

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

AUDREY SAMPSON, individually and as
Executrix of the Estate of John
Sampson,

Plaintiff,

v.

3M COMPANY, f/k/a Minnesota Mining &
Manufacturing Company; ASBESTOS
CORPORATION LTD., in itself and as
successor to Johnson's Company; BASF
CATALYSTS LLC, individually and as
successor to Engelhard Minerals and
Chemical Corp.; BELL ASBESTOS MINES
LTD.; BENJAMIN MOORE PAINT COMPANY;
CARBOLA CHEMICAL COMPANY; CERTAINTEED
CORPORATION; CSR LIMITED,
individually and as successor to
Colonial Sugar & Refinery Company;

(continued)

Docket No. A-002584-17

On Leave to Appeal from
the New Jersey Superior
Court, Law Division
Docket No. AM-730-16

Sat Below:
Hon. Ana C. Viscomi,
J.S.C.

**BRIEF OF PROPOSED AMICUS CURIAE ASSOCIATION OF
CORPORATE COUNSEL IN SUPPORT OF NEITHER PARTY**

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Defendants.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Association of Corporate Counsel ("ACC") is a global bar association for in-house counsel, with more than 43,000 members who practice in the legal departments of corporations, associations, and other organizations in the United States and abroad. ACC has 1,280 members based in New Jersey and thousands of other members representing clients who do business in New Jersey.

For over 35 years, ACC has worked to make sure that courts, legislatures, regulators, and other policy-making bodies understand the role and concerns of in-house counsel and the legal departments where they work. ACC takes a particular interest in questions relating to the attorney-client privilege, which--as the New Jersey Supreme Court has explained--is essential to guaranteeing the "free and full disclosure of information from the client to the attorney." Fellerman v. Bradley, 99 N.J. 493, 498 (1985). To ensure that attorney-client confidentiality is accorded appropriate respect, ACC regularly files *amicus* briefs on issues relating to the scope and application of the privilege.¹

¹ Over the past two years, for example, ACC has filed *amicus* briefs and letters on attorney-client privilege issues in In re Silver Wheaton Corp. Sec. Litig., No. 2:15-CV-05146 (C.D. Ca. June 14, 2018); Johns Hopkins Univ. v. Alcon Labs., Inc., No. 1:15-cv-00525 (Fed. Cir. Dec. 11, 2017); Alberta v. Suncor Energy, Inc., 2017 ABCA 221 (Alta. Ct. App. Sept. 18, 2017); and FTC v. Boehringer Ingelheim Pharms., Inc., Nos. 15-5356, 15-5357 (D.C. Cir. June 2, 2017).

The New Jersey Supreme Court previously granted ACC leave to participate as *amicus* in this litigation. Sampson v. 3M Co., 232 N.J. 285 (2018). In its initial *amicus* brief, ACC argued that the Supreme Court should allow an immediate interlocutory appeal from the trial court's order requiring the disclosure of documents claimed to be privileged by appellant BASF Catalysts LLC ("BASF"). The Court agreed, granted BASF leave to appeal, and remanded the matter to this Court to consider BASF's privilege claims on the merits. Sampson v. 3M Co., 232 N.J. 285 (2018).

ACC is aware of the general nature of the issues dividing the parties from public reports and filings in related matters. However, given the sealed nature of the trial court proceedings in this case, ACC is not privy to the specific details of the contested communications. ACC therefore took no position on the merits of the underlying privilege dispute before the New Jersey Supreme Court. For the same reason, ACC submits this *amicus* brief in support of neither party.

Rather, ACC writes to set forth several important principles that New Jersey courts have applied before invoking the crime-fraud exception to the attorney-client privilege. The crime-fraud exception must be meticulously applied to ensure that privileged communications are not improperly disclosed. Piercing the privilege when the proper conditions are not met can critically harm the privilege's purpose of encouraging "full and frank

communications between attorneys and their clients," which promotes "broader public interests in the observance of law and administration of justice." United States v. Zolin, 491 U.S. 554, 562 (1989). ACC has a particular interest in this case because the improper application of these principles could threaten the ability of in-house counsel to effectively represent their clients, punish counsel for their zealous advocacy, and undermine the adversarial process.

