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SECOND CIRCUIT REVIEW

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Recovering Frozen Terrorist Assets; Attorney Work Product

IN THIS MONTH's column, we report on two recent decisions of the U.S. Court of Appeals for the Second Circuit that resolve difficult and nuanced legal questions. In the first decision, the Second Circuit added to the growing body of September 11 jurisprudence by holding that surviving family members of victims of the World Trade Center terrorist attacks could not satisfy a prior judgment by recovering certain assets of the Iraqi government frozen by the U.S. and held by the Federal Reserve Bank of New York. In the second decision, the Second Circuit narrowly construed the scope of a waiver of attorney work-product when it ruled that a letter given by a criminal defendant to the prosecutors, which asserted the defendant's innocent state of mind based in part on discussions with law enforcement officials, did not result in waiver of a lawyer's work product covering notes of conversations with these officials.

Recovering Frozen Assets

Smith v. Federal Reserve Bank of New York,[1] involved two surviving spouses of victims of the terrorist attacks on the World Trade Center who, in the immediate aftermath of September 11, brought an action in the U.S. District Court for the Southern District of New York against various individuals, entities, and foreign states, including the Republic of Iraq, to remedy injuries resulting from international terrorism.[2] None of the defendants appeared in the suit and the district court issued a default judgment. After an inquest, during which terrorism experts such as Robert James Woolsey, the former Director of the Central Intelligence Agency, testified attempting to link Iraq to the September 11 terrorist attacks, Judge Harold Baer ruled that plaintiffs succeeded, "albeit barely," in showing that Iraq provided "material support" to the terrorists. The district court awarded plaintiffs $104 million in damages, including $63.6 million against Iraq.

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Subsequently, plaintiffs brought a declaratory judgment action against the Federal Reserve Bank of New York and the Department of Treasury seeking to satisfy the judgment against the terrorists by attaching certain Iraqi assets held by the Bank. Plaintiffs claimed that they were entitled to the assets under §201 of the Terrorism Risk Insurance Act (TRIA), which provides, in part, that "in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, . . . the blocked assets of that terrorist party . . . shall be subject to execution . . . in order to satisfy such judgment."

Defendants opposed attachment on two grounds. First, they noted that the president had earlier confiscated all frozen Iraqi assets and vested title to these assets in the Department of Treasury via an executive order pursuant to the authority granted him by the International Emergency Economic Powers Act (IEEPA). The assets, therefore, were no longer "blocked assets" for purposes of TRIA when the judgment in the action against the terrorists was entered. Second, defendants argued that plaintiffs' right to execute against the assets had been undermined by another executive order, in which the president made TRIA inapplicable to Iraq under the recently enacted Emergency Wartime Supplemental Appropriations Act (EWSAA).

Circuit Ruling

The district court accepted both arguments made by defendants and granted summary judgment in defendants' favor. The Second Circuit affirmed the decision below in a unanimous opinion written by Judge Robert A. Katzmann and joined by Judges Reena Raggi (U.S. District Court for the Eastern District sitting by designation) and Robert D. Sack.

Plaintiffs' sole argument on appeal

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hinged on the notion that §201 of TRIA represented a Congressional mandate — analogous to appropriation — that frozen Iraqi assets, including the assets at issue, be used only to compensate plaintiffs who had obtained a judgment against the Iraqi government. Thus, according to the plaintiffs, the president, acted without authority when he confiscated "blocked" Iraqi assets and directed their use for a purpose other than satisfying victims' judgments. The Second Circuit disagreed, casting plaintiffs' interpretation of the statute as "conclusory" assertions, "bereft of any explanation of why the language of the statute compels such a reading."

The *Smith* court gave four reasons for its decision. First, plaintiffs incorrectly equated TRIA to an appropriation. "A law may only be an appropriation . . . if the law specifically states that an appropriation is made," and TRIA did not include any such explicit statement.

Second, the language of §201 of TRIA could not be interpreted to mandate that the assets be "blocked" in perpetuity. The Second Circuit ruled that the "plain meaning" of the statute was to give terrorism victims a right to execute against terrorist assets that would otherwise be blocked. TRIA did not entitle victims who have yet to obtain judgment to any assets; nor did the statute guarantee that terrorist assets would "in fact be available when a particular victim [sought] to execute on a judgment."

