



WHITE-COLLAR CRIME

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Ancillary Jurisdiction in Criminal Cases

Ancillary jurisdiction is generally understood to encompass a court's power to adjudicate side issues that arise out of an action that is properly before the court. One does not ordinarily think of ancillary jurisdiction within the context of criminal law. Although not applied frequently, ancillary jurisdiction has been exercised in federal criminal cases for purposes of expunging a defendant's arrest record,¹ entertaining motions for the return of seized property,² or resolving issues involving legal fees.

According to the Supreme Court in *Kokkonen v. Guardian Life Ins. Co. of America*, ancillary jurisdiction has "two separate, though sometimes related, purposes: (1) to permit disposition of claims that are, in varying respects and degrees, factually interdependent by a single court, and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."³

Recent cases from the U.S. Court of Appeals for the Second Circuit, including the highly visible KPMG matter, serve to define the boundaries of a court's ancillary jurisdiction powers in criminal cases.

'Garcia v. Teitler'

In *Garcia v. Teitler*,⁴ the plaintiffs brought an action against their former attorney seeking to recover attorney's fees used as a retainer. The plaintiffs, Rene Garcia and Carmen Vazquez Alvarez, were indicted in the U.S. District Court for the Eastern District of New York for participation in an international drug and money laundering conspiracy. Initially, both Mr. Garcia and Ms. Alvarez, husband and wife, retained attorney Teitler to represent them in the criminal case. Mr. Teitler was found to have a conflict in representing both plaintiffs and was disqualified after a *Curcio* hearing. Mr. Garcia and Ms. Alvarez subsequently hired different attorneys.

During the pendency of their criminal trial, Mr. Garcia and Ms. Alvarez sought the return of



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refused to pay the amounts, claiming he was owed that money, plus more, for services rendered. The district court held an evidentiary hearing and ruled that Mr. Teitler had been properly discharged and ordered him to return the monies paid on behalf of Mr. Garcia and Ms. Alvarez. Mr. Teitler appealed the court's judgment, arguing that the court had no jurisdiction over the matter.

On review, the Second Circuit rejected Mr. Teitler's argument that Congress had abolished ancillary jurisdiction when it enacted the supplemental jurisdiction statute of 28 USC §1367. The court noted that §1367 applied specifically to civil actions and said nothing of criminal matters. Rather, a district court's jurisdiction over criminal matters is separately set forth in 18 USC §3231, which simply provides that "the district courts of the United States shall have original jurisdiction...of all offenses against the laws of the United States." To buttress its finding, the court noted that district courts long had exercised ancillary jurisdiction in criminal matters both before and after the passage of §1367. The question before the court, therefore, was "whether fee disputes during an ongoing criminal case, and as a result of a disqualification following a *Curcio* hearing, fall within a district court's ancillary jurisdiction powers."

The Second Circuit found that the district court's reliance on ancillary jurisdiction in this case properly served these purposes. Namely, the court held that the use of ancillary jurisdiction to resolve the fee dispute between the plaintiffs and Mr. Teitler related to the district court's ability to "function successfully."⁵

Noting that it had long recognized the validity of the use of ancillary jurisdiction by district courts to resolve fee disputes in the context of civil matters, the court rejected the assertion that this position should not be extended to criminal actions. Rather, the court found that the genesis

of the fee dispute was the *Curcio* hearing "which is itself ancillary to the underlying criminal action." Furthermore, the court believed it was significant that, although the plaintiffs had retained new counsel to represent them in the criminal case, the record showed that the funds used to pay Mr. Teitler were necessary to pay new counsel. "In order to guarantee a defendant's right to choose his own counsel where, as here, his criminal case is ongoing, and to avoid the possibility of defendants becoming indigent and requiring the appointment of counsel, a district court must be able to exercise ancillary jurisdiction to resolve a fee dispute."⁶

'Stein v. KPMG LLP'

A district court's ancillary jurisdiction power also has arisen as an issue in the highly publicized criminal case brought by the government against former KPMG executives on criminal tax fraud charges. The decisions in that case, rendered by Southern District of New York Judge Lewis A. Kaplan, challenged former Justice Department policies as set forth in the Thompson Memorandum and found that the government had violated the defendants' Sixth Amendment right to counsel and right to substantive due process by encouraging KPMG to decline to pay the defendants' attorney's fees.⁷ In addressing the constitutional deprivation, Judge Kaplan relied on the concept of ancillary jurisdiction set forth in *Garcia*.

Considering the appropriate remedial measures to be taken as a result of the government's actions resulting in the KPMG employees' constitutional deprivation, Judge Kaplan said that he was mindful of the Second Circuit's admonition that a district court should not consider dismissal of an indictment for government misconduct "unless it is otherwise 'impossible to restore a criminal defendant to the position that he would have occupied' but for the [government's] misconduct."⁸ Accordingly, rather than dismissing the government's case, Judge Kaplan allowed the KPMG employees to file a civil action against their former employer seeking reimbursement and advancement of legal fees to defend the criminal case. Further, Judge Kaplan determined that he would hear the fee dispute pursuant to the court's ancillary jurisdiction powers.⁹

During argument on a KPMG appeal, the Second Circuit raised the issue of whether Judge Kaplan's order could be appealed and suggested that a petition for mandamus might be more appropriate. Therefore, the panel provided Judge Kaplan with an opportunity to explain his decision.

