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Government Investigations / Government Contracts Advisory

In *Barko* Litigation, DC Circuit Reinforces Attorney–Client Privilege and Work Product Protection for Internal Investigations

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On August 11, 2015, the DC Circuit again granted mandamus in the continuing saga of litigation between Harry Barko and Kellogg Brown & Root, Inc. (KBR). This decision overturned district court rulings that KBR must disclose documents relating to an internal investigation because it waived the attorney–client privilege by using the documents to prepare a deposition witness and by referring to the investigation in its motion for summary judgment, and because Barko had a substantial need for the factual (as opposed to opinion), work product contained in those documents. Indeed, the court noted that the district judge's opinions on privilege, including his prior opinion that was previously overturned by the court, "suffer from the same fundamental flaw: They run contrary to precedent by injecting uncertainty into application of attorney–client privilege and work product protection to internal investigations" and are "irreconcilable with binding precedent."

The court's decision sends a strong message that the privileged status covering properly-conducted internal investigations is alive and well and that the court will not be receptive to arguments injecting uncertainty into that status, but it also highlighted potential missteps that companies and their counsel should avoid in order to maintain that status.

As has been discussed in our previous alerts on this litigation, "Don't Let Barko Bite Your Company's Attorney-Client Privilege And Work Product Protection" and "Barko Muzzled, But Attorney-Client Info Remains At Risk," government contractors, and indeed any corporation that undertakes an internal investigation, should pay close attention to measures that will increase the likelihood that their attorney–client privileged communications and work product will remain protected. The latest decision demonstrates that vigilance is warranted not only during the investigation but also after the investigation is over, including in subsequent litigation where the investigation might arguably be placed at issue.

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Questions and comments about the Steptoe Government Contracts advisory are always welcome.

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I. Case Background

A. Factual Background

Harry Barko, a former employee of KBR, filed a *qui tam* lawsuit under the False Claims Act against KBR, alleging a wide range of improper activities, including kickbacks relating to US government contracts performed in Iraq.[1] During the course of discovery, Barko requested that KBR disclose internal investigation reports, interview memos, and other associated files related to the alleged misconduct. KBR refused to turn over the documents, asserting that they were protected by the attorney–client privilege and work product doctrine.[2] Barko moved to compel disclosure of this information, arguing in the first

[1] *Id.*
[2] *Id.* at 2–3.

instance that the internal investigation reports were not privileged, and, if they were, that KBR had waived the privilege.

B. "Barko I"

In a highly controversial decision, Judge James S. Gwin of the Northern District of Ohio, sitting by designation in the District Court for the District of Columbia, found that communications relating to the internal investigation were not protected by attorney–client privilege.[3] Judge Gwin applied a "but for" test to determine whether the "primary purpose" of the investigation had been for KBR to obtain legal advice.[4] Finding that the investigation had been "undertaken pursuant to [Defense Department regulations] and corporate policy rather than for the purpose of obtaining legal advice," he rejected KBR's privilege claim.[5]

Judge Gwin also distinguished KBR's investigatory procedures from a privileged undertaking, noting that outside counsel had not been consulted, and that the investigators were not attorneys and had not informed interviewees that their interviews were for the purpose of assisting counsel in providing legal advice.[6] He did not reach Barko's argument that KBR had put the internal investigation documents "at issue" while defending itself against Barko's claims.

KBR challenged Judge Gwin's "primary purpose" ruling and filed a writ of mandamus with the DC Circuit. The appeals court granted the writ, and upon review vacated the district court decision, finding that KBR's internal investigation was protected by the attorney–client privilege. The court held that Judge Gwin's application of the "but for" test was inappropriate, and the correct test was instead "whether obtaining or providing legal advice was one of the significant purposes of the communication."[7] The case was returned to Judge Gwin with instructions authorizing him to consider any other arguments that Barko had timely asserted for why the internal investigation documents were not covered by either the attorney–client privilege or work product protection. Barko sought, but failed to obtain, *en banc* review of the panel's decision in *Barko I*.

