

D.C. Circuit Hears Oral Argument on KBR Privilege Case

White Collar Alert
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On May 7, 2014, the United States Court of Appeals for the District of Columbia Circuit heard oral argument in a mandamus petition filed by Kellogg Brown and Root (KBR) that could significantly impact the way internal investigations are conducted and memorialized. A DC District Court judge ordered that KBR produce in discovery certain internal investigative reports even though the reports were prepared by KBR employees at the direction of in-house counsel. In sum, the District Court ruled the reports were not protected from discovery by the attorney-client privilege or work product doctrine and must be produced in the underlying *qui tam* action.

The 2005 *qui tam* action, *United States ex rel. Barko v. Halliburton* (1:05-CV-1276, D.DC), which was not unsealed until 2009, alleges multiple violations of the False Claims Act by KBR in the course of reconstruction work on behalf of the United States in Iraq. In discovery the relator sought production of internal investigative reports prepared by KBR pursuant to its internal compliance program. The investigations were conducted after the KBR Law Department received a tip from an employee of a potential violation of KBR's policies and, while some of the interviews and investigatory steps were not conducted by counsel, the final reports were transmitted to the Law Department.

In separate suits in other jurisdictions, KBR successfully argued that the reports were protected from discovery pursuant to the attorney-client privilege and work product doctrine. So it was a surprise when the DC District Court, after reviewing the reports *in camera*, found that neither the privilege nor the doctrine protected the reports. In evaluating the privilege claim the District Court applied a unique, and arguably unsound, "but for" test, finding that internal communications from a corporate legal department are only privileged when they would not have been made "but for" the purpose of providing or obtaining legal advice. The District Court found that because internal KBR policies mandating the investigations in question "merely implement" certain Department of Defense regulations requiring government contractors to investigate "improper conduct," the reports failed to meet this "but for" test -- they would have been made even if legal advice had not been sought -- and did not qualify as attorney-client communications made for the purpose of obtaining legal advice.

The District Court also rejected KBR's work product doctrine argument. Finding that KBR conducted the internal investigations in the ordinary course of business required by government regulations, the District Court found the investigations could not have been conducted in anticipation of litigation which was required for proper invocation of the work product doctrine. Moreover, the District Court noted that while the investigations were conducted by KBR from 2004-2006, the underlying litigation was not unsealed until 2009 "further support[ing] the conclusion that the investigation was not conducted 'in anticipation of litigation.'"

The District Court denied KBR's motion for certification of interlocutory appeal, and KBR filed its mandamus petition with the DC Circuit the next day. The American Forest & Paper Association, Association of Corporate Counsel, U.S. Chamber of Commerce, Coalition for Government Procurement and the National Association of Manufacturers subsequently filed an *amicus* brief in support of KBR. Notably, after KBR filed its petition the District Court judge (Hon. James Gwin), without any request from the Circuit Court, filed a letter with the Clerk of Court for the DC Circuit noting that KBR's mandamus petition did not appear to attach the documents the District Court reviewed *in camera* and stating he was therefore forwarding to the Circuit Court the documents KBR "say are privileged from discovery." Moreover, the District Court's letter explicitly directed the Circuit Court to 20 of the documents that it characterized as "probably more important for your court's consideration of the mandamus petition."

The May 7, 2014 oral arguments were before Judges Griffith, Kavanaugh and Srinivasan of the DC Circuit and it was clear from

the outset that the Judges were engaged and well-prepared. Counsel for KBR faced probing questions whether the District Court's decision was so "particularly injurious" as to warrant mandamus review under the Supreme Court's *Mohawk Industries Inc. v. Carpenter* decision, noting that the Circuit had not yet clearly articulated a standard for identifying "particularly injurious" decisions. Counsel for KBR responded that the decision under review, if upheld, would constitute the "death knell" of *Upjohn* and, while conceding the decision was limited to a single case, maintained that the decision would impact the day-to-day operations and approach to internal investigations of innumerable corporations. The panel questioned why any error in the lower court's decision could not be cured on appellate review of the case's final disposition, with Judge Kavanaugh noting "no one has to follow this case." KBR's counsel responded that it is only with these materials that the relator even "has a case," suggesting that KBR should not have to endure litigating the case to a final judgment as a result of a clearly erroneous discovery ruling.

Notably, KBR's counsel also requested that the Circuit Court, regardless of its decision, re-assign the case upon remand, contending that the District Court's *sua sponte* letter to the Circuit Court directing it to specific documents (and other comments made by the judge in subsequent decisions in the case) violated Federal Rule of Appellate Procedure 21.

Setting aside the propriety of the mandamus posture of the case, the panel expressed skepticism of the legal underpinnings of the District Court's decision, noting that no Circuit case law appeared to support the "but for" test adopted by the lower Court. Perhaps sensing the Court's concern, relator's counsel focused much of his oral argument on the underlying propriety of the mandamus action under *Mohawk*. While conceding that *Mohawk* did not categorically bar mandamus review of attorney-client privilege issues, counsel maintained that the potential harm to KBR was not the "particularly injurious" type of harm contemplated by *Mohawk* and that any injury suffered by KBR as the result of an erroneous decision could be cured on direct appeal after final judgment.

Turning to the underlying decision of the District Court the relator appeared to be on shakier ground with the panel. Relator's counsel suggested that the District Court's decision did not wholesale mean that internal investigations conducted pursuant to a regulatory obligation were never privileged, but rather required a particularized review of the materials in question. In this case, relator continued, the District Court did exactly what it should do -- review the materials *in camera* and determine whether or not they were not prepared for the purpose of legal advice. In essence, the relator worked to convince the panel that the lower court's decision could be narrowly confined to the documents at issue in this case and did not create a new or unique test for evaluating documents connected to internal corporate investigations.

The panel appeared to reject this formulation, noting the lack of legal support for the Court's formulation of the "but for" test. Judge Srinivasan was perhaps the most pointed, suggesting that the District Court's finding that one could divorce internal investigations conducted to determine whether or not KBR needed to make certain reports under federal regulations from "legal advice" was a false division, and that providing advice as to the application of federal regulations was by its very nature "legal advice."

Overall, the panel did not clearly indicate a likely resolution. While the questioning suggested concerns about the propriety of the underlying opinion, the bench was clearly struggling with whether the matter was properly brought before the court through a mandamus action. Regardless, the judges appeared acutely aware of the importance of the issues before them -- not only with regard to the attorney-client privilege but also with what case law it may be creating with regards to mandamus petitions. As Judge Kavanaugh noted, in any opinion by the Court "semantics will be important." Indeed they will, as this case appears poised to have potentially far-reaching effects regarding the application of the attorney-client privilege and the breadth of available mandamus relief in the DC Circuit.

Miller & Chevalier will continue to monitor this matter and issue additional alerts as appropriate.

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