SUMMARY OF ARGUMENT

The attorney-client privilege is critically important not only to individual litigants, but to the adversarial system as a whole. When a client faces a legal problem--especially one involving an allegation of illegal action--it is crucial that the client be able to speak freely and frankly with counsel, without fear that those communications will be used against it.

The privilege may be pierced only in narrow circumstances. Most notably, the crime-fraud exception prevents clients from asserting the attorney-client privilege when the client's intent at the time they seek an attorney's advice is to further some continuing or future fraudulent or criminal activity. Before applying this exception, however, this court must assure itself of several things.

First, because the privilege belongs to and may only be waived by the client, the crime-fraud exception may only be invoked when

the *client* intends to further a crime or fraud through the communication. The conduct of a corrupt lawyer, acting without the client's knowledge and agreement, cannot provide grounds for piercing the privilege.

Second, before the Court may even examine documents claimed to be privileged, the plaintiff must establish probable cause--based on independent evidence--that the requirements of the crime-exception have been satisfied. And after that *prima facie* case has been established, the plaintiff bears the further burden of showing that the exception applies by a *preponderance of the evidence*.

Third, the crime-fraud exception does not cover statements that merely relate to--or even provide evidence of--a crime. Rather, the communication must actually *further* some criminal or fraudulent act.

Fourth, the exception does not cover statements involving past unlawful acts. Rather, the statement must be made in furtherance of a *future* crime or fraud.

And *fifth*, this Court must determine whether the crime-fraud exception applies *individually* for each privileged communication.

ARGUMENT

I. A robust attorney-client privilege is critically important not only to individual litigants, but to the adversarial system.

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." United States v. Jicarilla Apache Nation, 564 U.S. 162, 169 (2011) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)); Macey v. Rollins Env'tl. Servs. (N.J.), Inc., 179 N.J. Super. 535, 538 (App. Div. 1981). Its purpose is to "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn, 449 U.S. at 389; In re Grand Jury Subpoena, 745 F.3d 681, 687 (3d Cir. 2014); Fellerman v. Bradley, 99 N.J. 493, 498 (1985). That, in turn, benefits the public, which "is well served by sound legal counsel" based on full, candid, and confidential communications. Stengart v. Loving Care Agency, Inc., 201 N.J. 300, 315 (2010) (citation omitted).

For this reason, courts have emphasized that "where the privilege is applicable, it must be given as broad a scope as its rationale requires." Dontzin v. Myer, 301 N.J. Super. 501, 506 (App. Div. 1997) (citation and alteration omitted). Indeed, New Jersey courts have compared the sanctity accorded attorney-client communications to that of the "confessional" or the "marital bedroom." Macey, Inc., 179 N.J. Super. at 539-40 (quoting State v.

Sugar, 84 N.J. 1, 12-13 (1980)); In re Gonnella, 238 N.J. Super. 509, 512 (Law. Div. 1989). Consequently, piercing attorney-client privilege without a compelling reason would "drive a chilling wedge" between the attorney and his or her client. Gonnella, 238 N.J. Super. at 512.

In addition to advancing the attorney-client relationship, the privilege also "promotes . . . compliance with the law" by encouraging parties to seek legal advice before engaging in a particular course of action. United States v. Doe, 399 F.3d 527, 531 (2d Cir. 2005). By protecting attorney-client communications from disclosure, the privilege encourages parties to seek legal advice before engaging in a course of conduct.

