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WHITE-COLLAR CRIME

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Criminal Contempt Prosecution by Civil Litigants—-A Step Too Far?

The recent indictment of I. Lewis "Scooter" Libby, recently resigned chief of staff to the vice president, again raises the question of whether prosecutors believe the cover up is worse than the crime.[1]

Special Prosecutor Patrick J. Fitzgerald's charges against Mr. Libby for obstruction, false statements, and perjury in connection with Mr. Fitzgerald's CIA leak investigation ignominiously places Mr. Libby in an expanding rogues gallery. Mr. Libby has not been charged with actually impermissibly leaking any information. Nevertheless, along with the likes of Martha Stewart,[2] Frank Quattrone, Arthur Andersen, and Computer Associates, he is the latest of prosecutors' targets who have not been charged with actually committing a substantive crime, but who the prosecutors believe improperly have stymied their investigation.

For most crimes, our justice system provides a needed degree of objectivity by placing the charging decision in the hands of a dispassionate professional instead of leaving the decision in the hands of a person who believes themself to be a victim. Obstruction cases are the exception. There, the supposed victim—often the government lawyer in charge of the investigation—is empowered to prosecute the person who he or she believes to have wronged them. Although generally professional prosecutors exercise appropriate restraint in deciding when a case should be pursued, recent cases, such as the belated reversal of the obstruction charges against Arthur Andersen—a firm destroyed by its improper obstruction conviction—confirm the need for restraint and internal review in this area.

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The overall professionalism of the Department of Justice and its internal review procedures traditionally have acted effectively to counterbalance an individual prosecutor's potential for subjectivity. Whether such internal constraints exist in the civil arena, however, is yet to be seen.

In a recent high profile civil case, lawyers for the victorious litigant are seeking to take the right to exact revenge against their targets through the criminal process a step further. The plaintiff's counsel in Ron Perelman's case against Morgan Stanley have asked the trial court for the right to be appointed prosecutors to pursue criminal contempt charges against their adversaries. Such power in the hands of private attorneys is not unheard of, but presents substantial fairness questions that suggest special restraint must be exercised in this area.

Criminal prosecution because of the destruction of or deliberate failure to produce information arises almost exclusively in connection with criminal investigations. When civil litigants do not abide by discovery orders, the typical sanctions are those provided under Rule 11 of the Federal Rules of Civil Procedure or, in more egregious situations, findings or jury instructions that permit adverse inferences. For example, in a frequently cited 2004 civil case,[3] Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York meted out harsh sanctions to the defendant for destroying potentially relevant e-mails, including an adverse inference instruction to the jury, the costs of depositions required by tardy production, and the cost of plaintiff's motion for sanctions.[4] Criminal contempt is not a typical remedy for abuse of the civil discovery process. That may be about to change.

'Coleman Holdings' Case

Earlier this year, a Florida state court imposed unusually severe punishment for discovery abuses in *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*,[5] a case where Ronald Perelman, through his holding company, Coleman (Parent) Holdings Inc., sued Morgan Stanley for fraud in its role as an adviser to Sunbeam Corp. The fraud allegations stemmed from the 1998 sale of Mr. Perelman's controlling stake in Coleman Co. to Sunbeam for cash and stock. Mr. Perelman claimed that the investment bank misled him about the financial viability of Sunbeam. He sued when Sunbeam went bankrupt, after it was revealed that the company's accounts were fraudulent, and Mr. Perelman's new Sunbeam shares became worthless.

In the last in a series of pretrial discovery rulings, Judge Elizabeth Maass concluded

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that the defendant misled the court as to why it failed to produce e-mails and committed other discovery abuses. Judge Maass found that the investment bank had "deliberately and contumaciously violated numerous discovery orders." Its actions included choosing to "hide information about its violations and coach witnesses to avoid any mention of additional, undisclosed problems with its compliance." The court noted that "employees, and not just counsel, ha[d] participated in the discovery abuses." As a result, the court entered a default judgment against the defendant and instructed jurors to accept that the defendant had defrauded shareholders, including the plaintiff, whom a jury awarded $1.5 billion.

This substantial jury award generally would be enough for most litigants. The plaintiff in *Coleman*, however, sought more when a month after the trial, and three months after the pretrial ruling as to discovery abuses, the defendant in *Coleman* belatedly admitted that representations it had earlier made as to when its lawyers knew about the existence of unsearched e-mails were false. In fact, they had known about the e-mails in July 2004 and not October 2004 as their attorneys several times had earlier represented to the court. One month after these post-trial disclosures, the plaintiff, based on the false representations, brought a criminal contempt action by order to show cause against Morgan Stanley and four of its nonparty in-house lawyers, including its general counsel. In their papers, the plaintiff's attorneys suggested that the court should appoint them to assist the court in preparing for and conducting the c ontempt hearing.[6]

The defendant argued that the court lacked jurisdiction due to the defendant's pending appeal and that the plaintiff's attorneys, who have an interest in the underlying litigation, could not prosecute a criminal contempt action against an opposing party.[7] On Nov. 10, the court declined to rule on the criminal contempt action pending the appeal.[8]

The issue as to whether an obviously interested party should be permitted to prosecute its adversary for criminal contempt, however, remains.

