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D.C. Circuit Strongly Reaffirms the Applicability of the Attorney-Client Privilege to Internal Compliance Investigations

By George B. Breen, Jonah D. Retzinger, Marshall E. Jackson Jr., and Stuart M. Gerson*

There had been considerable doubt that the attorney-client privilege attached to internal compliance investigations, particularly those investigations conducted on governmental mandate by company internal counsel. In a recent victory for companies and effective compliance, the United States Court of Appeals for the D.C. Circuit squarely removed that doubt in support of the application of privilege. The authors of this article discuss the decision and its impact.

Especially in the District of Columbia Circuit, the home base for many fraud cases in which the government is opposed to health care providers and defense contractors, there had been considerable doubt that the attorney-client privilege attached to internal compliance investigations, particularly those investigations conducted on governmental mandate by company internal counsel. In a recent victory for companies and effective compliance, the United States Court of Appeals for the D.C. Circuit squarely removed that doubt in support of the application of privilege.

Reversing the controversial district court decision in *United States ex rel. Barko v. Halliburton Co.*,[1] the D.C. Circuit handed down its opinion in *In re Kellogg Brown & Root*.[2] The D.C. Circuit's holding reinforces the protections established by the Supreme Court 30 years ago in *Upjohn Co. v. United States*,[3] that afford privilege to confidential employee communications made during a corporation's internal investigation led by company lawyers.

THE DISTRICT COURT DECISION

In *Barko v. Halliburton Co.*, a former contract administrator for Kellogg,

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[1] 2014 U.S. Dist. LEXIS 36490, 2-3 (D.D.C. Mar. 6, 2014).

[2] 2014 U.S. App. LEXIS 12115 (D.C. Cir. 2014).

[3] 449 U.S. 383 (1981).

Brown, and Root ("KBR") alleged that Halliburton and other KBR contractors had inflated the costs of construction services on military bases in Iraq and passed on those inflated costs to the United States Government. KBR internally investigated tips about these potential procurement irregularities several years before the former contract administrator filed the *Barko* lawsuit. Non-attorney security investigators working under the direction and supervision of KBR's law department conducted the investigations. The investigators interviewed KBR employees and submitted reports to KBR's in-house attorneys, who, depending on whether the violation had been substantiated, would notify senior management and advise on further action.

Barko filed a *qui tam* suit and ultimately moved to compel the production of documents created in connection with these internal investigations. KBR opposed the production of documents, arguing that it had conducted the internal investigations for the purpose of obtaining legal advice, and the internal investigation documents were therefore protected by the attorney-client privilege. Barko countered that the internal investigation documents were unprivileged business records that he was entitled to discover.

The district court ultimately concluded that the documents were not protected by attorney-client privilege, holding that KBR's investigation was not for the "primary purpose" of seeking legal advice. In rejecting application of the attorney-client privilege, the *District Court* found significance in the fact that (1) the KBR in-house attorneys conducted the investigation without consultation with outside lawyers; (2) the interviewers were not attorneys; and (3) the confidentiality statements signed by the interviewees mentioned business, rather than legal, purposes for limiting the disclosure of information.[4] Additionally, the district court held that the work-product privilege did not apply because KBR conducted the internal investigation in the ordinary course of business, irrespective of the prospect of litigation.[5] The court therefore determined that the "investigations were undertaken pursuant to regulatory law and corporate policy rather than for purposes of obtaining legal advice."[6] The court reasoned that KBR would have conducted an investigation regardless of whether legal advice was sought because regulatory law and corporate policy required such compliance investigations.

THE D.C. CIRCUIT DECISION

KBR sought review of the district court's decision by the D.C. Circuit. The

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[4] *Barko v. Halliburton Co.*, 2014 U.S. Dist. LEXIS 36490 at *9–11.

[5] *Id.* at *11–14.

[6] *Id.* at *8.

D.C. Circuit rejected the district court's conclusion that the attorney-client privilege did not apply because the investigations had been undertaken pursuant to regulatory law and corporate policy rather than for purposes of obtaining legal advice. The D.C. Circuit held that the district court's privilege ruling was legally erroneous and materially indistinguishable from the assertion of the privilege in *Upjohn*.[7] KBR had initiated an internal investigation to gather facts that would allow the company's lawyers to advise on whether the company was in compliance with the law, and as in *Upjohn*, KBR conducted its investigation under the auspices of KBR's in-house legal department, acting in its legal capacity. The court held "[t]he same considerations that led the Court in *Upjohn* to uphold the corporation's privilege claims apply here."[8]

In its analysis, the D.C. Circuit noted several reasons why the attorney-client privilege applied. The court found that the fact that the internal investigation was conducted by in-house counsel without consultation with outside lawyers did not undermine the privileged nature of the review because *Upjohn* does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply. The court also found that the use of non-lawyers by KBR's legal department in its investigations did not negate the attorney-client privilege, and communications made by and to non-attorneys serving as agents of attorneys are protected. The D.C. Circuit found that the confidentiality statements signed by the interviewees—which mentioned business, rather than legal, purposes for limiting the disclosure of information—did not negate the privilege because nothing in *Upjohn* requires a company to use specific language in its communications to employees in order to gain the benefit of the privilege for an internal investigation.

Finally, the D.C. Circuit rejected the district court's attempt to distinguish *Upjohn* from *Barko* on the ground that KBR's internal investigations were undertaken to comply with Department of Defense regulations that require defense contractors, such as KBR, to maintain compliance programs and conduct internal investigations into allegations of potential wrongdoing. The D.C. Circuit found that "[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."[9]

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[7] *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 756–758 (D.C. Cir. 2014).

[8] *Id.* at 757–758.

[9] *Id.* at 758–759.

THE IMPACT OF THE D.C. CIRCUIT'S DECISION

The decision in the *KBR* case has reinforced the protections of the attorney-client privilege in the context of internal investigations. However, to receive such protection, both in-house and outside counsel must make sure to follow these steps when conducting and assisting in internal investigations:

1. *Have attorneys direct the investigation and document the oversight*. Non-attorneys involved in the investigation should be given written instructions making clear that they are working at the direction and under the control of the company's legal department or outside counsel and that one of the significant purposes of the investigation is to obtain the relevant facts that would enable the lawyers to provide legal advice to the company.
2. *Provide an appropriate Upjohn warning*. All employees who are interviewed in connection with an internal investigation should receive a warning explaining that the conversation is for the purpose of providing legal advice to the company and protected by the company's attorney-client privilege. Although the D.C. Circuit stated that "magic words" are not required, it remains important to notify witnesses that information discussed in an investigation should be kept confidential and that counsel represents the company and not any particular individual or employee of the company.
3. *Mark documents appropriately*. Label all documents that are intended to be covered by the attorney-client privilege or the work product doctrine.
4. *Address the investigation report to the company's attorneys.* The report of an investigation should be addressed to the company's in-house legal department, which should memorialize its review of the report and any advice offered to the company as a result of the investigation.
5. *Record efforts to preserve privilege.* There should be a record of efforts to preserve privilege. Counsel should report the results of its investigation directly to the specific client, whether it is the company's management, general counsel, or board of directors.
6. *Document any threat of litigation.* The scope of the work product doctrine depends, in part, on precisely when a company is determined to have acted in anticipation of litigation. Clear documentation on this point will help prevent a later conclusion that the investigation was not connected to the threat of litigation. One way to document this is to issue a litigation hold because such a hold generally marks the point at

which litigation or some other enforcement activity is anticipated.