



## Unclaimed Property / Government & Internal Investigations ADVISORY ■



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

*Decision May Strengthen Privilege Protection of Internal Unclaimed Property Investigations and Self-Audits Conducted by Holders*

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."

In the context of holder compliance with multistate unclaimed property laws, this decision may bolster privilege protection of internal reviews of unclaimed property compliance undertaken by holders for the purposes of submitting a state's formal voluntary disclosure agreement submission (VDA), defending a state's examination or audit, or completing a self-managed review of compliance should a state seek to discover the results of such an internal review in subsequent litigation or during an audit. Given the scope of the decision, however, holders are still cautioned to consult legal counsel and exercise the utmost care in conducting an elective internal review to avoid disclosure during subsequent litigation or examination.

#### **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.

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## District Court's Decision

The district 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, at 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, 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 nonattorneys; 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.”

## 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 nonattorneys so 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 whose 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; therefore, it was protected by the attorney-client privilege.

## Key Takeaways

This may be a significant victory for companies looking to conduct prompt internal investigations to ensure that their business practices comply with regulatory laws, *including multistate unclaimed property laws*, without having to sacrifice the protections of the attorney-client privilege—if the information obtained during the internal investigation is later sought by a state during an unclaimed property audit or subsequent litigation.

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 so long as one of the significant purposes of the investigation is to obtain legal advice. Also noteworthy is that the investigative work of nonattorneys 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. This may strengthen the application of attorney-client privilege to investigative work conducted by outside accounting or unclaimed property consultants so long as in-house or outside counsel direct and supervise their work.

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

Among other things, Alston & Bird recommends that:

- *Upjohn* advisements should still be administered at the outset of all employee interviews undertaken during an internal investigation of unclaimed property compliance.
- Internal investigations of unclaimed property compliance 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.
- If nonattorneys, such as outside accounting or unclaimed property consultants, are assisting in the internal investigation, there should be memorialization that their actions are being done at the direction of in-house and/or outside counsel 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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