Third, the court disagreed with plaintiffs' position that the first clause of §201 of TRIA, which provides that terrorist assets be blocked "notwithstanding any other provision of law," operated to abrogate the president's authority to confiscate the assets under IEEPA. According to the court, the "notwithstanding" language applied only when some other provision of law actually conflicted with TRIA, and the Second Circuit found no conflict between TRIA and IEEPA. Section 201 of TRIA did not impose an obligation on the president to maintain "blocked assets" for future attachment, and IEEPA authorized the president, in his discretion, "both to block and to confiscate terrorist assets as circumstances warrant." In fact, Congress defined "blocked assets" in TRIA by reference to a definition in IEEPA, thereby, as the court reasoned, "implicitly acknowledg[ing] that not all assets procured . . . from terrorists would be available for execution pursuant to TRIA §201."

Finally, the Second Circuit consulted the legislative history of §201 and found it to be "entirely consistent with the interpretation suggested by the statutory language." The legislative history supported the conclusion that the definition of "blocked assets" in TRIA reached broadly to encompass any property seized or frozen by the government, but did not reach so far as to include confiscated property. In the court's view, there was more than a "semantic difference" between seizure of assets, which "transfer[ed] possessory interest in the property," and confiscation that "transfer[ed] ownership of terrorist property by vesting right, title and interest as the President deem[ed] appropriate." And Senator Harkin's remarks — that "any asset as to which the United States claims ownership . . . are not subject to execution or attachment" under Section 201 of TRIA —lends further credence to this view.

Because it ruled that the assets were properly confiscated by the president under IEEPA, the Second Circuit declined to consider defendants' alternative argument that the president made TRIA not applicable to the assets pursuant to the authority granted to him by EWSAA.

With several actions against the September 11 terrorists pending in the federal courts, the decision in *Smith* is likely to have a direct and significant impact on the ability of plaintiffs in those actions to recover against terrorist assets frozen by the United States government.

Work Product Protection

In *In re Grand Jury Proceedings*[3] the Second Circuit reversed the district court's order compelling production of certain subpoenaed documents withheld on the ground that they constituted attorney work product. In so ruling, the court further refined the doctrine of "in issue" waiver of work-product protection.

In re Grand Jury Proceedings concerned a John Doe company that "made its facilities available to third parties to engage in purchase and sale transactions with one another."[4] These transactions included sales of firearms, which are subject to federal regulation and licensing under the supervision of the Bureau of Alcohol, Tobacco and Firearms (ATF). The U.S. Attorney for the Southern District of New York launched a grand jury investigation into whether Doe's role in firearms transactions required that the company possess a federal firearms license; whether some of these transactions were in violation of federal laws; and, if so, whether the company carried any responsibility for these violations.

When the company learned of the investigation, Doe's attorneys submitted a 46-page letter to the federal prosecutors, intending to "promote an expeditious resolution" of the investigation. In the letter, Doe asserted that it had proceeded in the good faith belief that its involvement in the firearms transactions was entirely legal. The company claimed that it had consulted ATF regarding compliance with applicable laws and was repeatedly advised by senior ATF officials, named in the letter, that its operations were lawful. Doe invited the investigators to "call to confirm . . . the ATF's position." The letter concluded by asserting that "nothing in this letter is intended to waive any applicable privilege or protection available under law."

After receiving Doe's letter, the government subpoenaed notes taken by Doe's attorneys (a) during meetings with ATF officials, and (b) during interviews with Doe's employees "related to the substance of the ATF's representations" to the company. Doe objected, asserting that the notes were protected by the

attorney work-product doctrine, and the government moved to compel production of the notes.

Judge Loretta Preska granted the government's motion. The district court reasoned that by submitting the letter to the U.S. Attorney's Office, in which the company avowed its good faith belief in the lawfulness of its actions and related the assurances it received from ATF officials, Doe involuntarily had waived any protection with respect to its attorney's notes.

