

The Case of *Mohawk Industries* – Why the U.S. Supreme Court Should Extend the Collateral Order Doctrine to Attorney-Client Privilege Rulings

James E. Griffith, Esq. and Byron L. Gregory, Esq., Foley & Lardner LLP

The attorney-client privilege is deeply imbedded into our legal tradition in order to promote “full and frank communications between attorneys and their clients.”¹ However, when a trial court rules that the privilege does not apply or has been waived, the party asserting the privilege is often left with no recourse to appeal that ruling until after final judgment. By that time, the communication has already been disclosed, and the harm caused by the breach in confidentiality has become irreparable.

The collateral order doctrine, defined by the U.S. Supreme Court in *Cohen v. Beneficial Industrial Loan Corporation*², provides a narrow exception to the final judgment rule, recognizing that certain errors can only be effectively corrected by an immediate appeal. Currently, only a minority of federal appeals courts permit immediate appeals of privilege waiver determinations under the collateral order doctrine.³ The majority of courts to review this issue allow immediate appeal only if a party willfully violates a privilege waiver order and is subject to a contempt sanction imposing a monetary penalty.⁴

In *Mohawk Industries v. Carpenter*, No. 08-678, the Supreme Court will resolve the circuit split as to whether a district court's finding of privilege waiver is immediately appealable under the collateral order doctrine.⁵

Case Background

Mohwak is a wrongful termination suit brought by a former shift supervisor for Mohawk Industries, Inc., a carpet and flooring manufacturer located in Calhoun, Georgia. The complaint alleges that the supervisor was illegally fired in retaliation for alerting Mohawk's human resources department that several of Mohawk's temporary employees were illegal aliens.⁶ The supervisor was allegedly instructed to meet with Mohawk's outside counsel after making his report.

The nature of this meeting is disputed by the parties. The supervisor claims that Mohawk orchestrated the meeting to coerce him into retracting his report, which he refused to do.⁷ In contrast, Mohawk claims that the meeting was part of its investigation into the supervisor's claims and that it additionally was investigating related misconduct claims against the supervisor, namely, that he had sought to send an unauthorized worker to a temporary agency so that the worker would be hired by Mohawk in circumvention of federal immigration laws.⁸ According to

Mohawk, its investigation revealed that the supervisor had committing immigration crimes by knowingly causing Mohawk to retain illegal aliens through an employment agency.⁹

Mohawk terminated the supervisor the day after he met with Mohawk's outside counsel. On March 15, 2007, the supervisor commenced his wrongful termination suit in the U.S. District Court for the Northern District of Georgia. Subsequently, Mohawk, responding to a request in a separate lawsuit, summarized its view of the supervisor's claims and discussed its investigation into the supervisor's conduct and the interview between its outside counsel and the supervisor.

The district court ultimately found that the response Mohawk filed in the separate action effected a waiver of the attorney-client privilege in the supervisor's wrongful termination case as to the communications between the supervisor and Mohawk's outside counsel.¹⁰ The court consequently ordered Mohawk to respond to discovery requests seeking otherwise privileged communications that took place during the interview.¹¹

Mohawk sought an immediate appeal of the district court's privilege waiver order with the Eleventh Circuit Court of Appeals. At the same time and in the alternative, Mohawk filed a petition for mandamus with the Eleventh Circuit seeking to compel the district court to vacate its privilege waiver order.

Eleventh Circuit Dismisses for Lack of Jurisdiction

On appeal, the Eleventh Circuit focused entirely on whether it possessed jurisdiction to hear Mohawk's challenge. Noting that discovery orders are generally not appealable until after final judgment, the court considered whether the order of the district court could trigger the collateral order doctrine, established by the Supreme Court in *Cohen*.¹²

To evaluate whether the collateral order doctrine applied to privilege waiver determinations, the Eleventh Circuit looked to the three factor test articulated by *Cohen*. Under that test, an order is appealable before final judgment "if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment."¹³ In its analysis, the Eleventh Circuit found that the first two elements were satisfied, but that the third factor was lacking since the privilege waiver ruling could be effectively reviewed after the conclusion of the case:

If this Court were to determine on appeal from a final judgment that privileged information was wrongly turned over and was used to the detriment of the party asserting the privilege, we could reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed information, as well as any

documents, witnesses, or other evidence obtained as a consequence of the improperly disclosed information.¹⁴

Rather than permitting a direct appeal through the collateral order doctrine, the Eleventh Circuit advocated the use of mandamus proceedings to immediately challenge discovery disputes relating to the attorney-client privilege.¹⁵ In doing so, the court acknowledged that the issuance of a writ of mandamus requires a showing that "there has been a clear usurpation of power or abuse of discretion," not that the trial court had simply erred.¹⁶ The Eleventh Circuit, however, also rejected Mohawk's petition for writ of mandamus finding that Mohawk had not established the degree of abuse required.

