SUPREME COURT OF NEW JERSEY
Docket No. 080316 (S-45-17)

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; *(caption continued on reverse)*	Civil Action On Motion for Leave to Appeal from the New Jersey Superior Court, Appellate Division Docket No. AM-730-16 Sat Below: Hon. Marie P. Simonelli, P.J.A.D. Hon. Greta Gooden Brown, J.A.D.

BRIEF OF PROPOSED *AMICUS CURIAE* ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF BASF CATALYST LLC'S MOTION FOR LEAVE TO APPEAL

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Defendants.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Association of Corporate Counsel ("ACC") is the global bar association for in-house counsel, with more than 40,000 members who practice in the legal departments of corporations and other private-sector organizations in the United States and abroad. ACC has 1,280 members based in New Jersey and thousands of other members who represent 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 this 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]

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[1] Over the past three years, for example, the ACC has filed *amicus* briefs on attorney-client privilege issues in Alberta v. Suncor Energy, Inc., 2017 ABCA 221 (Alta. Ct. App. Sept. 18, 2017); FTC v. Boehringer Ingelheim Pharms., Inc., Nos. 15-5356, 15-5357 (D.C. Cir. June 2, 2017); Stock v. Schnader Harrison Segal & Lewis, No. 651250/13 (N.Y. App. Div. May 12, 2015);

ACC submits this *amicus* brief to highlight a narrow but vital issue raised by the proceedings below: the importance of an immediate appeal from a trial court's order requiring disclosure over a claim of attorney-client privilege. ACC strongly believes that movant BASF Catalysts LLC ("BASF")--like virtually any litigant whose well-grounded claim of attorney-client privilege is rejected by a trial court--deserves immediate appellate review of that determination. Immediate review of privilege determinations is particularly important to ACC members because claims of privilege by in-house counsel and outside counsel representing corporations have been subject to frequent challenges by opposing parties. When courts make erroneous rulings on in-house privilege, immediate review becomes crucial to preventing the harm that can result from disclosure.

Denying a litigant an interlocutory appeal of an order denying privilege not only risks devastating consequences in the litigation itself, but also threatens to chill the free and frank communication between attorney and client that the privilege is designed to protect. In order to preserve the privilege and further the important goals it serves, this Court

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Paterno v. NCAA, No. 1709 MDA 2014 (Pa. Super. Ct. Apr. 10, 2015); and In re Kellogg Brown & Root, Inc., No. 14-5319 (D.C. Cir. Jan. 30, 2015).

should not only grant BASF leave to appeal here, but also announce more generally—-and consistent with existing law—-that a decision denying a party's privilege claim is presumed to be subject to immediate interlocutory appeal "in the interest of justice" pursuant to R. 2:2-4.

PRELIMINARY STATEMENT

Breaching a litigant's privilege is an important and irreversible decision. In this case and most cases, a party should therefore have the presumptive right to bring an immediate appeal when a court denies a claim of attorney-client privilege and orders the production of attorney-client communications. While New Jersey generally disfavors piecemeal review of trial-level proceedings, R. 2:2-4 authorizes the Appellate Division to grant a party leave to appeal an interlocutory order "in the interest of justice." The unique threat posed by the denial of a privilege claim—-both to the immediate interests of the litigant and to the broader goal of ensuring full and free communications between attorneys and clients in our adversarial system-—dictates that, in most cases, the interest of justice will be served by allowing immediate appellate review.

The harms imposed by a trial court's erroneous denial of a privilege claim are immediate, devastating, and usually cannot be remedied by an appeal after final judgment. Once

confidentiality is lost, it cannot be regained—-even if the privileged materials themselves are later returned. This harm is even greater where, as here, plaintiffs may argue that a privileged communication is relevant to a wide variety of other pending and potential litigation. When such evidence is revealed to one plaintiff, absent further protections it is effectively disclosed to *every* potential plaintiff—-and that disclosure cannot be undone even if the privilege ruling is belatedly reversed on appeal from a final judgment. In the privilege context, review delayed is almost always relief denied.