In a unanimous opinion written by Judge Pierre N. Leval and joined by Judges Robert A. Katzmann and Joseph M. McLaughlin, the Second Circuit vacated the order of the district court, ruling that the waiver of work-product protection was not warranted because the government would in no way be prejudiced if Doe was allowed to withhold the privileged documents.

The court observed that under some circumstances "it would be unfair for a party asserting contentions to an adjudicating authority to then rely on its privileges to deprive its adversary of access to material that might disprove or undermine the party's contentions." The court pointed to two cases in which "considerations of fairness to the adversary" led the courts to conclude that the government should have access to otherwise privileged information.

In *United States v. Nobles*,[5] the U.S. Supreme Court agreed with the trial court that a criminal defendant must produce to the government a report of interviews with principal incriminating witnesses prepared by an investigator who was going to provide testimony designed to undermine those witnesses' credibility. In *United States v. Bilzerian*,[6] the Second Circuit affirmed a decision below that the prosecutors in a criminal securities case should have access to the advice received by the defendant from his attorneys concerning the lawfulness of his actions, in the event the defendant were to testify that "he did not willfully violate the securities laws."[7] In both *Nobles* and *Bilzerian*, the court observed, it would have been unfair to require the prosecutor to run the risk that the jury would credit the defendant's claims as to the facts the defendant had put "in issue" while allowing the defendant to deny the prosecutor access to potentially relevant material that might impeach the defendant's claims.

In this case, however, "the particular circumstances in which the events occurred" were very different — the letter was delivered "gratuitously" to the United States Attorney's Office, and only to that office, at the time the government was conducting a grand jury investigation into Doe's activities. Unlike the district court, which reasoned that it would be unfair "to require the government to accept what might be a selective disclosure," the Second Circuit reasoned that the federal investigators were not required to accept anything and could adopt whatever course of action they deemed appropriate — be it calling ATF officials to confirm Doe's assertions or simply refusing to credit Doe's representations altogether. "The government is in no way worse off as the result of its receipt of Doe's letter than it would be if the letter had never been delivered. It does not run the risk that some independent decision maker will accept Doe's representations without the government having an adequate opportunity to rebut them."

The Second Circuit found its earlier ruling in *In re von Bulow*[8] controlling in this case. The *von Bulow* decision involved a book about a celebrated criminal case written by defendant's attorney after the defendant was acquitted of murder at a retrial, in which, with his client's permission, the attorney disclosed numerous confidences imparted by the defendant. In a subsequent civil action, plaintiffs moved to compel the defendant to disclose certain communications with his attorney. They argued that, by consenting to the publication of that book, the defendant had waived any privileges not only with respect to the specific revelations in the book, but covering the entire content of those conversations with his attorney that served as the basis for published materials. The Second Circuit vacated the district court's disclosure order, holding that fairness considerations, which would normally compel a waiver of privilege, "did not come into play when, as here, the privilege-holder … has made extrajudicial disclosures, and those disclosures have not subsequently been placed at issue during litigation."[9]

In disagreeing with the decision below, the Second Circuit imposed a crucial limitation on the scope of waiver of attorney work-product protection. Individuals and companies that find themselves targets of a grand jury investigation may now be able to make affirmative representations to the government, aimed at exonerating their conduct, without a court automatically ruling that privileged materials related to those representations must be turned over to investigators. Attorneys need to tread with extreme caution in this area, but the Second Circuit's ruling on waiver of attorney work product provides a glimpse of hope that a broad waiver will not be found reflexively.

(1) 346 F.3d 264 (2003).

(2) The plaintiffs amended their original Complaint to add Saddam Hussein and the Republic of Iraq to the list of defendants.

(3) Nos. 01-6079, 01-6222, 2003 WL 22461676 (2d Cir. Oct. 30, 2003).

(4) To preserve the secrecy of an ongoing grand jury investigation, the Second Circuit used pseudonyms and discussed the facts "circumspectly." See id. at *1, n.1.

(5) 422 U.S. 225 (1975).

(6) 926 F.2d 1285 (2d Cir. 1991).

(7) *In re Grand Jury Proceedings*, 2003 WL 22461676, at *4

(8) 828 F.2d 94 (2d Cir. 1987).

(9) *In re Grand Jury Proceedings*, 2003 WL 22461676, at *6

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