

No. 08-678

IN THE
Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

NORMAN CARPENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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QUESTION PRESENTED

Whether a party has an immediate appeal of district court's order finding waiver of the attorney-client privilege and compelling production of privileged materials under the collateral order doctrine, as set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

RULE 29.6 DISCLOSURE STATEMENT

Petitioner, Mohawk Industries, Inc. (“Mohawk”) states that it is a publicly-traded corporation incorporated under the laws of Delaware. Mohawk has no parent corporation, and no publicly-traded company owns ten percent or more of its stock.

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REPLY BRIEF

Respondent's Brief in opposition illustrates precisely why the Court should grant this Petition. Respondent admits a deep conflict exists among the courts of appeals on the question presented. Indeed, Respondent suggests that the conflict is even more developed (nine to three) than set forth in the Petition. Respondent's principal argument, however, is that this Court should ignore the conflict based on pure conjecture that the Third Circuit might – sometime – reverse itself and erase a leading decision on the question presented, *Kelly v. Ford Motor Co.*, (*In re Ford Motor Co.*), 110 F.3d 954 (3rd Cir. 1997). Respondent then suggests without any basis, that the Ninth and D.C. Circuits inexplicably will reverse course as well. On Respondent's view, this Court would never again accept a case to resolve a conflict among the circuits because it should expect them to simply disappear on their own.

This case presents an opportunity to review an important question that has and does divide the courts of appeals. Respondent's only real basis to oppose *certiorari* is to argue that Mohawk is wrong on the merits of how to resolve the conflict. As set forth in the Petition, the privilege waiver here is subject to appellate review under the collateral order doctrine set forth in *Cohen*. Respondent's merits objections to collateral order jurisdiction are just that—objections this Court should consider following the grant of the Petition.

ARGUMENT

I. There is a deep and irreconcilable conflict among the courts of appeals on the question presented.

Respondent explicitly acknowledges that the courts of appeals are divided on the question presented. Response to Petition, pp. 14-16.¹ As set forth in the Eleventh Circuit's opinion and in the Petition, the conflict now involves at least ten circuits, with at least seven refusing to permit collateral order jurisdiction and three circuits permitting jurisdiction. Appendix A, pp. 9a-10a; Mohawk Petition, pp. 9-14. Respondent explicitly accepts this breakdown, but suggests an even deeper conflict, contending that both the Sixth and Fourth Circuits have also made statements adopting the majority position. Response to Petition, pp. 14-16. Even if the Respondent were correct,² the conflict would be even more well-developed than as set forth in the Petition.

1. Before addressing the conflict among the circuits, Respondent spends considerable time arguing the merits of the underlying case. Response to Petition, pp. 1-9. The merits of Respondent's allegations against Mohawk are entirely irrelevant to this Petition. Rather, the relevant issue and arguments surround whether appellate jurisdiction exists under *Cohen*.

2. In *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005), the Sixth Circuit allowed immediate review of a discovery order involving the attorney-client privilege under *Perlman v. United States*, 247 U.S. 7 (1918), and did not address the question presented in this case. Though more to the point of the present appeal, *United States v. In the Matter of The Search of 235 S. Queen St., Martinsburg, W.V.*, No. 07-5144, 2008 WL 4809458 (4th Cir. Nov. 4, 2008), was an unpublished opinion of the Fourth Circuit.

Nonetheless, Respondent suggests that this conflict is one that is “crumbling and will likely die on its own.” *Id.*, p. 19. Respondent supports this theory based on pure speculation that the Third Circuit will eventually reverse *Ford* and that the Ninth and D.C. Circuits will then simply follow suit. Response to Petition, pp. 16-20.

To the contrary, the Third Circuit has repeatedly reaffirmed *Ford* and followed its holding. *See e.g., In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 357-58 (3rd Cir. 2007) (citing *Ford* and finding jurisdiction under the collateral order doctrine to review district court’s order requiring party to produce allegedly privileged documents and stating “in this context, we have little trouble concluding that we have jurisdiction over this appeal.”); *Coregis Ins. Co. v. Law Offices of Carole F. Kafrissen*, 57 Fed.Appx. 58, 59 (3rd Cir. 2003) (citing *Ford*, the court stated that “We have jurisdiction pursuant to the collateral order doctrine over discovery orders compelling disclosure of material that may be protected by the work product doctrine or attorney-client privilege.”); *Bacher v. Allstate Ins. Co.*, 211 F.3d 52, 53 (3rd Cir. 2000) (“We have held [in *Montgomery* and *In re Ford*] that the requirements of the collateral order doctrine are satisfied when a party appeals a discovery order involving information which the party claims to be privileged . . .”); *Montgomery County v. MicroVote Corp.*, 175 F.3d 296, 300 (3rd Cir. 1999) (“*In re Ford Motor Co.* established a bright-line rule permitting appeals from discovery orders requiring the disclosure of content putatively privileged by the attorney-client and work-

product privileges.”). None of these cases have ever suggested that *Ford* should be overruled *en banc*, nor given any indication that *Ford* is not proper and binding precedent. Simply, no evidence suggests that the Third Circuit will reverse *Ford*.

