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D.C. Circuit Upholds Privilege for Internal Investigation Documents

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Editor's note: John F. Savarese is a partner in the Litigation Department of Wachtell, Lipton, Rosen & Katz. This post is based on a Wachtell Lipton firm memorandum by Mr. Savarese, Peter C. Hein, and David B. Anders.

Earlier this week, the D.C. Circuit Court of Appeals for the second time granted a writ of mandamus and vacated district court orders that would have provided for the disclosure of privileged documents created in the course of a company's internal investigation. *In Re Kellogg Brown & Root, Inc., No. 14-5319 (Aug. 11, 2015)*.

As noted in our prior memo, in a 2014 decision in this same case the D.C. Circuit granted a writ of mandamus and made clear that a proper application of privilege principles would protect documents created in the course of a company's internal investigation—even if the investigation was conducted by in-house counsel without outside lawyers, even if non-attorneys (serving as agents of attorneys) conducted many of the interviews, and even if the internal investigation was conducted pursuant to a company compliance program required by a statute or government regulation (and thus arguably had in part a business purpose in addition to the purpose of obtaining or providing legal advice).

Yet, on remand, the district court again directed disclosure of the internal investigation documents, this time on the grounds that the company had waived privilege and that certain documents were discoverable fact work product as to which the plaintiff had shown substantial need.

Once again overruling the district court, the D.C. Circuit observed that the rationales advanced by the district court for directing disclosure suffered from a "fundamental flaw," namely, that the district court orders injected "uncertainty into application of attorney-client privilege and work product protection to internal investigations." On the specific issues before it on the second mandamus application, the D.C. Circuit rejected the argument that the company waived privilege because a corporate 30(b)(6) designee reviewed privileged documents in preparation for his deposition testimony. Similarly, the court rejected an argument that the company—by stating in a footnote in its court papers that the company will make a disclosure to the government when an internal investigation reveals a violation and that here the company performed an internal investigation, after which it did not report wrongdoing to the government—had waived privilege by placing the content of the internal investigation documents "at issue." And the court overruled the district court's conclusion that portions of the internal investigation documents were fact work product that were discoverable based on substantial need, concluding that summaries of

statements of company employees in the internal investigation report were privileged and various of the documents reflected the protected mental impressions of the investigators.

In the course of its reasoning, the D.C. Circuit noted that “companies and the government can, and often do, structure legitimate compliance and reporting programs that do not involve waiving privilege.” By now twice granting writs of mandamus to overrule district court orders directing disclosure of internal investigation documents, this Court of Appeals has sent an unmistakable message that district courts and government agencies should respect legitimate assertions of privilege with respect to internal investigation documents; has helpfully clarified the scope of materials that are protected by privilege in this increasingly important context; and has underscored that waivers of such important protections are not to be lightly inferred.