

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

S37 MANAGEMENT, INC., d/b/a MT.)	
PROSPECT PLACE APARTMENTS,)	
on behalf of itself and the Class,)	
)	
Plaintiff,)	
)	Case No. 06 CH 20999
v.)	
)	Hon. Sophia H. Hall
ADVANCE REFRIGERATION CO.,)	
)	
Defendant.)	

DECISION

This case comes on before the Court on defendant Advance Refrigeration Co.'s Amended Motion to Certify Question for Interlocutory Appeal Pursuant to Illinois Supreme Court Rule 308.

Advance seeks to certify the following question:

Whether the crime-fraud exception to the attorney-client and work product privilege applies to communications between a defendant and its counsel that relate to the defendant's communications with putative class members during the opt-out period.

Background

This case is a class action against Advance. On July 30, 2010, this Court certified a class of "all persons and entities who were customers of Defendant, Advance Refrigeration, and who paid the Gov't Processing Requirement to Defendant as part of a purchase during the period Dec. 11, 2001 to the present." Advance appealed, and the Appellate Court affirmed. The mandate issued March 9, 2012.

Thereafter, the parties disagreed on the language that should be contained in the Class Notice forms sent to putative class members. Advance also requested that an Opt-Out Form be included, and plaintiff objected. This Court made several rulings about the language to be used, and, on April 18, 2013, this Court approved Class Notice and Opt-Out forms to be sent to

putative class members. The Class Notice briefly, and neutrally, described the nature of the claims, and directed putative class members to contact class counsel in writing with questions regarding “any matter raised in this Notice.” The Notice did not direct putative class members to contact Advance’s counsel. The Opt-Out forms were sent at Advance’s expense. The opt-out period lasted from June 17, 2013 to August 13, 2013. Discovery proceeded.

On October 4, 2013, plaintiff filed a “Motion for Protective Order, Sanctions, and to Set an Evidentiary Hearing,” asserting that Advance had engaged in a campaign to urge its customers to opt out of the class during the opt-out period. On October 10, 2013, this Court ordered that Advance “shall not communicate with any class members, including those who opted out, about the Class Action or about Plaintiff’s Motion for Protective Order prior to further order of the Court.” On March 4, 2014, plaintiff filed an “Amended Motion for Protective Order, Sanctions, and to Set an Evidentiary Hearing,” in which plaintiff submitted additional evidence of Advance’s communications to its customers during the opt-out period. Plaintiff also sought discovery from Advance’s counsel about their role in Advance’s communications. Discovery disputes ensued thereafter.

June 10 and September 8, 2014 Orders

On June 10, 2014, this Court granted plaintiff’s “Amended Motion to Compel Defendant to Produce Documents, Privilege Log, Attorney-Client Communications, and Witnesses for Deposition.” In that motion, plaintiff sought to compel responses from Advance to certain of plaintiff’s document requests, interrogatories, and requests to admit. In its document requests, plaintiff sought “All documents constituting or relating to communications between Defendant and Defense Counsel regarding Defendant’s communications to members of the Class regarding opting out of the Class.” Plaintiff also sought “All documents constituting or relating to communications between Defendant and Defense Counsel regarding Defendant’s communications with members of the Class during the Class Exclusion Period.”

Advance had objected to plaintiff’s discovery requests based on attorney-client privilege. Plaintiff argued that the crime-fraud exception applied to its requests, and, therefore, the privilege did not bar plaintiff’s discovery, and Advance should be compelled to respond.

On September 8, 2014, this Court denied Advance’s “Motion for Protective Order Relating to Plaintiff’s Requests for Attorney-Client Communications and Attorney Work Product.” Advance’s motion again raised the attorney-client privilege, and argued that the crime-fraud exception did not apply, and thus it should not be compelled to respond.

Plaintiff, thereafter, requested a more specific order from this Court regarding the application of the crime-fraud exception. On September 25, 2014, this Court entered an order

nunc pro tunc to June 10, 2014, specifying explicitly that the crime-fraud exception applied to Advance's objections to plaintiff's discovery requests based on the attorney-client privilege and the work-product doctrine.

As the briefing on plaintiff's Amended Motion to Compel and Advance's Motion for a Protective Order had revealed, the crime-fraud exception is one of the recognized limits on the application of the attorney-client privilege. The exception is triggered "when a client seeks or obtains the services of an attorney in furtherance of criminal or fraudulent activity." *In re Marriage of Decker*, 153 Ill. 2d 298, 313 (1992). The party who raises the exception bears the burden to present evidence from which a "prudent person" would have a "reasonable basis to suspect" (1) "the perpetration or attempted perpetration of a crime or fraud," and (2) "that the communications were in furtherance thereof." *Id.* at 322. Once the attorney-client privilege is defeated by the application of the crime-fraud exception, the court may compel discovery of the information in question. *Id.*

In the briefing on those prior motions, plaintiff argued for application of the crime-fraud exception to the attorney-client privilege raised by Advance. Plaintiff attached evidence to support its argument that there was reason to believe that counsel had assisted Advance in unilaterally reaching out to its customers to opt out of the case by using misleading information about the litigation, which it argued would constitute illegal or fraudulent activity.

