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The Collateral Order Doctrine as Applied to Discovery Requests -- The Third Circuit's Kelly v. Ford Motor Co. (In re Ford Motor Co.)

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RECENT CASES AND LEGISLATION

THE COLLATERAL ORDER DOCTRINE AS APPLIED TO DISCOVERY REQUESTS—THE THIRD CIRCUIT'S *KELLY v. FORD MOTOR CO. (IN RE FORD MOTOR CO.)*

I. INTRODUCTION

While the collateral order doctrine has been invoked in a vast number of cases covering a wide array of issues, it has almost universally been held not to apply to discovery orders—pre-trial or otherwise. However, in *Kelly v. Ford Motor Co. (In re Ford Motor Co.)*[1] the Third Circuit utilized a unique rationale in extending the collateral order doctrine to include discovery orders. In so doing, the *Ford* court allowed the immediate appeal of a non-final order—more specifically, the appeal of a district court judge's decision concerning materials that were claimed to be protected by either the attorney-client privilege or the work product doctrine, or both. In its analysis, the Third Circuit failed to address a number of issues vital to a proper analysis of the collateral order doctrine. In so doing, the *Ford* court reached an illogical decision that is not only a radical departure from case precedent, but which may have serious negative ramifications on district courts and circuit courts alike.

II. GENERAL BACKGROUND

A. Final Orders

The appellate jurisdictional statute invoked by the Third Circuit in *In re Ford Motor Co.*, was 28 U.S.C. § 1291. Section 1291 states in pertinent part that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all *final* decisions of the district courts of the United

1 110 F.3d 954 (3d Cir. 1997).

States."[2] The requirement that a decision be final is obviously an essential element of § 1291 and most often it requires that the district court issue a decision that completely ends the litigation and leaves nothing left for the court to do but execute its judgment.[3] This requirement of finality has been justified for a number of reasons, including efficiency in judicial administration, avoiding delay caused by interlocutory appeals, and easing the burden on appellate courts by avoiding a piecemeal review of a district court's numerous rulings in the course of a typical case.[4] Additionally, "[a]llowing interlocutory appeals before a final judgment on the merits erodes 'the deference appellate courts owe to the district judge's decisions.'"[5]

Traditionally, if a party is unsatisfied with a discovery order, her inability to file an immediate appeal does not leave her wholly without recourse. The party's attorney can either appeal the decision after a final judgment has been rendered, or she can gain the right of appeal through the contempt process. This latter form of appeal is established when the attorney questioning the discovery order refuses to comply with it, which forces the court to hold her in contempt, and from that contempt order (which is considered a final judgment as to her) she then appeals.[6] This, traditionally, has been the exclusive way to immediately "appeal" a discovery order.

B. Collateral Order Doctrine—The Cohen *Case*

There is, however, an exception to the general rule that non-final orders are not appealable. This exception, known as the collateral order doctrine, was first espoused in 1949 by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*[7] In *Cohen,* Justice Jackson and the Court enunciated a three-prong test which is used to determine a circuit court's jurisdiction over appeals stemming from non-final orders. In essence, if a circuit court determines that a particular issue is completely independent and too important to be denied review, appeal will be granted immediately. According to Justice Jackson an appeal of a nonfinal order will lie if:

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2 28 U.S.C. § 1291 (1994) (emphasis added).

3 *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978).

4 *See, e.g.,* Boughton v. Cotter Corp., 10 F.3d 746, 748 (10th Cir. 1993) (citing Arthur Andersen & Co. v. Finesilver, 546 F.2d 338, 342 (10th Cir. 1976)).

5 *Id.* at 748–49 (quoting Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430 (1985)).

6 *See, e.g.,* Bennett v. City of Boston, 54 F.3d 18 (1st Cir. 1995).

7 337 U.S. 541 (1949).