Federal Prosecutions

• ***Federal Prosecutions for Civil Discovery Failures.*** In 18 USC §401, a federal court is given the power to punish "contempt of its authority" by fine or imprisonment. The Supreme Court, in *Chambers v. NASCO, Inc.*,[9] explained the genesis of this power: "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."

Federal Rule of Criminal Procedure 42 allows a federal court, under certain circumstances, to appoint a private party—as opposed to an attorney for the government—to prosecute a criminal contempt case.[10] Federal courts have addressed efforts by private litigants to be appointed as prosecutors of their hapless adversaries. The cautionary language courts have used in those cases is probably fair advice for criminal prosecutors as well.

"We believe courts should tread lightly in deciding whether to allow private parties to prosecute criminal contempt cases, especially those involved in the case…."

The Supreme Court addressed a prior version of Rule 42[11] in *Young v. United States ex rel. Vuitton et Fils S.A.*[12] Justice William Brennan, writing for a plurality of the court, held that a district court had the power to appoint a private attorney to prosecute defendants for contempt, but — because of the potential for bias— not an attorney for an interested party in the underlying litigation. Justice Brennan reasoned that, "[w]hile contempt proceedings are sufficiently criminal in nature to warrant the imposition of many procedural protections, their fundamental purpose is to preserve respect for the judicial system itself." As a result, he concluded, "courts have long had, and must continue to have, the authority to appoint private attorneys to initiate such proceedings when the need arises."

The court established a "categorical rule," however, that such attorneys may not represent interested parties, citing a number of reasons, including the possible "appearance of impropriety that diminishes faith in the fairness of the criminal judicial system in general." In language that seems equally applicable to criminal obstruction-type cases, Justice Brennan admonished that "we must have assurance that those who would wield [prosecutorial] power will be guided solely by their sense of public responsibility for the attainment of justice." Therefore, "[a] prosecutor of a contempt action who represents the private beneficiary of the court order allegedly violated cannot provide such assurance, for such an attorney is required by the very standards of the profession to serve two masters." Justice Brennan's ruling was based on the court's supervisory power and not on constitutional due process considerations. Only the late-Justice Harry Blackmun, writing in a concurring opinion, found that the practice of appointing counsel for an interested party was a violation of due process.

Second Circuit

Courts in the U.S. Court of Appeals for the Second Circuit have not hesitated to exercise their power to refer civil cases to the United States Attorney's Office or to appoint private attorneys for prosecution of criminal contempt, particularly where parties repeatedly have refused to obey court orders or where prior civil contempt proceedings have taken place. In *D'Orange v. Feeley*,[13] Southern District Judge Constance Baker Motley, given the choice between a civil and criminal contempt proceeding in a case where a licensed attorney had "offend[ed] the public by evading plaintiff's discovery inquiries and post-judgment discovery," chose to refer the case for prosecution of criminal contempt. The court in *In re Slovenec*[14] insisted on a criminal contempt action by two court-appointed attorneys, noting that "[t]he willful violation of a court order strikes at the very heart of our justice system." In *ACLI Government Securities, Inc. v. Rhoades*,[15] Judge Shira A. Scheindlin allowed both a civil contempt proceeding

and a referral for a criminal contempt action where the plaintiff, which sought to collect a judgment, moved for contempt based on the defendants' failure to comply with a discovery order. The defendants in that case already twice had been found in civil contempt.

Although the Second Circuit has held that *Young's* holding concerning interested parties does not apply to New York State contempt proceedings,[16] the Southern District has applied it in the federal context. In *In re Sasson Jeans, Inc.*,[17] the bankruptcy trustee managing a debtor company brought a criminal contempt prosecution against the defendant, who was the debtor company's former president, CFO, and principal shareholder. Chief Judge Burton A. Lifland of the bankruptcy court rejected the defendant's challenge of the trustee and the trustee's counsel as interested parties, on the ground that the trustee, who was appointed by the Department of Justice, "as a fiduciary vested with a public trust, lacks the characteristics of 'interestedness' and the attendant potential for personal gain which tainted the prosecuting party in *Young*."

The bankruptcy court concluded that the defendant had "attempted to secrete a substantial portion of the Debtor's assets by moving them from California to…Brooklyn" and had knowingly violated court orders to seal and preserve documents. The court found him to be in criminal contempt warranting sanctions and issued two certifications of contempt, one for each violation.