As an example of the application of the crime-fraud exception to an attorney's participation in a defendant's misconduct during class certification in a class action case, plaintiff relied on *Kleiner v. First Nat'l Bank*, 751 F.2d 1193 (11th Cir. 1985). In that case, the court held an evidentiary hearing, "in the nature of a disciplinary proceeding," to determine the extent of the defense attorneys' involvement in the defendant's (a bank) communications to class members, who were also its customers, to convince them to opt out of the class action.

The court in *Kleiner* held that the defendant's opt-out "solicitation campaign," which it undertook at the direction of its counsel, was illegal, because it violated two prior orders issued by the court. The first was the order setting forth the contents of the class notice. That notice instructed putative class members that they could contact either plaintiff or defense counsel in writing with questions, but required all responses from the attorney they contacted to be furnished to opposing counsel before being mailed. The second order was the court's ruling that limited the defense counsel's contact with class members to taking a certain number of depositions, and which also took under advisement the plaintiff's motion to prohibit the defendant itself from unilaterally communicating with its customers about the case during the opt-out period. The court construed that order as prohibiting the defendant from making contact while the motion was under advisement. *Id.* at 1200-01.

The *Kleiner* court imposed severe sanctions, including disqualification, on the defendant's attorneys for violating the court's orders by advising their client to unilaterally reach out to its customers to opt out of the class action. The court found that the outreach undermined the very purpose of the court's class notification order, which was designed to ensure that the class received objective, neutral information about the nature of the claim and the consequence of proceeding as a class. *Id.* at 1202. The defendant, and its counsel, engaged in an opt-out "solicitation campaign" by calling their customers to opt out of the class, which sabotaged the goal of informed consent with its one-sided presentation.

The court was also concerned with the potentially coercive nature of the defendant's unilateral communications to its customers/class members. *Id.* at 1202-03. The court noted that "a unilateral communications scheme . . . is rife with potential for coercion [where the] class and the class opponent are involved in an ongoing business relationship." *Id.* Perhaps most importantly, the court noted that such communications obstruct the duty of the trial court to "protect both the absent class and the integrity of the judicial process by monitoring the actions before it." *Id.* (internal quotation omitted).

In the instant case, plaintiff's evidence, attached to their Amended Motion to Compel, showed Advance's one-sided communications with its customers, who were putative class members. Advance broadly argued that it was entirely permissible for it to communicate with its customers, with whom it has ongoing business relationships, during the pendency of this suit.

The issue that was before this Court was whether there was sufficient evidence to show that defendant's attorneys participated in Advance's unilateral communications with its customers, which plaintiff's counsel argued crossed the line into an illegal or fraudulent campaign designed to convince customers that the suit is meritless and that they should opt out. This Court found that the evidence gave it a reasonable basis to suspect that Advance's counsel may have assisted or advised in the communications asserted to be an illegal or fraudulent opt-out campaign.

First, plaintiff had attached copies of two form e-mails and a form letter that Advance sent to its customers after June 17, 2013, when plaintiff sent Class Notice and Opt-Out forms to putative class members.

The first email, dated July 16, 2013, and signed by Dan Leach, Advance's President, was addressed to "Customers and Friends of Advance Refrigeration." Leach informed the recipients that the instant litigation is "an unfounded suit instituted by one former customer of Advance Refrigeration Co." Leach then asked the recipients to assist Advance to "fight the unfair claims" by doing two things. First, Leach asked the customers to complete and send in the Opt-Out forms, which had been sent to them along with the Class Notice. Leach stated, "the more people

that Opt-Out, the better it looks for Advance Refrigeration Co.” Leach did not stop there, but also asked the recipients to complete and send in an affidavit that Advance would be emailing them soon, which he emphasized “will greatly assist us and will be more convincing to the Court that our customers were not being deceived by Advance Refrigeration concerning the GPR fee” which is the subject of the instant litigation (emphasis in original).

The second email was dated July 30, and also was signed by Leach. It attached the aforementioned affidavit, with instructions on how to complete it. Leach stated that “the more affidavits we can receive, the more it will help us to show that the claims of one disgruntled customer are not the claims of the class.”

In August 2013, Advance faxed form letters to numerous customers. Those form letters, like the emails, thanked the customers for their “willingness to assist us in refuting the unfair Notice of Pendency of Class Action suit regarding the GPR charge,” and gave them instructions on how to complete the Opt-Out form and the enclosed form affidavit.

