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### **Overruling Precedent, California Supreme Court Allows Post-Loss Assignment of Insurance Policies Without Insurer Consent**

Overruling prior case law, the California Supreme Court held that a policyholder may assign its insurance rights without an insurer's consent if the property damage or injury resulting in loss has already occurred. *Fluor Corp. v. Super. Ct. of Orange Cnty.*, 354 P.3d 302 (Cal. 2015). ([click here for full article](#))

### **South Carolina Supreme Court Prohibits Assignment of Legal Malpractice Claim Between Adversaries**

The Supreme Court of South Carolina deemed impermissible the assignment of a legal malpractice claim between adversaries in the litigation in which the alleged malpractice arose. *Skipper v. ACE Prop. & Cas. Ins. Co.*, 775 S.E.2d 37 (S.C. 2015). ([click here for full article](#))

### **Eighth Circuit Rules That Insurer Is Entitled to Enforce Deductibles Notwithstanding Policy Defense Waiver**

The Eighth Circuit ruled that an insurer that has waived its policy defenses is entitled to enforce policy deductibles as a bar to coverage. *W. Heritage Ins. Co. v. Asphalt Wizards*, 795 F.3d 832 (8<sup>th</sup> Cir. 2015). ([click here for full article](#))

### **Wyoming Court Rules That Failure to Timely Reserve Right to Deny Coverage Based on Punitive Damages Exclusion Results in Waiver of Defense**

A Wyoming federal district court ruled that an insurer that failed to issue a timely reservation of rights waived the right to deny coverage based on a punitive damages exclusion. *Interstate Fire & Cas. Co. v. Apartment Mgmt. Consultants LLC*, 2015 WL 5165858 (D. Wyo. Sept. 1, 2015). ([click here for full article](#))

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The California Supreme Court ruled that an insurer may seek reimbursement of allegedly excessive defense fees directly from *Cumis* counsel. *Hartford Cas. Ins. Co. v. J.R. Mktg., L.L.C.*, 353 P.3d 319 (Cal. 2015). ([click here for full article](#))

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### **New York Court Rules That FCRA Statutory Damages Are Not Excluded Penalties**

A New York trial court ruled that statutory damages awardable under the Fair Credit Reporting Act constitute covered compensatory damages under an errors and omissions policy. *Navigators Ins. Co. v. Sterling Infosystems, Inc.*, 2015 WL 4540389 (N.Y. Sup. Ct. July 28, 2015). ([click here for full article](#))

### **For Second Time, D.C. Circuit Finds Error in District Court's Privilege Rulings**

The District of Columbia Circuit took the unusual step of issuing a second writ of mandamus in a discovery dispute, concluding that the district court erred in requiring the production of documents pertaining to a company's internal investigation of alleged fraud. *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137 (D.C. Cir. 2015). ([click here for full article](#))



## Assignment Alerts:

### Overruling Precedent, California Supreme Court Allows Post-Loss Assignment of Insurance Policies Without Insurer Consent

Under prior California case law, as set forth in *Henkel Corp. v. Hartford Accident & Indem. Co.*, 62 P.3d 69 (Cal. 2003), a consent-to-assignment clause precluded the transfer of insurance rights without insurer consent, even if a covered loss had occurred prior to transfer. *Henkel* explicitly held that a transfer of insurance rights was allowed only if a “chase in action” existed (*i.e.*, if claims had been reduced to a sum of money due). Last month, the California Supreme Court overruled *Henkel*, finding it inconsistent with state statutory law. *Fluor Corp. v. Super. Ct. of Orange Cnty.*, 354 P.3d 302 (Cal. 2015).



