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The collateral order doctrine after 'Mohawk'

9th Circuit has held the decision does not bar immediate appeal of a First Amendment privilege ruling.

BY AARON S. BAYER

A previous column ["Collateral Orders," NLJ, 11-27-06] noted that the U.S. Supreme Court had narrowed the categories of orders that were immediately appealable under the "collateral order" doctrine, allowing such appeals only when the denial of immediate review would "imperil a substantial public interest." *Will v. Hallock*, 546 U.S. 345, 352 (2006). The Supreme Court's recent decision from December 2009 in *Mohawk Industries v. Carpenter*, 130 S. Ct. 599 (2009), holding that the rejection of claims of attorney-client privilege are not subject to immediate appeal as collateral orders, signals a further retrenchment.

THE PRACTICE
Commentary and advice on developments in the law

The plaintiff in *Mohawk* sought to compel production of documents related to an internal investigative meeting between the plaintiff and counsel for his then-employer (Mohawk). The district court held that the company had waived the attorney-client privilege, and it ordered that the documents be produced. Recognizing the seriousness of its ruling, the district court suggested that a collateral order appeal would be appropriate. The U.S. Court of Appeals for the 11th Circuit, however, held that the collateral order doctrine did not apply, and the Supreme Court agreed.

As appellate practitioners know, to be immediately appealable as a collateral order, a ruling must "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

Each circuit that has addressed whether rejection of the attorney-client privilege is an appealable collateral order has found the first two factors satisfied. Only the 3d, 9th and D.C. circuits, however, found that the third factor was also satisfied, allowing immediate appeal of such privilege rulings because they were effectively unreviewable after final judgment. The Court in *Mohawk* declined to address the first two factors, holding only that rejection of the privilege rulings, even after production of the documents, could effectively be reviewed on appeal from a final judgment.

The Court acknowledged the importance of the interest protected by the attorney-client privilege but framed the issue as "whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders."

Amicus briefs filed by the solicitor general and by former Article III judges and law professors specifically expressed concern about burgeoning federal caseloads and the litigation delays that would result from allowing immediate appeals from attorney-client privilege rulings—and potentially other rulings—during discovery. Questions were raised at argument, however, about whether those concerns were empirically justified. Justice Samuel Alito Jr. could not recall from his years on the 3d Circuit any collateral order appeals of attorney-privilege rulings, and the defendant noted that there have been only a handful of such appeals in the three circuits that allow them. But the Court seemed concerned that a ruling allowing immediate appeal of attorney-client privilege rulings might be extended to other privilege rulings and ultimately other discovery orders, burdening appellate courts and disrupting litigation.

In deciding whether deferring appellate review would imperil the attorney-client privilege, the Court rejected arguments vigorously advanced by the defendant, the American Bar Association and the U.S. Chamber of Commerce that the value of the privilege is effectively destroyed once privileged documents are disclosed to opposing counsel. The Court expressed confidence that, on review of a final judgment, an appellate court can protect the interests served by the privilege by ordering a

AARON S. BAYER *is a member of the appellate and complex legal issues group at Wiggin and Dana in New Haven, Conn. He can be reached at abayer@wiggin.com.*

new trial that would exclude the privileged material. It was unimpressed by arguments that clients would not seek their lawyers' counsel if they knew that orders to disclose privileged communications could not be immediately appealed.

In lieu of a new category of appealable collateral orders, the Court favored use of existing, alternative avenues for appeal—including permissive appeals under 28 U.S.C. 1292(b), mandamus petitions and appeals from a contempt order imposed for violating an order compelling production of privileged documents. Each of these alternatives, though, has its own specific—and very narrow—basis for appellate review. Section 1292(b) requires a questionable ruling on a controlling issue of law, which both the district court and court of appeals must agree warrants interlocutory review. Mandamus provides a very limited basis for appellate review, usually requiring some compelling circumstances justifying immediate appeal. And contempt not only poses obvious risks, but it also may not yield an appealable order, because only criminal contempt is immediately appealable. It would be difficult to know whether a court would hold a party in criminal, or civil, contempt for disobeying a discovery order. Each of these routes to early appellate review are therefore uncertain and difficult to obtain. But that seems to be precisely the calculus chosen by the Court, favoring forms of appellate review that will serve as a screening mechanism to avoid excessive appeals of privilege rulings during discovery.

THE 9TH CIRCUIT'S DECISION

The extent to which *Mohawk* achieves that goal, however, remains to be seen. The 9th Circuit has already decided that *Mohawk* does not bar immediate appeal of a First Amendment privilege ruling, in a case decided just three days after *Mohawk* was issued. The case, *Perry v. Schwarzenegger*, 2009 WL 4795511 (9th Cir., Dec. 11, 2009), involved a challenge to California's Proposition 8 barring gay marriage. The plaintiffs sought discovery of internal electoral strategy and communications documents of the defendants, who had been involved in the campaign for passage of Prop. 8. The defendants appealed the order requiring them to produce the documents, which they argued were privileged under the First Amendment because they implicated the defendants' freedom of association.

In a decision by Judge Raymond Fisher, the 9th Circuit permitted the appeal under the collateral order doctrine. It specifically distinguished *Mohawk*, noting that freedom of association is a constitutional right and that it involves a greater public interest and is likely to generate fewer interlocutory appeals than attorney-client privilege rulings. Hedging its bets, the court also relied on its mandamus jurisdiction to hear the appeal. On the merits, it upheld the defendants' First Amendment privilege claims and required entry of a protective order based on them.

It is uncertain whether *Mohawk* will preclude collateral order review of other types of discovery rulings that involve sensitive interests. The circuits have divided, for example, on whether orders requiring disclosure of trade secrets are immediately appealable under the collateral order doctrine. See *Awuah v. Coverall North America Inc.*, 585 F.3d 479 (1st Cir. 2009) (not immediately appealable); *In re Carco Elecs.*, 536 F.3d 211(3d Cir. 2008) (immediately appealable).

The solicitor general, while arguing against extending the collateral order doctrine to attorney-client privilege rulings, asked the Court in *Mohawk* to recognize that orders implicating the presidential-communications and state-secrets privileges should be immediately appealable as collateral orders because of their constitutional basis and their importance to the government and national security. The Court declined to comment on the issue.

But the Court did suggest a potentially sweeping basis for cutting off all future expansion of the collateral order doctrine—by expressing a preference that any further expansion of the types of orders subject to immediate appeal come by way of rule, rather than judicial decision. The Court noted that Congress amended the Rules Enabling Act to allow the Court to adopt rules for determining when an order is final for purposes of appeal, and it later empowered the Court to prescribe rules providing for appeal of interlocutory orders not otherwise addressed in 28 U.S.C. 1292. Rulemaking, stated the Court, takes advantage of the "collective experience of bench and bar" and "facilitates the adoption of measured, practical solutions."

Justice Clarence Thomas went further in his concurring opinion, suggesting that the Court should simply do away with the collateral order doctrine and promulgate rules instead. Although the Court did not go that far, its comments on preferring rulemaking could apply to virtually every future argument for permitting a new collateral order appeal and may well pose a daunting hurdle for future appellants. ■