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INTERNAL INVESTIGATIONS AND THE EVOLVING FATE OF PRIVILEGE[1]

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ABSTRACT

In 1981, the United States Supreme Court delivered a landmark ruling in Upjohn Co. v. United States. The decision made clear that the protections afforded by the attorney-client privilege apply to internal corporate investigations. This piece examines the fundamental tenets of Upjohn, discusses some recent challenges to the applicability of privilege to materials gathered during internal investigations, and considers the manner in which the international nature of modern internal investigations adds complexity and uncertainty to the field.

[1] Thank you to my research assistant, Zachary Lessard, for his assistance with this piece.

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I. INTRODUCTION

In 1981, the United States Supreme Court was asked to consider the applicability of the attorney-client privilege to a corporate internal investigation in the case of *Upjohn Co. v. United States*.[2] The case stemmed from an internal investigation into questionable payments to foreign officials by employees of a pharmaceutical manufacturer. As part of the internal investigation, the corporation distributed a questionnaire to its employees seeking relevant information regarding such payments. The responses were then reviewed by the corporation's General Counsel and outside attorneys. Eventually, several governmental entities became involved in the matter, including the Internal Review Service, who was interested in the tax consequences of the payments. As part of its inquiry, the IRS requested copies of the questionnaire responses provided to investigating counsel by Upjohn's employees. The company refused on the basis of the attorney-client privilege and the matter was litigated to the Supreme Court.

In reaching its decision in the case, the Supreme Court considered the lower court's assertion that the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.'"[3] In the lower court's opinion, only those in the corporation's "control group" were covered by the privilege. In considering the matter, the Supreme Court rejected the "control group" approach, stating that the test "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."[4] In explaining its decision, the Court reminded the parties of the historical purpose of the privilege.

> The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.[5]

Consistent with the spirit and purpose of this language, the Court concluded that the

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2 449 U.S. 383 (1981).

3 *Id.* at 388.

4 *Id.* at 392.

5 *Id.* at 389.

questionnaires were covered by the attorney-client privilege.

The *Upjohn* decision made clear that the protections afforded by the attorney-client privilege apply to internal corporate investigations and interactions between investigating counsel and employees. Nevertheless, challenges to the applicability of the privilege have continued as adversarial parties have sought to gain access to materials from these inquiries. This piece examines three such examples and considers the lessons learned for corporations and their counsel in each.

II. KELLOGG BROWN & ROOT

One of the most publicized cases regarding internal investigations and privilege in recent years is the *Kellogg Brown & Root* ("KBR") matter in the District of Columbia. In the *KBR* case, a whistleblower argued that the corporation had defrauded the government related to military contracts in Iraq.[6] During discovery, the whistleblower requested documents regarding a prior internal investigation of the matter conducted by in-house counsel at the company. KBR refused, asserting that the investigation had been undertaken to obtain legal advice and, therefore, the materials sought were protected from disclosure by the attorney-client privilege.[7] In reviewing the matter, the district court concluded that the materials were not protected from disclosure because the defendant had not shown that "the communication would not have been made 'but for' the fact that legal advice was sought."[8] According to the district court, "KBR fail[ed] to carry its burden to demonstrate that the attorney-client privilege applies to the COBC documents. Most importantly, the Court finds that the COBC investigations were undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice."[9]

In 2014, the United States District Court for the District of Columbia overturned the lower court ruling, concluding that the "same considerations that led the Court in *Upjohn* to uphold the corporation's privilege claims apply here."[10] In reaching its decision, the appellate court offered important clarifications regarding the *Upjohn* decision. First, the court made clear that *Upjohn* "does not hold or imply that the involvement of

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6 *In re Kellogg Brown & Root, Inc. et al.*, 756 F.3d 754, 756 (D.C. Cir. 2014). Many of the cases discussed and referenced herein also include issues related to the work-product doctrine. This article, however, will only focus on the cases as they related to the attorney-client privilege.

7 *See id.*

8 *Id.*

9 *United States ex rel. Barko v. Halliburton Company*, 37 F.Supp.3d 1, 5 (D.D.C. 2014).