The court also noted that a party could choose to violate a discovery order and subject itself to sanctions, which under some circumstances could lead to an immediate right to appeal.¹⁷ Specifically, if the resulting contempt order imposed monetary sanctions that could not be otherwise avoided, such an order would also be subject to a direct or automatic appeal.

Supreme Court Appeal

The Supreme Court accepted *certiorari* over the Eleventh Circuit's decision and is now poised to resolve the dispute among the circuits as to how appellate courts should deal with immediate appeals of orders finding waiver of the attorney-client privilege. At issue is whether a party in federal litigation should be able to immediately appeal a lower court's ruling that the party has waived its rights to keep its communications confidential under the attorney-client privilege.

Both sides in the case have powerful allies who have submitted *amicus* briefs. The ABA, the U.S. Chamber of Commerce, and the civil litigation defense organization DRI have all filed briefs in support of Mohawk's appeal. The principal argument of these parties is that once a party is compelled to produce privileged material in discovery, its confidence has been breached and a full remedy cannot be obtained by the appellate court after final judgment. Therefore, because of the harm caused by an erroneous intrusion upon attorney-client privilege to the privilege holder and the legal process, direct appeals of privilege waiver rulings should be permitted.

On the other hand, the Obama administration and a group of academics have filed briefs arguing that allowing the immediate appeal of privilege waiver orders will unduly interfere with the district court's management of the discovery process and lead to an explosion of appeals delaying the completion of litigation and overburdening appellate courts. Curiously, the Solicitor General, while opposing direct appeals of privilege waiver orders relating to the attorney-client privilege, does advocate in its brief for direct appeals of waiver rulings relating to the presidential communications privilege and state secrets.

Direct Appeals Should Be Permitted

The case in favor of treating attorney-client privilege waiver rulings as immediately appealable collateral orders is strong. The privilege is not merely an evidentiary protection to exclude certain testimony from trial.¹⁸ The privilege also protects attorney-client communications from disclosure either during discovery or outside the litigation context.¹⁹ No appeal after final judgment can recover the confidence which has been breached by an incorrect waiver ruling. And as has been noted by the Supreme Court, “[a]n 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.”²⁰

Moreover, adverse privilege waiver holdings impose particularly significant burdens and risks upon large corporations. When a corporation is subject to an erroneous privilege waiver ruling, the volume of communications, including attorney-client correspondence and emails, can be enormous. Additionally, the litigation risk of complying with a privilege waiving ruling by exposing privileged communications to public view may exceed the value of the underlying litigation to the party because disclosure may have echo effects which reverberate not only through the first lawsuit, but through other related lawsuits (or potential lawsuits), as well. Consequently, a privilege holder may be pressured to settle a questionable claim simply because of the irremediable nature of the court's privilege waiver order.

The efficacy of corporate investigations to self-monitor legal compliance is also threatened when the confidentiality of attorney-client communications is threatened. Corporate counsel serve an important function in ensuring that internal conduct remains within the bounds of the law. If the privilege cannot be relied upon, corporations have little incentive to police themselves in areas such as securities regulation, corporate governance, and fraud detection. Internal inquiries will be discouraged if they risk being erroneously disclosed to third parties, who will use them for purposes adverse to the corporation's interests.

The argument that permitting direct appeals of privilege waiver rulings would lead to an explosion of piecemeal appeals and delays is overstated.²¹ As pointed out by Mohawk, the three circuits that already permit immediate appeals of privilege waiver order have not experienced a significant increase in their caseload.²² Appeals are expensive propositions and not undertaken lightly. Expense alone weeds out a significant fraction of potential appeals that are either unimportant or lacking in merit.

