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Preserving the Corporate Privilege in Internal Investigations: DC Circuit Clarifies Scope of the Privilege in Important Series of Decisions

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For the second time in just over a year, the DC Circuit granted the extraordinary remedy of a writ of mandamus to protect a company's assertion of privilege over materials relating to an internal investigation. In a significant case concerning the application of the corporate privilege – and one in which WilmerHale represented amici arguing against the lower court ruling – the Court vacated the denial of the protection of the privilege and warned, "If allowed to stand, the District Court's rulings would ring alarm bells in corporate general counsel offices throughout the country." In re Kellogg Brown & Root, Inc., No. 14-5319, slip op. (DC Cir. Aug. 11, 2015) ("*KBR II*")

The 2014 Decision – *KBR I*

KBR, a defense contractor, had conducted an internal investigation into allegations that it defrauded the United States by inflating costs and accepting kickbacks while administering military contracts in Iraq. In connection with a False Claims Act suit against KBR, the plaintiff sought documents related to the company's investigation, which KBR opposed on the basis of the attorney-client privilege. After the District Court rejected

KBR's assertion of privilege, the company sought a writ of mandamus, which the DC Circuit granted. *See In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (DC Cir. 2014) ("*KBR I*"). In its opinion, the DC Circuit cited to WilmerHale's amicus brief on behalf of a coalition of business associations, which criticized the sea change in privilege doctrine reflected in the District Court's opinion.

The Court of Appeals analyzed and rejected four separate justifications that the District Court had asserted in ordering the documents produced. First, with respect to the District Court's finding that KBR's internal investigation was conducted by in-house counsel, the DC Circuit clarified that the Supreme Court's seminal decision in *Upjohn*, recognizing the corporate privilege, "does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply," and that "a lawyer's status as in-house counsel does not dilute" the force of the privilege. Second, the Court of Appeals rejected the District Court's reliance on the fact that the interviews had been conducted by non-attorneys, holding instead that "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege." Third, the DC Circuit concluded that KBR's failure to inform employees that the purpose of the interview was to assist the company in obtaining legal advice was of no moment, as "nothing in *Upjohn* requires a company to use magic words to its employees" to avail the privilege in an internal investigation and, in any event, employees were told not to discuss the interviews without the approval of the legal department. Finally, the Court held that "[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation," the privilege applies, "even if there were also other purposes for the investigation and even if the investigation was mandated" by DoD regulation.

The 2015 Decision – *KBR II*

On remand, the District Court found that the "same contested documents" were discoverable because KBR had "impliedly waived" the attorney-client privilege and work product protections. Once again, the company sought a writ of mandamus, which the DC Circuit again granted. WilmerHale again supported the petitioner in *KBR II* on behalf of a broader coalition of business associations concerned with the uncertainty engendered by the District Court's opinion.

KBR II has three principal holdings. The first ruling concerns the interplay between the privilege and Federal Rule of Evidence 612, which provides that where a witness uses a writing to refresh his memory before testifying, an adverse party may have the writing produced "if the court decides that justice requires" production. The District Court had concluded that certain documents generated by KBR's investigation must be produced under Rule 612 on the theory that the company had waived attorney-client and work product protections when its 30(b)(6) witness had "reviewed the documents in preparation for his deposition" on the topic of the internal investigation. Rejecting this conclusion, the DC Circuit held that the District Court's reasoning would allow the privilege "to be defeated routinely by a counter-party noticing a deposition on the topic of the privileged nature of the internal investigation," thereby "potentially upend[ing] certain settled understandings and practices about the protections" governing internal investigations.

Second, *KBR II* addressed whether the company had effected an "at issue" waiver or "implied waiver" by making certain references to its internal investigation in a summary judgment brief. "Under the common-law doctrine of implied waiver, the attorney-client privilege is waived when the

client places otherwise privileged matters in controversy." In a footnote in its summary judgment filing, KBR described aspects of its investigation process without explicitly revealing its findings. Specifically, the brief stated that the company (1) generally reported findings of wrongdoing to the government, (2) had investigated the plaintiff's allegations of kickbacks, but (3) had made no report of misconduct to the government. The District Court found that KBR had implicitly argued that its investigation had found no wrongdoing, and thus had "actively sought a positive inference in its favor based on what . . . the [investigation] documents show." According to the District Court, KBR had impliedly disclosed the conclusion of its internal investigation. Recognizing that the issue of implied waiver presented "a more difficult question," the DC Circuit nevertheless rejected the District Court's finding because (1) KBR did not intend to make an "unconditional disclosure" of the results of its investigation; (2) KBR's reference to its investigation was only a "recitation of facts in the motion's introduction, not in an argument or claim concerning the privileged documents' contents"; and (3) as the movant for summary judgment, all inferences at this stage based on the contents of the privileged documents were to be drawn *against* KBR.

Third, the District Court had concluded that substantial portions of the investigation-related documents constituted fact work product, and that the plaintiff had made an adequate showing to overcome the work product protection. The DC Circuit agreed with the District Court that not "everything in an internal investigation is attorney-client privileged," and that pure fact work product may be discoverable upon a showing of "substantial need" and "undue hardship." It nevertheless concluded that the lower court had incorrectly compelled production of documents—including a report summarizing employee statements—that went well beyond pure fact work product and implicated both privileged materials and the mental

impressions of investigators.

Broadly speaking, this series of decisions helpfully clarifies the scope of the corporate privilege and its potential waiver in internal investigations. The recent decision in *KBR II*, in particular, is an important reminder to remain vigilant about inadvertently effecting an implied waiver of a company's privilege. Although the DC Circuit ultimately upheld KBR's assertion of the privilege, it observed that the company's discussion of its internal investigation, albeit brief, presented a relatively close call. A description of a privileged investigation in the course of litigation may be perceived—as it was by the District Court—as implicitly trying to convey the investigation's conclusions. In that regard, *KBR II* reinforces the need to consider carefully how privileged materials—whether arising from an internal investigation or otherwise—are used in litigation or in discussions with the government.

WilmerHale's Carl Nichols, Elisebeth Collins, and Adam Klein filed the amici briefs in both proceedings.

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