

PUBLICATION

Privilege Upheld for Internal Investigation Preceding False Claims Act Litigation [Ober|Kaler]

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The D.C. Circuit recently issued an important decision upholding the attorney-client privilege to protect corporate internal investigations. *In re: Kellogg Brown & Root*, No. 14-5055, 2014 BL 180217 (D.C. Cir. June 27, 2014). The case involved a qui tam lawsuit filed under the False Claims Act (FCA) by a whistleblower who worked for defense contractor, Kellogg Brown & Root (KBR). The whistleblower alleged that KBR violated the FCA by inflating costs and accepting kickbacks while administering contracts for the U.S. military. During the discovery phase of the FCA litigation, the whistleblower requested KBR to produce documents regarding KBR's internal investigation of alleged fraud preceding the FCA litigation. KBR asserted that the requested documents were protected by the attorney-client and work product privileges.

The trial court rejected KBR's privilege claims and ordered KBR to produce the requested documents to the whistleblower. The trial court's decision relied on the U.S. Supreme Court's seminal *Upjohn* decision relating to privileges in the context of internal corporate investigations. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). First, the trial court found that KBR's investigation was not privileged because it was conducted by in-house counsel, rather than outside counsel. Second, the trial court concluded that the investigation was not privileged because many of the employees contacted during the investigation were interviewed by non-lawyers. Third, the trial court found it significant that the employees who were interviewed were not advised that the interviews were for the purpose of obtaining legal advice. The trial court determined that under those circumstances, KBR's internal investigation was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." According to the trial court, KBR failed to show that the communications made during the investigation would not have been made "but for" a request for legal advice. The trial court not only rejected KBR's privilege claim, but also refused to allow KBR to take an immediate appeal of the trial court's ruling, thereby forcing KBR to petition the D.C. Circuit for a writ of mandamus.

The D.C. Circuit rejected the trial court's ruling as an incorrect application of the Supreme Court's *Upjohn* decision. The D.C. Circuit determined that KBR's internal investigation was privileged even though it was conducted by KBR's in-house lawyers, noting that the Supreme Court's recognition of the privilege for internal investigations, discussed in *Upjohn*, was not limited to outside counsel. The D.C. Circuit also determined that KBR was entitled to claim its investigation was privileged, despite the fact that some of its employees were interviewed by non-lawyers, because the interviews were conducted at the direction of in-house counsel. Moreover, the privilege applied even though the employees being interviewed were not advised that the investigation was intended to obtain legal advice for KBR. According to the D.C. Circuit, "nothing in *Upjohn* requires a company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation."

Perhaps most significantly, the D.C. Circuit criticized the trial court's ruling that KBR's investigation to assess its compliance with regulations and corporate policy could not be privileged. The appeals court rejected the notion that KBR had to show the investigation would not have been conducted but for an effort to obtain legal advice. "KBR initiated an internal investigation to gather facts and ensure compliance with the law after being informed of potential misconduct." Thus, the D.C. Circuit concluded 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.”

The *KBR* decision has important implications for any business entity, including those in the health care industry, which is highly regulated, is expected to monitor its regulatory compliance continuously, and often faces mandatory reporting requirements in the event of noncompliance. The trial court's decision had set an ominous precedent that internal investigations intended in part to ensure regulatory compliance may not necessarily be privileged. The D.C. Circuit's *KBR* decision, however, affirms that internal investigations may be protected by legal privileges if they are conducted in a proper manner.

The *KBR* decision should not be interpreted as a sign that internal investigations of regulatory compliance are privileged *per se*. Companies should keep the following principles in mind when conducting any internal investigation:

- The internal investigation should be conducted by or at the direction of legal counsel.
- Communications made to or from legal counsel during an internal investigation may be privileged if one of the significant purposes of the communication was seeking or providing legal advice.
- Companies asserting privileges have the burden of proving the privileges apply.
- Whistleblowers may aggressively challenge privilege claims in an attempt to seize sensitive documents relating to a company's internal investigation.
- Companies must carefully plan internal investigations to ensure that such investigations can be successfully protected using legal privileges.