The Changing Landscape of Internal Investigations

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In re Kellogg Brown & Root, Inc. (Barko I)

756 F.3d 754 (D.C. Cir. 2014)

- District Court: internal investigation not privileged
  - Investigation "undertaken pursuant to regulatory law and corporate policy"
  - Conducted by in-house counsel only
  - Non-attorney interviewers
  - Interviewees not told that the purpose was to assist the company in providing legal advice

In re Kellogg Brown & Root, Inc. (Barko I)

756 F.3d 754 (D.C. Cir. 2014)

- D.C. Circuit: internal investigations are privileged
  - But-for test rejected; "one of the significant purposes" was to obtain or provide legal advice
  - Outside counsel are not "a necessary predicate"
  - Communications by and to non-attorneys serving as agents of attorneys are routinely protected
  - No "magic words" necessary to tell employees in order to gain the benefit of the privilege

U.S. ex rel. Barko v. KBR (Barko II)

- On remand, District Court found waiver through statements made by KBR's counsel during discovery and at summary judgment:
  - The shield becomes a sword
  - Rule 612
  - No retraction allowed
- Alternatively, some is fact work product only and Barko has substantial need
- Another mandamus writ filed, with oral argument at 10:00 a.m.

Barko – Lessons Learned

- *Barko I*
  - Attorney-client privilege is alive and well
  - Make clear what your purposes are
- *Barko II*
  - [Maybe…]
    - Keep your sword in its sheath
    - Minimize deponent prep materials
    - Log all responsive, privileged materials

Barko – Securities & Exchange Commission

- SEC's involvement
  - Settlement regarding allegations that KBR required witnesses in internal investigations to sign confidentiality statements that could have kept them from reporting possible securities law violations to outside authorities.

Barko – Securities & Exchange Commission (cont.)

Original provision

- "I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment"

Revised provision

- "Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures"

Barko – SEC Lessons Learned

- Review existing policies to assess potential risk
- Consider using carve-out language
  - Nothing in this agreement shall prohibit you from communicating directly with…
- Affirmative language noting no obligation for prior counsel approval (or anyone else in the company)

Wal-Mart Stores, Inc.

- *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW, 95 A.3d 1264 (Del. 2014)*
- Wal-Mart shareholder, IBEW, seek access to internal investigation documents during a derivative action
- Del. Court of Chancery orders Wal-Mart to produce investigation files
- Del. Supreme Court agree, applying *Garner* exception

Wal-Mart Stores, Inc. (cont.)

- *Garner* doctrine allows disclosure of privileged materials to shareholders for "good cause"
- Court found good cause

Wal-Mart Stores, Inc. Lessons Learned

- Attorney-client privilege may take a back seat when fiduciary duties are involved
  - *Wal-Mart* unlikely to have sweeping impact on ACP
- Attorneys must be mindful of the fiduciary exception when communicating with corporate officials and conducting internal investigations

Bank of China

- *Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479 (S.D.N.Y. 2013)
- Wultz family bring suit against BOC under the Antiterrorism Act for allegedly providing material support and resources to terrorist organization
- Seek production of BOC's anti-money laundering compliance procedures and investigations
- BOC argue that documents are privileged

Bank of China (cont.)

- S.D.N.Y. look at choice of law and determine Chinese law applies to some docs; US law applies to others
- Where Chinese law applies
  - Chinese law does not recognize ACP or AWP, so neither privilege applies
- Where US law applies
  - Unlicensed Chinese in-house counsel not entitled to privilege
  - BOC fail to show that documents were prepared "in anticipation of litigation" so AWP does not apply

Bank of China Lessons Learned

- Foreign companies – importance of retaining U.S. counsel when possibility of litigation in the U.S. arises
- Importance of educating foreign clients regarding the attorney-client privilege and attorney work product doctrine in the United States

Freeh Investigation

- Where *Freeh Firm* not retained to provide legal services, its communications were not privileged.
- Court focused on the "**Scope of Engagement**" section of the firm's engagement letter:
  - Engaged to serve as "independent, external legal counsel" – NOT ENOUGH
- In contrast, the Freeh Firm's retention of the Freeh Group, "**for the purpose of providing legal services**", allowed Penn State to assert privilege over communications with the Freeh Group.

Freeh Investigation Lessons Learned

- Take extra caution when drafting engagement letters

- Beware Subject Matter Waiver

Questions?

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