CRIMINAL LITIGATION
AMERICAN BAR ASSOCIATION SECTION OF LITIGATION

Summer 2014, Vol. 14 No. 3

When Federal Agencies Are the "Same Party" under FRE 804(b)(1)

By Thad A. Davis and Leslie A. Wulff – August 14, 2014

In March, Zachary Warren, a former client manager at Dewey & LeBoeuf experienced firsthand the effects of the increasing frequency of cooperation between government agencies. Warren was indicted in New York state court for alleged fraud leading to the demise of Dewey & LeBoeuf in 2012. He had consented to be interviewed by the Securities and Exchange Commission (SEC) as a witness related to the SEC's civil investigation into the firm's collapse. Only after it was too late did Warren learn that his own testimony was going to be used against him as a partial basis for his ultimate indictment.

Warren's case illustrates the extent to which government agencies of all shapes and sizes are increasingly turning to each other to cooperate in the civil enforcement and criminal prosecution of financial fraud and other suspected wrongdoing. In cases where dual investigations are headed by separate federal agencies—such as the SEC and the U.S. Attorney's Office—questions regarding the cooperation and identity between the agencies are particularly important when it comes to issues of admission of out-of-court statements under the hearsay exception for prior testimony. Indeed, an effective defense may involve turning the tables on the agencies and using exculpatory transcripts of other witnesses the agencies have taken testimony from but are ultimately unavailable to be called at trial by the defense.

The federal courts are divided on this issue. We explore here the circuit split, and suggest the Seventh Circuit approach has much to recommend it.

Hearsay Exception for Prior Testimony

Federal Rule of Evidence 804(b)(1) allows for the admission of hearsay when it is in the form of prior testimony by an unavailable witness. This exception to the default exclusion of hearsay applies as long as the witness is unavailable and the testimony (1) was taken during trial, a hearing, or a lawful deposition; (2) is being used against the same party who previously took the deposition; and (3) that party had an opportunity and similar motive to question the witness as it would under cross-examination. The second prong of this test is the focus of our discussion here.

Government Agencies as the Same Party

Application of Rule 804(b)(1) is particularly interesting in instances where a now-unavailable witness was previously deposed by the SEC, or another federal agency, and provided testimony that could be potentially exculpatory in a pending federal criminal prosecution by the U.S. Attorney's Office. This issue is bound to arise more frequently as cross-border investigations continue and individuals express reluctance to travel to the United States to serve as witnesses. It

is becoming more likely that a foreign witness might be deposed by the SEC as part of a civil investigation and provide testimony that could serve as exculpatory evidence in a subsequent federal criminal prosecution for the same conduct.

The Seventh Circuit's "Functional" Approach

In deciding whether two federal government agencies are the same party for purposes of Rule 804(b)(1), the Seventh Circuit has developed a functional approach that focuses on the structural relationship between the two agencies, such as whether both agencies report into the executive branch; the factual and legal overlap between the civil and criminal proceedings; and the context in which the original deposition was taken—whether it was an exploratory or a conclusory interview. In *United States v. Sklena*, 692 F.3d 725 (7th Cir. 2012), the court found that the U.S. Commodity Futures Trading Commission (CFTC), and the U.S. Attorney's Office were the same party under Rule 804(b)(1). The CFTC had taken the deposition of a coconspirator in an alleged wire- and commodity-fraud case. That coconspirator passed away before the pending criminal case went to trial, but the CFTC deposition provided exculpatory evidence for the surviving coconspirator. The Seventh Circuit overruled the district court's decision to exclude the CFTC deposition from the criminal trial on the grounds that the agencies were similarly situated in the executive branch such that action by one was reasonably related to action by the other. In other words, when the two government agencies looked and smelled like they had the same interest, they probably did and should be considered the "same party" for purposes of Rule 804(b)(1).

The Southern District of New York's "Literal" Approach

In recent cases, the Southern District of New York has struck a more literal approach to interpreting the "same party" clause of Rule 804(b)(1). For example, in *United States v. Martoma*, No. 12-CR-973 (S.D.N.Y. Jan. 8, 2014), the court held that the SEC and the U.S. Attorney's Office were not the same party under Rule 804(b)(1). In part, because, federal prosecutors were not actually present at the SEC deposition and did not have the opportunity to direct the SEC's line of questioning, the court found that the two agencies could not be considered the same party. The court applied a far more literal interpretation of the "same party" language, ignoring the possibility that two government agencies could have so much in common so as to be considered the same party in the absence of evidence that employees of both agencies were acting in direct concert.

The Superiority of the Functional Approach

We believe that in the face of modern realities, the Seventh Circuit's functional approach presents the more realistic avenue for interpreting Rule 804(b)(1). In the wake of the recent economic meltdown, federal agencies are increasingly exercising their power to bring parties to justice through both civil and criminal enforcement. Even when those agencies are not talking on the phone or emailing every day and coordinating their strategy on a detailed level, such agencies may still be acting as the same party when they are advancing the same goals and interests and aligned in the federal bureaucracy in such a way that their interests can be considered functionally similar.

Conclusion

Given the aggressive criminalization of many previously civil matters, particularly in the

securities realm, extreme caution is in order when appearing before or meeting with any government agency. On the flip side, defense counsel must be aware of the ability to admit and use other testimony given to federal agencies. This may form the basis for an effective defense, depending on the path of the law in this area.

Keywords: criminal litigation, government agencies as the same party, hearsay exception for prior testimony, FRE 804(b)(1), functional approach, literal approach, *United States v. Sklena*, *United States v. Martoma*

Thad A. Davis is a partner and Leslie A. Wulff is an associate in the San Francisco, California, office of Gibson, Dunn & Crutcher LLP.