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KBR Case May Impact Internal Investigations

Law360, New York (March 17, 2014, 2:57 PM ET) -- A recent decision by a federal district court raises concerns about the ability of companies to claim privilege over the results of internal investigations. In United States ex rel. Harry Barko v. Halliburton Company et al., No. 1:05-CV-1276 (D.D.C. Mar. 6, 2014) (Doc. 150), Judge James G. Gwin of the United States District Court for the District of Columbia granted the plaintiff-relator's motion to compel production of materials that had been created by the defendants in connection with internal investigations of possible misconduct.

This article analyzes the rationale behind Judge Gwin's decision, notes the pitfalls identified by Judge Gwin, and assesses the potential impact of the decision on the ability of companies to claim privilege over materials generated in connection with internal investigations.

Case Background

Harry Barko was an employee of Halliburton Co. in Iraq in 2004 who claimed to have discovered abuses of the government contracting process. Barko brought a qui tam action under the False Claims Act against his former employers and several related companies.[1] During discovery, the defendants attempted to withhold documents created in connection with internal investigations into alleged violations of the companies' code of business conduct ("COBC").

The investigation was conducted by nonattorney investigators who interviewed personnel, reviewed relevant documents, obtained witness statements, and drafted a COBC report that was then transmitted to the law department. The challenged documents contained significant admissions and findings of misconduct, which Judge Gwin characterized as "eye-openers" following an in camera review.

Barko filed a motion to compel production of documents related to the internal COBC investigations. The court granted Barko's motion, holding that the defendants could not withhold the documents as privileged under either the attorney-client or work-product doctrines. The court reasoned that the COBC investigations were undertaken pursuant to regulatory law and corporate policy, rather than for the purpose of obtaining legal advice or in anticipation of litigation.

In reaching its holding, the court applied a narrow interpretation of the attorney-client privilege, noting that the party invoking the privilege must show the at-issue communications would not have been made "but for" the fact that legal advice was sought. Similarly, the court restricted the scope of the work-product doctrine, finding that the privilege applies only where the documents were prepared "because of" the prospect of litigation.

The court held that the COBC investigative materials and reports failed both tests. Specifically, the court

concluded that government contracting regulations required contractors such as Halliburton to have internal control systems such as the COBC program. As a result, the COBC investigations were necessary to comply with government regulations and would have been conducted even if legal advice was not sought or there was no prospect of litigation.

The court noted several instructive factors. First, the investigation was presented as part of routine corporate compliance, and was not an Upjohn-style investigation "conducted only after attorneys from the legal department conferred with outside counsel on whether and how to conduct an internal investigation."[2] Second, the employees who were interviewed were never informed that the purpose of the interviews was to assist Halliburton in obtaining legal advice.

Third, the confidentiality agreements that employees signed emphasized sensitive business implications of unauthorized disclosure, but did not say that the interviews were for purposes of obtaining legal advice. Fourth, the fact that the interviewers were nonattorneys was significant (although not dispositive); if attorneys conducted the interviews, employees may have been able to infer that the investigation was conducted for legal purposes.

Finally, the timing of the investigation — five years before the lawsuit was unsealed — cast doubt on the argument that the documents were prepared in anticipation of litigation. On these facts, the court concluded that the internal investigations would have been conducted even if no legal advice had been sought and were not in anticipation of litigation.

Judge Gwin's Further Decision Denying Interlocutory Appeal

On March 11, 2014, Judge Gwin provided further insight into his decision in an opinion denying Halliburton's motion for an interlocutory appeal or a stay pending petition for a writ of mandamus to the United States Court of Appeals for the District of Columbia Circuit.[3] Judge Gwin observed that his finding that the challenged materials were not privileged was "not a close question."[4] None of the documents included a request for legal advice or reflected legal advice, nor did the documents identify legal issues for further review.[5]

Although the court did not reach the issue and it did not figure in its initial decision, Judge Gwin further noted that Halliburton may have waived any privilege over the COBC documents.[6] In its summary judgment motion, Halliburton affirmatively argued that the COBC documents showed no evidence of improper conduct.[7] Judge Gwin observed: "When a party represents facts drawn from argued privileged communications, it cannot hide behind the attorney-client privilege claims to avoid allowing the other side to test those facts."[8] Judge Gwin was also clearly displeased that an in camera review revealed to the court that Halliburton made factual representations in its summary judgment papers that were contradicted by the COBC documents.

The Implications of the Halliburton Decision on Corporate Investigations

Although the Halliburton decision deals with internal investigations conducted pursuant to U.S. Department of Defense regulations, the potential scope of the decision is not limited to internal investigations conducted by defense contractors. Any company subject to regulations requiring internal control systems or even a company that voluntarily maintains such controls may be susceptible to an argument that an internal investigation was conducted because of a regulatory and/or corporate policy requirement.

Accordingly, this decision raises concerns about the ability of companies to maintain the privilege over materials generated in connection with internal investigations, especially where those investigations are commonplace or routine, as opposed to unique to a particular legal issue.

Judge Gwin's decision provides some guidance to companies about how to enhance their ability to claim privilege over internal investigations.

First, having lawyers oversee and direct internal investigations will help show that the inquiry is to obtain legal advice or is in anticipation of litigation. So too will having attorneys conduct interviews. At a minimum, attorneys should be consulted throughout the investigation. Second, the interviewer should deliver the Upjohn warnings, specifically informing the interviewees that the purpose of the interview is to assist the company in obtaining legal advice.

Third, the interviewer should make clear that any request for an employee to keep the conversation confidential is for the purpose of maintaining the company's attorney-client privilege. Merely informing the employee of the sensitive nature of the review and the adverse business impact of disclosure is insufficient.

Fourth, to the extent nonlawyers are involved in interviews or other aspects of the investigation, attorneys overseeing the investigation should provide clear directives to the nonlawyers regarding the steps that should be taken to protect the privilege, including the instructions that should be given to employees during interviews and the manner in which the non-lawyers should document their investigative steps.

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[1] 31 U.S.C. § 3729 et seq.

[2] See Upjohn Co. v. United States, 449 U.S. 383, 386-87 (1981).

[3] United States ex rel. Barko v. Halliburton Co., 2014 U.S. Dist. LEXIS 30866 (D.D.C. Mar. 11, 2014).

[4] Id. at *5.

[5] Id. at *6-7.

[6] Id. at *9.

[7] Id. at *9-10.

[8] Id. at *11.