(1) the order from which the appellant appeals conclusively determines the disputed question;

(2) the order resolves an important issue that is completely separate from the merits of the dispute; and

(3) the order is effectively unreviewable on appeal from a final judgment.[8]

The collateral order doctrine, or *Cohen* test, has been applied to a wide array of issues including qualified immunity,[9] allocating the expense of identification of class members,[10] disqualification of counsel,[11] and double jeopardy.[12]

However, the collateral order doctrine has almost universally been held *not* to apply to discovery orders. This is true of all twelve circuits[13] as well as the Supreme Court.[14] The only cases which have allowed the collateral order doctrine to be applied to a discovery issue have involved orders to compel disclosure of trade secrets.[15] These unique cases show exactly how vital an issue must be before a court will invoke the *Cohen* doctrine.

C. Writ of Mandamus

In an effort to circumvent these holdings, many parties have attempted to obtain review of discovery orders by way of mandamus. Issuance of a writ of mandamus is controlled by 28 U.S.C. § 1651.[16] It is abundantly clear that mandamus is an extraordinary remedy which

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8 *In re Ford Motor Co.*, 110 F.3d at 958.

9 *See* Behrens v. Pelletier, 516 U.S. 299 (1996).

10 *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).

11 *See* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981).

12 *See* Abney v. United States, 431 U.S. 651 (1977).

13 *See, e.g.*, Hahnemann Univ. Hosp. v. Edgar, 74 F.3d 456 (3d Cir. 1996); Bennett v. City of Boston, 54 F.3d 18 (1st Cir. 1995); McKesson Corp. v. Islamic Republic of Iran, 52 F.3d 346 (D.C. Cir. 1995); Simmons v. City of Racine, PFC, 37 F.3d 325 (7th Cir. 1994); MDK, Inc. v. Mike's Train House, Inc., 27 F.3d 116 (4th Cir. 1994); Boughton v. Cotter Corp., 10 F.3d 746 (10th Cir. 1993); Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397 (5th Cir. 1993); Marchetti v. Bitterolf, 968 F.2d 963 (9th Cir. 1992); Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159 (2d Cir. 1992); FDIC v. Ernst & Whinney, 921 F.2d 83 (6th Cir. 1990); Cox v. Piper, Jaffray & Hopwood, Inc., 848 F.2d 842 (8th Cir. 1988); Robinson v. Tanner, 798 F.2d 1378 (11th Cir. 1986).

14 *See, e.g.*, Church of Scientology v. United States, 506 U.S. 9 (1992).

15 *See, e.g.*, Smith v. BIC Corp., 869 F.2d 194 (3d Cir. 1989); IBM v. United States, 471 F.2d 507 (2d Cir. 1972).

16 Section 1651 states,

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

should only be issued in the most extreme cases.[17] Issuance of a writ of mandamus in connection with a discovery order is *very* rare and usually involves extreme instances of an abuse of discretion by the district court judge or some obvious usurpation of judicial power.[18] In many instances, the cases that have permitted mandamus review of discovery orders have been based upon the fact that the order in question raised some important and unique issue of first impression.[19] As aptly stated by the Third Circuit, "[g]iven its drastic nature, a writ of mandamus should not be issued where relief may be obtained through an ordinary appeal."[20]

III. Case Facts and Procedural History

In re Ford Motor Co. involved the death of Gerald Kelly. Mr. Kelly was killed when the Ford Bronco II he was driving rolled over. Appellee Susan Kelly, wife of the decedent, claimed that Ford Motor defectively designed the Bronco II's center of gravity, thus making the vehicle susceptible to a rollover. Appellee Kelly sought discovery of documents concerning the design, development, marketing, and safety of the Bronco II. Ford Motor answered her request for discovery by stating that because attorneys were present and trial strategy was discussed the documents requested were shielded by the work product doctrine or protected by attorney-client privilege, or both.

On October 4, 1996, the district court held that although the vast majority of the documents requested were not discoverable, two sets of documents were indeed discoverable. Those two sets of documents

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(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 1651 (1994).

17 *See, e.g.*, La Buy v. Howes Leather Co., 352 U.S. 249 (1957); Roberts v. United States Dist. Court, 339 U.S. 844 (1950); Bank of Am. v. Feldman (*In re* Nat'l Mortgage Equity Corp. Mortgage Pool Certificates Litig.), 821 F.2d 1422 (9th Cir. 1987).

