Life after *Mohawk*:
Protecting the privilege in Ohio

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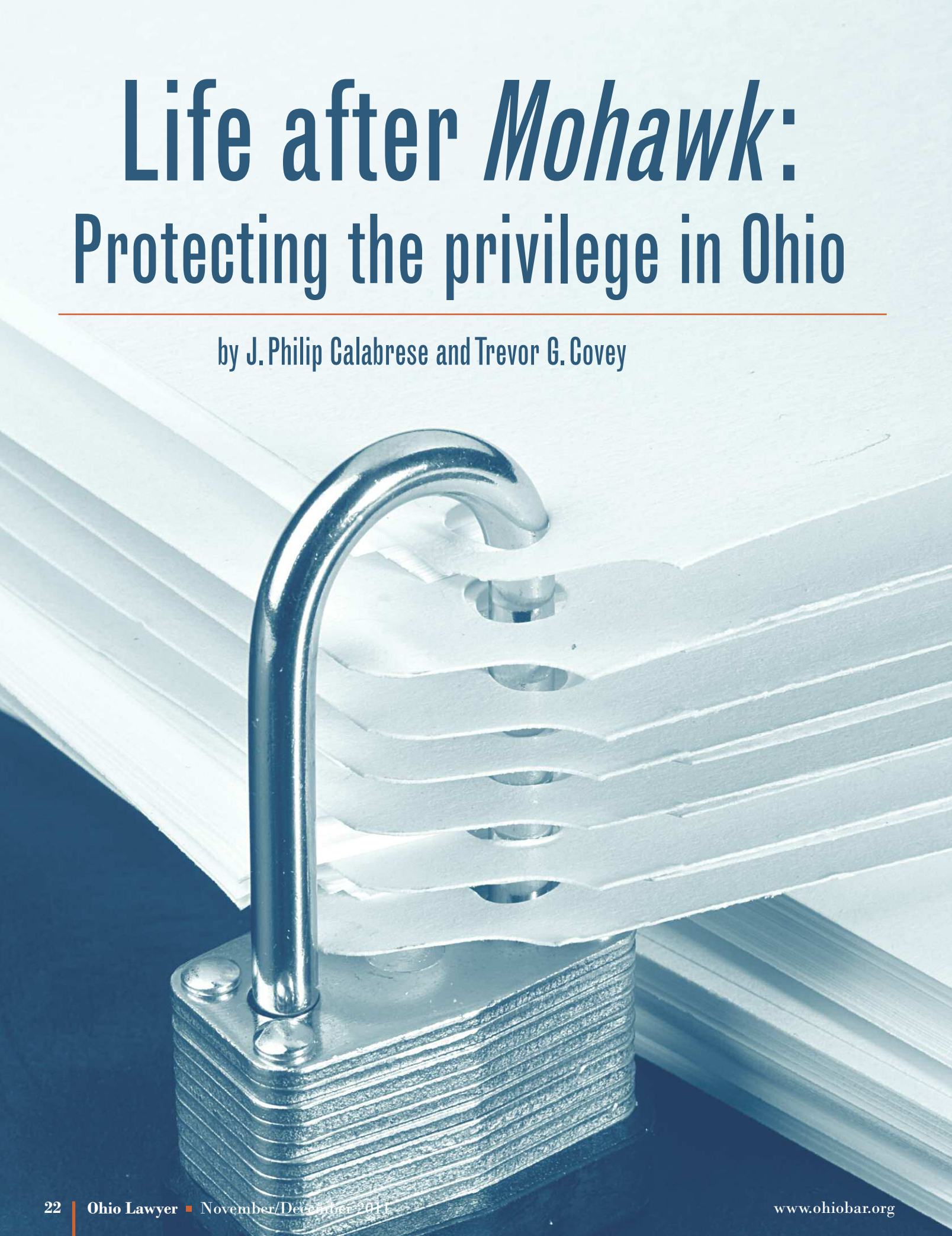

An influential U.S. Supreme Court decision severely limits a party's ability to protect privileged information through interlocutory review.

Imagine a fairly typical scenario: In the rough and tumble of discovery in civil litigation, you find yourself litigating against an opponent seeking information that you and your client reasonably believe is protected by a claim of privilege. It might be a memorandum summarizing the interviews of several employee-witnesses drafted by an in-house lawyer or an email from counsel to the board describing the company's position in its soon-to-be legal entanglement. Given the importance of protecting the information against disclosure, and with confidence in your position, you resist the discovery. The court sees it differently and orders disclosure. Short of taking a contempt citation, what are your options for protecting the privilege?

