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BUSINESS LITIGATION UPDATE

Supreme Court Limits Right to Immediate Appeal on Orders Compelling Production of Privileged Material

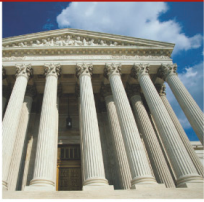
Lawyers and clients need to evaluate carefully the impact of losing a claim of attorney-client privilege at the trial level. The U.S. Supreme Court on December 8 issued a decision with far-reaching consequences for the attorney-client privilege, holding that the claim of privilege, if rejected by the trial court, is generally not immediately appealable.

In Justice Sonia Sotomayor's first written opinion as a Supreme Court justice, the Court held in *Mohawk Industries v. Carpenter* that the lower court's decision to require a company to release attorney-client privileged documents could not be immediately appealed under the collateral order doctrine. This decision resolved a split among the Circuits, and rejected the prior decisions in the Third, Ninth and District of Columbia Circuits, which had held that disclosure orders adverse to the attorney-client privilege were immediately appealable.

The *Mohawk* case was a wrongful termination case in which a former employee, Norman Carpenter, sought to establish that his termination by Mohawk was pretextual. Carpenter filed a motion to compel Mohawk to produce privileged information concerning the company's termination decision as well as documentation regarding a meeting Carpenter had with the company's counsel. The lower court determined that the attorney-client privilege protecting the documents had been implicitly waived and ordered production of the material. Mohawk filed a notice of appeal and petition for a writ of mandamus to the Eleventh Circuit, both of which were rejected.

In arguing the case to the Supreme Court, Mohawk conceded that discovery orders were generally not immediately appealable, but contended that rulings requiring the production of attorney-client privileged material were different because of the "important institutional interests at stake" and that "the right to maintain attorney-client confidences—the *sine qua non* of a meaningful attorney-client relationship—is 'irreparably destroyed absent immediate appeal' of adverse privilege rulings."

The Court, although acknowledging the importance of the attorney-client privilege, framed the issue as whether deferring review of such privilege rulings "so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." The Court determined that "postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege." According to the Court, any disclosure of attorney-client privileged material improperly mandated by a lower court could be remedied by an appellate court vacating the adverse judgment and remanding for a new trial in which the protected material would be excluded from evidence.



The Court also noted that there were other avenues available to aggrieved parties other than collateral order appeal, including requests to certify an interlocutory appeal under 28 U.S.C. § 1292(b) or a petition for a writ of mandamus when a disclosure order “amounts to a judicial usurpation of power or a clear abuse of discretion or otherwise works a manifest injustice.” The Court’s opinion even noted that “another long-recognized option” for the aggrieved party would be to defy the disclosure order and, if the party is found in contempt and receives what can be characterized as criminal punishment, that party could then appeal directly from the contempt ruling.

The Court rejected the assertion that its decision would chill open and frank communications between lawyer and client. According to the Court, whether or not there is an immediate right to appeal on disclosure orders, all clients and counsel must already recognize that the attorney-client privilege is not absolute and that there is always a possibility that they may have to disclose their communications because, for example, “they misjudged the scope of the privilege, because they waived the privilege, or because their communications fell within the privilege’s crime-fraud exception.”

The precise effect of this ruling remains to be seen. What is clear is that if a lower court erroneously requires disclosure of privileged material, opportunities for immediate appellate review are very limited. Certainly, the choice of disobedience to provoke a criminal contempt citation in order to obtain immediate review is an extreme one. Moreover, if there is no immediate appellate option and documents are turned over to opposing counsel, it is very difficult to “unring the bell” of their disclosure even if the judgment were later reversed and the case re-tried without the benefit of the privileged materials.

FOR MORE INFORMATION

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