18 *See, e.g.*, Iowa Beef Processors, Inc. v. Bagley, 601 F.2d 949 (8th Cir. 1979) (issuing writ because of the abrupt and unexplained turnabout of the district court which had issued a protective order for certain documents and then, without showing the existence of any intervening circumstances, allowed disclosure without any restraints on their use, less than ten months later). "[T]he power conferred by the All Writs Act 'is meant to be used only in the exceptional case where there is a clear abuse of discretion.'" *Id.* at 953 (quoting Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953)).

19 *See, e.g.*, *In re* Perrigo Co., 128 F.3d 430 (6th Cir. 1997); *In re* W.R. Grace & Co.-Conn., 984 F.2d 587 (2d Cir. 1993); Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159 (2d Cir. 1992).

20 Hahnemann Univ. Hosp. v. Edgar, 74 F.3d 456, 461 (3rd Cir. 1996) (citing *Bankers Life*, 346 U.S. at 383.

included the minutes of Ford Motor's Policy and Strategy Committee and a set of agendas and notes explaining technical aspects of the Bronco II litigation. After Ford Motor's request for reconsideration was denied on November 13, 1996, the district court issued a letter ruling on November 27, 1996 ordering the production of the documents on or before December 18, 1996. On December 18, 1996, Ford Motor sought a stay of the motion to compel discovery and filed a petition for both a notice of appeal (in which they asserted the collateral order doctrine) and a writ of mandamus.

IV. COURT'S HOLDING AND ANALYSIS

A. *Appellate Jurisdiction—The* Cohen *Test*

Under 28 U.S.C. § 1291, the court of appeals "shall have jurisdiction of appeals from all final decisions of the district courts."[21] Furthermore, orders to compel discovery are generally not final decisions and thus appellate jurisdiction cannot be obtained.[22] However, the Supreme Court has carved out a narrow exception—the *Cohen* doctrine—allowing appellate review.[23]

1. The First Prong

The first prong of the *Cohen* test states that the order from which the appellant appeals must conclusively determine the disputed question. Although the order need not be as clear as it is in *Ford*, the district court's order requiring Ford Motor to produce the disputed agendas and minutes does not allow for further review by the lower court. Ford Motor and its lawyers were faced with the forced discovery of the documents.[24] Therefore, the Third Circuit stated that "[i]t is beyond cavil that the first element is satisfied" when the district court issued the November 27, 1996 order requiring document production, which left "no room for further consideration by the district court of the claim that the documents [were] protected."[25]

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21 28 U.S.C. § 1291 (1994).

22 *See* Pacific Union Conference of Seventh-Day Adventists v. Marshall, 434 U.S. 1305 (1977) (per Mr. Justice Rehnquist as Circuit Justice); *Bank of Am.*, 821 F.2d 1422.

23 *See supra* text accompanying notes 7–15

24 *See* Bennett v. City of Boston, 54 F.3d 18 (1st Cir. 1995); Nancy C. Brown, Case Note, *Civil Procedure*—In re Rinehardt: *A Party's Attempt to Appeal an Interlocutory Order of Discovery by Contriving a Contempt Citation Against Its Designated Non-Party Witness*, 22 MEM. ST. L. REV. 157 (1991).

25 *In re Ford Motor Co.*, 110 F.3d at 958.

2. The Second Prong

The second prong of the *Cohen* test is that the order resolves an important issue that is completely separate from the merits of the dispute. The Third Circuit asserted that the question of whether an issue is important must be examined not in relation to the jurisprudential value of the question, but rather as to its relation with the final judgment rule. In other words, the test is not whether the resolution is important to the body of existing case law in a particular jurisdiction, but rather whether it is important to the controversy at hand. The court wrote that the "issue is important if the interests that would potentially go unprotected without immediate appellate review of that issue are significant relative to the efficiency interests sought to be advanced by adherence to the final judgment rule."[26]

As Judge Becker explained:

