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Thumbs Up for Upjohn: Sixth Circuit Upholds Privilege for Internal Investigations

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On October 3, 2025, in *In re FirstEnergy Corp.*, the U.S. Court of Appeals for the Sixth Circuit vacated a district court order that, if permitted to stand, would have required wholesale production of materials generated in an internal investigation, led by outside counsel, into a company's involvement in an alleged bribery scheme. [1] The Court held that the attorney-client privilege and work product doctrine protected disclosure of investigative materials directed by legal counsel, even though the company later relied on the investigation to make business decisions. *FirstEnergy* reaffirms the continued vitality of the Supreme Court's 45-year-old *Upjohn* decision upholding privilege and work product protections for counsel-led internal investigations, where legal advice is sought and future litigation reasonably anticipated.[2]

Background

In late 2016, FirstEnergy, a struggling Ohio-based utility company, allegedly participated in a scheme to bribe a member of the Ohio House of Representatives with millions in campaign contributions to advance legislation that would give FirstEnergy a $1.3 billion bailout. In July 2020, federal authorities charged the representative with violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") and subpoenaed FirstEnergy. The criminal complaint against the representative described an unnamed company (understood to be FirstEnergy) funding the bribery scheme. Upon the news, FirstEnergy's stock dropped 45%, and the company and its board each hired law firms to conduct an internal investigation into the alleged malfeasance. Regulatory investigations ensued, as well as a raft of civil lawsuits asserting securities and civil RICO claims. [3]

Among these lawsuits, two shareholders filed class actions in the Southern District of Ohio against FirstEnergy on behalf of all shareholders that bought stock during the alleged bribery scheme, claiming fraud in violation of federal securities laws. Amid discovery, the plaintiffs moved to compel the production of all previously withheld documents related to the law firms' internal investigations.[4] Plaintiffs also demanded that the Court order FirstEnergy's witnesses to "answer all questions (past and future) related to the internal investigation[s]." The Court agreed, finding that the internal investigations were not protected by attorney-client privilege or the work-product doctrine and ordering FirstEnergy to produce all previously withheld files.[5] After the district court denied FirstEnergy's motion to certify the order for interlocutory review, the company sought mandamus relief from the Sixth Circuit, contending that the attorney-client privilege and work product doctrine barred disclosure of the investigative materials at issue.[6]

Decision

In a per curiam decision, Sixth Circuit Judges Sutton, Batchelder, and Nalbandian granted the company's mandamus petition in full and vacated the district court's order requiring production of internal investigation materials.

As an initial matter, the Court held that the attorney-client privilege and work product doctrine applied to protect the investigative materials from disclosure.

Following the framework established in *Upjohn Co. v. United States*, the Court noted that an animating purpose of the board in hiring outside counsel was to secure legal advice through counsel's investigation into the company's potential criminal and civil liability.[7] Likewise, after the DOJ unsealed its criminal complaint and subpoenaed the company, the company and its board reasonably and correctly anticipated that they would face government investigations, civil litigation, and regulatory proceedings, as well as federal securities law claims.[8] Those expectations directly prompted the internal investigations, triggering work product protection.[9]

In so holding, the Court rejected the district court's assessment that a business (not legal) purpose drove the investigations, because the company later relied on the fruits of the investigations to make business decisions related to human resources and public relations.[10] The Court observed that companies regularly consult their attorneys about various business problems—compensation plans, proposed sales, potential bankruptcy, or employee termination decisions. Such adjacent business purposes, however, do not transform legal advice into business advice.[11] In the context of the high-stakes criminal and civil allegations FirstEnergy faced, it would be rare for a company *not* to have a tangential business purpose for legal advice.[12] Instead, what matters when evaluating privilege is whether the company sought legal advice—and "FirstEnergy showed that it primarily sought and received legal advice from its attorneys throughout the investigations."[13]

The Court further held that the district court's order requiring production of privileged investigative materials met the "lofty standard" required for mandamus relief.[14] The Court emphasized that the district court's error was clear and beyond the bounds of its discretion.[15] In the Court's view, there was no way to affirm the district court's ruling without abandoning nearly half a century of jurisprudence, flowing from *Upjohn*, establishing strong attorney-client privilege and work product protections in investigative settings. To rule otherwise would discourage full and frank communication between companies and their attorneys when investigating potential wrongdoing—a result the Sixth Circuit could not countenance.[16]

Takeaways

FirstEnergy is a clear win for robust attorney-client privilege and work product protections in internal investigation settings. The decision reaffirms that companies facing potential criminal and civil liability can seek legal advice through confidential internal investigations, conducted by outside counsel, without undue risk of disclosure in follow-up civil litigation.

The Court was particularly sensitive to the high-stakes context, as FirstEnergy faced a "bet-the-company setting demanding apex legal advice" with criminal investigations, multiple regulatory proceedings, and numerous civil lawsuits all converging at once. The Court noted that undermining privilege in such circumstances would discourage companies from investigating their own potential wrongdoing, which would undermine sound corporate governance and compliance.

Crucially, under *FirstEnergy*, a company's subsequent reliance on investigative findings in making business decisions does not destroy the privilege or open up the investigative findings to disclosure. The district court sought to pierce the privilege by pointing out that FirstEnergy made business decisions based on the investigations, such as public relations messaging and employment decisions. The Sixth Circuit firmly rejected this reasoning, emphasizing that what matters is whether the company *sought* legal advice, not what it later *did* with that advice.

Nonetheless, *FirstEnergy* does not provide companies a blank check to cloak any internal investigation of any kind under a veneer of privilege. Rather, the record must show that legal advice was actually sought through the investigation, and potential litigation was truly and reasonably anticipated. In this regard, context matters and a court will pay "acute attention to the circumstances" surrounding the internal investigation, particularly the imminence of potential litigation. The

Court also noted favorably that the FirstEnergy attorneys conducting the investigations met frequently with directors to discuss their investigative findings, legal analyses, and assessments of potential criminal and civil liability. Given the substantial exposure that would result from unanticipated disclosure, companies should consult with competent outside counsel before embarking on internal investigations to ensure that all appropriate safeguards and processes are instituted at the outset.

[1] *In re FirstEnergy Corp.*, 154 F.4th 431 (6th Cir. 2025).

[2] *Id.* at 438-39.

[3] *Id.*

[4] *Id.* at 435-36.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 436-37. The court explained that *Upjohn* "sets the framework" holding that attorney-client privilege applies when a company seeks legal advice to assess risks of criminal and civil liability. *Id.* at 436. The court noted that "[w]hat was true for Upjohn is true for FirstEnergy. As with Upjohn, FirstEnergy and its board hired lawyers to secure legal advice" through internal investigations into the company's potential criminal and civil wrongdoing." *Id.* Thus, as in *Upjohn*, these "communications—including outside counsels' analyses about what acts occurred, whether those acts were illegal, and what criminal and civil consequences might ensue—all involved requested legal advice." *Id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981)).

[8] *Id.* at 437.

[9] *Id.*

[10] *Id.* at 438.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 438.

[14] *Id.* at 440 (citing *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004)).

[15] *Id.* at 441.

[16] *Id.*