

## The Fifth Circuit Weighs in on Vicarious Liability under the Anti-Kickback Act

In a recent case of first impression, the Fifth Circuit broadly interpreted civil liability for government contractors under § 8706(a)(1) of the Anti-Kickback Act<sup>1</sup> (the “AKA”). In *United States ex rel. Vavra et al. v. Kellogg Brown & Root, Inc.*<sup>2</sup> (“KBR”) the court held that corporations could be vicariously liable for the actions of any employee acting with “apparent authority,” irrespective of whether the offending employee was acting within the scope of their employment or for the employer’s benefit. The decision has implications for government contractors and may lead employers all over the country to evaluate whether additional compliance measures would be appropriate.

### Case Background

In 2001, Kellogg Brown & Root Inc. (“KBR”) contracted with the United States Army to provide global logistical services, directly and through subcontractors. As part of the contract, KBR engaged two subcontractors, EGL, Inc. (“EGL”) and Panalpina, Inc. (“Panalpina”) to carry out work under the contract, including the transport of military equipment and supplies to Iraq, Afghanistan and Kuwait between 2002 and 2006.

Intervening in a *qui tam* suit initially brought by two private whistleblowers, the United States filed a complaint alleging that employees in KBR’s transportation department accepted kickbacks in the form of meals, drinks, sporting event tickets and other gifts and entertainment from EGL and Panalpina on at least one hundred forty-eight occasions. According to the complaint, the kickbacks were calculated to obtain and receive favorable treatment on KBR subcontracts. The alleged favorable treatment included overlooking service failures and awarding additional subcontracts despite such failures.

### Anti-Kickback Act Civil Penalty Provision

The AKA prohibits any person from giving, offering, requesting or accepting a kickback in connection with a federal government contract.<sup>3</sup> The AKA civil penalty provision under § 8706(a) provides:

- (a) Amount – The Federal Government in a civil action may recover from a person
  - (1) that knowingly engages in conduct prohibited by section 8702 of this title a civil penalty equal to
    - (A) twice the amount of each kickback involved in the violation; and
    - (B) not more than \$10,000 for each occurrence of prohibited conduct; and
  - (2) whose employee, subcontractor, or subcontractor employee violates section 8702 of this title by providing, accepting, or charging a kickback a civil penalty equal to the amount of that kickback

<sup>1</sup> 41 U.S.C. §§ 8701-8707 (formerly 41 U.S.C. §§ 51-58).

<sup>2</sup> Civ. No. 12-40447, 2013 WL 3779225 (5th Cir. July 19, 2013)

<sup>3</sup> 41 U.S.C. § 8702 (formerly 41 U.S.C. § 53).

## District Court Ruling

KBR moved to dismiss the government’s complaint, arguing that AKA § 8706(a)(1) did not permit vicarious liability. Alternatively, KBR argued that the complaint failed to allege sufficient facts to impute the KBR transportation department employees’ conduct to KBR.

The district court granted KBR’s motion to dismiss for failure to state a claim, finding that “the plain language” of § 8706(a) limited corporate vicarious liability to § 8706(a)(2) only. The court based its finding on the fact that § 8706(a)(2) explicitly mentioned “employee[s], subcontractor[s] and subcontractor employee[s]” while § 8706(a)(1) did not. The court reasoned that to extend corporate vicarious liability to § 8706(a)(1) would render the aforementioned language superfluous. The court further noted that, even if corporate vicarious liability was read into § 8706(a)(1), the government had “not sufficiently alleged that KBR employees were acting for the corporation’s benefit” and therefore imputation of vicarious liability would not be appropriate.

## Fifth Circuit Reversal and Remand

On appeal, the Fifth Circuit reversed and remanded, finding that § 8706(a)(1) did, in fact, allow corporate vicarious liability and that the government’s complaint had alleged facts sufficient to impute liability to KBR.

On the issue of corporate vicarious liability under § 8706(a)(1), the Fifth Circuit found fault with the district court’s decision in two respects. First, the district court had failed to account for the fact that both subsections of § 8706(a) allow the government to “recover from a *person*,”<sup>4</sup> a term the AKA defines to include corporations and other entities.<sup>5</sup> Second, it found that the district court had erred when it reasoned that allowing vicarious liability under both subsections would render § 8706(a)(2) superfluous. The Fifth Circuit’s view was that the real distinction between the subsections and their varying penalties is the element of knowledge – “knowing[]” violations under § 8706(a)(1) give rise to double damages and per-occurrence penalties, while violations where knowledge cannot be proven warrant recovery of civil penalties “equal to the amount of the kickback” under § 8706(a)(2).

