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On August 11, 2015, the U.S. Court of Appeals for the D.C. Circuit issued a writ of mandamus supporting the robust applicability of the attorney-client privilege and attorney work product doctrines in the context of False Claims Act (“FCA”) investigations conducted under the direction of corporate and outside counsel. This marks a continuation of its repudiation of a 2014 lower-court decision that significantly eroded these privileges. Interpreting the scope of the privileges in the context of internal investigations of potential FCA violations is especially tricky because of the unique roles played by the parties (the Government as a potential plaintiff, the relator as a bounty hunter, and the corporation-as-defendant). This latest ruling from the D.C. Circuit, in a case arising out of wartime contracts in Iraq run by Kellogg, Brown & Root, Inc. (KBR) (formerly part of Halliburton), is a breath of fresh air for companies doing business with the Federal Government. The ruling from the Court of Appeals also sends a signal to the trial court that an overly narrow view of the attorney-client privilege and attorney work product doctrine creates unacceptable uncertainty that will ultimately be rejected on appeal.

Background

This is the second time the D.C. Circuit issued a writ of mandamus in the KBR case. The D.C. Circuit’s first mandamus ruling rejected the district court’s overly narrow holding that materials prepared in an internal investigation overseen by non-attorneys in a corporation’s law department, to determine the existence of potential violations of the False Claims Act, were not privileged because they were “undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice.” "U.S. ex rel. Barko v. Halliburton Co., 37 F. Supp. 3d 1, 5 (D.D.C. 2014). KBR appealed the 2014 ruling to the D.C. Circuit on a petition for a writ of mandamus (Latin for “command”). A writ of mandamus is a pre- or mid-trial appeal seeking to correct a trial court’s decision on a specific legal issue by commanding that trial court to reach a different ruling that is better supported by the law. The D.C. Circuit granted the writ, holding that the materials were privileged attorney-client communications or privileged attorney work product (as those privileges have long been interpreted). But the D.C. Circuit also left room for the district court to determine whether the privileges might not apply for some other reason.

On remand, the district court found that the same materials were, notwithstanding the D.C. Circuit’s mandamus ruling, subject to an implied waiver. The district court justified this finding on two grounds: (1) KBR waived attorney-client privilege and work product protection by allowing a witness to review the privileged documents in preparation for his deposition, and (2) KBR waived the attorney-client privilege and work product protection by putting the documents “at issue” in the litigation. KBR again appealed to the D.C. Circuit on another petition for a writ of mandamus, which
resulted in the latest ruling (and the latest reversal from the D.C. Circuit).

D.C. Circuit Finds Attorney-Client Privilege and Work Product Protection, Again

Following its earlier precedent from 2014, the D.C. Circuit upheld the attorney-client privilege and attorney work product doctrine, and granted a writ of mandamus in KBR’s favor. With regard to the first issue—whether the privilege was waived by allowing a witness to review privileged documents in advance of his deposition—the Court held that the mere review of a document in advance of a deposition does not waive the privileges that apply to that document. The Court explained, [Plaintiff] cannot “overcome the privilege by putting [documents arising out of the internal investigation] in issue” at the deposition, and then demanding under Rule 612 [of the Federal Rules of Evidence, which permits an adverse party to use a writing that the witness used to refresh his or her recollection] to see the investigatory documents the witness used to prepare. Allowing privilege and protection to be so easily defeated would defy “reason and experience.”

Slip Op. at 12.

With regard to the second issue—whether the privilege was waived by putting the documents “at issue” in the litigation—the district court held that “KBR injected the [internal investigation document] contents into the litigation by itself soliciting” the deposition testimony on these exact issues. Slip Op. at 14. The district court had held that KBR was “creatin[ing] an implied waiver by ‘actively’ seeking ‘a positive inference in its favor based on what KBR claims the documents show.’” Id. But the Court of Appeals rejected this view and found that “KBR neither directly stated that the [internal] investigation had revealed no wrongdoing nor sought any specific relief because of the results of the investigation.” Id. at 17.

The D.C. Circuit also cautioned that not everything in an internal investigation is attorney-client privileged but that the work of non-attorneys acting at the direction of in-house counsel may be protected by the opinion work product doctrine as long as it is prepared in anticipation of litigation. Slip Op. at 19. This means work product created by non-attorneys is discoverable if it does not summarize a privileged communication with an employee and the opposing side demonstrates “substantial need.” Id. The Court emphasized that “there is nothing to be gained by sloppily insisting on both [the attorney-client privilege and work product doctrine] or by failing to distinguish between them. Id. at 21.

Lessons for Corporate Counsel

The D.C. Circuit’s latest mandamus ruling in the KBR case comes as a welcome relief to government contractors, health care entities, and financial institutions. Often times, the investigation of potential FCA violations can be just as costly as the litigation that follows. Having strong, clear guidance on the application of the attorney-client privilege and attorney work product doctrine will provide needed certainty for companies conducting those investigations. Maybe more importantly, the recent D.C. Circuit decision helps return some normalcy to this case law, calming down the tempest generated by the lower court in its prior, overly restrictive interpretations.

Although the D.C. Circuit has attempted to insert some clarity and predictability in the case law, it is important to keep in mind that courts in most jurisdictions have not reached a consensus regarding the application of the attorney-client privilege and work product doctrines in internal investigations. Most jurisdictions treat privilege issues as a factually intense question, the resolution of which varies from case-to-case. Corporate counsel should continue to carefully document and supervise internal investigations by getting involved early in the assessment and investigation of any allegations and retaining outside counsel when feasible. In addition, corporate counsel should oversee compliance functions and should include language in internal communications and policies stating that internal investigations are conducted for the purpose of obtaining legal advice.

Additionally, when a company uses non-attorneys to conduct interviews, in-house attorneys should always supervise, provide direction on the interviews and document reviews, and document the non-attorneys’ actions to show they were taken at the direction of legal counsel in order to provide legal advice to the company and to defend the company against possible litigation. Along the same lines, investigation reports and materials should clearly be marked as attorney-client privilege communications and attorney work product. Investigation reports should also contain a summary of legal issues to be examined.
It is also critical that investigators, whether attorneys or not, issue “Upjohn warnings” to all interview subjects and clearly explain that the interviewers are acting at the direction of legal counsel, that the contents of the interview will be shared with legal counsel, and that the purpose of the interview is to gather information to provide legal advice to the company and defend against possible litigation.

Lastly, companies must avoid public statements (such as in pleadings) that an internal investigation revealed no wrongdoing to avoid any potential privilege waiver issues.

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