BRYAN CAVE
A Broader Perspective
Bulletin

White Collar Defense and Investigations &
Securities Litigation and Enforcement Groups

To: Our Clients and Friends

April 22, 2009

COURT DECISION HIGHLIGHTS RISKS OF DUAL REPRESENTATION IN CORPORATE INTERNAL INVESTIGATIONS AND LITIGATION

A recent California federal court decision highlights the need for exercising great care when a corporation seeks to investigate itself and its executives and is also being sued by shareholders along with those executives. Corporate officers and inside and outside counsel alike must watch out for the risks of multiple representations.

The decision earlier this month by the U.S. District Court for the Central District of California shows in particular the dangers of having the same attorney represent a board committee conducting an internal investigation into possible corporate wrongdoing while the attorney simultaneously defends the company and individual executives in a civil lawsuit involving the same subject as the investigation.

In his decision in *United States of America v. Henry T. Nicholas, III and William J. Ruehle*, Judge Cormac J. Carney barred the U.S. Attorney's Office from introducing at a criminal trial certain statements made by a corporate executive in an Audit Committee investigation of stock options backdating at Broadcom Corp. He did so because the attorneys conducting the interview for the Audit Committee were also representing that Broadcom executive in a civil lawsuit.

Expressing particular concern over the lawyers' conduct in carrying out this dual role, Judge Carney also referred the attorneys to the California Bar for possible violations of legal ethics rules.

The scenario in the Broadcom case is a variation on a familiar theme: A corporation discloses possible corporate wrongdoing, and a committee of the Board of Directors begins an investigation. The U.S. Attorney and the SEC begin investigating as well. The disclosure also spurs litigation by shareholders, who file securities fraud class actions and/or derivative actions.

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A key question in these situations is who represents whom in the various proceedings. In the case of Broadcom, lawyers from a California law firm ("Law Firm") represented the company's Audit Committee in an internal investigation beginning in May 2006 into options backdating at the Company. As part of that investigation, the Law Firm in June 2006 interviewed William J. Ruehle, then the Company's Chief Financial Officer.

The problem, according to Judge Carney, is that the same Law Firm was also representing both Ruehle and the company in a derivative action concerning the stock options issue that was filed in late May 2006.

In August 2006, with Broadcom seeking to cooperate with investigators, the Law Firm, at the Audit Committee's direction, disclosed to Broadcom's outside auditors, the SEC and the U.S. Attorney's Office certain statements that Ruehle had made in his interview. Statements made by corporate executives to counsel for corporate committees have played a role in other similar cases.

Ultimately, the Government brought criminal charges against Ruehle and others. As part of the evidence against Ruehle, it planned to offer the statements he had made in his June 2006 interview with the Law Firm.

Ruehle objected, and moved to have the statement barred as attorney-client privileged communications, claiming he viewed the Law Firm as his personal counsel. Judge Carney granted Ruehle's motion. Because the Law Firm represented him in the litigation at the time of the interview, Ruehle had a legitimate expectation that whatever he told the Law Firm would be maintained in confidence and not used against him.

In part, the decision reflects an undisputed and relatively well known proposition among lawyers who handle corporate investigations: when a law firm represents a company (either under the direction of management, or of a Board committee as in the Broadcom case) in an investigation and interviews a corporate employee, it needs to disclose to the employee at the outset that it represents the corporation and not the employee, and that the corporation controls the attorney client privilege and can decide whether to waive or assert it in the future.

Sometimes referred to as a "corporate Miranda" or an "*Upjohn* warning," this kind of disclosure has become standard practice for attorneys representing corporations since the Supreme Court in *Upjohn v. United States*, 449 U.S. 383 (1981) recognized there could be a privilege for communications between corporate counsel and lower-level corporate employees.

In the Broadcom case, the Law Firm said it gave such a warning to Ruehle, while Ruehle denied that it did. But that was irrelevant, Judge Carney held. An *Upjohn* warning serves to prevent corporate employees from getting the impression that the company's counsel is their personal counsel. But here, since the Law Firm already was Ruehle's counsel, and the Audit Committee investigation was potentially adverse to him, an *Upjohn* warning would not have been enough. That dual representation meant that in order to act for Broadcom's Audit Committee, the Law Firm needed to have Ruehle's consent to represent a party with interests adverse to him. Under the relevant state rule, such

consent must be in writing, and must be based upon full disclosure of the conflicting interests between Ruehle and the Company.

Judge Carney's decision is being appealed. Among other issues, the U.S. Attorney's Office may argue that even if there was a violation, suppression is not the right remedy. Regardless of how the case is resolved, however, it reaffirms the need for corporations and their inside and outside counsel, when faced with litigation and and internal and external investigations concerning an issue, to give careful consideration to all of the various and potentially conflicting interests implicated in these tough situations.

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