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D.C. Circuit Declines to Eviscerate Attorney-Client Privilege in Internal Investigations

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On Tuesday, August 11, 2015, in *United States ex rel. Barko v. Haliburton et al.*, the U.S. Court of Appeals for the D.C. Circuit issued an opinion vacating another series of rulings by the United States District Court for the District of Columbia that had required defendant Kellogg Brown & Root, Inc. (KBR) to produce the privileged files underlying its internal investigation into allegations that the company defrauded the U.S. government. The District Court had concluded that KBR impliedly waived the privilege by putting the contents of its corporate investigation at issue in the litigation when it produced an in-house lawyer as a deposition witness on the topic of KBR's investigation and referenced that testimony in connection with its motion for summary judgment. The District Court had also ruled that the attorney-client privilege did not extend to summary reports prepared by KBR's non-lawyer investigators. In vacating the District Court's ruling, the D.C. Circuit reached three key holdings.

McDermott Will & Emery

Article By McDermott Will & Emery
Gregory R. Jones FCA Update Blog

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First, the D.C. Circuit held that KBR did not put the privileged investigation files at issue in the case by merely referencing the testimony in a footnote in its summary judgment brief because "KBR neither directly stated that the [internal] investigation revealed no wrongdoing nor sought any specific relief because of the results of the investigation." In reaching this holding, the D.C. Circuit reasoned that cursory statements made in footnotes of briefs should not be indulged as a matter of practice, and the mere inference of "no wrongdoing" that could be drawn from KBR's footnoted assertion held little weight because as a summary judgment movant, all inferences were to be drawn against KBR.

Second, the D.C. Circuit held that simply designating an in-house lawyer in response to a deposition notice on the topic of the privileged nature of an internal investigation, while still preserving the privilege in response to specific questioning during the deposition, does not compel the production of privileged materials reviewed by the witness to prepare for the deposition under Federal Rule of Evidence 612. In reaching this holding, the D.C. Circuit observed that "[i]f all it took to defeat the privilege and protection attaching to an internal investigation was to notice a deposition regarding the investigations (and the privilege and protection attaching to them), we would expect to see such attempts to end-run these barriers to discovery in every lawsuit in which a prior internal investigation was conducted relating to the claims." It was this potential "floodgates" consequence that drove the D.C. Circuit to conclude that "the District Court's rulings would ring alarm bells in corporate general counsel offices throughout the country about what kinds of descriptions of investigatory and disclosure practices could be used by an adversary to defeat all claims of privilege and protection of an internal investigation."

Finally, the D.C. Circuit held that the District Court wrongly concluded that some of the summary reports prepared by KBR's investigators were not privileged because it was clear that portions of the documents summarized statements made to the investigator, who "effectively steps into the shoes the attorney," by KBR employees. The D.C. Circuit clarified that the privilege attaches to a summary report prepared by an attorney (or its agent) where the purpose is "to put in usable form the information obtained from the client." However, the court rejected KBR's argument that such summary reports should be considered privileged for all purposes, as opposed to receiving qualified protection as work product. In doing so, the D.C. Circuit spurned the notion that "everything in an internal investigation is attorney-client privileged" and cautioned that "there is nothing gained by sloppily insisting on [asserting] both [attorney-client privilege and work product protection for the same content] or by failing to distinguish between them."

There are several lessons to be gleaned from the D.C. Circuit's second opinion in the *KBR/Barko* litigation. These include:

- The attorney-client privilege remains a powerful tool in protecting the confidentiality of internal corporate investigations.
- In-house counsel may continue to use non-lawyers to carry out internal investigations without jeopardizing the privilege, but the work product of such individuals is only protected on a qualified basis except to the extent that it reveals or summarizes a privileged communication with an employee.
- In the litigation context, plaintiffs cannot pierce the privilege by merely noticing a privileged investigation as a topic in a corporate deposition, and corporate defendants do not waive the privilege by designating an in-house lawyer as a corporate witness to testify about that topic, so long as the privilege is vigorously protected by counsel during the deposition.
- To avoid any assertions of implied privilege waiver, counsel must be mindful about how they publicly describe an internal investigation, including by avoiding overtly stating that the investigation "revealed no wrongdoing" and not seeking any litigation-related relief based on the results of the investigation.