Plaintiff’s Amended Motion to Compel also attached copies of the form “Individual Customer Affidavit” and the form “Company Customer Affidavit,” that had been sent to Advance’s customers, attached to the July 30 email and the August letters. The affidavits contained a statement that:

I understand that the GPR charge is a charge instituted by Advance to recoup the costs that Advance incurs in complying with government regulations. The nature of this charge was explained to me by a representative from Advance, - _____ (*if remembered). At no time did anyone from Advance ever represent to me that the GPR charge was a tax or a charge that was mandated by the government.

At the end of the form affidavits were the words “FURTHER AFFIANT SAYETH NAUGHT,” as well as the statement “Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.” The Court finds that language in the form affidavits is sufficient to raise the possibility that Advance’s attorney advised Advance in the preparation of the affidavits.

Additionally, plaintiff had attached 11 pages of a Call Log that Advance had prepared, indicating with respect to numerous customers the status of the completion of the affidavits sent to them.

Finally, plaintiff had attached an August 17, 2013 letter signed by Advance's Vice President of Sales, Rick George, in which he told one customer, named only as "Graham," that "They [plaintiff] claim we told our customers that the Government Processing Requirement (GPR) is a tax and that our customers were not aware of the fee. Nothing is further from the truth as all of our sales employees have confirmed that this is not true The GPR is simply a reimbursement for the overhead costs of filling out all the Federal, State and local reports and returns." The letter goes on to say, "Furthermore, the actual merits of the case have not yet been effectively analyzed by the judge."

In its argument, plaintiff also pointed out that Advance's counsel acknowledged in open court on September 6, 2013 that he intended to use "documents" Advance had gathered from its customers to support a motion to decertify the class.

As considered by the Court before issuing its June 10, September 8, and September 25, 2014 Orders, the totality of the evidence presented by plaintiff gave the Court a "reasonable basis to suspect" that Advance may have engaged in a unilateral fraudulent opt-out campaign by providing its customers misleading information about this case, and that Advance's counsel may have assisted or advised Advance in doing so. Such conduct, if proved to be true, obstructs this Court's duty to monitor the class notification and opt-out process, violates this Court's Class Notice orders, and interferes with this Court's discretion to issue appropriate notice to class members pursuant to 735 ILCS 5/2-803. The Court, in granting plaintiff's Amended Motion to Compel on June 10, 2014, determined that plaintiff's evidence was sufficient to warrant the Court's application of the crime-fraud exception to the discovery plaintiff sought, regarding communications between Advance and its counsel that involved Advance's communications to class members to opt out of the class.

Advance's 308(a) Motion

Presently before the Court is Advance's motion under Rule 308(a) to certify a question for interlocutory appeal. Rule 308(a) allows for the appeal of interlocutory orders not otherwise appealable if the court finds (1) that the order involves a question of law as to which there is substantial ground for difference of opinion; and (2) that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Appeals under Rule 308(a) are limited to "exceptional" circumstances. *Voss v. Lincoln Mall Mgmt. Co.*, 166 Ill. App. 3d 442, 445 (1st Dist. 1988).

The question Advance seeks to certify does not meet either requirement for certification:

Whether the crime-fraud exception to the attorney-client and work product privilege applies to communications between a defendant and its counsel that

relate to the defendant's communications with putative class members during the opt-out period.

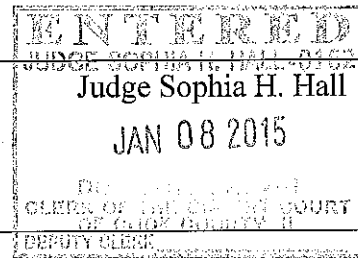
First, the way in which Advance has worded its question would require the appellate court to determine whether the crime-fraud exception could *ever* apply, as a matter of law, to attorney/defendant communications that relate to a defendant's communications with putative class members during the opt-out period. There is no substantial ground to dispute that the crime-fraud exception could apply to such communications, if a sufficient evidentiary showing is made to give the court a reasonable basis to suspect that the attorney participated in illegal or fraudulent conduct connected to the communications.

Further, Advance's proposed question for certification does not accurately address the specific issue on which this Court ruled. This Court did not rule that any and all communications between a client and its attorney, that involve the client speaking to class members during an opt-out period, are automatically subject to the crime-fraud exception. Rather, this Court's ruling was explicitly premised on evidence which raised the possibility, in this case, that defense counsel conferred with Advance about soliciting Advance customers to fill out opt-out forms and affidavits during the opt-out period.

CONCLUSION

For the foregoing reasons, defendant's motion is denied.

Entered: _____



Date: _____