

In *Navient Solutions, LLC v. The Law Offices of Jeffrey Lohman*, 2020 WL 1917837 (E.D. Va. Apr. 20, 2020), Judge Leonie M. Brinkema largely upheld a magistrate judge's order granting plaintiff's motion to compel, finding several of defendant's claims to be "threadbare at best" but denied plaintiff's request for sanctions because defendant's new counsel did not act unreasonably after taking over the defense.

In this case, plaintiff Navient Solutions, LLC, asserted claims against a group of defendants, primarily debt counseling companies, law firms, and individuals affiliated with those entities, alleging that they conspired together to defraud the plaintiff out of millions of dollars in outstanding student loan debt. *Id.* at *1. Plaintiff's claims included allegations that the defendants manufactured federal lawsuits and arbitration claims against the plaintiff for purported violations of the Telephone Consumer Protection Act (TCPA).

In the course of the litigation, the plaintiff filed a motion to compel seeking production of "all documents withheld by [one of the law firm defendants] on the basis of the attorney-client privilege," including documents withheld by the law firm defendant's former and current employees. *Id.* at *2. The plaintiff narrowed its request to defendant's communications with the student loan debtors who had been referred to it as clients. According to the plaintiff, the communications were discoverable under the crime-fraud exception to the attorney-client privilege. Defendant responded that the crime-fraud exception did not apply to the communications in question because only the attorneys, and not the clients, had purportedly committed a crime or fraud.

While the parties briefed the motion to compel, a potential conflict of interest arose, which defendants decided warranted separate counsel for some of them on substantive matters. Around a month later, "a substantial, actual conflict arose between [one of the law firm defendants] and [its counsel]." Thereafter, the new counsel took over discovery-related matters for the law firm defendant. Together with plaintiff's counsel and the magistrate judge, defendant managed to narrow the issues raised in plaintiff's motion to compel. Also, the law firm defendant's new counsel filed a supplemental brief in opposition to the motion to compel in which it continued to argue that the crime-fraud exception was inapplicable where only the attorney had purportedly committed a crime or fraud.

The magistrate judge granted the plaintiff's motion to compel, and the law firm defendant filed an objection to that decision. The objection raised two arguments, neither of which had been raised to the magistrate judge: "(1) that plaintiff had not made the requisite prima facie showing that [the law firm defendant] had committed a crime or fraud; and (2) that [the law firm defendant] was immune from liability under the Noerr-Pennington doctrine." *Id.* (emphasis in original). These arguments were premised on the law firm defendant's assertion that the only purportedly criminal or fraudulent conduct in which it had engaged was litigation activity, such as advising clients and filing federal lawsuits. But in the objection, the law firm defendant "did not inform the Court of the change of counsel that had occurred during the briefing on the Motion to Compel." Judge Brinkema then remanded the objection to allow the magistrate judge to address the law firm defendant's new arguments in the first instance and to consider an explanation for why these new arguments were not raised initially. *Id.* at *3.

The magistrate judge gave the parties one week to file a second round of supplemental briefing and announced that the objection would be construed as a motion for reconsideration and that in accordance with Judge Brinkema's remand order, sanctions were authorized, if necessary. On March 11, 2020, the magistrate judge issued a memorandum opinion and order requiring the law firm defendant to "produce all responsive documents withheld on the basis of the attorney-client privilege." The magistrate judge rejected both of the law firm defendant's new arguments, holding that the plaintiff had made the requisite showing that the law firm defendant had committed a crime or fraud and that the invocation of the Noerr-Pennington doctrine was premature. The magistrate judge also imposed sanctions on the ground that the defendant and its new counsel had "needlessly increased litigation costs." The magistrate judge's decision prompted another objection, which was the subject of the instant decision.