In *Fluor*, the California Supreme Court ruled that the enforceability of consent-to-assignment clauses is governed by California Insurance Code section 520, which provides that “[a]n agreement not to transfer the claim of the insured against the insurer after a loss has happened, is void if made before the loss.” A California trial court and intermediate appellate court had declined to apply section 520, finding that assignment was prohibited by *Henkel*. The California Supreme Court reversed. First, the court held that section 520 was valid and effective despite its “relative obscurity.” Second, the court concluded that section 520 was not limited to first-party insurance and extended to third-party liability policies. Finally, the court held that the statutory phrase “after a loss has happened” was ambiguous and should be interpreted to

mean “immediately after the injury or damage covered by the insurance policy has occurred.” Therefore, the court concluded that

after personal injury (or property damage) resulting in loss occurs within the time limits of the policy, an insurer is precluded from refusing to honor an insured’s assignment of the right to invoke defense or indemnification coverage regarding that loss. This result obtains even without consent by the insurer—and even though the dollar amount of the loss remains unknown or undetermined until established later by a judgment or approved settlement.

As the court noted, a majority of jurisdictions allow a post-loss transfer of insurance rights notwithstanding an anti-assignment clause. Indeed, a New Jersey appellate court reached this conclusion last month in *Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 2014 WL 10212769 (N.J. Super. Ct. App. Div. Aug. 12, 2015), ruling that a post-loss transfer was valid even absent insurer consent. The *Givaudan* court explained, “if there has been an assignment of the right to collect or to enforce the right to proceed under a policy after a loss has occurred, the insurer’s risk is the same because the liability of the insurer becomes fixed at the time of loss.”

### South Carolina Supreme Court Prohibits Assignment of Legal Malpractice Claim Between Adversaries

Addressing a matter of first impression, the Supreme Court of South Carolina deemed impermissible the assignment of a legal malpractice claim between adversaries in the litigation in which the alleged malpractice arose. *Skipper v. ACE Prop. & Cas. Ins. Co.*, 775 S.E.2d 37 (S.C. 2015).

ACE retained counsel to represent Specialty Logging in a lawsuit arising out of a motor vehicle accident involving a company truck. Unbeknownst to ACE or its appointed counsel, Specialty Logging entered into a settlement with the other driver. Under the settlement, Specialty Logging admitted liability and confessed judgment in the amount of \$4.5 million. Specialty Logging further agreed to pursue a legal malpractice claim against ACE and its attorneys and assigned the predominant interest in that

claim to the other driver. In exchange, the other driver agreed not to execute judgment so long as Specialty Logging cooperated in the legal malpractice claim against ACE and the attorneys.

Answering a question certified by a South Carolina federal district court, the Supreme Court of South Carolina held that such an assignment is invalid. Joining the majority of jurisdictions that have ruled on this issue, the court explained that a prohibition on the assignment of legal malpractice claims between adversaries in the litigation in which the alleged malpractice occurred is necessary to avoid the risk of collusion and to preserve the integrity of the attorney-client relationship.

## Waiver Alerts:

### **Eighth Circuit Rules That Insurer Is Entitled to Enforce Deductibles Notwithstanding Policy Defense Waiver**

The Eighth Circuit ruled that an insurer that has waived its policy defenses is entitled to enforce policy deductibles as a bar to coverage. *W. Heritage Ins. Co. v. Asphalt Wizards*, 795 F.3d 832 (8<sup>th</sup> Cir. 2015).

Asphalt Wizards was sued in a fax blasting class action. Western Heritage, its liability insurer, agreed to provide a defense. Four years later, Western Heritage notified Asphalt Wizards that it was defending subject to a reservation of rights. Thereafter, Western Heritage sought a declaration that it had no duty to defend or indemnify the class action. A Missouri federal district court ruled that the insurer had a duty to defend, but not indemnify. The court reasoned that Western Heritage had waived its defenses to coverage