Moreover, the threats posed by effectively unreviewable denials of privilege extend beyond the immediate parties to the case. An order improperly disclosing confidential communications in *any* case will reduce confidence in the privilege generally, prompting other clients to limit their communications with counsel, avoid seeking legal advice, and forgo internal investigations. As the United States Supreme Court has recognized, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

The Appellate Division's denial of appellate review of the privilege ruling here threatens to subject BASF to irreparable legal harm. The confidential documents that would be disclosed

by the trial court's order are relevant not only in this case, but may also be sought in thousands of other pending and potential asbestos claims across the country. Indeed, plaintiff's counsel in this case is also lead counsel in a putative class action pending in the District of New Jersey, which seeks damages related to the alleged fraudulent concealment of this very evidence. See Williams v. BASF Catalysts LLC, No. 2-11-cv-01754 (D.N.J.). The parties in that case are currently litigating many of the same privilege issues at stake in this appeal. See Nicole Narea, Docs Not Privileged in BASF Asbestos Fraud Case, Says Class, Law360 (Nov. 3, 2017).

If these documents are released without effective appellate review, they may become immediately available to plaintiffs in the federal class action and in other asbestos lawsuits across the country. Even if the trial court's denial of privilege is later reversed on appeal after final judgment, it will be impossible to put this evidentiary cat back in the bag. And the irreparable harm caused by a potentially erroneous—-and effectively unreviewable-—privilege ruling here will chill the free flow of information between attorney and client in a much broader sphere. Due to the high-profile nature of this case and the media attention it has generated, any ruling of the New Jersey courts suggesting that there will not be timely appellate review of trial court decisions mandating the turnover of

privileged documents could have profound effects. Given these serious and irremediable dangers, this Court should ensure that no disclosure occur before there is an opportunity for effective—and immediate—appellate review.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

For purposes of this *amicus* brief, the relevant facts are that the trial court ordered the disclosure of BASF's attorney-client communications pursuant to the crime-fraud exception; BASF sought interlocutory review in the Appellate Division; and that court denied review in a summary order that set forth no rationale for its decision.[2]

ARGUMENT

I. Courts should apply the presumption that an order compelling disclosure of putatively privileged communications is almost always immediately appealable.

A. R. 2:2-4 permits appeals of interlocutory orders "in the interest of justice" where an erroneous ruling would be "irremediable" after trial.

New Jersey courts have a "general policy against piecemeal review of trial-level proceedings." Brundage v. Estate of Carambio, 195 N.J. 575, 599 (2008). However, the Appellate Division is authorized to grant a party leave to file an immediate appeal of an interlocutory order "in the interest of

[2] *Amicus* takes no position on the merits of the underlying privilege issue, to which it is not privy given the sealed nature of the proceedings.

justice." R. 2:2-4. Such appeals are "not appropriate to 'correct minor injustices,'" but only when "there is the possibility of 'some grave damage or injustice' resulting from the trial court's order." Brundage, 195 N.J. at 599 (quoting Romano v. Maglio, 41 N.J. Super. 561, 567 (App. Div. 1956)). While leave to appeal an interlocutory claim is ordinarily "highly discretionary," review is proper when it is necessary to "consider a fundamental claim which could infect a trial and would otherwise be irremediable in the ordinary course." State v. Alfano, 305 N.J. Super. 178, 190 (App. Div. 1997).

As the Brundage Court noted, one area where interlocutory appeals are appropriate concerns "matters relating to questions of privilege." 195 N.J. at 600. Indeed, New Jersey courts routinely and repeatedly rely on R. 2:2-4 to permit interlocutory appeals--and to vacate or reverse erroneous rulings--on questions of attorney-client privilege. See, e.g., Alden Leeds, Inc. v. QBE Specialty Ins. Co., No. A-2034-14T1, 2015 WL 4507151 (N.J. Super. Ct. App. Div. July 27, 2015); Friedman Route 10, LLC v. Certain Underwriters At Lloyd's, London, No. A-0434-13T1, 2014 WL 340087 (N.J. Super. Ct. App. Div. Jan. 31, 2014); Hedden v. Kean Univ., 434 N.J. Super. 1 (App. Div. 2013); Travelers of N.J. v. Weisman, No. A-4085-10T4, 2012 WL 850615 (N.J. Super. Ct. App. Div. Mar. 15, 2012); First Trenton Indem. Co. v. D'Agostini, No. A-3089-08T3, 2009 WL

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While these decisions rarely contain any reasoned discussion of the reasons for granting leave to appeal, the Appellate Division's practice of permitting interlocutory appeals of privilege denials makes sense. The proper application of the attorney-client privilege is important not only to individual litigants, but to our adversarial system as a whole. And erroneous privilege rulings are notoriously difficult to unscramble on final appeal after the communications have already been disclosed.

