

No. 14-2072

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: PENSION BENEFIT GUARANTY)
CORPORATION,)
)
Petitioner.)

ORDER

Before: BOGGS, ROGERS, and SUTTON, Circuit Judges.

On July 21, 2014, the district court entered an order finding that defendant Pension Benefit Guaranty Corporation (“PBGC”) waived its privilege objections by responding to plaintiffs’ discovery requests with boilerplate objections and failing to provide a privilege log. PBGC petitions for a writ of mandamus striking the order and moves for an emergency stay. Plaintiffs oppose a stay.

“The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought.” *In re Am. President Lines, Ltd.*, 929 F.2d 226, 227 (6th Cir.1991) (citations omitted). In the context of a disclosure order, extraordinary circumstances exist when the order amounts “to a judicial usurpation of power or a clear abuse of discretion, or otherwise works a manifest injustice.” *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009) (internal quotation marks omitted). But most district court rulings on matters of privilege “involve the routine application of settled legal principles. They are unlikely to be reversed on appeal, particularly when they rest on factual determinations for which appellate deference is the norm.” *Id.* at 110. We conclude that this is such a case. The district court’s decision rests on detailed factual findings that developed over a five-year period.

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Moreover, PBGC is a party to the litigation “with recourse in a post-judgment appeal.”

Holt-Orsted v. Dickson, 641 F.3d 230, 238 (6th Cir. 2011).

[P]ostjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.

Mohawk, 558 U.S. at 109.

There are ways for PBGC to prevent or minimize the public disclosure of information that it believes to be privileged until post-judgment appeal becomes available. PBGC can move the district court to issue protective orders at the discovery stage upon a showing of “good cause.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984). PBGC could also move the court to place those documents under seal by showing “compelling reasons” that the interests of privacy outweigh the public’s right to know.” *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 474, 476 (6th Cir. 1983). We have held that preservation of attorney-client and work-product privileges as to the public-at-large can justify sealing documents even where a litigant may have waived those privileges as to the opposing party. *In re Perrigo Co.*, 128 F.3d 430, 439 (6th Cir. 1997). PBGC has not demonstrated that it is clearly and indisputably entitled to a writ of mandamus. *See, e.g., In re Prof’ls Direct Ins. Co.*, 578 F.3d 432, 443 (6th Cir. 2009). Accordingly, the petition for a writ of mandamus is **DENIED**. The motion for an emergency stay is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

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Re: Case No. 14-2072, *In re: Pension Benefit Guar*
Originating Case No. : 2:09-cv-13616

Dear Counsel,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Michelle M. Davis
for Robin Duncan, Case Manager
Direct Dial No. 513-564-7025

cc: Mr. David J. Weaver

Enclosure

No mandate to issue