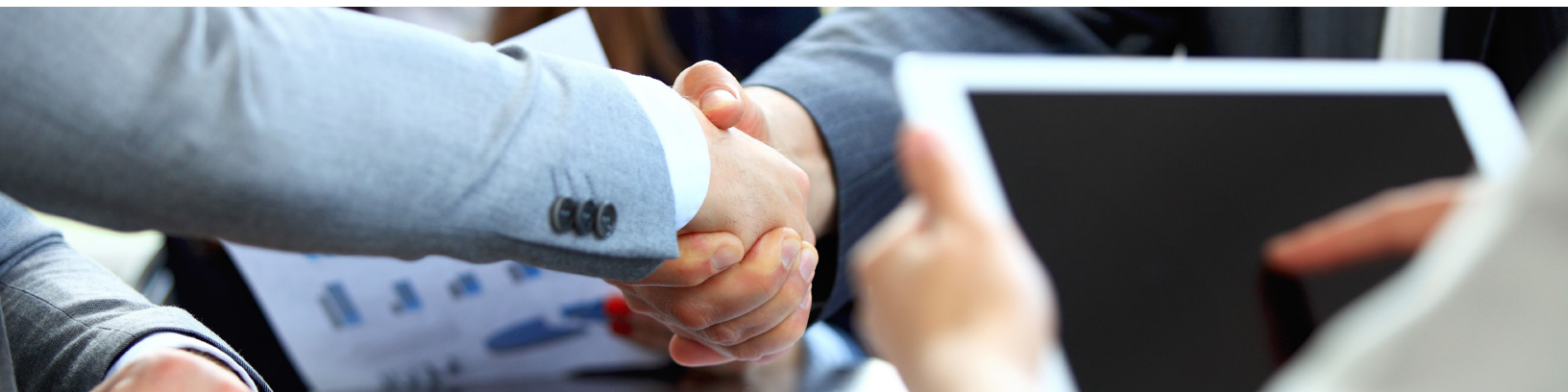
by waiting four years to issue a reservation of rights, but that coverage was nonetheless unavailable because no underlying claim exceeded the policies' \$1,000 deductible. The Eighth Circuit affirmed.

The Eighth Circuit ruled that a deductible is not a "defense to coverage" that can be waived. Rather, a deductible is akin to a policy limit, which cannot be waived because doing so would "create coverage where none existed under the policy in the first place." In addition, the court held that the \$1,000 per-claim deductible applied separately to each fax, rejecting the argument that Asphalt Wizards needed only to meet the deductible amount once each policy year.

### **Wyoming Court Rules That Failure to Timely Reserve Right to Deny Coverage Based on Punitive Damages Exclusion Results in Waiver of Defense**

A Wyoming federal district court ruled that an insurer waived the right to deny coverage based on a punitive damages exclusion by failing to issue a timely reservation of rights. *Interstate Fire & Cas. Co. v. Apartment Mgmt. Consultants LLC*, 2015 WL 5165858 (D. Wyo. Sept. 1, 2015).

A tenant sued a management company for injuries arising out of carbon monoxide exposure. The suit sought compensatory and punitive damages. The insurer agreed to defend without reserving its right to deny coverage. More than a year later, the insurer issued a reservation of rights based on the policy's punitive damages exclusion. At the conclusion of the underlying litigation, a jury awarded the tenant more than \$22 million in punitive damages. The management company then argued that the insurer was estopped



from denying coverage for the punitive damages based on its failure to timely issue a reservation of rights. The court agreed and granted the management company's summary judgment motion.

Under Wyoming's "default rule," the doctrines of estoppel and waiver cannot be used to expand coverage beyond that provided in the policy. However, an exception exists when an insurer assumes full control of the underlying defense with knowledge of a ground of non-coverage, without disclaiming liability or giving notice of a reservation of its right to deny coverage. Under such circumstances, the unconditional defense of the underlying action constitutes a waiver of the right to assert policy defenses. The court further noted that the policyholder need not establish prejudice from the late reservation because prejudice is assumed by the insurer's assumption of the defense. Here, because the insurer was on notice from the outset as to the punitive damage claims, its failure to disclaim coverage on that basis prior to assuming full control of the defense constituted waiver of its right to deny coverage based on the punitive damages exclusion.

## Defense Alerts:

### California Supreme Court Allows Insurer to Seek Reimbursement of Defense Costs From Cumis Counsel

Reversing an appellate court decision, the California Supreme Court ruled that an insurer may seek reimbursement of allegedly excessive defense fees directly from *Cumis* counsel. *Hartford Cas. Ins. Co. v. J.R. Mktg., L.L.C.*, 353 P.3d 319 (Cal. 2015).

