



Alerts

State Appeals Court Adopts U.S. Supreme Court's Recent Mohawk Industries Holding: Privilege Ruling Not Subject to Interlocutory Appellate Review

April 22, 2010

Lawyers for the Profession® Alert

Kurstin v. Bromberg Rosenthal, LLP, 2010 WL 682265 (Md. App. 2010)

Brief Summary

Discovery rulings adverse to the attorney-client privilege are not immediately appealable under the collateral order doctrine.

Complete Summary

Law firm Bromberg Rosenthal LLP ("Bromberg") represented a client in her divorce. A contract dispute involving the divorce settlement agreement later arose in which the client used new counsel, and which she eventually settled. Bromberg then sued the former client for unpaid legal fees. The client brought a malpractice counterclaim based on economic harm she had suffered in settling the post-divorce litigation. Bromberg argued that this harm was caused by her new counsel, rather than by Bromberg's work on the original divorce settlement. Bromberg sought to depose the client's new counsel and sought discovery of all documents related to his representation of the client. The client moved pretrial for a protective order based on her attorney-client privilege. The Montgomery County Circuit Court denied the motion based on waiver of the privilege. The client sought immediate appeal of this order.

The Maryland Court of Special Appeals held that this order was not immediately appealable. The court noted that the order was not appealable as a final order, and that the parties had not argued the issue of finality. The court focused on whether the order was appealable under the common law collateral order doctrine. This doctrine allows immediate appeal if: (1) the order is conclusive, (2) the order resolves an important issue, (3) the issue is completely separate from the merits of the case, and (4) the order would be effectively unreviewable following appeal from final judgment. The court held that the client's appeal met none of these four requirements, relying in part on the conclusion that the pretrial discovery ruling was not tantamount to a ruling on admissibility at trial.

The court alternatively held that discovery orders are almost categorically excluded from immediate appeal, in substantial reliance on the U.S. Supreme Court's recent decision that most discovery orders are not immediately appealable as a matter of right, and specifically that the vitality of the attorney-

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client privilege is adequately protected by post-judgment and other review mechanisms. *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. ___, 130 S. Ct. 599 (2009). Improper disclosure of privileged material, the Supreme Court held, can be remedied on appeal by “vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.” *Mohawk*, 130 S. Ct. at 602. The Supreme Court also noted that if an order is particularly injurious, litigants have other immediately available avenues, such as requesting an interlocutory appeal, petitioning for a writ of mandamus, or defying the order and incurring sanctions (which would be subject to review after final judgment). The Supreme Court was not swayed from its categorical holding by the fact that certain orders adverse to the attorney-client privilege may be imperfectly repairable.

Significance of Opinion

State court rules related to immediate appeal, including the collateral order doctrine, may vary from state to state, and generally are not controlled by U.S. Supreme Court precedent related to federal court appeals. This opinion is significant for the fact that Maryland chose to follow the U.S. Supreme Court's categorical holding in *Mohawk Industries* denying interlocutory appellate review. Moreover, both opinions, notably, do little if anything to differentiate attorney-client privilege issues from other evidentiary issues in the context of immediate appeals. Despite the admitted importance of the privilege, neither the federal nor the state court was willing to afford it special treatment.

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