This function of the attorney-client privilege is essential to corporations, which use this advice to conform their conduct to the law, or at least to remedy any violations quickly. Modern corporations face countless legal risks and pitfalls. "In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law." Upjohn, 449 U.S. at 392 (citation and internal quotes omitted); see also Swidler & Berlin v. United States, 524 U.S. 399, 407-08 (1998) ("[Businesses] regularly consult their attorneys about a variety of problems arising in the course of the business. These confidences may not come close to any sort of

admission of criminal wrongdoing, but nonetheless be matters which the client would not wish divulged."). And lawyers regularly advise corporate clients on how to test the application of current law in good faith, leading to the development and clarification of legal standards.

Recognizing this, New Jersey law unequivocally extends the privilege "to corporations which must act through agents, including their officers and employees." Macey, 179 N.J. Super. at 540. "The necessity for full and open disclosure between corporate employees and in-house counsel . . . demands that all confidential communications be exempt from discovery." Ibid.

In short, the privilege--in both the individual and the corporate context--protects interests and relationships that have been determined to be "of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." State v. Mauti, 208 N.J. 519, 531 (2012). Before that privilege is breached, a court must ensure that the requesting party has met all the burdens required for an exception to apply.

II. The crime-fraud exception is a narrow doctrine that allows attorney-client communications to be disclosed only where the plaintiff can show that the client intended to use the attorney's service to further a continuing or future crime or fraud.

The crime-fraud exception applies only to "communication[s] in the course of legal service sought or obtained in aid of the commission of a crime or fraud." N.J.S.A. § 2A:84A-20. Like any exception to the attorney-client privilege, it should be applied only where there are "circumstances so grave . . . that the privilege must yield to the most fundamental values of our justice system." In re Nackson, 114 N.J. 527, 532 (1989). To this end, New Jersey courts require a number of stringent showings be made before the exception is applied. We discuss these requirements below.

A. The crime-fraud exception applies only where the client intended the communication to further a crime or fraud.

New Jersey courts recognize that "the privilege belongs to the client, rather than the attorney." Fellerman, 99 N.J. at 498. As a result, the focus in applying the crime-fraud exception is on the *client's* intent; the law "require[s] a finding that the intent of the client was to further commission of some crime or fraud." Ibid.; see also In re Selser, 15 N.J. 393, 407 (1954) ("the privilege is that of the client, and bases his right to claim it, or liability to lose it, on his own conduct") (quoting Matthews v. Hoagland, 48 N.J. Eq. 455, 469 (Ch. 1891)).

As a consequence, the crime-fraud exception may apply if the client has fraudulent intent, even when the attorney is unaware and behaves innocently. In re Neurontin Antitrust Litig., 801 F. Supp. 2d 304, 311 (D.N.J. 2011). But the converse is also true: because "only the client may waive [the] protection" of the privilege, Macey, 179 N.J. Super. at 540, criminal or fraudulent conduct by the attorney without the client's knowledge and direction cannot abrogate the privilege. See, e.g., In re Grand Jury Proceedings, 417 F.3d 18, 23 (1st Cir. 2005) ("the privilege is not lost solely because the client's lawyer is corrupt").

This principle is vitally important to corporations that routinely rely on the advice of in-house and outside counsel. When, for example, a company hires a well-regarded law firm to handle a litigation, it should be able to presume that communications with those lawyers will be protected from disclosure. If a lawyer's misconduct--occurring outside the client's direction and without the client's participation--can break the privilege, that will have a chilling effect on all attorney-client communications.

Unless plaintiff can show that BASF's predecessor sought the advice of its attorneys for the purpose of furthering a crime or fraud, the crime-fraud exception does not apply. Fraudulent conduct by lawyers without their clients' knowledge and direction is not enough.

B. To invoke the crime-fraud exception, the plaintiff must show by a preponderance of the evidence that the privileged communication furthered a crime or fraud.

"The burden of establishing the elements of the ['crime fraud'] exception is upon the person seeking to overcome the privilege." National Utility Service, Inc. v. Sunshine Biscuits, Inc., 301 N.J. Super. 610, 618 (App. Div. 1997) (quoting Restatement (Third) of the Law Governing Lawyers §§ 118-122 (Proposed Final Draft No. 1, March 29, 1996)) (alteration in original). Before a court may apply the exception, the party seeking disclosure must clear two evidentiary hurdles.

