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Fraud and Compliance

The “Advice-of-Counsel” Defense: Cautionary Tales for Counsel in False Claims Act Cases

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A recent decision from the U.S. District Court for the District of South Carolina in *United States v. Berkeley Heartlab, Inc.*[1] has generated renewed attention to the assertion of the advice-of-counsel defense, and its potential pitfalls, particularly in the context of False Claims Act (FCA) cases.

Advice-of-Counsel Defense

The advice-of-counsel defense permits a defendant to raise reliance on legal advice as an affirmative defense to negate the *mens rea* element of an offense. In FCA cases, it is essential for the government or whistleblower to prove that the defendant "knowingly" presented or caused to be presented a false claim for payment.[2] Where a defendant can show good faith reliance upon legal advice, a trier of fact may conclude that the defendant lacked the necessary *mens rea* to establish FCA liability.[3]

Waiver of Privilege

Raising the advice-of-counsel defense is not without consequences, however. Principally, raising the defense waives the attorney-client privilege, and potentially, protected work product, as illustrated by the *Berkeley Heartlab* decision.

In *Berkeley Heartlab*, the government filed a complaint in intervention against the defendants alleging FCA violations arising out of three alleged kickback schemes: (1) receiving kickbacks from two laboratories, Health Diagnostic Laboratory, Inc. (HDL) and Singulex, Inc. (Singulex) in exchange for referrals; (2) offering processing and handling fees to referring physicians to induce referrals to HDL and Singulex; and (3) waiving co-payments owed by TRICARE beneficiaries to induce testing by HDL and Singulex.[4] In their amended answer, the defendants asserted several affirmative defenses, including good faith reliance on the advice of counsel.[5]

During the course of litigation, the government served document requests on the defendants, seeking information related to the legal advice and opinions forming the basis of the advice-of-counsel defense. The government argued that the defendants:

not only waived any claims of attorney-client privilege as to the advice upon which they plan to rely in defending this case, they also waived the protections afforded by the attorney-client privilege as to ***all*** information regarding: (1) the sales contracts BlueWave entered into with HDL and Singulex; (2) the P&H fees; and (3) the waiver of TRICARE copays and deductibles.[6]

The defendants disagreed, contending that there was no waiver of the attorney-client privilege or work product doctrine with regard to "litigation-related documents and communications" with counsel who advised them throughout the government's investigation.[7]

The district court ruled in favor of the government, noting at the outset that a party can waive the attorney-client privilege by "asserting reliance on the advice of counsel as an affirmative defense, thereby placing that advice directly at issue."[8] The court held that such waiver extends to the entire subject matter of the defense—"[w]ere the law otherwise, the client could selectively disclose fragments helpful to its cause, entomb other (unhelpful) fragments, and in that way kidnap the truth-seeking process."[9] The court found that "Defendants placed their communications with counsel at issue and so waived attorney-client privilege as to ***all information*** relating to their communications with counsel during the OIG investigation about the conduct at issue in this case."[10]

The court next addressed whether waiver of the attorney-client privilege also waived attorney work product protected by the work product doctrine.[11] Acknowledging a line of cases that work product waiver applies only to work product that has been *communicated* to the party asserting the affirmative defense, the court in *Barkeley Heartlab* nonetheless held that, because of the government's discovery needs in this particular case, the waiver of the work product protection extended even to "uncommunicated work product."[12] The defendants were consequently ordered to produce "all documents in their custody and control relating to the communications they received from counsel about the conduct at issue, including information currently in the possession of their former counsel."[13]

In *Barker v. Columbus Regional Healthcare Sys., Inc.*,[14] the U.S. District Court for the Middle District of Georgia examined a similar issue concerning potential waiver where the defendant did not expressly assert the advice-of-

counsel defense, but merely asserted that it did not knowingly violate the law, again in the context of an FCA claim. The district court in *Barker*, relying on Eleventh Circuit precedent from *Cox v. Adm'r U.S. Steel & Carnegie*, [15] found waiver of the attorney-client privilege under these circumstances.[16]