Under Ohio law, litigants have a remedy. Under R.C. 2505.02, a party may take an interlocutory appeal from an order compelling production of information subject to a claim of privilege. But what if the case is pending in federal court pursuant to diversity jurisdiction? Until recently, the Sixth Circuit Court of Appeals recognized that the collateral order doctrine might afford litigants an opportunity for interlocutory review.[1] In *Mohawk Industries, Inc. v. Carpenter*, the U.S. Supreme Court resolved a circuit split by holding that a party may not immediately appeal an order compelling production of privileged information.[2]

While technically limited to appeals based on the collateral-order doctrine, as a practical matter, the Supreme Court's decision in *Mohawk* has all but closed the door to a party's opportunity to protect privileged information through interlocutory review—providing litigants with tremendous leverage and powerful weapons against their opponents in discovery and forcing parties facing an order to disclose to make difficult decisions about their litigation strategy, including their willingness to litigate at all. In cases pending in Ohio federal courts on the basis of diversity jurisdiction, however, there is hope. Ohio's interlocutory appeal statute should afford a party the opportunity for an interlocutory appeal from an order compelling disclosure of privileged information.

Interlocutory review part and parcel of the privilege

In 1998 the Ohio General Assembly enacted R.C. 2505.02, which permits interlocutory appeals when "the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."[3] Since then, Ohio courts have consistently held that discovery orders adverse to an alleged attorney-client privilege are immediately appealable pursuant to R.C. 2505.02.[4]

The rationale for this rule is simple: Once disclosure of such information has been made, there is no adequate remedy available for protecting the privilege on appeal from final judgment. As the Supreme Court of Ohio has noted, "the proverbial bell cannot be unrung."[5]

Moreover, although R.C. 2505.02 lists discovery of a privileged matter as an example of a "provisional remedy," both Ohio case law and the General Assembly have identified the privilege as a substantial right.[6]

As a practical matter, *Mohawk* all but shuts the door to interlocutory review of orders compelling production of privileged information in federal court. The Supreme Court held that "disclosure orders adverse to the attorney-client privilege" do not "qualify for immediate appeal."[7] There, Carpenter filed suit against Mohawk claiming that he was terminated in violation of various federal and state laws. Carpenter alleged that his termination followed an email he sent alerting Mohawk's human resources department to the company's employment of undocumented immigrants. At the same time, Mohawk was defending a class-action lawsuit relating to claims that the company employed undocumented workers. Carpenter was not aware of this lawsuit when he sent the email, but after sending it Mohawk personnel instructed him to meet with the company's counsel retained to defend the class-action. Carpenter alleged that he was terminated when he refused to recant his statements at the request of counsel.

The class plaintiffs caught wind of Carpenter's allegations, requested an evidentiary hearing to explore them, and moved to compel Mohawk to produce information pertaining to the meeting between Carpenter and the company's counsel and the subsequent termination decision. Mohawk resisted discovery on the ground that the information sought was protected by the attorney-client privilege. The district court granted the motion because, although it determined that the privilege applied, it found that Mohawk had waived the privilege through its representations in the class-action suit. While the district court declined to certify an interlocutory appeal under 28 U.S.C. §1292(b), it stayed the case to provide an opportunity

for Mohawk to secure appellate review through other means, such as a writ of mandamus or pursuant to the collateral order doctrine. However, the 11th Circuit Court of Appeals denied Mohawk's effort to secure review.

The Supreme Court held that "postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege."[8] Even as it recognized that remedies following final judgment can "only imperfectly" undo the harms of disclosure, the Court opined that "by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence" an appellate court can adequately remedy improper orders to disclosure.[9] Accordingly, the Court held that orders compelling disclosure of matters protected by the privilege are not immediately appealable under the collateral order doctrine. [10]

Mohawk meets Ohio law

In all but the most unusual cases, *Mohawk* puts an end to interlocutory appeals in the federal courts to protect privileged matters. But will Ohio's statute, which includes interlocutory appellate review as one substantive protection afforded to privilege, apply in diversity actions? Rule 501 of the Federal Rules of Evidence directs consideration of the question.[11] Although no court has addressed the issue yet, there are sound reasons that the federal courts should give effect to R.C. 2505.02, notwithstanding *Mohawk,* and afford a party the right to protect its privilege through interlocutory review.

The *Erie* doctrine

Federal courts apply state substantive law to fulfill the twin aims of the *Erie* doctrine—"maintaining uniformity in the interpretation of a state's substantive law (so as to avoid forum-shopping) and preventing the accident of citizenship from unfairly affecting the outcome of a diversity case."[12] A law is substantive when it "gives rise to state-created rights" or is "otherwise bound up with these rights."[13] As the Ohio legislature has expressly declared and the Ohio courts have recognized, R.C. 2505.02 creates a substantive right.

The importance of this substantive right is obvious. Adverse privilege rulings not only can harm a litigant, but they can also be outcome-determinative. Even the prospect of releasing privileged materials may force uneven (and, indeed, unfair) settlement terms solely to avoid production, or a party may comply with an improper disclosure order thereby opening the door to that production *and further* discovery of privileged matters. These concerns are heightened in certain classes of cases, such as personal injury or product liability litigation, where discovery is largely asymmetrical. In such circumstances, individual litigants can pursue the threat of far-reaching discovery that extends into privileged matters with little fear of reprisal. As a result, *Erie* counsels against allowing the accident of state citizenship to affect the interpretation or application the substantive rights of the privilege in Ohio bound up with R.C. 2505.02.

