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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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