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Expert Analysis

Constitutional Questions in Corporate Internal Investigations

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In recent years, the Department of Justice (DOJ) has issued a number of policy statements which make clear that, when companies seek credit for cooperating with the government, they will be expected to turn over any incriminating evidence about current and former employees. This policy has given rise to a concern that companies will feel pressure to tailor internal investigations to the needs of federal prosecutors. As we commented, DOJ policy "may, in close cases, lead company counsel to over-interpret the facts, or find wrongdoing where the record is more consistent with innocent mistake or uncertainty." Elkan Abramowitz & Jonathan Sack, *Deferred Prosecution Agreements In Decline? Enforcement Implications*, N.Y.L.J. (Jan. 5, 2016).

Two recent criminal prosecutions illustrate the potential consequences of corporate internal investigations that become too closely linked with government investigations. In *United States v. Connolly*, No. 16-cr-370 (CM), a Southern District of New York prosecution, a former Deutsche Bank trader accused of manipulating LIBOR rates argued that statements he made to the bank's counsel during an internal investigation should be suppressed under the Fifth Amendment because the company's lawyers were acting as de facto agents of federal prosecutors. In *United States v. Blumberg*, No. 14-cr-458 (JLL), a District of New Jersey prosecution, a former executive of a securities brokerage firm argued that the government had violated his Fifth Amendment due process rights by "outsourcing" its investigative work to the brokerage firm's lawyers and failing to turn over exculpatory materials contained in corporate counsel's files.

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In this article, we discuss the relationship between corporate internal investigations and the constitutional rights asserted by the defense in *Connolly* and *Blumberg*. While neither case resulted in a dispositive ruling, the defense arguments, government opposition and judicial reactions are instructive. They highlight the legal and practical dangers that can arise if a corporate internal investigation becomes entangled with a parallel government investigation.

Fifth Amendment Rights And Corporate Internal Investigations

In 2012, DOJ launched a criminal investigation relating to alleged manipulation of LIBOR rates by global banks, including Deutsche Bank (DB). DB retained outside counsel to conduct an extensive internal investigation which included interviews of DB employees, details of which were shared with federal prosecutors. In April 2015, DOJ entered into a deferred prosecution agreement (DPA) with DB under which the bank agreed to (1) pay $775 million in criminal penalties and (2) continue cooperating with the government in its ongoing investigation. In June 2016, an indictment was returned against Matthew Connolly and Gavin Black, two former DB traders, on conspiracy and wire fraud charges stemming from the LIBOR investigation. Connolly and Black pled not guilty. When the government said it wished to offer at trial statements Black had made to DB counsel during the internal investigation, Black moved to suppress

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the statements, invoking his Fifth Amendment right against compelled self-incrimination.

In support of his motion, Black cited the U.S. Supreme Court's decision in *Garrity v. New Jersey*, in which the Court held that statements obtained from police offers under the threat of termination were involuntary and therefore inadmissible against them in a criminal trial. 385 U.S. 493, 500 (1967). Black also relied on *United States v. Stein*, in which SDNY Judge Lewis Kaplan extended the ruling in *Garrity* to a private employer, the global accounting firm KPMG, whose actions the court deemed "fairly attributable" to the government. 440 F. Supp. 2d 315, 337 (S.D.N.Y. 2006), appeal dismissed as moot, 541 F.3d 130, 136 n.2 (2d Cir. 2008). Judge Kaplan found that the government had urged KPMG to pressure employees to submit to interviews by prosecutors and to admit to personal criminal wrongdoing. In some instances, the court found, KPMG told its employees "to cooperate with prosecutors or be fired." Judge Kaplan held that private actions are "fairly attributable" to the government when "the government commands or significantly encourages a private entity to take the specific action alleged to violate the Fifth Amendment." Id. at 337. Under this standard, Judge Kaplan held that the pressure exerted on KPMG by the government had "resulted in statements that otherwise would not have been made," and thus "[t]he coerced statements and their fruits must be suppressed." Id. at 337-38.