First, before a court may even examine the disputed documents in camera, the plaintiff "must make a prima facie showing of fraud or crime, and the prima facie showing must be made by evidence other than the contested communication." Ocean Spray Cranberries, Inc. v. Holt Cargo Sys., Inc., 345 N.J. Super. 515, 523 (Law Div. 2000); see also Zolin, 491 U.S. at 572. To make this showing, the plaintiff's evidence must establish "a reasonable basis to suspect perpetration or attempted perpetration of a fraud or crime." Ocean Spray, 345 N.J. Super. at 524.

Second, after the prima facie case has been established and the documents are reviewed in camera, a court must find that the plaintiff has satisfied its burden of showing that the statements were, in fact, made in furtherance of a crime or fraud. While New

Jersey courts have not yet definitively ruled on the burden of proof at this stage, most state and federal courts require proof by a preponderance of the evidence in civil cases: "the court must decide if the evidence, including the communications themselves and the arguments presented, shows that it is more likely than not that the holder of the privilege sought or used legal advice to commit or try to commit a crime or fraud." Wachtel v. Guardian Life Ins. Co., 239 F.R.D. 376, 379 (D.N.J. 2006); see also, e.g., Medical Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc., 30 F. Supp. 2d 1182, 1206 (D. Ariz. 1998) (in order to apply the crime-fraud exception, "the district court must determine, by a preponderance of the evidence, whether the exception is justified"); Laser Ind., Ltd. v. Reliant Tech., Inc., 167 F.R.D. 417, 430 (N.D. Cal. 1996) (applying "more likely than not" standard for the crime-fraud exception); Harris Mgmt., Inc. v. Coulombe, 151 A.3d 7, 16 (Me. 2016) (applying preponderance standard); In re Grand Jury Investigation, 772 N.E.2d 9, 22 (Mass. 2002) (same); cf. Zolin, 491 U.S. at 572 ("[A] lesser evidentiary showing is needed to trigger in camera review than is required ultimately to overcome the privilege.").²

² In In re Grand Jury, 705 F.3d 133, 154-55 (3d Cir. 2012), the Third Circuit applied a more lenient "reasonable basis" standard for the crime-fraud exception before a criminal grand jury. However, the court made it clear that this decision was driven by considerations unique to the grand jury context, "where the need

We urge this Court to apply the preponderance of evidence standard in evaluating whether the communications at issue were made in furtherance of a crime or fraud. A lesser standard would make the attorney-client privilege too easy to pierce and create inconsistencies among the courts of the country.

C. The crime-fraud exception applies only to statements made in furtherance of a crime or fraud.

Clients routinely call on their attorneys to advise them about whether past or contemplated future conduct is prohibited by the law. These exchanges sometimes discuss conduct that could be construed as criminal or fraudulent. This sort of communication is within the heartland of the privilege; it involves precisely the kind of "free and full disclosure of information from the client to the attorney" that the privilege is intended to protect. Stengart, 201 N.J. at 315.

As a result, courts uniformly hold that the crime-fraud exception cannot be invoked when the advice "merely relate[s] to the crime or fraud." In re Grand Jury Subpoena, 745 F.3d 681, 692-93 (3d Cir. 2014). Rather, the communication must be "in

for speed, simplicity, and secrecy weighs against imposing a crime-fraud standard that would require adversarial hearings or the careful balancing of conflicting evidence." Id. at 154. These concerns are not present in the civil litigation context, where adversarial hearings and the careful consideration of conflicting evidence are central to the determination of adversarial claims.

furtherance of" the crime or fraud--that is, "the advice must advance, or the client must intend the advice to advance, the client's criminal or fraudulent purpose." Ibid. As the New Jersey Supreme Court explained, "when a client seeks the aid of an attorney for the purpose of committing a fraud, a communication *in furtherance of that design* is not privileged." Fellerman, 99 N.J. at 503 (emphasis added).

