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Client Alert Commentary

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Second Circuit: Fifth Amendment Bars Testimony Compelled by Foreign Governments

The court vacates LIBOR convictions with significant implications for US criminal cases involving cross-border investigations.

Key Points:

- The Fifth Amendment also limits the use a defendant's statements compelled by a foreign power.
- The government bears the "heavy burden" of showing all evidence is derived from a source "wholly independent" of a defendant's statements compelled by a foreign power.
- The government's reliance on tainted evidence before a grand jury was not harmless and warrants dismissal of indictment.

Introduction

Parallel investigations involving the US Department of Justice (DOJ) have been a part of the white-collar landscape for half a century. When financial or similar crimes are involved, the target of a grand jury investigation can also face peril from multiple civil agencies, like the US Securities and Exchange Commission (SEC), the US Commodities Futures Trading Commission (CFTC), or other federal and state regulators. Over time, DOJ and civil agencies have developed procedures that allow those proceedings to advance simultaneously and to share information consistent with the important protections imposed by the Federal Rules of Criminal Procedure, such as the grand jury secrecy requirement of Rule 6(e), and constitutional protections, such as the Fifth Amendment's protection against self-incrimination.[1]

DOJ involvement in parallel or cross-border investigations that involve coordination with foreign financial regulators has risen dramatically in the past decade. Many of the most significant DOJ investigations in the past several years involved parallel investigations by foreign regulators, and that trend only seems to be accelerating. As was the case for parallel civil-criminal proceedings in the US, parallel DOJ-international investigations require DOJ to develop procedures for cross-border investigations that adequately protect key statutory and constitutional protections when working with foreign counterparts, many of whom have very different models of investigation and prosecution.

The Second Circuit's decision in *United States v. Allen* highlights the challenge the prosecution of crimes transcending US borders can pose for DOJ.[2] In *Allen*, the Second Circuit vacated two LIBOR-related convictions and dismissed the underlying indictments based on a cooperating witness' exposure to the defendants' statements compelled by a UK regulatory authority.[3] The Second Circuit held that, pursuant to the Fifth Amendment, where a defendant has been compelled to provide testimony by a foreign power, the government bears the "heavy burden" of proving that it has not relied on that testimony.[4]

The LIBOR Investigations

Allen is the first criminal prosecution in the US related to the London Interbank Offered Rate (LIBOR) manipulation scheme to reach a US Court of Appeals.[5] Beginning in 2011, the US and UK were investigating banks for manipulating their LIBOR submissions to benefit themselves in LIBOR-tied transactions.[6] As widely reported, and as noted by the *Allen* court, by 2012, DOJ and the UK Financial Conduct Authority (FCA) had begun to investigate the bank then known as Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (Rabobank) for LIBOR manipulation.[7]

The bank was a LIBOR contributor for the US Dollar (USD) and Japanese Yen (JPY). One of the *Allen* defendants, Allen, was responsible for the bank's USD LIBOR submissions and the supervision of other LIBOR-responsible personnel. The other defendant, Conti, was also responsible for USD submissions. A third trader, Robson, was responsible for JPY LIBOR submissions.[8] FCA interviewed Allen, Conti and Robson. The FCA interviews were compulsory, as witnesses faced imprisonment if they refused to testify. Recognizing the Fifth Amendment risks associated with these compelled statements, DOJ and FCA implemented a "wall" between their respective investigations, and DOJ conducted interviews prior to the FCA.[9]

The FCA brought an enforcement action against Robson and, following normal FCA procedure, disclosed relevant evidence, including Allen and Conti's compelled testimony. Robson reviewed, annotated and took handwritten notes regarding that testimony. The FCA thereafter stayed its enforcement action in favor of Robson's criminal prosecution in the US.