C. "Barko II"

1. The District Court's Decisions

On remand, Judge Gwin proceeded to consider Barko's argument that KBR had waived the attorney–client privilege when its Rule 30(b)(6) witness, Christopher Heinrich, Vice-President of Legal for KBR, examined the internal investigation documents before his deposition, and when it subsequently referred to the investigation in connection with its motion for summary judgment.[8]

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[3] *See United States ex rel. Barko v. Halliburton Co.*, 37 F. Supp. 3d 1 (D.D.C. 2014).
[4] *Id.* at 5.
[5] *Id.*
[6] *Id.* at 5–6.
[7] *In re Kellogg Brown & Root, Inc*., 756 F.3d 754 (D.C. Cir. 2014) (*KBR I*).
[8] *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-cv-1276, 2014 U.S. Dist. LEXIS 18153, at *19–42 (D.D.C. Nov. 20, 2014).

Barko's Rule 30(b)(6) notice had designated the internal investigation as a topic for questioning, and Heinrich had consequently reviewed the relevant documents before his deposition. However, when Barko's attorney asked him why KBR had not reported potential kickbacks to the US Department of Defense, KBR's attorney objected to the line of questioning by asserting attorney–client privilege, and instructed Heinrich not to answer.[9] When KBR's attorney examined Heinrich, he testified that KBR was contractually obligated to conduct the investigation and it was KBR's normal practice to report reasonable evidence of kickbacks, but after this investigation, KBR had decided to make no report and give no refunds to the Defense Department.[10] And Heinrich explained that even when KBR has made notifications to the Defense Department as required by contracts, it has never provided internal investigation documents themselves to the Defense Department because it has always treated the investigation as subject to attorney–client privilege.[11]

Shortly after this deposition, KBR moved for summary judgment. Excerpts from Heinrich's testimony covering the above-described subjects were attached to KBR's motion, and KBR referenced this deposition language in its accompanying statement of undisputed facts. In addition, the introductory portion of the motion contained a footnote stating that, as a matter of course, KBR investigates potentially illegal activities, that it discloses violations of the Anti-Kickback Act to the government (but not investigation materials) when it uncovers them, that its investigations are privileged, and that, in this case, it had conducted an investigation of the circumstances underlying Barko's claim but had not made any reports to the government regarding the subject of this investigation.

In view of these circumstances, Judge Gwin found that KBR had waived the attorney–client privilege. He based his opinion on two grounds: First, he found that KBR had put its internal investigation "at issue" in the litigation, both by affirmatively questioning Heinrich during Barko's deposition of him and by referencing the internal investigation in the footnote in its motion (as well as the ancillary materials accompanying the motion). He held that KBR had "injected" the investigation documents into its deposition preparation of Heinrich, and had made "extended and repeated references to the results of its privileged internal investigation."[12] He also held that the footnote was tantamount to an argument seeking an inference in KBR's favor that the investigation found no wrongdoing. Second, he found that Federal Rule of Evidence 612 (which relates to compelled disclosure of documents used to refresh a witness's memory) applied to the investigation documents that Heinrich had reviewed before his deposition. He explained that Rule 612 requires a balancing test and concluded that "fairness considerations" outweighed KBR's interests and supported disclosure of those documents to Barko.

In a separate decision, Judge Gwin considered whether there were additional grounds for disclosure of portions of the investigation documents under the work product doctrine. He held that certain materials

[9] *Id.* at *21–22.
[10] *Id.* at *22–25.
[11] *Id*. at *27–28.
[12] *Id*. at *32.

should be turned over to Barko because they contained nothing but fact work product and Barko had demonstrated substantial need for that information.[13]

KBR thereafter petitioned for a writ of mandamus covering both decisions.