The Fifth Circuit also reversed the district court’s holding that the government had not pled sufficient facts to support holding KBR vicariously liable for the conduct of its employees. The court rejected KBR’s argument that the AKA’s language and structure required the government to plead facts showing that KBR employees acted (1) with the intent to benefit KBR *and* (2) in a managerial capacity *and* (3) within the scope of their employment. Instead, the Fifth Circuit adopted a broader theory of vicarious liability familiar from the common law – that a master is subject to liability for his servant’s torts if (a) the servant acts in the scope of his or her employment *or* (b) (if the act occurs outside of the scope of employment) the servant purports to act or speak on behalf of the master and there is reliance upon apparent authority *or* (c) the servant is aided in accomplishing the tort by the existence of the agency relationship.<sup>6</sup> Thus, the government’s singular reliance on the KBR transportation department employees’ apparent authority was enough to impute liability to KBR. In rejecting the narrower theory of corporate vicarious liability advocated by KBR in favor of the common law approach, the Fifth Circuit explicitly distinguished its prior decision in *United States v. Ridgley State Bank*,<sup>7</sup> and noted that the Supreme Court’s holding in *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp* (“ASME”) required

<sup>4</sup> See 41 U.S.C. § 8706 (formerly 41 U.S.C. §55) (emphasis added).

<sup>5</sup> See 41 U.S.C. § 8701(3) (formerly 41 U.S.C. § 52(3))

<sup>6</sup> RESTATEMENT (SECOND) OF AGENCY § 219 (1958); accord *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp* (“ASME”), 456 U.S. 556, 565-566 & n.5 (1982).

<sup>7</sup> 357 F.2d 495, 498-500 (5<sup>th</sup> Cir. 1966)

application of the broader standard for corporate vicarious liability called for under the common law.<sup>8</sup> In particular, the Fifth Circuit determined that *ASME* required vicarious liability where “agents act with apparent authority *including when the agent acts solely to benefit himself.*”<sup>9</sup>

In finding that the government had sufficiently alleged vicarious liability in its complaint, the Fifth Circuit further noted that common law agency principles that limited vicarious liability for punitive awards<sup>10</sup> did not apply in the AKA context.<sup>11</sup> Citing the Supreme Court’s 2003 opinion in *Cook Cnty. v. United States ex rel. Chandler*,<sup>12</sup> the Fifth Circuit ruled that limitations to vicarious liability were applicable only to “classic punitive damages [statutes], which leave the jury with open-ended discretion” over the amount. While admitting that the § 8706(a)(1) had punitive characteristics, the court reasoned that the AKA was not a “classic punitive damage statute” because it lacked *express* language providing for punitive damages.<sup>13</sup> Rather, the Fifth Circuit reasoned that the double damages and per-occurrence penalties under § 8706(a)(1) placed the AKA in a “special” category of statutes (which includes the federal False Claims Act (“FCA”)) with damage multipliers that did not trigger limitations on vicarious liability in the same way as “classic punitive damage[]” statutes.<sup>14</sup>

## Conclusion

The Fifth Circuit’s decision in *KBR* should be troubling to corporations conducting business with the government. Under *KBR*, corporations can face liability for employee activity – even where the act occurs outside the employee’s scope of employment and arguably even where the employee lacks the managerial capacity to provide the benefit sought by the alleged kickback.

The *KBR* decision charges corporate entities with the difficult task of monitoring third-party views of employees’ “apparent authority” or face potential liability for those employees’ actions. To limit this risk, government contractors and other corporate entities should evaluate their current compliance and oversight measures to ensure that they are adequate.

We will continue to monitor the *KBR* district court proceedings after remand for additional guidance on defenses to the vicarious liability standard set forth by the Fifth Circuit. If you have questions about this decision or its implications for your company, please reach out to your usual Ropes & Gray lawyer, or an attorney in our [False Claims Act](#) practice.

<sup>8</sup> *KBR*, 2013 WL 3779225 at 7 (emphasis added).

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 542 (1999) (quoting and applying RESTATEMENT (SECOND) OF AGENCY § 217C (1958)).

<sup>11</sup> *KBR*, 2013 WL 3779225 at 8.

<sup>12</sup> 538 U.S. 119, 131-132 (2003).

<sup>13</sup> *KBR*, 2013 WL 3779225 at 8.

<sup>14</sup> *Id.* at 9 (citing RESTATEMENT (SECOND) OF AGENCY § 217C cmt. c (1958)).