Indictment, Trial, and *Kastigar* Hearing

A grand jury in the Southern District of New York (SDNY) returned an indictment charging Robson with, *inter alia*, wire fraud. Robson pleaded guilty and signed a cooperation agreement with DOJ. Thereafter, the government charged Allen and Conti with conspiracy to commit wire and bank fraud, and substantive wire fraud. Robson's testimony, which an FBI agent presented to the grand jury, was the grand jury's sole source of material evidence regarding Allen and Conti's alleged role in the LIBOR manipulation scheme.[10]

Prior to trial, defendants moved to dismiss the indictments and suppress Robson's testimony based on *Kastigar v. United States*.[11] In *Kastigar*, the Supreme Court held that, when a witness has invoked his or her Fifth Amendment privilege, the government can compel that witness' testimony only by granting immunity against both direct and derivative use of that testimony.[12] When an immunized witness later becomes a defendant, a hearing is held in which prosecutors are required to establish that the government's case is not based on the compelled testimony. "This burden of proof ... is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[13]

At trial, Robson testified and (again) was the sole source of material evidence regarding Allen and Conti's role in the alleged scheme. Allen and Conti were convicted of all charges.[14] The Court then held a two-day hearing on the defendants' *Kastigar* motions.[15] The extent of Robson's exposure to Allen and Conti's compelled statements was disclosed by the government, but Robson testified that his trial testimony was not impacted by that exposure.[16] The government argued, *inter alia*, that the Court's ruling in *United States v. Balsys*,[17] which held that the Fifth Amendment did not foreclose the government compelling testimony that might incriminate the witness in a foreign criminal prosecution, likewise permits the government's use of testimony compelled by a foreign power.[18] The government further argued that *Kastigar*'s "independent source" doctrine[19] applies only to testimony compelled by US federal or state authorities, not foreign powers.[20] Finally, the government emphasized the steps that DOJ and FCA took to ensure that FCA-compelled testimony would not taint DOJ's investigations, including a DOJ

presentation to FCA representatives on the Fifth Amendment, *Kastigar*, and the importance of maintaining a "wall" between their investigations.[21] DOJ also obtained written assurances from UK investigators that they would not share information derived from compelled testimony, and established a "day one/day two" approach for interviews by which DOJ would interview Rabobank personnel prior to FCA.[22] The District Court denied the *Kastigar* motions, assuming that even if the Fifth Amendment applied to statements compelled by a foreign power, the government had satisfied its burden under *Kastigar*.[23]

The Second Circuit Decision

Allen and Conti appealed arguing, *inter alia*, that the District Court erred in denying the *Kastigar* motion. The Second Circuit agreed, finding that the government's reliance on Robson's testimony necessitated vacatur of defendants' convictions and dismissal of their indictments.[24]

The Second Circuit held that the Fifth Amendment precludes the government's reliance on a defendant's testimony compelled by a foreign power at trial.[25] When such testimony exists, "the government bears 'the heavy burden of proving that all of the evidence it proposes to use was derived ... from a legitimate source wholly independent of the compelled testimony.'"[26] In *Allen*, this required the government to prove that Robson's exposure to Allen and Conti's compelled statements "did not shape, alter, or affect the information that [Robson] provided and that the Government used."[27] The Second Circuit found that Robson's conclusory denials at the *Kastigar* hearing were insufficient to carry that burden in light of the fact that Robson's pre-exposure FCA testimony was "materially" inconsistent with his post-exposure testimony before the grand jury and at trial.[28] The Second Circuit further stated, in *dicta*, that the "most effective way" for the government to carry this burden would be by "demonstrating that [the witness'] testimony was unchanged from comparable testimony given before the exposure."[29]

The Second Circuit further found that the government's reliance on Robson's testimony was not "harmless," thus necessitating that defendants' convictions be vacated.[30] Reliance on tainted evidence is "harmless," and a conviction will survive, when a court is "persuaded beyond a reasonable doubt that the jury would have reached the same verdict without consideration of the tainted evidence."[31] The Second Circuit refused to find that reliance on Robson's testimony was "harmless" when he "was the unique source of particularly significant and incriminating evidence."[32]

The Court further found that defendants' indictments required dismissal based on the government's reliance on Robson's testimony before the grand jury.[33] In doing so, the Second Circuit held that "if the government has presented immunized testimony to the grand jury, the indictment should be dismissed unless the government established that the grand jury would have indicted even absent that testimony."[34] The Court could not conclude the grand jury would have indicted but-for Robson's testimony, because that testimony "was not merely 'material,'" but "essential," and "provided the grand jury with definitive, clear-cut testimony that Allen and Conti had directly participated in the scheme."[35] The Second Circuit further refused to maintain those indictments based on documentary evidence presented to the grand jury, when such evidence was available prior to Robson's cooperation but DOJ chose to charge Allen and Conti only after obtaining Robson's post-exposure testimony.[36]

Significance of the *Allen* Decision

In *Allen*, the Second Circuit has sent a strong signal that it will guard the procedural protections afforded all defendants in the US, even if both DOJ and its foreign counterparts acted in good faith and lawfully in their respective jurisdictions when conducting the investigation. In so doing, the Court has placed the onus on DOJ to continue to develop procedures for working with DOJ foreign counterparts to ensure evidence developed in foreign investigations does not compromise prosecutions in the US.

