

Client Alert

DOJ Rebuked on Limitation of Legal Fee Coverage

June 29, 2006

In reliance upon the Thompson Memorandum, the Department of Justice unconstitutionally pressured accounting firm KPMG to curtail its practice of advancing legal fees to company employees under investigation and prosecution, according to the June 26 Opinion issued by U.S. District Judge Lewis A. Kaplan. The ruling emanates from defense motions and a resulting three day hearing conducted by Judge Kaplan in May to address defense claims in the case of *United States v. Stein* (S1 05 Crim. 0888). The defense argued that Southern District prosecutors violated the Sixth Amendment right to counsel and Fifth Amendment Due Process rights of former KPMG employees by essentially forcing KPMG to abandon its fee advancement policy.

In 2003, Former Deputy Attorney General Larry D. Thompson issued the controversial internal Justice Department memorandum at issue, which states that a corporation's advancement of legal fees to culpable employees and agents is relevant in the Department's decision whether to indict the corporation. The Thompson Memorandum, binding on all federal prosecutors, has thereby discouraged companies from paying or advancing legal fees contrary to long-standing business policies and state corporation codes.

In his opinion, Judge Kaplan writes: "The argument that payment of legal fees to employees and former employees is relevant to gauging the extent of a company's cooperation . . . is problematic. There is no necessary inconsistency between an entity cooperating with the government and, at the same time, paying defense costs of individual employees and former employees. ...[I]t simply cannot be said that payment of legal fees for the benefit of employees and former employees necessarily or even usually is indicative of an unwillingness to cooperate fully." Judge Kaplan further explains that the Thompson Memorandum "discourages and, as a practical matter, often prevents companies from providing employees and former employees with the financial means to exercise their constitutional rights to defend themselves. ...The legal fee advancement provision violates the Due Process Clause."

The effect of Judge Kaplan's ruling in the *Stein* case is yet to be seen, as the Court directed defendants to file civil claims within 14 days if KPMG persists in denying fee coverage. More broadly, however, the Court's ruling is a potential landmark decision which may cause the Department of Justice to reevaluate its tactical use of the Thompson Memorandum, at minimum in relation to corporate fee advancement policies. Judge Kaplan's opinion also sends a strong message to the business community to resist government efforts to force their election between corporate survival and respect for the fundamental constitutional rights of their employees.

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