UPJOHN: A SURVEY AND ANALYSIS OF THE CASE

BY CHARLES E. WELCH *

Before I get into a discussion of the Supreme Court's opinion in the *Upjohn* case,[1] I think it would be helpful if I talked about the practical side of that case. Even though the setting of a case is not supposed to affect the Justices when they are deliberating, it would be hard for them to ignore the backdrop in which the case arises.

You will recall that, in the early '70s, when the "questionable foreign payments" issue broke, there was a great hue and cry inside corporations themselves. Most companies were just coming out of attacks by the Naderites and others, and business did not need another round of adverse publicity. They had been trying to counter a largely unjustified bad public image by stressing evidence of their credibility, honesty, and good behavior.

When the news of these payments broke, boards of directors of most corporations, including my own company, were shocked to think that there might be problems of this sort involving their companies. What happened to Upjohn happened to a lot of companies, and they did basically what Upjohn did here. The CEO called his general counsel in and said, "Get to the bottom of it." The general counsel proceeded to get the facts and then made a recommendation to the board so that action could be taken to deal with any problems that were found to exist.

The next step for Upjohn was for its counsel to make the trip to the SEC. By that time it was generally recognized that, when one went to discuss these matters with the SEC, copies of any papers filed with that agency would also be given to the IRS to allow them to deal with any tax violations that might be involved. If you will keep this background in mind as you review the *Upjohn* case, and look at the briefs and the opinion of the Supreme Court, you will understand why the Court had to conclude that Upjohn handled the problem in a very responsible way.[2] It is my strong feeling that when corporations

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1. Upjohn Co. v. United States, 449 U.S. 383 (1981). For a discussion of the United States Court of Appeals for the Sixth Circuit's opinion, *see* Comment, *The Corporate Attorney-Client Privilege: The Subject Matter Test v. The Control Group Test: Will Reasonableness Prevail?*—United States v. Upjohn, 5 DEL. J. CORP. L. (1980).

2. "The Upjohn Co. is a worldwide pharmaceutical manufacturer and marketer operating in the United States and, through branches and subsidiaries, in over 200 foreign countries." 5 DEL. J. CORP. L. 480, 481 (1980).

handle problems responsibly, eventually the courts will treat them in an equally responsible way.

I think it's fortunate for all of us who are concerned with the attorney-client privilege [3] and work product doctrine that there was a good set of facts winding its way to the Supreme Court. The Court decided the case,[4] I think, in a proper and helpful way.

Let's turn to the *Upjohn* opinion. It was decided a little over three months ago, January 13, 1981.[5] In spite of the Court's disclaimer twice in the opinion that it was not laying down a set of rules which would govern the applicability of the attorney-client privilege for corporations and the work product doctrine in all cases,[6] the Court said a lot which is important to those of us advising corporate clients. The tone of the opinion and the unanimity of the judgment are indicative of a new attitude of the Supreme Court which goes far beyond the facts in this specific case.

Two recent examples illustrate this. On March 23, 1981, Judge Higginbotham of the United States District Court in Dallas cited the *Upjohn* case in ruling that the attorney-client privilege protected from disclosure documents prepared by a law firm in anticipation of securities fraud litigation against its corporate client, even though the parties seeking to obtain the documents are shareholders suing derivatively.[7]

Two weeks ago, on April 15, 1981, as you probably read in *The Wall Street Journal,* IBM used the *Upjohn* case as a basis for another motion to dismiss the antitrust case against it, arguing that the judge's rulings against IBM were plainly erroneous.[8]

The facts of *Upjohn* are fairly simple.[9] In January 1976, Upjohn's auditors informed its general counsel that they had found questionable payments—this was a typical development in that era—by one of its overseas subsidiaries to local government officials.[10] Upjohn officials decided to launch an in-house probe, and the general counsel,

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3. The Supreme Court characterized the attorney-client privilege as "the oldest of the privileges for confidential communications known to common law. . . . Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." 449 U.S. at 389; United States v. Upjohn, 600 F.2d 1223, 1225 (6th Cir. 1979).

4. 449 U.S. at 386-87.

5. 449 U.S. at 383.

6. *Id.* at 386, 401-02.

7. *In re* LTV v. SEC Litigation, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,969 (N.D. Tex. March 23, 1981).

8. Wall Street Journal, April 15, 1981, at 7, col. 2.

9. 449 U.S. at 386-89; 600 F.2d at 1225; 5 DEL. J. CORP. L. 480, 481-82 (1980).

10. 449 U.S. at 386.

after consulting outside counsel and the chairman of his board, undertook a careful program to gather information from all company managers abroad.

I think you could conclude that where "monkey business" was going on in a company, in almost all cases it was at a fairly low level.