> What is important for present purposes is that . . . because of the imperative of preventing impairment of some institutionally significant status or relationship, the danger of denying justice by reason of delay in appellate adjudication outweighed the inefficiencies flowing from interlocutory appeal. By the same calipers, we are convinced that in the present case the orange of the interests protected by the attorney-client privilege (which would be eviscerated by forced disclosure of privileged material) is sufficiently significant to the apple of the interests protected by the final judgment rule to satisfy the importance criterion of the second *Cohen* prong.[27]

Additionally, the court stated that "[a]lthough one might assume that collateral finality would be determined by a bright-line rule, the important determination under the Supreme Court's jurisprudence is rather a function of a balancing process."[28] In this case, the court found that, on balance, the interest protected by the attorney-client privilege clearly outweighed the interest protected by the final judgment rule.

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26 *Id.* at 959.

27 *Id.* at 960–61.

28 *Id.* at 960; *see also* Behrens v. Pelletier, 516 U.S. 299, 314–24 (1996) (Breyer, J., dissenting) (canvassing recent collateral order jurisprudence and noting that the importance analysis is a balancing of interests); Johnson v. Jones, 515 U.S. 304, 315 (1995) (stating that in determining appealability a court must look to the competing considerations that underlie questions of finality, namely "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other") (citation omitted).

3. The Third Prong

The third prong of the *Cohen* doctrine is that the order must be effectively unreviewable on appeal from a final judgment. The *Ford* court cited *Lauro Lines v. Chasser*,[29] for the proposition that "review after final judgment is ineffective if the right sought to be protected would be, for all practical and legal purposes, destroyed if it were not vindicated prior to final judgment."[30] In the case at hand, the damage from the disclosure of attorney work product and attorney-client confidential materials cannot be undone by appeal from final judgment. The Third Circuit concluded that "[a]t best, on appeal after final judgment, an appellate court could send the case back for re-trial without use of the protected materials. At that point, however, the cat is already out of the bag."[31]

In an effort to refute contrary case precedent, the court claimed that its decision with respect to the privilege and work product documents was buttressed by Supreme Court decisions in *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*,[32] *Mitchell v. Forsyth*,[33] *Nixon v. Fitzgerald*,[34] *Helstoski v. Meanor*,[35] and *Abney v. United States*.[36] Although none of these cases address the issues of attorney-client privilege or work product doctrine, they each applied the *Cohen* doctrine and allowed an appeal of a non-final order. Consequently, the court held that "there is no effective means of reviewing after a final judgment an order requiring the production of putatively protected material. Accordingly, the strictures of the collateral order doctrine have been met in this case, and we have jurisdiction over the appeal."[37]

B. Writ of Mandamus

After concluding that the appellate jurisdiction was appropriate, the court stated that "there is no need to examine whether we have original, mandamus jurisdiction."[38] However, the court continued, "we also believe that if we did not have appellate jurisdiction, we

29 490 U.S. 495 (1989).

30 *In re Ford Motor Co.*, 110 F.3d at 962.

31 *Id.* at 963.

32 506 U.S. 139 (1993) (examining Eleventh Amendment immunity).

33 472 U.S. 511 (1985) (examining qualified immunity).

34 457 U.S. 731 (1982) (examining absolute immunity).

35 442 U.S. 500 (1979) (examining the Speech and Debate Clause).

36 431 U.S. 651 (1977) (examining double jeopardy).

37 *In re Ford Motor Co.*, 110 F.3d at 964.

38 *Id.*

would have mandamus jurisdiction to review the district court's order."[39]

According to the court the essential difference between appellate jurisdiction and mandamus jurisdiction is the standard of review. Under mandamus jurisdiction, the review is narrow in scope, while the standard of appellate review depends on the issue that is being reviewed. Additionally, the court wrote that

> mandamus jurisdiction affords an appellate court less opportunity . . . to provide guidance for future cases. Moreover, comity between the district and appellate courts is best served by resort to mandamus only in limited circumstances. Review under appellate jurisdiction is therefore preferable to review under mandamus jurisdiction. In light of this preference, the wisdom of our holding that an appeal will lie in this case is confirmed.[40]

V. ANALYSIS OF *IN RE FORD MOTOR COMPANY*

A. *Ineffective Remedy*

In *In re Ford Motor Company*, the Third Circuit dealt with an issue common to all cases—jurisdiction. The jurisdictional issue requires a court to first determine if it has the power to decide a case before itcan rule on the merits. Relying on the *Cohen* exception to 28 U.S.C. § 1291, the *Ford* court determined that its jurisdictional basis lay in ordinary interlocutory appeal.