The consequences of DOJ and its foreign counterparts developing the additional procedures give rise to new risks, however. The possibility that statements from a parallel proceeding may trigger a Fifth Amendment violation will likely lead to still closer and earlier collaboration between DOJ and its foreign counterparts, *ex ante*. This may force DOJ to bring its resources and expertise to bear at an earlier stage of cross-border investigations to minimize the risk of adverse consequences in those multiple jurisdictions, *ex post*. As the Court noted in *Allen*, this kind of deeper collaboration has already begun, as evidenced by the recent placement of DOJ prosecutors with Eurojust in The Hague and INTERPOL in France, and the detailing of DOJ anti-corruption prosecutors to the UK's Serious Fraud Office (SFO) and FCA.[37]

Defense counsel, in particular US lawyers representing individuals under scrutiny in cross-border investigations, should consider coordinating closely with counsel in each jurisdiction to gain a complete understanding of the processes and risks attendant to each parallel investigation. Counsel should also note the Second Circuit panel's skepticism regarding the government's decision to prosecute these defendants in the US. At oral argument, Judge José A. Cabranes asked both sides to explain why "Main Justice" had brought charges against two UK nationals who were young, relatively low-level employees working at a Dutch bank in London.[38] Judge Cabranes described the circumstances as a "puzzlement."[39] Appellant counsel noted that a "critical witness," whose exonerating testimony would have been available in the UK, proved unavailable to defendants because the government opposed, and the District Court denied, their motion to order that witness' deposition.[40] Judge Gerard E. Lynch questioned whether this resulted in the "jury ... not [being] permitted to hear all of the evidence that bears on the question" of whether defendants had engaged in unlawful conduct.[41] Through this prism, the Second Circuit then considered whether the government's use of defendants' FCA-compelled testimony ran afoul of the Fifth Amendment.

The *Allen* opinion also highlights DOJ's need to maintain sufficient procedural protections when private US industry regulators, such as the Financial Industry Regulatory Authority (FINRA), conduct parallel investigations of a criminal defendant. The Fifth Amendment does not preclude private self-regulatory organizations (SRO) like FINRA from compelling testimony from its members,[42] and typically, the government can use that testimony in US criminal proceedings.[43] But, the Second Circuit has stated, in *dicta*, that the Fifth Amendment could limit use of SRO-compelled testimony in criminal proceedings if there is "a sufficiently close nexus between the State and the challenged action of the" SRO.[44] Based on *Allen*, where such nexus exists and the SRO has compelled a defendant's testimony, the government likely will bear the burden of satisfying *Kastigar*'s "wholly independent" standard. Thus, much like its foreign counterparts, DOJ must consider carefully how to avoid triggering a Fifth Amendment violation due to use, even indirectly, of a defendant's compelled statements from a parallel SRO proceeding. Whether they involve foreign jurisdictions, domestic regulators, or both, the increasing occurrence of investigations pursued in multiple jurisdictions and simultaneously under administrative, regulatory, and criminal procedures requires careful handling and a thorough understanding of the issues and risks involved.

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Endnotes

[1] *See, e.g.*, SEC. AND EXCH. COMM., DIV. OF ENF'T, ENFORCEMENT MANUAL 102-04 (Oct. 28, 2016), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf (detailing procedures for seeking immunity).

[2] 2017 WL 3040201 (2d Cir. July 19, 2017).

[3] *Id.* at *27.

[4] *Id.* at *19-20.

[5] *Id.* at *1.

[6] *See, e.g.*, Mark Gilbert, *et al.*, London Fog: Scrutiny of LIBOR Banks Grows, WASH. POST, Dec. 4, 2011, 2011 WLNR 25064047.

[7] *Allen*, 2017 WL 3040201, at *8.

[8] *Id.* at *5.

[9] *Id.* at *9.

[10] *Id.* at *10.

[11] 406 U.S. 441, 460 (1972).

[12] *Id.* at 442.