Qualified immunity cases provide a precedent

The Sixth Circuit has permitted interlocutory appeals of orders denying qualified immunity to litigants "only if the state law provides immunity from suit, as opposed to immunity simply from liability." In *Chesher v. Neyer*, the Sixth Circuit recognized that an amendment to Ohio's immunity statute provided that orders denying immunity are final and, therefore, immediately appealable.[14] The Sixth Circuit held that the amendment effectively provides immunity from suit, not just liability, permitting interlocutory review under the collateral order doctrine.[15] Here, R.C. 2505.02 affords analogous substantive rights to litigants seeking to protect the privilege. The General Assembly codified this substantive right in R.C. 2505.02 by affording litigants a remedy against the serious and irreparable effects of improper disclosure orders.

Interlocutory review

Several practical litigation realities demonstrate the value of interlocutory review of adverse privilege rulings and support applying Ohio's statute in diversity cases in federal court. First, as already discussed, rulings ordering disclosure of matters protected by a claim of privilege can be outcome-determinative. For that reason, and given the high rate of settlements in civil cases that effectively preclude review, appellate courts necessarily decide cases in this area that are unrepresentative of the cases in which civil litigants and the lower courts encounter privilege questions. Interlocutory review provides a mechanism otherwise unavailable for appellate courts to provide guidance and uniformity in development of the law, particularly as technology and the legal marketplace change. With respect to the increasingly prominent role of electronic discovery in civil litigation, productions of hundreds of gigabytes or even terabytes are becoming more common. If only because of the sheer volume, courts will confront novel privilege questions in the course of those productions with greater frequency. More guidance—not less—from reviewing courts is necessary, and the opportunity for that review following *Mohawk* is severely limited.

For these reasons, as litigants and the federal courts adjust to life after *Mohawk*,

Ohio law provides an avenue for interlocutory review of orders to disclose privileged matters that should be given effect in diversity cases. ■

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Endnotes

1 See, e.g., *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 444 F.3d 462, 473 (6th Cir. 2006).

2 *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. ___, 130 S. Ct. 599 (2009).

3 R.C. 2505.02(B)(4)(b).

4 See, e.g., *State ex rel. Butler County Children Servs. Bd. v. Sage*, 95 Ohio St.3d 23, 25, (2002); see also, e.g., *Smalley v. Friedman, Damiano & Smith Co., L.P.*, 172 Ohio App. 3d 108, 113 (Ohio Ct. App. 8th Dist. 2007).

5 *State v. Muncie*, 91 Ohio St.3d 440, 451 (Ohio 2001); see also *Johnson ex rel. Estate of Johnson v. University Hospitals of Cleveland*, 2002-Ohio-1396, ¶26, 2002 Ohio App. LEXIS 1428, at *6 (Ohio Ct. App. 8th Dist. 2002) (recognizing that "no meaningful or effective remedy [for disclosure of privileged information] exists because once [that] information has been disclosed, there is no way to undo the damage").

6 See, e.g., *Fredricks v. Good Samaritan Hospital*, 2008 Ohio 3480, ¶2 (Ohio Ct. App. 2008) ("The order is not appealable under R.C. 2505.02(B)(2), because it does not affect a substantial right, such as a claim of privilege, for example."), and *Kemper Secs. v. Schultz*, 111 Ohio App.3d 621, 624 (Ohio Ct. App. 1996) ("[T]he court order permits the disclosed documents and deposition testimony, which Schultz asserts are protected under the attorney-client privilege, to be revealed to Kemper; thus, the order affects a substantial right."); see also Ohio Rev. Code Ann. §2317.02 (LexisNexis 2010) (codifying 2007 Am. Sub. S.B. 117, §6 ("The General Assembly declares that the attorney-client privilege is a substantial right and that it is the public policy of Ohio that all communications between an attorney and a client in that relation are worthy of the protection of privilege ...")).

7 130 S. Ct. at 603.

8 *Mohawk*, 130 S. Ct. at 606.

9 Id. at 608 and 606-07.

10 The Supreme Court listed some "potential avenues of review": certification for appeal under §1292(b), mandamus, court-imposed sanctions, or even contempt. Id. at 607-08. Examination of these options is beyond the scope of this article. For current purposes, each of these options is an extraordinary remedy and not necessarily practical even for the litigant for whom the disclosure carries a high cost.

11 "[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

12 *Miller v. Davis*, 507 F.2d 308, 313 (6th Cir. 1974).

13 *Shropshire v. Laidlaw Transit, Inc.*, 550 F.3d 570, 573 (6th Cir. 2008).

14 *Chesher v. Neyer*, 477 F.3d 784, 793-794 (6th Cir. 2007).

15 Id.