But despite the courts' widespread recognition that the interest of justice typically requires immediate appellate review of adverse privilege rulings, the proceedings below show that some cases—even ones of great importance like this one—still go unreviewed. ACC urges this Court not only to correct the specific error before it by granting leave to appeal in this case, but also to announce a general presumption going forward that rulings denying review of well-founded or important attorney-client privilege claims are immediately appealable.

B. Erroneous denials of privilege pose a grave threat of damage not only to individual litigants, but to the adversarial system as a whole.

This Court has time and again reaffirmed the attorney-client privilege's vital role in our adversarial legal system, explaining that it is "rooted in our jurisprudential traditions and reflect[s] a firm societal commitment to preserving particular confidences even at the expense of truth." Payton v. New Jersey Tpk. Auth., 148 N.J. 524, 546 (1997); see also Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998).

The privilege's primary purpose is to encourage the "free and full disclosure of information from the client to the attorney." Fellerman, 99 N.J. at 502; see also Upjohn, 449 U.S. at 389 (privilege exists to "encourage full and frank communication between attorneys and their clients."). That free

exchange ultimately benefits the public, which "'is well served by sound legal counsel'" providing advice based on "full, candid, and confidential exchanges." Stengart v. Loving Care Agency, Inc, 201 N.J. 300, 315 (2010) (quoting Fellerman, 99 N.J. at 502).

In addition to advancing the attorney-client relationship, the privilege also "promotes . . . compliance with the law." United States v. Doe (In re Grand Jury Investigation), 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 particular course of conduct. This function of the attorney-client privilege is essential to corporations, who use this advice to conform their conduct to the law, or at least to remedy any violations quickly.

Indeed, the benefits of corporate confidentiality are well-established within our judicial system. "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). Recognizing this, New Jersey law unequivocally extends the privilege "to corporations which must act through agents, including their officers and employees." Macey v. Rollins Env.

Serv., 179 N.J. Super. 535, 540 (App. Div. 1981). "The necessity for full and open disclosure between corporate employees and in-house counsel . . . demands that all confidential communications be exempt from discovery." Ibid.

If privilege determinations are not immediately appealable, that will have a chilling effect in many areas in which corporations seek legal advice. In particular, corporate internal investigations almost always involve attorneys and rely heavily on the protections afforded by the attorney-client privilege. See, e.g., Lance Cole, Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided), 48 Vill. L. Rev. 469, 483 (2003) ("Failing to afford the protection of the attorney-client privilege to communications between business entitles and their legal counsel would have a chilling effect on internal investigations of corporate activities."). Internal investigations benefit from the involvement of in-house and outside counsel because they can facilitate prompt redress of violations. However, opposing parties often seek discovery into those investigations despite the involvement of counsel. See, e.g., In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014). If privilege determinations are not immediately appealable, it may have a chilling impact on internal

investigations and discourage involvement of in-house counsel and outside counsel who are retained to assist in those matters.

Given the central role that the attorney-client privilege plays in sustaining the adversarial system and promoting compliance with the law, any erroneous denial of the privilege presents a danger of "grave damage or injustice." Brundage, 195 N.J. at 599. Incorrect and haphazard rulings by trial courts-—especially where there is no prospect of effective appellate review—-undermine confidence in the privilege and may cause clients to withhold information from their attorneys or forego internal investigations. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." Upjohn, 449 U.S. at 393.

C. Erroneous denials of privilege cannot be remedied by post-judgment appellate review.

Unlike rulings on other discovery or evidentiary issues, which can be corrected after final judgment, an order compelling the production of a privileged communication has an immediate and irrevocable effect. Once confidentiality is broken, it cannot easily be restored-—even if the physical evidence is later returned. Because an erroneous privilege ruling is "irremediable in the ordinary course" of final-judgment review,

Alfano, 305 N.J. Super. at 190, immediate interlocutory review offers the only effective safeguard against error.

After a trial court denies a privilege claim, a party seeking to avoid contempt has no choice but to disclose the putatively confidential communication. Once this happens, confidentiality is lost forever. At most, ordinary appellate review after a final judgment can direct the return of the privileged material and order a new trial. But even if the privileged documents are later returned, their content can never again be made private. The mere fact of disclosure causes immediate, irreparable damage on several levels that cannot be remedied by final-judgment appeal.

