



Government & Internal Investigations ADVISORY ■

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D.C. Circuit Reaffirms Applicability of Attorney-Client Privilege to Corporate Internal Investigations

On June 27, the United States Court of Appeals for the D.C. Circuit issued an important decision in *In re Kellogg Brown & Root, Inc.*, 14-5055, 2014 WL 2895939 (D.C. Cir. June 27, 2014), restoring the applicability of the attorney-client privilege to documents created in connection with a company's internal investigation. The court's opinion is considered a victory for the business community, as it reversed a lower court decision that "threaten[ed] to vastly diminish the attorney-client privilege in the business setting."

I. Facts

The case involved a False Claims Act lawsuit brought by Harry Barko, a former employee of Kellogg Brown & Root, Inc. (KBR), who alleged that KBR and other defense contractors had defrauded the government by inflating the costs of construction services on military bases in Iraq and accepting kickbacks. Before the lawsuit was filed, KBR had conducted an internal investigation in accordance with its Code of Business Conduct and as required by government procurement regulations. During discovery, Barko sought documents related to the internal investigation, to which KBR objected on grounds of attorney-client privilege and the work-product doctrine. The district court reviewed the documents *in camera* before ruling on the discovery dispute.

II. District Court's Decision

The lower court acknowledged that the Supreme Court in *Upjohn v. United States* held that the attorney-client privilege applies even when the client is a corporation, "as long as '[t]he communications at issue were made by [company] employees to counsel for [the company] acting as such, as the direction of corporate superiors in order to secure legal advice from counsel!'"

The district court, however, distinguished this case from *Upjohn* and ruled that the documents were not privileged because the investigation had not been conducted for the primary purpose of seeking legal advice, but instead, was a routine compliance investigation pursuant to regulatory law and corporate policy. In support of that conclusion,

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the district court noted that: (1) in-house attorneys had conducted the investigation without consultation with outside lawyers; (2) many of the interviews during the investigation had been conducted by non-attorneys; and (3) the employees interviewed were not advised that the purpose of the interview was to assist the company in obtaining legal advice. As a result, the district court concluded that KBR had failed to show that the “communication would not have been made ‘but for’ the fact that legal advice was sought.”

III. The D.C. Circuit’s Decision

The D.C. Circuit reversed the district court’s decision and granted KBR’s petition for writ of mandamus—a “drastic and extraordinary” remedy. The appellate court ruled that KBR’s claim of privilege “is materially indistinguishable from *Upjohn*’s assertion of privilege in that case.” In reaching that conclusion, the three-judge panel held that: (1) the fact that the internal investigation was conducted by in-house counsel without consultation with outside lawyers did not undermine KBR’s assertion of privilege; (2) the attorney-client privilege still applied to interviews conducted by non-attorneys as long as they were done at the direction of in-house attorneys; and (3) the mere fact that the company did not use “magic words” to advise its employees about obtaining legal advice did not eviscerate the privilege, since the facts showed that employees “knew that the company’s legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected.”

The D.C. Circuit also rejected the district court’s use of a “but-for” test to determine whether the primary purpose of an internal investigation was to assist the company in obtaining legal advice. A “but-for” test, the panel explained, would improperly narrow the privilege only to those communications where the *sole* purpose was to obtain legal advice. Instead, the appellate court explained that the correct test is whether “obtaining or providing legal advice [was] a primary purpose of the communication, meaning one of the significant purposes of the communication.”

Thus, the privilege applies if “one of the significant purposes of the internal investigation was to obtain or provide legal advice,” 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.” In this case, the court found that one of the significant purposes of the communications surrounding the internal investigation was to obtain or provide legal advice and it was therefore protected by the attorney-client privilege.

IV. Key Takeaways

This is a significant victory for companies looking to conduct prompt internal investigations to ensure that their business practices comply with regulatory laws, without having to sacrifice the protections of the attorney-client privilege. Particularly noteworthy is the appellate court’s conclusion that the corporate attorney-client privilege can still be upheld even if the investigation is motivated in part by business/regulatory compliance concerns if *one* of the significant purposes of the investigation is to obtain legal advice. Also noteworthy is that the investigative work of non-attorneys may still be privileged, so long as the investigation was conducted at the direction of in-house or outside counsel for the purpose of obtaining legal advice.

