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Have No Fear: Fourth Circuit Confirms Contractors Shouldn't Fear Privilege Waivers When Making Mandatory Disclosures

By Kevin Barnett and Michael Wagner on April 10, 2020

False Claims Act

The Fourth Circuit recently rejected a trial court's ruling that a contractor's mandatory disclosure submission waived its attorney-client privilege over the underlying internal investigation. In re Fluor Intercontinental, Inc., No. 20-1241 (Mar. 25, 2020) (per curiam). The court granted Fluor's mandamus petition and directed the district court to vacate its orders requiring Fluor to produce privileged information from its internal investigation relating to the subject matter of four statements in its mandatory disclosure submission. *Id.* at 1. In doing so, the Fourth Circuit confirmed that "Government contractors should not fear waiving attorney-client privilege" when making mandatory disclosures. It also curtailed an outlier ruling and provided reassurances to other corporations and individuals who routinely make similar disclosures and fact proffers to the government.

Background

In early 2019, Steven Anderson sued Fluor for wrongful termination in the Eastern District of Virginia alleging that his termination violated various whistleblower protection statutes. Before the termination, Fluor had investigated Anderson's conduct and submitted a mandatory disclosure to the Department of Defense Inspector General. In its submission, Fluor informed DoD that it had conducted an internal investigation and reported that Mr. Anderson "used his position . . . to pursue [improper opportunities] and . . . to obtain and improperly disclose nonpublic information." Feb. 26 Order at 6 (alterations in original). The investigation not only led to Anderson's termination, but also a subsequent criminal investigation into his conduct.

As part of his lawsuit, Anderson propounded several discovery requests for internal investigation documents, such as witness statements, reports, and interview summaries. Fluor objected to each by asserting the attorney-client privilege and work product protections. A complicated procedural history ensued:

- The court granted Anderson's motion to compel and found Fluor had waived its privilege and directed the magistrate judge to determine the scope of the waiver. ECF 113, Nov. 8 Order.
- The court denied Fluor's motion for reconsideration. ECF 161, Dec. 20, 2019 Order.
- The magistrate judge determined the scope should be narrow; Anderson objected.

- The court overruled the magistrate judge, found a broad subject-matter waiver, and ordered Fluor's immediate compliance. ECF 197, Feb. 26, 2020 Order.

District Court Decisions

In this series of orders, the trial court directed Fluor to turn over all of its internal investigation materials on the same subject matter as four statements in the mandatory disclosure submission. These statements were: (i) Plaintiff "appears to have inappropriately assisted . . ."; (ii) "Fluor considers [that] a violation . . ."; (iii) Plaintiff "used his position . . . to pursue [improper opportunities] and . . . to obtain and improperly disclose nonpublic information . . ."; and (iv) "Fluor estimates there may have been a financial impact . . . [due to] improper conduct." Nov. 8 Order at 9-10 (alterations in original).

In analyzing these statements, the court applied Federal Rule of Evidence ("FRE") 502(a), which provides that the disclosure of privileged communications only results in a subject matter waiver if "(1) the wavier is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together." To begin, the district court found that the statements at issue were not factual statements, but were "legal conclusions which characterize Plaintiff's conduct in a way that reveals attorney-client communications." Nov. 8 Order at 10. The court then found that Fluor voluntarily disclosed these privileged statements to the government in its written disclosure.

The district court placed great weight on Fluor's characterization of its disclosure as "voluntary" in its answer. It also rejected the argument that the disclosure was not voluntary because it was required by the Mandatory Disclosure Rule. The district court interpreted the "so-called Mandatory Disclosure Regulation" as requiring "mere notice that the contractor has credible evidence" and "does not require disclosure of investigatory findings, the credible evidence which triggers the requirement, a summary, or any details." Nov. 8 Order at 12 n.1.

Fourth Circuit Proceedings

Fluor filed a petition for a writ of mandamus with the Fourth Circuit, arguing that the statements at issue did not reveal any attorney-client communications. Rather, it said the statements were generic, innocuous declarations of Fluor's investigation findings. Fluor also challenged the court's interpretation of the Mandatory Disclosure Rule. It emphasized that contractors were expected to provide details about their investigations and conclusions as part of a mandatory disclosure submission and cited the rule's regulatory history to show the FAR Council's stated expectation that disclosures would not waive privilege.

The Fourth Circuit swiftly reversed the trial court's decision. In its per curiam opinion, the court held that "the district court's ruling that Fluor's disclosure waived attorney-client privilege is clearly and indisputably incorrect." In re Fluor Intercontinental, Inc., No. 20-1241 (Mar. 25, 2020) (per curiam). In doing so, it found that the district court erroneously found that the four statements revealed attorney-client communications in the first place. *Id.* at 8-9. It reasoned that the disclosure of non-privileged facts or conclusions cannot effect a waiver, even if the facts/conclusions are on the same subject matter of other privileged communications. *Id.* Thus, disclosing the four non-privileged statements could not result in a privilege waiver.

