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Texas Supreme Court Removes Obstacle to Corporate Cooperation in DOJ and SEC Investigations

By Weston C. Loegering, Joshua Roseman, Evan P. Singer – (Jan. 13, 2015) – Companies that conduct internal investigations into potential violations of the Foreign Corrupt Practices Act ("FCPA") may decide to share information collected as part of that investigation with the U.S. Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") as a way of obtaining credit for cooperating with the government. *See www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf*. Whereas the SEC Director of Enforcement recently characterized sharing of investigative information as "commonplace," the decision whether to cooperate with DOJ and SEC is a complicated one in which a number of factors must be weighed. *See www.sec.gov/news/speech/sec-cooperation-program.html*.

As General Counsel in Texas weigh the benefits and risks of internal investigations, the Texas Supreme Court reduces one of the risks to be evaluated.

One factor that has started arising with increasing regularity is the effect that sharing information with the government would have on collateral or parallel proceedings, such as shareholder derivative lawsuits that allege fiduciary violations by the company's board of directors, or claims made by employees who were terminated because of actions uncovered during those investigations. Those litigants often attempt to secure copies of investigative information via discovery or other procedural devices, such as a Delaware § 220 inspection of books and records request, or a Freedom of Information Act ("FOIA") request.

A recent opinion from the Supreme Court of Texas may provide valuable new guidance in making the cooperation decision. Overruling a lower court, in *Shell Oil Company and Shell International, E&P, Inc v. Writt,* the Court held that statements made by Shell Oil Company ("Shell") in a written report to DOJ were "absolutely privileged" under Texas law, and therefore could not form the basis of a former employee's defamation claim. *See, Shell Oil Co. and Shell Int'l, E&P Inc. v. Writt,* No. 13-0552, slip op. (Tex. May 15, 2015). In this way, the Court's opinion should provide comfort that information shared with the government will not form the basis of a defamation claim by an individual identified in that information (at least in Texas), thus alleviating the potentially untenable position faced by companies that ostensibly had to choose between seeking cooperation credit and defending related defamation claims. Second, the opinion serves as an important reminder that concrete steps should be taken to preserve claims of privilege during the course of the FCPA investigation, some of which are discussed below.

Wes Loegering

1. Overview of the Shell Opinion

In this case, Shell contractor VetcoGray entered into a plea agreement with DOJ for FCPA violations stemming from bribes paid to Nigerian customs officials through Panalpina, Inc., a freight-forwarder that imported equipment for an offshore oil and gas project called "Bonga Project." Five months later (in early 2008), DOJ informed Shell that DOJ was aware of Shell's use of Panalpina and "that certain of ›

those services may violate the [FCPA]." Shell agreed to meet with DOJ, and after which it agreed to conduct an internal investigation in close cooperation with, and report its findings to, DOJ, with the understanding that the report would be treated as confidential.

Shell provided its findings in a report to DOJ in February 2009. Among other things, the report contained information about the plaintiff, Robert Writt, whose responsibilities with respect to the "Bonga Project" included "serving as the holder of the contract between Shell and VetcoGray and being responsible for approving for VetcoGray's reimbursement requests." As to Writt, the report stated that he "was aware of 'several red flags' concerning Panalpina's customs clearance process and that he provided inconsistent information about his knowledge of Panalpina's questionable acts." Shell terminated Writt's employment as a result, finding his actions to be violations of the company's code of conduct.

Writt then sued Shell for defamation and wrongful termination. His defamation claim was based on Shell's statements in the report, which he claimed "falsely accused him of approving bribery payments and participating in illegal conduct."

Shell moved for traditional summary judgment on the defamation claim. While that motion was pending, Shell entered into a Deferred Prosecution Agreement with DOJ pursuant to which it agreed to pay a $30 million criminal fine and make certain improvements to its FCPA compliance and reporting program. The trial court entered summary judgment to Shell on the defamation claim, finding that the statements in the report to DOJ were "absolutely privileged" under Texas law.

2. Court of Appeals' Ruling

The First District Court of Appeals reversed, finding that Shell's statements were conditionally privileged because Shell's actions in connection with the investigation "were not enough to conclusively establish that Shell provided the report under a serious threat of prosecution; nor was the fact that the DOJ eventually initiated a criminal proceeding against Shell conclusive evidence that such a proceeding was actually contemplated or under serious consideration by the DOJ as of the time Shell provided the report."

3. The Court's Opinion

Reviewing *de novo,* the Supreme Court reversed and held that Shell's statements to DOJ were "absolutely privileged" under Texas law. The Court explained that Texas recognizes two classes of privilege in defamation suits: absolute and conditional (or qualified) privilege. Statements made in "situations which involve the administration of the functions of the branches of government, such as statements made during legislative and judicial proceedings," are absolutely privileged, which "is more properly thought of as an immunity."

Further, "a witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding."

