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PRIVILEGE

Ronald J. Hedges and Jeane A. Thomas provide commentary on the recent Supreme Court ruling on the appealability of orders relating to attorney-client privilege and its implications for e-discovery.

Mohawk Industries and E-Discovery

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In *Mohawk Industries Inc. v. Carpenter*, 2009 WL 4573276 (Sup. Ct. Dec. 8, 2009), the U.S. Supreme Court addressed ''whether disclosure orders adverse to the attorney-client privilege qualify for immediate appeal under the collateral order doctrine.'' *3. What are the implications of the court's answer to that question for discovery in general and discovery of electronically stored information in particular?

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The Facts. The relevant facts are straightforward. Norman Carpenter was employed by Mohawk Industries. Allegedly, Carpenter advised Mohawk that it was employing illegal aliens. Unknown to Carpenter, Mohawk was embroiled in class action litigation where that allegation was central. Refusing to recant his testimony after a meeting with Mohawk's class action counsel, Carpenter was fired.

Meanwhile, the class action plaintiffs pursued discovery based on Carpenter's allegation. In defense, Mohawk revealed the ''true facts'' about Carpenter's discharge.

In his wrongful discharge action, Carpenter sought information about the meeting with class counsel and Mohawk's decision to discharge Carpenter. Mohawk refused to provide the information, arguing it was protected by the attorney-client privilege.

The district court found that the information sought by Carpenter was privileged, but that Mohawk had waived the privilege by its conduct in the class action.

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The court stayed its ruling to give Mohawk an opportunity to seek appellate review.

The Eleventh Circuit Court of Appeals rejected Mohawk's mandamus petition and dismissed its notice of appeal, concluding that the district court's order was not immediately appealable as a ''collateral order'' under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The Supreme Court granted certiorari to resolve a circuit split on the ''availability of collateral appeals in the attorney-client privilege context.'' *4 (footnote omitted).

Collateral Order Doctrine. Writing for the court, Justice Sotomayor held that the collateral order doctrine was unavailable. *Cohen* represents an exception to the finality rule of 28 U.S.C. Sec. 1291, and that exception is an extremely narrow one to the overriding policy against piecemeal appeals and encroaching on the prerogatives of district courts.

Justice Sotomayor stressed that ''the justification for immediate appeal must therefore be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes.'' Absent an important question apart from the merits and the inadequacy of post judgment review, *Cohen* is inapplicable. Moreover, in addressing the applicability of *Cohen*, an entire class of claims must be considered, rather than an individual one.

Privilege No Different? Importantly for our purposes, Justice Sotomayor rejected Mohawk's argument that the privilege waiver order in issue was distinct from ''run-of-the-mill discovery orders,'' although she recognized the importance of the attorney-client privilege. *6. In so doing, she denied the existence of any discernible chill on the exercise of the privilege, concluding that ''clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order, let alone on the timing of a possible appeal.'' *7.

Appropriate Remedies. What remedies, then, did the court deem adequate? ''Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating the judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.''

Alternatively, an aggrieved party (such as Mohawk) can (1) seek certification of an interlocutory discovery order pursuant to 28 U.S.C. Sec. 1292(b); (2) seek mandamus review; (3) defy the order and incur sanctions, which would be subject to post judgment review; or (4) defy the waiver order, be held in contempt, and (arguably) seek immediate review of the contempt citation. **6-7.

These are, of course, hardly appealing avenues. Mohawk itself was a victim of the discretionary nature of the appellate decision to deny a mandamus petition. And what attorney can comfortably advise its client to incur sanctions or be held in contempt in the expectation that an appellate court will reverse a district court's exercise of its discretion?

These avenues are premised on a district court's willingness to extend some level of protection to materials which the court has already decided are entitled to none.

Implications. Where does *Mohawk Industries* leave attorneys and clients who must deal with the consequences of discovery orders? Several avenues that might afford some protection merit consideration:

- First, when a discovery order compels the disclosure of sensitive material, the disclosing party could seek a protective order under Fed. R. Civ. P. 26(c) to limit the scope of the disclosure to parties.
- Second, when the order is premised on the intentional disclosure of otherwise privileged material, the disclosing party could do its utmost to limit the scope of waiver pursuant to Fed. R. Evid. 502(a).
- Third, and again when the order compels the disclosure of otherwise privileged materials, the producing party could seek a nonwaiver order under Fed. R. Evid. 502(d).

Of course, these avenues are premised on a district court's willingness to extend some level of protection to materials which the court has already decided are entitled to none.

An Irony. One final comment on *Mohawk Industries* is in order: Justice Sotomayor commented on ''legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately available,'' and wrote eloquently of the ''important virtues'' of the rulemaking process under the Rules Enabling Act. *9 (quoting *Will v. Hollock*, 546 U.S. 345, 350 (2006)).

This is ironic, coming, as it does, from the court that some contend has reinterpreted well-established law on the sufficiency of pleadings and bypassed the rulemaking process in its reinterpretation of Fed. R. Civ. P. 8(a)(2). (See *Ashcroft v. Iqbal*, U. S., No. 07-1015, 5/18/09; 702 DDEEU, 7/8/09.)

Mohawk Industries is not about e-discovery per se. However, it is a cautionary tale for those who seek to challenge any interlocutory—and discretionary—discovery order.

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