The details of the internal investigation were as follows. The outside auditors first noted the payments and informed the general counsel. Then the general counsel consulted outside counsel and the chairman. Afterwards, they decided to conduct an internal investigation and the attorneys prepared a letter containing a questionnaire.[11] Some may question whether this was a wise thing to do in the first place, but I can tell you that, in most corporations, that is the way it was handled because they were looking for facts; and when you are dealing across the world, it is very difficult to gather facts without a questionnaire. It is a customary practice.

The questionnaires were sent to all foreign general and area managers. It was signed by the chairman. The letter noted the disclosures that some American companies had made apparently illegal payments to foreign officials and emphasized that management needed full information concerning any payments made by Upjohn.[12]

Detailed information was also sought about each of these payments. The managers were instructed to treat it as a highly confidential matter and not to discuss it with anyone other than Upjohn employees who might be helpful in gathering the requested information. The responses were sent directly to the general counsel. He and outside counsel interviewed the recipients of the questionnaire as well as thirty-three Upjohn officers and employees as part of this investigation.[13]

In March 1976, Upjohn voluntarily submitted its Form 8-K preliminary report disclosing the payments to the Securities and Exchange Commission.[14] Upjohn amended it in July when it found additional facts.[15] A copy of the report was simultaneously submitted to the IRS, which immediately began an investigation to determine the tax consequences—understanding of income, etc.

The details regarding the dealings with the IRS are as follows: The special agents conducting the investigation were given the lists by Upjohn of all employees and officers interviewed and all who had

11. *Id.* at 386-87; 600 F.2d at 1225.
12. *Id.*
13. *Id.*
14. *Id.* at 387.
15. *Id.* at 387 & n.1.

responded to the questionnaire; there was a full disclosure of what had taken place. In November 1976, the IRS issued a summons demanding all files relative to the investigation conducted under the supervision of the general counsel for the purpose of identifying any payments to employees of foreign governments and any political contributions made by Upjohn or any of its affiliates since January 1, 1971.[16] The IRS also sought to determine whether any funds of Upjohn had been improperly accounted for on the corporate books during that period.[17]

The IRS further said that the records should include, but not be limited to, written questionnaires sent to the managers of Upjohn's foreign affiliates and memoranda or notes of the interviews conducted in the United States and abroad with officers and employees of Upjohn and its subsidiaries.[18] The company declined to produce these responses. Upjohn argued that the documents were protected from disclosure by the attorney-client privilege and constituted the attorney's work product prepared in anticipation of litigation.[19] There was no question but that litigation was anticipated by almost everyone who was involved in this from the very beginning.

The IRS filed a petition seeking enforcement of its summons in the United States District Court in Michigan. The court appointed a magistrate and later adopted the magistrate's recommendation that the summons be enforced.[20]

The United States Court of Appeals for the Sixth Circuit—Justices Celebreeze, Keith, and Merritt, with Merritt writing the opinion —rejected the magistrate's finding of a waiver of the attorney-client privilege. It agreed that the privilege did not apply to the extent the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice, for the simple reason that the communications were not the client's.[21]

The circuit court opinion stated further that accepting the petitioner's claim for a broader application of the attorney-client privilege would encourage upper echelon management to ignore unpleasant facts and create too broad a "zone of silence."[22] It then remanded

16. That was a standard request. *Id.* at 387-88.

17. *Id.*

18. *Id.*

19. *Id.* at 388.

20. United States v. Upjohn [1978-1] U.S. TAX CAS. ¶ 9277 (W.D. Mich. 1978), *aff'd*, 600 F.2d 1223 (6th Cir. 1979), *cert. granted*, 445 U.S. 925 (1980).

21. 600 F.2d at 1227.

22. "When the knowledgeable agents are located in several foreign countries, as here, the burden on discovery is severe. We, therefore, decline to accept Upjohn's argument because of the broad 'zone of silence' it would tend to create." 600 F.2d at 1227.

to the district court for a determination of who was within the control group, and concluded that the work product doctrine was not applicable to administrative summonses issued by the IRS.[23]

The Supreme Court granted *certiorari*.[24] The case was argued on November 5, 1980 and decided on January 13, 1981.[25] There was unanimous judgment for reversal and remand.[26]

There were two issues before the Supreme Court. First was the issue concerning the scope of the attorney-client privilege in the corporate context.[27] Both the parties and the *amici*[28] sought to have the Court choose between two tests, namely, the "control group" test and a "non-control group" test.[29] Second, the Court was faced with determining the applicability of the work product doctrine in tax summons enforcement proceedings.[30]

In short, the Court stated that the attorney-client privilege protects the communications at issue in this case from compelled disclosure, and that the work product doctrine does apply in tax summons enforcement proceedings.[31] However, the Court declined to decide whether a case of sufficient necessity can ever be shown to overcome the protection of work product based on oral statements from witnesses.[32]

When the question of privilege is applied to a corporate client, the question raised is what constitutes a corporation and how far within the corporate structure may the privilege be asserted. The Court responded to this issue by rejecting the "control group test,"[33] which, I am sure you all recognize, is that group which has the power to make the substantial decisions of the corporation. The Court refused to follow this test because it fails to recognize that the attorney-client privilege exists to protect not only the communication of pro-

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23. *Id.* at 1228.

