



COURT FOILS ATTEMPT BY PLAINTIFFS' LAWYERS TO BROADEN CRIME-FRAUD EXCEPTION TO ATTORNEY-CLIENT PRIVILEGE

by Thomas E. Spahn

The overcriminalization of American law creates enormous risks for corporations. In addition to the obvious criminal liability jeopardy, corporate clients must be concerned with the so-called crime-fraud exception to the attorney-client privilege. That doctrine can strip away privilege protection for corporate clients' communications with their lawyers, possibly depriving corporations of confidential legal advice just when they need it most.

In a rare but welcome bit of good news, most courts have construed the crime-fraud exception narrowly. In November, the court handling the General Motors (GM) ignition-switch litigation applied the doctrine by the book, and denied plaintiffs' efforts to access GM's communications with its lawyers. *In re General Motors LLC Ignition Switch Litigation*, Nos. 14-MD-2543 & -MC-2543 (JMF), 2015 U.S. Dist. LEXIS 159721 (S.D.N.Y. Nov. 25, 2015).

All courts exclude from privilege protection certain otherwise privileged communications related to clients' sufficiently egregious future misconduct. However, courts disagree about various elements of the crime-fraud exception. Several factors deserve mention to put the doctrine and the *GM* decision in context.

First, courts have assessed what type of future wrongdoing triggers the exception. All courts apply it to crimes and intentional fraud, and some courts even extend it to tortious misconduct (or even gross negligence). *See, e.g., Safety Today, Inc. v. Roy*, Case No. 2:12-cv-510, 2013 U.S. Dist. LEXIS 147765, at *17 (S.D. Ohio Oct. 11, 2013) (applying the exception to "alleged tortious interference of a contract or business relations, which is a species of intentional tort under Ohio law"). However, most courts take a narrower view.

The *GM* court acknowledged that sufficiently egregious litigation misconduct could trigger the doctrine, and even stated that GM and its lawyers "played it too close to the vest" in responding to discovery in one ignition-switch case. 2015 U.S. Dist. LEXIS 159721, at *139. But the court held that such a "perhaps overly aggressive" litigation tactic should be "addressed by sanctions in the same case"—and was "not the stuff that crimes and frauds are made of." *Id.* at *139-41.

Similarly, the *GM* court rejected plaintiffs' argument that GM's lawyers' alleged ethics violation triggered the doctrine's application. As with the alleged litigation misconduct, the court held that in the case of any professional misconduct, "it is generally better to sanction the lawyers themselves, either in the same case or through disciplinary proceedings." *Id.* at *144.

Second, the crime-fraud exception applies only if the communications related in some way to the client's *future* misconduct. As the court handling Martha Stewart's criminal prosecution explained, the doctrine does not apply merely because the communications would provide evidence of wrongdoing. *United States v. Stewart*, No. 03 Cr. 717 (MGC), 2003 U.S. Dist. LEXIS 23180 (S.D.N.Y. Dec. 29, 2003).

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Courts apply a spectrum of standards. Some courts require only that the communication be “reasonably related” to the wrongdoing, while other courts insist that the communication “further” the client’s wrongdoing. A few weeks before the *GM* decision, the District of Nebraska used a combination of the “furtherance” and “closely related” standards. *Tracy v. Telemetrix*, No. 8:12CV359, 2015 U.S. Dist. LEXIS 153852, at *26 (D. Neb. Nov. 13, 2015). About three weeks after the *GM* case, the First Circuit used a “facilitate or conceal” standard. *United States v. Gorski*, Nos. 14-1063, -1964, & -2074, 2015 U.S. App. LEXIS 21302, at *22 (1st Cir. 2015).

The *GM* court specifically rejected the much more expansive “reasonably related” standard—quoting a Second Circuit decision requiring that the communication “was *itself* in furtherance of the crime or fraud.” *United States v. Richard Rowe, Inc. (In re Richard Rowe, Inc.)*, 68 F. 3d 38, 40 (2nd Cir. 1995) (emphasis in original).

Third, the crime-fraud exception can apply even if the lawyer is unaware that her communication is furthering the client’s future misconduct. That issue did not arise in the *GM* case, but accounts for some highly respected firms’ communications losing privilege protection when the exception applies. The First Circuit’s *Gorski* decision applied the crime-fraud exception to communications between the defendant and lawyers with Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. See also, *United States v. Ceglia*, No. 1:12-cr-876 (VSB), 2015 U.S. Dist. LEXIS 45027 (S.D.N.Y. Mar. 8, 2015) (denying privilege protection for communications between Facebook’s alleged half-owner Paul Ceglia and his lawyers at DLA Piper and Kasowitz, Benson, Torres & Friedman).

Fourth, courts’ application of the crime-fraud exception begins with the first step of a two-part analysis—initially determining whether the adversary has justified the court’s *in-camera* review of withheld documents. The U.S. Supreme Court held that adversaries face a lower burden during this initial step than when attempting to strip away a litigant’s privilege protection—but did not very carefully explain the standard. *U.S. v. Zolin*, 491 U.S. 554 (1989). Courts’ standards include probable cause, preponderance of the evidence, *prima facie* showing, and a reasonable belief that such an *in-camera* review might aid the court.

The *GM* court applied a “probable cause” standard in declining to conduct an *in-camera* review. This was somewhat surprising, given GM’s deferred-prosecution agreement. But the court noted that it had examined many documents for which GM had already voluntarily relinquished privilege protection.

Fifth, courts reviewing withheld documents *in camera* must decide if the adversary has satisfied the higher burden required to strip away the litigant’s privilege. As with the *in-camera* determination, courts take varying approaches to the ultimate standard for applying the exception—*prima facie*, probable cause, clear-and-convincing showing, reasonable basis, preponderance of the evidence, etc. The *GM* court did not reach this second step of the exception’s two-part application.

Sixth, a court reviewing withheld documents *in camera* sometimes might decide that certain communications should lose their privilege and other communications should not. For instance, a few weeks before the *GM* decision, the court handling the Chinese Drywall MDL “conclude[d] that certain communications are subject to the crime-fraud exception to the attorney-client privilege in that they revolve around [the litigant’s] intent to commit criminal contempt.” *In re Chinese Manufactured Drywall Product Liability Litigation*, MDL No. 2047, Section L, 2015 U.S. Dist. LEXIS 153164, at *7 (E.D. La. Nov. 10, 2015). The *GM* court did not have to deal with this process, but the judicial burden associated with a court’s document-by-document review further narrows the risk that judges will apply the crime-fraud exception too broadly.

It is refreshing that a well-respected court followed the majority, narrow view of the crime-fraud exception—especially given the high stakes and the widespread publicity surrounding GM’s ignition-switch incidents. Although some courts have expanded the exception’s application in one of the areas discussed above, most courts continue to respect the attorney-client privilege even as the overcriminalization of corporate behavior accelerates apace.