Even if this Court were to entertain the possibility that the Third Circuit will eventually overturn *Ford*, it is an even further stretch to assume that the Ninth and D.C. Circuits will choose to follow suit. While Respondent acknowledges that the D.C. and Ninth Circuits have taken the minority position on this issue, prior to the decision below these were the most recent courts to address the question (in 2003 and 2007, respectively). When confronting a six to one split, these circuits took the minority position and only deepened the conflict. Both courts carefully analyzed the issue. In *United States v. Philip Morris, Inc.*, the D.C. Circuit specifically recognized that the position they chose to take was a minority position. *Philip Morris*, 314 F.3d 612, 619-20 (D.C. Cir. 2003). And the Ninth Circuit’s decision does not even cite to or rely upon the decision in *Ford*. *UMG Recording, Inc. v. Bertelsmann AG (In re Napster)*, 479 F.3d 1078 (9th Cir. 2007). Respondent does not point to any opinions from either of those circuits to suggest that reversal is even remotely likely.

In light of the recent decisions of the D.C., Ninth and Eleventh Circuits on the question presented, Respondent’s contention that the conflict on this question is “crumbling” is without merit. Likewise, the suggestion that the conflict will die and that three courts

of appeals will reverse themselves is without merit as well. There is a deep and well-developed conflict among the courts of appeals on an important jurisdictional question that this Court has never addressed.³

3. This Court may be reluctant to grant a petition in a case like this one from a circuit in the majority position. Granting a petition from a circuit that has denied jurisdiction, however, provides a superior vehicle for appellate review because the jurisdictional question is presented in a cleaner fashion. Here, the court of appeals did not pass on the merits of the underlying privilege dispute in deciding the *Cohen* issue. If the Court were to wait for a case from the Third, Ninth, or D.C. Circuits, those courts would have found collateral order jurisdiction and then upheld the merits of the privilege claim (reversing the trial court). (If those courts were to deny the privilege claims, appellees in those circuits will have prevailed and would not have occasion to file petitions for certiorari challenging appellate jurisdiction.) If a court of appeals permitted jurisdiction and found the district court erred in compelling the production of privileged materials, this Court could grant certiorari and reverse on jurisdictional grounds, putting the Court in the unenviable and unfortunate position of compelling the production of privileged materials based entirely on a jurisdictional issue, where the court of appeals had already found the district court wrongly compelled the production of the privileged materials. The Court should grant certiorari in this case, which cleanly presents the jurisdictional issue without the complications of a decision on the merits of the privilege claim in the court of appeals.

II. This Petition concerns the important question of collateral order jurisdiction to allow the review of orders finding waiver of the attorney-client privilege.

Without any real basis to oppose the Petition, Respondent turns to the merits of the question presented, contending that permitting collateral order jurisdiction will eviscerate the final judgment rule and open the appellate floodgates. Response to Petition, pp. 23, 30. This, however, is an argument on the ultimate question presented, and a flawed one at that. Regardless, such fears are unfounded. First, this Petition does not stem from a “standard discovery dispute” as Respondent suggests. Response to Petition, pp. 1, 4. Rather, the order at issue is an order finding that Mohawk waived the attorney-client privilege based on three sentences contained in a brief in another case.⁴ Thus, Mohawk is seeking appellate review for the sole purpose of protecting the attorney-client privilege which, as set forth in Mohawk’s Petition, is an important issue, particularly in the context of internal

4. Respondent has given this Court the false impression that the District Court’s based its finding of waiver on *fourteen sentences* contained in a brief filed in the *Williams* class action case. Response to Petition, pp. 6-7. That is wrong. Though the District Court did quote a lengthy excerpt of the *Williams* brief in the “Background” section of the discovery opinion, only three sentences of that excerpt were quoted in the waiver section of the opinion. Mohawk Petition, Appendix B, pp. 18a-19a, 51a. Those were clearly the three sentences relied on by the District Court in finding that the privilege had been waived. The remaining portions of the excerpt were merely presented and identified as “Background.”

investigations like the one that occurred in this case. Additionally, Respondent cites nothing from the Third, Ninth or D.C. Circuits that suggests collateral order review has resulted in an increase or abundance of privilege appeals.

Respondent further re-writes the question presented to be unduly broad and reach all discovery disputes. Respondent's efforts to expand the question presented and, in turn, argue that granting the Petition and reversing the Eleventh Circuit will greatly expand collateral order jurisdiction are without merit. And as set forth in the Petition, this Question is precisely the type that satisfies the *Cohen* test and Respondent's response does not undermine any of those arguments.

Finally and contrary to Respondent's suggestions, this Court's decisions in *Church of Scientology of California v. United States*, 506 U.S. 9 (1992) and *Cunningham v. Hamilton County*, 527 U.S. 198 (1999) have not decided the question presented. Nor does any holding in those cases preclude review here. First, *Church of Scientology* is not a collateral order case. The issue in that case was whether an IRS subpoena was moot since the requested information had already been turned over to the IRS. *Church of Scientology*, 506 U.S. at 12. While *Cunningham* is a collateral order case, it has absolutely nothing to do with waiver of the attorney-client privilege. *Cunningham* involved a sanctions order that resulted in the disqualification of plaintiff's counsel. The Court held that such an order was not immediately appealable under the collateral order doctrine. See *Cunningham*, 527 U.S. at 202. *Cunningham* does not, however, resolve the question presented as waiver

of the attorney-client privilege was in no way implicated in the case. As such, *Cunningham* does not preclude review. To the contrary it serves as one of many examples of this Court granting *certiorari* to resolve a question of collateral order jurisdiction.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Court should grant the Petition to resolve the conflict among the courts of appeals.

Respectfully submitted,

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