In reaching its conclusion, the Court compared two prior cases in which courts considered the privilege potentially applicable to statements made to investigating authorities. In the first such case, *Hurlbut v. Gulf Atlantic Life Insurance Co.,* 749 S.W.2d 762, 768 (Tex. 1987), the Court had concluded that statements made by the president of an insurance company to an Assistant Texas Attorney General were conditionally privileged because they were statements "of public interest to a public officer ›

or private citizen authorized to take action if the information is true." There, the insurance executive's statements to the Assistant AG were made at a time when neither he nor the company were involved in the AG's investigation; indeed, those parties stopped communicated with the AG office after it was intimated that the investigation might be expanded to include them.

In the second case, *Clemens v. McNamee,* 608 F. Supp. 2d 811, 824-25 (S.D. Tex. 2009), the Southern District of Texas had ruled that the statements made by a witness to the Mitchell Commission were absolutely privileged. In that case, the government had informed the witness that his status in connection with the investigation would be reconsidered if he did not provide testimony to the Commission, and all of his interviews with the Commission "were arranged and attended by the Assistant United States Attorneys or other government agents." Under those circumstances, the federal district court concluded that he was "for all practical purposes compelled to make his statements to the commission" and "to classify [his] statements as only conditionally privileged would have caused great harm to the administration of government and the government's ability to ensure justice was served."

Applying that precedent to the case before it, the Supreme Court of Texas concluded that Shell's situation was "more analogous to those in Clemens than those in Hurlbut." The Court reasoned:

> The summary judgment evidence establishes that at all relevant times, Shell was a target of the DOJ's investigation, while Gulf was not a target of the investigation when its president made the allegedly defamatory statements that Gulf had not authorized Hurlbut to sell the group policies in question and that Gulf was not underwriting the policies. The difference between Shell's status and that of Gulf are brought into clearer focus by the fact that after Gulf's president was told by the Assistant Attorney General investigating the case that the investigation might need to include Gulf as well as Hurlbut, Gulf's communications to the prosecuting authorities stopped. Further, when the DOJ's leverage over Shell vis-à-vis the FCPA and its somewhat draconian potential penalties are considered, it is manifest that Shell was, practically speaking, compelled to undertake its internal investigation and report its findings to the DOJ, just as McNamee was, practically speaking, compelled to cooperate.

The Court also pointed to the significant growth of FCPA prosecutions, including at the time that Shell had submitted its report to DOJ, and observed that "[f]rom the time Shell was first contacted by the DOJ to the time it provided its report to the DOJ, FCPA compliance was of great concern for U.S. businesses operating overseas and potential violations were not taken lightly." It further noted that "Federal prosecutors and the U.S. Sentencing Guidelines 'place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matter."

At bottom, the Court found that "the summary judgment evidence is conclusive that when Shell provided its internal investigation report to DOJ, Shell was the target of the DOJ's investigation and the information in the report related to the DOJ's inquiry. The evidence is also conclusive that when it provided the report, Shell acted with serious contemplation of the possibility that it might be prosecuted." For those reasons, the Court found that Shell's report was "an absolutely privileged communication," reversed the decision of the lower court, and reinstated the judgment of the trial court.

4. The Effect of the Shell Opinion

As discussed, the *Shell* opinion should provide important guidance to companies (and their counsel) conducting internal investigations in at least two ways. First, it is now established ›

that, under Texas law statements contained in a written report provided to DOJ and SEC cannot form the basis of a defamation claim by an individual named in that report. In this way, the Court has taken a significant step towards alleviating the problem faced by companies who had to balance the potential benefit of securing cooperation credit by sharing investigative information with the government on one hand, with the potential cost of defending a resulting defamation claim brought by an employee named in the report on the other.

Second, the opinion reinforces the importance of taking steps to preserve claims of privilege on information shared with the government given the recent growth of collateral or parallel proceedings to FCPA investigations. For example, at the outset of an investigation, the company likely will want to ensure that either internal or external counsel provides direction and oversight of the investigation, and that the attorneys (or their agents) who conduct witness interviews provide the admonitions that trace their roots back to *Upjohn*. *See, e.g., In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014) (relying on Upjohn to grant writ of mandamus and vacating district court's order to produce investigative information to *qui tam* relator where investigation "was conducted at the direction of the attorneys in KBR's Law Department); *Upjohn Co. v. United States,* 449 U.S. 383 (1981). Similarly, the company may to memorialize in writing that the investigation is being conducted for the purposes of providing legal advice, such as in the engagement letter for outside counsel.

If information uncovered during the investigation will be shared with the government, the company likely will want to consider the form in which the information is provided. For instance, the company may want to provide information to the government orally and not in writing, and it may want to refrain from providing written copies of counsel's work product, such as interview memoranda or written briefings. Further, information protected by privilege or the work product protection should be carefully identified and separated (as applicable), particularly opinion work product materials. And finally, the company may want to consider marking information provided to the government as "FOIA Exempt" pursuant to certain exceptions to FOIA, such as exception 7(a).

Wes Loegering is a partner at Jones Day in Dallas. He is widely regarding as a national expert in FCPA legal issues. Josh Roseman is also a partner at Jones Day in Dallas. He represents companies, officers and directors in FCPA inquiries. Evan Singer is a partner in the Dallas office of Jones Day. He also represents companies and executives in internal and government investigations.

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