

### Appeals Court Confirms that Results of Internal Investigation are Privileged

On June 27, 2014, the United States Court of Appeals for the District of Columbia Circuit issued a decision in *In re: Kellogg Brown & Root, Inc.*, an important ruling which confirms the application of the attorney-client privilege to corporations within the business setting as set forth by the Supreme Court over thirty years ago in *Upjohn Co. v. United States*.<sup>1</sup> In *Kellogg Brown & Root*, the D.C. Circuit vacated a district court's decision that denied the protection of the attorney-client privilege to documents created during the course of an internal investigation by the company's in-house lawyers. Recognizing that the district court's decision had generated substantial uncertainty about the scope of the attorney-client privilege in the business setting, the Court held that the attorney-client privilege applied to documents generated during an internal investigation provided that obtaining legal advice was *one* of the significant purposes of the internal investigation.

#### Case Background

On March 6, 2014, 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 defendant in connection with an internal investigation.<sup>2</sup> The district court applied a very narrow interpretation of the attorney-client privilege, finding that the documents sought in discovery were not privileged because the investigation for which they were prepared was undertaken pursuant to regulatory law and corporate policy, rather than for the purpose of obtaining legal advice or in anticipation of litigation.<sup>3</sup> The district court denied the application of the attorney-client privilege, ruling that a party invoking the privilege must show that a communication would not have been made "but for" a request for legal advice. The district court denied KBR's motion for interlocutory appeal or for a stay pending its petition for a writ of mandamus.<sup>4</sup> KBR filed a petition for mandamus with the D.C. Circuit, which granted a stay of the requested document production.<sup>5</sup>

#### D.C. Circuit Rejects District Court's Attempt to Distinguish *Upjohn*

The D.C. Circuit's decision, written by Judge Brett Kavanaugh for the Court, found that the district court erred in ordering production of documents generated pursuant to an internal investigation.<sup>6</sup> Instead of adopting a strict "but-for" test for application of the attorney-client privilege, the Court held that the attorney-client privilege applies so long as "providing legal advice was *one* of the significant purposes of the internal investigation," even if there were other purposes for the investigation or if the investigation was mandated by regulation.<sup>7</sup> The Court emphasized that a communication can have two primary purposes—one legal and one business.<sup>8</sup> The proper inquiry in determining whether a particular communication is covered by the attorney-client privilege, according to the Court, is whether obtaining or providing legal advice was "*one* of the significant purposes of the communication."<sup>9</sup>

<sup>1</sup> 449 U.S. 383 (1981).

<sup>2</sup> *United States ex rel. Harry Barko v. Halliburton Company*, No. 1:05-CV-1276 (D.D.C. Mar. 6, 2014) (Doc. 150).

<sup>3</sup> See our prior coverage of this case: "U.S. District Court Rules that Results of Internal Investigations Conducted in the Ordinary Course of Business are not Privileged and Must be Produced to Whistleblower" (March 2014), available at <http://www.pbwt.com/alert-barko-halliburton-us-district-court-rules-internal-investigations-not-privileged-whistleblower/>.

<sup>4</sup> *United States ex rel. Barko v. Halliburton Co.*, 2014 U.S. Dist. LEXIS 30866 (D.D.C. Mar. 11, 2014).

<sup>5</sup> *In re: Kellogg Brown & Root, Inc.*, No. 14-5055, slip op. (D.C. Cir. June 27, 2014).

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.* at 7-8 (emphasis added).

<sup>8</sup> *Id.* at 9.

<sup>9</sup> *Id.* at 10 (emphasis added).

The Court also rejected the district court's attempts to distinguish KBR's assertion of privilege from the assertion of privilege in *Upjohn*.<sup>10</sup> KBR's investigation was initiated to gather facts and ensure compliance with the law after being informed of potential misconduct, and was conducted by KBR's in-house legal department acting in its legal capacity.<sup>11</sup> The Court observed that *Upjohn* does not require the involvement of outside counsel as a necessary predicate for the attorney-client privilege to apply.<sup>12</sup> Further, the Court found that the fact that some interviews were conducted by non-attorneys does not preclude the application of the attorney-client privilege because "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege."<sup>13</sup> Finally, the Court found that employees interviewed as part of the internal investigation did not need to be expressly informed that the purpose of the interview was to assist the company in obtaining legal advice in order for the privilege to apply; there are no "magic words" required for privilege to attach to an internal investigation.<sup>14</sup>

The D.C. Circuit granted the rather extraordinary remedy of mandamus because it held that KBR had "no other adequate means to attain the relief it desire[d]" because appeal after final judgment would come too late; disclosure of privileged documents would mean "the cat is out of the bag."<sup>15</sup>

### **This Decision Reaffirms the Importance of the Attorney-Client Privilege in the Business Setting and Should Reassure Corporate Counsel**

The D.C. Circuit's opinion is a resounding affirmation of the importance of attorney-client privilege in a corporate setting, as first enunciated by the Supreme Court in *Upjohn* thirty years ago. "The district court's 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," the decision announced.<sup>16</sup> "In turn, businesses would be less likely to disclose facts to their attorneys and to seek legal advice, which would 'limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.'"<sup>17</sup> Companies should thus be comforted by the D.C. Circuit's decision and again feel confident that assertions of the attorney-client privilege will continue to apply to documents created as part of an internal investigation provided that one purpose of investigation was to obtain legal advice.

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<sup>10</sup> *Id.* at 5.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 6.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.* at 12.

<sup>16</sup> *Id.* at 9.

<sup>17</sup> *Id.*

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