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How Mohawk Will Affect Litigation

Law360, New York (February 04, 2010) -- Here are two sentences lawyers would be happy never to read in an order directed to their clients: "The attorney-client privilege has been vitiated. Produce previously protected communications."

Harsh consequences can radiate out from such words like ripples in a pond: litigation strategy may be revealed; embarrassing, damaging — and often irrelevant — discussions will be viewed and probably used by the opposing party; and lawyers will become deponents.

The initial reaction of any lawyer and client is likely, "Can we appeal and stay the order of production?" For a number of years, the answer to this question was, "It depends on the circuit." Now, the answer is more simply "No."

Last month, the U.S. Supreme Court, in Mohawk Industries Inc. v. Carpenter, resolved a circuit split by holding that orders ruling against claims of attorney-client privilege are not immediately appealable under the collateral order doctrine.

The Mohawk Decision

Mohawk was a wrongful termination case filed in the U.S. District Court for the Northern District of Georgia.

Among other things, Plaintiff Norman Carpenter alleged he was terminated because he informed Mohawk's human resources department the company was employing undocumented immigrants. Mohawk v. Carpenter, Slip Op. at 2. This behavior, according to Carpenter, violated 42 U.S.C. § 1985(2) and Georgia law.

Prior to his termination, Carpenter met with in-house counsel in connection with an internal investigation regarding Mohawk's alleged hiring of undocumented workers. Carpenter sought records of this meeting in his employment action. Mohawk objected, claiming the documents were protected by the attorney-client privilege.

The district court agreed, but held the privilege was waived during Mohawk's defense of a tangentially related class action. The district court ordered immediate production of the documents.

Mohawk — like most parties facing an order to disclose attorney-client communications — sought immediate appellate review. It sought an appeal as of right under the collateral order doctrine.

This doctrine permits immediate appeal of decisions that: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) are effectively unreviewable on appeal from a final judgment. Id. at 3 (citing Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949)).

The Eleventh Circuit dismissed the appeal, finding the third requirement — that the decision must be effectively unreviewable on appeal from a final judgment — was not satisfied.

In other words, the court decided the issue was not immediately appealable as of right because a ruling regarding the attorney-client privilege could be effectively reviewed on appeal after final judgment. It did not reach a decision on the merits of the attorney-client ruling.

Federal circuit courts had previously ruled both for and against this argument. Some of the Eleventh Circuit's sister courts — the Second, Fifth, Seventh and Tenth Circuits, as well as the Federal Circuit Court — stood with the Eleventh in finding such appeals under the collateral order doctrine were not as of right.

Mohawk, Slip Op. at 4, n. 1 (citing Boughton v. Cotter Corp., 10 F.3d 746, 749-50 (10th Cir. 1993); Texaco Inc. v. Louisiana Land & Exploration Co., 995 F.2d 43, 44 (5th Cir. 1993); Reise v. Board of Regents, 957 F.2d 293, 295 (7th Cir. 1992); Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 162 (2nd Cir. 1992); Quantum Corp. v. Tandon Corp., 940 F.2d 642, 643-44 (Fed. Cir. 1991)).

Other circuits, however, had reached the opposite conclusion, with the Third, Ninth and D.C. Circuits holding attorney-client privilege decisions were immediately appealable as of right under the collateral order doctrine.

Mohawk, Slip Op. at 4, n. 1, (citing In re Naptster Inc. Copyright Litigation, 479 F.3d 1078, 1087-88 (9th Cir. 2007); United States v. Philip Morris Inc., 314 F.3d 612, 617-621 (D.C. Cir. 2003); In re Ford Motor Co., 110 F.3d 954, 957-964 (3rd Cir. 1997)).

The Supreme Court granted certiorari to resolve the split. The Supreme Court agreed with the Eleventh Circuit, holding that an order vitiating the attorney-client privilege is not immediately appealable under the collateral order doctrine set forth in its earlier Cohen opinion.

Writing for the court, Justice Sonia Sotomayor focused on the third Cohen prong and reasoned that the right to review an adverse attorney-client ruling may be adequately vindicated on appeal following a lower court's entry of final judgment.

The court found that such a ruling could be remedied effectively if an appellate court were to vacate the lower court's decision and grant a new trial, along with an instruction that the privileged material not be used.

The Court's Rationale

Undergirding the Supreme Court's decision in Mohawk is a belief that the potential harm to the interests at stake — specifically, full and frank attorney-client communications — does not necessitate the recognition of a right to immediate appeal.

The court found clients and counsel would be no less candid just because they would be barred from immediately appealing erroneous privilege rulings — the likelihood of such rulings, the court reasoned, was "remote" anyway. Mohawk, Slip Op. at 8.

The court also relied on considerations of judicial efficiency in further support of its ruling. In particular, the court cautioned against permitting "piecemeal appeals" of the kind sought by Mohawk because, so the court reasoned, allowing them would have negative efficiency implications for the administration of justice at the district and appellate levels.

For district courts, the court noted immediate appeals would result in fragmented, drawn-out litigation. Along the same lines, the court found allowing these types of immediate appeals would flood appellate courts with calls to overturn privilege rulings by courts below.

