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First Department Limits “At Issue” Waiver of Attorney-Client Privilege

An “at issue” waiver of the attorney-client privilege occurs when a party to litigation “affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information.” *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 62 A.D.3d 581 (1st Dep’t 2009). In the recently decided *Nomura* case, the First Department read the exception narrowly and severely limited its availability to legal malpractice defendants.

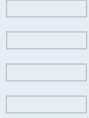
Plaintiff Nomura Asset Capital (“NAC”) originated and pooled securitized mortgage loans into a \$1.8 billion fund. Among those loans was a \$50 million loan to Doctors Hospital. NAC subsequently entered into an agreement to sell the package of loans warranting that the loans were compliant with IRS regulations and that the underlying real property had a fair market value of at least 80% of the principal amount of the mortgage loan. NAC also agreed to repurchase any loan found to be breach of the agreement. NAC’s warranties were based in part upon advice provided by its attorneys, Cadwalader, Wickersham & Taft, LLP.

The Doctors Hospital Loan subsequently went into default, prompting LaSalle Bank, N.A., as trustee of the building fund, to bring an action in federal court alleging a breach of the warranties made by NAC. While the District Court granted NAC’s motion for summary judgment and dismissed the action, *LaSalle Bank N.A. v. Nomura Asset Capital Corp.*, 2004 US Dist LEXIS 18599 (S.D.N.Y. 2004), the Second Circuit reversed in part holding that there was a question of fact whether the 80% requirement was satisfied at the time of its origination, and remanding the matter to the District Court on that issue. *LaSalle Bank Nat’l Ass’n v. Nomura Asset Capital Corp.*, 424 F.3d 195 (2d Cir. 2005). NAC subsequently settled with LaSalle Bank for \$65 million prior to trial.

NAC then commenced a legal malpractice action against Cadwalader, alleging that the 80% requirement was improperly included in the agreement and that it was improperly advised that the 80% requirement was satisfied. Cadwalader moved to compel certain privileged materials relating to and created after the federal court action, arguing that said materials had been put “at issue” by the legal malpractice

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action and were therefore discoverable. The lower court denied Cadwalader's motion to compel.

On appeal, the First Department held that there was no merit to Cadwalader's argument that the privileged materials sought had been put "at issue." The Court reasoned that although NAC's communications with its attorneys in the federal court action evaluating Cadwalader's prior advice were certainly relevant to the malpractice claim, since NAC disavowed any intention to use such communications and Cadwalader failed to show that any such communications are necessary to either plaintiff's claim or its defense, NAC could not be compelled to disclose the privileged materials.

The Court further held that the issue of the reasonableness of NAC's settlement in the underlying action did not, by itself, put the privileged materials "at issue." The Court reasoned that the reasonableness of the settlement could be adequately determined by the other discovery materials generated before the federal court action was commenced.

This case makes clear that an "at issue" waiver does not occur unless the privileged communication at issue is necessary to determine the validity of a claim or defense of the party asserting the privilege. ■

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