In the LIBOR prosecution, Black equated his circumstances to those in *Stein*. Black pointed to documents in discovery which indicated that the government had taken an active role in the decision making of DB's outside counsel concerning interviews of DB employees. For example, the government allegedly asked outside counsel to give it "a heads up" about investigative actions it intended to take, directed outside counsel to provide an interview plan and lists of documents that would be used prior to interviews, and expected outside counsel to ask the government for permission to conduct follow-up interviews. See No. 16-cr-370 (CM), ECF Nos. 233-3, 233-5, 233-6, 233-7 (S.D.N.Y. April 23, 2018). On one occasion, according to telephone call notes produced by DOJ, the government instructed a DB lawyer to approach an interview "as if he were a prosecutor." Id., ECF No. 233-4. In seeking to preclude the use of his statements at trial, Black argued that DB policy required employees "to cooperate with investigations initiated by DB's Legal Department or face termination of employment." Id., ECF No. 232 at 9. Black also emphasized that DB would not have been eligible for cooperation credit under applicable DOJ policies without conducting these interviews.

> Under Justice Department policy, companies seeking leniency are under tremendous pressure to conduct internal investigations in a manner that helps prosecutors build a case against individual targets.

The government sought to distinguish Black's case from *Stein*. The government argued that, unlike KPMG, DB initiated an internal investigation on its own—not at the government's direction. Unlike the KPMG employees in *Stein*, Black was not interviewed at government offices in the presence of prosecutors, and no one told Black that he would be fired if he refused to sit for an interview (though he argued that he believed that he would be fired). Id., ECF No. 251 at 6-7 (S.D.N.Y. May 7, 2018). The government likened Black's circumstances to other cases in which the Second Circuit has held that companies that conduct internal investigations are not government actors, even when they are cooperating with the government, and "even when employees suspected of crime end up jettisoned." See, e.g., *Gilman v. Marsh & McLennan Cos.*, 826 F.3d 69, 77 (2d Cir. 2016). In *Gilman*, the Second Circuit recognized that companies routinely conduct internal investigations for "good institutional reasons," particularly when allegations of misconduct are having a negative effect on a company's stock price and "clients, directors, investors, and regulators [are] demanding answers." Id. at 76.

SDNY Chief Judge Colleen McMahon initially expressed skepticism toward Black's motion, commenting that there was "no basis on the current record to attribute Deutsche Bank's actions to the Department of Justice," but the court nonetheless ordered an evidentiary hearing. *Connolly*, 2018 WL 2411216, at *11 (S.D.N.Y. May 15, 2018). The judge said that she would apply the following legal standard to a *Garrity* challenge to admission of statements made pursuant to an internal investigation by a private employer:

> [T]here is no *Garrity* problem, and so no Fifth Amendment issue, if (1) the private actor interviewed the defendant in pursuit of its own duties or interests, and (2) any penalty imposed by the private actor for refusing to sit for the interview was meted out, whether by policy or discretionary act, without government pressure.
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> Id.

During the evidentiary hearing, Black's lawyers produced documents from the CFTC indicating that the government had outlined the scope and priorities of DB's internal investigation. Describing this evidence as "highly persuasive," Chief Judge McMahon stated that the "CFTC gave [counsel] its marching orders" and signaled that this would present "a problem for the government on the state action question." Perhaps sensing that Black's arguments

had resonated with the court, the government ultimately decided not to introduce Black's statements to corporate counsel at trial, thus mooting the *Garrity* issue.

Due Process Rights and Corporate Internal Investigations

In or about 2011, ConvergEx Group, an investment brokerage company, retained two law firms to conduct an internal investigation of possible fraudulent conduct relating to mark-ups and mark-downs on securities transactions. In December 2013, following its internal investigation, ConvergEx entered into a DPA with the DOJ, which required the company to pay $30.8 million in criminal penalties and forfeiture. That agreement highlighted the company's "extraordinary and ongoing cooperation," including its sharing of information obtained during the internal investigation. About one year later, an indictment was returned against Anthony Blumberg which accused him of conspiracy, wire fraud, and securities fraud related to concealing profit margins in securities transactions.