Finally, the court noted that despite its ruling, other means of immediate appeal remain open to parties in situations similar to Mohawk's. First, a party can still request from the district court certification of an interlocutory appeal under 28 U.S.C. § 1292(b).

Second, a party can bypass the district court and seek a writ of mandamus. Third, a party can disobey the lower court's discovery ruling, incur court-imposed sanctions, and, in certain situations, appeal the basis for those sanctions.

The Implications of Mohawk

The court's position will no doubt be unpopular with lawyers defending large businesses with active legal departments.

As noted both in the U.S. Chamber of Commerce's amicus brief in support of petitioner Mohawk — which Jeff Bucholtz, one of the co-authors of this article, helped write — and in other papers filed by parties and amici, the primary purpose of the privilege is to protect against the disclosure of confidential attorney-client communications, not merely to prohibit the use at trial of the information contained therein. Chamber of Commerce Brief at 18 (quoting Ford Motor Co., 110 F.3d at 963).

These lawyers argue irreparable damage to the party seeking protection over privileged material occurs at the moment a court erroneously orders the disclosure of such material. Id.

A real-world example occurs when a defendant is required to disclose sensitive information, which is then used by opposing counsel to revise his litigation strategy. See American Bar Association Brief at 15.

An attorney's or client's concerns about the use of potentially thorny evidence thus can be exposed to the opposing side: In effect, the work of the one party is done by its opponent — and only rarely will there be an opportunity for appellate review.

The court's proposed alternative means of obtaining appellate review will provide the corporate defense lawyer with small solace. First, a permissive appeal under 28 U.S.C. § 1292(b) is not a likely option because the district court still retains discretion as to whether it will grant the appeal.

And, as the court noted, such appeals are generally reserved for rulings dealing with a novel legal issue. A trial court could similarly impose an evidentiary sanction — such as striking a party's answer — which would likewise not be immediately appealable.

Next, a writ of mandamus is warranted only in "extraordinary circumstances," and is thus difficult to secure. To obtain such relief, a party must typically meet a very high standard — it must establish that the lower court's privilege ruling was "a judicial usurpation of power." Will v. United States, 389 U.S. 90, 95 (1967).

Finally, contempt provides a viable means of immediate appeal only if the district court holds a noncomplying party in criminal contempt. Civil contempt does not provide the basis for immediate appeal. Fox v. Capital Co., 299 U.S. 105, 107 (1936).

Because a district court has discretion as to which type of contempt (civil or criminal) it chooses to issue, pursuing contempt is far from a reliable means of immediate appeal.

And, even if it were a reliable choice, none of the "choices" are appealing: Is the contempt civil or criminal? Who's led away in handcuffs? The client? The lawyer? Both?

As to the court's reasoning that allowing appeals under the collateral order doctrine would open the "floodgates," the Chamber of Commerce examined the volume of appeals in the Third, Ninth and D.C. Circuits — where the right of immediate appeal of attorney-client privilege rulings was once recognized. Chamber of Commerce Amicus Brief at 30-35.

The Chamber's analysis looked back to the date when the right was first recognized in each jurisdiction. Id. The numbers indicated there was more a dribble than a flood: The Third Circuit dealt with about six appeals of this type of ruling since 1997; in D.C., there was one appeal since 2003; and for the Ninth Circuit, one appeal since 2007. Id.

Post-Mohawk

Of all the arrows in a litigator's quiver after Mohawk — discretionary appeal, contempt or mandamus — the last option seems to have the sharpest point.

Although mandamus requires a high standard, some appellate courts have acknowledged that it may furnish a party's best opportunity for immediate appeal of an adverse privilege ruling — especially in jurisdictions that did not recognize an appeal under the collateral order doctrine.

See In re Vioxx Prods. Liab. Litig., No. 06-30378, 0630379, 2006 WL 1726675, at *1 (5th Cir.) (per curiam) ("mandamus is the only avenue of review"); In re Regents of Univ. of Calif., 101 F.3d 1386, 1387 (Fed. Cir. 1996) ("A writ of mandamus may be sought to prevent the wrongful exposure of privileged communications."); Chase Manhattan Bank, 964 F.2d at 163 (recognizing the need for mandamus review of discovery orders concerning privilege in certain circumstances); see also, In re Lott, 424 F.3d 446, 450 (6th Cir. 2005) ("The inability to cure an unlawful piercing of the privilege through direct appeal has led numerous courts of appeals to regularly utilize mandamus when important interests ... are at issue.").

Nonetheless, defendants facing a potentially adverse privilege ruling in products litigation may be more willing to settle rather than risk disclosure of sensitive information. The ruling may chill a client's communication with in-house and outside counsel — even before a single plaintiff files suit.

As suggested in an amicus brief by DRI, an association of defense lawyers and their clients, Mohawk may come to shape a corporate client's approach to its internal investigations and potentially undermine the efficacy of regulatory schemes dependent on some degree of self-policing. Defense Bar Brief at 14-15.

In light of Mohawk, practitioners of all stripes should inform their clients about how the decision has limited the tools with which litigants can challenge an adverse discovery ruling regarding the attorney-client privilege.

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