10 *In re Kellogg Brown & Root, Inc. et al.*, 756 F.3d at 757.

outside counsel is a necessary predicate for the privilege to apply."[11] Second, the court explained that "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege."[12] Third, the court noted that *Upjohn* does not require a "company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation."[13]

The appellate court in the *KBR* case also rejected the lower court's argument that the company's internal investigation did not deserve privilege protection because it was the result of regulatory requirements and corporate policies. The appellate court stated, "So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion."[14] As part of this analysis, the appellate court rejected the lower court's use of a "but for" test to determine if a communication was properly protected by the attorney-client privilege.[15]

> [T]he District Court's novel ["but for"] approach would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry. In turn, businesses would be less likely to disclosure facts to their attorneys and to seek legal advice, which would "limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 392.[16]

The appellate court concluded by determining that the district court "clearly erred."[17]

Despite the strong language from the appellate court in the *KBR* case, the plaintiffs in the matter continued to challenge the applicability of the attorney-client privilege.[18] The matter eventually made its way to the United States Supreme Court, which denied the

11 *Id* at 758.

12 *Id.*

13 *Id.*

14 *Id.* at 758-59. As part of this analysis, the appellate court also rejected the lower court's use of a "but for" test with regard to the purpose of the communication. *See id.* at 759.

15 *See id.* at 759.

16 *Id.* at 759.

17 *See id.* at 760.

18 *See Kellogg Brown & Root, Inc. et al.*, 2015 WL 4727411 (D.C. Cir. Aug. 11, 2015).

plaintiff's writ of certiorari in January 2016.[19] The *KBR* matter is a strong signal that, despite *Upjohn*, investigating counsel must be prepared for potential litigation regarding the applicability of the attorney-client privilege to internal investigations. To this end, counsel must be vigilant in ensuring that the investigation and any subsequent disclosures are made with a full understanding and appreciation of the risks of such challenges.

III. WAL-MART

Another internal investigation matter that has garnered recent attention is the dispute over the applicability of the attorney-client privilege to an internal investigation conducted by Wal-Mart related to alleged violations of the Foreign Corrupt Practices Act. The matter began when the New York Times published a story in April 2012 regarding potential bribery by employees of Wal-Mart in Mexico.[20] The article included allegations that Wal-Mart executives had been aware of the conduct since 2005, and failed to adequately respond.[21] In particular, the article alleged that Wal-Mart had conducted an ineffective internal investigation, allowing the same general counsel of Wal-Mart de Mexico who was implicated in the scandal to lead the inquiry.[22] In June 2012, the Indiana Electrical Workers Pension Trust Fund IBEW ("IBEW"), a Wal-Mart shareholder, contacted the company and requested access to documents related to the company's investigation of the bribery allegations.[23] Wal-Mart provided some materials, but declined to provide documents that that they argued were protected by privilege or not necessary and essential to the trust fund's inquiry.[24] The issue eventually moved into the Delaware Court of Chancery, which ordered Wal-Mart to produce the documents under what is known as the *Garner* doctrine.[25] The matter was then appealed to the Delaware Supreme Court, which also focused on the *Garner* doctrine to determine whether the plaintiffs were entitled to the materials.[26]

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19 *See United States ex rel. Barko v. Kellogg Brown & Root, et al.,* U.S., No. 15-589*, cert. denied* (Jan. 16, 2016).

20 *See* David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, New York Times (April 21, 2012), *available at* http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all&_r=0

21 *See id.*

22 *See id.*

23 *See Wal-Mart Stores Inc. v. Indiana Electrical Workers Pension Trust Fund IBEW*, 95 A.3d 1264, 1268-69 (Del. 2014)

24 *See id.* at 1269.

25 *See id*. at 1270 (citing *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970)).

26 *See id.*

The *Garner* doctrine "allows stockholders of a corporation to invade the corporation's attorney-client privilege in order to prove fiduciary breaches by those in control of the corporation upon showing good cause."[27] In determining whether good cause exists, the Garner court established a number of factors for consideration.

There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.[28]

In this matter, because the IBEW was a shareholder, much of the contention centered on the necessity of breaching the privilege to obtain the information sought.

After reviewing the facts of the case and the *Garner* doctrine, the Delaware Supreme Court affirmed the lower court decision ordering Wal-Mart to produce the privileged materials.[29] In reaching its decision, the Delaware Supreme Court noted the importance of the attorney-client privilege and stated, "[T]he *Garner* doctrine fiduciary exception to the attorney-client privilege is narrow, exacting, and intended to be very difficult to satisfy."[30] Nevertheless, the court reasoned that the plaintiff's had satisfied this high bar. The conclusion was reached, in part, because the focus of the suit was on the internal

27 *See id.* at 1276.

> The attorney-client privilege still has viability for the corporate client. The corporation is not barred from asserting it merely because those demanding information enjoy the status of stockholders. But where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.

Id.

28 *Id.* at 1276 n.32 (quoting *Garner*, 430 F.2d at 1104).

29 *Id.* at 1280.

