

CLIENT UPDATE

D.C. CIRCUIT UPHOLDS PRIVILEGE PROTECTIONS IN COMPLIANCE INVESTIGATIONS

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On June 27, 2014, the U.S. Court of Appeals for the D.C. Circuit granted a writ of mandamus and overturned a widely publicized decision by the district court, *United States ex rel. Harry Barko v. Halliburton Company et al.*,¹ which had held that documents relating to an internal investigation conducted by defendant Kellogg Brown & Root Services, Inc. (“KBR”) were not protected from disclosure by the attorney-client privilege.² In vacating the district court’s order to produce the documents at issue, the Court of Appeals concluded that the lower court’s analysis was inconsistent with the seminal Supreme Court case *Upjohn Company v. United States*, which held that the attorney-client privilege protects confidential employee communications made during a business’s internal investigation led by company lawyers.³

¹ No. 1:05-cv-1276, 2014 WL 1016784 (D.D.C. Mar. 6, 2014).

² *In re Kellogg Brown & Root Servs., Inc.*, No. 14-5055, 2014 WL 2895939 (D.C. Cir. June 27, 2014); see also Andrew M. Levine, Andy Y. Soh and Sebastian Ko, *U.S. District Court Limits Privilege Protections in Compliance Investigations*, 5(9) FCPA Update (Apr. 29, 2014), available at http://www.debevoise.com/files/Publication/16d38047-f25e-4e68-89e3-8616135248d2/Presentation/PublicationAttachment/10b2fcbc-f6e4-4d04-9d6f-9b4e5e47c84a/FCPA_Update_Apr_2014.pdf.

³ *In re Kellogg Brown & Root Servs., Inc.*, 2014 WL 2895939, at *3 (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)).

At the core of the D.C. Circuit’s opinion was its articulation of the “primary purpose” test to be used in cases in which an attorney-client communication has multiple purposes. According to the court, the privilege applies if “one of the significant purposes” of the communication was to obtain or provide legal advice.⁴ In the context of internal investigations, the court reasoned, the privilege applies so long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, “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.”⁵

THE DISTRICT COURT’S OPINION

The underlying case was brought by Harry Barko (“Barko”), a whistleblower plaintiff who had alleged that KBR, Halliburton, and other contractors had overbilled the U.S. government in connection with hundreds of war-zone construction contracts. During discovery proceedings before a magistrate judge, Barko moved to compel KBR to produce certain documents related to KBR’s prior internal investigation of the alleged billing misconduct. The investigation had been conducted pursuant to statutory and contractual requirements – imposed on all government contractors – that required KBR to establish and administer a compliance program and conduct internal investigations, and, where necessary, make self-reports of misconduct by its employees. The program was overseen by KBR’s Law Department.

KBR opposed the motion, arguing that its investigation was protected by the attorney-client privilege under *Upjohn Company v. United States*, which extended the privilege to communications made by corporate employees to in-house counsel conducting an internal investigation on the company’s behalf.⁶ After the magistrate judge granted Barko’s motion to compel and ordered KBR to disclose the documents, KBR sought review by the district court.

In an opinion issued on March 6, 2014, the district judge upheld the magistrate judge’s order, holding that the investigation-related documents were not subject to the attorney-client privilege because KBR failed to show that the communications “would not have been made ‘but for’ the fact that legal advice was sought.”⁷ The district court’s decision focused on the fact that KBR’s compliance program was mandated by regulatory

⁴ *In re Kellogg Brown & Root Servs., Inc.*, 2014 WL 2895939, at *4.

⁵ *Id.*

⁶ *Upjohn*, 449 U.S. at 394.

⁷ *United States ex rel. Harry Barko v. Halliburton Co.*, 2014 WL 1016784, at *2 (quoting *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 128 (D.D.C. 2012)).

requirements imposed on all government contractors by the Department of Defense. In the court's view, because the investigation would have been conducted in the ordinary course of business, irrespective of whether legal advice was sought or provided, the "primary purpose" of the internal investigation was regulatory compliance and not the obtainment or provision of legal advice.⁸

The district court also distinguished the facts of the case from *Upjohn* by noting that, unlike *Upjohn*: (1) the in-house attorneys did not consult outside lawyers before beginning the investigation;⁹ (2) the interviews were generally not conducted by lawyers;¹⁰ and (3) the witnesses interviewed were not expressly informed that the aim of the interview was to facilitate legal advice.¹¹

THE D.C. CIRCUIT'S OPINION

KBR asked the district court to certify the privilege question to the D.C. Circuit for interlocutory appeal. Upon the district court's denial of the request for certification, KBR filed a petition for a writ of mandamus in the D.C. Circuit, which stayed the document production order pending resolution of the petition. In an opinion issued on June 27, 2014, the circuit court granted KBR's petition and vacated the district court's document production order.