First, once opposing counsel sees information that is arguably protected by the privilege, that information cannot be unlearned. Even if the material is later held to be privileged and inadmissible, "[s]uch documents may alert adversary counsel to evidentiary leads or give insights regarding various claims and defenses." Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 165 (2d Cir. 1992). Because "a remedy after final judgment cannot unsay the confidential information that has been revealed," there may be no way for a court to cure the prejudice caused by the initial disclosure. In re Sims, 534 F.3d 117, 129 (2d Cir. 2008); see also Kellogg Brown & Root, 756 F.3d at 761.

Second, the disclosure of confidential material can have spillover effects in other, related, litigation. A privileged communication may be relevant not just to a single plaintiff's claim, but to claims in other pending and potential cases. Once the confidential information is disclosed to a single plaintiff, it may then become available to all potential plaintiffs—including those outside the current court's jurisdiction. See, e.g., In re Qwest Communications, Int'l, 450 F.3d 1179, 1183 (10th Cir. 2006) (recognizing in mandamus context that "given the litigation pending outside this court's jurisdiction, normal appellate review could not return the parties to the status quo . . . [and] review after production would essentially be meaningless"). In mass tort cases such as this one, thousands of outside claims may be affected. An appellate court can only provide redress in its particular case; it has limited power to remedy the spillover effects of improper disclosure outside its own jurisdiction, rendering final-judgement review entirely toothless.[3]

[3] In this case, for example, any material that was ordered to be disclosed may find its way into the pending federal class action brought by plaintiff's counsel in the District of New Jersey, which seeks damages for the alleged withholding and destruction of asbestos-related evidence by BASF's predecessor and their former counsel. See Williams v. BASF Catalysts, LLC, No. 2-11-cv-01754 (D.N.J.).

Third, the disclosure of confidential information can close off final-judgment appellate review by creating strong pressures for early settlement. A litigant facing a disclosure order will often feel pressure to settle rather than comply with the order--especially where the confidential material, once disclosed, could be used in other related litigations. Privileged material is sensitive by its very nature, and its disclosure can threaten a company's profitability or even economic viability. In such cases, a company may prefer to settle in order to avoid disclosure, regardless of the merit of the underlying claims.

These pressures are especially acute in cases like this one, which involve the crime-fraud exception to the privilege. A trial court ruling that the crime-fraud exception applies imposes a special stigma on both the attorney and the client, which may feel additional pressure to settle in order to protect its reputation. See Cary Bricker, Revisiting the Crime-Fraud Exception to the Attorney-Client Privilege, 82 Temple L. Rev. 149, 166–167 (2009). And such a holding can open the door to the disclosure of other confidential communications—through, for example, depositions of the attorneys allegedly involved in the unlawful activity—which may further damage an attorney's reputation and professional credibility and chill future attorney-client communications. An appeal after a final judgment

may come too late to repair such damage. The crime-fraud exception should be applied in appropriate cases, but never lightly—-and not without effective appellate review.

Other state courts considering this issue have also concluded that final-judgment review is wholly inadequate to redress the harms caused by the compelled disclosure of privileged communications. The Pennsylvania Supreme Court-—applying a collateral appeal framework more stringent than New Jersey's flexible "interest of justice" standard-—affirmed the importance of immediate review in Commonwealth v. Harris, 32 A.3d 243 (Pa. 2011). The Pennsylvania court cogently explained why a final-judgment appeal cannot cure the harm caused by the disclosure of privileged material:

> Absent a stay and an immediate appeal, the possessor of putatively privileged material will repeat to others what the client told him or her in confidence, and, if it turns out that the claim of privilege was meritorious, a later appeal will not be able to undo the harm. Once putatively privileged material is in the open, the bell has been rung, and cannot be unrung by a later appeal.

Id. at 249. The only way to prevent these irremediable harms is to provide an avenue for interlocutory review *before* the disclosure occurs.

D. This Court should protect the attorney-client privilege by announcing a prospective presumption of interlocutory review for adverse privilege rulings.