Hartford initially refused to defend its insureds against a third-party lawsuit, but later agreed to defend subject to a reservation of rights. However, Hartford declined to pay defense costs previously incurred and to provide independent (so-called *Cumis*) counsel. A California trial court ruled that Hartford was required to defend from the date of original tender and to fund *Cumis* counsel to represent its insureds in the underlying action. The trial court also issued an enforcement order that required Hartford to pay "reasonable and necessary" counsel bills in a timely fashion. Although the order precluded Hartford from invoking the rate provisions of California Civil Code section

2860 (which provides guidelines relating to an insurer's duty to provide independent counsel), it specifically stated that "[t]o the extent Hartford seeks to challenge fees and costs as unreasonable or unnecessary, it may do so by way of reimbursement after resolution of the [underlying action]." An appellate court affirmed the enforcement order.



Following resolution of the underlying lawsuit, Hartford sought to recoup approximately \$13.5 million in defense costs directly from *Cumis* counsel Squire Sanders. The trial court rejected the claim, finding that to the extent Hartford had any right to reimbursement, it was from its insureds rather than from *Cumis* counsel. The appellate court affirmed, reasoning that allowing Hartford to obtain reimbursement directly from Squire Sanders "would frustrate the policies underlying section 2860 and the *Cumis* scheme generally." The Supreme Court of California reversed.

The California Supreme Court ruled that under the particular facts and procedural history presented, Hartford was entitled to seek reimbursement directly from Squire Sanders. Emphasizing the limited nature of its holding, the court explained that:

[the] enforcement order plainly permits Hartford to pursue *someone* for reimbursement of allegedly excessive legal charges. The clarity and finality of this order removes from our consideration the question of whether Hartford, as a "breaching" insurer that was arguably caught shirking its

defense duties, ought to be able to pursue *anyone* for alleged overpayments ... . Taking the ... enforcement order as we find it, we conclude that equitable principles of restitution and unjust enrichment dictate that Hartford may seek reimbursement for the allegedly unreasonable and unnecessary defense fees directly from Squire Sanders.

### Nebraska Supreme Court Rules That Violation of Voluntary Payments Provision Relieves Insurer From Paying Defense Costs

Addressing a matter of first impression, the Nebraska Supreme Court ruled that an insurer is not liable for defense costs where a policyholder violates a voluntary payments provision by settling an underlying suit without the insurer's knowledge. *Rent-A-Roofer, Inc. v. Farm Bureau Prop. & Cas. Ins. Co.*, 291 Neb. 786 (2015).

In 2007, Rent-A-Roofer ("RAR") was sued for faulty workmanship. Farm Bureau refused to defend the suit on the basis that it did not allege an "occurrence" and that a policy exclusion barred coverage. RAR hired its own counsel and ultimately settled the suit. In 2010, RAR was sued by a different plaintiff, who alleged similar causes of action. This time, instead of notifying Farm Bureau of the claim, RAR proceeded with its hired counsel, reached settlement, and then sought reimbursement of indemnity and defense costs from Farm Bureau. In ensuing litigation, Farm Bureau argued that there was no coverage because RAR violated the policy's notice and voluntary payments provisions. A

Nebraska trial court agreed and granted Farm Bureau's summary judgment motion. On appeal, RAR amended its prayer for relief to seek only defense costs.

The Nebraska Supreme Court ruled that "an insurer's duty to defend is relieved when the insured fails to notify the insurer of a claim until after it has reached a binding settlement agreement with the claimant, in breach of both the notice and voluntary payments provisions of its insurance policy." Under Nebraska law, prejudice is required in order to deny coverage based on a violation of a notice provision. However, the Nebraska Supreme Court had not previously addressed whether a showing of prejudice is necessary with respect to a coverage denial based on a breach of a voluntary payments provision. Noting disagreement among jurisdictions on this issue, the court concluded that "it is proper to maintain the prejudice requirement when an insurer seeks to avoid the policy for breach of a voluntary payments provision." However, the court held that prejudice is established as a matter of law where, as here, a policyholder's settlement deprived the insurer of the opportunity to participate in litigation or settlement negotiations.

