

**D.C. CIRCUIT REHABILITATES CORPORATE ATTORNEY-CLIENT PRIVILEGE***In re Kellogg Brown & Root, Inc.*, ---F.3d--- No. 14-5055, 2014 WL 2895939 (D.C. Cir. June 27, 2014)

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A District of Columbia discovery order in the spring of 2014 cast serious doubt on the continued viability of the attorney-client privilege in the corporate context. This doubt was soon put to rest, however, when the D.C. Circuit, in *In re Kellogg Brown & Root, Inc.*, ---F.3d--- No. 14-5055, 2014 WL 2895939 (D.C. Cir. June 27, 2014), vacated the district court's order and held that the attorney-client privilege protects communications made during a business's internal investigation conducted at the behest of the company's attorneys.

In *Kellogg*, a defense contractor employee filed a False Claim Act action against the contractor in 2005, alleging that the contractor inflated costs and accepted kickbacks while working under military contracts in Iraq. *Id.* at \*1. During discovery, the employee sought internal investigation documents the contractor had previously prepared to investigate similar accusations. The contractor's law department oversaw and conducted the investigation pursuant to the contractor's internal policies, and a discovery dispute arose when the contractor asserted that the documents were privileged. After conducting an *in camera* review the District Court ordered the contractor to produce the investigation documents, reasoning that the privilege did not apply because the contractor failed to show that "the communication would not have been made 'but for' the fact that legal advice was sought" and the investigation was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." *Id.* at \*1.

The contractor filed a petition for a writ of mandamus in the D.C. Circuit, which held that the district court's discovery order was legally erroneous. The court initially cited to the Supreme Court's seminal *Upjohn Co. v. United States*, 449 U.S. 383 (1981) decision, which generally provided that the attorney-client privilege applies to a corporation's internal investigation conducted pursuant to the corporation's in house counsel's recommendation. *Kellogg*, 2014 WL 2895939 at \*2. The court then reasoned that the instant case was indistinguishable from *Upjohn*, as in both instances the corporation conducted an internal investigation to ensure compliance with the law after being informed of potential wrongdoing and the investigation was conducted by the corporation's own legal department, acting in its legal capacity. *Id.* at \*3.

The court then dismissed the district court's rationale for distinguishing *Upjohn*. First, the privilege applies regardless of whether a corporation's in house counsel consulted with outside counsel. *Id.* at \*3. Second, the applicability of the privilege does not depend on whether attorneys or non-attorneys conducted the investigation, as "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege." *Id.* at \*3. Third, in conducting such an investigation a corporation need not inform its employees that the investigation was intended to assist the company in obtaining legal advice. *Id.* at \*3.

Fourth, and perhaps most importantly, the fact that the investigation was at least partially conducted to ensure compliance with regulatory requirements or pursuant to corporate policy does not defeat any privilege claim. Under the circuit's primary purpose test, which examines whether communications motivated by both business and legal concerns are privileged, the privilege will apply as long as obtaining legal advice was one of the investigation's "significant purposes." *Id.* at \*4. And, in *Kellogg*, the court reasoned that despite multiple motivations for the investigation, obtaining legal advice was indeed a significant purpose driving the contractor's investigation. The court accordingly granted the contractor's writ for mandamus and vacated the district court's opinion.

*If you have any questions about this Client Bulletin, please feel free to contact any of the attorneys listed or the CMN attorney with whom you regularly work.*

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