The D.C. Circuit rejected the "but for" test applied by the district court, noting that this "novel approach to the attorney-client privilege would eliminate the attorney-client privilege for numerous communications that are made for *both* legal and business purposes and that heretofore have been covered by the attorney-client privilege."¹² Rather, the correct test is the "primary purpose" test, which, as articulated by the D.C. Circuit, asks whether obtaining or providing legal advice was "a primary purpose of the communication, meaning one of the significant purposes of the communication."¹³ The circuit court emphasized that a court should "not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other," and should not "presume that a communication can have only one primary purpose."¹⁴

⁸ *Id.* at *3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *In re Kellogg Brown & Root Servs., Inc.*, 2014 WL 2895939, at *4 (emphasis added).

¹³ *Id.* at *5.

¹⁴ *Id.*

As applied to internal investigations, if one of the significant purposes of the investigation was to obtain or provide legal advice, the privilege will apply under the court's decision, "regardless of whether [the investigation] was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy."¹⁵

The D.C. Circuit also rejected the district court's other attempts to distinguish the case from *Upjohn*. According to the appellate court, *Upjohn* does not require the involvement of outside counsel for the application of the attorney-client privilege, and "[o]n the contrary, the general rule . . . is that a lawyer's status as in-house counsel 'does not dilute the privilege.'"¹⁶ Even non-lawyers may conduct privileged interviews, provided the non-lawyers are acting as agents of attorneys directing the investigation.¹⁷ Finally, with respect to the fact that KBR did not expressly inform witnesses that each interview was intended to facilitate legal advice, the D.C. Circuit stated that *Upjohn* does not require a company to convey "magic words to its employees" in order to invoke legal privilege for interviews.¹⁸ It was sufficient that KBR's employees knew that the legal department was conducting a sensitive investigation and would protect the information that they disclosed.¹⁹

THE IMPORTANCE OF THE DECISION

As the D.C. Circuit noted, the district court's decision had "generated substantial uncertainty about the scope of the attorney-client privilege in the business setting,"²⁰ and had "the potential to work a sea change in the well-settled rules governing internal corporate investigations."²¹ According to the appellate court, the district court's "novel approach would eradicate the attorney-client privilege for internal investigations,"²² thereby eviscerating the protections secured by *Upjohn*.

Of particular concern was the potentially chilling effect of the decision on communications made in the course of internal investigations conducted by businesses required by law to maintain compliance programs. As the D.C. Circuit recognized, given the numerous

¹⁵ *Id.*

¹⁶ *Id.* at *3 (quoting *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984)).

¹⁷ *Id.* (citing *FTC v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980)).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at *1.

²¹ *Id.* at *7 (internal quotation marks omitted).

²² *Id.* at *4.

federal laws that require many companies to maintain internal controls or compliance programs, the district court's approach "would disable *most public companies* from undertaking confidential internal investigations."²³

The district court's opinion, if left undisturbed, could have unnecessarily exposed internal compliance investigations, whether required by law or voluntarily undertaken, to compelled production of documents and giving of testimony in both private and government actions. In overturning the district court's decision, the D.C. Circuit has enabled companies to continue building and investing in robust compliance programs that include self-investigation of potential regulatory violations under the protection of the attorney-client privilege. Nevertheless, to best maintain the privilege, companies should ensure that they meet the other requirements articulated by *Upjohn* and its progeny. Internal investigations should retain a focus on legal compliance, and be monitored carefully by attorneys and executed under their direction.²⁴

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Please do not hesitate to contact us with any questions.

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²³ *Id.* at *7.

²⁴ For more best-practice recommendations, see Andrew M. Levine, Andy Y. Soh and Sebastian Ko, *U.S. District Court Limits Privilege Protections in Compliance Investigations*, 5(9) FCPA Update (Apr. 29, 2014), available at http://www.debevoise.com/files/Publication/16d38047-f25e-4e68-89e3-8616135248d2/Presentation/PublicationAttachment/10b2fcbc-f6e4-4d04-9d6f-9b4e5e47c84a/FCPA_Update_Apr_2014.pdf.