30 *Id.* at 1278.

investigation itself, rather than the underlying bribery.[31] This led the court to conclude that providing access to the privileged investigatory materials was necessary and essential to the IBEW's claims. As the lower court stated when considering the matter, "[W]here there is a colorable basis that part of the wrongdoing was in the way the investigation itself was conducted, I think it's very difficult to find those documents by other means."[32]

As shareholder suits related to allegedly improper or inadequate internal investigations grow, counsel must be cognizant of the possibility that plaintiffs might attempt to overcome privilege protections using the *Garner* doctrine.[33] This should serve as a reminder to corporations of the importance of engaging independent outside counsel to conduct thorough and credible investigations when potential serious misconduct is discovered.[34] If the Wal-Mart investigation itself had not been at issue here, it is probable that the *Garner* exception to the privilege protection might not have been invoked and the materials might have remained protected from compelled disclosure.

IV. BANK OF CHINA

The above cases demonstrate the increasing frequency with which challenges are being brought regarding the application of privilege to internal investigation materials. While the above cases center on the application of United States privilege law, the growing international nature of internal investigations means that foreign privilege laws are also of vital importance. As noted in my 2011 article, *International White Collar Crime and the Globalization of Internal Investigations*, understanding how privilege laws vary by jurisdiction is imperative for investigating counsel.[35]

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[31] *See Wal-Mart Stores Inc.,* 95 A.3d at 1278 ("The record reflects that IBEW's proper purposes sought information regarding the handling of the WalMex Investigation, whether a cover-up took place, and what details were shared with the Wal-Mart Board. The Court of Chancery explained that the documents IBEW sought under *Garner* 'go to those issues.'").

[32] *Id.* at 1279.

[33] *See e.g. In re Lululemon Athletica Inc.*, 220 Litigation, C.A. No. 9039-VCP (April 30, 2015) (in which the Delaware Court of Chancery ordered the company to produce certain privileged documents to plaintiffs related to an investigation of potential insider trading).

[34] *See* Lucian E. Dervan*, International White Collar Crime and the Globalization of Internal Investigations*, 39 FORDHAM URBAN LAW JOURNAL 361 (2012); *Responding to Potential Employee Misconduct in the Age of the Whistleblower: Foreseeing and Avoiding Hidden Dangers*, 3 BLOOMBERG CORPORATE LAW JOURNAL 670 (2008).

[35] Lucian E. Dervan, *International White Collar Crime and the Globalization of Internal Investigations*, 39 FORDHAM URBAN LAW JOURNAL 361 (2012).

> [O]ne must be familiar with privilege laws in the jurisdictions, both regional and national, involved in an international internal investigation as the rules vary dramatically by country and subject matter. While the different variations of privilege can have a myriad of impacts on an internal inquiry, two will be mentioned here specifically. First, the role of inhouse counsel, including a corporation's general counsel, must be closely examined. While it is common for in-house counsel in the United States to perform a preliminary inquiry to determine whether outside counsel is required for a more extensive investigation, in some jurisdictions the materials and information collected during this initial appraisal of the situation might not be protected from compulsory disclosure. . . Second, counsel must be aware of the possibility that attorneys from one region of the globe might not enjoy any privilege protections in certain jurisdictions, even if they are independent outside counsel. . . While grappling with the difficulties presented by these divergent privilege rules is challenging, conducting an international internal investigation without consideration of their impact on the course and conduct of the inquiry could be fatal.[36]

The potential ramifications for the existence of varying approaches to the attorney-client privilege around the world is well illustrated by the *Bank of China* case.[37]

The *Bank of China* case stems from the death of Daniel Wultz and the injuries suffered by Yekutiel Wultz in a 2006 suicide bombing in Tel Aviv, Israel.[38] The attack was carried out by the Palestinian Islamic Jihad ("PIJ"), an organization designated a terrorist group subject to economic sanctions.[39] In response, the Wultz family filed suit against the bank and others in federal court in the United States, alleging, among other things, that the bank had provided material support to the PLI in violation of United States law. According to the plaintiffs, the Bank of China failed to comply with the economic sanctions against the PIJ and facilitated wire transfers for the organization that "were instrumental in helping the PIJ to plan and execute terrorist attacks."[40] During discovery in the matter, the plaintiffs sought documents from the Bank of China, including materials located in China and related to "anti-money laundering ("AML") and compliance procedures and investigations."[41] The bank, however, refused to provide certain materials, alleging they were protected from disclosure by the attorney-client privilege. In

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36 *Id.* at 372-73.

37 *See* Wultz v. Bank of China Ltd., 304 F.R.D. 384 (S.D.N.Y. 2015); Wultz v. Bank of China ltd., 979 F. Supp. 2d 479 (S.D.N.Y. 2013).

