

ELEVENTH CIRCUIT GIVES GUIDANCE TO THIRD PARTIES SERVED WITH DISCOVERY

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Attorneys and their clients should be aware of the means of preserving, or attempting to preserve, the right immediately (or almost immediately) to appeal discovery orders adverse to the “attorney-client privilege”, regardless of whether the client is a party or non-party to the case in which a formal request for documents, a subpoena, was served. A recent opinion from the Eleventh Circuit confirms that the court of appeals lacks subject matter jurisdiction—authority—over an appeal of a non-final order (i) by a party litigant of an order denying a non-party’s motion to quash a document subpoena on privilege grounds, and (ii) by a non-party to a discovery order adverse to the attorney-client privilege notwithstanding that he cannot appeal a final judgment.

In *Drummons Co., Inc. v. Collinsworth, et al.*, 2016 WL 1319743 (11th Cir. Mar. 15, 2016), the Eleventh Circuit addressed whether it had subject matter jurisdiction over appeals of an order denying a non-party’s motion to quash a subpoena seeking production of documents in unrelated litigation. The appeals were by a law firm defendant to the litigation which was not the entity upon which the subpoena was served, and the non-party law firm served with the subpoena. The connection between the non-party law firm and the party law firm defendant was that they served as co-counsel in unrelated litigation that raised a similar issue: alleged involvement in human rights violations by paramilitary forces in Colombia.

In rejecting the party’s appeal on jurisdictional grounds, the Eleventh Circuit relied on *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), which held that an order requiring disclosure of materials covered by the attorney-client privilege did not warrant interlocutory review when the holder of the privilege was a party to the litigation which could appeal after final judgment.

In rejecting the non-party’s appeal, the Eleventh Circuit rejected the contention that the court possessed jurisdiction under what is referred to as the Cohen collateral order doctrine—one of a handful of narrow exceptions to the rule that only orders that conclude a case are appealable to a higher court. After noting that discovery orders generally do not meet the “important question[]” component of the requirements for a collateral order to be immediately appealable, the court rejected the contention that the rule in *Mohawk Industries* that the collateral order does not extend to orders compelling discovery of materials claimed to be covered by the attorney-client privilege did not apply to non-parties. The Eleventh Circuit explained that the non-party could have refused to comply with the district court’s order compelling disclosure and appealed after being held in contempt, or it could have filed a petition for writ of mandamus with the appellate court itself. The court explained that when other appellate options are available to a non-party, immediate appeal under the collateral order is unavailable.

Finally, addressing the non-party’s petition for what is referred to as a writ of mandamus, basically an order from a higher or superior court directing a lower or inferior court to undertake a certain act, the Eleventh Circuit remanded the matter to the district court so that it could consider, on a case-by-case basis, any assertion of the work product privilege on an item-by-item basis.

A review of the Eleventh Circuit's opinion in Drummons Co. is recommended reading for persons or entities who have been, or may in the future be, subject to a document subpoena from parties to litigation.

For more information about this topic, please contact the authors Paul Avron and Ilyse Homer, on the firm's Business Reorganization Team.

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