"[T]he privilege is not lost if a client proposes a course of conduct which he is advised by counsel is illegal." United States v. Doe, 429 F.3d 450, 453 (3d Cir. 2005). It is only "extinguished when a client seeks legal advice to further a continuing or future crime." Ibid. This typically requires the party seeking discovery to "show that the wrong-doer had set upon a criminal course *before* consulting counsel." Grand Jury Subpoena, 745 F.3d at 692 (citation omitted) (emphasis in original); see also, e.g., In re Grand Jury Subpoenas, 144 F.3d 653, 660 (10th Cir. 1998) ("The evidence must show that the client was engaged in or was planning the criminal or fraudulent conduct when it sought the assistance of counsel.").

Similarly, it is not enough that the privileged statement may be evidence of a crime or fraud. "[E]vidence of a crime or fraud, no matter how compelling, does not by itself satisfy both elements of the crime-fraud exception" because "the party seeking to circumvent the privilege by invoking the exception bears the burden

of making a prima facie showing that there were communications between the client and attorney in furtherance of that fraud." In re Chevron Corp., 633 F.3d 153, 166-67 (3d Cir. 2011); see also Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 1.6:104 at 147 (2d ed. 1990) ("the communications must actually contribute to the criminal activity, not merely provide evidence of it").

New Jersey courts have applied these principles to protect attorney-client communications which, while inconsistent with later statements by the litigant, were not shown to be in furtherance of a fraud at the time they were made. For example, in Sunshine Biscuits, the Appellate Division excluded a pre-litigation memorandum prepared by in-house counsel, holding that it did not fall within the crime-fraud exception "merely because it embodies advice inconsistent with a legal theory thereafter developed by litigation counsel." 301 N.J. Super. at 613. (The memorandum admitted the existence of a contract between the parties, which the client later challenged during litigation.) The court concluded that the memorandum, "prepared over three years before the litigation, by in-house counsel laying out an approach to be taken with respect to resolving a contract dispute, and not suggesting the development of false information or facts, is not discoverable or subject to use by plaintiff as a communication in furtherance of a crime or fraud merely because trial counsel

asserted an affirmative defense arguably inconsistent with the legal position embodied in the memo." Id. at 618-19.

In this case, it would not be enough for plaintiff to identify communications which provide evidence of some past crime or fraud by BASF. Nor would it be sufficient to show that BASF's past communications with its attorneys took positions inconsistent with its later litigation posture. Unless plaintiff can show that BASF's predecessor, at the time the communications at issue occurred, intended them to further a crime or fraud, then those attorney-client communications cannot be disclosed.

D. The crime-fraud exception applies only to statements furthering a continuing or future crime or fraud, not statements relating to past wrongdoing.

It follows from the "in furtherance" requirement that the exception may not be invoked for communications relating solely to past acts. Because "the attorney-client privilege must necessarily protect the confidences of wrongdoers" seeking legal counsel, the privilege only "ceas[es] to operate . . . where the desired advice refers *not to prior wrongdoing, but to future wrongdoing.*" Zolin, 491 U.S. at 562-63 (quoting 8 J. Wigmore, *Evidence*, § 2298 at 573 (McNaughton rev. ed. 1961)) (emphasis in original); see also, e.g., Grand Jury Subpoena, 745 F.3d at 687; Neurontin, 801 F. Supp. 2d at 309-10 ("the legal advice 'must relate to future illicit conduct by the client'") (citation omitted).

This principle was recognized over a century ago in the first reported New Jersey case applying the crime-fraud exception. See Matthews v. Hoagland, 48 N.J. Eq. 455, 465 (Ch. 1891). And recent cases continue to apply the distinction: while "the attorney need not and should not disclose information received from his client which concerns continuing aspects or effects of past criminal conduct," the privilege may be pierced "where the client consults the attorney in reference to a future criminal or fraudulent transaction." Nackson, 114 N.J. at 536 (citations and internal quotation marks omitted).

