July 8, 2014

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Corporate Internal Investigations Alert: D.C. Circuit Reaffirms Application of Upjohn Rule to Internal Investigations

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In an important ruling for any corporation that conducts internal investigations of employee conduct, the D.C. Circuit Court of Appeals recently reaffirmed that the protections of the attorney-client privilege fully apply to attorney-supervised internal investigations. The D.C. Circuit's decision in *In re Kellogg, Brown & Root, Inc.*[1] ("*KBR*") provides comfort that companies can conduct internal investigations without fearing that communications during the investigation, including interviews with employees, will be subject to discovery in, among other settings, civil litigation. The D.C. Circuit's decision also provides an opportunity for all of us to be reminded of certain best practices in conducting internal investigations that should ensure that the protections of the privilege are respected.

The District Court's Decision

In *United States ex rel. Barko v. Halliburton Co.*,[2] a *qui tam* plaintiff filed suit against Kellogg Brown & Root Services, Inc. and related entities (the "defendants"), alleging that they engaged in a scheme to defraud the United States by inflating costs and accepting kickbacks while administering contracts in wartime Iraq. The plaintiff requested production of documents from the defendants relating to internal audits and investigations of the alleged misconduct, including internal investigative reports that reflected employee witness statements. The defendants withheld the requested documents as privileged under the attorney-client and work product privileges, and the plaintiff filed a motion to compel production.

After an *in camera* review of the withheld documents, the court ruled the defendants' internal investigative materials were not privileged because they were not created for the purpose of seeking legal advice but instead as result of a "routine" internal investigation required by corporate policy and regulatory law, namely, Department of Defense ("DOD") contracting regulations that require contractors to have an internal control system to "facilitate timely discovery and disclosure of improper conduct in connection with Government contracts."[3] The court even suggested that because that the investigative reports would have been created to comply with the company's DOD reporting obligations, the privilege would not have attached "regardless of whether legal advice were sought" in connection with the internal investigation.[4]

Importantly, the court also distinguished the internal investigative activities from those to which the privilege has classically applied by noting that: (1) the internal investigation was conducted without the consultation of outside lawyers for the company; (2) the interviews of company employees were conducted by non-attorneys; (3) the employees who were interviewed during the internal investigations were never informed that the purpose of the interview was to assist the defendants in obtaining legal advice; and (4) the confidentiality agreements signed by the employees did not mention that the purpose of the investigation was to obtain legal advice.[5]

Appellate Court Ruling

On mandamus review, the D.C. Circuit Court of Appeals summarily rejected the district court's ruling and reaffirmed the Supreme Court's ruling in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), that the attorney-client privilege applies to communications between employees and representatives of the company's counsel in the context of an internal investigation. The appellate court found (rightly in our view) that the district court's primary rationale for its order—that the internal investigation was not privileged because it was undertaken to comply with regulatory or company policy requirements rather than to obtain or provide legal advice—"rested on a false dichotomy."[6] In expressly rejecting the district court's "but for" test, which would require that the internal investigation be undertaken expressly to provide legal advice to the corporation, as opposed to any other purpose, the appellate court ruled:

> In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy.[7]

The Court of Appeals noted the significance of its own ruling, as "a variety of other federal laws require similar internal controls or compliance programs."[8] Accordingly, the court stated that it was appropriate to grant the extraordinary mandamus relief because the district court's approach "would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry."[9] Indeed, the district court's decision had broad-sweeping implications for a number of industries, including the financial services industry.[10]

The Court of Appeals also addressed the other rationales offered by the district court to distinguish *Upjohn* and in doing so affirmed that the privilege will apply when companies take the following approaches commonly used in connection with internal investigations:

First, the internal investigation can be conducted without outside counsel being consulted. The Court of Appeals rejected the notion that the defendants could not claim privilege over the internal investigative reports because outside counsel was not consulted: "*Upjohn* does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply. On the contrary, the general rule, which this Court has adopted, is that a lawyer's status as in-house counsel 'does not dilute the privilege.'"[11] Because in *KBR* the internal investigative reports at issue were conducted under the auspices of in-house counsel, the rule in *Upjohn* applied.