In analyzing the application of the collateral order doctrine to the *Ford* case, there can be little debate that the first two prongs of the *Cohen* test have been met. Clearly the district court's discovery order conclusively determined the disputed question.[41] The question at hand was whether the minutes of Ford Motor's Policy and Strategy Committee and a set of agendas and notes explaining technical aspects of the Bronco II litigation were protected by either the attorney-client privilege or the work product doctrine. The district court deter-

39 *Id.*; *see, e.g.*, Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851, 861 (3d Cir. 1994) (exercising mandamus jurisdiction over review of privilege and work product issues); Haines v. Liggett Group, Inc., 975 F.2d 81, 88–91 (3d Cir. 1992) (exercising mandamus jurisdiction over review of work product issues); Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1422 (3d Cir. 1991) (exercising mandamus jurisdiction over privilege and work product issues); Sporck v. Peil, 759 F.2d 312, 314–15 (3d Cir. 1985) (exercising mandamus jurisdiction over work product issues); Bogosian v. Gulf Oil Corp., 738 F.2d 587, 591 (3d Cir. 1984) (exercising mandamus jurisdiction over work product issues).

40 *In re Ford Motor Co.*, 110 F.3d at 964.

41 *See supra* text accompanying notes 24–25.

mined they were not. Furthermore, few would argue that the discovery order did not resolve an important issue that was completely separate from the merits of the dispute.[42] The merits of the dispute centered on the liability of Ford Motor Company in regards to the death of Gerald Kelly. The order itself dealt only with whether the documents in question were discoverable.

Therefore, the crux of the decision in *In re Ford Motor Company* centered on the third prong of the *Cohen* test and more specifically, on the fact that the Third Circuit now felt that appealing privilege and work product issues only after a final judgment had been rendered was an ineffective remedy. As the court put it, "once putatively protected material is disclosed, the very 'right sought to be protected' has been destroyed."[43]

Before one begins the analysis of this reasoning, it is imperative to mention the fact that the Third Circuit completely ignored the ability of an attorney to gain an appeal through the contempt process. By defying the discovery order and being held in contempt, an attorney can garner a full review of the district court's order without having to reveal any of the material sought to be protected. By ignoring this option of appeal, the Third Circuit ignored one of the key reasons why courts find that discovery orders routinely fail to meet the third prong of the *Cohen* test.[44] Since a contempt order is considered a final judgment as to the attorney, it defies logic to then state that the discovery order is "effectively unreviewable," as is required by *Cohen.* Why the court chose not to deal with this issue is uncertain. Nonetheless, we can begin to examine the arguments promulgated by the *Ford* court for allowing the immediate appeal of a non-final order.

As stated, the Third Circuit based its decision in *Ford* on the grounds that appealing a discovery order only after a trial has concluded is an ineffective remedy. The court stated, "'[A]ttorneys cannot unlearn what has been disclosed to them in discovery'; they are likely to use such material for evidentiary leads, strategy decisions, or the like."[45] This sort of argument, however, is squarely at odds with both long-standing precedent on this issue as well as the legislative intent behind 28 U.S.C. § 1291. While the *Ford* court did provide a number of colorful analogies to support its claim of irreparable

42 *See supra* text accompanying notes 26–28.

43 *In re Ford Motor Co.*, 110 F.3d at 963 (quoting *Bogosian*, 738 F.2d at 591).

44 *See, e.g.*, Bennett v. City of Boston, 54 F.3d 18, 20 (1st Cir. 1995).

45 *In re Ford Motor Co.*, 110 F.3d at 963 (quoting Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 165 (2d Cir. 1992)).

harm,[46] it completely failed to address the competing interests that § 1291 was established to protect.