2. The DC Circuit Decision

After oral argument on May 11, 2015, the DC Circuit, in an opinion by Judge Wilkins,[14] granted KBR's petition and rejected all of Judge Gwin's rationales for compelling disclosure, but left the door slightly open for him to revisit the question of whether certain portions of the internal investigation documents contain fact work product for which Barko has a substantial need.[15]

The DC Circuit first dealt with Judge Gwin's holding that the documents shown to Heinrich during his deposition preparation must be produced under Rule 612. The court held that Rule 612 was inapposite because the record contained no evidence that the documents were used to refresh Heinrich's recollection or otherwise affected his testimony.[16] The court also noted that even if the Rule 612 balancing test had been apposite, Rule 612 cannot be construed to permit a litigant to "routinely" circumvent attorney–client and work product protections for internal investigation documents by noticing a deposition on the topic of the investigation itself (as opposed to the facts underlying the investigation) and thereby leaving the witness no choice but to review those documents to prepare for the deposition.[17] The court lambasted Barko's counsel for taking the "absurd position" that KBR could have avoided waiver either by summarizing the documents to Heinrich before his deposition or by producing a different witness without personal knowledge of the investigation. The court noted that such a proposition would "defeat[] the purpose of civil discovery."[18]

The court also rejected Judge Gwin's ruling that KBR had placed the investigation or its results at issue in the litigation, but took pains to acknowledge that this was a closer call than the Rule 612 ruling, and in particular that the summary judgment motion's footnote was "undoubtedly the highest hurdle to our conclusion that KBR did not waive the privilege."[19]

The court easily disposed of the investigation references that appeared in the ancillary summary judgment materials, pointing out that neither the statement of undisputed facts nor the deposition testimony constituted argument of the type that could place the investigation or its results at issue in the

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[13] *United States ex rel. Barko v. Halliburton Co.*, 75 F. Supp. 3d 532, 535 (D.D.C. Dec. 17, 2014).
[14] Judges Tatel and Sentelle comprised the rest of the panel.
[15] *KBR II*, slip op. at 2, 22 (D.C. Cir. Aug. 11, 2015).
[16] *Id*. at 10.
[17] *Id*. at 10–11 (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)).
[18] *Id*. at 11.
[19] *Id.* at 18; *see also id.* at 15.

motion.[20] Nevertheless, the court cautioned that ***partial*** disclosures of privileged information in a statement of undisputed facts or deposition testimony "surely" can create a waiver.[21]

The court's analysis of the footnote's discussion of the investigation was considerably more complex. Ultimately, KBR was saved from waiver because the discussion (1) appeared in a footnote in the introductory portion of KBR's brief (rather than in the text of the argument portion), (2) recited only facts and "neither directly stated that the . . . investigation had revealed no wrongdoing nor sought any specific relief because of the results of the investigation," and (3) could not reasonably be interpreted to request an ***inference*** favorable to KBR (i.e., that the investigation had revealed no wrongdoing), because the law unequivocally prohibits courts from drawing inferences in favor of parties moving for summary judgment.[22] The court also analyzed the footnote in the context of the relationship between KBR's internal investigation and the Defense Department's regulatory regime, concluding that the footnote reflected a "deal" between KBR and the Department calling for preservation of attorney–client and work product protection under certain circumstances.[23]

Finally, the court turned to Judge Gwin's ruling that work product protection should be overridden for certain documents containing nothing but factual materials for which Barko had a substantial need. Here, the court concluded that Judge Gwin's basic legal analysis was correct, but his application of that analysis to the documents was faulty. KBR argued unsuccessfully that ***all*** of the investigation documents were entirely protected by attorney–client privilege as well as the work product doctrine.[24] The court rejected that argument because some of those documents were communications between attorneys and the investigators who had worked under their supervision, and these communications did not consist entirely of attorney–client privileged information (e.g., interviews of KBR employees conducted by the investigators) and work product (e.g., mental impressions of the investigators).[25] Judge Gwin erred in applying this principle insofar as many of the portions of documents that he ordered to be disclosed actually included summaries of KBR employees' privileged statements or investigators' mental impressions.[26] Because of Judge Gwin's misapplication of the law (and in particular his failure to distinguish between fact and opinion work product), the court did not reach the question of whether Barko had shown the substantial need necessary for compelling disclosure of factual work product.[27]

As of the release of this alert, Barko has not yet filed a petition for rehearing en banc.