24. 445 U.S. 925 (1980).

25. 449 U.S. at 383. Daniel Gribbon of Covington & Burling argued the case for Upjohn. *Id.* at 385.

26. *Id.* at 402, 404.

27. *Id.* at 386.

28. Briefs of amici curiae urging reversal were filed by the American Bar Association, the Federal Bar Association, the American College of Trial Lawyers, the Chamber of Commerce for the United States, and the Committee on Federal Courts. *Id.* at 385.

29. *Id.* at 386, 390-97.

30. *Id.* at 386, 397-402.

31. *Id.* at 386.

32. *Id.* at 391. The Court declined to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were they able to do so. *Id.* at 386. This is where Chief Justice Burger deviated from the Court. *Id.* at 402-04.

33. *Id.* at 390-97.

fessional advice to those in a position to act on it, but also the communication of information to counsel to enable him to give good advice.[34]

In analyzing this case we must not lose sight of the fact that the information needed by the general counsel was way down in the organization's structure. Until he had these facts, the general counsel was not in a position to make a recommendation to the board.[35]

Regardless of whether the Upjohn employees questioned were within the control group, the Court concluded, they had relevant information concerning matters within the scope of their duties not otherwise available. This information was required by counsel to advise the corporation concerning actual and potential legal difficulties.[36]

In the corporate context, it is frequently those persons beyond the control group who possess the knowledge. If somebody is going to pay a bribe or make a political contribution to enhance himself in the company's foreign operations, it is unlikely that the home office will ever have knowledge of this type of conduct. Even though, in some of those cases, it was alleged that upper management might have known, I submit to you that in most instances that would not be the case.

Furthermore, the Supreme Court indicated the control group test frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice; for those in corporate practice that is important.[37]

This test limits the attorney's ability to predict with some degree of certainty whether particular discussions will be protected. As the Court said, "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." [38]

In dismissing the "zone of silence" contention that extending the privilege beyond the limits of the control group test would result in a severe burden on discovery, the Court stated: "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney . . . ." [39] Thus, the client cannot be compelled to answer the

34. *Id.* at 391-92.
35. *See* notes 8-12 *supra.*
36. 449 U.S. at 394-95.
37. *Id.* at 392.
38. *Id.* at 393.
39. *Id.* at 395.

question, "What did you say or write to the attorney?," but he may not refuse to disclose any relevant facts within his knowledge merely because he incorporated a statement of such facts into his communication with his attorney.

Let's turn quickly to the work product issue. To the extent the material subject to the summons is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, the Court considered whether the work product doctrine precluded its discovery.[40] The government conceded, wisely, that the court of appeals erred and that the work product doctrine does apply to IRS summonses, but the government asserted it made a sufficient showing of necessity to overcome its protection.[41] The government, however, was very weak in showing both the necessity and its efforts to follow other courses of action.

After discussing the 1947 case of *Hickman v. Taylor*[42] and Rule 26 of the Federal Rules of Civil Procedure,[43] the Court noted that some courts have concluded that no showing of necessity can overcome the protection of work product which is based on oral statements from witnesses, and that even those courts which declined to adopt an absolute rule have nonetheless recognized that such material is entitled to special protection.[44] The Court declined to decide the issue of whether this rule is absolute, but decided that, before a court could compel disclosure, a far stronger showing of necessity and availability would have to be made by means other than those articulated by the government or applied in the district court.[45]

Since the court of appeals believed that the work product protection was never applicable in an enforcement proceeding such as this,[46]

40. *Id.* at 397-402.

41. *Id.* at 397.

42. Hickman v. Taylor, 329 U.S. 495 (1947).

43. FED. R. CIV. P. 26. The court in its opinion specifically discussed the applicability of rule 26(b)(3). 449 U.S. at 398 & n.7. That rule states:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

44. *Id.* at 401.

45. *Id.* at 401-02.

46. 600 F.2d at 1227-28.

and since the district court applied a too lenient standard of protection, the judgment was reversed and remanded to the court of appeals for such further proceedings in connection with the work product claim as were consistent with the opinion.[47]

47. 449 U.S. at 402.