In pre-trial proceedings, Blumberg filed a motion asking the court to order the government to search ConvergEx's files for possible exculpatory material, production of which is required under the Due Process Clause of the Fifth and Fourteenth Amendments. See, e.g., *Brady v. Maryland*, 373 U.S. 83, 86 (1963). Blumberg argued that the government had "used ConvergEx and its counsel as both a sword and a shield," effectively deputizing the company's corporate counsel as part of the government's investigation team while ignoring "unproduced *Brady* materials in ConvergEx's files." No. 14-cr-458 (JLL), ECF No. 96-1 at 15-16 (D.N.J. Feb. 24, 2016). In support of the motion, Blumberg relied on *United States v. Risha*, 445 F.3d 298 (3d Cir. 2006), in which the Third Circuit held that the government has "constructive possession" of materials in another entity's files when (1) the entity is "acting on the government's 'behalf' or is under its 'control'"; (2) the entity and the government "are part of a 'team,' are participating in a 'joint investigation' or are sharing resources"; and (3) the government "has 'ready access' to the evidence." Id. at 304. In the Second Circuit, courts apply a "totality of the circumstances" test and have held that "a prosecutor's constructive knowledge only extends to those individuals who are an arm of the prosecutor or part of the prosecution team" by virtue of, among other things, "actively investigat[ing] the case, act[ing] under the direction of the prosecutor, or aid[ing] the prosecution in crafting trial strategy." *United States v. Meregildo*, 920 F. Supp. 2d 434, 440-42 (S.D.N.Y. 2013).

Blumberg cited several examples of how ConvergEx's counsel had "played an active and instrumental role" in the government's investigation, including voluminous correspondence suggesting that the government had delegated investigative tasks to ConvergEx. These tasks included "responding to hundreds of requests from the Government to produce, review and analyze relevant evidence; conducting the entirety of the document and audio review for the Government; analyzing the trade data and customer information for the Government; creating binders of key documents; and conducting dozens of interviews for the Government." No. 14-cr-458 (JLL), ECF No. 96-1 at 18.

District of New Jersey Judge Jose Linares ordered an evidentiary hearing on the *Brady* issue, noting that the court had "questions regarding the exact relationship between the Government and ConvergEx … and also the extent to which the Government outsourced and/or delegated discovery and investigation tasks to ConvergEx." Id., ECF No. 113 at 2 (D.N.J. June 7, 2016).

During four days of testimony on the issue in March and May 2018, Blumberg's counsel introduced notes taken by prosecutors during meetings with ConvergEx's lawyers in which, the defense argued, the company had proposed helping the government identify culpable individuals in exchange for corporate leniency. Blumberg also elicited testimony regarding the substantial investigative efforts of ConvergEx's outside lawyers undertaken at the government's request, which included (1) reviewing millions of documents and listening to thousands of recorded phone calls, (2) creating analytical charts and spreadsheets for the government, (3) interviewing witnesses in the United States and overseas, and (4) providing input on potential investigative targets. In response, the government argued that it had conducted its own investigation "aggressively and independently." Before Judge Linares could issue a ruling, Blumberg entered into a favorable plea agreement with the government, thus mooting the *Brady* question.

Conclusion

Companies routinely conduct internal investigations without becoming de facto agents of the government. Under Justice Department policy, however, companies seeking leniency are under tremendous pressure to conduct internal investigations in a manner that helps prosecutors build a case against individual targets. Under these circumstances, care must be taken to establish and preserve a boundary between the private and public investigations. If the boundary is not maintained, and decision making and evidence gathering become intertwined, difficult issues may arise. In such cases, defense counsel must be vigilant to protect their clients' constitutional rights.