Significantly, the Nebraska Supreme Court rejected RAR's argument that its duty to notify Farm Bureau of the claim was waived in light of the insurer's previous coverage denial of an allegedly similar claim. Although a policyholder has no continuing duty to provide notice as to a claim that an insurer has explicitly denied, that rule of law does not apply where the two claims involve different parties, occurrences and allegations.



## Claims-Made Alert:

### **Eighth Circuit Denies Coverage, Finding That “Claim” Was Made Against Policyholder Before Policy Period**

The Eighth Circuit ruled that a “claim” was made when a policyholder received a demand for money, even absent threats of litigation or attorney involvement. Because the record established demands for compensation prior to the inception of the policy period, the court concluded that the insurer had no duty to defend. *Ritrama, Inc. v. HDI-Gerling Am. Ins. Co.*, 796 F.3d 962 (8th Cir. 2015).



In 2008, Ritrama, a manufacturer of cast vinyl film products, received notice from a customer that it was experiencing product quality issues. Throughout 2008, Ritrama and the customer corresponded about the problems. In 2011, having failed to resolve the dispute, the customer sued Ritrama. Ritrama’s insurer denied coverage and refused to defend because a “claim” was made before the March 2009 policy inception date. A Minnesota federal district court agreed and granted the insurer’s summary judgment motion. Although the policy did not define “claim,” the district court deemed it to mean “an assertion by a third party that the insured may be liable to it for damages within the risks covered by the Policy.” The Eighth Circuit affirmed.

In upholding the district court’s ruling, the Eighth Circuit rejected Ritrama’s assertion that a claim requires “a written, legal demand for monetary relief, within which is an express or implicit threat to sue.” Although the court noted that a mere complaint or request for information is generally insufficient to establish a claim, it explained that some type of demand or assertion for relief can constitute a claim. On the facts before it, the Eighth Circuit found that a claim was made prior to the inception of the policy. In particular, the Eighth Circuit concluded that a September 2008 communication from the customer to Ritrama, containing a detailed spreadsheet of damages incurred as a result of Ritrama’s product failures constituted a “demand for relief.”

*Ritrama* rejects a bright-line rule that a written threat of legal action is required to establish a “claim.” The court emphasized the overall “context of the surrounding communications” between Ritrama and its customer during 2008, including the fact that Ritrama itself referenced a “claim” in correspondence about the dispute.

## Regulatory Alert:

### **Second Circuit Rules That Filed Rate Doctrine Bars Fraud Claims Based on “Lender-Placed” Insurance**

The Second Circuit ruled that fraud claims based on lender-placed insurance rates were barred by the filed rate doctrine, even though the rates were imposed by an intermediary rather than by the insurance companies that obtained regulatory approval for those rates. *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256 (2d Cir. 2015).

When plaintiff borrowers failed to purchase requisite hazard insurance on their properties, their loan servicer, GMAC Mortgage, bought lender-placed insurance from insurance companies at rates that were approved by regulators. GMAC then sought reimbursement from plaintiffs at those same rates. Plaintiffs sued the insurers, alleging that they were fraudulently overbilled because the rates billed by GMAC did not reflect “rebates” and “kickbacks” that GMAC received from the insurers in the form of free loan tracking services by the insurers’ affiliate company. The insurers

moved to dismiss pursuant to the filed rate doctrine, under which any rate approved by a governing regulatory agency is “per se reasonable and unassailable in judicial proceedings brought by ratepayers.” A New York federal district court disagreed, holding that the filed rate doctrine did not apply because plaintiffs were not direct customers of the rate filer—*i.e.*, the insurers. However, the district court acknowledged a conflict in authority on this issue, and certified its decision for interlocutory appeal. The Second Circuit reversed.