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retainer amounts paid to Mr. Teitler. Mr. Teitler

Judge Kaplan's Belief

In defending his decision to exercise ancillary jurisdiction to entertain the civil claims within the context of the criminal case, Judge Kaplan restated his belief that “the KPMG Defendants might well be ‘restore[d] ... to the position that [they] would have occupied’ but for the government’s actions if they prevailed on their contention that KPMG is obliged legally to advance their defense costs.” The district court relied heavily on the Second Circuit’s decision in *Garcia v. Teitler*, saying that no significant factual distinction existed between that case and the one presented in *Stein*.

Noting that §3231, the jurisdictional statute relied upon in both *Garcia* and this case, did not explicitly grant district courts the jurisdiction to resolve fee disputes between criminal defendants and their employers, Judge Kaplan observed that *Garcia* must rest on two propositions. First, that §3231 implicitly confers upon district courts the power to resolve fee and other disputes where necessary “to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.” Second, that the use of this implicit power is proper where the ancillary dispute has its “genesis” and “is important to doing justice in the criminal case, even in rare circumstances by adding a party not named in the charging instrument.”¹⁰

Judge Kaplan identified the ancillary dispute in the *Stein* case as the employees’ claim to money allegedly owed them by KPMG for use in defending the criminal charges against them. This dispute had its genesis in the criminal case in the sense that it grew from the government’s violation of the defendants’ constitutional rights. Judge Kaplan noted the similarities to *Garcia* and stated his belief that the need for resolution of the ancillary dispute in *Stein* was even greater because of the scope, complexity and cost of the criminal case.

Even without the precedential support of *Garcia*, Judge Kaplan asserted that he properly exercised ancillary jurisdiction over the fee dispute, recognizing that both constitutional and statutory authority were required for the proper reliance on ancillary jurisdiction.

Constitutional Authority

Article III judges are authorized by the Constitution to obtain jurisdiction “over a case or controversy in its entirety.” Judge Kaplan concluded that the boundaries of the “case or controversy” requirement with respect to ancillary jurisdiction do not require that the facts of the underlying action and the ancillary action be intertwined. Rather, as articulated by the Supreme Court in *Kokkonen*, “an ancillary proceeding over which there is no independent basis of subject matter jurisdiction is within Article III if it is appropriate to ‘enable a court to function successfully....’”¹¹

Though KPMG was not a party to the underlying criminal action, Judge Kaplan found that the fee dispute was sufficiently tied to that case. The accounting firm was an unindicted co-conspirator in the criminal action and had been separately indicted for the same conspiracy as the employee defendants. Regardless of this relationship, Judge Kaplan noted that the resolution of the question whether KPMG legally is obligated to pay the defendants’ legal fees is important to determine an appropriate remedy for the government’s unconstitutional actions. “[T]here is a logical relationship between the government’s

actions with respect to KPMG’s payment of legal fees that are at issue in the criminal case and the question whether KPMG legally is obligated to pay.”¹²

Finally, Judge Kaplan asserted that the court’s exercise of ancillary jurisdiction in the *Stein* case was within its discretion, in recognition of the compelling and unique circumstances of the case. First, Judge Kaplan observed that the relationship between the criminal case and the genesis of the fee advancement claim was close because the fee advancement issue arose directly out of the government’s conduct in the criminal case. Second, Judge Kaplan noted that the court’s actions were in direct response to Second Circuit law that dismissal of an indictment for government misconduct should only occur where it is “impossible to restore a criminal defendant to the position that he [otherwise] would have occupied.”¹³

KPMG Case vs. ‘Garcia’

Ultimately, the Second Circuit disagreed with Judge Kaplan. Just weeks ago, in an opinion authored by Judge Ralph Winter, the Court of Appeals issued a writ of mandamus and vacated “the orders below to the extent that they find jurisdictions over the complaint” lodged by the various defendants against KPMG.¹⁴ The opinion acknowledged its prior statement in *Garcia* that “boundaries of ancillary jurisdiction are not easily defined and the cases addressing it are hardly a model of clarity,” but stated that those boundaries are not without limit. Distinguishing the KPMG case from *Garcia*, the court stated:

When a court undertakes to resolve claims arising from a relationship between a party to an action and the party’s attorney in that action and involving the attorney’s conduct of that litigation, the parties to the ancillary proceeding are already before the court as a litigant and officer of the court; the relevant facts are generally more accessible to that court than to another; and the ability of the court to conduct and dispose of the underlying litigation may turn on, or at least be greatly facilitated by, resolution of the issues raised in the ancillary proceeding. However, when a non-party to the primary proceeding is sought to be joined as a defendant in the ancillary proceeding, the need for the ancillary proceeding and the efficiencies provided by it must be both sufficiently great to outweigh the prejudice to the non-party and to be consistent with the limited jurisdiction of federal courts.¹⁵