In *Cox*, the court held that "when a defendant affirmatively asserts a good faith belief that its conduct was lawful, it injects the issue of its knowledge of the law into the case and thereby waives the attorney-client privilege."[17] The court in *Cox* explained that the attorney-client privilege was "'intended as a shield, not a sword.' [A party] waives the privilege if it injects into the case an issue that in fairness requires an examination of otherwise protected communications."[18] Relying on the Eleventh Circuit's decision in *Cox*, the district court in *Barker* found that although the advice-of-counsel defense was not expressly raised in the case before it, "[the defendant] injected its belief as to the lawfulness of its conduct into the case and waived its attorney-client privilege as to communications relating to the legality of the transactions that form the basis of Plaintiff's claims."[19] Thus, *Barker* (and *Cox*) illustrate that waiver of the attorney-client privilege can be found even without an assertion of the advice-of-counsel defense if the defendant injects its belief of lawfulness into the case as part of its defense.

Conclusion

As demonstrated by the decisions in *Berkeley Heartlabs*, *Barker*, and *Cox*, counsel for FCA defendants must be extremely cautious in responding to an FCA complaint, particularly with respect to the issue of *mens rea*. First, counsel must be aware that by injecting into the case their client's belief as to the lawfulness of its actions, a court could find waiver, even though advice-of-counsel is not expressly raised. Second, when raising the advice-of-counsel defense, counsel must be intimately familiar with the potential consequences of doing so and advise the client that waiver could result in any and all legal advice provided by counsel winding up in front of a judge or jury as evidence.

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[1] *United States v. Berkeley Heartlab, Inc.*, Civil Action No. 9:14-cv-00230-RMG (D.S.C. Apr. 5, 2017).

[2] 31 U.S.C. § 3729(b).

[3] *United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 381 (4th Cir. 2015).

[4] *United States v. Berkeley Heartlab, Inc.*, Civil Action No. 9:14-cv-00230-RMG, at *2 (D.S.C. Apr. 5, 2017).

[5] *Id.* at *2 ("Defendants BlueWave, Dent, and Johnson acted in good faith reliance on counsel, including, but not limited to, the legal opinions/advice of attorney Gregory B. Root dated December 27, 2007 and January 2, 2008, the legal opinion/advice of attorney Michael F. Ruggio dated April 27, 2012 . . . and the advice of attorney Gene Sellers with respect to BlueWave's contracts with HDL, Singulex and its independent contractors.").

[6] *Id.* at *3 (emphasis in original).

[7] *Id.*

[8] *Id.* at *5 (quoting *Smith v. Scottsdale Ins. Co.*, 40 F. Supp. 3d 704, 724 (N.D. W. Va. 2014)).

[9] *Id.* (quoting *XYZ Corp. v. United States*, 348 F.3d 16, 24 (1st Cir. 2003)).

[10] *Id.* at *6–7 (emphasis added). Notably, the defendants argued that their advice-of-counsel defense concerned advice provided *before* the course of conduct precipitating the government's investigation. The district court rejected this argument, stating "Defendants cannot narrow the scope of their affirmative defense in their briefings on this motion to compel where the defense asserted in their amended answer was not so limited[,]" suggesting that potentially, such a limitation if used in the Answer could preclude waiver. *Id.* at *6 n.1.

[11] *Id.* at *7 (citing *In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1300 (Fed. Cir. 2006)).

[12] *Id.* at *8 (quoting *Chiron Corp. v. Genentech, Inc.*, 179 F. Supp. 2d 1182, 1189-90 (E.D. Cal. 2001)).

[13] *Id.* at *8–9.

[14] *Barker v. Columbus Reg'l Healthcare Sys., Inc.*, Case No. 4:12-cv-108 (CDL) (M.D. Ga. Aug. 29, 2014).

[15] *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1414 (11th Cir. 1994).

[16] *Barker* at *4.

[17] *Barker* *5–6 (citing *Cox*, 17 F.3d at 1419).

[18] *Cox* 17 F.3d at 1418–19 (quoting *GAM Business Servs., Inc. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir. 1987)).

[19] *Barker* at *6.

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