KBR Privilege Saga Returns to the D.C. Circuit

White Collar Alert
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On May 11, 2015, the parties in the ongoing privilege dispute in *United States ex rel. Barko v. Halliburton Co.* (No. 1:05-cv-1276, D.DC) returned to the United States Court of Appeals for the DC Circuit for oral argument (No. 14-5319, DC Cir.). At issue in this round of the continuing tussle: Can an individual who has reviewed privileged and protected materials testify at a Rule 30(b)(6) deposition without waiving those protections, even if they do not testify about the substance of the privileged materials? And if such deposition testimony does cause a waiver, can a company disavow its purported reliance on the testimony and wipe the slate clean?

As Miller & Chevalier has previously reported (here and here), in 2005 a *qui tam* relator sued Kellogg Brown and Root (KBR) in the United States District Court for the District of Columbia, alleging that KBR violated the False Claims Act in connection with reconstruction work it performed on behalf of the United States in Iraq. Judge James S. Gwin, of the U.S. District Court for the Northern District of Ohio, has presided over the case in the trial court by designation.

In a March 2014 order, the District Court required KBR to produce 89 documents relating to the company's internal Code of Business Conduct (COBC) investigations -- namely witness statements from employees, investigator reports to KBR employees and communications among KBR attorneys and investigators concerning their findings. Three months later, the DC Circuit granted KBR's petition for a writ of mandamus, found that all 89 COBC documents were privileged and reversed the District Court's decision as "irreconcilable" with *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The Court of Appeals remanded the case, and allowed the District Court to consider other arguments that the relator had timely asserted for why the documents are not covered by either the attorney-client privilege or the work-product doctrine.

On remand, the District Court concluded that KBR had impliedly waived the attorney-client privilege by intentionally putting the contents of its COBC investigation at issue. In particular, during a Rule 30(b)(6) deposition of Christopher Heinrich (one of KBR's in-house lawyers), "KBR...had Heinrich testify that KBR's normal practice and contract terms required it to report any reasonable evidence of kickbacks; however after investigating the allegations in this case, KBR made no report and gave the Department of Defense no refunds." KBR subsequently attached to its summary judgment brief a statement of material facts that reflected Heinrich's testimony. According to the District Court, "Heinrich's deposition and KBR's use of his testimony put[] the COBC investigation at issue" because KBR made "extended and repeated references to the end results of its privileged internal investigation." Further, the District Court declined to allow KBR an opportunity to avoid producing the COBC documents by withdrawing its allegedly waiver-inducing assertions from its summary judgment papers and disavowing them.

KBR filed another petition for a writ of mandamus with the DC Circuit, seeking to reverse the District Court's most recent privilege rulings. And as it did the last time it was before the DC Circuit in this case, KBR again asked the appellate court to assign the matter to someone else. KBR argued that by quoting from privileged documents in public orders, requiring the disclosure of other privileged materials and issuing a series of *sua sponte* orders compelling disclosures from the U.S. government (a non-party), the District Court had "abandoned its role as a neutral arbiter" and had instead assumed the role of a prosecutor. According to KBR, the District Court's "persistent efforts to identify *some* grounds for compelling disclosure of the same documents [the DC Circuit] found to be privileged" had "raised serious questions regarding [the court's] ability to fairly preside over this litigation."

During oral argument, a well-prepared three-judge panel (Judges Tatel, Wilkins, and Sentelle) did not address KBR's request that the case be reassigned. The judges instead spent the bulk of their time challenging the relator's positions on waiver and disavowal. The panel seemed skeptical about the District Court's conclusion that KBR waived its privilege protections over the COBC documents as a result of Heinrich's deposition testimony. Counsel for the relator asserted that the waiver occurred as soon as KBR

questioned Heinrich and elicited testimony about his "ultimate conclusion" that KBR was compliant with its contract. Relator's counsel characterized Heinrich's conclusion as "necessarily and undeniably linked" to the KBR lawyer's review of the COBC documents. In response, Judge Tatel remarked, "You've got a problem if that's your answer."

The panel's concern was expressed succinctly by Judge Wilkins, who noted that lawyers run most companies' corporate compliance programs and conduct their internal investigations. He asked who, other than a lawyer, could testify about those topics at a 30(b)(6) deposition without waiving privilege. The panel appeared doubtful when relator's counsel responded that any other employee of the company could testify -- so long as he or she had not reviewed privileged documents prior to his or her deposition, because any testimony would purportedly open the door to waiver on that basis alone. Judge Wilkins queried whether such an employee would have to conduct an entirely new investigation to be competent on the topic.

As for whether KBR could disavow its reliance on Heinrich's testimony, relator's counsel asserted that if KBR did not want to produce the COBC documents, KBR's only option was to dismiss its defenses in their entirety. Judge Wilkins asked skeptically, "So if you waive as to some small, marginally relevant fact, the only way you can disavow is to give up all your defenses if you're a defendant?"

In contrast to the 45 minutes spent questioning relator's counsel, the panel engaged very little with counsel for KBR. But it was clear that the judges were focused on whether this case again presents the extraordinary circumstances necessary for a writ of mandamus. Indeed, Judge Tatel remarked that in order to show the clear error required under the mandamus standard, he would expect the party seeking mandamus to find a case "exactly on point."

Despite their concern about whether this case could meet the high bar for a mandamus action, the judges appeared to be aware that the case presents important questions concerning the practicalities of post-investigation Rule 30(b)(6) depositions, whether default is a defendant's only way to escape a waiver and the precedent that might be set for mandamus actions if the court grants the petition in this case.

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

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