Finally, the alternatives available to direct appeal are inadequate given the importance of the right involved. A writ of mandamus is an extraordinary remedy in which a litigant seeks an order from the appellate court to order the trial judge to take a particular action, typically in response to an abuse of judicial power. Mandamus is hardly well-suited to cases of pure legal error in application of privilege waiver standards. Because a petitioner must show the order to be not only erroneous, but a “clear abuse of discretion,” the burden on the petitioner to obtain review of an erroneous order is simply too great. In fact, it is easy to imagine

circumstances in which the appellate court agreed with the petitioner that the trial court had erred on the merits, but that insufficient interests were at stake to warrant issuance of a writ of mandamus.

While some courts allow a direct appeal of a contempt sanctions order in the event the party refuses to comply with the order compelling disclosure of the otherwise privileged documents, this practice is troubling in that it encourages litigants to willfully violate court orders to gain access to the appellate courts. Additionally, parties who are repeatedly before the courts, particularly large corporations, will be disinclined to protect their rights if doing so will invoke the public notoriety and dishonor associated with violating a court order. Moreover, violating a contempt order may not even have the desired effect. If the sanctions imposed by the district court are not monetary or if the order can otherwise be avoided by some other form of compliance, then a party will not be permitted access to the appellate court even upon refusing to comply with the order.

Conclusion

The public and private harm associated with an erroneous finding of a waiver of the attorney-client privilege is significant and cannot be adequately remedied after final judgment. Because the experience of the circuits permitting direct appeals has indicated only a trickle, not a deluge, of appeals, there is no empirical basis for the claim that applying the collateral order doctrine will result in an overburdening of the appellate courts. The Supreme Court in *Mohawk* should acknowledge the vitality of the attorney-client privilege by permitting an immediate appeal when a district court orders disclosure of communications otherwise protected by the privilege.

James E. Griffith is senior counsel with Foley & Lardner LLP and a member of its General Commercial Litigation, IP Litigation, and Trademark, Copyright & Advertising Practices. His practice focuses on intellectual property and complex civil litigation matters. He can be reached at jgriffith@foley.com.

Byron L. Gregory is a partner with Foley & Lardner LLP and a member of its General Commercial Litigation Practice. His practice focuses on antitrust, product liability, securities, intellectual property and insurance. Mr. Gregory can be reached at bgregory@foley.com.

¹ *Upjohn v. U.S.*, 449 U.S. 383, 389 (1981).

² *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

³ *UMG Recording, Inc. v. Bertelsmann AG (In re Napster, Inc. Copyright Litig.)*, 479 F.3d 1078, 1087–88 (9th Cir. 2007); *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617–21 (D.C. Cir. 2003); *Kelly v. Ford Motor Co. (In re Ford Motor Co.)*, 110 F.3d 954 (3d Cir. 1997).

⁴ *FDIC v. Ogden Corp.*, 202 F.3d 454, 458–459, n. 2 (1st Cir. 2000); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749–50 (10th Cir. 1993); *Texaco Inc. v. La. Land & Exploration Co.*, 995 F.2d 43, 44 (5th Cir. 1993); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 162–63 (2d Cir. 1992); *Reise v. Bd. of Regents*, 957 F.2d 293, 295 (7th Cir. 1992); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 644 (Fed. Cir. 1991).

⁵ The opinion before the Supreme Court is *Carpenter v. Mohawk Industries, Inc.*, 541 F.3d 1048 (11th Cir. 2008).

⁶ *Id.* at 1050.

⁷ *Id.*

⁸ *Id.* at 1051.

⁹ *Id.*

¹⁰ *Id.* at 1051–52.

¹¹ *Id.* at 1052.

¹² *Id.* (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)).

¹³ *Id.* (also citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

¹⁴ *Id.*

¹⁵ *Id.* at 1054.

¹⁶ *Id.* at 1055.

¹⁷ *Id.* at 1054–55.

¹⁸ See e.g. Federal Rule of Evidence 501.

¹⁹ See e.g. Federal Rule of Civil Procedure 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense. . . .”); Model Rule of Professional Conduct 1.6.

²⁰ *Upjohn v. U.S.*, 449 U.S. at 393.

²¹ See Brief for Respondent in *Mohawk Industries, Inc. v. Carpenter* (U.S. No. 08-678) at 44–52.

²² See Brief for Petitioner in *Mohawk Industries, Inc. v. Carpenter* (U.S. No. 08-678) at 40.