the "joint defense" or "common interest" doctrine. Another element of that doctrine involves the necessity of litigation or anticipated litigation.

In Velo Holdings Inc. v. Paymentech, LLC (In re Velo Holdings Inc.), Ch. 11 Case No. 12-11384 (MG), Adv. No. 12-1564 (MG), 2012 Bankr. LEXIS 2645 (S.D.N.Y. June 12, 2012), the court found that New York law required pending or reasonably anticipated litigation before the participants could rely on the doctrine. The court noted that this "requirement that the legal advice must be with respect to pending or reasonably anticipated litigation is not present in the federal common law." Id. at *17-18. Several weeks later, the Supreme Court of Texas bluntly stated that "Texas requires that the communications be made in the context of a pending action" before they can deserve common interest doctrine protection. In re XL Specialty Ins. Co., No. 10-0960, 2012 Tex. LEXIS 568, at *11 (Tex. June 29, 2012). In fact, because in Texas "no commonality of interest exists absent actual litigation,” Texas' version of the doctrine “is more appropriately termed an 'allied litigant' privilege.” Id. at *11, *12 (citation omitted).

Companies already in ongoing litigation can normally rely on the common interest doctrine to avoid waiver, as long as they communicate with other allied litigants about a common legal strategy. However, companies merely anticipating some future litigation enter into such agreements at their own risk – because they might ultimately be sued in a jurisdiction that does not recognize the non-waiver effect of the doctrine until the litigation begins. Of course, by that time it is too late for the companies to have avoided waiving their privilege.