


**COMMERCIAL
LITIGATION**

Jon P. Devendorf
315.425.2724
jdevendorf@hblaw.com

Karim A. Abdulla
Jessica M. Baker
Frank V. Balon
Robert A. Barrer
Marc S. Brown
David G. Burch
Samuel J. Burrano
Jennifer Nichols Castaldo
J. Eric Charlton
Linda J. Clark
John D. Cook
Kathryn D. Cornish
David M. Cost
Thomas B. Cronmiller
Nicholas J. DiCesare
James P. Domagalski
Anne Burak Dotzler
Ellen K. Eagen
James P. Evans
Michael E. Ferdman
Joseph M. Finnerty
Richard Fischbein
Frank T. Gaglione
Kevin P. Glasheen
Christopher J. Harrigan
Richard K. Hughes
William A. Hurst
Susan R. Katzoff
Todd V. Lamb
John P. Langan
Robert J. Lanza
Robert B. Liddell
Leigh A. Lieberman
Carolyn A. Marcotte
Dennis R. McCoy
Douglas J. Nash
John M. Nichols
Gabriel M. Nugent
Thomas J. O'Connor
Michael A. Oropallo
Anthony J. Piazza
Paul A. Sanders
Anthony A. Scibelli
Michael J. Smith
Joseph L. Stanganelli
Stephen H. Volkheimer
Samuel C. Watkins
Brian E. Whiteley
Angela C. Winfield

Supreme Court Decision Resolves Split on Collateral Order Rule and Interlocutory Orders Adverse to Attorney-Client Privilege

In a decision that has significant implications for the attorney-client privilege, the United States Supreme Court recently held that interlocutory orders requiring production of arguably privileged material cannot be immediately appealed under the collateral order rule. The Supreme Court's decision in *Mohawk Industries v. Carpenter*, 558 U.S. (2009), the first authored by Justice Sonia Sotomayor, resolves a split among the federal circuits on the applicability of the collateral order rule.

As a general rule, in federal court only "final" orders are appealable. However, the collateral order rule, which was established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and subsequent cases, allows for immediate appellate review of interlocutory orders that (a) conclusively determine a disputed question; (b) resolve an important issue completely separate from the merits of the case; and (c) effectively would be unreviewable if the party challenging the order was forced to wait until the end of the case to appeal. Before *Mohawk Industries*, three circuits held that the collateral order rule applied to decisions requiring disclosure of information arguably protected by the attorney-client privilege.

Mohawk Industries came to the Supreme Court on appeal from the Eleventh Circuit. The controversy involved a district court order requiring disclosure of confidential information because the petitioner, Mohawk, had waived the attorney-client privilege. Mohawk filed a notice of appeal and a writ of mandamus to challenge the ruling. The Eleventh Circuit dismissed the appeal for lack of jurisdiction under 28 U.S.C. § 1291, holding that the district court's ruling was not immediately appealable under the collateral order rule.

The Supreme Court affirmed the Eleventh Circuit's decision, and held that "collateral order appeals are not necessary to ensure effective review of orders adverse to the attorney-client privilege." The Supreme Court added that "[p]ermitting piecemeal, prejudgment appeals . . . undermines efficient judicial administration and encroaches upon the prerogatives of district court judges, who play a special role in managing ongoing litigation."

Hiscock & Barclay is a full service, 210-attorney law firm, with offices throughout the major cities of New York State, as well as in Boston, Washington, D.C. and Toronto. We provide comprehensive legal and business counsel to a diverse client base in 29 specialized practice areas with statewide and regional expertise as well as with national and international capabilities.



Commercial Litigation
Construction & Surety
Corporate
Creditors' Rights
Economic & Project
Development
Energy & Utilities
Environmental
Financial Institutions &
Lending
Health Care & Human
Services
Immigration
Indian Law
Insurance Coverage &
Regulation
Intellectual Property &
Technology
Intellectual Property
Litigation
International Business
Labor & Employment
Lobbying & Election
Law Compliance
Media & First
Amendment Law
Municipal & Land Use
Professional Liability
Public Finance
Real Estate
Real Property Tax &
Condemnation
Regulatory
Sports & Entertainment
Tax
Telecommunications
Torts & Products
Liability Defense
Trusts & Estates

Mohawk argued that because the attorney-client privilege is so essential to the functioning of the legal system, decisions as to its application cannot wait until a final judgment has been rendered. In rejecting this argument, the Supreme Court stated that “[it] routinely require[s] litigants to wait until after final judgment to vindicate valuable rights . . . central to our adversarial system.” The Supreme Court also rejected the argument that its ruling would have a “chilling effect” on full and frank discussions between attorneys and their clients, stating that “in deciding how freely to speak, 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.”

The Supreme Court also noted that parties ordered to disclose arguably privileged material have two options apart from appealing a disclosure order under the collateral order rule. The first option is to seek permission to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The second option is to seek mandamus review. The Supreme Court also noted that, if all else fails, a party could refuse to comply with a disclosure order and face sanctions, or be held in contempt and then appeal.

It is not likely that parties in Mohawk’s position will derive any comfort from the Supreme Court’s suggestions. Relief under the two alternative options mentioned is granted infrequently. Further, it is difficult to envision a situation where it makes sense for a party to risk sanctions or a contempt finding to prevent disclosure of privileged material. Thus, as a practical matter, disclosure of sensitive (and possibly privileged) material under such circumstances will provide a litigation advantage that is not counterbalanced by the right of appeal after a final decision is rendered. All the more reason to ensure that the utmost care is taken to preserve the attorney-client privilege. ■

If you require further information regarding the information presented in this Legal Alert and its impact on your organization, please contact any of the members of the Practice Area listed on the front of this Alert.