While R. 2:2-4's "interest of justice" standard is typically committed to the discretion of the Appellate Division, New Jersey courts have not hesitated to announce a presumption in favor of interlocutory review in categories of cases where the interest of justice will frequently require such review. In Daniels v. Hollister Co., 440 N.J. Super. 359, 362 (App. Div. 2015), the Appellate Division recently announced such a prospective intention with respect to orders granting or denying class certification. While noting that such orders are not appealable as of right, the court nevertheless recognized "that the decision to grant or deny class certification often has a profound effect on the litigation." Ibid. Consequently, the court announced that it would

> hereafter, as a general matter, liberally indulge applications for leave to appeal: (1) "when a denial of class status effectively ends the case (because, say, the named plaintiff's claim is not of a sufficient magnitude to warrant the costs of stand-alone litigation)"; (2) "when the grant of class status raises the stakes of the litigation so substantially that the defendant likely will feel irresistible pressure to settle"; and (3) when permitting leave to appeal "will lead to a clarification of a fundamental issue of law."

Ibid. (citations omitted).

Similar factors support the adoption of a presumption that denials of privilege be immediately appealable. As discussed above, such rulings are not only irremediable on final-judgment appeal, they also often create an "irresistible pressure to settle" in order to prevent the threatened disclosure from being used in other actions. In addition, the knowledge that such holdings would presumptively be subject to interlocutory appellate review would lead to greater certainty and uniformity in New Jersey's application of the privilege.

This need not open up the appellate courts to a flood of unmeritorious appeals. No presumption is absolute, and the Appellate Division would still have the power to deny leave to appeal for obviously unmeritorious claims. But in cases raising a well-grounded argument for the application of the privilege, involving important privilege questions, or involving substantial intrusions on the privilege, parties should presumptively be entitled to a second look before disclosure occurs. And courts denying review should be required--as the court below did not--to set forth a reasoned basis for the denial. These considerations are only amplified where, as here, the crime-fraud exception is at issue and the disclosure of privileged information could impact other pending and future lawsuits.

II. At a minimum, this Court should grant BASF leave to appeal in this case.

Amicus believes that establishing a presumption of immediate appealability would be the best way to protect litigants, increase certainty, and further the important societal goals advanced by the attorney-client privilege. However, even if this Court is unwilling to announce a prospective presumption, it should at a minimum grant BASF's motion for leave to appeal on the facts of this case.

As discussed above, R. 2:2–4 authorizes the Appellate Division to grant leave to appeal an interlocutory order "in the interest of justice." A similar standard applies to this Court's review of interlocutory orders. See R. 2:2–2(b) (providing that the Supreme Court may take appeals from interlocutory orders to "prevent irreparable injury"). BASF satisfies both of these tests.

Even more than the typical privilege dispute, the trial court's ruling below threatens BASF with irreparable injury both in this case and in related litigation. While many of the filings concerning this matter are under seal, *Amicus* understands that the documents over which BASF claims attorney-client privilege may be potentially relevant to the claims not only in this case, but in other pending and potential asbestos cases arising from exposure to the same products. Moreover, the

documents are potentially applicable to a parallel putative class action filed by plaintiff's counsel in federal court, which seeks damages for fraud and fraudulent concealment allegedly carried out by BASF's predecessor and their former counsel. See Williams v. BASF Catalysts LLC, No. 2-11-cv-01754 (D.N.J.).

If the documents at issue are unsealed and released in this case, the plaintiff here will undoubtedly seek to share them with the plaintiffs in these related actions, many of whom are represented by the same counsel. Consequently, even if an appellate court were to reverse the trial court's privilege ruling on final-judgment appeal, it could do nothing to prevent the use of the documents in these other litigations. Because "normal appellate review could not return the parties to the status quo," any "review after production would essentially be meaningless." Qwest Communications, 450 F.3d at 1183. Depriving BASF of immediate appellate review of this privilege determination would effectively rob it of any appellate review at all.

The Appellate Division, by summarily denying leave to appeal, failed to address any of the irreparable injuries that BASF will face once the evidentiary cat is out of the bag. This Court should cure this neglect by granting leave to appeal and considering this matter on its merits.

CONCLUSION

An order erroneously denying a claim of attorney-client privilege can cause immediate harm both to the immediate parties and to the adversarial system--harm which cannot be undone by a belated appeal after final judgment. To provide a check against these dangers, this Court should announce that such orders are presumptively entitled to interlocutory appeal pursuant to R. 2:2-4. And, in any case, it should grant BASF's motion for leave to appeal the trial court's order in this case.

Respectfully submitted,

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Dated: December 11, 2017