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Whistleblower Defense Alert: D.C. Circuit Grants Writ of Mandamus and Protects Privilege of Internal Corporate Investigations

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By Michael J. Bronson and Jacob D. Mahle

Last week, the D.C. Circuit provided good news to defense contractors, health care providers and all other corporate entities doing business with the government. In a forceful opinion, the court overruled a trial court decision that portended disastrous consequences for privileged internal investigations by corporate legal departments. In its place, the D.C. Circuit provided a thoughtful analysis that reinforces the critical attorney-client privilege attached to internal investigations, rebuffs attempts to condition that privilege on the participation of certain attorneys or the use of “magic words” of privilege, and protects that privileged investigation through the use of a writ of mandamus.

On Friday, June 27, the Court of Appeals for the D.C. Circuit granted a writ of mandamus overturning the District Court’s decision on a key privilege issue in the case of *In re Kellogg, Brown & Root, Inc.* (No. 14-5055, 2014 U.S. App. LEXIS 12115). Relator Harry Barko filed a False Claims Act complaint in 2005 against KBR related to its administration of military contracts in Iraq. In the course of the litigation, Barko sought discovery of documents related to KBR’s internal investigation into the alleged fraud — an investigation that was conducted pursuant to the company’s Code of Business Conduct and overseen by the company’s law department.

After an *in camera* review, the District Court ordered the production of the investigation documents. In so ordering, the District Court held that the attorney-client privilege did not apply to the investigation because, among other reasons, it had not been shown that “the communication would not have been made ‘but for’ the fact that legal advice was sought.” *U.S. ex rel. Barko v. Halliburton Co.*, No. 05-CV-1276, 2014 WL 1016784 at *2 (D.D.C. Mar. 6, 2014). In reaching its conclusion, the District Court sought to distinguish the *Barko* case on several grounds from the United States Supreme Court’s *Upjohn* decision, the keystone ruling providing attorney-client protection to internal corporate investigations for more than three decades.

The D.C. Circuit found that the District Court's ruling on the privilege issue was clearly erroneous. The court held that the standard from *Upjohn* — where “communications were made by company employees to company attorneys during an attorney-led internal investigation that was undertaken to ensure the company's ‘compliance with the law’” — mandated a finding that the attorney-client privilege applies to internal investigations and communications in the case at bar. In so doing, the D.C. Circuit concluded that KBR's claim of privilege was “materially indistinguishable from *Upjohn*'s assertion of the privilege in that case.”

Going further, the D.C. Circuit rejected the District Court's attempts to factually distinguish KBR's claim from *Upjohn*. The D.C. Circuit concluded that whether the investigation was conducted independently by in-house counsel or in consultation with outside attorneys was irrelevant, finding that the involvement of outside counsel is not a necessary predicate for the privilege to apply — and rejecting one of the District Court's foundations. Likewise, the D.C. Circuit rejected the District Court's reliance upon the fact that many of the interviews were conducted by non-attorneys, reasoning that the investigation was conducted at the direction of KBR's Law Department, and recognizing that “communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege.” Finally, the D.C. Circuit rebuked the District Court's attempt to distinguish its ruling on the basis that KBR employees were not “expressly informed that the purpose of the interview was to assist the company in obtaining legal advice,” as the interviewees in *Upjohn* had been. As the D.C. Circuit said, there is no requirement that a party “use magic words to its employees in order to gain the benefit of the privilege for an internal investigation.”

In addition to its finding that the factual circumstances were factually indistinguishable from *Upjohn*, the appellate court held that the District Court had applied the incorrect standard to its determination of whether the attorney-client privilege applied. The D.C. Circuit reasoned that the District Court reliance on the notion that the purpose of the internal investigation was to comply with regulatory requirements, rather than to provide or obtain legal advice, created a “false dichotomy.” According to the D.C. Circuit, “[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.”

The District Court reached its erroneous conclusion because it misconstrued the “primary purpose” test by applying a “but-for” test — namely, that attorney-client communications can only be privileged if they would never have been made “but for” the fact that legal advice was sought. The D.C. Circuit flatly rejected this test, explaining that the use of that approach in the context of the attorney-client privilege would eliminate the privilege entirely for communications made for both legal and business purposes, while completely eradicating the 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.”

Instead, the D.C. Circuit articulated a much clearer explanation of the “primary purpose” standard — stating that “properly applied, the test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication. 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.”

Under these circumstances, the D.C. Circuit concluded that the extraordinary remedy of mandamus was warranted. In addition to its finding of clear legal error in the District Court's substantive privilege decision, the D.C. Circuit concluded that there was no other adequate means to obtain relief, because other avenues of appeal were not available and an appeal after final judgment would be too late, because privileged materials would have already been released. The District Court also concluded that the writ was "appropriate under the circumstances" in light of the "potentially far-reaching consequences" of the District Court's decision, which threatened to "vastly diminish the attorney-client privilege in the business setting" and "potentially upend certain settled understandings and practices" related to internal corporate investigations by defense contractors.

The D.C. Circuit's decision provides critical reinforcement for the protection of documents and information generated through internal corporate investigations. If allowed to stand, the District Court's decision would have provided support for future attempts by FCA plaintiffs to obtain and use the sensitive investigative materials compiled by legal departments in the course of their statutory compliance and litigation preparation. By rejecting the District Court's ruling, the D.C. Circuit has reaffirmed the *Upjohn* protection of internal investigations, and also made it clear that those investigations (1) need not involve outside attorneys, (2) can utilize non-attorneys for the investigatory interviews, and (3) do not require the utterance of any "magic words" to obtain the protection of the attorney-client privilege. Additionally, by vindicating the privilege through the use of the remedy of mandamus, the D.C. Circuit has identified another potential avenue for FCA defendants to protect investigatory materials.

When conducting an internal investigation, in-house counsel should take care to document that the investigation is being conducted at the direction of counsel (whether inside or outside counsel) and that one of the substantial purposes of the investigation is ensure compliance with the law. If non-lawyers are involved in gathering facts or interviewing witnesses, any reports or summaries they prepare should clearly state that the work was done at the request of counsel and that the gathered information is being provided to counsel to obtain legal advice. When conducting interviews of employees, the employees should be told that an investigation is being conducted by the legal department and that the communications must be kept confidential. By creating a clear record that the investigation was conducted in order to obtain or provide legal advice, companies can make it far easier to defend privilege claims in any subsequent litigation that may arise.

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