As stated by the Tenth Circuit in *Boughton v. Cotter Corporation,*

> [w]hile recognizing that most interlocutory orders disadvantage or inflict some degree of harm on one of the parties to a litigation, this court *must balance that concern* against the need for efficient judicial administration, the delay caused by interlocutory appeals, and the burden on appellate courts imposed by fragmentary and piecemeal review of the district court's myriad rulings in the course of a typical case.[47]

These interests go to the very heart of why courts require a final order before an appeal may be heard and must be considered in any analysis of § 1291.

The *Ford* court did offer numerous cites and references to various Supreme Court decisions in an effort to "buttress" its proposition concerning the ineffective remedy. However, these Supreme Court cases do not deal with discovery issues. Instead, they address issues concerning the immediate appeal of immunity challenges,[48] double jeopardy challenges,[49] and speech and debate challenges.[50] While it is true that each of these Supreme Court decisions did allow an immediate appeal, the *Ford* court made a leap that is supported by neither precedent nor logic when it applied these immunity decisions to the case at hand.

Unlike a discovery order, a claim of immunity or double jeopardy is not merely a step towards a final judgment. A party claiming this type of immunity is contesting the very authority of the government to hale them into court. In *Abney v. United States,* the Supreme Court stated "the guarantee against double jeopardy assures an individual that, among other things, he will not be forced . . . to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense."[51] Therefore, if a party is not granted an immediate appeal in these cases, the very right to not stand trial is lost. This was simply not the case in *Ford.* The issue was not whether the Ford Motor Company must stand trial, but whether it

46 *See In re Ford Motor Co.*, 110 F.3d at 963 ("[T]he cat is already out of the bag . . . there is no way to unscramble the egg scrambled by the disclosure; the baby has been thrown out with the bath water.")

47 Boughton v. Cotter Corp., 10 F.3d 746, 748 (10th Cir. 1993) (emphasis added).

48 *See* Mitchell v. Forsyth, 472 U.S. 511 (1985).

49 *See* Abney v. United States, 431 U.S. 651 (1977).

50 *See* Helstoski v. Meanor, 442 U.S. 500 (1979).

51 *Abney*, 431 U.S. at 661.

had to comply simply with another step towards the final disposition of the case.

B. Evidentiary Leads and Strategy Decisions

Apparently, the *Ford* court also seemed extremely concerned with the possibility that attorneys might use erroneously disclosed discovery for "evidentiary leads" and "strategy decisions." While this concern may seem legitimate, it can easily be dealt with after a final judgment has been rendered, in an order to reverse by the court of appeals. As stated in the *Boughton* case:

> If this court determines that privileged documents were wrongly turned over to the plaintiffs and were used to the detriment of defendants at trial, we can reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed documents. Plaintiffs would also be forbidden to offer at trial any documents, witnesses, or other evidence obtained as a consequence of their access to the privileged documents.[52]

It is not uncommon for a court to issue such a decree. For example, when police illegally obtain a statement from a criminal defendant, courts quite often decree that evidence flowing from such statements cannot be used at trial.[53] And as stated by the Second Circuit in 1967, when privileged material is erroneously disseminated, "the harm occasioned resembles that suffered in any retrial because of error in the first."[54] If, however, this decree is not enough to keep attorneys from using the erroneously disseminated material (as the *Ford* court seemed to imply), the problem may very well be one of ethics and not effective remedy.

C. Attorney-Client Privilege

Another argument that the *Ford* court put forth in support of its decision is the supposed detrimental effect upon the attorney-client privilege. According to the Third Circuit, the attorney-client privilege is meant to encourage "full and frank communications between an attorney and client, without the fear of disclosure, so as to aid in the administration of justice."[55] In defending their position, the court went on to restate the Second Circuit's view that "with respect to the attorney-client privilege, the limited assurance that the protected ma-

52 *Boughton*, 10 F.3d at 749.

53 *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963).

