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Whistleblower Defense Alert: D.C. Circuit Upholds Assertion of Privilege as to Internal Investigation Documents in FCA Suit

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CLIENT ALERT | 8.12.2015

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On Tuesday, August 11, 2015, the United States Court of Appeals for the District of Columbia Circuit released a decision upholding an assertion of privilege by Kellogg Brown and Root, Inc. (KBR) over internal investigation documents in a FCA suit alleging kickbacks and overbilling on Iraq war subcontracts. *In re: Kellogg Brown & Root, Inc.*, No. 14-5319, 2015 U.S. App. LEXIS 14016 (D.C. Cir. Aug. 11, 2015). During discovery in the FCA case, the relator sought production of KBR's prior internal investigation into the alleged fraud, which had been conducted by the company's legal department. The District Court ordered the production of the documents, holding that the investigation was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." (*Id.* at *3.) The D.C. Circuit vacated this order, holding that the District Court's privilege ruling was "'materially indistinguishable' from the Supreme Court's contrary holding in *Upjohn*." (*Id.*) (We analyzed the Court's previous decision in this *Whistleblower Defense Alert*.) However, in its prior decision, the D.C. Circuit allowed that the District Court might consider "timely asserted other arguments for why these documents are not covered by either the attorney-client privilege or work-product protection." (*Id.* at **3-4.) The D.C. Circuit's August 11 decision granted KBR's second petition for a writ of mandamus vacating the District Court's subsequent ruling that the same internal investigation documents should be turned over in discovery.

In its second review of the internal investigation documents at issue, the District Court found that KBR had impliedly waived the attorney-client privilege and work-product protection for the documents. The District Court concluded that (1) the documents must be produced under Federal Rule of Evidence 612¹ on the theory that KBR waived attorney-client privilege and work product protection when KBR's corporate representative indicated that he reviewed the documents in preparation for his deposition, and (2) KBR waived the attorney-client privilege and work product protection for the documents under the doctrine of "at issue" waiver. (*Id.* at *10.) The D.C. Circuit found that both

rulings were in error.

The D.C. Circuit roundly rejected the District Court's first ruling, because it "would allow the attorney-client privilege and work product protection covering internal investigations to be defeated routinely by a counter-party noticing a deposition on the topic of the privileged nature of the internal investigation." (*Id.* at *13.) The D.C. Circuit held that allowing a party to "'overcome privilege by putting [internal investigation documents] in issue' at a deposition, and then demanding under Rule 612 to see the investigatory documents the witness used to prepare" would "defy 'reason and experience,' and 'potentially upend certain settled understandings and practices' about the protection for such investigations." (*Id.* at *15.) The District Court's ruling, said the D.C. Circuit, represented a misapplication of Rule 612 and "failed to give due weight to the privilege and protection attached to the internal investigation materials." (*Id.*)

The D.C. Circuit found the District Court's second ruling incorrect because KBR had not put the conclusions of the internal investigation document "at issue." The District Court's finding of "at issue" waiver relied on a footnote in KBR's motion for summary judgment stating that KBR was required under applicable regulations and policies to report any wrongdoing to the government, and that no report to the government was made following its investigation of the alleged fraud. The District Court also pointed to KBR's corporate representative's deposition testimony regarding the "fact of the [internal] investigations and KBR's reporting duties." (*Id.* at **18-19.) According to the District Court, KBR's inclusion of this footnote and the deposition testimony created an implied waiver by "actively" seeking a "positive inference in its favor based on what KBR claims the documents show" (*id.* at *18)—namely, that because KBR was required to report any wrongdoing to the government, and no report following the investigation was made, the internal investigation documents must have concluded that there was no wrongdoing on the part of KBR. The D.C. Circuit ruled that no such implied disclosure of the internal investigation documents' contents and conclusions had occurred that would result in a waiver. The transcript of the corporate representative's deposition, according to the D.C. Circuit, was "simply a record of what was said, not itself an argument" for the "positive inference" drawn by the District Court. (*Id.*) The D.C. Circuit further held that the footnote contained no direct statement regarding the internal investigation documents' contents, and was a factual recitation rather than an argument putting the contents of the documents at issue. (*Id.* at **22-23.) The District Court's assignment of a "positive inference" as to KBR under the footnote was also found to be in error, as KBR was the movant for summary judgment, and all inferences should therefore have been drawn against it rather than in its favor. (*Id.* at *24.)

The D.C. Circuit further found the District Court's order compelling the production of "substantial portions" of the internal investigation documents that "constitute[d] fact work product" was in error. (*Id.* at **24-25.) Although the D.C. Circuit concluded that the District Court "got the law right," it had "misapplied that law to the documents it ordered disclosed." (*Id.*) According to the D.C. Circuit, "[t]he District Court correctly stated that materials produced by an attorney's agent are attorney-client privileged only to the extent they contain information obtained from the client." (*Id.* at **27-28.) But "[e]ven a cursory review of the compelled documents" showed that the District Court's order "would require KBR to produce materials" and "that are attorney-client privileged" and that contain "numerous mental impressions of the investigators." (*Id.*)

The D.C. Circuit's decision is a boon to any entity that may find itself defending against an FCA suit in which allegations are related to or implicate privileged internal investigations conducted by its legal department. Indeed, the decision strongly reinforces the longstanding precept that "the attorney-client privilege protects confidential employee communications made during a business's internal investigation

led by company lawyers.” (*Id.* at *1.) Moreover, the decision provides a useful guide as to how FCA defendants may refer to such investigations in pleadings, motions, and depositions, while still maintaining their privileged and protected status.

¹ Federal Rule of Evidence 612 provides that where a witness has used a writing to refresh memory before testifying, the adverse party is entitled to have it produced and to introduce into evidence any portion that relates to the witness’s testimony, “if the court decides that justice requires the party to have those options.” Fed. R. Evid. 612(a)(2).