Therefore, unless plaintiff can show that the individual statements at issue furthered some continuing or future fraud by BASF's predecessor, those communications must remain privileged.

E. The court must evaluate each communication individually to determine whether it was made with the intent to further a continuing or future crime or fraud.

Even if plaintiff can show by a preponderance of the evidence that crime-fraud exception applies, that does not trigger a blanket waiver of the attorney-client privilege. Rather, the exception extends only to those individual communications that are shown to have been made in furtherance of the crime or fraud. "[D]ocuments that were not created or used in furtherance of the alleged fraud . . . thus are not subject to disclosure through the application of the exception." Chevron, 633 F.3d at 156; see also, e.g., In re

Grand Jury Subpoena, 419 F.3d 329, 343 (5th Cir. 2005) (crime-fraud exception "does not extend to all communications made in the course of the attorney-client relationship, but rather is limited to those communications and documents in furtherance of the contemplated or ongoing criminal or fraudulent conduct"); Amusement Indus., Inc. v. Stern, 293 F.R.D. 420, 427 (S.D.N.Y. 2013).

To this end, New Jersey courts carefully limit the application of the crime-fraud exception (and other exceptions to the privilege) to cover only the specific communications which furthered the alleged crime or fraud. For example, in In re Gonnella, 238 N.J. Super. 509 (Law Div. 1989), a prosecutor subpoenaed a criminal defense attorney to question him about communications in which his client had allegedly threatened to kill a co-defendant's lawyer. The court held that those statements fell within the crime-fraud exception, but emphasized that the attorney could not be questioned about other privileged matters:

[T]he prosecutor is advised to stick as closely as possible to the list of questions previously submitted to this Court. In that way, there should be no violation of the attorney-client privilege with respect to all other conversations between Mr. Gonnella and Mr. Martini. The prosecutor must keep in mind, at all times, that there were conversations between the two which do indeed remain privileged and all precaution must be taken to preserve their sanctity.

Id. at 515.

Similarly, in Halbach v. Boyman, 369 N.J. Super. 323, 329-30 (App. Div. 2004), a minority shareholder (Halbach) sued the company's attorney (Boyman) for allegedly breaching his fiduciary duty in drafting a corporate buyout agreement. Boyman, in turn, asserted a third-party claim against Halbach's attorney (Thurber), and sought discovery of Thurber's file relating to the transaction. The trial court held that Halbach had waived any attorney-client privilege over his communications with Thurber by putting the communications at issue in his lawsuit, and ordered the entire file to be produced.

The Appellate Division reversed this holding as overbroad and remanded for a more detailed review of the individual records: "Orders declaring a wholesale waiver of the attorney-client privilege should not be entered; rather, there should be a careful delineation of permissible avenues of inquiry, if indeed, there be any." Id. at 239-240. Other courts have similarly emphasized that the presence of an exception to or waiver of the privilege as to some communications does not lift the privilege as to all communications. See e.g., Payton v. New Jersey Tpk. Auth., 148 N.J. 524, 550 (1997) (remanding overbroad privilege determination to trial court "to determine the exact role that an attorney played regarding each particular document for which the privilege is asserted").

Thus, even if plaintiff can make the required showing that certain attorney-client communications were intended to further a crime or fraud, the court should strictly limit any disclosure to the documents--indeed, the specific portions of documents--that fall within the crime-fraud exception.

CONCLUSION

The attorney-client privilege unquestionably covers communications relating to wrongful acts. Indeed, it is in such situations that a client most needs assurance that its full and frank communications with its lawyers will not be turned against it. The crime-fraud exception is a narrow carve-out to the privilege, which applies only when the client seeks to enlist its lawyers as accomplices in furthering some ongoing or future crime or fraud. Recognizing the gravity of such an allegation, New Jersey courts have consistently set a high bar for invocation of the privilege. Before applying the privilege here, this Court should ensure that plaintiff has met her heavy burden.

Respectfully submitted,



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