The Fourth Circuit also corrected the district court's misconceptions of the Mandatory Disclosure Rule. It noted that Fluor's disclosure was not voluntary, but was made "pursuant to a regulatory scheme mandating disclosure of potential wrongdoing." *Id.* at 7. It then stated that the "vague or

incomplete disclosures" suggested by the district court would be "patently at odds with the policy objectives of the regulatory disclosure regime at issue." *Id.* at 12.

In a helpful practice tip, the court contrasted the factual statements in the Fluor disclosure with statements at issue in In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988). *See In re Fluor*, Op. at 10-11. The court explained that in *Martin Marietta*, the privilege was waived because the disclosure "revealed privileged communications" when it directly quoted witness statements and summarized the substance and format of most of the internal notes and memoranda on the interviews.[1]

Broader Significance of the Decision

The Fourth Circuit's ruling in *In re Fluor* reaffirms the long-standing principle that the attorney-client privilege protects internal investigations conducted at the direction of legal counsel for the purposes of providing legal advice. It also further vindicates the important corollary that contractors do not waive the privilege by merely disclosing the factual results of a privileged investigation.

But the ruling also has implications beyond the government procurement arena, as it provides a strong counterweight to a handful of district court rulings that have more freely found implied waivers in the context of disclosures to the government, factual proffers, or other government submissions. *See, e.g.*, In re Grand Jury Investigation, No. MC 17-2336 (BAH), 2017 WL 4898143 (D.D.C. Oct. 2, 2017); S.E.C. v. Herrera, No. 17-20301-CIV, 2017 WL 6041750 (S.D. Fla. Dec. 5, 2017). That said, both the *Fluor* saga and these other district court rulings are helpful reminders that legal practitioners must exercise appropriate caution and remain attuned to privilege concerns when preparing any statement or disclosure to the government.

Key Takeaways

First, and most important, the Fourth Circuit's ruling erases a troubling lower court precedent in an important jurisdiction. The fact that the Fourth Circuit is home to myriad government contractors and government agencies—most notably the Department of Defense—made a bad privilege ruling on mandatory disclosures particularly concerning. In its place, the Fourth Circuit reaffirmed the long-standing principle that mandatory disclosure submissions do not require a privilege waiver over the underlying investigation. And by doing so in such a strongly worded opinion, the Fourth Circuit casts doubt on certain other district court opinions that adopted broad

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[1] [1] Although not raised by the *Fluor* court, *In re Martin Marietta* can also be distinguished on other grounds. Most notably, the *Martin Marietta* court found a waiver of non-opinion work product protection over internal interview notes when the company was "fac[ing] criminal charges" and made "testimonial use" of interview notes in an effort to resolve the active criminal investigation. See *In re Martin Marietta Corp.*, 856 F.2d 619, 625 (4th Cir. 1988). But in so holding, the court expressly noted: "We do not decide the issue of disclosures in less adverse circumstances like regulatory disclosures." *Id.* Thus, *Martin Marietta* would not govern the waiver analysis in the case of a mandatory disclosure under FAR 52.203-13.

Additionally, *In re Martin Marietta* also was a pre-FRE 502 case. Enacted in 2008, FRE 502 was meant to create a uniform rule across all jurisdictions and eliminate the harsh result of subject-matter waiver for all disclosures of privileged communications—such as in *In re Martin Marietta*.

theories of waiver akin to the "clearly and indisputably incorrect" reading applied by the trial court here.

Second, this case suggests that government contractors may enjoy a special status when appealing privilege decisions stemming from regulatory disclosure obligations. Although courts disfavor the immediate appeal of orders requiring disclosure of privilege decisions, both the D.C. Circuit and now the Fourth Circuit have granted the extraordinary remedy of mandamus to cure an erroneous privilege decision impacting contractors. *See* In re Kellogg Brown & Root Inc., 756 F.3d 754 (D.C. Cir. 2014). As a result, Fluor was spared having to pursue the unsatisfactory routes of standing in contempt or awaiting final judgment to appeal.

Third, the Fourth Circuit's ruling provides a helpful reminder that disclosures should reveal facts—and only facts. Contractors should take pains to ensure there is no implicit disclosure of attorney-client communications or work product in any disclosure. According to the Fourth Circuit, the privilege is not waived by reciting facts or even legal conclusions, but it is waived when directly quoting witness statements or disclosing other protected communications between attorney and client. While the statements at issue likely would have escaped even a careful scrubbing for potentially offending remarks, contractors are well-advised to take a conservative approach and review a draft disclosure from the perspective of a district court judge who might be inclined to find a privilege waiver.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our False Claims Act practice:

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