Focusing on the fact that KPMG was not a party to the underlying criminal action, the Circuit Court found that: (1) KPMG would be unduly prejudiced by the ancillary action and (2) no compelling need existed for the ancillary action. Specifically, the court found the prejudice to KPMG to be clear as the contractual claims against it were to be decided by the district court using an “ad hoc mix of the criminal and civil rules of procedure.” Because the litigation involved a series of complex issues involving decades of KPMG conduct, state of mind determinations of dozens of individuals, and the applicability of these issues to each claiming defendant, the court found the *sui generis* proceeding proposed by Judge Kaplan to be inappropriate.¹⁶

With respect to the need for the ancillary action, the court observed that the constitutional violation would not necessarily be resolved by the resolution of the contractual claims between KPMG and its

employees. First, the possibility exists that KPMG will prevail on those claims. Further, even if KPMG were determined liable for the employees’ attorney fees, the payment of those fees may not provide a “full remedy” for the constitutional violation found by the district court.¹⁷

Interestingly, the Second Circuit hinted that the very remedy Judge Kaplan sought to avoid unnecessarily—dismissal of the criminal indictment—may be the only appropriate remedy. The court said that “assuming the cognizability of a substantive due process claim and its merit here, dismissal of the indictment is the proper remedy.” The next round of this roller coaster case will indeed be interesting.

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1. See, e.g., *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977); see also *United States v. Sumner*, 226 F.3d 1005 (9th Cir. 2000); *Morrow v. District of Columbia*, 417 F.2d 728 (D.C. Cir. 1969).

2. See, e.g., *Rufu v. United States*, 20 F.3d 63 (2d Cir. 1994); *Soviero v. United States*, 967 F.2d 791 (2d Cir. 1992); see also *Okoro v. Bohman*, 164 F.3d 1059 (7th Cir. 1999); *Thompson v. Covington*, 47 F.3d 974 (8th Cir. 1995).

3. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 US 375, 379-80 (1994).

4. 443 F.3d 202 (2d Cir. 2006).

5. *Id.* at 208.

6. *Id.* at 209. To support this proposition, the Court cited a case from the Southern District of New York captioned, *United States v. Weissman*. 1997 WL 334966 (SDNY June 16, 1997). In *Weissman*, the district court exercised ancillary jurisdiction in the criminal case to determine whether the defendant’s employer, Empire Blue Cross/Blue Shield, was obligated to advance the defendant’s legal fees under an indemnity agreement. Finding that the “criminal arena” provided little guidance regarding the exercise of ancillary jurisdiction in such matters, the *Weissman* Court relied on analogous situations in the civil context to justify its exercise of ancillary jurisdiction, noting that the issue presented concerned the funding of the defendant’s “ongoing case before this Court.” Further, the Court stated, “I do not believe it would be wise for this Court to decline jurisdiction over a question so intimately intertwined with the comportment of the case before it.” *Id.* at **6-7. See also *United States v. Stein*, 435 F. Supp.2d 330, 335 (SDNY 2006) (citing *Weissman*).

7. *United States v. Stein*, 435 FSupp2d 330 (S.D.N.Y. 2006) (“*Stein I*”); *United States v. Stein*, 440 F. Supp. 2d 315 (SDNY 2006) (“*Stein II*”).

8. Judge Lewis A. Kaplan, Response to Rule 21(b)(4) Invitation, *Stein v. KPMG, LLP*, 06-4358-cv (2d Cir. Jan. 8, 2007) (“Kaplan’s Response”) at p. 44 (citing *United States v. Artuso*, 618 F.2d 192,196-97 (2d Cir.), cert. denied, 449 U.S. 879 (1980)).

9. *Stein I*, 435 FSupp2d at 377-78.

10. Kaplan’s Response at pp. 27-28.

11. *Id.* at pp. 31-32.

12. Kaplan’s Response at pp. 35-36.

13. *Artuso*, 618 F.2d at 196-97.

14. *Stein v. KPMG LLP*, Docket No. 06-4358 (2d Cir. May 23, 2007).

15. *Id.* at pp. 15-16.

16. *Id.* at 17.

17. *Id.* at pp. 20-21. The Court also addressed the *Weissman* case in its opinion. Although the district court in that case compelled the criminal defendant’s former employer—a nonparty to the criminal case—to advance legal fees, the Second Circuit found the circumstances to be quite different from the *Stein* case. Specifically, the Court noted that the issue of the employer refusing to advance expenses arose at a time when no disposition of the issue could be reasonably obtained in another forum. In contrast, there was no barrier to the former KPMG employees proceeding with a civil action against KPMG on their contractual claims. *Id.* at p. 21, fn. 2.