

## **D.C. Circuit Reaffirms the Protections of *Upjohn* in the Context of Corporate Internal Investigations**

On June 27, 2014, the United States Court of Appeals for the District of Columbia Circuit, on *mandamus*, held in *In re Kellogg Brown & Root, Inc.*<sup>1</sup> that the district court too narrowly circumscribed the protections afforded to a corporation by the attorney-client privilege, as articulated in *Upjohn Co. v. United States*.<sup>2</sup> In doing so, the court provided clarity and comfort to companies following the district court's controversial decision, which, as noted by amici to this case, had the potential to "work a sea change in the well-settled rules governing internal corporate investigations."<sup>3</sup>

### **I. Factual Background and Procedural History**

In 2005, Harry Barko, a former employee of defense contractor Kellogg Brown & Root (KBR), filed a False Claims Act complaint against KBR alleging that KBR and certain subcontractors defrauded the United States Government by inflating costs and accepting kickbacks while administering military contracts in wartime Iraq. During discovery, Barko sought documents relating to KBR's prior internal investigation into the alleged fraud. KBR opposed such discovery, arguing that because the internal investigation had been conducted for the purpose of obtaining legal advice, the documents were protected by the attorney-client privilege. Barko argued the documents were unprivileged business records and, as such, properly discoverable. The district court reviewed the documents *in camera* and held that the attorney-client privilege did not apply because KBR had not shown "the communication would not have been made 'but for' the fact that legal advice was sought."<sup>4</sup> Likewise, the district court found that KBR's internal investigation was undertaken pursuant to regulatory law and corporate policy rather than for the purpose of seeking legal advice.

KBR asked the district court to certify the privilege question to the D.C. Circuit for interlocutory appeal and to stay its order pending a petition for *mandamus*. The district court denied KBR's requests and ordered KBR to produce the disputed documents within a matter of days. KBR promptly filed a petition for a writ of *mandamus* to the D.C. Circuit.

### **II. The Circuit Court's Decision**

The Court of Appeals granted petitioner's writ of *mandamus* and vacated the district court's March 6, 2014, document production order. In reaching its decision, the court made two key holdings:

**First, the D.C. Circuit held that the district court's decision is irreconcilable with *Upjohn*.** Citing *Upjohn* as the basis for its holding, the court ruled that "KBR's assertion of the privilege in this case is materially indistinguishable from *Upjohn*'s assertion of the privilege in that case."<sup>5</sup> The court analogized the two cases, explaining that, as in *Upjohn*, KBR initiated an internal investigation to "gather facts and ensure compliance with

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<sup>1</sup> Case No. 14-5055, 2014 WL 2895939 (D.C. Cir. June 27, 2014).

<sup>2</sup> 449 U.S. 383 (1981).

<sup>3</sup> *In re Kellogg Brown & Root, Inc.*, 2014 WL 2895939, at \*7 (quoting Br. of Chamber of Commerce et al. Amici Curiae 1).

<sup>4</sup> *Id.* at \*1 (quoting *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 1016784, at \*2 (D.D.C. Mar. 6, 2014) (quoting *United States v. ISS Marine Services, Inc.*, 905 F. Supp. 2d 121, 128 (D.D.C. 2012))).

<sup>5</sup> *Id.* at \*3. The court explained that in *Upjohn*, "the communications were made by company employees to company attorneys during an attorney-led internal investigation that was undertaken to ensure the company's 'compliance with the law.'" *Id.* at \*2 (quoting *Upjohn*, 449 U.S. at 392).

the law after being informed of potential misconduct.”<sup>6</sup> Similarly, as in *Upjohn*, KBR’s investigation was conducted under the auspices of its in-house legal department. Accordingly, the court found that “[t]he same considerations that led the Court in *Upjohn* to uphold the corporation’s privilege claims apply here.”<sup>7</sup>

The court found the district court’s distinctions of *Upjohn* unpersuasive. Specifically, the court noted four erroneous distinctions drawn by the district court: (1) KBR’s investigation was conducted in-house without consultation with outside lawyers; (2) the interviews were conducted by non-attorneys; (3) the interviewed employees were not expressly informed that the purpose of the interview was to assist the company in obtaining legal advice; and (4) the investigation was undertaken to comply with regulations and corporate policy.<sup>8</sup> The court noted that none of these so-called distinctions actually conflicted with *Upjohn*. *Upjohn* did not require consultation with outside lawyers; did not prohibit interviews conducted by agents for and at the direction of attorneys; did not mandate a company to use “magic words” to its employees in order to maintain privilege; and certainly did not require that obtaining or providing legal advice be the only purpose for the attorney-client communication. Thus, the court held that, “[i]n short, none of [these] distinctions of *Upjohn* holds water as a basis for denying KBR’s privilege claim.”<sup>9</sup>

**Second, the D.C. Circuit concluded that the “but-for” test articulated by the district court was inappropriate in the attorney-client privilege context.** Furthermore, the court noted that the district court’s application of a “but-for” test in the context of assessing privilege was inappropriate for the attorney-client privilege analysis.<sup>10</sup> The district court stated that the primary purpose of a communication is to obtain or provide legal advice only if the communication would not have been made “but for” the fact that legal advice was sought.<sup>11</sup> The court found the district court’s approach would “eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs.”<sup>12</sup> The court explained that “the test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication.”<sup>13</sup> Thus, the court noted that as long as one of the significant purposes of the internal investigation was to obtain or provide advice, the privilege would apply “regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy.”<sup>14</sup>

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<sup>6</sup> *Id.* at \*3.

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

<sup>8</sup> *Id.* at \*3-4. As to the district court’s conclusion that the purpose of KBR’s internal investigation was to comply with regulatory requirements rather than to obtain or provide legal advice, the court held that this analysis “rested on a false dichotomy. So 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.” *Id.* at \*4.

<sup>9</sup> *Id.* at \*4.

<sup>10</sup> *Id.* While the district court properly began the analysis by reciting the “primary purpose” test used by many courts to resolve privilege disputes, the district court then erred by further narrowing the analysis with application of the “but-for” test. *Id.*

<sup>11</sup> *Id.* (citing *Halliburton Co.*, 2014 WL 1016784, at \*2).

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

<sup>13</sup> *Id.* at \*5. The court also noted that “[g]iven the evident confusion in some cases, we also think it important to underscore that the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other.” *Id.*

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

Having concluded that the district court's privilege ruling constituted error, the court went on to assess whether that error justified a writ of *mandamus*. In finding the writ of *mandamus* justified in this case, the court noted that the district court's decision "would disable *most public companies* from undertaking confidential internal investigations."<sup>15</sup>

### III. Conclusion

The D.C. Circuit's opinion in *KBR* brings much needed clarity to the protections afforded by the attorney-client privilege in the context of corporate internal investigations.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or [cgilman@cahill.com](mailto:cgilman@cahill.com); Jon Mark at 212.701.3100 or [jmark@cahill.com](mailto:jmark@cahill.com); John Schuster at 212.701.3323 or [jschuster@cahill.com](mailto:jschuster@cahill.com); or Caitlin Higgins at 212.701.3509 or [chiggins@cahill.com](mailto:chiggins@cahill.com).

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<sup>15</sup> *Id.* at \*7 (quoting *KBR* Pet. 19).