Although favorable, this decision is not binding on courts outside of the District of Columbia. Companies should therefore still proceed with caution and take steps to preserve the corporate attorney-client privilege in the context of internal investigations.

Among other things, Alston & Bird recommends that:

- *Upjohn* advisements should still be administered at the outset of all employee interviews.
- Internal investigations should still, when feasible, be conducted by or at the direction of outside counsel. Having outside counsel conduct investigations confers additional benefits that may be appropriate in certain circumstances, such as enhancing the credibility of the investigation with regulators and other stakeholders. At a minimum, internal investigations should be conducted at the direction of in-house counsel.
- Where non-attorneys are assisting in the investigation, there should be memorialization of the fact that their actions are being done at the direction of in-house and/or outside counsel and for the purpose of assisting the company in obtaining legal advice.

Alston & Bird will continue to monitor developments in this area and advise as other courts weigh in on this issue.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Craig Carpenito
Co-Chair
212.210.9582
craig.carpenito@alston.com

Michael L. Brown
Co-Chair
404.881.7589
mike.brown@alston.com

George Abney
404-881-7980
george.abney@alston.com

Christina Hull Eikhoff
404-881-4496
christy.eikhoff@alston.com

Edward T. Kang
202-239-3728
edward.kang@alston.com

Theodore J. Sawicki
404-881-7639
tod.sawicki@alston.com

Randall L. Allen
404-881-7196
randall.allen@alston.com

Rodney J. Ganske
404-881-4996
rod.ganske@alston.com

Louis A. Karasik
213-576-1148
lou.karasik@alston.com

Brian Stimson
404-881-4972
brian.stimson@alston.com

Jeffrey A. Belkin
404-881-7388
jeff.belkin@alston.com

Mary C. Gill
404-881-7276
mary.gill@alston.com

John L. Latham
404-881-7915
john.latham@alston.com

Jason M. Waite
202.239.3455
jason.waite@alston.com

Donna P. Bergeson
404-881-7278
donna.bergeson@alston.com

James A. Harvey
404-881-7328
jim.harvey@alston.com

Dawnmarie R. Matlock
404-881-4253
dawnmarie.matlock@alston.com

Kyle G.A. Wallace
404-881-7808
kyle.wallace@alston.com

Cathy L. Burgess
202-239-3648
cathy.burgess@alston.com

Katherine E. Hertel
213.576.2600
kate.hertel@alston.com

Wade Pearson Miller
404-881-4971
wade.miller@alston.com

Kenneth G. Weigel
202-239-3431
ken.weigel@alston.com

Mark T. Calloway
704-444-1089
mark.calloway@alston.com

H. Douglas Hinson
404-881-7590
doug.hinson@alston.com

William R. Mitchelson
404.881.7661
mitch.mitchelson@alston.com

R. Neal Batson
404-881-7267
neal.batson@alston.com

Marianne Roach Casserly
202-239-3379
marianne.casserly@alston.com

J. Andrew Howard
213-576-1057
andy.howard@alston.com

Bruce Pasfield
202-239-3585
bruce.pasfield@alston.com

Angela T. Burnette
404-881-7665
angie.burnette@alston.com

Steven M. Collins
404-881-7149
steve.collins@alston.com

Brett D. Jaffe
212-210-9547
brett.jaffe@alston.com

Kimberly K. Peretti
202.239.3720
kimberly.peretti@alston.com

Brian J. Fields
212-210-9585
brian.fields@alston.com

Thomas E. Crocker
202.239.3318
thomas.crocker@alston.com

William H. Jordan
404-881-7850
bill.jordan@alston.com

T.C. Spencer Pryor
404.881.7978
spence.pryor@alston.com

Eileen M.G. Scofield
404-881-7375
eileen.scofield@alston.com

ALSTON & BIRD LLP

WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 12th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260
SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333