Game Changer? The S.D.N.Y. Endorses a Company-Friendly Privilege Standard

Thomas E. Spahn (tspahn@mcguirewoods.com) is a partner with McGuireWoods LLP in Tysons Corner, Virginia. Tom practices as a commercial litigator and regularly advises clients on ethics issues including conflict of interest, confidentiality, and dealing with corporate wrongdoing. He is a frequent lecturer on legal ethics and privilege issues, and among numerous other publications is the author of The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide published by the Virginia Law Foundation. Tom has spoken at more than 1,000 CLE programs throughout the United States and in several foreign countries, and has served on the ABA Standing Committee on Ethics & Professional Responsibility.

In his February 4, 2015 “Privilege Points” release, Tom Spahn discusses the privilege and investigation-related documents with a legal advice purpose.

In In re General Motors LLC Ignition Switch Litigation, No. 14-MD-2543 (JMF), 2015 U.S. Dist. LEXIS 5199, at *220 (S.D.N.Y. Jan. 15, 2015), Judge Furman upheld General Motors' claim of privilege and work product protection for "notes and memoranda relating to the witness interviews" Jenner & Block conducted while investigating GM's ignition switch issue. The opinion naturally has received extensive media coverage, given the high profile. But many reports do not focus on the court's ground-breaking adoption of a company-friendly privilege standard.

Most courts provide privilege protection only to communications whose "primary purpose" relates to legal rather than business advice. Last year, the D.C. Circuit rejected that rule, and extended privilege protection to investigation-related documents if "legal advice was one of the significant purposes." In re Kellogg Brown & Root, Inc., 756 F.3d 754, 758-59 (D.C. Cir. 2014) (emphasis added) (also known as the Barko decision). Although acknowledging that the D.C. Circuit's decision did not bind it, the General Motors court adopted that standard. This appears to represent the first time another court has adopted the D.C. Circuit's favorable privilege standard. Most significantly, the court held that "the D.C. Circuit's holding is consistent with - if not compelled by - the Supreme Court's logic" in the seminal Upjohn decision. Gen. Motors, 2015 U.S. Dist. LEXIS 5199, at *240 (citing Upjohn v. United States, 449 U.S. 383, 394 (1981)).

The General Motors court's rejection of the "primary purpose" test and powerful endorsement of a "one of the significant purposes" standard could extend privilege protection in other contexts, such as with compliance-related communications.