The Second Circuit ruled that the filed rate doctrine applied because allowing plaintiffs’ claims to proceed “would undermine the rate-making authority of the state insurance regulators who approved [the insurers’] rates.” Plaintiffs’ allegations that they were overbilled rested on the theory that they were improperly charged the full rates (which were approved by regulators) instead of lower rates reflecting the value of the free loan tracking services. The court explained that under the “nonjusticiability principle” inherent in the filed rate doctrine, it is “squarely for the regulators to say what should or should not be included in a filed rate.” In addition, the court held that allowing the claims to proceed would offend the “nondiscrimination principle” of the filed rate doctrine, under which challenges to rates are barred if they would undermine the scheme of uniform rate regulation. The court noted that allowing plaintiffs to recover damages would operate to give them a preference over other borrowers in the form of a discounted rate. The Second Circuit expressly rejected the district court’s finding that the filed rate doctrine does not apply where, as here, the rate is imposed through an intermediary rather than by the

insurer directly. The decision illustrates New York’s broad application of the filed rate doctrine to claims that do not challenge the amount of a rate per se, but rather allege fraud in the context of an overall insurance scheme and would, if successful, affect the rates and/or authority of rate setting regulators.

As discussed in our [May 2011](#) and [October 2010 Alerts](#), other courts have similarly enforced the filed rate doctrine to bar fraud claims against insurance companies, although application of the doctrine varies by jurisdiction.

## Damages Alert:

### New York Court Rules That FCRA Statutory Damages Are Not Excluded Penalties

A New York trial court ruled that statutory damages awardable under the Fair Credit Reporting Act (“FCRA”) constitute covered compensatory damages under an errors and omissions policy. *Navigators Ins. Co. v. Sterling Infosystems, Inc.*, 2015 WL 4540389 (N.Y. Sup. Ct. July 28, 2015).

Navigators Insurance argued that it had no duty to defend or indemnify two FCRA actions filed against policyholder Sterling on the basis that the suits sought only “penalties,” which were excluded from coverage. The court disagreed, finding that damages awardable for willful FCRA violations constituted covered compensatory damages. Noting that categorization of damages is “not always so clear cut,” the court concluded that the FCRA damages functioned “primarily” as compensation





rather than punishment. In so ruling, the court explained: “[t]hat Congress provided a consumer the option of recovering either actual or statutory damages, but not both, supports the presumption that they serve the same purpose.” The court also reasoned that FCRA statutory damages served a non-punitive purpose by “facilitat[ing] litigation in instances in which actual damages are difficult or impossible to calculate.” Finally, the court explained that interpreting the statutory damages as compensatory “results in a more harmonious reading of the FCRA’s overall damages structure” because the FCRA contains a separate provision relating to punitive damages.

## Discovery Alert:

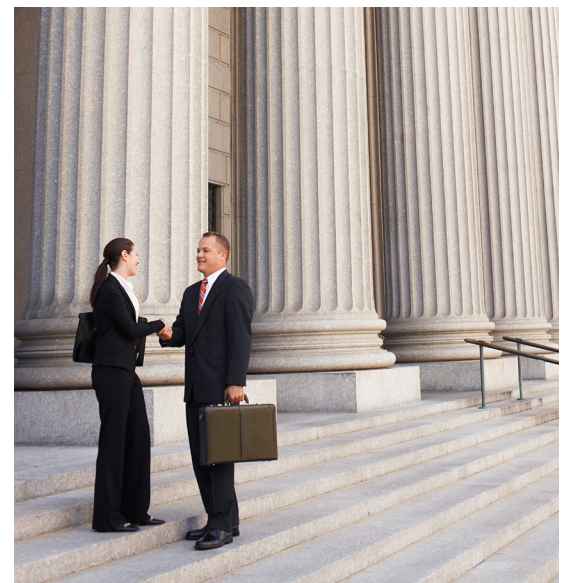
### For Second Time, D.C. Circuit Finds Error in District Court’s Privilege Rulings

The District of Columbia Circuit took the unusual step of issuing a second writ of mandamus in a discovery dispute, concluding that the district court erred in requiring the production of documents pertaining to a company’s internal investigation of alleged fraud. *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137 (D.C. Cir. 2015).