The law firm defendant made three claims in arguing that the magistrate judge erred in applying the crime-fraud exception to its privileged communications with the student loan debtors. First, the law firm defendant argued that the crime-fraud exception does not apply where the attorney alone purportedly committed a crime or fraud. Judge Brinkema explained that this issue was "a question of first impression in the Fourth Circuit" and observed that both circuit and district courts had reached conflicting conclusions on this issue. After comparing the competing lines of authority, Judge Brinkema ultimately found "application of the crime-fraud exception where the attorney alone purportedly committed a crime of fraud is entirely consistent with the purpose of the attorney-client privilege" and "would both serve the public good and advance the search for the truth." *Id.* at *5-*6. Therefore, because the magistrate judge reached the same conclusion (based on many of the same cases) as Judge Brinkema, that conclusion was not clearly erroneous or contrary to law. *Id.* at *6.

Second, the law firm defendant argued that the plaintiff failed to make a prima facie showing either that the law firm defendant had engaged in criminal or fraudulent conduct or that the privileged communications sought bore a close relationship to that conduct. Specifically, "[a]s to the former," the law firm defendant "argue[d] that the evidence cited by the magistrate judge 'merely indicate[d] that [it] [was] being a zealous advocate for [its] clients.'" "As to the latter, [the law firm defendant] argue[d] that the evidence cited by the magistrate judge 'd[id] nothing to establish a direct link' between the purportedly criminal or fraudulent conduct and the communications sought." Judge Brinkema disagreed, however, finding that the magistrate judge properly concluded that the plaintiff made a prima facie showing that the law firm defendant had engaged in criminal or fraudulent conduct — that is, mail fraud and wire fraud — by asserting its conspiracy allegations and that the plaintiff presented emails and deposition testimony corroborating both the existence of the alleged scheme and the law firm defendant's involvement therein. *Id.* at *7. She also concluded that the magistrate judge properly found that "there is a close relationship between the privileged communications sought and the purported criminal or fraudulent conduct" because the evidence plaintiff sought — communications with the student loan debtors regarding " (1) the consequences of defaulting on student loans, (2) resolution of debt-relief matters or TCPA claims, and (3) [the student loan debtors'] satisfaction with the resolution of debt-relief matters or TCPA claims' " — constituted "the building blocks of the scheme and [of] [p]laintiff's case." Accordingly, Judge Brinkema found that the magistrate judge's ruling on this issue was not clearly erroneous or contrary to law.

Third, the law firm defendant invoked the Noerr-Pennington doctrine, arguing that the doctrine “bars application of the crime-fraud exception.” *Id.* at *8. As Judge Brinkema explained, “[t]he Noerr-Pennington doctrine ‘safeguards the First Amendment right to petition the government for a redress of grievances ... by immunizing citizens from the liability that may attend the exercise of that right.’” But, as the magistrate judge and Judge Brinkema both agreed, the doctrine “is by definition an exemption from ... liability, and does not apply to discovery” disputes. Accordingly, Judge Brinkema refused to disturb the magistrate judge’s ruling on that issue.

Last, as to sanctions, Judge Brinkema overruled the magistrate judge’s imposition of sanctions because she herself erred in the first instance in instructing the magistrate judge that sanctions might be warranted. *Id.* at *9. Specifically, “[w]hen the Court issued its remand order” with suggestions that the magistrate judge consider imposing sanctions, “it had not been made aware of the circumstances surrounding [the law firm defendant’s] change of counsel.” As Judge Brinkema now recognized, from the date that the law firm defendant’s new counsel took over discovery-related matters, the new counsel “worked diligently to narrow the issues presented by plaintiff’s Motion to Compel.” In the end, because the law firm defendant’s new counsel “did not act unreasonably under the[] circumstances,” Judge Brinkema sustained the law firm defendant’s objections on this issue. However, she concluded her decision with a warning. Because the legal bases for arguments advanced by the law firm defendant (as well as some of the other defendants in this action) were often, in Judge Brinkema’s view, “threadbare at best,” including the law firm defendant’s incorrect invocation of the Noerr-Pennington doctrine, she put the defendants “on notice that the Court will not hesitate to impose sanctions for the assertion of any frivolous arguments.” *Id.* at *10.