

Majority Opinion >

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In re: UNITED SHORE FINANCIAL SERVICES, LLC, Petitioner.

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No. 17-2290

January 3, 2018, Filed

In re: UNITED SHORE FINANCIAL SERVICES, LLC, Petitioner: Elliot H. Scherker, Brigid F. Cech Samole, Katherine Marie Clemente, Greenberg Traurig, Miami, FL.

Before: GUY, MOORE, and GILMAN, Circuit Judges.

**ORDER**

United Shore Financial Services, LLC petitions for a writ of mandamus, seeking to compel the district court to vacate two orders: (1) an August 28, 2017 order directing production of documents protected by the attorney-client privilege; and (2) an October 4, 2017 order denying clarification of the August order.

Plaintiff Al Leibovic filed a putative class action against United Shore and Xerox Management Services, Inc. ("XMS") arising from intrusions into an XMS program on which United Shore stored potential borrowers' personal identification information. United Shore asserted several affirmative defenses, including that Leibovic and the class claims were barred based on XMS's acts or failure to act.

In response to XMS's discovery requests, United Shore stated that the firm it retained through counsel to investigate and prevent future intrusions had concluded that XMS's actions caused the intrusions. United Shore, however, withheld hundreds of documents relevant to the investigation, citing attorney-client privilege. XMS moved to compel United Shore to produce the withheld documents, alleging that it implicitly waived the attorney-client privilege by citing to the investigation's conclusions. The district court granted XMS's motion and denied United Shore's subsequent motion to clarify its order. This mandamus petition followed.

The remedy of mandamus is a drastic one to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 , 662 , 98 S. Ct. 2552 , 57 L. Ed. 2d 504 (1978). To determine whether mandamus relief is appropriate, we consider five factors: (1) whether the petitioner "has no other adequate means, such as direct appeal, to attain the relief desired"; (2) whether "the petitioner will be damaged or prejudiced in a way not correctable on appeal"; (3) whether the district court's action "is clearly erroneous as a matter of law"; (4) whether the district court's action "is an oft-repeated error, or manifests a persistent disregard of the federal rules"; and (5) whether the district court's action "raises new and important problems, or issues of law of first impression." *John B. v. Goetz*, 531 F.3d 448 , 457 (6th Cir. 2008).

United Shore cannot immediately appeal the district court's order under the collateral-order doctrine. See *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 , 113-14 , 130 S. Ct. 599 , 175 L. Ed. 2d 458 (2009). But it has other remedies, such as refusing to comply with the order. A district court may hold a non-complying party in contempt, which is immediately appealable under certain circumstances. *Id.* at 111 . And district courts have a range of lesser sanctions from which to choose besides contempt—designating the matters or facts embraced as established, prohibiting the non-disclosing party from using [\*2] those facts to support or oppose their positions, or striking pleadings in whole or in part—that permit the non-disclosing party to obtain post-judgment review without revealing the allegedly privileged information. *Id.*

United Shore's conclusory allegations of harm do not rise to the level of irreparable harm. Generally, post-judgment appeals "protect the rights of litigants and ensure the vitality of the attorney-client privilege" because improper disclosure can be remedied by vacating the judgment, remanding for a new trial, and excluding the privileged material from evidence. *Id.* at 109 .

The district court correctly concluded that the attorney-client privilege can be implicitly waived. *In re Lott*, 424 F.3d 446 , 452-53 (6th Cir. 2005). "Litigants cannot hide behind the privilege if they are relying on privileged communications to make their case" or, more simply, cannot use the privilege as "a shield and a sword." *Id.* at 454 (quoting *United States v. Bilzerian*, 926 F.2d 1285 , 1292 (2d Cir. 1991)). "Thus, the privilege may be implicitly waived when defendant asserts a claim that in fairness requires examination of the protected communications." *Bilzerian*, 926 F.2d at 1292 . Here, United Shore cited XMS's action or lack of action as an affirmative defense. And it commissioned an investigation that concluded that XMS was at fault. Thus, it attempted to prove a defense by disclosing or describing the attorney-client communications. See *In re G-I Holdings, Inc.*, 218 F.R.D. 428 , 433 (D.N.J. 2003). Once waived, the privilege is waived with respect to all communications involving the same subject matter. *Id.* The district court did not clearly err in compelling disclosure of the privileged documents.

United Shore does not assert, nor could it, that this is a novel issue. "[M]ost" district court rulings on attorney-client privilege "involve the routine application of settled legal principals." *Mohawk Ind., Inc.*, 558 U.S. at 110 . That is the case here, where both this court and other courts have considered the implicit waiver of the privilege under similar circumstances.

On balance, none of the considerations governing our review establish that United Shore has a clear and indisputable right to the relief sought. The mandamus petition is accordingly **DENIED**.

## General Information

<b>Judge(s)</b>	KAREN NELSON MOORE; RALPH B. GUY JR; RONALD LEE GILMAN
<b>Related Docket(s)</b>	17-02290 (6th Cir.);
<b>Topic(s)</b>	Damages & Remedies; Evidence; Privacy & Information Law; Class Actions
<b>Industries</b>	Financial Services
<b>Court</b>	United States Court of Appeals for the Sixth Circuit
<b>Parties</b>	In re: UNITED SHORE FINANCIAL SERVICES, LLC, Petitioner.