54 American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 281 (2d Cir. 1967).

55 *In re Ford Motor Co.*, 110 F.3d at 963.

terial will not be disclosed at trial 'will not suffice to ensure free and full communication by clients who do not rate highly a privilege that is *operative only at the time of trial.*' "[56]

Unfortunately, this quote pulled from *Chase Manhattan Bank* did not refer to an ordinary ruling on a claim of attorney-client privilege, but instead reflected the Second Circuit's concern with the strange manner in which the district court chose to deal with the materials in question. In *Chase Manhattan Bank,* the district court judge's order permitted plaintiff's counsel to examine documents that the defendant claimed were protected by the attorney-client privilege *before* he made any ruling whatsoever on the merits of the defendant's claim. It is exactly this kind of strange procedure to which the *Chase Manhattan Bank* court is referring when they speak of a privilege that is "operative only at the time of trial." Obviously, one can always find a phrase which seems to support one's argument, but by simply pulling this quote out of context, the *Ford* court failed to acknowledge the importance of the very unique circumstances being dealt with in *Chase Manhattan Bank.*[57]

In contrast, the facts of *Ford* reveal no such strange or potentially damaging circumstances. The district court's order was nothing more then a basic ruling on whether the documents in question were privileged. There is a constant danger that a court might rule that certain documents, thought by the client to be privileged, are in actuality not protected. The ability to appeal immediately does not alleviate this danger nor does it provide the client with any assurance that his communications will later be protected. Therefore, the *Ford* court's argument that this appeal must proceed immediately because of its detrimental effect on the policies underlying the attorney-client privilege is unsubstantiated.

D. Writ of Mandamus

Finally we look at the Third Circuit's claim that even if they did not have jurisdiction under the *Cohen* doctrine, they would have had mandamus jurisdiction over the case. While this off-hand comment may be true, it completely failed to recognize the important differ-

56 *Id.* (quoting Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 165 (2d Cir. 1992) (emphasis added)).

57 Furthermore, in pulling this quote from *Chase Manhattan Bank,* the *Ford* court fails to mention the fact that, while the Second Circuit in *Chase Manhattan Bank* did allow a writ to be issued, the Second Circuit actually *refused* to allow the interlocutory appeal. In so doing the Second Circuit stated, "We thus reaffirm our long-stated view that *Cohen* does not provide jurisdiction to review interlocutory discovery orders." *Chase Manhattan Bank,* 964 F.2d at 163.

ences between the two paths and failed to analyze properly the policies and requirements of mandamus jurisdiction.

As stated by the Supreme Court, "The remedy of mandamus is a drastic one . . . 'only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.'"[58] And to ensure that writs of mandamus are issued only in these extraordinary situations, "the Supreme Court has established two prerequisites to the issuance of a writ: (1) that petitioner have no other 'adequate means to attain the [desired] relief,' and (2) that petitioner meet its burden of showing that its right to the writ is 'clear and indisputable.'"[59]

Some jurisdictions, taking very seriously the Supreme Court's admonition that federal appellate courts are to exercise their writ power with caution, have required an even higher standard than this two-part test. For example, many courts, including the Supreme Court, have based their decisions regarding mandamus jurisdiction on whether the case at hand raises any questions of first impression.[60] Other courts, like the Ninth Circuit, have promulgated a series of factors to be considered and weighed when making this determination. These include:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he desires;
> (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
> (3) whether the district court's order is clearly erroneous as a matter of law;
> (4) whether the district court's order is an oftrepeated error or manifests persistent disregard for the federal rules; and
> (5) whether the district court's order raises new and important problems or issues of law of first impression.[61]

While it is within a court's discretion whether they choose to utilize any of these factors in making its mandamus determination, it is imperative for a court to remember that a writ of mandamus is an extreme and extraordinary measure. By treating it as such, the court can properly protect the policy considerations underlying the rule. Issuing a writ not only forces the district court judge to become a liti-

58 Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976) (quoting Will v. United States, 389 U.S. 90, 95 (1967)).

59 Haines v. Liggett Group Inc., 975 F.2d 81, 89 (3d Cir. 1992) (quoting *Kerr*, 426 U.S. at 403).

60 *See supra* note 19 and accompanying text.