38 *See* Wultz, 979 F. Supp. 2d at 483.

39 *See* Wultz v. Bank of China Ltd., 811 F. Supp. 2d 841, 844 (S.D.N.Y. 2011).

40 *Id.*

41 *Wultz,* 979 F. Supp. 2d at 484.

response, the plaintiffs filed a motion to compel.

In addressing the dispute, the court first determined which privilege law was applicable in the matter. This was of vital significant because of distinctions between the privilege laws of the United States and China. After examining choice of law precedent, the court concluded that some documents were government by Chinese law and others were governed by American law.[42] With regard to the documents governed by Chinese law, the court quickly disposed of the issue by noting that Chinese law does not recognize the attorney-client privilege.[43] As a result, the court ordered the bank to produce those materials government by Chinese law and dated prior to receipt of the plaintiff's demand letter on January 28, 2008, which date marked the beginning of litigation in the case.[44] With regard to the documents government by American law, the court focused on whether the protections afforded by the attorney-client privilege should be extended to communications between employees of the company and members of the company's Legal and Compliance Department in China. The plaintiffs argued that the company's in-house counsel in China were "not required to have legal degrees or bar certificates" and, therefore, communications with them were not entitled to protection by the attorney-client privilege.[45] The Bank of China responded by arguing that the Chinese in-house counsel were the "functional equivalent" of attorneys and were permitted to offer legal advice.[46] The court agreed with the plaintiffs and concluded that the bank had failed to establish that the communications satisfied the requirements of the attorney-client privilege.[47]

> The *United Shoe* principle justifies the protection of the attorney-client privilege for circumstances where a lawyer—whose authority derives from her position as a

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42 *See id.* at 489-92. The court utilized a "touch base" analysis in determining which country's privilege laws should apply. This analysis asks which country "has the 'predominant' or 'the most direct and compelling interest' in whether those communications should remain confidential, unless that foreign law is contrary to the public policy of this forum." *Id.* at 486.

43 *See id.* at 492-93 ("BOC does not seriously contest the proposition that Chinese law does not include the attorney-client privilege or work-product doctrine as understood in American law.").

44 *See id.* at 492 ("U.S. privilege law applies to all documents created after January 28, 2008 that do in fact relate to the demand letter and the subject matter that gave rise to this lawsuit, because those documents pertain to American law "or the conduct of litigation in the United States.").

45 *Id.* at 493.

46 *See id.*

47 *See id.*

> Defendant has failed to carry its burden of establishing that the documents contain "communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal assistance, or attorneys' mental impressions, opinions or legal theories concerning specific litigation."

Id. (internal citation omitted).

> member of the bar—is engaged to provide legal advice. While the Chinese legal system may be developing, the distinctions between lawyer and in-house counsel are clear and presumably exist for a good reason. I see no compelling reason to depart from the long-standing principle of *United Shoe* and create a "functional equivalency" test for the invocation of the attorney-client privilege when applying United States law. To the extent BOC has claimed privilege over communications from, to and among members of legal or other departments who are not licensed attorneys, the attorney-client privilege does not apply.[48]

In concluding its discussion of the privilege issue, the court reminded the parties of the fundamental rule that "[p]rivilege does not apply to 'an internal corporate investigation . . . made by management itself.'"[49]

The *Bank of China* case is an important example of the complexities and potential pitfalls that can result from the international and cross-border nature of modern internal corporate investigations. The decision of the court in the *Bank of China* case to compel the disclosure of materials from the investigation makes clear that counsel must consider and react to varying global standards regarding the applicability of privilege when structuring and conducting an investigation. This includes understanding that privilege laws in foreign jurisdictions may determine the outcome of discovery disputes in not only foreign venues, but also in United States courts.

V. CONCLUSION

In 1981, the United States Supreme Court made clear in *Upjohn* that the protections afforded by the attorney-client privilege apply to internal corporate investigations. Nevertheless, the application of such privilege protections remains an evolving field as new challenges are brought and new complexities are introduced. As investigating counsel continue engaging in these matters, it remains vital that privilege considerations and changes in this area of law remain at the forefront of their minds as they both structure and conduct inquiries.

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[48] *Id.* at 495. The quote refers to *United States v. Shoe*, 89 F. Supp. 357 (D.C. Mass. 1950).

[49] *Id.* at 496; *see also* Lucian E. Dervan, *International White Collar Crime and the Globalization of Internal Investigations*, 39 FORDHAM URBAN LAW JOURNAL 361, 367-73 (2012) (discussing the importance of using legal counsel when conducting internal investigations).