Second, employee interviews can be conducted by non-attorneys. The court noted that even though the interviews in *KBR* were conducted by non-attorneys, the investigation was nevertheless "conducted at the direction" of attorneys in the defendants' in-house legal department. Accordingly, the non-attorney interviewers were serving as "agents" of the attorneys in the internal investigation, and, as such, communications made to these non-attorneys during the course of the internal investigation were privileged.[12]

Third, the court noted that *Upjohn* did not require that the interviewed employees be "expressly informed that the purpose of the interview was to assist the company in obtaining legal advice."[13] Relatedly, and also in disagreement with the district

court, the court found that it was insignificant that the "confidentiality agreements signed by KBR employees did not mention that the purpose of KBR's investigation was to obtain legal advice."[14] The court did suggest, however, that the general awareness of the interviewed employees that the investigation was being conducted by the legal department may be a relevant factor in analyzing *Upjohn*'s applicability.[15]

Best Practices for Internal Investigations

While the appellate court's ruling is significant for reaffirming *Upjohn*'s applicability to internal investigations, it is also a reminder that the privilege that applies to internal investigations is subject to attack, with potentially grave consequences should such an attack be successful, as it almost was in *KBR*. Accordingly, it is a good time to take stock and remind ourselves of certain best practices that will ensure that communications during an internal investigation are privilege-protected. These include the following:

- At the beginning of the investigation, document the legal department's intent to conduct an internal investigation for the purpose of providing legal advice to the company's management;
- Explain to witnesses that the internal investigation is being conducted under the auspices of the company's counsel (whether in-house or outside counsel) for the purpose of seeking legal advice from counsel on behalf of the company;
- Explain to witnesses that their communications with the interviewer will be protected by the attorney-client privilege, a privilege that belongs to the company;
- Remind witnesses that the company's attorneys involved in the internal investigation represent the company, not the witness; and
- Maintain in-house attorney direction, if not the direction of outside counsel, of the internal investigation at all stages of the investigation.

Finally, it is worth noting that some companies may permit their internal audit departments or other internal investigators to conduct routine investigations without first consulting with the company's legal department. Although there may be reasons to permit internal auditors or investigators to conduct witness interviews without the involvement of the legal department, companies should be mindful that those interviews may not necessarily enjoy the protection of the attorney-client privilege.

1. *In re Kellogg, Brown & Root, Inc.*, No. 14-5055, 2014 WL 2895939 (D.C. Cir. June 27, 2014).
2. *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-cv-01276, 2014 WL 1016784 (D.D.C. Mar. 6, 2014).
3. *Id.* at *3.
4. *Id.* Specifically, the court noted that DOD's regulations "require a 'written code of business ethics,' 'internal controls for compliance,' 'a mechanism, such as a hotline, by which employees may report suspected instances of improper conduct,' 'internal and/or external audits,' 'disciplinary action for improper conduct,' 'timely reporting to appropriate Government officials,' and 'full cooperation with any Government agencies.'" *Id.* (quoting 48 C.F.R. §§ 203.7000—203.7001(a) (10-1-2001 edition)) (brackets omitted).
5. *See id.* The district court also held that the work product doctrine did not protect the internal reports because the defendants conducted the internal investigations "in the ordinary course of business irrespective of the prospect of litigation." *Id.* at *4. The court suggested that the defendants would not have ignored the allegations because responsible businesses investigate allegations of fraud, waste, or abuse in their operations and that DOD regulations required the defendants to investigate any potential fraud. *Id.* The court also noted that the fact that the investigations occurred years before the complaint in the case was unsealed indicated that the documents prepared during the investigations were not prepared in anticipation of litigation. *Id.* The appellate court did not address this aspect of the ruling, as its finding that the district court had erred in holding that the attorney-client privilege did not apply precluded reaching the merits of this issue.
6. *In re Kellogg, Brown & Root, Inc.*, 2014 WL 2895939, at *4.
7. *Id.* at *5.
8. *Id.* at *7. Notably, the court cited the books and records and internal controls provisions applicable to issuers under the 1934 Exchange Act, 15 U.S.C. § 78m(b)(2), as a type of federal law that requires internal controls and compliance programs to be maintained by a company. *See id.*

9. *Id.* at *4.
10. *See, e.g.,* Bank Secrecy Act, 31 U.S.C. §§ 5311 *et seq.* (requiring domestic banks, insured banks, and other financial institutions with operations in the United States to maintain a compliance program and internal controls that are designed to detect and report suspicious activity such as money laundering, terrorist financing, or other financial crimes).
11. *In re Kellogg, Brown & Root, Inc.*, 2014 WL 2895939, at *3 (quoting *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984)).
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

White Collar Defense & Investigations is published by the Litigation Department of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

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