[13] *Id.* at 460. Perhaps the most famous application of *Kastigar* was the ruling by the D.C. Circuit in *United States v. North*, where the court reversed the conviction of Lt. Col. Oliver L. North, finding that the Independent Counsel had been unsuccessful in isolating the prosecution team from any taint stemming from North's immunized testimony before Congress and failed to satisfy the burden of proving an independent source. 910 F.2d 843 (D.C. Cir.), *opinion withdrawn and superseded in part on reh'g*, 920 F.2d 940 (D.C. Cir. 1990).

[14] *Allen*, 2017 WL 3040201, at *10.

[15] *Id.*

[16] *See United States v. Allen*, 160 F. Supp. 3d 684, 689, 692-93 (S.D.N.Y. 2016), *rev'd*, 2017 WL 3040201 (2d Cir. July 19, 2017).

[17] *United States v. Balsys*, 524 U.S. 666, 667, 677-89 (1998).

[18] Gov't Mem. in Opp. to Defs.' Mot. to Dismiss Based on *Kastigar* at 7-12, *United States v. Allen, et al.*, No. S4:14-CR-00272-JSR (S.D.N.Y. Aug. 6, 2015), ECF No. 95.

[19] *Kastigar*, 406 U.S. at 460-61.

[20] Gov't Mem. in Opp., *supra* note 18, at 12-14.

[21] *Allen*, 160 F. Supp. 3d at 694-95.

[22] *Id.*

[23] *Id.* at 690-98 & nn.8, 18.

[24] *Allen*, 2017 WL 3040201, at *27.

[25] *Id.* at *12-13.

[26] *Id.* at *20 (quoting *Kastigar*, 406 U.S. at 461-62).

[27] *Id.* at *21 (referencing legal standard articulated in *North*, 910 F.2d at 856).

[28] *Id.* at *21 & n.142 ("In order to be 'materially' inconsistent, the witness's account of events before exposure must be significantly different, and less incriminating, than the testimony ultimately used against the defendant.").

[29] *Id.* at *21.

[30] *Allen*, 2017 WL 3040201, at *24-25.

[31] *Id.* at *24 (quoting *United States v. Nanni*, 59 F.3d 1425, 1443 (2d Cir. 1995)).

[32] *Id.* at *24.

[33] *Id.* at *25-27.

[34] *Id.* at *26 (quoting *Nanni*, 59 F.3d at 1433).

[35] *Id.* at *26.

[36] *Allen*, 2017 WL 3040201, at *27.

[37] *Id.* at *18. Last year, in a speech discussed in the opinion, the then-Assistant Attorney General for the Criminal Division noted that DOJ has placed attachés in eight countries (Bangkok, Bogata, Brussels, London, Manila, Mexico City, Paris and Rome) and has 60 resident legal advisers and 45 intermittent legal advisers stationed internationally. Leslie R. Caldwell, Remarks at American Bar Association's 30th Annual National Institute on White Collar Crime (Mar. 4, 2016), https://www.justice.gov/opa/speech/assistant–attorney–general–leslie–r–caldwell–speaks–american–bar–association–s–30th.

[38] Oral Argument at 00:36 – 02:28, 44:31 – 44:48, *United States v, Allen*, 2017 WL 3040201 (2d Cir. July 19, 2017) (Nos. 16-898 & 16-939), http://www.ca2.uscourts.gov/decisions/isysquery/0b1e9904-6f0e-427e-a6de-23a5cb9326e6/418/doc/16-898%2C%2016-939.mp3.

[39] *Id.* at 02:00 – 02:05.

[40] *See, e.g.*, *id.* at 06:25 – 07:45.

[41] *Id.* at 25:50 – 27:42; *see also id.* at 28:49 – 30:27 (panel inquiring why District Court had denied motion to depose).

[42] *See, e.g.*, *United States v. Solomon*, 509 F.2d 863, 867-72 (2d Cir. 1975).

[43] *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002) (stating "[t]estimony in [a National Association of Securities Dealers, Inc.] proceeding may entail exposure to criminal liability, but that in itself is not enough to establish" application of Fifth Amendment protections against self-incrimination (citation omitted)); *see also Solomon*, 509 F.2d at 867-72 (2d Cir. 1975) (Fifth Amendment did not preclude Government's use in criminal proceedings of defendant's compelled statements before New York Stock Exchange).

[44] *D.L. Cromwell*, 279 F.3d at 161 (citation omitted); *see also Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206-07 (2d Cir. 1999).