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[20] *Id.* at 14–15.
[21] *Id.* at 15.
[22] *Id.* at 17–18.
[23] *Id.* at 15–16.
[24] *Id.* at 19–20.
[25] *Id.* at 20–21. The court did acknowledge that, for purposes of this analysis, an investigator "effectively steps into the shoes" of an in-house attorney who directs his work. *Id.* at 20. However, the court criticized KBR's analysis as overly simplistic, as discussed further below.
[26] *Id.* at 21.
[27] *Id.* at 22.

II. Analysis

While *KBR II* resoundingly confirms that the DC Circuit takes a strong view in favor of the privileged nature of internal investigations, it does not eliminate the need for careful attention to establishing and maintaining attorney–client privilege and work product protection when conducting such investigations. Moreover, it highlights the waiver risks that are presented after the investigation has been completed. Our previous alerts (available here and here) suggested some ways that companies can proceed during the investigation stage to establish and maintain protection for the resulting documents, particularly given the fact that there can be no assurance that other courts will universally follow the DC Circuit's lead. Below we note some measures suggested by *KBR II* that should be taken after the investigation has been completed in order to reduce waiver risks:

- ***Depositions:*** *KBR II* strongly suggests that litigation counsel should be very judicious about using internal investigation materials in connection with depositions. During preparation sessions, showing such materials to witnesses may well be entirely unnecessary, as long as counsel themselves have studied the materials sufficiently to inform their interactions with the witnesses. In those very limited circumstances where such materials absolutely must be shown to witnesses in order to prepare them adequately, care should be taken to document that the purpose and effect of showing the documents was neither to refresh their recollections nor to affect their testimony. During depositions, counsel should (1) assiduously preserve privilege objections, (2) instruct witnesses not to answer any questions about the investigation other than "name, rank and serial number," and (3) refrain from asking any substantive questions about the investigation unless absolutely necessary.

- ***Pleadings/Motions:*** While merely mentioning an internal investigation in a footnote in the introductory section of a motion for summary judgment may not waive privilege, *KBR II* certainly suggests that there could be circumstances in which a party could be found to have waived protection of investigation documents by making assertions about the investigation in pleadings or motions. For example, even in the context of moving for summary judgment, it would appear that setting forth the factual findings and legal conclusions of an internal investigation in a manner that leaves no room for inference, favorable or unfavorable, could trigger waiver. It is not hard to understand why Judge Gwin interpreted KBR's disclosure that (1) it conducted an internal investigation, (2) its policy is to disclose wrongful conduct uncovered by such investigations to the government, and (3) it did not disclose wrongful conduct in this instance, as sending a strong message that its investigation uncovered no wrongdoing. Companies should be wary about flying as close to the sun as KBR did here in summary judgment papers, even though, as the DC Circuit held, inferences cannot be drawn in favor of the movant.

  In any event, had KBR's statements regarding its internal investigation been made in a motion or pleading other than for summary judgment, the result might very well have been different. Companies may be tempted to reference their internal investigation findings in other litigation contexts, such as in an answer to a complaint, a counterclaim, or even in responses to discovery

requests.[28] In such cases, counsel should carefully review the proposed disclosure, as well as all privileged materials relating to the subject matter of the proposed disclosure, in order to fully assess the risks and potential consequences of an "at issue" waiver. When counsel decides that the benefit of such a disclosure outweighs the risk of waiver, counsel should nonetheless exercise care in how the investigation is described in any pleadings, and should avoid mentioning any legal or other conclusions drawn from the investigation. In all circumstances, counsel should bear in mind the DC Circuit's reminder that voluntary partial disclosures may lead to compulsory full disclosures.