In a *qui tam* action brought under the False Claims Act, an employee sought the production of documents created in connection with an internal investigation conducted by his employer, KBR. Last year, the District of Columbia federal district court ordered KBR to produce the documents, finding that attorney-client privilege did not apply. As discussed in our [July/August 2014 Alert](#), the District of Columbia Circuit granted a writ of mandamus vacating the district court’s order. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014). There, the D.C. Circuit held that a company’s internal investigation documents are protected by attorney-client privilege so long as “obtaining or providing legal advice was one of the significant purposes of the internal investigation ... even if there were also other purposes for the investigation and even if the investigation was mandated by regulation.” On remand, the district court again ordered the production of the documents, this time on the basis that privilege was impliedly waived. Last month, the D.C. Circuit issued a second

writ of mandamus, ruling that the district court erred in finding waiver.

The D.C. Circuit ruled that KBR did not waive privilege either by (1) allowing its designated deposition witness to review the privileged documents in preparation for his testimony, or (2) placing the documents “at issue” in the litigation. First, the court ruled that the attorney-client privilege and work-product protection covering internal investigations are not defeated by a counter-party noticing a deposition on the topic of the privileged nature of the investigation. As the court noted, “[a]llowing privilege and protection to be so easily defeated would defy ‘reason and experience.’” Second, the court held that testimony about the privileged nature of the investigation could not be a basis for finding “at issue” waiver because a “deposition transcript is simply a record of what was said, not itself an argument.” The court further held that references to the internal investigation in KBR’s summary judgment memorandum did not constitute “at issue” waiver because KBR did not explicitly rely on the results of the investigation as a defense. Rather, KBR merely mentioned, as part of a “recitation of facts,” that it had conducted an internal investigation and had not reported any wrongdoing to the government. Based on this circumstance, the D.C. Circuit held that it was error for the district court, in ruling on the motion for summary judgment, to infer that KBR was affirmatively relying on the contents of the investigation documents and had thus placed the documents “at issue” in the litigation.



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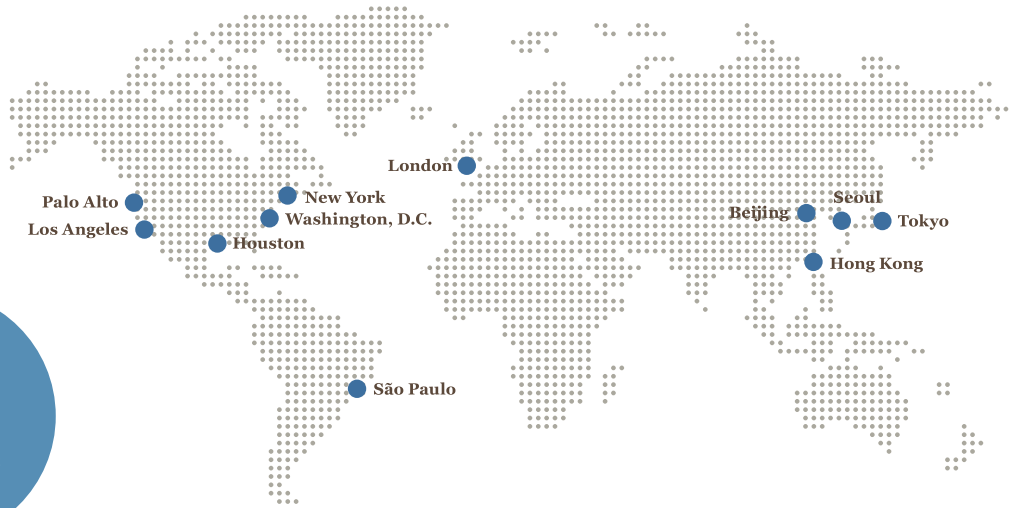
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