Southern District Judge Morris E. Lasker, however, found that the trustee's prosecution of the two alleged contempts violated the rule of *Young* concerning interested parties and set aside the certifications. The court noted that the *Young* opinion and its progeny "do[] not attempt to specify particular circumstances which would be determinative as to whether counsel is 'interested' so as to disqualify him or her from acting as the prosecutor of the criminal contempt." Judge Lasker found several factors to be persuasive, including the following. First, the trustee's fee was contingent on the amount of the estate recovered and his counsel was paid by the hour. Although the trustee had no financial gain from the prosecutions, "*Young* was concerned not with actual prosecutorial impropriety, but with 'the potential for private interest to influence the discharge of public duty.'" Second, the trustee and the defendant were engaged in adversary proceedings. The *Young* court "found that the parties' involvement in civil suits 'theoretically could have created temptation to use the criminal investigation to gather information of use in those suits, and could have served as bargaining leverage in obtaining pleas in the criminal prosecution.'" Third, unlike *Young*, the United States attorney was not first asked to prosecute the contempts. Finally, the court applied the standard announced in *Young* that "[a] private attorney appointed to prosecute a criminal contempt…certainly should be as disinterested as a public prosecutor who undertakes such a prosecution" and found that it was not satisfied.

Conclusion

In its papers responding to the plaintiff's criminal contempt petition in *Coleman*, the defendant cited *Young* and noted that only three Florida cases (which it distinguished) existed where a civil litigant's opposing counsel had served as the prosecutor of a criminal contempt proceeding arising out of a civil case. We believe that courts should tread lightly in deciding whether to allow private parties to prosecute criminal contempt cases, especially those involved in the case in any fashion. Not only do private parties lack objectivity, they lack the training and institutional restraints of the prosecutorial agencies.

In the criminal realm, prosecutors too should heed Justice Brennan's call for restraint so as to avoid turning obstruction statutes into a means by which individual prosecutors too zealously pursue those they believe to have made their jobs difficult.

1. See Robert G. Morvillo & Robert J. Anello, "Is the Cover-Up Worse Than the Crime?", NYLJ, Oct. 14, 2004.

2. Mr. Morvillo represented Ms. Stewart at trial.

3. *Zubulake v. UBS Warburg LLC*, 229 FRD 422 (SDNY 2004).

4. The court also placed the burden of production on the attorneys in that case, noting that although Federal Rule of Civil Procedure 26 creates a "duty to supplement" responses to the opposing party's requests that "is nominally the party's," the duty "really falls on counsel." Judge Scheindlin went so far as to require counsel to take possession of at least some of the company's backup media. The court then outlined what a lawyer "must…do to make certain that relevant information—especially electronic information—is being retained." In discussing counsel's duties to monitor compliance—which included locating relevant information and continuing to ensure compliance even after identifying all sources of potentially relevant information—the court noted that, while lawyers have extensive responsibilities to ensure effective compliance, a lawyer "cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for the failure to preserve." In imposing the sanctions, Judge Scheindlin came to the following conclusion: "At the end of the day, however, the duty to preserve and produce documents rests on the party. Once that duty is made clear to the party, either by court order or by instructions from counsel, that party is on notice of its obligations and acts at its own peril."

5. No. CA 03-5045 AI, 2005 WL 674885 (Fla. Cir. Ct. March 23, 2005). See also 2005 WL 679071 (Fla. Cir. Ct. March 1, 2005).

6. See Verified Petition for a Show-Cause Order Regarding Morgan Stanley's Criminal Contempt of Court, *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, No. CA 03-5045, July 27, 2005; see also CPH's Verified Reply Brief in Support of CPH's Verified Petition for a Criminal Contempt Show-Cause Order, Oct. 11, 2005.

7. See Morgan Stanley's Opposition to Verified Petition for a Show-Cause Order, *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, No. CA 03-5043, Sept. 13, 2005. Morgan Stanley also made additional arguments under Florida state law.

8. See Jonathan Stempel, "Morgan Stanley Judge Won't Rule on Perelman Motion," Reuters, Nov. 10, 2005.

9. 501 US 32 (1991).

10. Rule 42(a)(2) states: "The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government denies the request, the court must appoint another attorney to prosecute the contempt."

11. The earlier version of Rule 42 referred to "the United States attorney or…an attorney appointed by the court" but did not include the current language concerning "interest of justice" or government denial of the request to prosecute. The rule was amended in 1987.

12. 481 US 787 (1987).

13. 959 FSupp 631 (SDNY 1997).

14. 799 FSupp 1441 (WDNY 1992).

15. 989 FSupp 462 (SDNY 1997), aff'd, 159 F3d 1345 (2d Cir. 1998).

16. *Sassower v. Sheriff of Westchester County*, 824 F.2d 184 (2d Cir. 1987). A lower New York State court has held that *Young* precludes opposing counsel from serving as prosecutor in a criminal contempt proceeding. See *People v. Calderone*, 573 NYS2d 1005 (N.Y. Crim. Ct. 1991). Other states, including Tennessee and Illinois, have permitted attorneys for interested private parties to prosecute criminal contempt.

17. 83 BR 206 (Bankr. SDNY 1988); 104 BR 600 (SDNY 1989).