

District Court's Attorney-Client Privilege Ruling Counteracts Incentives to Perform Internal Investigations March 24, 2014

Guest Commentary

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It has long been assumed that under the U.S. Supreme Court's decision [Upjohn Co. v. United States](#), reports generated during an internal investigation undertaken at the direction, and under the supervision, of corporate attorneys are protected from discovery by the attorney-client privilege. It came as a significant surprise then that the U.S. District Court for the District of Columbia recently held that the privilege does not apply when an investigation is conducted pursuant to a legal requirement, and not purely for the purpose of obtaining legal advice. Unless reversed, this decision could pose a significant new dilemma for regulated companies, and especially for government contractors, that perform internal investigations to determine whether "credible evidence" of actual wrong-doing exists.

The decision in [United States of America ex rel. Harry Barko v. Halliburton Company, et al.](#) is the latest in a long-running False Claims Act ("FCA") suit against Halliburton and its former subsidiary, Kellogg, Brown & Root ("KBR"). In the course of pre-trial discovery, the relator sought the production of reports created by KBR in the course of conducting internal investigations into alleged violations of the company's Code of Business Conduct ("COBC"). KBR objected to the production of the COBC reports, contending they were protected from discovery by the attorney-client privilege and work-product doctrine. On the relator's motion to compel, the court rejected KBR's argument that *Upjohn* was dispositive of the issue, and ordered that the reports be produced. The court reasoned that because the KBR investigators who prepared the reports were not lawyers, and because the subject investigations were done pursuant to legal requirements and corporate policy, and not solely for the purpose of obtaining legal advice, the reports were not privileged.

More specifically, the court explained that the KBR case could be distinguished from *Upjohn* because while the internal investigation at issue in *Upjohn* was conducted only after company attorneys conferred with outside counsel, KBR's COBC investigations were routine compliance investigations required by law and corporate policy. As such, held the court, the COBC investigative reports did not meet *Upjohn's* "but for" test because the investigations would have been conducted regardless of whether legal advice was sought, and the COBC investigations "resulted from the Defendants [sic] need to comply with government regulations."

U.S. ex rel. Barko is important in that it not only contradicts *Upjohn*, but is counter to a string of more recent cases in which similarly conducted internal investigations were held to be privileged. By ruling that investigations conducted pursuant to legal requirements are not privileged, even if conducted at the direction of legal counsel, and even if at least in part for the purpose of legal advice, the decision seems to completely abrogate the rule that has guided corporate investigations for more than three decades. If upheld, this decision could deprive most federal government contractors of the benefits of the attorney-client privilege when conducting internal investigations because virtually all contractors are subject to legally or contractually required internal controls and investigations obligations.

This decision, however, would appear to go beyond the government contracting context, affecting most publicly-traded companies as well by depriving such companies of the benefits of the attorney-client privilege when conducting internal investigations. This is because Sarbanes-Oxley and other laws require publicly-traded companies to maintain a system of internal controls and a mechanism for conducting internal investigations. Moreover, the U.S. Sentencing Guidelines provide for an offense level reduction where a corporate defendant establishes standards and procedures to prevent and detect criminal conduct. Thus, this decision, which seems to penalize companies that actually follow legally imposed investigatory requirements, will undoubtedly have a chilling effect on corporate efforts to detect internal wrongdoing. This cannot be in line with Congress's intent or the desire of governmental agencies to have companies investigate wrong-doing thoroughly and provide concise voluntary disclosures as appropriate.

In response to this decision, KBR has petitioned the D.C. Circuit Court of Appeals for a writ of mandamus directing the district court to vacate its order. But, until and unless the district court's decision is reversed, public companies, and especially government contractors, must choose between ignoring internal investigation requirements imposed by federal statutes/regulations/contracts, or following these requirements, knowing that the attorney-client privilege may not apply to any internal investigation conducted pursuant to thereto. Either choice is fraught with peril. This new reality might be very good for *qui tam* plaintiffs, but it presents an unenviable dilemma for companies intent on following the law.

The bottom line, at least for now, is that all government contractors and other companies subject to internal investigation requirements should review and revise existing policies and procedures for handling internal investigations to ensure such investigations fall under *Upjohn* decision and not the *KBR* decision.

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