61 Bank of Am. v. Feldman (*In re* Nat'l Mortgage Equity Corp. Mortgage Pool Certificates Litig.), 821 F.2d 1422, 1425 (9th Cir. 1987).

gant in the matter, it places a heavy burden upon already crowded lower court dockets by encouraging piecemeal litigation.[62] Furthermore, in regards to legislative intent the Court in *Kerr* stated,

> It has been Congress' determination since the Judiciary Act of 1789 that as a general rule "appellate review should be postponed . . . until after final judgment has been rendered by the trial court." A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress.[63]

If these considerations are not addressed the entire purpose of the final order doctrine of 28 U.S.C. § 1291 is entirely abandoned.

Unfortunately, it seems that none of these considerations were taken into account by the *Ford* court. In this case, there existed no issues of first impression and most certainly no extraordinary or extreme circumstances. But what is most troubling about the Third Circuit's handling of the mandamus issue are its comments in relation to appellate jurisdiction. The *Ford* court stated:

> [M]andamus jurisdiction affords an appellate court less opportunity to correct district court error in the case before it and less opportunity to provide guidance for future cases. Moreover, comity between the district and appellate courts is best served by resort to mandamus only in limited circumstances. *Review under appellate jurisdiction is therefore preferable to review under mandamus jurisdiction. In light of this preference, the wisdom of our holding that an appeal will lie in this case is confirmed.*[64]

In other words, according to the *Ford* court, its holding that an ordinary appeal will lie in this case is buttressed by the fact that appellate jurisdiction is preferable to mandamus jurisdiction. While it is true that review under mandamus is exceedingly narrow, the lack of a *preferred* standard can in no way be grounds for deciding a jurisdictional question. Instead of following proper procedure (first determining jurisdiction and then applying the proper standard of review), the Third Circuit seemed to be saying that it can take the opposite approach—find a standard which best fits the desired decision and then "find" a jurisdictional basis to match.

However, it is without question that the issuance of a writ is largely at the discretion of the appellate court. It must, furthermore, be conceded that while most jurisdictions would probably not have

62 *See Kerr*, 426 U.S. at 402–03.

63 *Id.* at 403 (quoting *Will*, 389 U.S. at 96) (footnote omitted).

64 *In re Ford Motor Co.*, 110 F.3d at 964 (emphasis added) (footnote omitted).

found these circumstances akin to issuance of a writ, this court would not have overstepped its bounds in so doing.

VI. Conclusion

The Third Circuit's decision in *In re Ford Motor Company* failed to address a number of issues vital to a proper analysis of the collateral order doctrine, including the legislative intent behind § 1291 and the ability of an attorney to gain an appeal through the contempt process. However, what is most disconcerting about the decision in *In re Ford Motor Company* is the potential breadth of its coverage. The facts in *Ford* reveal no unique or extreme circumstances that would justify such a radical departure from case precedent. One cannot help but read the Third Circuit as saying that from now on, each and every discovery order that touches upon issues of attorney-client privilege or work product doctrine automatically falls under the collateral order doctrine and is immediately appealable. Such a reading will undoubtably cause district courts to become bogged down, appellate courts to become flooded with a myriad of discovery appeals, and the Third Circuit to become a mecca for forum shopping litigants.

On the other hand, one cannot disagree with the Third Circuit that certain parties will be disadvantaged by the majority reading of the collateral order doctrine. However, all rules must be viewed in relation to the legal system as a whole, and although most rules work to the disadvantage of one party or another, the effects of a rule upon individuals must be balanced against its effects upon the system as a whole. Congress, the Supreme Court, and all other circuits have weighed these competing interests and have found that the possible harm that may befall certain individuals is greatly outweighed by the need to have a system that permits a fair and efficient administration of the law.

The Third Circuit's decision in *In re Ford Motor Company* not only fails to administer this balancing test but it also fails to even recognize

the competing interests that are at the very heart of the 28 U.S.C. § 1291 and the collateral order doctrine.

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