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***Broadcom* Ruling Highlights Potential Pitfalls in Internal Investigations**

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On April 1, 2009, a federal judge suppressed evidence obtained during interviews of Broadcom Corporation's then CFO, William J. Ruehle, by an outside law firm that was conducting an internal investigation on behalf of Broadcom while simultaneously representing Ruehle in related litigation. [United States v. Nicholas, slip op., No. SACR 08-00139-CJC \(C.D. Cal. Apr. 1, 2009\)](#). The court concluded that the law firm had breached its duty of loyalty to Ruehle by disclosing attorney-client privileged information to prosecutors without his consent and referred the firm to the California State Bar for potential disciplinary proceedings.

Although the ruling arose from a criminal case, it addresses important legal representation issues common to most internal investigations. Companies that fail to avoid the pitfalls surrounding those issues risk losing a key benefit of conducting internal investigations. Thus, anyone undertaking an internal investigation must be crystal clear about the relationship between counsel conducting the investigation and any witness who provides information during the investigation.

Background

In March 2006, a Broadcom shareholder filed a lawsuit challenging the Company's stock option granting practices. The lawsuit named Broadcom and certain officers and directors as defendants, but did not name Ruehle initially. Broadcom and the individual defendants retained the same law firm to represent them in the lawsuit.

In mid-May 2006, Broadcom also retained the same law firm to conduct an internal investigation of stock option granting practices on behalf of the corporation. A few weeks later, a second lawsuit regarding those practices was filed against Ruehle and others, and the complaint in the first lawsuit was amended to name Ruehle as a defendant. The following month, the SEC and the U.S. Attorney's Office began

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investigating Broadcom's stock option granting practices.

For several months, the law firm represented Broadcom in the internal investigation, while simultaneously representing both the Company and Ruehle in the pending civil lawsuits. During the period of dual representation, the firm's lawyers interviewed Ruehle about Broadcom's stock option granting practices. At Broadcom's direction, the law firm later disclosed the substance of those interviews to Broadcom's outside auditors, the SEC, and the U.S. Attorney's Office.

Basis of the Ruling

When Ruehle learned that the government intended to use his statements to the law firm in a criminal case against him, he objected that the statements were protected by the attorney-client privilege. After an evidentiary hearing, the court determined that when the interviews occurred, Ruehle reasonably believed that an attorney-client relationship existed between him and the law firm, that he was communicating with his attorneys for the purpose of obtaining legal advice, and that any information he provided to them would remain confidential. Accordingly, the court held that Ruehle's statements to the law firm were protected by the attorney-client privilege.

The government argued that because the lawyers who interviewed Ruehle gave him a so-called "*Upjohn*" warning, the privilege did not apply. Named after the Supreme Court's decision in *Upjohn Company v. United States*, 449 U.S. 383 (1981), an *Upjohn* warning is used during internal investigations to inform employees that no attorney-client relationship exists between them and the lawyers conducting the investigation, and that their communications with those lawyers may be disclosed to others at the corporation's discretion.

The court rejected the *Upjohn* argument on multiple grounds. After expressing some doubt about whether any *Upjohn* warning was given to Ruehle, the court then found that the warning described in the testimony was inadequate because it did not tell Ruehle that the lawyer conducting the interview was not his lawyer, suggest that he consult with another lawyer, or inform him that any statement he made to the law firm could be disclosed to third parties. Most importantly, the court determined that an *Upjohn* warning is irrelevant when lawyers are interviewing a witness with whom they have an existing attorney-client relationship.

After determining that Ruehle's statements to the law firm were privileged, the court then concluded that the firm breached its duty of loyalty to Ruehle in three ways. First, the law firm failed to obtain Ruehle's informed written consent to the firm's simultaneous representation of Ruehle in the private civil lawsuit and Broadcom in the internal investigation. The court noted that when the same law firm represented both Ruehle and Broadcom in a prior case, it had informed Ruehle in writing of the potential for conflicts inherent in dual representation and obtained his informed written consent to proceed with the representation. Second, the firm breached its duty by interrogating Ruehle "for the benefit of another client" — Broadcom — without obtaining Ruehle's informed written consent and waiver of the conflict of interest. Third, the firm disclosed its communications with Ruehle to third parties without his consent.

Broader Impact on Companies?

Although the court's written ruling addresses the use of evidence in prosecuting an individual defendant, the judge's remarks at the hearing reveal the potential for a much broader impact. As the court noted, companies frequently share the results of internal investigations with regulators or prosecutors in the hope of obtaining more lenient treatment. At the hearing, the court mentioned that Broadcom might be deprived of the full benefit of its cooperation, as the way in which the law firm conducted the Ruehle interviews led to the suppression of that evidence and meant that the government "cannot get the bang for the buck" from Broadcom's investigation.

Conclusion

The *Broadcom* ruling confirms that under certain circumstances, dual representation can limit the company's control over the decision to disclose information. Before authorizing dual representation, particular care must be taken to ensure that outside counsel comply with the rules of professional conduct for the relevant jurisdiction. Those responsible for internal investigations — whether as a director

supervising the investigation or as general counsel – must be cognizant of these limitations and plan accordingly. Companies should be aware of the risk that they may not receive “cooperation credit” if their counsel proceeds in ways which limit the type or degree of disclosure the company can provide.