- ***Discovery Disputes:*** The DC Circuit went out of its way to lecture counsel about the importance of distinguishing between attorney–client privilege and work product protection in the context of assessing waiver issues, stating: "The attorney–client privilege and opinion work product protection separately operate as barriers to compelled disclosure, and there is nothing to be gained by sloppily insisting on both or by failing to distinguish between them."[29] The court also quoted extensively and approvingly from Edna Selan Epstein's treatise on "The Attorney–Client Privilege And The Work Product Doctrine," including her assertion that waiver of the attorney–client privilege should "always be analyzed distinctly from waiver of work product."[30] However, the court felt constrained from applying this distinction because KBR and Judge Gwin had proceeded on the assumption that the waiver analysis was the same for both attorney–client privilege and work product.[31] Litigation counsel would be well-advised to keep this distinction in mind when briefing and arguing future discovery disputes involving waiver of these protections. However, we do not read *KBR II* as calling into question the widespread practice of labeling internal investigation materials as both attorney–client privileged and work product, given the DC Circuit's recognition that some internal investigation documents may contain ***both*** attorney–client privileged information and opinion work product.[32]

- ***Disclosures to the Government:*** KBR's summary judgment motion took pains to make clear that although it submits reports to the government when it has reasonable grounds to believe that a violation of the Anti-Kickback Act has occurred, it never provides written reports of its investigations to the government and it intends to preserve its attorney–client privilege and work product protection in connection with its disclosures to the government. Addressing this issue, the DC Circuit noted that "companies and the government can, and often do, structure legitimate

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[28] *See, e.g.*, *Tackett v. State Farm Fire and Cas. Ins. Co.*, 653 A.2d 254, 259 (Del. 1995) (defendant implicitly waived privilege by putting the subject of certain documents "at issue" through its answer to plaintiff's complaint and in its affirmative defense); *In re Imperial Corp. of Am.*, 179 F.R.D. 286, 290 (S.D. Cal. 1998) ("the party alleging reliance on his attorney's investigation to discover certain causes of action and overcome the statute of limitations bar [to a counterclaim], impliedly waive[s] the attorney–client privilege and work product protection that might apply regarding the investigation and its findings and conclusions"); *Stern v. O'Quinn*, 253 F.R.D. 683, 676–77 (S.D. Fla. 2008) (finding waiver in defamation case where defendants indicated in their discovery responses their intention to rely upon information obtained through internal investigation in making their defense).

[29] *KBR II* at 21.

[30] *Id.* at 12.

[31] *Id.* at 13.

[32] *See, e.g.*, *id.* at 20.

compliance and reporting programs that do not involve waiving privilege."[33] Although this statement probably cannot be classified as a holding of *KBR II*, it certainly can be viewed as dictum confirming the principle that merely reporting a violation to the government does not necessarily result in waiver regarding the underlying investigation materials. By the same token, the underlying premise of this statement—that disclosure of otherwise privileged information to the government constitutes waiver of any further privilege claim regarding the disclosed information—is consistent with prior DC Circuit precedent,[34] and the absence of any footnoted discussion of the issue suggests that this per se prohibition is still alive and well in this jurisdiction. Accordingly, companies doing business with federal government agencies must still consider the extent to which any particular disclosure to the government can waive privilege and work product protection for investigation materials. Sharing investigation reports, interview memoranda, or other privileged information with a government body will continue to present a clear and present danger of waiving any future claims of privilege for all investigation materials vis-à-vis third parties in the District of Columbia, and the prospect of such an outcome must be borne in mind at every step involving an internal investigation.

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[33] *KBR II* at 16.
[34] *See In re Sealed Case*, 877 F.2d 976, 980–81 (D.C. Cir. 1989).